Ombudsman

CASE NOTES

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Foreword

The biannual publication of *Case Notes* is one of the means how the Office of the Ombudsman communicates with and reaches out towards the public.

The case summaries that appear in this publication are a sample of the Ombudsman's investigative work and demonstrate the mandate and the main thrust of the institution's mission in favour of citizens. At the same time it serves to highlight the outcome of the Ombudsman's investigation of grievances regarding administrative decisions and actions that may give rise to anxiety, hardship or frustration and that people may consider unfair or discriminatory. Obviously what citizens may perceive as an administrative process that is contrary to law or unjust may not necessarily be so and the Ombudsman's task is to place these episodes coming from daily life under his scrutiny and provide an impartial assessment of the extent to which they are in line or not with the norms of fair, transparent and responsive public administration.

The Ombudsman's main underlying motive is to resolve the difficulties that individual complainants may encounter in their daily contacts with the diverse branches of public administration in order to ease their concerns. A complementary aspect is to contribute towards an improvement in administrative processes, systems and procedures that might be creaking so that all citizens will stand to benefit.

In the final analysis most government decisions and actions have a direct, often immediate, impact on people's daily lives; and the Ombudsman's intervention seeks to restore the balance between government bureaucracy and the people whenever these decisions and actions are found to be insensitive to their rights and expectations, unreasonable or downright mistaken and based on a mechanical, impersonal and an all too rigid interpretation of procedures.

This publication of *Case Notes* also follows the lines of edition number 22 issued in October 2006 and includes three reports that have already been

released on the website of the Office of the Ombudsman in the last six months. These reports deal with situations in different areas of government administration where the Ombudsman has detected systemic failure and are being brought to the attention of readers of this publication not only in view of their general interest to citizens but also to promote more widely among the people at large the principles of administrative fairness.

Joseph Said Pullicino
Ombudsman

April 2007

Case No C 197

MOSTA LOCAL COUNCIL

Neighbours

The complaint

A resident reported to the Ombudsman that he was aggrieved at the decision by the Mosta Local Council to paint yellow lines prohibiting on-street vehicle parking in front of his residence so that the owners of two garages on the opposite side of the street would have unrestricted access to manoeuvre a van and a boat which they owned in and out of their garages.

Facts and findings

Under parking management measures adopted by the Mosta Local Council which included paint marking on the ground of car parking bays, bays were marked in white on both sides of complainant's street while areas in front of garages were enclosed by yellow lines. However, the spaces in front of complainant's residence and the house next to it were not designated as vehicle parking bays and the area was instead marked with yellow lines to prohibit parking and permit better manoeuvrability and easier access in and out of their respective garages to the two owners of a van and a boat living on the opposite side of the street.

Complainant made representations to the Mosta Local Council about these arrangements that prevented him from parking his car in front of his own residence. At the same time he admitted his reluctance to park his car inside the garage that he owned next to his own residence because this was inconvenient especially in view of his disability.

The Ombudsman's investigation revealed that the Mosta Local Council received complaints from residents in the street in question about parking

problems that frequently gave rise to quarrels between residents and that the Council had even sought the help of the police authorities in order to solve this problem. The Ombudsman also found that contrary to what was claimed in complainant's letter of grievance, the District Police Inspector had not ordered the painting of prohibitory yellow lines in front of his residence but had merely provided assistance to the Council to maintain law and order when the signs were being painted.

On his part the Mosta Mayor explained to the Ombudsman that during a site visit the District Police Inspector had requested the owner of the van to manoeuvre his vehicle in and out of his garage while cars were parked on the opposite side of the street. Since this proved impossible, it was agreed not to allow cars to park in that section of the road.

The Mayor also informed the Ombudsman that when the Council sought guidance from the Traffic Control Board on parking policies including the marking of parking spaces, the Board advised that a garage owner has the right to enter and exit his garage at any time and in this case the Council had merely acted in accordance with this guideline.

Considerations and comments

The Ombudsman's investigation confirmed that the Mosta Local Council had decided the parking layout in the street in question after a number of residents had raised the issue. The Ombudsman also found that although the Council had sought general advice from the Traffic Control Board, it did not expressly consult the Board on the markings of the bays that had given rise to the dispute among residents.

The issue facing the Ombudsman was whether the yellow lines that prohibited parking in front of complainant's house were justified or not. Whereas complainant was of the view that parking should be permitted in front of his own residence, the owners of two garages on the opposite side of the road claimed that they would not be able to manoeuvre their vehicles freely in and out of their garages if cars were allowed to park in front of complainant's residence.

The Ombudsman was of the opinion that the boat owner was not justified to ask that parking should not be allowed on the other side of the street facing his garage at all times since a boat is not normally taken in and out of a garage frequently or daily. On the other hand, if the van in question belonging to the other resident was longer than a normal car, it was true that its owner was likely to experience difficulty to drive it in and out of his garage – and this was confirmed by the Mayor himself.

The Ombudsman pointed out that although this squabble arose largely out of pique between residents, these matters should not be decided so as to resolve the whims of quarrelling neighbours. Since complainant himself owned a garage next to his residence, the Ombudsman felt that his contention that parking should be allowed in front of his own house was not justified since after all even if this were to be done, this space would not be reserved for him. Furthermore, if complainant was unwilling to park his car in his own garage during the day, there was nothing to stop him from leaving it in front of his own garage during this time.

The Ombudsman concluded that it was unreasonable to prohibit parking in a sufficiently wide street to allow the owner of a boat unfettered, round-the-clock access in and out of his garage all year round. At the same time he concluded that in the circumstances the only claim that was justified was that of the owner of the van since its overall length made it impossible for him to manoeuvre in and out of his garage whenever a car was parked on the opposite side of the street facing his garage.

Conclusion and recommendation

In the light of these considerations the Ombudsman concluded that the Mosta Local Council acted within its powers in terms of subarticle 33(1d) of Part IV of the Local Councils Act when it made arrangements for the line marking of parking bays in complainant's street for improved parking management in the locality. However, although the Local Council had acted under pressure from conflicting parties and its involvement was meant to avoid conflict, it appeared that the Council failed to seek adequate advice on technical issues related to this specific case even though such an approach was likely to have

helped to find the best possible solution out of this fix.

The Ombudsman stated that the main objective of the Local Council was to maximize parking spaces while leaving access to residents' garages free at all times. He therefore recommended that the Mosta Local Council should seek the advice of the Transport Planning Unit of the Malta Environment and Planning Authority on an improved layout of the area available for parking in complainant's street and on the marking of parking spaces that would permit the best use of available space and at the same time allow easy access by residents to their garages.

The Ombudsman understood that upon being approached by the Mosta Local Council, the Transport Planning Unit of the Authority in due course submitted two options to the Council as a solution to the parking problems in complainant's street.

Case No F 163

DEPARTMENT OF CIVIL PROTECTION

The vicissitudes of sixteen assistance and rescue officers in Gozo

The complaint

Sixteen workers submitted a joint complaint to the Ombudsman from Gozo alleging unfair treatment by the Department of Civil Protection. The complainants, previously engaged with the Armed Forces of Malta (AFM) and seconded to the Malta International Airport (MIA), felt aggrieved when after joining the Department of Civil Protection, they were not paid allowances to which they claimed they were entitled according to the conditions that appeared in the call for applications when they joined the department.

Facts of the case

Complainants were originally AFM members who had been seconded to the MIA to perform duties at the Gozo Heliport. Following the issue of a call for applications by means of MPO Circular No 8/2004 on 29 January 2004, they were employed as Assistance and Rescue Officers in the Department of Civil Protection (Gozo Station) on a two-year contract, renewable for further periods of three years subject to satisfactory performance. Their appointment was subject to the rules of the public service and to the regulations of the Department of Civil Protection.

Paragraph 6.2 of the call for applications stated that "*Where selected applicants come from parastatal organisations or companies in which Government is directly or indirectly a shareholder, where they are entitled to special pension rights from Government and to other employment rights arising from the conditions of their previous transfer from employment under the Government to employment with any said parastatal organisation or company, such selected*

applicants shall retain the said pension and other employment rights with the exclusion of any right to revert to employment with any said parastatal organisation or company."

Complainants explained that when earlier in their careers they served in the Armed Forces of Malta, they formed part of the Air Traffic Control Corps (ATCC) and the Airport Company (AC). However, on the disbandment of these two units, the Armed Forces, Malta International Airport, the Department of Civil Aviation and the Management and Personnel Office reached an agreement on 22 April 1998 on the terms and conditions of these personnel upon their engagement with the MIA.

This agreement stated as follows with regard to their salaries, allowances and total remuneration:

"3. <u>Salary</u>

There will be no change from the salary payable to ATCC and AC personnel up to the last day of service in the AFM …..…

4. <u>Allowances</u>

There will be no change in total remuneration of those allowances payable to ATCC and AC personnel up to the last day of service in the AFM.

5. <u>Total remuneration</u>

It follows from paragraphs 3 and 4 above that the total remuneration received by ATCC and AC personnel on engagement with MIA will be no different from that given to ATCC and AC personnel up to their last day of service in the AFM."

Recalling their earlier term of duty as AFM employees who had been seconded to the MIA[1] and that while serving at the Malta International Airport they had applied to join the Department of Civil Protection, complainants pointed out that the reference in paragraph 6.2 of the call for applications to "*other*

[1] At that time the MIA was classified as a parastatal company.

employment rights arising from the conditions of their previous transfer from employment under the Government to employment with any …..… parastatal organisation or company" was made specifically with their situation in mind. Consequently, the provision appearing in this paragraph on the retention of these employment rights was directly applicable to them.

Complainants explained to the Ombudsman that when they were seconded to the MIA, they were allowed to transfer with them their full pension rights as well as their right to the payment of various allowances. However, soon after joining the Department of Civil Protection they were taken aback in October 2004 to find that despite the agreement and despite what was stated in the call for applications, these allowances were no longer payable to them.

Considerations by the Ombudsman

From the outset the Ombudsman pointed out that the terms and conditions of employment that appear in calls for applications for particular posts have the same weight and standing as a contract and can only be amended with the consent of the parties involved, namely management and the selected applicants. The Department of Civil Protection was therefore obliged to respect all the provisions that appeared in MPO Circular No 8/2004 including paragraph 6.2 to which direct reference was made by complainants and as a result, what needed to be determined at this stage was whether the Department of Civil Protection and the Management and Personnel Office had given a correct interpretation to this paragraph.

The sequence of events showed that when complainants were seconded to the MIA they transferred with them the right to their salaries, allowances and terms and conditions of service at the AFM in line with the agreement reached on 22 April 1998 between representatives of all the government departments and bodies involved. Complainants were attached to the Department of Civil Protection in March 2004 and had received their formal appointment on 21 October 2004 with effect from 7 September 2004.

Complainants told the Ombudsman that between March and September 2004 they received from their new department the salaries and allowances that they

enjoyed throughout their stint at the MIA and the only allowance which they no longer received was the allowance given expressly by the MIA to its employees since they were now no longer on the MIA payroll.

The Ombudsman understood that the previous AFM allowances that had been withdrawn consisted of an annual allowance of Lm120 as AFM members; a trade allowance of Lm237 p.a.; and a Gozo allowance of Lm190.80 that was only granted to four complainants out of the whole group.

The Ombudsman was aware that under AFM policy, a trade allowance is awarded to members of the Armed Forces who are deployed on tasks which require proficiency in skills and specialised training and that AFM members on assignments where these skills are not required forfeit their right to this allowance. The only exception to this policy concerns AFM personnel who are assigned different duties by management for a limited period because of the exigencies of the service. This means in effect that AFM members do not receive this allowance while on assignments that do not require any specialised skills and the Ombudsman held that in view of these arrangements, according to paragraph 6.2 of the call for applications there is no automatic right to the award of a trade allowance.

At the same time it was confirmed that the four complainants who benefited from the Gozo allowance when they served with the AFM no longer received this allowance upon being posted to the MIA.

The stand by the Management and Personnel Office (MPO) was that under paragraph 5 of the agreement of 22 April 1998, the overall remuneration to ex-AFM members upon joining the MIA should not be different from the total remuneration that they received on their last day of service in the Armed Forces. The MPO maintained that once taken as a whole the compensation of employees recruited by the Department of Civil Protection via the MIA turned out to be higher than their total remuneration during the final stages of their service with the AFM, they were not entitled to other additional payments (including allowances).

Conclusions and recommendations

The Ombudsman appreciated that the interpretation of the relevant clauses in

the agreement could give rise to doubts in the sense that it could be maintained that they only served to provide an assurance that complainants would not suffer any drop in the overall level of the income, consisting of their salaries and allowances, which they enjoyed before. It can also perhaps be argued that the words "*there will be no change from the salary payable to ATCC and AC personnel*" should be taken to mean that the salary could not be increased even though it had in fact been increased – and substantially so. It had resulted, however, that complainants received, and continued to receive for some time, a higher salary together with their former allowances and these payments lasted until they received their formal letters of appointment from the Department of Civil Protection.

The Ombudsman felt that in the circumstances the doubts that arose regarding the interpretation to be given to the agreement should go in favour of complainants especially since these clauses appeared in the call for applications at a time when complainants were already receiving the benefits that were withdrawn subsequent to their appointment with the Department of Civil Protection. The Ombudsman was of the view that this finding would naturally apply to those sections of his report where the claims raised by complainants were found justified.

Having examined the merits of the case, the Ombudsman concluded that complainants were entitled to an annual allowance of Lm120 as ex-members of the Armed Forces although they were not entitled to receive trade allowances unless they were assigned duties that required specialised skills for which a trade allowance would normally be given.

The Ombudsman also ruled that the complainants who did not receive a Gozo allowance while they were serving with the Armed Forces were not entitled to this allowance because it did not form part of their overall remuneration package when they were employed with the AFM.

Despite the Ombudsman's recommendation, however, the Management and Personnel Office maintanied that complainants were not entitled to the AFM allowance. The MPO continued to insist that paragraph 6.2 of the call for applications was merely meant to safeguard AFM members who joined the Department of Civil Protection from a drop in their overall remuneration level and did not provide any guarantee that they would retain as of right any allowances that are applicable to members of the Armed Forces.

Case No F 325

LAND DEPARTMENT

Closing an eye to the misuse and abuse of public property

The complaint

This complaint to the Ombudsman concerned government-owned land leased *in solidum* for agricultural purposes to various tenants by the Land Department.

Facts and findings

On private property adjoining his tenement FG, one of these tenants, owned a farmhouse which he converted into a villa. However, unknown to the Land Department, in 1995 FG incorporated part of the land leased to him by the Government to his private property and after having obtained development permission from the Planning Authority (as the Malta Environment and Planning Authority was then known), he enclosed both properties by a boundary wall, carried out other works including a swimming pool, fountains and landscaping and started to use the grounds for commercial purposes. The Ombudsman's investigation revealed that although other tenants lodged various reports about these illegal works, the Land Department took no effective steps to stop these works.

The Ombudsman also found that in mid-1999 FG entered into a promise for the sale of the whole property to a third party, AB. However, since not all the other tenants gave their consent, the transfer of FG's lease in favour of AB could not go ahead and a year later AB protested with the Land Department about the situation in which he found himself. All of a sudden in June 2001 the department informed all the tenants that it was planning to terminate their lease although it later emerged that the department did not proceed with this action.

In August 2003 AB again raised the issue and insisted that the Land Department

should find a solution to recognize him officially as the new tenant instead of FG since this would pave the way for the issue of a call for tenders by the department for the sale of the land originally leased to FG in which he expected to be given the right of first refusal. In January 2004, however, the department decided that after all the best way to regularize the whole situation was not to terminate the lease arrangements of all the tenants but to sell directly to AB the land which FG had developed even though it had been leased to him and he was not its owner.

In April 2005 the department informed AB that the value of the land which it planned to sell to him amounted to Lm90,000. AB felt that this price was excessive and alleged that earlier he had been told that in the event of a public call for offers the value of the land would not exceed Lm25,000. He maintained that despite the developments that had taken place on this land, the department had continued for many years to regard it as agricultural land and had accepted the agricultural leases paid by the tenant farmers and so it was unacceptable that the value of the land was now being established on the basis of its development potential.

In the meantime AB's persistent efforts to get the approval of all the other tenants for the transfer of FG's lease to him failed and the Land Department was not in a position to transfer this lease to him.

When asked by the Office of the Ombudsman to explain its actions, the Land Department confirmed that its original plan was to terminate the agricultural lease of the various tenants. However, it was later felt that since the area was no longer considered as an agricultural zone and was covered by permits for building development, the only practical solution was to sell the land at its commercial value.

Continuing to trace the way in which events regarding this land unfolded, the Ombudsman found that although in his application for improvements and other works FG had wrongly claimed that he was the owner of this land, the Planning Authority had nonetheless issued the permit in 1995.

AB explained to the Ombudsman that before he entered into a promise of sale for the land with FG, he was assured by the Land Department that all that

needed to be done in order to transfer FG's lease in his favour was to secure the approval of the other tenants. He was also given an assurance that if these co-tenants would refuse to give their approval, the department itself would take the necessary action.

During the Ombudsman's investigation the Land Department explained that while the saga was unfolding, this policy had changed and it was no longer possible to convert the agricultural lease of government-owned land held *in solidum* from one tenant to another merely on the strength of the approval of the other co-tenants.

The Ombudsman established that prior to 2001 transfers of such agricultural leases were sanctioned by the Land Department as long as all the tenants on the land in question would agree to allow a new tenant to take in his favour a lease that was renounced by another tenant. However, since it was found that under this policy co-tenants could hold the department to ransom and in order to cut down abuse when leased land changed hands, new procedures were launched in 2001 so that disposal of governed-owned land can only take place following the issue of an open call for tenders or a motion in the House of Representatives.

Considerations and comments

The Ombudsman concluded that the allegation that the Land Department had given underhand assistance to AB could not be confirmed. However, his investigation revealed various serious administrative shortcomings that he felt in duty bound to comment upon.

The Ombudsman found that in this case a tenant who leased government-owned land for agricultural purposes had unilaterally changed its purpose and carried out works with the approval of the development planning authorities and that this permit was issued under false pretences because the tenant claimed in his application that this land belonged to him. The Ombudsman also found that when the Land Department became aware of this ruse, it failed to take the necessary steps to terminate the lease and it decided instead to take advantage of this permit since it felt that on the basis

of the development potential of the site, it would fetch a higher price. The Ombudsman pointed out that although this may seem a valid consideration, such an attitude tended to encourage the abuse of public property with impunity. The Ombudsman appreciated that the Land Department lacks the capability to monitor all public property and suffers from a chronic shortage of trained manpower resources for the supervision and inspection of vast areas of government-owned property. He recommended that this serious problem should be resolved urgently because of the loss of funds to the public coffers arising from the misuse and abuse of public property.

The Ombudsman, however, insisted that the department's limited manpower resources did not justify its reaction when it became aware of illegal developments on public property and took no immediate steps to stop this abuse and to recall this land. He observed that although for various years the department was aware of this glaring abuse, its failure to take the necessary action sent the wrong message to society. While agreeing that if the Land Department had terminated the lease agreement over the whole property persons who had done no wrong would have been badly hit, the Ombudsman was of the view that it was not impossible to find a remedy that would at the same time protect the interests of the co-tenant farmers who were extraneous to the whole situation.

In his investigation the Ombudsman considered AB's allegation that despite assurances by the Land Department that his problem would be remedied in no time at all, the department failed to regularise the situation and he had found himself at the wrong end of the stick. The Ombudsman was not, however, in a position to ascertain what happened during meetings between AB and officials from the Land Department especially since no records were found in the department's files about these meetings.

With regard to AB's allegation that at first he was told that the land was valued at Lm25,000 and that later this price shot up to Lm90,000 even though the site was still classified as agricultural land, the Ombudsman declared that it is not the function of his Office to determine the value of land. He observed, however, that although the estimated value of land issued out to tender by the Land Department should not be disclosed, it would appear that this policy had not been followed in this case.

Considerations by the Ombudsman

The evidence gathered by the Ombudsman led him to conclude that there was evidence of serious maladministration in this case where sheer abuse went unchecked and public property had been subjected to speculation while the department failed to take effective measures. He commented that this grievance had revealed that public officials were responsible for gross mismanagement of public affairs and flagrant abuse of public property and insisted that government-owned land should be administered in a better way.

The Ombudsman explained that public land and public property belong to the community and form part of the common good and no person should be allowed to usurp them for his personal benefit by taking possession of them without any legal title. Nor is it acceptable that a person is allowed to turn to his advantage public property that is entrusted to his possession and to use it in a way that goes against the title by which it was bequeathed to him. It is equally unacceptable to allow a person to falsely declare that he is the owner of public property. Abuse committed knowingly is a grievous act that could be subject to criminal sanctions. Misappropriation and theft of immovable property are both serious offences and responsibility for such criminal acts rests not only upon the shoulders of those who are directly involved but also upon those who aid and abet their commission.

In the case under review with his actions FG made himself liable not only to the serious charge of having made a false declaration on public property but also that he appropriated this land for his own needs, disrupted its original use and made improvements for which he demanded and received compensation from third parties. Since according to law any improvements that take place on public land rightfully belong to the Government as its owner, FG had no right to any compensation and the Government was entitled to terminate its lease to him because of that serious infringement.

The Ombudsman believed that at some point AB must surely have been aware of FG's position at law and that by his actions FG had prejudiced his lease agreement with the Government. AB must also surely have known that the improvements for which he had entered into a promise of sale did not belong to FG but belonged instead to the Government. As a result AB had no right to

expect the Land Department to negotiate favourably with him for the transfer of public property to which he had no legal title whatsoever and over which he had no right to claim any preferential treatment.

The Ombudsman pointed out that AB ought also to have known that the Land Department cannot depart from established procedures and enter into direct negotiations with him for the sale of this property but had to follow government policy for the sale of public land by means of an open call for tenders. AB ought also to have known that land with substantial building development cannot be regarded as agricultural land and can only be sold as a developed site on the basis of its commercial value.

Although aware of this situation, AB had nonetheless taken a calculated risk in the hope that he would acquire the property at a convenient price by convincing the Land Department to ignore established procedures for the sale of government-owned property. The Ombudsman commented that AB had only himself to blame if his gamble backfired and the only way in which he could acquire the property was in line with the government's declared policy for the disposal of public land.

The Ombudsman warned the Land Department about its obligation to safeguard against abuse of public property and to hold firm against persons who lay their hands on public property over which they have no legal right. The department is responsible to bring to justice all those who flout the law on government-owned land and should not favour persons who seek to make undue profit at the expense of the community.

Pointing out that the lack of an adequate number of enforcement officers does not justify failure by the Land Department to administer properly public assets especially when it becomes aware of abuse, the Ombudsman recommended that the department should be provided immediately with the right tools to enable it to monitor effectively the use of government-owned land in both Malta and Gozo. He commented that with a mere complement of two enforcement officers, the Land Department cannot be expected to carry out its surveillance duties efficiently on the use of public property and observed that being so heavily under-resourced the department is unable to become aware whether abuse is taking place and take the necessary action to stop any

such abuse.

With the Land Department virtually incapable of investigating reports about abusive activity in government-owned property, the Ombudsman felt that it was almost inevitable for the department to adopt a policy based on the line of least resistance and to favour an approach based on compromise and appeasement that serves to encourage speculators.

The Ombudsman also pointed out that in similar situations the Land Department should adopt sensible solutions. In the case under review, for instance, it was not true that the only alternative facing the department was to demolish the illegal developments since these had taken place on government-owned property and in effect belonged to the Government. The Land Department was therefore in duty bound to adopt a solution based on serious and transparent management of public affairs. In the case under review this meant that the department had no other option but to ensure that while the lease of the other co-tenants would remain valid, FG's lease would be terminated forthwith so that it would then be in a position to dispose of this property, including the buildings and improvements which FG had done, according to established government procedures.

The Ombudsman also turned his attention to the shortage of inspectors and enforcement officers and recommended that the Land Department should collaborate with the Malta Environment and Planning Authority to make use of the administrative and technical resources and other back-up services that are available at the Authority to collect information about the use to which government-owned property is put. The Ombudsman observed that greater convergence and cooperation between Mepa and the Land Department, particularly with regard to the exchange of information on the use of public property and to the use of human resources and the technical and administrative capacity of the two bodies, should serve as a first step to improve the current situation and promote effective management and control of government-owned land.

The Ombudsman also commented that another obvious solution would be an immediate increase in the number of enforcement officers in the Land Department. No serious administration and no self-respecting country can

tolerate a situation which seems to favour persons who choose not to abide by the rule of law with the apparent even if unwilling connivance of persons holding responsible positions in the public administration.

Conclusion

The Ombudsman stated that failure by the Land Department to take effective, serious and decisive action against abusive action deserves the strongest criticism. In the case under review, FG had enriched himself by carrying out illegal development works on agricultural land owned by the Government and had been let off the hook with no sanctions being taken against him by the Land Department. Furthermore, this blatant abuse had been allowed to persist for years on end while the department collected a mere pittance from FG's old agricultural lease.

The Ombudsman requested the Land Department to implement his recommendations with particular emphasis on the immediate revocation of the agricultural lease to FG and to ensure that the land in dispute would revert to the Government as soon as possible. The department should then proceed to make the maximum profit from the property in question.

The Ombudsman also recommended that the Land Department should as a matter of urgency take the necessary steps to strengthen its capability in the field of enforcement and surveillance with a view to ensuring that any abuse of public property will be immediately identified and remedial measures taken in hand forthwith.

Case No F 440

MALTA TRANSPORT AUTHORITY

The unjust removal of a reserved parking bay for a person with serious mobility problems

The complaint

In a complaint that was lodged with the Ombudsman, an old lady who was registered with the National Commission Persons with Disability expressed reservations on the removal of a reserved parking bay in front of her own residence even though she had a permit for parking for disabled persons that was valid up to 24 March 2008.

Facts of the case

During his investigation the Ombudsman was informed that complainant had reserved parking space in front of her residence because she was unable to walk long distances on account of disability. However, when in June 2005 the Local Council repainted all the parking bays in the locality and the bay in front of her house should have been painted yellow to show that it was reserved parking, the bay was instead enclosed by white paint as a normal parking space.

Soon afterwards the Malta Transport Authority (ADT) informed complainant that her application for a reserved parking bay which she was required to submit at regular intervals had not been accepted because according to reports reaching the ADT's Board for Reserved Parking for the Disabled, she did not suffer from any severe mobility problems.

Faced with this situation, complainant asked the National Commission Persons with Disability for a reconsideration of this decision but in August she was

informed by the Commission that the Review Panel for Reserved Parking had confirmed the ADT's decision that she did not qualify for the concession to have a reserved parking bay.

Complainant claimed that this was a blatant instance of discrimination that was causing her difficulties because medical reports confirmed that she suffered from a severe disability and an acute restriction of mobility. She expressed surprise at the fact that whereas for eight whole years she had qualified for a reserved parking space, this concession had been withdrawn at a time when her condition had actually deteriorated and she considered this decision as controversial and unfair.

When asked by the Office of the Ombudsman for its views on this case and to explain the grounds of the reports which indicated that the mobility problems of complainant were not so severe, the ADT replied as follows:

"*The Malta Transport Authority reserves the right to revise each reserved parking for disabled every two years as per Guidelines for Traffic Management Scheme, section 5.0. The case … was revised by the Board for Reserved Parking for the Disabled accordingly. The decision by this Board was based on the information submitted by the applicant, the Local Council and the report submitted by the Authority's medical doctor…… all of which confirmed that the applicant did not have a severe mobility problem.*

The Authority is informed that the applicant appealed from the decision of the Board for Reserved Parking for the Disabled at the Review Panel for Reserved Parking of the National Commission Persons with Disability, which review confirmed the decision of the first board."

The Office of the Ombudsman approached the Review Panel for an explanation on the case including the reasons for its decision and the submission of any reports that had guided its work. Although administered by the National Commission Persons with Disability, the Review Panel provides a service to the ADT in the sense that whenever an applicant or a Local Council do not agree with a decision by the ADT regarding parking for the disabled, any party involved is free to request the Review Panel to reconsider the case.

The Ombudsman learnt that in complainant's case the Review Panel in August 2005 had carefully examined all the reports in its possession and was unanimous that complainant did not qualify for a reserved parking bay. The Review Panel provided to the Ombudsman copies of these reports including three medical reports by complainant's own doctor; another report by a specialised consultant; another report by the ADT's doctor; and a report by the Local Council of complainant's locality.

The Ombudsman noted that in the first report on 21 March 2005 complainant's medical doctor stated that as a result of her condition including a prosthetic right knee, his patient had "*very limited mobility*" and needed to use a walking aid. Her disability was described as "*permanent*" while the degree of her disability was classified as average. Given her situation, the allocation of a reserved parking bay in close proximity to her residence was recommended.

In a second certificate on 9 July 2005 complainant's doctor confirmed that his patient suffered from a lower limb condition that significantly restricted her mobility and certified that she was still considered fit to drive a motor vehicle and that this was essential for social reasons. It was therefore suggested that in view of her limited mobility, reserved parking facilities should continue to be made available near her own house.

In a third certificate on 11 July 2005 the doctor certified that his patient suffered from a severe disability with severe restriction of mobility and classified the degree of her disability as "*severe*" instead of "*moderate*" as had been stated in the March certificate. This certificate too indicated that it was essential to allocate the reserved parking space.

The Ombudsman also considered the certificate issued by a specialist orthopaedic surgeon on 12 July 2005 who confirmed that complainant's mobility was severely impaired and that she could only walk for a short distance with the help of a walking stick and concluded that it was vital to allocate a reserved parking space near her house.

To a large extent the report by the ADT medical doctor on 28 June 2005 confirmed the seriousness of complainant's condition. It indicated that complainant needed a walking stick at all times and required assistance in

order to walk indoors and outdoors and that in order to reach her first floor maisonette, she needed to hold on to grab rails and had to stop various times as she went up the staircase. The ADT doctor described her disability as "*permanent/progressive*" and commented that it was apparently complainant's neighbour who was making strong objections to the continued existence of a reserved parking bay in the area.

In the report submitted by the Local Council of complainant's locality, the Ombudsman noted that:

- in the section where the Council was asked whether complainant had severe mobility problems which would entitle her to a reserved parking space in front of her own residence, the answer was a clear cut "*No*" without any further details in the line underneath where additional information was requested in support of this reply;
- according to the Local Council, complainant's disability was of a temporary nature;
- when asked whether there were any parking restrictions, the Local Council wrote "*Yes*" and explained that complainant spent the summer months away from the locality at her summer residence;
- as to whether complainant really needed a reserved parking bay, the Local Council stated that she seemed "*perfectly mobile*" and added that "*if she had indeed any mobility problems, these do not seem to warrant a reserved parking facility*."

The Ombudsman took cognizance of the way in which the ADT's Board for Reserved Parking for the Disabled took its decision on complainant's case. He noted that this Board had recommended that a reserved parking bay should not be allocated to complainant because, relying to a very large extent on the report by the Local Council, it reached the conclusion that the applicant did not have any severe mobility problems. At the same time the Board agreed that applicant could re-apply at any time in the future if her condition deteriorated.

The Ombudsman was critical of the intervention by the Local Council especially since the Council could not claim to possess any expertise in this field. He was above all disturbed by declarations that complainant's disability

was of a temporary nature, that she seemed perfectly mobile and that if she had any mobility problems these did not warrant a reserved parking facility since these views were in sharp contrast with medical evidence that complainant's disability was severe, permanent and progressive.

The Ombudsman also referred to the statement that complainant spent the summer months at a summer residence. He stated that in his view this did not constitute a valid reason to turn down her request for reserved parking space because the fact that she did not live in her residence in the locality during the summer months did not render her more mobile.

The Ombudsman observed that it was difficult to comprehend the decision to withdraw the reserved parking facility that had been provided to complainant for eight years on account of her condition when according to medical evidence her disability was showing signs of progressive deterioration which further heightened the need to allow her to continue to make use of this parking space.

The Ombudsman expressed surprise that two boards withdrew complainant's reserved parking bay on the basis of submissions by the Local Council of her locality that she did not suffer from any severe mobility problems when the Council had no technical competence to issue such a claim. He failed to be impressed by the claim of the Review Panel that it had turned down complainant's application for a reserved parking facility on the basis of reports in its possession and tended to believe that this decision had been taken merely on the strength of the Local Council's report.

Conclusion

The Ombudsman concluded that the evidence that emerged during his investigation indicated that complainant was right to claim that she had been treated unfairly. No grounds existed that could justify the conclusion reached by the Local Council and later confirmed by the Review Panel that she was not entitled to a reserved parking facility.

The Ombudsman pointed out that this wrong conclusion by the Review Board could only have been the result of a lack of attention by members in their

assessment of complainant's application. It also reflected lack of a proper appreciation of the medical evidence that was submitted which confirmed beyond any shadow of doubt that complainant qualified for a reserved parking bay on the grounds of the degree of her disability.

The Ombudsman stated that even if any doubts existed about complainant's situation, these ought to have disappeared in the light of certificates about her medical condition. These documents had been testament to her situation and to the rapid deterioration of her condition and it was unexplainable how the Local Council had concluded that complainant did not deserve to retain the reserved parking facility.

The Ombudsman stated that the conclusion by the Local Council was wrong, unfair and completely out of touch with the facts that emerged from the medical evidence that had been presented. In the circumstances he felt in duty bound to recommend that the decision by the Board for Reserved Parking for the Disabled be withdrawn forthwith since clearly this Board too had failed to appreciate the true nature of complainant's medical condition and the extent of her disability.

In the best possible scenario the Ombudsman pointed out that even if the benefit of the doubt was given to the Local Council and to the Board for Reserved Parking for the Disabled and the two bodies acted in good faith, the fact that complainant's medical condition deteriorated badly in the space of a few months was an indication that the decision not to allow reserved parking facilities to her had to be reversed urgently.

The Ombudsman concluded that complainant's grievance was fully justified and recommended that the reserved parking bay opposite her residence be restored as soon as possible.

A few days later the Local Council put into effect this recommendation by the Ombudsman.

Case No F 469

CAPITAL TRANSFER DUTY DEPARTMENT

The taxpayer who found no joy in being first on the list

The complaint

In a complaint with the Office of the Ombudsman respondent alleged that she was subjected to unfair treatment when the Capital Transfer Duty Department requested her to pay an additional duty/penalty of Lm5,500 on the transfer of property even though duty payable to the department had already been settled in full. Complainant also objected that she had been selected to pay this penalty when she was only one of twenty four owners whose names and identities were all known to the department.

Complainant stated that following her objection on these two counts, the department took an inordinately long time to carry out a re-evaluation of the property. As a result the reply to her objection was received after the expiry of the concession allowed by law to taxpayers by the Duty on Documents and Transfers Act, 1993 whereby a penalty would be reduced to 10% of the amount if settlement is made within 90 days from the date of the department's claim.

In the meantime, in view of this delay and faced with the threat of an increase in the amount of additional duty if she did not pay before the passage of 90 days from the date of the assessment, complainant settled the amount under protest although she made it clear that her payment was conditional to a refund if her protest was sustained. Nonetheless, the department's position was that in similar cases the law does not allow payment of any refund to taxpayers.

Facts and findings

The deed of sale of two plots of land in March 2004 indicated that the price agreed upon between the parties was Lm90,000 and that provisional capital

gains tax due on this deed amounted to Lm4,500. In line with the Duty on Documents and Transfers Act the notary who drew up the deed of sale submitted to the Capital Transfer Duty Department in August 2004 and in October 2004 the necessary documents in respect of this deed and also duly effected payments of Lm2,000 and Lm2,500 respectively in the form of provisional capital gains tax. For some reason the department did not establish the link between the two declarations.

On the strength of its powers at law, the Capital Transfer Duty Department established the value of the two plots in question at Lm150,000 and on 22 November 2004 issued a claim upon complainant whose name appeared first on the list of twenty-four former co-owners of this property to pay an additional duty of Lm5,500 since, according to the department, the property had been undervalued and duty had been underpaid.

On 6 December 2004 complainant objected to this claim and asked the department for a re-evaluation of the plots of land. However, it was only on 17 February 2005 that the two plots were re-valued at Lm100,000 by the department's own architect. This meant that by the time that this new evaluation reached the department, the 90-day period from the date of the original claim for payment of the penalty by complainant had already expired and that at this stage the penalty could only be reduced to 20% if paid within 120 days from the date of the assessment. It also meant that under the law no additional duty was payable since the original valuation was within the 15% deviation from the department's estimate that a taxpayer is permitted without incurring a penalty.

In the meantime, receiving no reply to her objection and faced with the threat of a higher amount of duty if the deadline from the date of the department's claim went by unobserved, complainant paid Lm550 under duress on 18 February 2005. In her letter to the department complainant pointed out that her payment was without prejudice to her bid to claim the money back in the event that her case would be upheld.

The department accepted the payment but pointed out that in terms of the law a refund was not possible while in a transfer *inter vivos* the transferor and the transferee are jointly and severally responsible to pay duty.

Considerations and comments

The Ombudsman pointed out that this complaint gave rise to three issues, namely:

- complainant's objection to the department's decision to send the claim for payment to her when she was only one among various other ex-joint owners of the property;
- the department's delay to make a fresh evaluation of the property which allowed the 90-day limit from the date of the claim to elapse and forced complainant to pay additional tax under duress; and
- the department's decision not to refund complainant the overpaid amount.

The Ombudsman noted that the department's practice in cases of multiple sellers is to issue claims in the name of the person who appears first on documents presented by the notary responsible for the deed. The department explained that in this case the claim was issued in the name of *complainant et* because it was complainant's notary who had placed her at the top of the list of twenty four previous joint owners.

The Ombudsman observed that even if the department's practice were acceptable at law, the application of any such provision must ensure that basic principles of good administration are observed, namely:

- equality of treatment whereby persons in the same situation are treated in the same manner and any difference in treatment must be justified by objective reasons;
- being fair and reasonable; and
- allowing a reasonable time limit for taking a decision.

By singling out complainant for the payment of additional tax when the particulars of the other co-transferors in the sale of the property were available, this practice implied unequal treatment and was manifestly unfair while breaching the first two principles mentioned above.

The second issue concerned the department's delay in responding to complainant's objection. Despite strict deadlines attached to the payment of

additional tax and to the application of concessions in terms of the law, the department seemed to have no guidelines to process objections well ahead of the expiry of these deadlines to enable taxpayers contesting its measures to take appropriate action. The Ombudsman felt this was a manifest case of unfair practice that went against the interests of citizens.

The Ombudsman pointed out that in these circumstances, complainant had either to delay payment in the hope that her objection would be upheld or else fork out the amount decided by the department even if it might later result that it was unfair. By allowing the interval permitted by law to lapse before replying to complainant's petition the department attracted the Ombudsman's criticism.

The third point concerned the issue of refunds. According to the Ombudsman, considerations arising from a correct interpretation of the Duty on Documents and Transfers Act conclusively supported complainant's request.

The Capital Transfer Duty Department maintains that complainant could not subject her payment to any conditions or qualify her payment because section 52(4)(a) of the Act states that "*no additional duty shall be chargeable with respect to the amount of duty and corresponding additional duty so paid, and no objection shall be entertained with respect thereto*." The department holds that once a person liable to pay additional duty takes advantage of the option allowed by this section to pay additional duty within a definite time window, this person would have irremediably forfeited any right to a refund of the amount paid, whatever the circumstances.

The Ombudsman declared that in his view this constitutes an incorrect application of the law and ignores basic rules that should be applied in the interpretation of legal provisions. Foremost among these rules are the principles that legal provisions have to be interpreted in their context and that a correct interpretation of a legal provision should take due account of its wording and spirit as well as the way in which it relates to and is dependent on other provisions of the same law. Furthermore, a legal provision has to be interpreted in its entirety and should not be considered in a disjointed manner so as to change or warp its meaning.

The Ombudsman also observed that a correct reading of section 52(4) shows that in a transfer *inter vivos* the persons involved shall be required to pay additional duty equivalent to the amount of duty assessed by the Commissioner of Inland Revenue in instances where, in the opinion of the Commissioner, "*the deed of transfer or the deed of declaration … does not reflect the true conditions of the transfer*." It is clear that, where in the opinion of the Commissioner this is not the case, no additional duty is payable. It is also clear that in cases where the Commissioner is initially of the opinion that a property was undervalued but is subsequently convinced that this opinion was mistaken, the Commissioner is in duty bound to amend his assessment accordingly. In similar circumstances it is obvious that any additional duty assessed by the Commissioner has to reflect the amended correct amount of duty assessed and that the revised assessment of additional duty has also to take effect as from the day that the revised assessment of duty is communicated to the parties involved.

The Ombudsman pointed out that section 52(4) can only be interpreted to mean that if the Commissioner of Inland Revenue, as in the case under review, revises his assessment and decides that no duty is chargeable, then no additional duty could be assessed by him. The parties could not be held liable to pay any additional duty for the simple reason that the duty had to be equivalent to the amount of duty assessed by the Commissioner which, in this case, was non-existent. It is therefore inconceivable for the department to cancel its claim for capital transfer duty so as to neutralise its original assessment which was based on wrong technical advice and at the same time maintain that additional duty raised on an incorrect assessment was still due and had to be paid.

The Ombudsman observed that the department was refusing to refund additional duty, paid under protest by complainant, on the strength of proviso (a) of section 52(4) that once any additional duty raised is paid, "*no objection shall be entertained with respect thereto*." It should be manifest, however, that this provision is only applicable where the duty to which the additional duty attaches is in fact due. The Ombudsman felt that it was unreasonable and unjust for the Commissioner to raise additional duty if the assessment and the claim for duty to which the additional amount referred, was withdrawn. No one can gain advantage from his own mistake and the law does not sanction such an approach.

On the contrary the Ombudsman held that the law expressly provides that the Commissioner is bound to refund any duty paid if it results that this was not due. Section 62.1(d) of the Act stipulates that the Commissioner may refund duty received that is not due while paragraph (e) expressly refers to the refund of any excessive duty that has been paid and arising from "*an error in computation*". Since this paragraph makes no distinction between duty and additional duty, all duties of whatever nature that are unjustly received by the Commissioner have to be refunded. The law applies the basic principle of natural justice that no one should enrich himself at the expense of others and everyone has the duty not to retain what is unjustly paid when it is not due.

The Ombudsman also pointed out that it is not correct to state that complainant objected to the Commissioner's decision to raise additional duty when the Commissioner assessed the value of the property. Truly the objection to the department's assessment of duty arose on the grounds that it did not reflect the property's real value. As a result, when the Commissioner accepted complainant's objection and the department admitted its mistake and withdrew its assessment, a natural and inevitable consequence of that decision was the withdrawal of the claim for payment of additional duty when it was manifestly not due.

The Ombudsman observed that in the context of the citizen's right to good administration, the department should ensure that objections by taxpayers are duly processed and properly addressed and concluded well in time before the lapse of substantive deadlines without the need to force taxpayers to effect payments under duress. To allow deadlines to slip by and then plead the law in one's favour is tantamount to malpractice.

The Ombudsman noted that in the case under review, complainant was obliged to pay under duress but had done so under protest and without prejudice to her right to claim refund in case her objection was sustained. However, despite these safeguards the department had merely accepted her payment and had failed to inform her in due time of its legal position in similar circumstances even though this itself was based on a wrong interpretation of the law. Insisting that in terms of good administration the provision of such information is mandatory and that the department was guilty of an injustice when despite being at fault it pleaded the law in its favour, the Ombudsman stated that it is

unacceptable for citizens to pay for the failure of a government department towards them.

The Ombudsman finally pointed out that there were other considerations regarding the practice to issue claims in the name of the first person on a list presented to the department regarding a deed for the transfer of property. Although it was understood that this practice was based on the legal provision that imposes joint and several liability for the payment of duty to the department, the Ombudsman observed that in his view the department should examine this position and drew its attention to the following points:

(i) although the law lays down that in a transfer *inter vivos* the parties are jointly and severally liable to pay duty, a distinction should be made between the joint and several liability of persons to fulfil an obligation established by law at the time an obligation comes into being and the moment when the creditor can exact payment due in satisfaction of this obligation. It is only after a person effectively becomes a debtor that a debtor can be made jointly and severally liable for the payment of the debt together with other debtors who have similarly assumed or have been made by law to assume that obligation. A creditor can only proceed to enforce joint and several liability after having satisfied the legal requisites attaching such liability to the co-debtor.

(ii) section 54 of the Duty on Documents and Transfers Act provides that the Commissioner shall serve on the person liable to pay duty a notice stating the amount of duty payable and that an assessment is deemed for all purposes of the Act to have been made by the Commissioner on the date of service of this notice. It would therefore appear that this section does not give the Commissioner the right to pick and choose the person who is to be made liable to pay duty but imposes a duty on him to serve a notice of assessment on persons liable to pay the duty to afford every one of them the right to contest it. This is clear also from section 55 that determines the date on which an assessment shall be deemed to have been made as the date of service of the notice to the person liable to pay duty.

It would therefore seem that a person who is potentially liable to pay duty would not become so jointly and severally liable until such time as an

assessment is served upon him. This interpretation is strengthened by the right given to the person liable to duty to apply to the Commissioner for its revocation or revision within a specified term "*from the date of the service of the notice*."

An interpretation of these clauses to the effect that the service of a notice of assessment to one person out of many liable to pay the same duty would suffice and that this service extends virtually to other persons liable to tax who are affected with the action of the person served, would not only be unreasonable and unjust but also in violation of the right of these persons to contest the assessment and of their fundamental right to a fair hearing.

The Ombudsman commented that these considerations indicated that the department should revisit its policy to pick and choose a person on whom a notice of assessment is served and, even worse, to serve the notice on the first person appearing on a list submitted to the department. This policy seems arbitrary and fundamentally unjust and although the law and administrative practice should ensure that taxes are duly paid and that outstanding revenue is fully safeguarded, this should not be done at the expense of a taxpayer's fundamental rights.

Conclusions and recommendations

On the basis of these considerations the Ombudsman concluded that the complaint was justified because of the following administrative failures:

- irrespective of whether the Capital Transfer Duty Department acted within the law or not when it only sent the claim to complainant, it breached two basic principles of good administration, namely, equality of treatment and fairness;
- once the department accepted to reconsider its original valuation, it failed to communicate the re-evaluation in good time and before the expiry of the 90-day limit from the claim;
- the department was not only giving a wrongful interpretation regarding the issue of a refund once a citizen pays a claim but also failed to inform complainant in advance that payment under protest and subject to refund

was not acceptable in terms of its interpretation of the law;

- the department ought to have been aware that complainant had satisfied the requirements of the law as regards payment of duty and acknowledged that the correct duty had been paid in the first place even before it sent the claim for additional duty/penalty; and
- the valuation on which complainant was forced to pay Lm550 under duress was made by the department's architect who had subsequently admitted that his valuation was mistaken.

Taking everything into account the Ombudsman recommended that the department should refund the sum of Lm550 to complainant and that the department should improve its administrative procedures to avoid a recurrence of the failures that had emerged to the fore in this grievance.

Case No F 498

WORKS DIVISION

The repercussions of a very tortuous selection process

The complaint

An employee alleged in a complaint with the Ombudsman that due to excessive delay in the publication of results of interviews for the post of Technical Officer in the Works Division of the Ministry for Resources and Infrastructure, he was not promoted to this post because he had reached retirement age by the time that the results were published.

Complainant explained that this delay meant that not only had he foregone the higher salary of a Technical Officer that he would have earned if he had been promoted but also had negative repercussions on his rate of pension. He also stated that his petition to the Public Service Commission (PSC) about his case had been turned down.

Sequence of events

When in September 2002 a call for applications was issued to fill the posts of Technical Officer in the Works Division, complainant had duly applied to fill one of these posts. The interviews of applicants started in January 2003 but complainant's interview, due for February, was not held because a directive banning recruitments, appointments and promotions in the public service until the formation of a new Cabinet was issued after the announcement that a general election would be held on 12 April 2003.

Subsequent to the formation of a new Cabinet, the Public Service Commission asked the selection board in the second half of April 2003 to indicate when the selection process was likely to be finalised but was informed that clearance

to go ahead with the interviews of the remaining applicants was still pending.

Soon after complainant went out on long sick leave in March 2004, the Ministry for Resources and Infrastructure sought the advice of the PSC whether interviews held prior to the dissolution of Parliament were still valid and was advised that the process could continue. Complainant was called for an interview in mid-May 2004 but was boarded out on medical grounds and retired from the public service a few days later.

In the meantime, despite the PSC's insistence that the selection board should complete its task without further delay, the final report remained outstanding.

In October 2004 the selection board finally presented its final overall report and complainant was ranked first in his section in the Works Division while in November 2004, six months after he had already retired from the public service, the Works Division sent its recommendation to the PSC that complainant be promoted Technical Officer.

Following a further delay until the Management and Personnel Office (MPO) approved a revised manpower plan of the Works Division with proposals for the deployment of personnel, in May 2005 the PSC finally endorsed the report by the selection board. However, this was by no means the end of the story because when the Works Division informed the PSC in June 2005 that in the meantime complainant had been boarded out, the Commission approved the appointment of the second placed candidate to take his place.

During his investigation the Ombudsman asked the Works Division to comment on complainant's claim that he had performed the duties of a Technical Officer from 1999 up to his retirement in 2004 even though this post was higher than his substantive grade. In its reply the Works Division did not deny that complainant performed these duties during these years but said that according to the Public Service Management Code an acting allowance or a deputising allowance for the performance of higher duties is only paid where the vacant post falls in salary scales 1 to 10 and since the post of Technical Officer falls in salary scale 12, complainant's request for a deputising allowance could not be met.

Considerations by the Ombudsman

The Ombudsman observed that without the slightest shadow of doubt there had been an inordinate and unacceptable delay between September 2002 when the call for applications was first issued and October 2004 when the selection board sent its final report to the PSC. There was also a considerable gap between the closing date for the call for applications in October 2002 and complainant's retirement on medical grounds in May 2004.

The Ombudsman appreciated the very large number of applications from employees in the Works Division for the posts that were advertised and that the interviews of candidates got under way soon after the closing date for applications. However, various stumbling blocks had arisen. The first difficulty arose from the directive issued by the Office of the Prime Minister subsequent to the announcement of a general election that was interpreted that the selection process had to be halted. The second difficulty arose from doubts whether the chairman of the selection board should continue to be involved in the selection process after his secondment to a parastatal organization.

The Ombudsman also observed that although the PSC had repeatedly asked the board to conclude its selection process, these requests had a negative outcome and a very long time passed before the final report reached the PSC. In the meantime complainant had retired from the public service on medical grounds.

The Ombudsman noted that although the selection board had placed complainant on top of the list in his category and this entitled him to the appointment of Technical Officer, the PSC in turn decided that it was too late to appoint him to this post. This meant that despite the fact that complainant had carried out duties associated with the post of Technical Officer for no less than five years before he left the public service, at the end he remained without receiving his due.

The Ombudsman has pointed out on various occasions in cases involving selection and promotion of officials in the public service that the Commission

is set up in terms of the Constitution of Malta and that the merits of its decisions are not subject to review not even by the courts of law. Nonetheless in such cases the Office of the Ombudsman verifies that the Commission has given adequate consideration to issues raised in petitions to the Commission and reviews the process adopted by the Commission in its evaluation of these petitions in order to ascertain whether there was anything in the process that was mistaken at law, unfair or improperly discriminatory or in any way wrong or unjust.

It resulted to the Ombudsman that in this instance the PSC gave a fair hearing to the issues raised by complainant and also gave due weight to the position which it had adopted earlier in a similar case. However, even after taking due regard of the various reasons that caused the delay, the Commission felt that this time it could not recommend that complainant be awarded the promotion with effect from a date prior to his retirement from the public service. The PSC also turned down his request for the payment of arrears or at least the award of some form of compensation whereby his service pension would in turn be increased. The Commission took these decisions in the exercise of its discretionary powers under the Constitution.

Despite the PSC's decision the Ombudsman felt strongly, however, that there was excessive delay in the selection process and a considerably long time had been allowed to pass between the time when interviews were held and the time when the final report of the selection board reached the Commission. In the Ombudsman's view this delay constituted administrative failure on the part of the Works Division that severely prejudiced complainant's promotion prospects. As a result he suffered financial loss in the sense that, according to the pension law, he would have been entitled to a higher rate of pension if he had been awarded the promotion which the selection board had belatedly recognized that he merited and if he had retired from the public service in the substantive grade of Technical Officer.

The Ombudsman felt that the PSC should not have ignored the fact that according to its mandate as laid down by the Constitution, it is responsible to monitor and regulate the whole selection process and cannot therefore in this case detach itself from responsibility for the excessive delay until the whole

selection process was concluded and which by any account was unacceptable. The Ombudsman pointed out that even the PSC itself had repeatedly requested the selection board to conclude its task and this was a clear indication that the Commission too was concerned at the length of time taken by the board to reach its final decision. He noted that the PSC's intervention failed to produce the desired results and the selection process had gone on and on with the result that complainant was treated unfairly by the authorities and had suffered from administrative delay that was unjustified.

In the course of his investigation the Ombudsman was informed that the PSC had taken steps so that the selection process to fill posts in the public service would be hastened and commented that if this system was already in place when complainant's selection process was under way, the process would not have dragged on for such a long time and complainant would have been promoted to the post of Technical Officer before his retirement. This would have enabled him to benefit from a higher salary and also from a higher rate of pension.

According to the Ombudsman, by itself this argument was enough to justify the award of adequate and fair redress to complainant that would place him in the same situation as if the instance of maladministration had not arisen. He suggested that the Commission should reconsider whether there was any substantial difference in the particular circumstances of the case under review and its decision in other similar cases where the PSC itself had recommended that applicants be awarded an appointment even though they had already retired from the public service.

The Ombudsman further recalled that complainant had carried out the duties of a Technical Officer for five years although under the Public Service Management Code his grade did not entitle him to qualify for a deputising allowance. Although strictly speaking this meant that complainant was not entitled to receive any compensation for work which he had done that belonged to a grade higher than his substantive post, the Ombudsman pointed out that his Office had always maintained that whenever an employee is required to undertake duties that are higher than his substantive grade for a prolonged period, the employee should receive compensation by the payment of the

basic salary of the higher position associated with the duties that he would be carrying out. The Ombudsman stated that in his view if these arrangements are not followed, this would amount to exploitation of the employee involved.

Out of a sense of fairness and equity the Ombudsman was therefore somewhat hesitant to accept the argument that the Public Service Management Code does not provide for cases that are similar to the one raised by complainant because of the grade that is involved. He expressed the view that in the case under review complainant should not suffer the consequences of a blatant act of administrative failure as a result of which a vacant post remained unfilled for five years while the person who in fact undertook these duties during all these years received a lower pay.

Conclusions and recommendations

The Ombudsman concluded his investigation by stating that the main considerations on which he based his final opinion on the merits of the case were as follows:

- complainant had undoubtedly suffered injustice as a result of administrative failure and delays that could and should have been avoided in the first place. The Public Service Commission itself had recognized that failure to complete the selection process in due time had resulted in an extraordinary delay in the conclusion of a promotion exercise although it had failed to appreciate the hardship that had been caused to complainant in terms of income foregone for duties that were carried out and a lower rate of pension;

- the Ombudsman concluded that in this case the remedy put forward by his Office to address the injustice caused to complainant by failure by the selection board to conclude its task in a reasonable time ought to prove acceptable to the PSC and should be adopted since it was meant to make up for the administrative failure that lay at the root of complainant's distress and that had served to harm his interests;

- in the view of the Ombudsman the basic circumstances that guided his evaluation of the case and that justified complainant's grievance while at the same time calling out for a solution based on justice and equity towards complainant were the following:

    - for five years complainant had performed duties that belonged to a category that was higher than his substantive post and was never granted any extra remuneration for these services;
    - complainant had applied for promotion to a higher position which he was already filling on a *de facto* basis and moreover, even if too late, he had been ranked first by the selection board for promotion to the post of Technical Officer; and
    - the only reason why complainant was not given the promotion which he deserved was that he had already retired from the service by the time that the selection process was concluded.

- complainant attributed his grievance to undue delay by the selection board to complete its task which made it impossible for the promotion to which he was entitled to be applied with retroactive effect together with the payment of arrears. He claimed that this situation would have negative repercussions for the rest of his life since it also affected his rate of pension.

The Ombudsman concluded that the main thrust of complainant's grievance about a reduced rate of pension and that he suffered injustice at the hands of a public authority were justified on the following grounds:

- for five years he had carried out duties that were higher than his substantive grade without any additional remuneration; and
- he had not been promoted and as a consequence also lost his right to a higher pension because the selection process had lasted an inordinately long time. If this process had been concluded within a reasonable time, his promotion prospects would not have been jeopardized and he would have received his promotion that would also have entitled him to a higher rate of pension.

In the circumstances the Ombudsman recommended that in the light of his findings:

- the PSC should reconsider complainant's case and agree to implement one of the following alternatives so as to ensure that he would finally receive his due:

    - promote complainant to the post of Technical Officer by giving effect to the recommendation of the selection board on 24 October 2004 and by backdating this promotion to one day before complainant's retirement in May 2004; or
    - give complainant a salary on a personal basis as his official pay and a personal emolument that would be equivalent to that of a Technical Officer and make these arrangements applicable as from the day prior to his effective retirement from the public service.

The Ombudsman concluded that since it was his understanding that either of these two recommendations would have the same effect for the purpose of the computation of complainant's pension, he recommended that the option to be selected should be the one that would create the least disturbance to existing administrative procedures.

The Ombudsman also pointed out that complainant's right to be adequately compensated for work that was of a higher nature than his substantive duties which he had performed for some five years should be kept in abeyance but should be resorted to in the event that complainant's grievance regarding his rate of pension would not have a favourable outcome and the authorities would not implement his recommendations.

Notwithstanding the conclusions that were reached by the Ombudsman, the Public Service Commission felt that it should not take any further action on this case while the Management and Personnel Office of the Office of the Prime Minister considered that it should not sanction the payment of a deputising allowance for work that was carried out by complainant that was above his grade.

Case No G 002

DEPARTMENT OF PUBLIC HEALTH/ FOOD SAFETY COMMISSION

No tea party for an importer of tea bags

The complaint

A local importer lodged a complaint with the Ombudsman where he claimed that the Department of Public Health was unjustly refusing to allow him to import a brand of tea bags even though the Food Safety Commission had originally stated that the labelling of this product conformed to local regulations. Although the health authorities continued to insist that the labels on the tea bags had to be changed before he would be allowed to release the product on the local market, the importer maintained that the labelling was fully in line with local as well as EU regulations.

Facts of the case

Before importing his first consignment of tea bags from an Asian supplier early in 2004, complainant gave samples of these bags to the Food Safety Commission. When the Commission informed him that the labelling of these products conformed to Maltese regulations, this cleared the way for the importation of this consignment.

When complainant imported a second consignment in 2005, the Port Health Services of the Department of Public Health observed that labels on the bags were in contravention of regulations on labelling of products for human consumption laid down in subparagraph 1(a)(iii) of regulation 4 of Legal Notice 483 of 2004 and withheld the release of the goods. Complainant retorted that a few months earlier the Food Safety Commission had approved the labels that gave rise to these objections.

In line with article 39 of the Food Safety Act[1], complainant agreed with the Department of Public Health in February 2005 that he would remedy the contravention to which his attention had been drawn. He undertook not to release the second consignment before officials from the department had inspected the product and ascertained that the labels had been amended to conform to regulations.

Although complainant was aware that proceedings would be instituted against him under this agreement in the event that he infringed its provisions, he continued to make representations about the issue. On its part, after seeking further advice from the Malta Standards Authority and the Food Safety Commission, the Department of Public Health finally agreed to allow the release of the second consignment with the original label on condition that complainant would agree that future consignments would conform fully to regulations regarding the labelling of foodstuffs.

Complainant subscribed willingly to this decision and on 27 June 2005 he entered into another agreement with the Department of Public Health binding himself to observe existing labelling regulations before placing any product on the local market and not to release any consignment unless he had secured the prior approval of the department.

The next step took place in July 2005 when the public health authorities informed complainant that in future consignments the label on each tea bag should only promote tea as a natural drink that does not contain any artificial substances or preservatives. This meant that words that appeared on the previous label to the effect that "*the contents form an important role as a health drink*" had to be removed since according to advice from the Food Safety Commission, these words were not allowed by the Food Safety Act and regulations issued under this Act.

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[1] *"When it appears to the health authority that any person engaged in any food business has engaged in any conduct that constitutes an offence …… the health authority may, at its discretion, instead of causing proceedings to be instituted against that person, caution that person in writing, and seek an undertaking in writing from that person that he shall refrain from the conduct specified in the undertaking for such period as may be agreed to by the parties concerned, and, …… upon the making of such undertaking no further proceedings may be instituted with respect to such offence."*

However, soon after having signed the June 2005 agreement where in effect he admitted that he was in breach of the regulations and accepted to remedy the situation, complainant contested the fact that there had been any such breach and again insisted that the previous labels on his product were in conformity with local regulations and met EU directives.

Faced with this change of attitude by complainant, the Department of Public Heath maintained that regulations published under Legal Notice 483 of 2004 were in conformity with Directive 2000/13/EC of the European Parliament and of the Council of the 20th March 2000 on the approximation of the laws of Member States relating to the labelling, presentation and advertising of foodstuffs as amended by other subsequent directives. In fact subparagraph 1(a)(iii) of regulation 4 of Legal Notice 483 of 2004 which states that the labelling of products and the methods used must not be such as could mislead purchasers "*by suggesting that the foodstuff possesses special characteristics when in fact all foodstuffs possess such characteristics*" is virtually a word-by-word replication of the contents of subarticle 1(a)(iii) of Article 2 of Directive 2000/13/EC.

While the Ombudsman's investigation was under way, complainant pressed his point further by presenting a number of tea bags originating from a Member State of the EU that are distributed on the local market by a rival importer. The labels on these bags contained declarations to the effect that being naturally rich in antioxidants, the product is of benefit to drinkers; that tea is a rich source of antioxidants; and that antioxidants found in tea, fruit and vegetables constitute an important part of a healthy diet. At this stage, the Ombudsman asked the Department of Public Health for an explanation on the different treatment accorded to complainant.

In its reply the department informed the Ombudsman that in the light of more consultations with the Food Safety Commission which confirmed that the decision taken in the first place about the product imported by complainant was correct, it was decided that henceforth any importer who failed to observe the provisions of Legal Notice 483 of 2004 on the labelling of foodstuffs would face the same repercussions as complainant. The department insisted that all future consignments of imported tea would need to contain labels that would conform fully to regulations.

Considerations and comments

The Ombudsman summed up complainant's contestation of the decision by the health authorities regarding his consignments of imported tea bags as follows:

- before importing his first consignment, complainant had presented a sample of these bags to the Food Safety Commission which agreed that this product conformed to regulations and that it carried an approved label;
- although the Department of Public Health objected to certain words which appeared on the labels of the bags in his second consignment and at first stopped the release of the product on the local market, complainant was subsequently authorized to release the product and warned that in future he would need to change the wording on the labels before he would be allowed to sell it in Malta;
- advice given to complainant by the British Tea Council showed that in the Council's view the original wording on his labels was straightforward and there was no reason why it should not be acceptable to the authorities;
- the health authorities raised no objection to the sale on the local market of a similar product imported from an EU Member State with labels that contained words that promoted the characteristics of this drink and that were possibly even more explicit.

The Ombudsman's initial reaction to this complaint was that he was being requested to change a decision by the Department of Public Health following advice by the Food Safety Commission and to state that the product should be allowed in the country despite this decision. The Ombudsman pointed out that the Food Safety Commission is responsible under the Food Safety Act to advise the health authorities and to monitor the enforcement of any relevant legislation, standards and practices in relation to food business and is empowered to ensure that international obligations entered into by the Government on all matters related to food are complied with. This means that since the Commission is the competent authority to decide on the labelling and packaging of foodstuffs, including imported items, the Commission had carried out its function according to law and the Ombudsman cannot be

expected to assume this function himself and to subject the Commission's decision to his scrutiny.

However, despite these considerations the Ombudsman felt that he could not desist from expressing his criticism at the fact that the Food Safety Commission had not carried out its duties diligently. Complainant had showed foresight in submitting samples of the tea bags that he intended to import and had only made arrangements to import this brand following the Commission's approval of the samples including their packaging and labelling. It was only upon the arrival of the second consignment when the Port Health Services expressed disagreement with the label that had already been approved by the Food Safety Commission that the Commission changed its original decision and that the Department of Public Health withheld the importation of this product. The situation was further complicated when at a later stage the Food Safety Commission agreed to allow the release of the second consignment without insisting upon any changes to the original labels.

The Ombudsman was of the opinion that the way in which the whole episode unfolded, including the attitude displayed by the authorities involved, constituted an instance of maladministration. He argued that if its final decision was correct, the Commission must have been slipped badly when in January 2004 it approved the original label that had been submitted by complainant.

Complainant had also submitted evidence that the authorities had allowed the release on the local market of tea products from an EU Member State with labels that contained health claims that were similar, if not more in breach of the law, to those on his labels without taking the same measures against this importer. In reply to the Ombudsman's query about this peculiar situation, the Food Safety Commission considered the case anew and confirmed its original decision about complainant's product while agreeing that the same measures needed to be taken with regard to other brands of tea that were already on the market and whose labels did not comply with local and EU regulations.

In this situation, the Ombudsman could not but express his consternation at the fact that, at least insofar as issues concerning labelling are concerned, it

seemed that law enforcement by the authorities was not being carried out in a proper and consistent manner. He insisted that in issues concerning the labelling of products, the authorities who are entrusted with responsibility to take decisions on these matters should ensure uniformity both at national and at international level.

The Ombudsman recalled that when his second consignment was withheld in February 2005 as a result of objections that were raised by the Port Health Services, complainant had undertaken to make up for this breach of the regulations and also agreed not to release the product on the local market before the labels had been changed to conform to regulations. However, although legally bound to observe this agreement, complainant had continued to object to the stand taken by the authorities. On the other hand, despite this agreement the Department of Public Health allowed the consignment to be released on the understanding that the labelling of any future consignments would be in line with the provisions of the law even though notwithstanding this concession regarding this consignment, complainant continued to delve deeper into the fairness of the action taken by the Department of Public Health.

The Ombudsman ruled that in his opinion once complainant had accepted the condition and bound himself to change the labels of his second consignment, he had no right at a subsequent stage to expect to be released from an undertaking that he had freely accepted.

Conclusion

After having examined the grievance, the Ombudsman reached the following conclusions:

- since the complaint concerned the exercise of functions bestowed by law upon the Food Safety Commission and the Office of the Ombudsman cannot substitute the Commission in the exercise of its functions, the Ombudsman felt that complainant had at his disposal fair means of redress which he had availed himself of;
- notwithstanding this consideration and on the assumption that the final decision by the Food Safety Commission was correct, it appeared that

the Commission was wrong in January 2004 to approve the original label in complainant's first consignment;

- when complainant bound himself legally at the risk of a penalty in the event of non-performance, he lost the right not to honour his obligation in the agreement regarding the consignment which he had imported on the basis of this agreement although at the same time he remained free to contest the decision with regard to any other future consignments especially if he was able to produce new evidence to support his contention.

Finally the Ombudsman observed that the evidence that he had seen during his investigation cannot but raise doubts and concerns about whether the enforcement of regulations regarding the labelling of foodstuffs is being carried out in an efficient manner and in a way that ensures uniformity in the market. The Ombudsman recommended that the authorities involved should ensure that arrangements for the enforcement of these issues are strengthened and observed properly at all times.

Upon receiving an assurance from the authorities that were involved in this case that appropriate measures would be taken to ensure uniformity in food labelling and packaging standards, the Ombudsman closed the file.

Case No G 60

MINISTRY FOR RURAL AFFAIRS AND THE ENVIRONMENT

The engineer who yearned to perform private work

The complaint

A Senior Architect who up to April 2003 was deployed at the Works Division of the Ministry for Resources and Infrastructure used to avail himself of the approval to perform private work that was granted to him by this Ministry. However, upon being transferred to the Ministry for Rural Affairs and the Environment to be responsible for the organization of its new section for parks and landscape conservation, this approval was withheld.

In a complaint with the Office of the Ombudsman the employee alleged that the Ministry subjected him to unfair treatment when it unjustifiably denied him the right to private work even though he satisfied the conditions under the collective agreement for government engineers so that he could be given permission to carry out private work. He insisted that the inequity of this refusal to allow him the right to private work was heightened by the fact that upon re-joining the Works Division in August 2005 he was again authorised to carry out private work.

Facts of the case

The Ombudsman's investigation revealed that on 15 December 2003 complainant had requested permission from the Permanent Secretary of the Ministry for Rural Affairs and the Environment to perform private work. Three days later this request was turned down on the grounds that "*approval cannot be given until substantial progress is achieved*" in the operation of the Ministry's section for parks and landscape conservation.

Complainant submitted a string of similar requests to the Ministry's Permanent

Secretary in February, July, October and December 2004 and also in June 2005 but by the time that he went back to the Works Division in August the permit was still pending.

Complainant's application for permission to perform private work was made in terms of Memo No 299/2002 entitled *Performance of private work by periti* issued in November 2002 by the Director General of the Works Division which referred to the approval granted by the Management and Personnel Office to architects and civil engineers (*periti*) in government employment to perform private work in accordance with a set of terms and conditions that regulated these activities. This Memo stated that *periti* in the public service "*may be allowed to perform private work provided that … before engaging in such private work they obtain approval in writing to do so from their respective Permanent Secretary*."

This approval was also subject to several other conditions including compliance with the Code of Practice for *Periti* drawn up by the *Kamra tal-Periti* and the Public Service Management Code; the requirement that private work had to be done strictly outside normal office hours and during vacation leave and did not interfere with the performance of duties in the public service; the avoidance of conflict of interest; the submission of periodic updates on applications submitted to the Malta Environment and Planning Authority; and prohibition on the use of government resources and assets for private work. Another proviso was that approval could be withdrawn if the permit holder infringed any of these conditions.

The Ombudsman requested the Permanent Secretary of the Ministry for Rural Affairs and the Environment to explain why permission to perform private work was not granted to complainant when *prima facie* there should have been no objection to the issue of this permit in terms of the agreement between Government and the *Union Periti tal-Gvern u Parastatali* on behalf of architects and civil engineers in the public sector.[1]

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[1] *"4.5 Extra work*
4.5.1 The Government has no objection to the assignment to government architects of certain works now undertaken by private architects for government or parastatal or other bodies controlled by Government provided that such work does not impinge on the employee's hours of work or in any way conflict with the employee's duties."

In reply the Permanent Secretary stated that he was authorized to set any reasonable condition before he gave his approval to a request for private work in order to ensure that the Ministry would achieve its programmes and perform in an efficient manner. He also stated that in effect he considered as reasonable the stipulation which he imposed upon complainant linking the issue of a permit for private work with the condition that substantial progress had to be achieved in the operation and management of the Ministry's section for parks and environmental conservation and landscaping which fell under his direct responsibility.

The Permanent Secretary explained that postponement of the approval of complainant's application was meant to motivate him to achieve the performance targets set for the Ministry's new initiative and that he intended to reassess the position later on the basis of results achieved by complainant. He stated that in adopting this approach he was all along guided by the fact that complainant was responsible under his direction for the implementation of new initiatives by the Ministry and that several human resource management issues still needed to be resolved.

The Permanent Secretary insisted that he always dealt with complainant with extreme fairness and this was confirmed by the fact that despite his assignment, he had even given him the necessary permission in 2004 to complete his studies on an overseas scholarship. According to the Permanent Secretary this showed that complainant had been treated fairly and that full consideration was also given to his career prospects and advancement.

The Ombudsman duly took note of these views but observed that the issue of a permit for private work to an architect in the public sector could not, under the agreement with the *Union Periti tal-Gvern u Parastatali*, be withheld on the basis of the need to assess an applicant's future work performance. The agreement did not place this right in the context of the exigencies of the service and once this right was not subject to this condition, provided that there were indications that an applicant intended to ensure full compliance with the conditions under which the permit was issued, such a permit could not be withheld. These conditions include the withdrawal of the permit in the event that private work is considered to interfere with the service that the architect

is bound to give to his employer but do not provide for the refusal of a permit in the first place.

The Ombudsman pointed out that the Permanent Secretary's reading of his duties regarding approval for architects to perform private work seemed to arise from a rather ambiguous drafting of Memo No 299/2002. This document gave effect to an agreement with the *Union Periti tal-Gvern u Parastatali* in which the Government acknowledged that it had no objection to the performance of private work by civil engineers in its employment as long as these activities were regulated and carried out in accordance with a set of approved guidelines and conditions. This Memo in fact went beyond what appears in this agreement and referred to the approval that was granted by the Management and Personnel Office to *periti* (architects and civil engineers) in the public service "*to perform private work in accordance with the attached terms and conditions regulating private work by periti in government employment*." These terms and conditions provided that these engineers might be allowed to perform private work on the understanding that they observe a number of specific and precise conditions.

According to the Ombudsman this wording can only mean that architects who satisfy these conditions and continue to observe them during the performance of their private work, cannot be refused the right to engage in such work. In fact the Memo laid down the principle and created the right of engineers in the public sector to engage in private work so long as they abide by the stated terms and conditions. It is true that both the Memo and the terms and conditions attached to it specified that before engaging in private work these architects and civil engineers needed to "*obtain approval in writing to do so from their respective Permanent Secretary*" but the Memo did not appear to extend to the Permanent Secretary the right to withhold or to condition his approval or subject it to terms that go beyond the terms and conditions annexed to the Memo.

It would therefore appear that a more reasonable interpretation of this Memo would be that approval in writing was needed to ensure that in this way a Permanent Secretary would be aware that an architect in his Ministry's employment was availing himself of the right given to him to perform private

work. By means of this approval the Permanent Secretary would also be able to monitor whether that architect was in fact observing the terms and conditions that he was bound to follow.

The Ombudsman pointed out that in his view there was a basic difference between Memo No 299/2002 and the Malta Public Service Management Code. In the latter document officers generally in the Maltese public service can be allowed exceptionally to undertake private work outside their duties and in such cases authorisation has to be given by Permanent Secretaries who, in their consideration of these applications, must take into account "*any particular condition that may be attached to the appointment or position held by the applicant*." The performance of private work is in this case considered as an exception to the rule and implies that public officers have no automatic right to perform private work.

In the Memo architects in the public sector were given the right to carry out private work and this right had to be recognised by the authorities when considering applications for private work by these employees. The decision by the Permanent Secretary in this case amounted to a refusal to grant authorisation and at the same time implied that substantial progress had not been achieved by the Ministry's section for parks and landscape conservation. However, nowhere was it stated or implied that this lack of progress was in any way attributable to complainant and this meant in turn that, without a valid reason, complainant was being penalised by not being given the right to carry out private work that he and his professional colleagues were in fact fully authorised to perform.

Feeling that in his opinion the wording of the Memo and of the terms and conditions was inopportune and could give rise to misunderstanding, the Ombudsman pointed out that in the circumstances it would seem proper to have the Memo reviewed.

Conclusion

The Ombudsman concluded that the failure by the Permanent Secretary to

issue a permit to complainant to perform private work in the first place was in breach of the relative agreement and upheld the complaint.

At the same time the Ombudsman observed that he had no grounds to believe that there was any bad intention on the part of the Ministry for Rural Affairs and the Environment since its action arose merely from its insistence to ensure that the new initiatives for which complainant was responsible would be implemented successfully.

Case No G 165

LAND DEPARTMENT

The tenant who held his ground

The complaint

A complaint reached the Office of the Ombudsman from a former resident of Tigné who agreed to a temporary evacuation from premises that were leased to him by the Government to make way for development of the Tigné area by MIDI plc. This evacuation was regulated by an agreement reached in September 1999 between all the parties involved. Following this agreement complainant's old residence was demolished and in due course he was given a new apartment to occupy on title of lease in the Clock Tower Block that had been constructed by MIDI plc.

Complainant raised three issues in his letter to the Ombudsman namely, defects in construction; delay in the conclusion of a contract of lease with the Land Department; and delay in the settlement of payments due to him under the contract of September 1999.

Facts of the case

After having settled in his new apartment in June 2005, complainant noted various construction defects in the building and took up the matter with the company which had built the apartment. However, after some time the company claimed that the problems were the Government's responsibility and refused to discuss the issue any further.

In August 2005 complainant raised the matter with the Director of Land and was informed that the Housing Construction and Maintenance Department would see to the necessary repairs.

In September 2005 complainant was called by the Land Department together with other residents in the block to sign the new lease agreement. However, no agreement was reached due to various conditions which the residents considered unacceptable including the department's insistence that the premises were to be handed to them *tale quale* and the reduction of space for the parking of vehicles from two cars to one car per household although residents insisted that the original agreement was that upon their return each household would be allocated two parking spaces.

Complainant also pleaded that payments due to former residents under the 1999 contract remained unsettled. These payments included the refund of expenses incurred when these families transported their household possessions back to Tigné as well as a "*disturbance compensation*" of Lm15,000 per household that was agreed as part of the contract.

Complainant regarded the attitude by the Land Department that it would only settle these outstanding amounts when the formal lease agreement covering the new apartments would be finalized as constituting an abuse of power which was counter to the 1999 contract which stated that:

"*The Government undertakes to pay former residents on an ex gratia basis and once only the sum of Lm15,000 … (disturbance compensation) … and also undertakes to effect this payment within a week from the date when the residents will start to reside in the new apartments that are being provided to them at Tigné by the Government by way of a lease agreement …..…*

…..…The Government undertakes to meet all the expenses incurred by residents on the removal and transport of furniture and all other movable household items from their alternative temporary accommodation to their new apartment building in Tigné which will be allocated to tenants, as indicated earlier. These expenses will be met by the Government and paid to tenants as soon as all removal works and transport have been completed on the understanding that residents will submit invoices according to law."

Following the intervention of the Office of the Ombudsman, the Director of Land informed complainant in May 2006 that the Housing Construction and

Maintenance Department had submitted a list of repairs to be carried out by MIDI plc and stated that his department would ensure that the company would undertake these works to the satisfaction of the new tenants.

When these repairs were completed, the Ombudsman took note of this positive development but at the same time pointed out that the discomfort caused to complainant by these works could have been avoided if the original conditions of the contract had been respected in the first place. The Ombudsman also observed that since complainant was only an occupier, the matter should have been dealt with and resolved directly between the Government and MIDI plc.

A second issue raised by complainant was that since the contract of lease was not yet concluded, he was averse to pay rent. He therefore inquired whether in this situation his landlord was entitled to start to charge rent as from the date when agreement on the lease would be reached or whether at a later stage he would have to pay a lump sum for arrears of rent.

Complainant also maintained that since the amount due to him under the 1999 agreement was not linked in any way to the contract for the lease of the apartment, he was entitled to interest on this amount, and especially on the disturbance allowance of Lm15,000, since this payment was being withheld through no fault of his own.

In the course of further contacts between the Ombudsman and the Housing Construction and Maintenance Department, the department in October 2006 expressed the view that the dispute was merely a matter between complainant and MIDI plc and that it had only intervened as an arbiter between complainant, MIDI plc and the Land Department.

The Director of Land on his part took a more conciliatory approach and in November 2006 observed that with the exception of some minor works in complainant's apartment, remedial works had been settled. The Director also explained that the contract had not been signed because of disagreement whether each residence should be allocated one parking space or two. Whereas the Land Department was of the view that only one parking space was due per residence, on the other hand residents maintained that government sources

had earlier given them to understand that each residence would be allocated two parking lots.

Considerations and comments

In his final report on this grievance, the Ombudsman stated that complainant was perfectly within his rights to resort to his Office when the public authorities were dragging their feet to complete the outstanding works that were needed to make his new residence reasonably comfortable. The Ombudsman observed that as a result of the intervention of his Office it had been established that the original complaints were generally justified and considerable progress was made to resolve the issues although complainant still showed concern at the quality of some of the remedial works undertaken.

The Ombudsman commented that although in truth the main bone of contention was not between complainant and the Housing Construction and Maintenance Department, at the same time it was equally not correct to state that the dispute was between complainant and MIDI plc. The Ombudsman insisted that in the light of the way in which the situation had developed, complainant had no relationship with MIDI plc and his relationship was exclusively with the Land Department which had bound itself to execute repairs and works in the residence that was due to be leased to him. While it was true to say that MIDI plc had constructed the residential block, the company had no relationship at all with complainant and the block that it had built was government property while it was responsible to the Government Property Division and not to complainant for the quality of the works that had been done.

The Ombudsman pointed out that in this case two sets of relationships were at stake – the first relationship was between complainant as tenant of the apartment and his landlord or, in other words, the Government as represented by the Government Property Division of which the Land Department forms part; while the second relationship was between the Government Property Division and MIDI plc. Any problems related to construction issues and defects were not therefore for complainant to take up directly with MIDI plc but for the landlord to see to and to resolve although this did not mean that as

the inhabitant of the apartment complainant could not identify defects and bring them to the attention of his landlord. Indeed it was his duty to safeguard in this manner the property serving as his residence and it was also in his interest to address the defects that were noted and to get them remedied.

At the same time while there was nothing to stop complainant from insisting with the Government to have the necessary works carried out and to take reasonable steps to minimize his inconvenience, on the other hand it was up to the landlord to ensure that the company would fulfil its contractual obligations and make good any construction defects. The Ombudsman observed that in all fairness this was, at least in part, what the Government sought to do in this case.

The Ombudsman noted that the Government did not deny complainant's allegation that it tried to get him to accept the premises *tale quale*. Although this does not exonerate the Government from its commitment as complainant's future landlord to fulfil obligations that are by law or by contract proper to a landlord, at the same time it is understandable that the Government would expect complainant and his fellow residents to declare upon signing the lease agreement that they were accepting the premises in the state that they were at the time of signature. In any event, such a declaration would not release the Government from its right and duty as landlord to ensure that MIDI plc would observe its obligations under the agreement between the two parties.

The Ombudsman found, however, that complainant's outstanding claims were of a relatively minor nature that did not justify the delay in concluding the lease agreement. It was therefore important for the Government and complainant to conclude the contract of lease as soon as possible since in the absence of a lease agreement complainant was still without a formal title to the premises that he was occupying while on its part the Government was foregoing rent payments although at a later stage it was still entitled to exact compensation for occupation and to ask for payment of a lump sum as compensation in lieu of past rents.

Another issue concerned the payment by the Government of the sum of Lm15,000 as a one time *ex gratia* disturbance compensation which was due

to complainant and to his fellow residents upon the signing of the lease agreement. The Ombudsman observed that although complainant could argue that this sum had to be paid by the Government within a week from the date when residents took possession of the new apartment that had to be provided to them on title of lease by the Government, on the other hand the Government could argue equally correctly that this amount was only due when complainant and the other occupiers would actually become tenants at law. The Ombudsman felt that this issue was a matter of interpretation that needed to be determined by a court judgment in case of disagreement.

The Ombudsman held that this point was relevant to complainant's claim that he was entitled to the payment of interest on this amount. The agreement of September 1999 leaves no doubt that the contracting parties intended complainant and his fellow residents to take possession of their apartments by way of a lease title and it was never intended or foreseen that they would occupy the premises without any title. This supervening situation had brought about a state of uncertainty in the interpretation of the relevant clauses of the agreement that needed clarification. It meant that while complainant can argue that the agreement entitles him to demand payment of the disturbance compensation within a week of physically taking possession of the property and settling inside the apartment, the Government could on the other hand maintain that he had not yet taken possession of the premises as tenant.

Another point of contention concerned the claim by residents regarding the allocation of two parking spaces to each household. The Ombudsman stated that while it was true that the Government had committed itself by a letter sent to residents of the Tigné Housing Estate in June 1999 to intervene with MIDI plc so that the company would allocate to residents in the Clock Tower Block space to park two cars instead of one, it was also true that the Government had only formally bound itself to provide the garage space indicated in the plan attached to the 1999 agreement which covered only the requirement of one car per household.

Consequently complainant did not have any right at law beyond what was stipulated in the agreement and what appeared in the contract. This meant that although residents were free to persist with their efforts to prevail on the

Government to try and obtain two parking spaces per household, they were not correct in refusing to sign the lease agreement once its terms were identical to those set out in the 1999 agreement.

To complainant's charge that costs incurred to transport household belongings to the new apartment block at Tigné had not been refunded, the Ombudsman stated that reimbursement of these expenses fell due when complainant had materially transported his possessions to his new residence and presented the relative fiscal receipts and no delay in the payment of these amounts was justified. The Ombudsman insisted that these payments ought to be settled forthwith together with any interest that was due from the date on which complainant had presented fiscal receipts for payment.

Conclusions and recommendations

The Ombudsman concluded that:

- complainant was justified to claim undue delay in the completion of works so that his property could be considered to have been properly finished to an acceptable standard. Although most of these works were carried out while the Ombudsman's investigation was under way, the Housing Construction and Maintenance Department was responsible to see to any other outstanding works immediately since this department is directly responsible towards complainant for the necessary repairs;

- the best option that would fully respect the will of the contracting parties would be to backdate the lease agreement to the day when complainant and his fellow residents actually took possession of their residences. This recommendation would have positive consequences in the sense that payment of the disturbance allowance would, under the terms of the agreement, be due as from that date to the residents as tenants and not as occupiers. This arrangement would also imply that interest would be due as from that date at a rate of 5% which is the same rate of interest that the parties had agreed as being due on the capital amount if a tenant opted to buy the property within five years from the date of the agreement;

- transportation costs incurred by complainant and supported by fiscal receipts ought to be reimbursed together with interest at 5% p.a. as from the date when the Government was in duty bound to pay.

The Government was legally only bound to honour its commitment on the provision of parking space as agreed upon by the parties in the contract of September 1999. In this respect since complainant alleged that MIDI plc was not averse to granting two parking spaces per residence and on the assumption that this claim was well founded, the Ombudsman stated that the Government would do well to honour its previous commitment to intervene with MIDI plc to provide two parking lots per residence so that this issue would not contribute towards further delay in the signing of the lease agreement.

Finally the Ombudsman strongly recommended that all outstanding issues regarding this complaint be swiftly concluded on the basis of his considerations since any further delay in the signing of the lease agreement could seriously prejudice complainant's rights.

Since by April 2007 the Ombudsman was not aware of any steps that were taken by the Land Department to give effect to his recommendations, the Office of the Ombudsman continued to pursue the matter with the department with a view to a positive outcome to this grievance.

Case No G 171

UNIVERSITY OF MALTA

In the twilight of the career of a university academic

The complaint

A university academic lodged a complaint with the Ombudsman that the University of Malta treated him unfairly when upon the termination of his secondment with the Ministry of Foreign Affairs, he was not allowed to return to his substantive post of Senior Lecturer even though the two sides had earlier agreed that when his assignment with the Government would terminate, he would be entitled to retain his former position.

Complainant claimed that the refusal by the University to extend his service beyond 61 years of age was illegal and discriminatory since most similar requests by university academic staff were acceded to.

Facts and findings

Complainant was appointed Senior Lecturer at the University of Malta in 1995 but following a request by the Ministry of Foreign Affairs, in June 2000 the University agreed to release him for three years to allow him to take an assignment with the Ministry as from 15 September 2000 with the possibility of an extension at the end of the initial term. The University also agreed that complainant would retain the right to return to his position at the end of his secondment. At the time of this agreement complainant was 56 years old.

In October 2005 the Ministry of Foreign Affairs wrote to refer the University to the agreement on the secondment of complainant and informed the university authorities that complainant would be free to return to his former position on 1 December 2005. By this time complainant was 61 years of age.

Some time before complainant turned 61 years of age in March 2005, he submitted a request for the extension of his substantive academic appointment up to 65 years of age. The Council of the University, however, turned down his request on 4 May 2005 and informed complainant that he had been released from his position as Senior Lecturer on 1 October 2000. Complainant was also told that since the extension of service of university academic staff beyond 61 years of age depended on whether the department concerned still required the academic's services after reaching retirement age and since complainant was away from the University for the last five years, it was difficult for his department to say that it still needed his services.

Complainant, however, continued to maintain that he had a right to return to his Senior Lecturer post on the basis of the commitment given by the University back in June 2000. He insisted that during his secondment he had not severed his ties with the University but continued to serve as tutor to students reading for a master's degree in his subject up to 2004.

In his investigation on this complaint the Ombudsman requested the University to provide details on its policy regarding extension of service to staff beyond 61 years of age. He also inquired whether this policy formed part of the University Statute or was the result of a decision by the University Council and asked when this policy was introduced.

In its reply the University provided the Ombudsman with a copy of a Council resolution dated 19 November 1982 regarding its policy on the retirement of academic staff[1] as well as details of instances where similar requests had not been approved.

The University admitted that its agreement with the Ministry of Foreign Affairs on complainant allowed him the right to revert to his former position at the end of his secondment but maintained that the main consideration in this case

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[1] *"Retirement age – academic staff*

816. The Council considered the retirement age of members of the academic staff and following discussion agreed that retirement age be established at age 61 but Council would consider requests for extension up to the age of 65 years, year by year."

was that at the time when complainant reached retirement age he had not reverted to his former position at the University but was instead still on secondment with the Ministry of Foreign Affairs. The University held that as a result it was difficult for complainant's Head of Department and the Dean of the Faculty to assert that his services were still required for the good running of the department.

At the same time the University contended that since Council agreed to release complainant from his position initially for three years as from 15 September 2000 with the possibility of an extension and since no extension of complainant's employment with the institution had in fact been requested or granted, technically his employment with the University had lapsed in 2003.

The University also provided information to the Ombudsman about its ongoing retirement policy for academic staff although Council finalized this policy after complainant had lodged his grievance with the Ombudsman. This policy laid down procedures and criteria for the extension of appointments beyond the age of 61 years. In respect of permanent staff aged between 61 and 65 years, besides seeking the opinion of the Head of Department on the academic person involved, these criteria envisaged that academic staff applying for an extension must also:

(i) be currently giving service which is of continuing relevance to the University;
(ii) be able to perform all the normal tasks of teaching, research, administration and development in line with their academic status; and
(iii) generally possess a sound and consistent track record of service, commitment and loyalty to the University and show to have given priority to their university work over other career options or prospects especially in the years immediately preceding their application.

Considerations and comments

Complainant alleged discrimination and unfair treatment by the University on the following grounds:

- the University was bound to allow him to return to his substantive post in terms of its letter of 16 June 2000 to the Ministry which sanctioned his right to return to his former post once his secondment came to an end and its refusal to accept his return to this position at the end of this secondment was tantamount to a breach of promise;
- in a similar case where another university academic staff member had been allowed to return to his post even though his secondment had extended beyond its original three-year period and where the Ministry of Foreign Affairs had not requested an extension of this secondment, the University had not considered this person's employment as having been technically terminated as was being argued by the University in complainant's case; and
- the University's argument that complainant had not provided a service to the institution for five years prior to his retirement age and therefore it could not be considered that his services were required, was not valid since other members of staff had been seconded for even longer periods by the University.

The Ombudsman decided to consider the grievance from two distinct perspectives: improper discrimination; and non-performance of contractual obligations.

Of improper discrimination

The University sought to justify its refusal to accept complainant's request for the extension of his employment by pointing out that it cannot be argued that his department needed his services beyond his retirement age since he did not give any service to this department during the preceding five years whilst on secondment. Although complainant referred to his assistance to students reading for a masters degree while he was on secondment, the Ombudsman stated that he was unable to judge this contribution.

Pleading improper discrimination by the University because other academics who had not provided a service to the institution for several years had still been retained beyond their retirement age, complainant referred to the case of an academic who was even promoted to the post of professor while on secondment from the University. The Ombudsman stated, however, that in

order to prove improper discrimination, the discriminatory decision must be in respect of analogous situations and in his review of these cases no evidence emerged that these situations were in fact comparable to complainant's case since in none of these cases the academic concerned had reached the age of 61 years.

From details provided to the Ombudsman by the University on nine other academic staff members who since 2000 had applied for an extension of their employment beyond the age of 61 years, the Ombudsman found that only two were not granted an extension for at least one year.

While appreciating that university academic staff members have no automatic right for an extension of service beyond the retirement age of 61 years, the Ombudsman also pointed out that it was correct to say that if this case were to be considered on a par with others, the essential recommendation from complainant's department and from his faculty was not forthcoming and the University Council had, as a final ruling, merely endorsed the faculty's position.

The Ombudsman stated that in his view complainant had not sustained his allegation of improper discrimination insofar as the University had correctly applied procedures that were well established at that time. He ruled that it was not proper for him to question the exercise of discretionary powers that are proper to the University's institutional organs.

Of non-performance of contractual obligations

In his review of this aspect of complainant's grievance the Ombudsman was guided by the cardinal principles that agreements are to be interpreted in good faith and are to be respected. At the same time he observed that the University should be the last public institution to fail to honour its commitments.

There were no doubts that the University had entered into a binding agreement with the Ministry of Foreign Affairs on behalf of the Government that protected complainant's academic post at the University and ensured that he could revert to this post once his secondment ended. The exchange of letters between the two sides constituted a contractual bond that gave complainant the right to return to his position once his assignment with the Ministry came to an end.

Since it is from the contents of these letters and the terms in which these letters were drafted that the rights and obligations of complainant and of the University arise, the Ombudsman underlined two significant points that emerged from this exchange of correspondence:

- on 31 May 2000 the Ministry of Foreign Affairs requested the University to release complainant on secondment for three years as from 15 September 2000 with the possibility of an extension and stated that if this request would be approved "*…… at the end of his secondment … (complainant) … should retain the right to return to his current position of Senior Lecturer*";

- on 16 June 2000 the University informed the Ministry of Foreign Affairs about Council's agreement to release complainant from his duties for three years with the possibility of an extension while allowing him to retain "*the right to return to his position as University Senior Lecturer once this period of secondment comes to an end*."

On the strength of these two letters complainant was seconded to the Ministry of Foreign Affairs initially for three years and for any possible future extension and his assignment lasted from 15 September 2000 to 14 September 2003 and was subsequently extended until it was effectively terminated on 30 November 2005. The University was informed of this termination on 21 October 2005 by a letter from the Ministry of Foreign Affairs which stated that subsequent to what had been agreed in 2000 "*… (complainant) … may return to his position as University Senior Lecturer as of December 1, 2005*".

The Ombudsman declared that these events showed that after attaining the age of 61 on 3 March 2005 complainant continued to occupy a government position for some time and that the Government interpreted the agreement between the two sides as meaning that even after reaching pensionable age, complainant had the right to revert to his former position at the University.

The Ombudsman stated that this fact was particularly relevant for a proper interpretation of the contractual bond between the Government and the University. As one of the contracting parties, the Government interpreted the

text of the understanding that had been reached in the exchange of letters between the two sides in the sense that at any time that complainant's secondment came to an end, he had the right to return to his position at the University.

The Ombudsman observed that when complainant took up his appointment with the Ministry of Foreign Affairs at 56 years of age, its original term of three years took him close to the retirement age of 61 applicable to university academic staff. It should therefore have been obvious to the University at the time when it agreed to extend his right to revert to his post also following a possible extension and considering that no term was specified as to the duration of this extension, that term could at law be interpreted, in default of a specified shorter term, to be coextensive with that of the original term, namely three years.

The Ombudsman observed that despite the University's statutory regulations on the extension of service of academic staff beyond the retirement age of 61 years, it would appear that in this case the University exceptionally assumed a contractual obligation with the Government in favour of complainant. Under this obligation the University accepted that complainant had a right to return to his former post even after having attained pensionable age if his government appointment extended beyond that date and gave him a vested right that he can exercise, irrespective of any regulation that would otherwise have applied.

The Ombudsman stated that complainant's right stemmed from another important point that emerged from the exchange of letters, namely that the University undertook unconditionally to re-engage complainant upon his release from his assignment with the Ministry of Foreign Affairs. Accepting that the University had to honour that obligation even after he reached retirement age, one can only conclude that in complainant's case the University had waived the condition that extension of service beyond 61 years depended on the relevant department still requiring the lecturer's services. Any other interpretation would run counter to the wording and spirit of the agreement between the two sides.

In his report on this complaint the Ombudsman also indicated that he did not

share the University's view that complainant prejudiced his right to revert to his former post because he did not ask for an extension after his initial posting with the Ministry expired. The Ombudsman was of the view that it was clear from the exchange of letters that no such request for an extension was necessary since the contract between the two sides foresaw the possibility of an extension and that the contractual relations would not change during the extension period. If anything, complainant was expected to ask for an extension of his academic post before he attained the age of 61 – and this, he had in fact done.

Further considerations

The Ombudsman also expressed his serious reservations about the *modus operandi* that was revealed by this case.

His investigation found that deliberations by the University Council on matters affecting the future of a senior member of staff did not apparently go beyond merely taking into account two brief notes by the Head of Department and by the Dean of the Faculty to which complainant belonged. The Ombudsman felt that this was unacceptable and expressed concern that the note by the Head of Department simply stated the obvious without giving an opinion ("*… at present (complainant) is on long leave of absence and therefore no teaching duties have been assigned to him during the past five years*") whereas the Dean of the Faculty stated that he could not recommend complainant's request on the grounds that the department had done without his service for a number of years and had adjusted fully to his absence. The Ombudsman considered both these comments as superficial since it was obvious that when Council granted complainant the right to revert to his lectureship post, it also empowered the Faculty to adjust to this absence.

The Ombudsman also observed that the way in which the University Council communicated its decision to complainant did not satisfy his right to be given a quality reply to his request. He pointed out that by informing complainant tersely that his request had been turned down was unsatisfactory. Equally unsatisfactory was the record taken during the Council meeting where complainant's request for an extension of his appointment was considered and which merely stated that this request was not justified.

The Ombudsman recommended that the University should revisit its administrative practices to ensure transparency and a fair hearing in procedures that directly affect the rights and duties of individuals. This approach would be in full respect of the basic principles of justice when applying clearly defined statutory rules uniformly across the board.

In view of his considerations, the Ombudsman was of the opinion that, rather than on grounds of discrimination, complainant was justified on the grounds that the University failed to honour its contractual obligations with the Government in his favour. He also expressed reservations on the procedures adopted by the University to sanction extension of service after retirement age and the way in which these procedures were applied although in this connection he noted the positive developments that took place in October 2006 to introduce more transparent and just procedures for the extension of staff appointments according to well-defined criteria. These rules could not, however, be invoked in complainant's case since they were not yet in force when he applied for an extension of his employment with the University.

The Ombudsman underlined the fact that since the University itself had felt the need to introduce these procedures, this was proof that the matter needed regulation in many respects, not least in establishing clearly defined criteria that would entitle academics to apply for an extension. The Ombudsman expressed the hope that these procedures would be uniformly applied with the least possible modification and without any amendments *ad personam*.

Conclusion and recommendation

The Ombudsman was of the opinion that complainant failed to prove that the University, when applying regulations which existed at that time, had improperly discriminated against him when it did not accept his request for an extension of his full time appointment upon attaining the age of 61.

However, complainant had proved that the University failed to honour in his favour its contractual obligation with the Ministry of Foreign Affairs which gave him the right to return to his position as Senior Lecturer once his period

of secondment with the Ministry came to an end, regardless of whether this happened during the original three-year term of the assignment or at the end of any subsequent extension.

The Ombudsman therefore recommended that the University of Malta should honour its contractual obligation and allow complainant to return to his position of Senior Lecturer as from 30 November 2005 when his secondment with the Ministry of Foreign Affairs came to an end.

Case No G 250

MINISTRY FOR GOZO

The burning wish of an employee at the Gozo incinerator

The complaint

An engine driver at the Civil Abattoir in Gozo who operated the incinerator in the slaughterhouse complained with the Ombudsman that he felt aggrieved by his exclusion from the shift of engine drivers at the abattoir since this shift included another employee who did not possess the licence required by an engine driver to operate machinery.

Facts of the case

Complainant told the Ombudsman that for various years he had been assigned duties in connection with the operation of the incinerator at the Gozo slaughterhouse.

He explained that soon after the incinerator facility resumed operations upon the completion of upgrading works, a shift system was introduced early in June 2004 which consisted of four engine drivers (including complainant) with a fifth engine driver as a reliever together with other support staff to enable the incinerator to operate on a 24-hour basis.

It was at this time that complainant presented a medical certificate and went on sick leave and asked to be transferred from the slaughterhouse to the Gozo General Hospital. In September 2004 his request for a transfer was accepted and he started to report again for work after having been out on sick leave for three months.

In the meantime, faced with complainant's defection the management of the

Gozo slaughterhouse made alternative arrangements so that the shift system would continue to operate. These arrangements included the deployment from January 2005 as a reliever of an employee who had the substantive grade of gardener. The Ombudsman understood that despite his grade, on various occasions in the past this employee had carried out repairs on the incinerator at the abattoir and on other equipment. Complainant insisted, however, that this employee was never previously involved in the operation of the slaughterhouse incinerator but merely undertook general maintenance duties.

In April 2005 complainant asked to be transferred back to the abattoir. Although arrangements introduced after his departure from the slaughterhouse were working well, his request was accepted in February 2006 on the understanding that upon completion of modernisation works, complainant would be responsible for the new facilities at the abattoir.

Despite complainant's return, the abattoir management felt that the arrangements that were in place for the operation of the slaughterhouse were satisfactory and there was no need to change them and recall complainant back in the shift at the expense of the reliever. It was felt that although this reliever did not possess the licence of an engine driver he had provided a reliable service especially at a time when the system might otherwise have experienced manning problems.

Considerations and comments

The Ombudsman pointed out that the issue arose when complainant went back to the abattoir after a somewhat lengthy interval and felt aggrieved because upon his return he had not been reassigned his former shift duties while the reliever who had taken his place was allowed to continue his duties on this shift. The main argument was that this reliever had the substantive grade of a gardener and did not have the licence of an engine driver which complainant possessed.

The Ombudsman pointed out that although complainant's line of reasoning

implied that an employee who is not in possession of a licence of an engine driver cannot be involved in the operation of the incinerator at the Gozo abattoir, he had failed to provide any argument or evidence to substantiate this claim.

The Ombudsman also established from the Management and Personnel Office that no collective agreement or any document related to manpower deployment in the public service specifies that a person involved in the operation of an incinerator must be in possession of a licence for an engine driver.

The Ombudsman next sought the views of the Chief Executive of the Health and Safety Authority on this issue who declared that there is no specific regulation to this effect. Nevertheless he drew the attention of the Ombudsman to article 6(1) of the Occupational Health and Safety Authority Act that "*it shall be the duty of an employer to ensure the health and safety at all times of all persons who may be affected by the work being carried out for such employer*." This means that it is an employer who is responsible to ensure that an employee has the capacity and the ability to undertake tasks assigned to him without affecting his own health and safety and the health and safety of others.

The Ombudsman noted that since the superiors of the reliever expressed satisfaction that this worker was fully capable of carrying out the tasks entrusted to him, in the event that complainant harboured any reservations on this issue he was free to raise the matter with the Occupational Health and Safety Authority. At the same time if complainant held that on the strength of his substantive grade he had the right to be deployed on shift duties on incinerator operations instead of the gardener who was assigned these duties, this matter fell under the sphere of industrial relations and needed to be resolved between management and workers' representatives.

An important consideration which led the authorities responsible for the Gozo Abattoir to retain the reliever on shift work and not to replace him by complainant was the fact that this person had formed part of the shift system as from early 2005 and these arrangements had been in place for over a year before complainant reverted to his duties at the abattoir. Management felt that

since these arrangements to enable the shift system to continue to operate were successful, it would be unfair to remove this employee from the system when this employee had served the department in a satisfactory manner for a long time when the services of complainant were not available.

Complainant maintained in turn that although in mid-2004 he had requested a transfer from the abattoir because of problems associated with health and safety at the workplace, this reason ought not to be held against him and ought not to have been a determining factor behind the decision by the abattoir management not to withdraw the employee who had replaced him in the shift system.

In the course of his investigation the Ombudsman was given to understand that complainant had put in his request for a transfer because of health and safety problems that were associated with his place of work. The Ombudsman saw a copy of the medical certificate which complainant had submitted in 2004 to support his request to be transferred from the abattoir to take other duties elsewhere. Nowhere in this certificate or in complainant's original letter of grievance to the Ombudsman was any mention ever made of any concerns regarding health and safety aspects at the Gozo abattoir. Furthermore, not even during the meeting held in Gozo between the Ombudsman and complainant was any reference ever made to this problem. The Ombudsman drew his conclusions from this evidence and observed that if there were in fact any serious problems regarding safety, complainant had every opportunity to seek the appropriate remedial measures.

Finally complainant also alleged that he not been given his former duties on the shift system and the person who had taken his place had not made way for him because this employee had a direct family relationship with a high ranking official in the Ministry for Gozo. The Ombudsman felt that this argument was out of place because a person should not be made to lose his existing entitlements merely because of his family connections.

In the final analysis the Ombudsman was of the opinion that management brought forward reasons that were sufficiently valid why the person concerned should not be removed from shift work in order to be replaced by complainant

after this employee had served the department well for more than a year while complainant carried out other duties elsewhere at his own request.

Conclusion

After having examined the merits of the case, the Ombudsman concluded that the grievance did not constitute an instance of maladministration by the authorities responsible for the Gozo abattoir and that the complaint was not justified.

Case No G 260

ZAMMIT CLAPP HOSPITAL

An assiduous employee

The complaint

An employee who worked for many years as a Transport Aide at Zammit Clapp Hospital alleged in a complaint which he lodged with the Office of the Ombudsman that he had been misled when the hospital management informed him that income from his part time work at the hospital would be subject to a tax rate of 15% whereas according to the Office of Inland Revenue his tax rate for income derived from these duties was higher than 15%.

Complainant claimed that as a result of this misunderstanding he suffered financial hardship and also asserted that after the psychological trauma that he had suffered, he had retired from work on sick leave.

Facts of the case

In a circular issued in November 2002 the management of Zammit Clapp Hospital drew the attention of employees to vacancies that had arisen for the post of Nursing Aide in the hospital. The circular gave no information about the conditions that were associated with this post but stated merely that a job description could be collected from the offices of the hospital management.

In his application for this post in December 2002 complainant wrote that he had worked for various years at Zammit Clapp Hospital as a full time Transport Aide and that he felt it was now time for him to further his knowledge through appropriate training so as to be able to work with patients in the wards.

Although the call for applications only referred to full time posts, shortly afterwards, however, management felt that the situation at the hospital at that

time also warranted the employment of part time Nursing Aides. As a result, a few days later complainant amended his application and expressed interest in taking up the duties of a Nursing Aide on a part time basis. Some time later complainant duly filled an Employment Application Form for the post of part time Nursing Aide where he provided various personal details although neither in the first nor in the second application form was there any reference to the rate of tax that would be applicable to employees selected to fill these posts.

According to a declaration that was sent by the hospital management to the Employment and Training Corporation, complainant commenced his new duties as a part time Nursing Aide on 27 March 2003 under an indefinite contract. These duties were over and above his normal duties as a Transport Aide in the same hospital.

On 1 April 2003 complainant signed a declaration under the Final Settlement System (FSS) for income tax purposes. This form had been filled on his behalf by the hospital management and stated that the rate of tax for his part time work would stand at 15%. In fact it was this rate of tax that was charged on income from his part time duties at the hospital for the first two years or so.

In 2005 the Office of Inland Revenue informed complainant that the special rate of tax of 15% for part time work that appeared in his declaration to the tax authorities under the Final Settlement System was not applicable in his case since he was employed as a full time worker as well as on a part time basis with the same employer. Upon being made aware of this development, complainant stopped his part time work and went on sick leave with the result that his income dipped and, according to what he confided to the Ombudsman, he started to face severe financial difficulties.

Rule 5 of the 1996 regulations covering income tax payable on part time work states that the rate of tax of 15% does not apply whenever a full time employee carries out part time duties with the same company, organization or enterprise where the employee normally works.

Considerations and comments

The Ombudsman's interest in this case was the extent to which it was fair to

accept the argument by complainant that he suffered financial loss because of an administrative shortcoming on the part of the management of Zammit Clapp Hospital. The Ombudsman decided that the first issue which needed to be ascertained was whether in fact there was any administrative shortcoming by the hospital authorities when filling the FSS form for complainant in connection with tax that needed to be collected on behalf of the Office of Inland Revenue in connection with complainant's part time duties.

According to law an employer is bound to deduct from an employee's income the amount of tax that is due by the employee and failure by an employer to do so would render management liable to the sanctions that are laid down by law. It is therefore management's responsibility to ensure that the rate of deduction of tax from an employee's wage or salary is declared correctly in the employee's FSS form and to collect the right amount of tax from every employee.

Current legislation lays down that as a general rule the rate of tax that is applicable for part time employment is a special rate of 15% of income derived from this work. There are, however, various conditions attached to this provision. One of these conditions is that the rate of 15% is only applicable for the first Lm3,000 of income earned from any part time occupation and that any income above this amount would be taxed according to the rate that is applicable for the employee in question; and there were indications that complainant was aware of this particular condition. Another condition is that the special rate of 15% is not applicable in the case of an employee who works on a full time as well as on a part time basis with the same employer.

The Ombudsman pointed out that it is the responsibility of management to be aware of regulations laid down by the tax authorities regarding the withholding of the proper rate of tax from an employee's income. In the case under review the Ombudsman felt that there had clearly been an administrative failure when the hospital authorities applied the wrong rate of tax and complainant's part time income had been taxed at the rate of 15% that was not applicable in his case. The Ombudsman stated that this maladministration by the hospital management attracted criticism.

The Ombudsman observed that on his part complainant had signed the FSS

document which referred to a withholding tax rate of 15% that was manifestly wrong since under the relevant FSS provisions this rate was not applicable to him. The Ombudsman pointed out that although it could be argued that complainant was presumably unaware of this provision, this did not justify his action since ignorance of the law is no excuse.

The Ombudsman held, however, that from an administrative point of view this principle is not applicable in this case because it was the hospital management that had the primary responsibility to draw complainant's attention to his situation and to explain its repercussions. The Ombudsman remarked that in similar circumstances an employee is not to be blamed for following instructions or directives issued by management which is expected to be well versed about the provisions that are laid down by law about employment conditions and related considerations.

As a result of this administrative failure, complainant had paid a lower rate of tax on the first Lm3,000 from his part time income throughout the years when the wrong rate of tax had been deducted by the hospital authorities on income derived from his part time occupation. It was estimated that during basis years 2003-2005 the maximum amount of foregone income tax amounted to Lm300 per annum.

Complainant pleaded in turn that during the years when he had also carried out part time duties at Zammit Clapp Hospital he had entered into various financial commitments. He maintained that the amount of tax arrears due to the Office of Inland Revenue in respect of his part time work caused him severe financial difficulties and also brought in its wake distress and health problems which led him to decide to give up his part time work with a consequent drop in his overall income level.

The Ombudsman argued that it was somewhat difficult to justify complainant's decision to give up his part time occupation and to forego the relatively high income which he used to derive from these duties when he was faced with a claim for the payment of substantial tax arrears by the Office of Inland Revenue. The Ombudsman felt that it was rather strange that instead of finding ways how he could settle these outstanding tax payments, complainant had instead decided to give up his part time duties and blamed his difficult financial situation on the hospital authorities.

The Ombudsman expressed his opinion that in view of the way in which events unfolded, there was no semblance of logic in complainant's expectation that the false impression given to him by the hospital management regarding a 15% tax rate on his part time income rendered him not liable to pay from his own pocket the amount of tax which he had failed to pay to the Office of Inland Revenue. There could be no dispute to the fact that income from his part time employment had found its way into his income stream and that he spent this money according to his own wishes. Clearly, then, according to law it was complainant himself who had to settle outstanding tax payments on this income and not the hospital authorities as claimed by him.

Complainant also asserted that the hospital management had further misled him since employment regulations do not allow a full time employee to work on a part time basis as well with the same employer. Following consultations with the Department of Industrial and Employment Relations, the Ombudsman confirmed that there are no legal limitations that prevent a full time employee from also being engaged to carry out part time work with the same employer as long as the part time duties are of a different nature than the employee's normal full time occupation. The Ombudsman ascertained that whereas complainant was employed as a full time Transport Aide with Zammit Clapp Hospital, his part time employment was as a Nursing Aide – and these are two different occupations.

Conclusion

After having examined the merits of the case the Ombudsman reached the following conclusions:

- the management of Zammit Clapp Hospital had clearly been guilty of maladministration when it failed to apply the proper rate of tax on income earned by complainant from his part time employment with the hospital; and
- notwithstanding this shortcoming by the hospital authorities, complainant was not justified in expecting to be released from the payment of tax due according to law or in expecting the hospital management to settle on his behalf tax which was due to the Office of Inland Revenue that arose from his extra work at the hospital.

Case No G 261

STUDENTS' MAINTENANCE GRANTS BOARD

The mature MCAST student who was entitled to a maintenance grant

The complaint

A forty-year old married woman who enrolled at the Malta College of Arts, Science and Technology (MCAST) for a diploma course starting in October 2004 expressed her disappointment with the Ombudsman that her application for a student maintenance grant had been turned down by the Students' Maintenance Grants Board. Feeling aggrieved at being told that she was not entitled to this grant because she was over the age of 30 and did not satisfy the means test, she argued that this refusal was in breach of legislation on the award of students' grants.

Facts and findings

Although her first application for the award of a maintenance grant was turned down, complainant was not disheartened and when she started the second year of her course in October 2005 she again submitted an application for a grant. When she did not receive a reply, complainant approached the Students' Maintenance Grants Board in January 2006 where she referred to her two applications and claimed that in terms of regulations for the award of student grants, the age limit of 30 years for these grants was not applicable in her case. In May the Board informed her in writing that the clause relating to the age limit of 30 years was a blanket provision for the students' grant system and that her application could not be accepted since her husband had a full time occupation.

The Ombudsman sought the comments of the Students' Maintenance Grants Board on the case raised by complainant. In its reply the Board referred to Legal Notice 165 of 1999 as amended by Legal Notice 372 of 2005 and argued

that in terms of this legislation, provided they satisfied other conditions, "*students beyond the age of 30, to receive a maintenance grant will have to prove to the Board that they have particular circumstances of hardship*." The Board concluded that since complainant was a married woman who was over 30 years of age, she did not automatically qualify for a grant.

Complainant challenged this reply and held that when she enrolled in 2004, Legal Notice 372 of 2005 had not yet been issued and therefore did not apply. She explained that when she joined, the course was regulated by Legal Notice 165 of 1999 that did not exclude the award of maintenance grants to post secondary students at MCAST over the age of 30 years although admittedly this exclusion applied to university students.

Legal Notice 165 of 1999 entitled *Post secondary and tertiary students maintenance grant regulations, 1999* and which was repealed in November 2005 by Legal Notice 372 of 2005, provided differently in respect of eligibility for maintenance grants for post secondary students and for university students. Regulation 3 in Part I of the 1999 regulations entitled *Eligibility to a maintenance grant by post secondary students* listed various eligibility requirements and related provisos but made no reference to the age limit of 30 years mentioned by the Students' Maintenance Grants Board. On the other hand Part II of these regulations provided information about eligibility to a maintenance grant by university students with regulation 8(c) stating that university students must not be over 30 years of age at the commencement of their course of studies to qualify for a grant.

Considerations and comments

In his report the Ombudsman pointed out that the issue at stake was whether under the regulations that prevailed at different points in time, complainant was entitled or not throughout her post secondary course to a maintenance grant. The Students' Maintenance Grants Board ruled that complainant was not eligible on the basis of a blanket provision in the regulations that students older than 30 years did not qualify for a grant unless, subject to other requirements, they qualified on a family means test. Complainant's view was completely at odds and she claimed that regulations applicable during her course in fact entitled her to the award of a maintenance grant.

The Ombudsman observed at the outset that the contention raised by the Students' Maintenance Grants Board that the 30-year age limit was a blanket provision for all students was not factual and was based on the Board's misinterpretation of the law. He stated that the correct interpretation of the law was that when complainant started her course at MCAST in October 2004, the provision regarding an age limit applied only to university students and not to post secondary MCAST students since the 1999 Regulations prescribed different eligibility requirements for university students and for post secondary students.

Under Legal Notice 165 of 1999 eligibility requirements for post secondary students were more liberal than those for university students. Thus, for instance, whereas a maintenance grant was only given to university students who were themselves Maltese citizens, there was so such limitation in the case of post secondary students and it was sufficient that an applicant had at least one parent who was a Maltese citizen even if the student was not a Maltese citizen. According to the Ombudsman the requirements were tailor-made to apply to different categories of students and the exclusion of a requirement concerning an age limit in the case of post secondary students was intentional and not accidental.

The Ombudsman underlined that complainant's claim to a maintenance grant had to be considered in terms of regulations in force in 2004 which did not impose any age limit for students in respect of post secondary studies at MCAST. The Board's decision to turn down complainant's application when she was following the first year of her course was clearly mistaken at law and was therefore unjust.

In its initial reaction to the complaint, the Students' Maintenance Grants Board stated that the award of grants to students is governed by Legal Notice 165 of 1999 as amended by Legal Notice 372 of 2005. The Board agreed that the crux of the complaint was to determine firstly, whether complainant satisfied the requirements laid down in the regulations set out in Legal Notice 165 of 1999; and, secondly, if amendments to this Notice by Legal Notice 372 of 2005 applied to her case.

The Ombudsman stated that without the slightest hesitation the answer to the

first question was in the affirmative. Complainant satisfied all the requirements laid down in regulation 3 of Legal Notice 165 of 1999 in the sense that she was a Maltese citizen; had resided in Malta for a period of not less than five years from the date when her studies got under way; had completed her compulsory education; and there was evidence that she attended the course regularly and made satisfactory progress. At the same time the provisos of regulation 3 did not apply to her case.

As to the question whether the amendments to Legal Notice 165 of 1999 by Legal Notice 372 of 2005 were applicable in complainant's case, the Ombudsman argued that Legal Notice 372 published in November 2005 repealed the 1999 regulations and replaced them with new regulations that applied to courses that got under way in October 2005 when complainant started her second year at MCAST. These did not apply retrospectively beyond that date. Although regulation 4(iv) of Legal Notice 372 of 2005 introduced an age limit of 30 years as well as the consequential means testing process also in respect of eligibility for the award of a grant to post secondary students, regulation 16 of this Legal Notice stated that students who commenced a post secondary course before 1 October 2005 remained eligible for a maintenance grant as stipulated in the 1999 regulations.

The Ombudsman maintained that on this basis complainant was eligible for a grant when she started her course in October 2004 and that she had been unjustly denied this grant at that time and also that she remained so eligible under the 2005 regulations by virtue of regulation 16.

The Students' Maintenance Grants Board initially disagreed with this interpretation and argued that when Legal Notice 165 of 1999 was issued, there were no students beyond the age of 30 attending post secondary educational institutions and so the need to refer to students aged over 30 in these regulations did not arise. The Board further stated that, on the other hand, it was common for university students to be over 30 and it was considered important at that time to introduce an age limit of 30 years for the award of maintenance grants to university students.

The Ombudsman pointed out that this argument by the Board was not valid and contended that, at most, it implied that whoever was responsible for

changes in the legislation – as was done in 2005 – did not act in time when it became clear that older students were joining post secondary courses. He stated that it was unacceptable that a student be made to suffer because of such failure or, even worse, to apply limitations against a student that the law, as it stood at that time, did not impose.

The Ombudsman reiterated that complainant fully satisfied requirements laid down by law at the time that she applied to join the course at MCAST. These requirements were specific and were meant by the legislator at that time to apply to students joining post secondary courses and the Board cannot arbitrarily extend these requirements or restrict their application either by analogy or by retroactive application.

Conclusions and recommendations

In the light of this analysis the Ombudsman concluded as follows:

- complainant was eligible for a maintenance grant as a post secondary student when she joined MCAST in October 2004;
- the decision to apply the age limit of 30 years to her was contrary to the regulations in force at that time and was therefore unjust; and
- since the 2005 regulations provided that those who commenced a post secondary course before October 2005 remained eligible for a maintenance grant under the 1999 regulations, the refusal to award a grant to complainant for the second year of her course was mistaken at law and therefore unjust.

The Ombudsman concluded that complainant was the victim of repeated wrong decisions in respect of her eligibility for the award of a student grant and recommended that the Board compensates her by paying her the equivalent of the grant due to her as laid down by the regulations applicable to her with effect from the first day of her course.

A few days later the Board informed the Ombudsman that it was in agreement with his conclusions and paid the grant that was due to complainant as from the first day that she enrolled at MCAST.

Case No G 276

HEALTH DIVISION

The right of patients to be informed of their entitlements

The complaint

A patient who had breast surgery in May 1999 and regularly attended St Luke's Hospital for post-operative treatment in subsequent years alleged in a complaint that she lodged with the Ombudsman that the hospital authorities never informed her that in her condition she was entitled to the free supply of a breast prosthesis by the Health Division. As a result she had made her own arrangements for a breast prosthesis and replacement prostheses and had even paid for them out of her own pocket for no less than six years until she finally became aware in 2005 that she was entitled to this benefit under the national health service and started to avail herself of this entitlement.

Despite various attempts by complainant to be compensated by the health authorities for their failure to inform her of her rights as a patient, all her efforts were to no avail.

Facts of the case

After undergoing a mastectomy operation, complainant used to attend regularly the Surgical Out Patients Department and later the Breast Care Clinic. However, she was never informed during all these visits that she was entitled to financial assistance by the health authorities for a breast prosthesis as well as for replacement prostheses that were necessary for her condition. As a result, as from 1999 complainant used to buy these items from a local healthcare company which, as things turned out, happened to be the same company that was awarded a contract in 2000 to supply these prostheses to the Health Division.

Complainant explained to the Ombudsman that it was only in August 2005 that she first learnt of the service provided free of charge by the Government to persons in her condition and that she only got to know of this benefit from the supplier who was under contract to supply these items to the Health Division and from where she had purchased all her needs since 1999. Subsequent to this information complainant resolved to raise the issue with the hospital authorities at her first appointment at St Luke's Hospital in March 2006 and it was only from that time onwards that she started to benefit from the Government's support for persons in her condition.

The Ombudsman's investigation revealed that in cases of surgery for breast cancer the Health Division provides the first prosthesis and subsequent replacement prostheses to patients as necessary. Under the procedures used by the Division in these cases, an authorised official in the Surgical Out Patients Department at St Luke's Hospital would inform the patient about this benefit and submit a written request for the supply of a prosthesis to the patient through the Government Pharmaceutical Services. Upon approval from the authorities, the authorized supplier who is bound to provide these items to the Health Division would get in touch and enter directly into arrangements with the patient.

When the Health Division selected a new supplier for this service in 2000 a new system was introduced whereby patients became entitled to receive a replacement prosthesis every year while as from 2004 the Health Division's expenditure per patient went up to Lm19. The Ombudsman also understood that although some patients selected superior quality prostheses that were more expensive, the financial commitment by the Health Division did not go beyond Lm19 per patient and the patients concerned would need to make up for the difference.

In the course of his investigation the Ombudsman found that it is not standard practice for the Health Division to include information in a patient's personal medical file on whether a request would have been submitted on behalf of the patient for the supply of a free prosthesis under the national health scheme. In fact, after the Office of the Ombudsman obtained the necessary authorization from complainant to examine her medical records at St Luke's Hospital, it

was confirmed that her file contained no indication whatsoever about this matter.

Considerations and comments

The issue facing the Ombudsman was the assertion by complainant that her case constituted an instance of maladministration by the hospital authorities. The Ombudsman was required to investigate the allegation that as a patient at St Luke's Hospital, complainant had not been informed of her right to a free prosthesis under the scheme operated by the Health Division for patients suffering from her condition. This meant that since the operation undergone by complainant which had led her to make use of a prosthesis had taken place way back in 1999, the Ombudsman was in effect being requested to establish what had taken place in that year in the Surgical Out Patients Department where complainant at first used to attend as a follow-up to her operation.

The Ombudsman pointed out that it was obviously difficult to establish the way in which events had unfolded so many years earlier. On the one hand complainant declared quite emphatically that she had never been told to go to the supplier who provided prostheses to the Health Division in order to collect her own prosthesis under the Division's support programme in favour of persons in this condition. On the other hand the Health Division stated that it was the direct responsibility of nursing staff at St Luke's Hospital to inform patients about any entitlements to which they might be eligible and to fill the necessary forms on their behalf to apply for these benefits. The Health Division also pointed out that its nursing staff follows this standard procedure in respect of some 60 to 100 patients who annually undergo breast surgery and stated that no similar grievance was ever raised by any other patient.

The Health Division confirmed that there was no evidence in complainant's personal medical case history to show that she had ever been informed of her entitlement to a free prosthesis. At the same time the Division felt that it should not be expected to foot the bill for the expenses that had been incurred by complainant on the purchase of her prostheses and related requirements since there was no clear indication as to what had really happened and the

Division should not be made to incur these expenses when it had not been established that the Division or its employees were in any way at fault.

The *Patients' Charter of Rights and Responsibilities* issued by the Hospital Management Committee of St Luke's Hospital states as follows:

"1. Respect for human dignity

1.02 The hospital patient has the right to considerate care with respect to his/her human dignity. This care includes access to the best level of medical, nursing and allied services as well as appropriate counselling, accommodation, administrative and technical assistance that the country can afford.

2. Informed consent

2.01 The hospital patient has the right to receive clear information concerning his/her medical condition, planned course of treatment, alternatives, risks and prognosis. Information must be given to the patient in a way appropriate to his/her capacity for understanding and in full respect of any patient's wish not to be informed."

This document lays down that every patient undergoing treatment and care in a hospital or in a healthcare institution or facility provided by the Government has the right to be given the appropriate treatment under the national health system including the right to information and advice that are in the patient's best interest. It is therefore the responsibility of officials who are providing treatment to inform their patients about facilities that are available for their particular condition under the country's health service such as, for instance, their right to free medicines if circumstances so warrant or to a free prosthesis should this be the case.

Besides the responsibility to inform patients about benefits to which they may be entitled, hospital staff responsible for the treatment and care of patients also have the responsibility to ensure that any form-filling that needs to be done on behalf of patients to enable them to claim their entitlements is done

at the appropriate moment so that patients may avail themselves of these benefits in due time. Failure to do so would create an injustice towards patients who would have to pay themselves for benefits to which they would otherwise be entitled free of charge.

The Ombudsman pointed out that these obligations and responsibilities on the shoulders of hospital authorities in turn contributed towards a situation where it was in their own interest that these authorities should ensure that proper records are kept which show that inmates have been duly informed of any entitlements that may be due to patients suffering from a particular condition. If this information can be traced from available records, the authorities should as a rule be able to clear themselves from any allegation regarding any responsibilities which they might have failed to observe although at the same time it is clearly in the patients' own interest to ascertain and to establish the benefits to which in their condition they would be entitled.

Once the Health Division admitted to having no official records to show that complainant's attention had been drawn to entitlements and benefits that were due to her as a result of her condition, this placed the Ombudsman in a situation where he had to reach his own conclusion between the unequivocal declaration of complainant and the stand adopted by the Health Division which was not backed or substantiated by any documentary evidence. In the situation the Ombudsman felt that he could not but give weight to complainant's declaration that she had never been informed of her entitlements by the hospital staff and that as a result of this failure, between 1999 and 2005 she had paid for the purchase of the prostheses that she required out of her own pocket.

When asked by the Ombudsman to produce evidence of expenses incurred on her personal needs arising out of her condition, complainant presented various invoices and cash sale documents (but no fiscal receipts) which confirmed that between mid-1999 and March 2006 she had spent a total of Lm164 on the purchase of these items. The Ombudsman felt, however, that since for many years complainant was not aware of the benefits to which she was entitled, it was not fair to insist that she should present fiscal receipts in respect of these purchases.

After deducting amounts spent in respect of items which are not eligible for

refund under the scheme to provide support to persons in needs of prostheses following surgery and recalling that initially patients in complainant's condition were not entitled to a prosthesis on an annual basis, the Ombudsman felt that a refund of the amount of Lm66 to complainant would be fairer and more appropriate.

Conclusion and recommendations

After having examined the merits of the case the Ombudsman concluded that the Health Division was not in a position to rebut the allegation that complainant had never been informed of the benefits to which she was entitled even though she had a right to this information. As a result, once it had been established that she had incurred additional expense unjustly, the Ombudsman found that her complaint was justified and recommended that the Health Division should offer her financial compensation amounting to Lm66.

The Ombudsman also suggested that the necessary steps be taken as a matter of urgency so that the medical records of patients would henceforth include details about applications made on their behalf for any entitlements that may be due to them in respect of free medicines, prostheses or any other benefits.

Case No G 402

HEALTH DIVISION

The Albanian patient

The complaint

In a letter that reached his Office, the Ombudsman was requested to intervene because complainant claimed that despite her repeated requests for the treatment in Malta of an Albanian national who needed a kidney transplant, she had remained without an adequate response from the local health authorities.

Facts and findings

Complainant stated that in January 2006 she had asked officials from the Health Division for information about the possibility of medical treatment in Malta for an Albanian national including advice about the procedures that needed to be followed in connection with this treatment. Together with this information, the Maltese health authorities also gave her an indication of the costs that would be involved for any such treatment.

Following a meeting with top officials at the Department of Institutional Health who identified the difficulties that were associated with this case, complainant also sought the advice of a consultant at St Luke's Hospital about the matter in mid-2006. The consultant explained the ethical and technical difficulties that would be posed by this treatment including the fact that this operation would require the prior approval of the Ethics Committee since it would be the first live donor transplant ever to be carried out in Malta. Furthermore the Maltese health authorities would be required to give their approval since an Albanian national is not entitled to any such care in Malta. It was also explained to complainant that adequate assurances would be needed regarding follow up procedures following the operation.

As a humanitarian gesture, the consultant indicated that he was willing to perform the operation on the donor but pointed out that his operation only constituted one step of the whole process since the actual transplant in the patient would then need to be carried out by another surgeon. It also emerged that this consultant had made these comments before he had examined the Albanian patient since this patient was not yet in Malta at that time.

After having examined the patient and after having carried out the necessary investigations which enabled him to be in a better position to comment on this case, the consultant early in August 2006 explained in greater detail to complainant the medical difficulties that were involved and pointed out that this was not a straightforward operation at all. He indicated that preliminary urological surgery needed to be carried out at a specialised centre of reference dealing with similar complicated cases and expressed the view that this type of surgery should ideally be performed in the unit that would ultimately take responsibility for the living related transplant. This statement stopped short of suggesting that the treatment involved including the necessary operation/s could or would be carried out in Malta.

The ecclesiastical authorities in Albania subsequently also approached the Maltese Government about this case which was in turn referred to the Ministry of Health. Officials from this Ministry confirmed to the Ombudsman that the matter had been discussed with the ecclesiastical authorities who had made these representations and full explanations had been given to them as to why the operation on the Albanian national could not be carried out in Malta. Although on their part the church authorities hinted that complainant had in her possession a document which suggested that the operation could in fact be carried out in Malta, the Ombudsman was assured that after full consideration of all the implications involved, the health authorities in Malta were unfortunately not in a position to be of any help to the Albanian national.

Considerations and comments

The Ombudsman insisted that the function of his Office is to investigate complaints on alleged instances of failure by the public administration in the

country. It is not the function of the Office to enter into the merits as to whether a request for the treatment of a patient in a state hospital should be accepted or not especially since in this case the patient who was involved was not even entitled to this treatment in Malta. The decision whether to accept or not a similar request lies therefore fairly and squarely at the discretion of the local health authorities who must of course seriously consider all the implications involved in reaching their decision.

In the exercise of their discretion the health authorities would need to weigh the deserving humanitarian aspects that were presented by this case as well as the inherent risks that the proposed surgical treatment would involve together with the exigencies of the national health service.

When viewed from a purely humanitarian aspect, the Ombudsman pointed out that one would normally be inclined to accept a similar request especially when taking into account that the Maltese sponsor of the Albanian patient seemed ready to underwrite the expense involved as well as to undertake that this would be a one-off case. In this connection the Ombudsman also noted that the Maltese authorities had all along showed strong interest in this case and indicated that in view of the gravity of the case they were quite willing to help although they had made it clear to the Maltese person who sought to coordinate efforts to assist the Albanian national that it was up to the competent authorities in the health sector to decide the extent of their intervention with the hope of resolving this situation.

The Ombudsman recognized that the ultimate decision by the Maltese health authorities had to be based primarily on the advice of the consultants who would be required to provide the necessary treatment if this case were to go ahead. This decision also needed to be taken in the light of an assessment of the wider implications that such a precedent could be expected to have on the capacity of the Maltese health service not only to perform delicate and potentially risky interventions but also, and more importantly, to follow them up.

The Ombudsman pointed out that from information gathered by his Office it was understood that both the considered medical opinion of consultants as

well as the assessment made by officials responsible for the management of the Maltese public health service did not consider that the obvious humanitarian reality of this case would outweigh the potential medical risks that were involved or indeed the negative administrative implications that would result if complainant's request was to be accepted.

The Ombudsman insisted that a final decision in such a critical situation had to be taken by the proper competent authorities and by nobody else. It was also important to ensure that any such decision would also be well motivated and in the public interest. In the circumstances the Ombudsman was of the opinion that he could not at this juncture impute any maladministration on the merits of this case which required his direct intervention.

In this situation the Ombudsman felt that his remit only concerned the request that had been made by complainant that she ought to have been given a written and definite reply by the health authorities on this issue as to whether the intervention that was needed could in fact take place or not in a state hospital in Malta. The Ombudsman pointed out that whereas the local health authorities had repeatedly stressed the difficulties that were involved in accepting this request, a definite negative reply had never been given to complainant in writing. He felt therefore that complainant ought to have been given a clear and unequivocal reply in writing directly by these authorities so that the issue would finally be brought to an end.

Conclusions and recommendations

After considering the facts of this case the Ombudsman's conclusions were as follows:

- it is not within the remit of the Office of the Ombudsman to enter into the merits as to whether the intervention that was required on the Albanian patient should be carried out in a state hospital since it involved treatment to a foreign national who in any event is not entitled to free medical or surgical care in Malta; and
- although humanitarian considerations based on solidarity should serve

as guiding principles, ultimately it is the public interest which should prevail.

The Ombudsman also concluded that complainant was entitled to be given a definite reply directly by the Maltese health authorities that would state clearly the reasons behind the decision not to accept the request by the Albanian patient for treatment in Malta.

Subsequent to the Ombudsman's conclusions, the Health Division informed complainant in writing that St Luke's Hospital is not a specialized centre for the type of complex surgery that was required by the Albanian patient and that although aftercare of renal transplantation is complex and very expensive, the Albanian public health authorities had failed to provide any information regarding these arrangements at their end once the patient would be back in his country.

From the Ombudsman's Caseload

Case 3 (December 2006)

Ombudsman finds in favour of the right of Mepa's Audit Officer to communicate his reports to interested parties, foremost among them complainants, other than Mepa

The complaint

Mr Joseph Falzon, Audit Officer of the Malta Environment and Planning Authority (MEPA), requested my advice on a matter of principle of good administration.

By letter dated 23 October 2006 he informed me that when the Audit Office of the MEPA was established in April 2004, he consulted my predecessor on the way that the Office should operate. He had taken a decision after his advice that a copy of his report if any, following an investigation, was to be transmitted to the complainant, where applicable. He then thus proceeded:

"*The MEPA has consistently objected to this practice claiming that section 17C(3) of the Development Planning Act precludes me from doing so. The MEPA claims that this paragraph is exclusive and requires that copies of our reports be transmitted only to the MEPA. I disagree with this interpretation since I believe that according to the Act, I must hand a copy of the report to the MEPA but it does not exclude me from handing the report to other interested parties in particular the complainants*."

The Audit Officer, therefore, asked me whether I would go into the matter and advise him accordingly.

MEPA's position

Limiting myself strictly to the terms of reference of the complaint, I can state MEPA's position on the issue in its own terms as set out by the letter of the

Board Secretary, Mr Francis Tabone, to the Audit Officer dated 17 October 2006:

"*The Development Planning Act is quite clear on the availability of audit reports. The Authority points out that the distribution and circulation of your reports is regulated by article 17C(3) of the Development Planning Act. This requires the Audit Officer to transmit a copy of all reports drawn up by him specifically and explicitly to the Board of the Authority. The distribution and/or circulation of your reports to anyone else, be it a ministry, agency of government, the complainant or other parties, is in breach of the law. This position is strengthened by the next article of the Act, article 17C(4), which requires the Authority to transmit a copy of all the reports drawn up by the Audit Officer to the Minister and shall inform him of any action taken by it in connection with the Audit Officer's report*."

The Audit Officer's position

The Audit Officer replied to MEPA by letter of 19 October 2006. He took exception to the comments in relation to the availability of audit reports and disagreed completely with the MEPA stance. He maintained that:

"You state incorrectly that the only channel through which the audit reports can be communicated "specifically and explicitly" is to the Board of the Authority.

In my view, subsection (3) of section 17C of the Development Planning Act is not exclusive. It rather lays down the minimum reporting requirements thereafter linking with the duty of the MEPA Board in subsection (4) to inform the Minister. The Development Planning Act, contrary to what is stated in your above referenced communication, does not exclude other avenues through which the audit reports can be communicated.

This course of action, whilst not excluded by the Development Planning Act, is also dictated by common sense and by good administration. It is inconceivable how MEPA has the audacity to demand that complainants are

not informed of the conclusions of investigations carried out as a result of their complaints.

I also consider that it is necessary to inform other persons or bodies whenever the need for this arises. In the case under examination, in view of the fact that a senior public officer had, in my view, acted incorrectly, I considered it appropriate to draw the attention of the Prime Minister to the issue in order that he would consider whether to initiate any action on his part as a result of the audit report.

It is incomprehensible how MEPA should consider it necessary to shield abusive/inappropriate action of public officers by trying to obstruct the communication of a report to who has the authority to act."

The Ombudsman's competence to investigate

The Audit Officer interprets the attempt by MEPA to redefine his method of operation as "*one intended to restrict and control access to information essential for my functioning*."

He considers that MEPA, through its position taken on the availability of audit reports, is seriously undermining the independence of his office. It is because of this conviction that he has drawn the attention of the Ombudsman in order that I may investigate the matter in terms of law.

This is therefore a formal complaint alleging maladministration by a public authority established by law that it definitely within my remit. The requested investigation which would lead to an opinion on the correctness of the Audit Officer's insistence that he has the right to communicate his reports to other interested parties apart from MEPA, falls squarely within the strict parameters of the Ombudsman's function to promote good administrative practice. It would also determine whether MEPA's objection to his doing so was justified or whether, on the contrary, it constitutes a violation of the right of the citizen to demand and obtain full information on matters which affect his rights and interests.

Interpretation of section 17C

The Audit Officer is essentially asking me for an interpretation of subsection 3 of section 17C of the Act that establishes the Office of the Audit Officer in the light of basic fundamental principles of administrative law.

It is not the practice of this Office to give advice on the legal interpretation of provisions of law. Nor would my interpretation be final or binding. Ultimately it is a Court of Law that has the jurisdiction and *vires* in this sphere. I can and should, however, give an opinion on whether an action that falls within my purview and which forms the subject matter of an investigation, appears to be contrary to law or was in accordance with a law or a practice that is or may be unreasonable, unjust, offensive or improperly discriminatory or was based wholly or partly on a mistake of law.

If it results that the complaint that provokes the investigation is justified, I have the right not only to recommend that any practice on which the administrative decision, recommendation, act or omission was based should be reconsidered but also if the merits of the case so warrant, that any law on which such practice is based should also be revisited (section 22(3) of Act XXI of 1995).

A matter of substantial public interest

The Audit Officer is raising a matter of substantial public interest regarding the nature of his Office, directly affecting the rights and interest of citizens, which my Office is in duty bound to investigate.

It is essential from the outset to underline what is the nature of the Office of the Audit Officer set up by an amendment to the Development Planning Act enacted by Act XX1 of 2001. It is clear even from a cursory reading of section 17C that the legislator did not set up the Audit Office merely to provide a mechanism for internal audit to improve administrative practice and promote efficiency. The legislator intends the Audit Officer to operate in a framework outside the administration of the Authority and independently of it. The Audit Officer has to be seen to be the guarantor of the citizen's right to be treated

fairly and indiscriminately by the Authority. His main function is to investigate complaints, identify shortcomings or abuse and suggest redress, if any.

The *raison d'être* of the Audit Officer

It is obvious that the *raison d'être* of the Audit Officer is akin to that of the Ombudsman. He is seen as a tool to ensure a transparent and fair administration in the way the Authority conducts its business. He is neither an advocate for complainant nor for the Authority. He ascertains the facts of the case under review and reaches an impartial and independent conclusion on the merits.

The Audit Officer should not be seen to be, and should not act in, a state of contrast and continuous conflict with the Authority but rather as a means to promote its efficiency. His essential duty remains that of providing a check on possible arbitrary or improper use of power and a break on inefficiency and dereliction of duty. In this respect, therefore, the nature of the Office of Audit Officer can be likened to that of the Ombudsman insofar as the Audit Officer can be considered to be, by definition, a defender of people's rights and interests.

The Authority itself is bound to recognise these distinctive features of the Audit Officer and in particular his autonomy, impartiality and independence of judgement. It is also bound to accept that, when drawing up his reports, he is bound to act on his individual judgement and shall not be subject to the direction of any other person or authority including of course MEPA itself. This is expressly provided for in the law.

It is therefore right and proper for the Audit Officer to assert his autonomy and be jealous of his independence. He has the duty to do so and the Authority is bound to refrain from any act that seeks to undermine and weaken the Audit Officer's authority.

The functions of the Audit Officer

The functions of the Audit Officer are set out in subsections 1 and 2 of section 17C of the Development Planning Act (Chapter 356). They can be identified thus:

- the Audit Officer shall review all the functions and working of the Authority;
- he shall investigate, either on his own motion or following a complaint received by him, the functions and working of the Authority. He may suggest to the Authority what redress, if any, should be given.

The complaint referred to me by the Audit Officer, now being reviewed, does not require me to analyse in detail and define the parameters of his functions. I shall limit myself to the following observations necessary for the present investigation:

(a) The Audit Officer is entrusted with the review of all the functions and working of the Authority. These terms of reference are indeed very wide but the Audit Officer should be careful not to read into them more than what the law empowers him to do. The Audit Officer is not an Appeal Board from decisions of the Authority or any of its organs set up by law. In reviewing the functions and working of the Authority, the Audit Officer has to be careful to limit his investigation to an assessment as to whether the Authority acted correctly in the exercise of its functions and whether its workings were carried out in strict conformity with its functions as established by law, rules, regulations and the Authority's own policies. The Audit Officer has no right to substitute his discretion to that of the Authority when it results that such discretion was exercised according to law in a reasonable, fair and just manner.

(b) The Audit Officer is bound to investigate the functions and working of the Authority either on his own motion or <u>following a complaint received by him.</u> It is clear that the law wants to create a mechanism whereby the citizen can seek redress against alleged injustice, abuse or improper discrimination. An investigation following the receipt of a complaint necessarily implies that the complainant must show that he has a personal interest in the merits of his complaint insofar as his interests or rights were actually or potentially put in jeopardy as a result of an act or omission of the Authority.

(c) A complaint must therefore be substantial, actual and above all personal to the complainant. The law enjoins the Audit Officer to make an

independent investigation into that complaint. It gives him the administrative means to conduct the investigation and authorises him to suggest to the Authority what redress, if any, should be given to complainant. The law therefore decrees that the investigation of a complaint has to be conducted *ad personam* and that the redress that the Audit Officer might suggest is intended primarily, though not necessarily exclusively, to rectify any prejudice that complainant might have been found to have suffered or will suffer as a result of the Authority's actions.

Principles of good administration

Having established that the Office of Audit Officer is intended primarily as an added safeguard for the citizen against administrative abuse and improper discrimination and not merely as an internal audit, it is clear that the principles governing good administration, insofar as they govern citizens' rights, are applicable. These principles have developed into rights, based on natural justice, that not only guarantee transparency and fairness in administrative decisions but also due process.

These principles are translated into duties that the public administration has to perform towards the citizen who, on his part, acquires the corresponding right to be treated accordingly. Foremost among these principles are the following relevant to the present case:

- it is today accepted that the administration has the duty to state the grounds for its decision. Consequently, the citizen has the right to expect that every decision which may adversely affect his rights or interests shall state the grounds on which it is based by indicating clearly the relevant facts and the legal or policy basis for it;

- it is also today accepted that the administration has the duty to notify the citizen of its decisions and hence the citizen has the corresponding right to expect to be so notified. An official within the public administration is bound to ensure that decisions which affect the rights and interests of individual persons are notified in writing to them as soon as the decision has been taken.

These basic principles are enshrined in *The European Code of Good Administrative Behaviour* as part of the right to good administration to which every EU citizen is recognised to be entitled. This right is today recognised as a fundamental right according to Article 41 of the *Charter of Fundamental Rights of the European Union* which Malta ratified. These principles bind the Audit Officer just as much as they bind MEPA.

The right to be informed

There is no doubt that the investigation carried out by the Audit Officer into a complaint made by a citizen directly affects his rights or interests. Nobody questions the fact that the conclusions of the Audit Officer and the motivation on which they are based could materially affect the outcome of an application before the Authority's institutions and could be a determining factor in its approval or refusal.

There can be, therefore, no doubt that a complainant submitting a case before the Audit Officer has the right not only to be informed whether, as a result of the Audit Officer's investigation, it has been established that his rights and interests were correctly evaluated and determined by MEPA according to law, subsidiary legislation, rules and regulations but also, and more importantly, whether he was unjustly subjected to improper discrimination or unfairly treated.

There can be no doubt that the complainant therefore not only has the right to be informed of the outcome of the decision of the Audit Officer on his complaint and its motivation but also of any recommendation for redress which the Audit Officer might think fit to make. This right, naturally, presupposes that the Audit Officer conducts his investigation strictly within the parameters of his functions and according to the basic rules governing due process. It is inconceivable – as MEPA seems to suggest – that the law intends to exclude the person directly concerned with the findings of the Audit Officer and whose rights and interests have been the subject of the investigation from the whole process that could lead to potential redress to rectify the abuse or injustice he is proved to have suffered.

Analysis of section 17C

MEPA is objecting to the practice of the Audit Officer of sending his report to a complainant. MEPA interprets this subsection as requiring the Audit Officer to transmit copies of all reports drawn up by him, specifically and exclusively to the Board of the Authority, and that the distribution of such report to any other party, including complainant, is a breach of the law. It quotes subsection (4) of the same section in support of this interpretation whereby MEPA is required to transmit a copy of all reports drawn by the Audit Officer to the Minister.

Subsection (2) of section 17C provides that:

"The Audit Officer shall investigate either on his own motion or following a complaint received by him, the functions and working of the Authority. The Audit Officer may suggest to the Authority what redress, if any, should be given."

Subsection (3) of the same section provides that:

"The Audit Officer shall transmit a copy of all reports drawn up by him to the Board of the Authority. He shall draw up an annual report which shall be published in its entirety as part of the Authority's annual report."

Subsection (4) provides that:

"The Authority shall transmit a copy of all the reports drawn up by the Audit Officer to the Minister and shall inform him of any action taken by it in connection with the Audit Officer's reports and where no such action as recommended by the Audit Officer is taken, it shall inform the Minister of the reasons why no such action is taken."

These provisions suggest the following considerations:

1. It is immediately apparent that the Audit Officer is not by law enjoined to report to the Board of the Authority. He is only bound to transmit a copy of

all reports drawn up by him to that Board. His reports therefore remain the property of his Office; he is not bound by secrecy of office. He is certainly not bound to hand his reports solely and exclusively to the Board of the Authority. He is free and he can be in duty bound to communicate his report certainly to the complainant but also, if he so deems fit, to others. The law leaves this matter in his hands, trusting that he would act reasonably and judiciously as befits his Office. It does so to assert his authority and independence as well as to give him an effective means to adequately guarantee the rights and interests of complainant.

2. The fact that the Audit Officer is bound to transmit a copy of all reports drawn up by him to the Board of the Authority imposes a specific duty on him that he cannot avoid. The law reasonably requires the Audit Officer to transmit to the Authority a copy of the full report. Likewise the Authority on its part is bound to transmit a copy of all reports drawn up by the Audit Officer to the Minister. Even in this case the Authority has to transmit a full copy. It also has to inform him of any action taken by it in connection with the Audit Officer's report. This procedure, strictly regulated by law, is necessary and intended to ensure that the Audit Officer properly and effectively exercises his functions.

3. Contrary to what MEPA maintains, however, these provisions in no way limit the right of the Audit Officer to give a copy of his report to complainant or to any other interested party, or indeed to make use of it to influence public opinion in the normal democratic process. If the law had wished this to be so, it would have stated so – *ubi lex voluit, dixit*. Indeed the law could not wish that it be so because that would mean that basic principles of good administration would be breached.

4. It is interesting to note that the Authority is bound to publish in its entirety, as part of its annual report, the annual report drawn up by the Audit Officer. It is obvious that the publication of the Authority's annual report would in this case have to include all or any report which its Audit Officer chose to include, even *verbatim*, in his annual report. This alone defeats and negatives MEPA's contention that the Audit Officer's reports are to be given exclusively to its Board and not to complainant.

5. It is also interesting to note that the wording of the sections under review is distinctly different from that used by the legislator in other laws setting up commissions or authorities with investigative functions. Thus, for example, Act XV of 1987 which made provision for the establishment and functions of a Commission for the Investigation of Certain Injustices – the precursor of the Ombudsman Act – clearly stated in section 10 that:

"*The Commission shall send to the Prime Minister, at the earliest opportunity, a report of the result of the investigation … and where the Commission finds that an injustice has been committed or sustained, the report shall contain recommendations as to the redress that the Commission considers appropriate in the circumstances*."

In that case the Commission sent its report to the Prime Minister and was reporting to him directly. It was not therefore free to divulge that report to any other person since that report, even materially, should be transmitted and communicated solely to the Prime Minister. In that case the circumstances that the legislator was providing for were totally different from those under review. That law was politically charged and was eventually repealed by section 30 of the Ombudsman Act, 1995 which was in turn followed by the setting up of a tribunal having judicial functions. However, even in those exceptional circumstances the legislator felt that:

"*The Commission shall also inform the complainant, in writing, of the justification or otherwise of his complaint.* "

The legislator was therefore conscious that the fundamental right of good administration requires that the citizen be informed of administrative actions that affect his rights and interests. It was for this reason that the Commission was bound to inform the complainant of the outcome of the investigation even though the Commission was specifically, in that case, not free to divulge the whole contents of the report. That limitation cannot be deduced from the wording of section 17C.

6. It is also to be noted that MEPA may not unreasonably ignore the Audit Officer's report. It is by law bound to consider any remedial action suggested by him. It has to actively examine whether that action was

appropriate and, if so, proceed to act accordingly. It can only not do so if it could reasonably justify its rejection of the suggested remedy and it would then be bound to inform the Minister of the reasons why no such or alternative action was taken.

7. The law, therefore, provides specific checks and balances to ensure that the complainant is given satisfaction that his rights and interests are being fully safeguarded by the Authority. These checks and balances would not make any sense unless complainant is made fully aware of the Auditor's findings, their motivation and recommended redress.

8. It is relevant to note that the amendment to the Development Planning Act (Chapter 356) that provides for the Office of Audit Officer was enacted in 2001 following widespread criticism of the workings of the Planning Authority. The Government rightly took action to provide a measure of open government through a mechanism which is meant to ensure uniformity and transparency in decisions taken. This at a time when MEPA was topping the list of public organisations against which my Office was receiving the greatest number of complaints. It was definitely a step in the right direction to provide the citizen with access to an independent and impartial officer who could specifically investigate whether his rights and interests were being fairly and justly dealt with by the Authority and to give him full satisfaction. This independently of the *quasi* judicial and judicial remedies to which he was, by law, entitled.

9. It is imperative that this process remains an open and transparent one and that the workings of the Authority, within its functions, are subjected to the scrutiny and judgement of public opinion. MEPA's interpretation of this section of its law reduces this democratic process inherent in good public administration to a secretive and negative one. The law undoubtedly does not intend this to be so while it also expects the Audit Officer to act strictly within the parameters of his functions.

Conclusion

I am therefore of the opinion that MEPA's interpretation of section 17C of the Planning Development Act is erroneous at law and that the Audit Officer is entitled to give a copy of his report or part of it, as he deems appropriate, to those interested persons who, in his opinion, have a right to it, foremost among them the complainant/s.

Case 4 (January 2007)

On rumblings in Local Councils: the role of Executive Secretaries

Introduction

In recent months the attention of the Ombudsman was drawn to instances where it was alleged that Local Councils exceeded their statutory powers and failed to comply with their obligations under the Local Councils Act. These complaints gave rise to concerns about signs of discord in some Local Councils that need to be addressed sooner rather than later.

In order to ensure that Local Councils will work better and that their key role in responsible governance and accountability will be more widely appreciated, the Ombudsman has decided to publish this report which is largely based on his findings in connection with a complaint against a Local Council by its former Executive Secretary.

The publication of this report is not meant to cast any aspersions but is meant as a contribution in favour of better local governance, to enhance the reputation of Local Councils and to bring them together in the sharing of best practice and streamlined systems and procedures to the communities that they serve.

The role and functions of Executive Secretaries

When the three-year appointment of the Executive Secretary of a Local Council expired in March 2005 and her employment contract was not renewed, the employee approached the Ombudsman on the grounds that this constituted an unjustified dismissal. She claimed that she had a creditable track record with the Council and presented testimonials which lauded her communication skills, organisational abilities and reliability.

Complainant was also upset that the full 10% performance bonus for the third

year of her stint at the Council had been withheld and that although subregulation 6(1) of the Local Councils (Human Resources) Regulations sets out that a Local Council should award to its Executive Secretary at least 5% of the performance bonus, she had been deprived of this award as well. She felt that she was owed an explanation for these decisions especially since the Council had paid her a full performance bonus in the first two years of her contract as a sign that her performance had gone beyond what is normally required of the position. Besides, no charges or warnings were ever issued against her.

On its part the Local Council claimed that complainant's contract was not renewed because she showed various shortcomings during the latter part of her assignment. The Council insisted that her contract had been honoured in full and that it had every right as an autonomous entity not to renew the contract since this was in line with article 53(5) of the Local Councils Act which states that "*the Executive Secretary and other employees of the Council shall be appointed for a period of three years and their contract may be renewed for successive three year periods*".

With regard to the award of a full performance bonus to complainant, the Council informed the Ombudsman that since it was set up "*the Council has always awarded its employees a full performance bonus out of respect for them irrespective of whether their performance has been impeccable … This has been the constant policy of the Council*."

Despite various accusations and conflicting versions by the two opposing camps during his investigation, the Ombudsman reached his own conclusions on the impasse between complainant and the Council. He concluded that the relationship between the Mayor and the Executive Secretary deteriorated steadily as the contract neared its end mainly due to incompatibility between the way in which the Mayor used to run the business of the Council and complainant's management of Council affairs. Amid fears that the Council's work would grind to a halt, it became clear that the only solution was for the two sides to part ways and a motion which was carried by 5 votes to 2 not to renew complainant's contract meant that the majority cut across party lines and there was evidence that this decision was guided by what councillors felt to be in the Council's best interest.

At the same time, although in the Ombudsman's opinion complainant seemed to have the qualities required for an Executive Secretary and in the right environment she would perform well, she tended to forget that she was in the first place a Council employee. The Ombudsman detected that the Mayor considered her merely as a Council employee who should obey his instructions without raising any questions and also regarded her attitude to his style of management of Council affairs as a threat to his authority and it was no wonder that this clash led to a deterioration of the relations between them. The Ombudsman held that difficulties during complainant's last year were due to factors not wholly attributable to her and for which the Council had to share responsibility as well.

The Ombudsman noted that in complainant's last year the Local Council awarded a full bonus to all its employees with the exception of complainant. He also noted that despite misdemeanours attributed to her, the Council had not issued any warnings and even paid her a full bonus in her first two years. Since this attested to her competence and considering that this bonus was as a rule given to all Council employees, the Ombudsman held that complainant should not have been deprived of a full bonus unless there was conclusive evidence that she failed to perform her duties adequately during her third year and was wholly responsible for any such failure. In the absence of any evidence, the Ombudsman recommended that the Council should pay complainant the full performance bonus for her last year since it appeared that there were no grounds to discriminate against her with regard to this award.

The Ombudsman commented that the Council's decision not to award the minimum performance bonus to complainant was indicative of the level to which relations between the two sides had ebbed and observed that this decision was not only manifestly unjust but also illegal.

The Ombudsman referred to regulation 24 of the Local Councils (Human Resources) Regulations which states that when a Council takes a decision whether to renew or not the employment contract of its Executive Secretary, this decision has to be taken by a resolution of the Council on a motion moved by the Mayor in a meeting where the subject is discussed.

On the strength of the evidence that was presented, the Ombudsman confirmed

that the Local Council had discussed complainant's contract and gave explanations for the non-renewal of the contract. Since this decision was in accordance with the law and councillors were free to vote according to their own evaluation of her performance, the Ombudsman felt that this decision was not taken lightly or capriciously. The current procedures had been followed and the Council had not exercised its discretion unreasonably while its decision was not based on irrelevant grounds or on discriminatory considerations.

The Ombudsman concluded that the Council was ultimately justified in not renewing complainant's employment contract since relations with its Executive Secretary had deteriorated to such an extent as to seriously prejudice its work and in the situation there was no option but to recruit another Executive Secretary.

Observations by the Ombudsman
on the legal implications arising out of this case

The Ombudsman was of the opinion that this case gave rise to various considerations on the role and functions of an Executive Secretary in the context of efficient service provision by local authorities since situations are known to arise at times that threaten to overwhelm Executive Secretaries.

The nature of the office of Executive Secretary

Article 52 of the Local Councils Act lays down that as the executive, administrative and financial head of the Council, an Executive Secretary is responsible for the day to day running of its administrative business and has to ensure a proper conduct of Council affairs. An Executive Secretary is required to carry out "*administrative duties as may be detailed by the Mayor, in accordance with policies decided and delegated by the Council*" and has control over the Council's finances. Besides, article 27 of the Act vests the Mayor and the Executive Secretary with the legal and judicial representation of a Local Council.

Secondary legislation under the Local Councils Act, and in particular subregulation 14.5 of the Local Councils (Human Resources) Regulations,

also allocates to the Executive Secretary responsibility "*for the administration of all Council employees, including the giving of orders, discipline, instructions and work distribution*."

The law also lays down that as the administrative head, an Executive Secretary is to ensure that all the Council's activities are carried out in accordance with the relevant regulations and procedures. The post is therefore a vital cog in the system of checks and balances that the Local Councils Act establishes between the national government authorities and Local Councils that are set up as autonomous bodies.

Although a Council employee, an Executive Secretary is not, however, subservient to the Council. While an Executive Secretary is responsible for an efficient implementation of the Council's legitimate decisions, a person holding this post also serves as a watchdog of the Council's activities and has to ensure good governance and proper administration and to ascertain that the Mayor and councillors observe financial and administrative procedures.

Failure to recognise the status of Executive Secretaries

The Ombudsman commented that it is his impression that the status of an Executive Secretary is not properly understood and even less appreciated by some Local Councils which consider an Executive Secretary merely as their employee and nothing more.

The Ombudsman noted that he was aware that at times efforts by Executive Secretaries to perform functions that are proper to their position are considered as undue interference in the business of the Council and that Executive Secretaries are expected to do the Mayor's or the Council's biddings at all times. He lamented that there appears to be little recognition of the autonomous role of Executive Secretaries to oversee the Council's activities and ensure proper governance and that this situation is accentuated by the fact that Executive Secretaries are, by law, direct dependants and employees of the Local Council for a definite period of three years.

The Ombudsman pointed out that from a legal viewpoint this situation is

anomalous. While an Executive Secretary should have good relations with the Mayor and councillors, it is unacceptable that an officer who is by law required to control the activities of a Local Council should in turn be subject to its control to the extent that an Executive Secretary's continued employment with a Council depends on the will and the whims of the persons who are subject to the Secretary's control.

The vulnerable situation in which Executive Secretaries may find themselves

An Executive Secretary should be committed to fair, independent, impartial and objective service and to guarantee continuity and stability in the management of a Local Council notwithstanding the confrontation that at times besets the activities of these Councils.

Although in theory an Executive Secretary should be to a Local Council what the civil service is to the legislative and executive branches of government, in practice it seems that holders of this post not only lack this standing in Council affairs but are also often dragged into the Council's internal squabbles, having to take sides when they should stand aloof. In this situation an Executive Secretary feels vulnerable and fears that backing the wrong horse might prejudice the prospects of continued employment upon the expiry of the contract. Supporting the stronger faction in issues that could be political in the wide sense of the word but could also be of a purely interpersonal nature, could possibly hold sway over the actions of persons occupying this position at the expense of objective decision-making and integrity.

The vulnerability of Executive Secretaries has now reached the point where some even feel threatened with the termination of their work contracts before their expiry simply on the grounds of a change in the Council's composition. These fears are irrational and manifest misconceptions on the role and functions of the office of Executive Secretary.

Proposals for a solution to this situation

Faced with this situation, the Association of the Local Councils Executive

Secretaries (Malta) launched a campaign both locally and before EU institutions to have Executive Secretaries employed on a permanent basis as a means of removing discrimination and abuse of employment legislation. The Office of the Ombudsman, however, is perturbed at the negative implications that delay in resolving this issue could have on the good governance that local councils should promote and feels that any solution should ensure that:

- the role and duties of an Executive Secretary will be recognized as a point of reference between Councils and the central government authorities;
- the independence of the office of Executive Secretary will be strengthened and measures taken to promote accountability and continuity by such means as the permanent employment of Executive Secretaries following a probationary period; and
- since an Executive Secretary occupies a position of trust and is in duty bound to relate closely with the Mayor and councillors, ways should be found to provide a remedy when for some reason this trust fails since this situation could obstruct a Council's activities.

In this context the Ombudsman recommended that consideration be given to a proposal which would allow Executive Secretaries to be transferred among Local Councils on an exchange basis while respecting the autonomy of the Councils involved.

Other issues regarding the employment contract of Executive Secretaries

The Ombudsman noted that subregulation 24 (1) of the Local Councils (Human Resources) Regulations provides that all Local Council appointments "*shall be on a three-year contract which may be renewed for successive periods of three years*." This provision is widely interpreted in the sense that Councils are free not to renew any fixed term contract upon its termination without even giving any reason to the employee concerned. The Ombudsman considers that this is an incorrect interpretation at law.

According to the Ombudsman this subregulation does not merely state that

an employment contract must have a three-year limit but also states that an original contract may be renewed for successive periods of three years. This means that if a Local Council chooses to extend the term of an original contract for further periods, it can prolong the engagement of the employee involved without having to follow the normal procedures for the recruitment of employees.

At the same time, although a Local Council is allowed a measure of discretion either to renew or not to renew an employment contract, this discretion should be exercised reasonably and should not be based on irrelevant grounds or on considerations that are vexatious or discriminatory. Furthermore, a Local Council is at all times accountable for its actions and its decisions have to be transparent, fair and just.

The Ombudsman pointed out that the non-renewal of a contract of employment purely on grounds of political motivation would therefore be unjustly discriminatory. On the other hand, a Local Council is justified not to renew an employment contract if relations with its Executive Secretary deteriorate in a way that seriously prejudices its work.

The Ombudsman was particularly perturbed by the statement that since it was set up, the Local Council that featured in this complaint had as a matter of policy paid a full bonus to all its employees irrespective of their performance. He observed that this statement merited criticism and showed that this Council not only had no clue about the aims of a performance bonus but had also made a travesty of the system to award this bonus to employees.

Urging that the situation be rectified without delay because the payment of public funds should be scrutinized and take place only after due verification, the Ombudsman recommended that the authorities should adopt strict procedures to ensure a proper assessment of the performance of Council employees that provide a proper basis for a fair and just entitlement to a performance bonus.

Conclusion

It is the view of the Ombudsman that the authorities should scrutinize whether

the objectives of Act XV which set up Local Councils in 1993 are being achieved and should also review the workings of this Act to determine to what extent this legislative framework is providing a positive tool for good service performance by Local Councils. This review should include an evaluation of the role and functions of an Executive Secretary as the administrative kingpin between Local Councils and the central government. In this task all those involved in local government should take note of the Ombudsman's considerations regarding the legal implications of establishing the post of Executive Secretary in a manner that would ensure the continuity that is essential for good governance.

This continuity would give the post of Executive Secretary a measure of autonomy that is necessary to consolidate its position as the executive, administrative and financial head of a Local Council. An Executive Secretary has the duty to execute the policies and directives of the Council but should above all observe the duty to safeguard the interest of the community which the Local Council is bound to serve by ensuring a transparent, just and effective administration according to law.

Case 5 (April 2007)

The duty to consult and the right to be consulted

The complaint

1. Various residents requested the Office of the Ombudsman to investigate the issue of building permits by the Malta Planning and Environment Authority (Mepa) to developers of adjoining sites that involved the changing of development zoning to allow the construction of multi-storey underground garages and overlying high rise buildings. These residents complained, *inter alia*, that no public consultation at all took place about these zoning changes; that the public was not advised by Mepa of these major changes; and that they were not even given the opportunity to submit their representations. They also claimed that other irregularities of a technical nature took place in the processing of the application that in their view severely prejudiced their rights.

2. As is usual practice in such cases, complainants were informed on 1 September 2006 that the Ombudsman had forwarded their complaint to Mepa's Audit Officer for investigation.

Conclusions by Mepa's Audit Officer

3. The Audit Officer completed his investigation on 9 November 2006. He concluded that Mepa failed to consult with the public on the substantial amendments and additions that were carried out to the draft Local Plan after the original drafts were issued for public consultation. Mepa justified its actions by stating that it acted on legal advice.

Audit Officer's considerations

4. It is useful to reproduce the core considerations in the Audit Officer's

report regarding the lack of consultation that was his main motivation in favour of complainants.

"The Duty to Consult

It is the view of the Audit Office that the Mepa is obliged to consult the public on the preparation of a Local Plan (vide Section 27 of the Development Planning Act) on a substantially wider scale than that applied by MEPA. The relevant provision in the Development Planning Act legislation which clearly explains the spirit of the law and the intentions of the legislator is Section 27(2)(a) which reads:

"During the preparation or review of a subsidiary plan, the Authority shall make known to the public the matters it intends to take into consideration and shall provide adequate opportunities for individuals and organizations to make representations to the Authority".

The Mepa is thus obliged "to make known to the public the matter it intends to take into consideration". This duty is not restricted to the first draft of the Local Plan. In fact it is "during the preparation" of a local plan when the Mepa has the duty to consult the public. The crucial issue therefore is to determine the period of the 'preparation' of the Local Plan. In my view the period of 'preparation' spans the time from initial drafting up to the final approval. It is on the basis of this interpretation that in my view all additions, as well as substantial amendments, to the Draft Local Plan require public consultation. This consultation process should, in my view, be repeated until such time as the public (individuals and organisations) would have had an adequate opportunity to submit representations on all proposals contained in a Draft Local Plan.

It is obviously not reasonable to criticise the Mepa for acting on legal advice. It is also beyond my competence to judge the validity or otherwise of the advice tendered.

However, irrespective of the manner in which the legal provisions were interpreted, the procedure adopted by the Mepa can easily lead to suspicions

that any person or persons, within the Mepa structure, can omit crucial (and possibly controversial) policies at the initial stage and then include them in the Local Plan at a later stage, when no further consultation is possible. The potential for abuse in accepting the procedures as adopted by the Mepa is enormous. This clearly conflicts with both the letter and spirit of the Development Planning Act.

I believe that legal provisions should be introduced to ensure consultation at all stages of the preparation or amendment of a local plan. I find comfort in the fact that the Mepa Chairman has stated in his reactions to a preliminary version of this report that "Mepa would endorse a conclusion of the Audit Officer which would be critical of the provisions of the law and suggesting possible amendments". I would recommend that a legal notice is issued to specify clearly the duties of Mepa relative to public consultation. In my view, it should be clear that these are as follows:

a) That the draft proposals for the Local Plan are published for public consultation and submissions from the public are received. These representations are analysed and amendments to the Draft Plan carried out where considered necessary and subsequently a new draft produced.

b) That the amendments and any new policies included in the amended Local Plan should be re-published for public consultation. This consultation process should be repeated any number of times as necessary and should be limited only to substantial modification, new or proposed deletion of draft policies.

c) Only when all the matters which have been taken into consideration have been subjected to public consultation, is the finalized Local Plan process to be considered as validly concluded as only at this stage would the process of public consultation be exhausted.

Obviously, this would lengthen the process. However, it should be borne in mind that the process relative to the Local Plans has been in hand for over ten years during which there was ample time for public consultation.

Public participation in Land Use Planning is crucial to the democratisation of the planning process as regulated by the Development Planning Act. Adopting procedures which limit or curtail this right is unacceptable."

Reaction by the Minister for Rural Affairs and the Environment

5. Complainants insisted that the Office of the Ombudsman should intervene to ensure action on the Audit Officer's report by the competent authorities. On 15 February 2007 the Ombudsman wrote to the Minister for Rural Affairs and the Environment for his reaction to the report and to advise whether any action was to be taken by way of remedy. The Minister wrote back on 1 March 2007 and stated as follows on the issue of consultations following amendments to the Draft Local Plan:

"*The AO's report includes an interpretation of the Development Planning Act which is manifestly incorrect. It so happens that this Ministry had sought legal advice on this issue on 16th May 2006. A copy of the legal advice is attached.*

The report is also contradictory in that it acknowledges that it is not reasonable to criticise Mepa for acting on legal advice. In spite of this, the report still admonishes Mepa on the basis of an (incorrect) interpretation of the law.
……
In its response, Mepa through its legal office made the legal file available to the Audit Officer. From the AO's report, it appears that the AO did not take up Mepa's offer to him to inspect the file. It is likely that the file contained information which may have had a determining influence on his eventual recommendation. As such therefore I consider his assessment of the complaint as incomplete.

In view of these and other deficiencies of the report, this ministry considers it advisable not to give undue weight to its conclusions.

Having said that, I appreciate the concerns of persons relating to the issue dealt with in the AO's report. I can understand people's desire to be consulted

following amendments made to the draft plan (following the statutory public consultation). This ministry is considering proposing an amendment to the DPA Act to rectify the situation. This will have to be done in a manner which is workable and which will not unduly lengthen a process which is already exceedingly burdensome and lengthy."

Legal opinion

6. It is pertinent at this stage to state that the legal opinion given to the Ministry was in the sense that Article 27(2)(a) and (b) of the Development Planning Act (Chapter 356) requires Mepa to consult the public when it initially launches the process for the revision or the making of a Local Plan.

"*However, once this initial step has been complied with, notwithstanding any further developments which might follow – even if of such a radical nature which depart from the original Mepa proposal – which might take place during the subsequent process, there is no legal requirement to start afresh the consultation process. Otherwise the whole process would end up to be an interminable one and it would take a substantial period of time to revise or prepare a new local plan*."

General considerations

7. The main considerations that guided the Ombudsman were as follows:

- the report by the Audit Officer substantially upheld the complaint in respect of lack of proper consultation even though, as he correctly pointed out, despite the failure to consult afresh, the Local Plan, as amended, is legal unless the Courts of Justice decide otherwise;

- the Audit Officer's assessment on the issue, even though strongly contested by the Ministry, is not as a rule subject to the Ombudsman's review;

- technical considerations are to be made by competent persons and the Office of the Ombudsman recognizes that it does not have any know-how to pass judgement on technical issues; and

- the Ombudsman's intervention is limited to an assessment whether the investigation by the Audit Officer was procedurally wrong or manifestly unjust or if the Audit Officer's findings and recommendations were unreasonably ignored by the Authority.

8. The Minister for Rural Affairs and the Environment suggested that the Audit Officer's assessment of the complaint was incomplete because he turned down Mepa's offer to inspect its documents which were likely to contain information that might have had a bearing on the outcome of his report. The Ombudsman felt, however, there was no need for him to look at this issue because it was obvious that the Audit Officer's conclusion was based on the fact, that resulted from his investigation, that Mepa had not conducted proper public consultation on the proposed amendments; and it was only this issue that needed to be considered.

9. The Ministry maintained that its interpretation of the Development Planning Act was based on legal advice sought expressly on the issue of consultations following amendments to a Draft Local Plan which stated that no requirement exists to undertake additional consultations on a Draft Local Plan after the lapse of six weeks for public consultations.

10.1 The Audit Officer stated correctly that "*it is obviously not reasonable to criticise Mepa for acting on legal advice*" and pointed out that it was beyond his competence "*to judge the validity or otherwise of the advice tendered*". On his part the Ombudsman too decided not to enter into the merits of that advice and understood that Mepa's actions were in this case underscored and justified by the advice given. This of course does not necessarily mean that Mepa acted correctly or that the interpretation given to the legal provisions in question was right.

10.2 The Ombudsman therefore considered it useful to comment on the duty to consult that Mepa has in similar circumstances. He insisted that his views were not to be understood as passing judgement on the legal advice

tendered but rather on whether Mepa was correct in acting on that advice and, more importantly, on the course of action it should take in the future in similar situations.

The duty to consult

The parameters of the Ombudsman's investigation

11. Since at this stage the Ombudsman needed to determine whether Mepa had correctly fulfilled its duty at law to consult interested parties, the main parameters of his considerations were as follows:

(a) Article 12 (3)(a) of Act XXI of 1995 provides that the Act does not apply to persons or bodies listed in Part A of the First Schedule to the Act that includes any counsel or legal adviser to the Government acting in such a capacity; and it could therefore be questioned whether the Ombudsman has jurisdiction to investigate legal advice to Mepa which refers to the interpretation of articles in the Development Act. It could be argued that the Authority is not part of Government and that legal advice was not requested from and tendered by a counsel or legal adviser to the Government.

(b) Irrespective of these issues, this restriction on the Ombudsman's jurisdiction would only preclude him from investigating the relationship between the Government and its legal advisors and the manner and the content of advice tendered. It does not preclude the Ombudsman from having a different opinion on advice given, commenting on it or expressing reservations that the Government/Mepa decided to act on it. When this is the case, however, the Government/Mepa could justify their actions by claiming that they acted on competent legal advice and this is generally a strong defence against intentional maladministration.

(c) On the other hand Sub-Article 2 of Article 12 of Act XXI of 1995 extends the Ombudsman's jurisdiction to cases where the person to whom it applies "*acted in accordance with recommendations received or after holding consultations according to law or after observing other legal requirements*". The law, therefore, clearly provides that a person or body, subject to the

jurisdiction of the Ombudsman, could not avoid investigation into alleged maladministration by pleading that he acted on advice given by competent persons or after having consulted them.

The legal provisions

12. The provisions regulating the requirement of public consultation in the formulation of a Local Plan are contained in Article 27 (2)(a) and (b) of the Development Planning Act. These state as follows:

"*(2) Where the Authority prepares a subsidiary plan or a review thereof as aforesaid, it shall seek the Minister's approval in terms of the following procedure:*

(a) during the preparation or review of a subsidiary plan, the Authority shall make known to the public the matters it intends to take into consideration and shall provide adequate opportunities for individuals and organisations to make representations to the Authority;

(b) when the subsidiary plan or a revision thereof has been prepared, the Authority shall publish the plan together with a statement of the representations it has received and the responses it has made to those representations. The Authority shall invite representations on the plan to be submitted to it within a specified period of not less than six weeks; where in such a subsidiary plan or revision thereof it is proposed that any land be excluded from a Temporary Provisions Scheme Boundary or a development boundary as indicated in a local plan, the Authority shall publish in the Gazette and in two local daily newspapers a notice showing the land that is to be excluded."

Sub-Article (c) of Article 27 (2) provides that the Authority shall adopt a subsidiary plan "*after taking into consideration all the representations submitted to it as aforesaid*".

Analysis of the legal provisions

13. The law does not limit itself to a statement that, when preparing a

subsidiary plan or a review of it, the Authority has the duty to consult interested parties before seeking the Minister's approval and indeed the legal provision under review does not even mention the term "*consult*". The law instead lays down in detail the procedure that the Authority is bound to follow, as a minimum, before seeking the Minister's approval for the plan; and it is a procedure which aims to ensure transparency and regularity; to set out the limits of public participation in the preparation or review of subsidiary plans; to curb the possibility of abuse; and to provide adequate avenues for interested persons to make representations that favour the best possible outcome for the proposed development.

14. Under Article 27 of the Development Planning Act the Authority has the duty, in the preparation or review of a subsidiary plan, to:

- make known to the public the matters it intends to take into consideration;
- provide adequate opportunities for individuals and organisations to make representations;
- when the subsidiary plan or a review thereof is completed, publish that plan together with a statement of the representations it received and its responses to these representations;
- invite representations on that plan within a period of not less that six weeks; and
- adopt a subsidiary plan after taking into consideration all the representations submitted to it.

15. These legal provisions indicate that the scope of the legislator is that the Authority should not merely inform interested persons and the public of a proposed subsidiary plan or its revision but also provide a forum for the cross fertilisation of ideas to influence the final decision. Under a statutory *iter* of consultation that it is bound to follow, the Authority must adopt a subsidiary plan only after taking into account all the representations submitted to it although this does not mean that the Authority is bound to accept all or any of the representations made or that it can lightly or capriciously discard them.

16. Although in the present case Mepa maintained that it satisfied its duty

to consult, the Ombudsman stated that the divergence of opinion that arose centred on whether the Authority had performed that duty to the extent required by law. In view of the fact that Mepa sought to justify its actions on the basis of independent legal advice on an issue that ostensibly can be a question of opinion and interpretation, the Ombudsman admitted that it was difficult for him to conclude that the Authority was in this case guilty of maladministration. Although the final interpretation of the relevant legal provisions would of course rest with the Courts to which complainants can have recourse, the Ombudsman felt that it was proper for him to indicate what he considered to be not only the correct interpretation of these articles but also, and more importantly, the constitutive elements of proper public consultation from the point of view of fair and transparent administration.

Public consultation – a democratic tool

17. Where the law imposes a duty of public consultation on a public authority it is imperative that this authority should not limit itself to informing the public of the action it proposes to take but should also ensure that the process is a means of involving members of the public and giving them a voice in matters that affect them. Public authorities should not therefore regard consultation as an irksome process, proposed by law, that could hinder their action and that should be conducted at a minimum level merely to satisfy the letter of the law. It should be considered as a democratic tool that broadens the decision making base, encouraging public participation in administrative policies or actions that affect them – a participation that could lead, if not to consensus, at least to a fuller awareness of the implications of the execution of such policies and actions and how citizens could be affected by them.

The elements of consultation

18.1 **(i)** Consultation should be effective and has to be based on openness, trust, integrity, mutual respect for the legitimacy and point of view of all participants and transparency of purpose and process. This implies that both the authority carrying out the consultation and the participants have to be fully aware of the purpose of the exercise and its limitations.

(ii) It has to be realised that consultation is not a process of negotiation but of reciprocal comprehension of views. While the outcome of consultation should not be predetermined and the process should not merely be used to communicate decisions already taken, it should also be clear that consultation is not necessarily intended to achieve or be dependant on consensus. Following the exchange of views and submission of representations, the final decision rests upon the public authority that is bound to take the consultative process into account when reaching its final decisions.

(iii) It is imperative that consultation be focused and that the public body should from the outset define the issues on which representations are being sought so that any views made beyond those issues will not be given weight and will be discarded. On the other hand, the consulting authority is bound to inform participants in the process about issues that have already been decided by those who are at law empowered to do so and which are not, therefore, subject to such process.

(iv) Applying these principles not only enhances the openness of the procedure but also ensures that the consultation is kept within its proper parameters. In this way friction on controversial issues would be avoided and debate would be more fruitful and useful.

18.2 The principle of subsidiarity in Government presupposes a culture of meaningful, open and ongoing public consultation. This principle is being recognised of late in legislation and the articles in the Development Act under review prove this. On the other hand, according to the Ombudsman, the strict, literal interpretation of these articles given in the legal advice to Mepa showed that the true meaning of the essential elements of public consultation which are outlined above was not always fully appreciated and applied.

Specific considerations

19.1 The Ombudsman admitted that in principle he found no fault with the Articles under review though there is room for fine-tuning to avoid ambiguity. Even though they provide only for representations, if correctly

interpreted, they fully reflect and faithfully include the essential, constitutive elements of effective consultation. The following points illustrate this statement.

(a) Sub Article 2(a) of Section 27 of the Development Planning Act provides that "*during the preparation or review of a subsidiary plan, the Authority shall make known to the public the matters it intends to take into consideration*." The Authority has therefore the duty to provide precise information to the public about the "*matters*" that it intends to consider when preparing or reviewing a subsidiary plan and these "*matters*" have to be material and substantial to its decision and the information has to include all such matters at whatever stage in the preparation or review the Authority decides to consider them. It is not correct to say, therefore, that the Authority satisfies this obligation merely by making known to the public what matters it intends to take into consideration when initially deciding to consult and the word "*during*" in this Sub-article has to be given its proper weight and full meaning. Nor it is correct to say that the Authority has the duty to make known to the public any matter concerning the preparation or review of a subsidiary plan since it is only bound to make known to the public those matters that are of such importance that it intends to take them into account when fulfilling this task.

(b) By implication, when preparing or reviewing a subsidiary plan, the Authority is bound to inform the public at the outset of matters which it could not take into consideration because they have already been decided beforehand by persons who are empowered by law to do so. Such matters are not and could not form the subject of public consultation. Thus, for example, if the House of Representatives has by resolution decided that a particular project is to be constructed in a particular place within a particular budget, that matter could not be the subject of public consultation since it is not a matter that the Authority can or should consider.

(c) A proper interpretation of Sub-Article 2(a) of Section 27 seems to preclude the Authority when finally deciding on a project from considering matters that have a determining effect on its decisions but which have not been previously the subject of adequate public consultation. It is therefore

correct to state that the process of consultation on such matters should be ongoing throughout the whole process of preparation or review of the subsidiary plan and cannot be limited to its initial launching.

(d) This interpretation is a corollary of the duty imposed by law on the Authority to accord interested persons adequate opportunities to make representations. To be able to do so one has to ensure that these persons are made aware of all the crucial elements that would determine the Authority's decision, at whatever stage they were introduced during the preparation stage of the subsidiary plan or its review.

(e) It is important to emphasise that when the Authority specifies the "*matters*" it intends to take into consideration, these are strictly related to the type of subsidiary plan they are referring to. Article 23 of the Development Planning Act lists the different types of subsidiary plans that can be prepared; and subject plans, local plans, action plans and development briefs are all clearly defined in subsequent articles of the law as each type of plan seeks to provide for particular planning exigencies with specific finalities and each one of them requires the consideration and the determination of "*matters*" proper to its specific aims. When submitting the preparation or review of a subsidiary plan for public consultation it is therefore important that the Authority not only states the exact type of plan it is proposing and in terms of what article in the Act but also ensure that the "*matters*" to be taken into consideration by it fall within the natural scope of that particular plan. It is only by so doing that the consultation process is properly focused.

(f) When the amended draft of a subsidiary local plan produced by the Authority after taking into consideration the representations made, is the result of the "*matters*" subjected to the process of "*representations*" laid down in Article 27, the law does not require the amended plans to be resubmitted to renewed consultation even if it includes major departures from the original plan. The only exception to this rule should be when the amended plans introduce "*matters*" that involve new, material and substantial elements not previously encompassed in the representations stage and on which, therefore, interested persons have not been given the opportunity to make such representations.

(g) It is, therefore, not correct to state that, as the law stands or indeed as the law should be, the process of consultation should be repeated every time that there is a substantial change in the subsidiary plan or its review, as the Audit Officer seems to suggest. Nor is it correct to state, as the expert legal opinion given to the Ministry opines, that the duty to consult is satisfied and exhausted merely by submitting the original, prepared or reviewed subsidiary plan to the public irrespective of any future amendments to it, even if these substantially and indeed radically change the nature and/or the extent of the project. The Ombudsman agreed that such a restrictive interpretation is not only against the spirit of the law but also against its letter. It can easily give rise to abuse that would nullify the whole consultative process and make a mockery out of public participation. The comments made by the Audit Office in this respect are therefore correct and to the point.

(h) It is important to note that the law distinguishes very clearly between the phase of preparation or review of a subsidiary plan and its publication. The principles governing the process of inviting representations which the Ombudsman traced in earlier sections of his report apply during the preparation or review of the plan as provided in sub-articles (a) of Article 27. It is at this stage that one can envisage one of more phases in the process. When a subsidiary plan or a revision thereof has been prepared, the Authority is bound to publish it together with a statement of the representations it has received and the responses it has made to those representations. Sub-article 2(b) of Article 27 lays down a specific period of not less than six weeks within which interested persons could make representations and the Authority would then decide.

(i) The law, however, envisages that during this second phase all the relevant matters that determine the nature and extent of a subsidiary plan would have been taken into consideration by the Authority during the first phase and that no new such matters would be introduced at this late stage. It also assumes that the final decision will be taken within the context of "*matters*" that have been the subject of consultation and that no new matters will be introduced. If new "*matters*" were introduced at this stage, this would mean that the preparation or review phase has not yet been concluded.

(j) Finally the Ombudsman pointed out that it is relevant and interesting to note that the law in this Article uses the term "*make representations*" rather than the term "*conduct consultations*". Strictly speaking therefore the law does not envisage a two-way debate. It would have, in theory, been sufficient for the Authority in this case to provide adequate opportunities for individuals and organisations to submit their views and objections on the subsidiary plans to it.

19.2 It was to its credit, therefore, that the Authority chose to go for a broader interpretation and embark on a process of proper consultation in the preparation or review stage thus allowing direct public participation in land use planning and affording the opportunity of a significant contribution to the democratisation of the planning process as well as a better understanding of development policies.

19.3 On the other hand, while the Authority appeared to have satisfied the basic requirement of allowing for representations as per the legal advice given to it, it did not appear to have satisfied that duty if the law were to be properly interpreted and applied.

Conclusions

20.1 From these considerations, the Ombudsman elicited the following conclusions relevant to the case under review:

- bearing in mind the conflicting interpretations of Article 27 of the Development Planning Act and that Mepa's action was in conformity with an opinion given by a competent legal expert, the Ombudsman stated that he cannot conclude that this case can be qualified as an act of maladministration;

- the final word as to the interpretation of the relevant articles of the Act rests with the Court, to which complainants are free to have recourse. It was the opinion of the Ombudsman, however, that the advice was not correct and needed to be revisited. In following

that advice Mepa has, therefore, not correctly exhausted the process laid down by law to provide adequate opportunities for representations to be made;

- it is significant that both Mepa and the Minister for Rural Affairs and the Environment concur that there is scope for a reconsideration of the legal provisions regulating amendments made to a draft plan following the statutory public consultation.

20.2 The Ombudsman, therefore, endorsed the Audit Officer's recommendation that the process of receiving representations and of public representations stage be better specified and regulated also in the light of his considerations.

20.3 This process should ensure a well-structured, effective consultative framework within definite parameters that would not unduly delay the definition of planning policies and projects.

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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)*
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