Ombudsman

CASE NOTES

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Office of the Ombudsman
11 St. Paul Street, Valletta
MALTA

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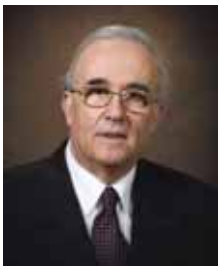
Note

The names that appear in some of the cases in this publication are fictitious and have been used in order to preserve the identity of complainants who were involved in these cases.

Foreword



The twelve case summaries that appear in this edition of **Case Notes** have one common denominator – they recount the varied experiences of citizens who feel that they have been treated badly by those who wield the power of authority in public office and who resort to the Office of the Ombudsman as a shield against the injustice, unfairness and discrimination to which they aim to have been subjected.

In some of these cases the Ombudsman finds in favour of complainants and recommends appropriate remedial measures that are meant to place these citizens back in the position in which they would have found themselves if the injustice or act of maladministration against them had not occurred at all. In other instances the Ombudsman finds that what was perceived as an action or a decision that was arbitrary was either not so in the first place or else was not as harmful or as discriminatory as it was made out to be by citizens who had submitted their grievance to him.

Whatever the outcome of the various cases in this **Case Notes** and of the hundreds of other cases that do not make it to this publication, recourse to the Office of the Ombudsman enables people to bring out their experience at the hands of public authorities while comforted by the knowledge that their voice will be heard; that they will be treated with genuine respect and understanding; and that they will be given a fair hearing by an institution that jealously guards its independence and autonomy.

As is widely recognized, the main aim of the institution is to restore dignity to persons who are hurt or who have suffered hardship by a public authority since a pension or a promotion that has been unfairly denied or an application of a welfare benefit that has been unjustly withheld or the imposition of an unduly high tax claim constitute an erosion of citizens' rightful expectation of a fair administration.

This Office is of course aware that it cannot solve all the problems that administrative processes across the wide spectrum of government activity are known to give rise to among citizens of all shades despite strong efforts in recent years to raise and improve service standards by public authorities and ensure that their clients are treated equitably. Clearly it would be

presumptuous and naive to expect that the Office can ever hope to resolve all these concerns since no doubt only a share of these issues and concerns are ever brought to its attention.

Nonetheless, to the extent that the Office of the Ombudsman continues to provide assistance and support to enable citizens who knock at its doors to solve their problems with public authorities fairly and that every intervention by this Office serves to carve a deep critical insight into the cogs of the vast administrative machinery that underpins government actions and decisions, it is obvious that this institution fulfils a useful role in Maltese society.

On the basis of a sustained search that is shared between the Maltese ombudsman institution and public authorities for equitable solutions to perceived instances of maladministration and allegations of arbitrary action or inaction, it should be possible to improve further the quality of the Maltese public service in the context of fairness, good practice and the rule of law and the right of citizens at large to good public administration.

Joseph Said Pullicino
Ombudsman **April 2008**

Case No F 118

MALTA COLLEGE OF ARTS, SCIENCE AND TECHNOLOGY

The applicant who should at least have been short-listed

The complaint

The Ombudsman received a complaint from an applicant for a Lecturer post at the Malta College of Arts, Science and Technology (MCAST) who alleged that he was unfairly excluded from the selection process on the grounds that his qualifications did not meet the academic requirements for the post that were laid down by the College management in its call for applications.

Complainant was also annoyed by undue delay on the part of the MCAST authorities to send a reply to his various queries on the issue.

Findings and considerations

Complainant told the Ombudsman that four months after he applied for a post of Lecturer in one of the fields of behavioural science that was advertised by MCAST, he was informed that he had not been selected and that the post had been filled. In reply to his enquiry why he had not even been called for an interview, he was told after an interval of three more months that his application was not considered because he did not possess academic qualifications in the subject area that featured in the call for applications.

When complainant protested with the College administration about this outcome, he was informed by means of a letter from the Principal of the College that, if anything, he was overqualified in terms of the College's requirements. The Principal also told him that he had not been short-listed for an interview because he did not possess the necessary experience for the post in question.

During the investigation by the Ombudsman the MCAST Principal admitted that complainant's masters degree as well as his doctorate had in fact satisfied the academic qualifications for persons wishing to be considered for the post. In the course of this investigation the Ombudsman also found that complainant possessed teaching experience at the University of Malta as well as at another foreign institution besides other experience in clinical psychology in various welfare organizations and community groups in Malta that are concerned with the provision of support, treatment and care services to various sections of the population. The Ombudsman also established that complainant did clinical internships abroad in child and family protection services and had also dealt with clients with psychosocial problems.

The Ombudsman understood that one reason that could *prima facie* have militated against complainant was that the call for applications specifically required candidates to possess "*at least five years experience preferably with children, persons with disability and with the elderly*." He stated that it had to be assumed that this experience had to be acquired after candidates had obtained a first degree in the discipline and not through clinical exposure in practical sessions during study phases or related study periods.

From an assessment of complainant's *curriculum vitae* including a close look at the years when he obtained his M.Sc. overseas and his doctorate, the Ombudsman was of the opinion that even if complainant's clinical internship as part of his doctoral studies was to be considered as part of his "*experience*" – something which in itself was a doubtful interpretation of this requisite as laid down in the call for applications – at most this would only amount to a maximum of four years experience from the year of his graduation up to the time that he applied for the post. Moreover, although there was evidence that complainant had exposure to the psychological problems of children and that this was an area in which he had specialised, he did not seem to have any experience with persons with disability or with the elderly.

On paper, therefore, the selection board could maintain with some justification that complainant did not possess the necessary experience that was required by the call for applications. The Ombudsman felt that this weakness, once proved, could have been detrimental to complainant's chances of being selected for the post.

The Ombudsman felt that on the other hand when due account was taken of complainant's qualifications, it would have been proper to include him for an interview together with all the other candidates who were in possession of the relevant qualifications and experience. By doing so the selection board would have allowed him the opportunity to elaborate on his clinical experience during the years that preceded his application.

As the Ombudsman has declared on various similar occasions, apart from the time factor the element of experience cannot always be accurately measured or quantified during a selection process and more often than not it remains to a large extent the result of a subjective interpretation given by the selection panel to the value, significance and relevance of a candidate's practical experience in a particular area of activity. This consideration is relevant insofar as a selection board has to appreciate the experience gained by a candidate over a period of time in the light of the candidate's suitability to fill a post that is being advertised.

The Ombudsman noted that when the MCAST selection board short-listed the applicants for the post, this process had been guided by the choice of applicants who were in possession of "*the appropriate and relevant experience required for this particular lecturing post and better related to the age cohort of students*." On this basis he was of the view that complainant might not necessarily have been an automatic choice for the post and that indeed he might have been excluded because of lack of the type of experience that was required in the call for applications.

In the final analysis, however, the Ombudsman was of the opinion that in the circumstances complainant should have been given the benefit at least of being included among short-listed applicants and of being interviewed to prove his case before a final decision was taken.

Conclusion

With regard to complainant's main grievance the Ombudsman concluded that the way in which MCAST had carried out the selection process was flawed and had deprived complainant of any chance to compete for the post. This approach attracted the criticism of the Ombudsman who considered that on these grounds the grievance was justified.

Regarding the other claim of undue delay in addressing complainant's concerns and that correspondence with him had taken a very long time, the College authorities acknowledged that there had been a slippage on their part. They pleaded that this had happened because the official who was responsible to send a reply to complainant had been away from work for six months.

The Ombudsman commented, however, that this reason did not completely absolve MCAST although he noted that in a letter to complainant the Principal of the College had personally apologised in writing to complainant for this delay and had even admitted that it was not acceptable for the College to treat applicants in this way. The Ombudsman stated that he considered as a positive sign the fact that the authorities had issued a spontaneous apology to complainant and stated that the issue of an apology to citizens in instances of administrative failure should be done as a matter of routine.

The Ombudsman also took note of the commitment given to his Office by the College authorities that they had taken internal measures so as to ensure that a recurrence of this failure will be avoided.

On the basis of his findings the Ombudsman concluded that complainant's grievance was justified only insofar as he had been deprived of a proper hearing by the selection board. However, in the light of the above consideration and given that the appointment had already been made, the Ombudsman stated that no further consideration or action was warranted.

Case No F 156

QORMI LOCAL COUNCIL/PARLIAMENTARY SECRETARIAT FOR SMALL BUSINESS AND THE SELF-EMPLOYED

Disarray at the Qormi open-air market

The complaint

The Ombudsman received a multiple complaint from eighteen market hawkers who started to sell their wares from streetside stalls at de la Cruz Avenue at the Qormi open-air market after May 2002. They alleged that they were left in the lurch and subjected to discrimination and unjust treatment that harmed their interests and their rights when sites at this market were allocated to other hawkers who set up their stalls after them.

Complainants went on to explain that after a survey held in 2004 by the Parliamentary Secretariat for Small Business and the Self-Employed, most of them appeared in a list of hawkers at the Qormi market that was prepared by the Secretariat while for some unknown reason, others in their group were left out. They stated that since they all had a licence issued by the Trade Licensing Unit to act as market hawkers, they were at a loss to understand why the Qormi Local Council had not allocated a site to them when the Qormi open-air market was reorganized since under regulation 5(7) of Legal Notice No 119 of 2002 they should have been given a site to carry out their activity in preference to any other applicant.

Facts of the case

Legal Notice No 119 of 2002 (Activities requiring permit by Local Councils Regulations, 2002) that regulates commercial activity in outdoor markets sought to introduce order in open-air markets in Malta and Gozo. The regulations place the onus on Local Councils to ensure that hawkers in outdoor markets place their stalls in spaces that are allocated to them and that are appropriately identified by a site number and stipulate that every

year the names of all licensed hawkers at open-air markets and the identification numbers of their respective sites are to be published in the *Government Gazette*. According to these regulations hawkers should submit applications for the issue of a licence to the Local Council and require the authorisation of the Council where the activity is registered in order to set up their stalls while Local Councils cannot allocate more than one fixed site to any hawker in any open-air market.

The Legal Notice also provides that Local Councils should allocate new spaces for the setting up of stalls in authorised open-air markets on a first-come, first-served basis. However, regulation 5(7) lays down that any hawker already holding a valid trading licence when the regulations were first published on 28 May 2002 and who carried out a commercial activity from an open-air market on that date had the right to be allocated a space in this market before any other applicant.

The Ombudsman found that after surveys by the police authorities in 2000 and 2002 to identify hawkers who set up stalls at the Qormi open-air market, an inspection by officials from the Parliamentary Secretariat for Small Business and the Self-Employed in January 2004 to establish the number of hawkers revealed that there were 24 hawkers in a section of this outdoor market that occupied a stretch of de la Cruz Avenue. When a second inspection took place a week later, this number had gone up. In a bid to limit this uncontrolled sprawl in de la Cruz Avenue, it was agreed that the Secretariat's list of authorised hawkers in Qormi for 2004 should include hawkers who set up their stalls in this area and who already appeared in the list for 2002. As a result of this decision ten other hawkers were allocated space for a stall in this avenue whereas complainants who had all started to operate at the market after May 2004, were not included in the 2004 list.

There was, however, another consideration by the Qormi Local Council to explain why complainants were left out of the list of authorized hawkers for 2004. Since 1999 the Council had objected that the section of de la Cruz Avenue where complainants used to set up their stalls should form part of the market because of the problems caused by traffic congestion in the area and so the Council had not painted any signs on the ground in this street to indicate where stalls could be set up. This was the reason behind complainants' exclusion from the list of approved hawkers for 2004 that was first issued by the Qormi Local Council in the *Government Gazette* on

23 April 2004 even though most of them appeared on the Parliamentary Secretariat's list after the two inspections in January 2004.

This exclusion came as a huge surprise to complainants. In their view although they started to set up their stalls after May 2002 and the Local Council did not allocate a fixed site for their stalls in de la Cruz Avenue, they claimed that once like all the hawkers found operating at the Qormi market during the 2004 survey they had been issued with a note by the Secretariat to the effect that they were carrying out their activity on that date, this note gave them the right to continue to operate their stalls without any hassle. Faced with this situation, the Qormi Local Council accommodated all these hawkers in the market.

The Ombudsman observed, however, that despite the regulations the official list of authorized hawkers for 2004 included hawkers who occupied two adjacent stalls or who shared the same stall while one site was even shown to belong to three different hawkers. Officials from the Secretariat referred to their "*understanding*" with the Qormi Local Council at the time of their survey that hawkers who occupied more than one space might possess a permit issued in the name of another family member that enabled them to link their stalls together. They explained that for the purpose of their exercise these hawkers were considered to hold a separate licence and to occupy only one site although at that stage no verification was done regarding the authenticity of their licences.

The Ombudsman was told that after this survey, in order to remedy this situation the Qormi Local Council asked hawkers who were found to occupy more than one space to present another licence for a market hawker issued by the Trade Licensing Unit in the name of another member of their family. The Council confirmed that as soon as a second licence was presented, it had sanctioned the allocation to these hawkers of a stall that was larger than that allowed by law regardless of the fact that these licences were issued in 2004 and without any consideration as to whether individuals being allocated a stall in this way had ever acted as market hawkers in Qormi before or to the date when they had started to operate at the market.

During his investigation the Ombudsman also found that three complainants had a hawker's licence issued before the regulations of 2002 came into force – and according to these regulations, these hawkers were

entitled to precedence in the allocation of a stall if they used to carry out their activity in the market or in an area previously considered to form part of the market.

Considerations by the Ombudsman

The main issue underlying this grievance was that although complainants had set up their streetside stalls in de la Cruz Avenue after May 2002, they were not allocated any space after the reorganization of the Qormi market whereas other persons who never carried out any trading activity there or who started to set up their stalls even later, were given ample space from where to carry out their business.

The Ombudsman stated that his understanding of Legal Notice No 119 of 2002 was that to be given preference in an open-air market, a hawker needed first of all to have a licence to set up a stall in an outdoor market before this Legal Notice came into effect on 28 May 2002. However, since complainants had set up their stalls in de la Cruz Avenue after May 2002 even though the Local Council was reluctant to allow this area to form part of the market, the Ombudsman was of the view that they could claim no precedence over other hawkers.

The Ombudsman pointed out that the Qormi open-air market started several years before the regulations were issued and that a large number of hawkers had set up their stalls without authorization. He realized, therefore, that despite efforts by the Parliamentary Secretariat and the Local Council to organize this market, at this late stage the issue of a call for applications for the allocation of spaces to hawkers on the basis of the existing regulations was likely to give rise to even greater problems especially in the light of the haphazard way in which these regulations had already been implemented.

The Ombudsman referred to surveys undertaken in 2000 and 2002 to compile a list of hawkers who operated at the Qormi open-air market and expressed surprise that instead of making use of these records which were likely to be closer to the spirit of the regulations of 2002, a new survey was undertaken in 2004 and that, regardless of the regulations, stalls were allocated to hawkers on the basis of the findings of this survey. However, since the Council was not in favour that de la Cruz Avenue which served as the base of complainants' operations should form part of the town's market,

these hawkers were deprived of their "*right*" to have a site from where to operate and were excluded from the list of authorised hawkers which appeared in the *Government Gazette* in April 2004.

According to the Ombudsman, although the January 2004 survey was meant to identify and control the number of *bona fide* hawkers, this exercise was not conducted seriously. Although regulations expressly prohibit hawkers from having more than one stall in the same market, the survey accepted hawkers who occupied two stalls and the Ombudsman commented that the "*understanding*" reached between the Secretariat and the Qormi Local Council regarding these hawkers was unacceptable.

The Ombudsman noted that what happened afterwards was that, regardless of all other considerations, hawkers with more than one stall were asked by the Local Council to provide evidence that other members of their family held a hawker's licence issued by the Trade Licensing Unit although it emerged that even licences presented by business associates of these hawkers were accepted with no questions asked. As a result those able to lay their hands on a licence for market hawkers were allocated space by the Local Council where to set up their stalls. This move further aggravated the situation for complainants because persons who never before carried out any activity at the Qormi outdoor market were allowed all of a sudden to enter the fray and to operate as hawkers.

The Ombudsman pointed out that the decision by the Qormi Local Council to accept licences issued by the Trade Licensing Unit after the survey of January 2004 had been held was unacceptable. Equally unacceptable was the other decision to accept hawkers who registered with the Department of VAT after the list of hawkers had already appeared on the *Government Gazette* in April 2004.

In the Ombudsman's opinion failure by the Council to insist that hawkers had to present a valid trading licence issued prior to January 2004 meant that complainants were justified to claim unjust treatment when they were not allowed to set up their stalls while other hawkers who started their business activity later or, possibly, had never before set up their stalls at the Qormi market, were accommodated.

The Ombudsman commented that another disturbing aspect of the whole situation was the fact that despite evidence which showed that twenty sites

at the Qormi outdoor market had not been allocated, fourteen of these sites were occupied unlawfully and being used without any legal title. This situation gave rise to difficulties that were hard to overcome and showed a lack of control on the part of the authorities.

Conclusions and recommendations

Having taken everything into account the Ombudsman concluded that:

(i) since the Qormi market was in existence before the 2002 regulations came into force, this led the Ombudsman to believe that it was impossible at this stage to enforce the 2002 regulations since this was likely to give rise to even greater problems instead of contributing towards a solution of the situation;

(ii) the 2004 survey by the Parliamentary Secretariat for Small Business and the Self-Employed would have been more reliable had it taken into account the findings of the survey by the police authorities in 2002 when the regulations had been issued although the Ombudsman felt that this mistake had not prejudiced complainants' position;

(iii) the "*understanding*" between the Secretariat and the Qormi Local Council would have been more credible if hawkers who occupied more than one space when the survey took place had been requested to present hawkers' licences in the name of other members of their family that were valid before the day when the survey was held; and

(iv) acceptance by the Local Council of licences for market hawkers issued after the survey undermined any good intention behind this "*understanding*" with the result that persons who did not possess a valid licence to set up a stall in the market before the survey was held were given precedence over complainants even though complainants' stalls were outside the market zone defined by the Council and they had started to carry out their activities in this area long before other hawkers; this gave rise to complainants' justified grievance and drove the Ombudsman to recommend that they deserved an appropriate remedy.

The Ombudsman stated that the disarray at the Qormi market was attributable to failure by persons who had the duty to ensure existing

regulations would be observed. Instead, the utter disregard of these regulations gave rise to a situation where some hawkers were allowed to sell their wares or even to operate from more than one stall when they had no right at all to be there; other hawkers were entitled to set up a stall but were not allowed to do so; others carried out their activity illegally but were still recognised as *bona fide* hawkers; while there were others who, despite having no right to set up their own stalls, were aggrieved to find that other hawkers who started to sell their wares later and were not covered by a trading licence had been awarded space to set up their stalls. This was the state of play at the Qormi open-air market revealed by the Ombudsman's investigation.

Feeling that it was not useful to investigate what had led the situation to degenerate to this extent, the Ombudsman put forward two options:

- under the first alternative, the position could be clarified by a rigid application of the regulations so that hawkers who were ineligible to set up a stall in this market in the first place and who remain ineligible to do so, would no longer be allowed to set up their stalls. Following this exercise, any remaining vacant spaces would be allocated strictly in accordance with a waiting list established according to regulations;
- under the second alternative, steps would be taken so that all those who were allowed to set up a stall, including complainants, would be allocated a site from where to continue their activity.

The Ombudsman recommended that the Qormi Local Council should:

- grant permission to set up a stall in the market only to eligible persons under a rigid application of existing regulations while declaring that hawkers not abiding by these regulations were operating illegally and had to make way; this would enable the allocation of any extra spaces to hawkers who are now setting up their stalls in the market subject to a strict observance of the sequence of the date when each hawker first set up his stall there; or
- agree to allocate a space to all the complainants within six weeks from the submission of the Ombudsman's report.

The Ombudsman concluded that regardless of the option selected by the Qormi Local Council, the review of regulations on open-air markets should be speeded so as to ensure that when new regulations take effect, they

would be applied equitably and in a uniform manner so as to avoid a repetition of the abusive situation revealed by this complaint.

During a meeting of the Qormi Local Council that took place soon after the submission of the Ombudsman's report, councillors were unanimous in their view that it did not seem practical to extend further the existing footprint of the town's outdoor market in order to provide space for more hawkers. It was therefore agreed to try to identify an alternative location that would be larger than the existing site where the Qormi open-air market could be set up and allow hawkers to be accommodated without any undue inconvenience to residents.

Case No F 238 et al

LAND DEPARTMENT/HOUSING AUTHORITY

Expropriation blues

The complaint

The Office of the Ombudsman received several complaints about failure by the Land Department and the Housing Authority to honour agreements on the transfer of property that remained outstanding for various years. Complainants alleged that the Land Department and the Housing Authority failed to sign these contracts even though preliminary agreements in some cases had been concluded way back in 1982 and 1991.

Although the details of the four complaints covered by this case note varied slightly, the crux of each grievance was an agreement reached a long time ago between complainants and these two public bodies regarding transfer of land or property which at that time did not belong to the Government. The common link threading these grievances was that although many years had passed, complainants still remained without a legal title to these properties because the title of ownership had not yet been transferred.

Facts of the four cases

Case No F 238

In 1982 the couple involved in this case were awarded a plot of land in Gudja by the Land Department under the Home Ownership Scheme where they subsequently built their residence. In that year they also signed a preliminary agreement of sale with the department and had regularly paid the ground rent ever since. However, when after twenty-five years the couple wanted to sell the house to go and live somewhere else, all prospective buyers balked upon finding that according to law they would not have any title regarding this residence unless the couple were able to show a signed contract with the Land Department on this property.

Case No G 23

In 1987 the Housing Authority awarded a plot of land in Dingli on a perpetual lease to complainants on which they duly built their residence while in 1999 complainants had also signed a preliminary agreement with the Authority in connection with the redemption of the annual ground rent of this plot. In this case when complainants wanted to move out to take up residence elsewhere, they faced the same difficulties with prospective buyers as those faced by the previous complainants in the sense that they still held no formal title to the property despite the fact that they honoured all their commitments with the authorities.

Although on its part the Housing Authority found no objection to the transfer of this property by complainants to third parties, it was unable to enter into a definite contract regarding the land in question because the Land Department had not yet passed this property to the Authority.

Case No G 39

The couple submitting this complaint made a preliminary agreement with the Housing Authority in 1983 in connection with the purchase of a plot of land in Marsascala against the payment of an annual sum until such time as a definite contract would be signed between the two sides. On this site the couple had built their residence. When the couple brought their case to the attention of the Ombudsman and complained that the legal title of this property had not been vested in their names after so many years, the Ombudsman found that as in the other complaints, the formal lease agreement could not be signed since even here the Housing Authority awaited the transfer of the land from the Land Department.

Case No G 104

A family that entered into a promise of sale with the Housing Authority in 1986 for the purchase of a dwelling and had settled in full the agreed price by 1991, was upset to find that after so many years the contract with the Authority remained pending. In this case too the Authority awaited the formal transfer of the dwelling to the Land Department before it could enter into a contract that would give the family a legal title to this property.

Findings by the Ombudsman

Since a common link between these complaints was failure by the Land Department to take appropriate action, the Office of the Ombudsman asked the department for an explanation.

In its defence the Land Department explained that these four instances reflected grievances that it received regularly from residents in various government housing estates. The problem in these cases is that years ago the Government had expropriated from private landowners the land on which these housing estates were built but compensation for these sites remained outstanding. The department pointed out that once the Government settles compensation that was due for these plots, it would be able to transfer these properties to the Housing Authority by means of a legal notice and this would in turn pave the way for the Authority to conclude contracts for the sale or the lease of the properties involved.

The Land Department explained that it lacked funds to effect compensation for property acquired prior to 1993 and that for various years funds allocated by the Government in its annual estimates to the department to meet costs for the expropriation of property were not enough to meet even expropriation costs in instances where decisions by the Land Arbitration Board on payment due for expropriation were binding. The department assured the Ombudsman that it would give priority to these cases once it would be provided with the necessary funds.

The Ombudsman commented that it resulted that outstanding payments for expropriation were limited to cases where the Government had taken over private property prior to 1993 since after that year no property was expropriated unless the department or public authority involved already had funds at its disposal to meet expropriation costs. Prior to 1993 the President's declaration for the expropriation of property by the Government would still take place even though funds to cover expropriation costs were not available.

The Ombudsman stated that it all boiled down to inadequate funding for the payment of compensation to persons whose property was taken over for public purposes prior to 1993. He explained that unless payment is made to

the original owners, expropriated property is not considered as government-owned land and cannot pass over to citizens occupying this land.

The Ombudsman maintained that the annual allocation of funds to the various departments and public authorities is the prerogative of the House of Representatives and that he has no jurisdiction over Parliament. The Ombudsman cannot insist upon this institution to provide funds needed to cover all pending instances of expropriation and associated costs.

Notwithstanding this, the Ombudsman commented that the Government is obliged to provide adequate funding for outstanding instances of expropriation and should find an equitable solution for this situation as soon as possible. He stated that in his opinion it is unacceptable for a country to pay lip service to its democratic credentials and to its respect for fundamental human rights.

In the Ombudsman's view this situation gave rise to injustice among owners of expropriated land who have not yet been given what belongs to them by right while in instances where judicial proceedings are still in progress, this situation affects in a negative way the fundamental right to a fair hearing in a reasonable time.

The Ombudsman felt that these circumstances also hurt persons who had entered into a promise of sale with the Government to acquire land that was expropriated under various titles. These citizens not only paid the lease, and possibly even paid the full price of the property, as from the date of the promise of sale but were then made to carry out improvements at a time when the land had not yet been transferred to them.

The Ombudsman observed that many promises of sale in which the Government undertook to transfer land and property to citizens and on the basis of which these individuals made improvements worth thousands of Maltese liri, had lapsed a long time ago. A promise of sale that is not done by a public deed is valid for five years and if it is not renewed, as had happened in these cases, the agreement is dissolved and no party can be forced to honour obligations that appear in the promise of sale. This means that, at least in theory, the rights of complainants and of others who were in the same situation were seriously, if not irretrievably, prejudiced.

The Ombudsman explained that according to law, improvements and buildings which citizens make on land that is given to them by means of a mere promise of sale do not belong to them at all but are considered as improvements on land that remains firmly government property by virtue of the President's original declaration of expropriation for public purposes.

As a result, complainants do not have the right to transfer to third parties improvements made on land that does not even belong to them. They also have no right to request the Government to enter into a formal contract to transfer any such land to them. This is due to the fact that the Government itself would not have as yet acquired any definite title over such land and also because the promise of sale on this land would have expired a long time ago. In this regard complainants were in an even more precarious situation than citizens whose land was expropriated for public purposes in the sense that these former owners at least have a title over the land and, in some cases, are awaiting a decision by the Courts on the actual amount of compensation that is due to them.

The Ombudsman understood that besides legal complications, these circumstances give rise to uncertainty. Citizens who built their own homes many years ago and now wish to purchase a smaller residence are prevented from doing so while other couples who went their own separate ways face similar difficulties. This also occurs in the case of persons who inherit property originally covered by a promise of sale and are then taken aback to discover that they have no legal title over this property and that this situation does not even allow them to include any such assets when making arrangements for the disposal of their inheritance.

The Ombudsman stated that this situation is undoubtedly a direct consequence of maladministration by successive administrations. It has been allowed to degenerate to the point that it may be considered to amount to a violation of the rights of individuals under ordinary laws as well as of their traditional constitutional rights and not least of their newly found rights of the European Union. Given that an ordinary citizen who is expected to act as a *bonus paterfamilias* is liable to sanctions by the country's judicial and executive organs if he administers his possessions in this way, a public administration that is responsible for a similar situation deserves to face these sanctions as well.

The Ombudsman was of the view that the inordinately long time that was allowed to pass without any solution to this quandary cannot be justified. The inequity of this situation is even more blatant when it is recalled that successive administrations resorted to the issue of expropriation orders on various properties and sites in the public interest when they were aware that in most cases not enough public funds were available to cover the payment of compensation to the rightful owners of these properties. The Ombudsman emphasized that this is not the way to administer public property and to ensure an equitable treatment of citizens. Thankfully, this practice has now been brought to an end.

The Ombudsman observed that time is ripe for a strong effort to find an effective solution to this situation. This would entail the allocation of adequate funds to remedy the damage done to various citizens including complainants who have to put up with this injustice till the present day.

Conclusion

The Ombudsman concluded that the grievances raised by complainants were justified and that they were fully entitled to expect their long standing agreements with the Government to be confirmed by a contract according to law. He also insisted that the Land Department should at an early opportunity provide an effective and just remedy for this injustice.

He therefore recommended that, as a matter of urgency, appropriate steps be taken in consultation with the Attorney General to respect the rights of all those persons who entered into a promise of sale with the Government that was not followed by a formal contract in respect of the property involved. In this way the Government would remedy the act of maladministration for which the Land Department is solely responsible even though in the meantime these promises of sale have expired.

The Ombudsman recommended that effective action be taken to remedy in a short time injustices that have no place in a democratic environment. This action would give priority to cases that, in the light of an appropriate evaluation, would be found to deserve immediate attention because this delay has already caused substantial harm to many citizens.

In his ongoing contacts with the Land Department regarding these complaints, the Ombudsman referred to the proposal outlined in the *Budget Speech 2007* where the Government, recognizing that a large number of citizens had waited for many years to receive compensation for land that was expropriated for public purposes, proposed to set up a Property Fund worth Lm20 million to settle the amounts due at a faster rate. Despite the Ombudsman's insistence that this Fund should be established as a matter of urgency so as to safeguard the rights of citizens who found themselves embroiled in this situation, the Land Department informed the Ombudsman that preparatory work in connection with the setting up of this Fund was still in progress at the end of 2007.

Case No G 117

MALTACOM plc

A hotly contested headship position

The complaint

A Maltacom employee who felt aggrieved by the outcome of his appeal before the company's Board of Appeals (Promotions) with regard to the call for applications for the post of Head, Mechanical Maintenance Unit resorted to the Office of the Ombudsman for an investigation of his grievance. In his complaint he explained that he also felt hard done by since he believed that once he had placed second in the final order of merit, he was entitled to this post when the selected candidate reached retirement age a few months later and the vacancy arose again.

Facts of the case

The Ombudsman found that in his appeal to Maltacom's Board of Appeals (Promotions) against the original decision by the selection board for the post of Head of the Mechanical Maintenance Unit, complainant raised the following issues:

- although the successful candidate lacked experience in the leadership of a maintenance unit, he was awarded the maximum number of points for relevant work experience whereas complainant was awarded lesser marks even though for six years he performed a wide range of duties including tasks in the section responsible for air conditioning plant that enabled him to acquire experience that was relevant to the post in question;

- the selected candidate was awarded maximum points for academic qualifications when he did not possess any qualifications that were better than those held by complainant himself and was also

awarded two points for computer literacy when he was not familiar with computer applications;

- complainant requested the Board to seek the views of the person who was responsible for the management of the department where he was working to provide details about his work ethic and his commitment to his duties;

- insofar as personal skills and the ability and willingness to learn new things and competencies were concerned, complainant insisted that the selected candidate had only followed staff training programmes organized by the company whereas he had met out of his own pocket the fees for a course in project management to provide even better service at his workplace.

Complainant also claimed that although during his interview he should have been asked questions that were related to his work, the questions by the selection board were not at all connected to his duties. He also alleged that a member on the selection board might have had a conflict of interest.

Maltacom's Board of Appeals (Promotions), set up in accordance with the Collective Agreement between the company and the General Workers' Union, met to consider complainant's appeal and after having listened to his representations, reached the following conclusions:

- since complainant's experience was limited to building maintenance including the organization of trades linked to building maintenance programmes and these activities were not directly related to the position for which he had applied, it was agreed that marks awarded by the selection board for his work experience were correct and he did not deserve any additional points;
- despite an adjustment made by the Board to marks awarded both to the successful applicant and to complainant for their academic qualifications, complainant still had five more marks than the other candidate under this criterion;
- under criteria such as work ethic, computer literacy and personal skills and competencies, complainant had been awarded maximum marks;

- during their interviews the two candidates were asked the same technical questions related to the post but the Board did not enter into the merits of the points that were awarded to complainant.

In the circumstances the Board decided that with the exception of marks awarded for qualifications, the marks given to the two applicants should not be adjusted.

Following this decision complainant asked for a copy of the report by the Board of Appeals but this request was turned down after the Board received legal advice that the report was a company document with restricted access and that its distribution would have created a precedent. On its part the company management simply informed complainant that his request had not been accepted.

The Collective Agreement stipulated that under the procedures to be used by the Board of Appeals when considering cases brought to its attention, both the chairperson of the selection board and the employee submitting the appeal should be present. It is also possible for the employee to be assisted by a person of his own choice who has the right to bring forward evidence and to ask questions to company representatives.

With regard to decisions by the Board, the Collective Agreement states that "*… The Board of Appeals (Promotions) … shall submit a detailed report of its decision to the Chairman, Maltacom plc for consideration by the Board of Directors and at the same time inform in writing an employee submitting an appeal about the decision taken by the Board of Appeals (Promotions) with regard to the employee's claim.*"[1]

The Ombudsman noted that in its final report the selection panel had recommended that the post of Head, Mechanical Maintenance Unit be awarded to the candidate who was placed first in the order of merit with eleven marks more than complainant. With regard to complainant the Board commented, however, that it wished "*to highlight the excellent*

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[1] "*Il-Bord ta' l-Appelli (Promozzjonijiet) ….… għandu jissottometti rapport dettaljat tad-deċiżjoni li jkun wasal għaliha liċ-Chairman tal-Maltacom plc għall-kunsiderazzjoni tal-Bord tad-Diretturi, u fl-istess ħin jinforma bil-miktub lil kull appellant bid-deċiżjoni tal-Bord ta' l-Appelli (Promozzjonijiet) fil-konfront tiegħu.*"

attributes and qualities that … (complainant) … *possesses. These were amply proved during the interview. Although …..… not as much versed as the selected candidate on the functions attached to the post of Head, Mechanical Unit he demonstrated that he merits a higher grade that reflects his present responsibilities, namely those of Head, Property Maintenance Unit. In this regard the selection board also recommends the issue of a call for applications for a higher post* … (that would) … *adequately compensate* (complainant) *for his dedication and loyalty towards the company albeit carrying an inferior grade than the level of his current responsibilities*."

The company, however, failed to implement this recommendation.

The Ombudsman noted that a few months after the successful candidate was appointed to the post, he left work upon reaching retirement age and his duties were assigned to two other employees.

When the Ombudsman sought the views of the company management regarding the vacancy that arose when the successful candidate retired, it was explained that it was the selection board itself which pointed out that complainant was not well versed in the functions attached to the post of Head, Mechanical Maintenance Unit and since the duties of the Head of this unit and of the Property Maintenance Unit are of a different nature, it was felt that it would be inopportune to appoint complainant to the post of Head, Mechanical Maintenance Unit especially at a time when the company was undergoing a restructuring programme for its employees.

With regard to the selection board's recommendation that complainant deserved a higher grade, management stated that this issue was due to be tackled at the time that complainant's job would be evaluated in connection with the restructuring exercise.

Considerations and comments

The Ombudsman observed that the privatisation of Maltacom plc took place some time after the complaint reached his Office and as a result his investigation was limited to the company's actions before it was privatised since its new status excluded it from the Ombudsman's jurisdiction. This meant that complainant's request to the Ombudsman to recommend his

appointment to the post after the retirement of the successful candidate could not even be considered.

The Ombudsman noted, however, that complainant had followed the procedures laid down in the Collective Agreement when he felt aggrieved by the results of the interviews by the selection board. Since according to the Collective Agreement, decisions by the Board of Appeals (Promotions) are final, in similar instances the role of the Ombudsman is limited to a review as to whether the Board observed the established procedures and whether it gave adequate consideration to all the issues raised by appellant. The Office of the Ombudsman cannot enter into any subjective judgement passed by this Board with regard to the merit of an appeal that is lodged with the Board.

From information gathered by the Ombudsman it resulted that the Board had observed the provisions of the Collective Agreement and had invited complainant to attend its proceedings when his appeal was under consideration. This allowed him the opportunity to put questions regarding the issues as laid down in the Collective Agreement.

The Ombudsman then proceeded to examine whether the Board gave due consideration to the issues that were raised by complainant on the strength of the report that was submitted by the Board of Appeals but that was not made available to complainant. He noted that the Board had reacted as follows to the seven issues raised by complainant:

- after having examined the relevant work experience of complainant and of the successful candidate, Board members shared the view that complainant's experience in the field of maintenance was not at all relevant to the type of experience that was required by the person who would head the Mechanical Maintenance Unit;

- with regard to complainant's claim on the marks awarded for academic qualifications, the Board found that the selection panel was responsible for a genuine oversight in its award of marks to the two candidates and proceeded to correct this situation in a way that under this score complainant ended with five marks more than the successful applicant;

- the Board noted that complainant was awarded maximum points for his attitude towards work, computer literacy and personal skills although it

seemed to have allowed to fall by the wayside complainant's allegation that the chosen candidate did not deserve the points that he was awarded. The maximum total amount of marks awarded to complainant for computer literacy and personal skills was 10: and since complainant had objected to the two marks awarded to the chosen candidate for computer literacy, this meant that when added to the 5 marks under academic qualifications, the total number of points being contested by complainant at most stood at 7 when the difference between their final total marks was 11. The Ombudsman commented that even if for argument's sake complainant's assertion was right, he would still not be able to match marks awarded to the successful applicant.

In its final report the Board referred to the explanation given by the selection board regarding the questions that were put to candidates during their interviews and confirmed that issues covered by these questions fell under the tasks of the Head, Mechanical Maintenance Unit. On this point the Ombudsman held that the choice of questions put to candidates in an interview or test is obviously the sole prerogative of the examining board and a candidate has no right to expect to be allowed to select these questions or to decide which topics and issues are to be covered.

The Ombudsman also pointed out that the report by the Board of Appeals failed to refer to allegations by complainant that a member of the selection board had shown signs of prejudice. Although the Ombudsman found that this allegation had no backing, he commented that the Board was expected nonetheless to refer to this allegation and to rebut complainant's claim.

In this connection the Ombudsman observed that the member of the selection board who was mentioned by complainant as having a potential conflict of interest was merely one of three board members even though he occupied the role of Chairman of the board. The Ombudsman noted at this stage that the Chairman had in fact entered a positive note regarding the merits of complainant and that the report had received the board's unanimous support.

In the course of his investigation the Ombudsman came across an interesting issue – this concerned the extent to which an appellant has the right to request to be given a copy of the report by the Board of Appeals. The Ombudsman observed that although the Collective Agreement did not

consider this as an automatic right of a person lodging an appeal, it appeared likely that this was due to the fact that the Board included a representative of the company's employees.

The Ombudsman pointed out that in his view citizens are entitled to be given reasons for actions and decisions that are taken by those holding positions of authority and that directly affect them, especially when these decisions hit them in a negative manner. He observed that in view of the provision in the Collective Agreement regarding this issue he was reluctant to issue a recommendation on the matter but advised complainant that he might seek recourse to the Commissioner for Data Protection.

The Ombudsman stated that in the course of his investigation it had resulted that for a long time complainant was given responsibilities that pertained to a grade that was higher than his substantive position. This was confirmed by the selection board which went on to recommend that complainant should be awarded the grade and salary scale of Head, Property Maintenance Unit in recognition of his ongoing responsibilities and duties. The Ombudsman noted, however, that Maltacom not only failed to implement this recommendation but also failed to explain why it had not acted on this proposal by the selection board.

While recalling that in the meantime Maltacom plc had been privatised and this excluded the company from his jurisdiction, the Ombudsman commented that he still considered this failure as an instance of maladministration. He insisted that it is unjust to expect employees to perform duties that are above their substantive grades except for a short period and that those who carry out higher duties should be shown due recognition by means of an appropriate remuneration or by being placed in grades and salary scales that are applicable to the range of their duties.

Conclusion

After having examined the merits of this case, it resulted to the Ombudsman that the Board of Appeals (Promotions) acted in accordance with procedures laid down in the Collective Agreement. In addition it resulted to the Ombudsman that the Board had to a large extent given due consideration to the issues raised by complainant although it had turned a blind eye to complainant's allegation regarding a possible conflict of

interest on the part of one of the members of the selection board and also failed to investigate the allegation regarding marks awarded to the selected candidate for his computer literacy and his work competencies. However, given that marks awarded to the successful candidate on both these counts amounted to 7 and there was a difference of 11 between marks awarded to complainant and to the successful candidate, the Ombudsman held that even if complainant's allegation were sustained, this would still not be enough to tip the balance in his favour.

In the circumstances the Ombudsman concluded that despite the omissions in its report, the Board of Appeals would not have reached a different conclusion.

The Ombudsman also observed that prior to its privatisation Maltacom failed to give a valid reason why it had not accepted the recommendation by the selection board regarding complainant. According to the Ombudsman the company acted wrongly when it allowed complainant to perform tasks that pertained to a grade that was higher than his substantive grade for several years without giving any due recognition to his merit. However, since in the meantime the company's ownership changed and the Ombudsman had no jurisdiction over the new company, it was now beyond his power to submit a direct recommendation to this company to consider the possibility of providing redress to complainant.

Nonetheless, the Ombudsman declared that it would not be amiss for him to state that complainant's merit that was amply recognized by the selection board and by the Board of Appeals should also be duly noted in the restructuring exercise that was in hand at the time that he submitted his report. The Ombudsman remarked that it is only fair that employees are not asked for a long time to carry out duties that are higher than their substantive grades without adequate compensation not only in terms of financial remuneration but also in terms of an appointment to a substantive position that will truly reflect their work and service to the company.

With regard to complainant's request to be given a copy of the report by the Board of Appeals, the Ombudsman refrained from passing any judgement once the Collective Agreement does not cover this issue. He noted, however, that complainant had other means at his disposal to gain access to this report if in fact he had a right to see this document.

Case No G 176

VALETTA LOCAL COUNCIL/POLICE

A mix-up that involved no consequential damage

The complaint

Dino Bates, a resident in Nadur, Gozo was surprised early in 2006 when he went to renew the road licence of his vehicle and discovered that according to police records there was an outstanding ticket for an offence which was alleged to have taken place in Valletta and in which his car was involved. Since at that time vehicles needed a special permit to enter Valletta that his car did not even have and at the time that the offence took place his car was said to have been driven by a person whom he did not even know, Bates submitted his case to the Petitions Board. In mid-March 2006 the Board cleared him of the offence.

Since it was not before this date that Bates could effect payment of the vehicle licence that had effectively expired at the end of February, he lodged a complaint with the Office of the Ombudsman that he had been deprived of the use of his car for two whole weeks. He also asked the Ombudsman to investigate whether there had been any manipulation of motor vehicle records at the Valletta Local Council or the Police to make it look as if his car had been involved in a traffic contravention when nothing of the sort had happened.

Considerations by the Ombudsman

The Ombudsman contacted the Valletta Local Council and the Police and looked carefully at the records concerning this strange occurrence but concluded that by no stretch of the imagination could it be said that any manipulation of these records had taken place. All evidence pointed towards a genuine mistake by the Police when the summons was being issued and although clearly the whole episode was characterized by a large

element of carelessness and lack of attention, no facts emerged which made the Ombudsman believe that any element of bad faith could be attributed to the Police or to the Valletta Local Council which in the final analysis had issued the traffic offence summons following a report which the Council had received from a police official.

In view of these circumstances the Ombudsman pointed out that it could not be said that every single mistake, even one made in good faith, ought to give rise to a search in order to determine responsibility and establish whether any consequential damage was due.

The Ombudsman pointed out that during a meeting that he held with Bates, he found that although it was true that complainant had suffered inconvenience for a whole fortnight since he could not make use of his car, he had not in fact suffered any material damage as a consequence of this situation. The Ombudsman found that during this period complainant was able to make use of alternative transport facilities and did not need to resort to a rented car in order to go round the island.

Conclusion

The Ombudsman concluded that Bates was justified to complain that he had been the victim of an administrative error when a traffic offence ticket was issued in his name even though he was not involved in any offence and it had been fairly easy for him to clear his name.

According to the Ombudsman this was clearly a genuine mistake and since complainant had not suffered any material damage as a result of this mix-up, he did not see the need to submit any recommendation in connection with this grievance or feel that the award of any remedy was warranted in this instance.

Case No G 209

DEPARTMENT OF CUSTOMS

Strong misgivings about a bank guarantee

The complaint

In January 1995 a local shipping agency reached an agreement with the Department of Customs to operate a bonded warehouse at the Hal Far Groupage Complex for groupage cargo that it brought to the island on behalf of its clients. Among various conditions to operate this facility, the agency undertook to provide security in the form of a bank guarantee of Lm6,000 in favour of the department.

Subsequent to Malta's membership of the European Union, Rocco Baldini, a director of the agency, requested the Department of Customs to waive the requirement for a bank guarantee because in his view this condition was no longer necessary. When the department turned down his request and insisted that unless he renewed the guarantee it would suspend his licence to operate the warehouse, Baldini submitted a complaint to the Office of the Ombudsman.

Complainant felt that since his company was using Hal Far to unstuff goods arriving exclusively from EU Member States, mainly Italy, and once after Malta's accession to the European Union the Hal Far facility no longer served as a bonded store but to hold goods in temporary storage, the bank guarantee to cover duties and fees that may become due in relation to goods stored by the company was not required any more.

Facts of the case

Officials from the Department of Customs explained to the Ombudsman that when in the mid-90s the Government built a groupage terminal in Hal

Far consisting of twenty warehouses and all groupage operations were transferred to this site, the department and groupage operators had agreed that in the event that any goods stored in these warehouses would be taken out without having been duly cleared, the operators would be required to pay full duty on such goods in addition to any penalty to which they would be liable under the Customs Ordinance. It was also agreed that should the operators fail to pay duty due on the missing goods, any such duty as well as the penalty would be deducted from a bank guarantee that each operator had to issue in the department's favour.

The department explained that these arrangements were introduced because although groupage operators are not considered as importers and their responsibility is to group together consignments of different importers and make arrangements for their transportation to Malta, they are responsible for the imported goods while these goods are stored in their warehouses as if they were themselves their owners.

The first paragraph of the January 1995 agreement between Baldini's agency and the Department of Customs stated as follows:

"*You shall provide the Comptroller of Customs with a security in the form of a deposit in cash or a banker's guarantee issued by a local bank to the amount for the time being of Lm6,000 to cover any duties and any fees that may become chargeable against you or in relation to the said goods stored in the said bonded warehouse and to cover any penalties that may be incurred by you under the Customs Ordinance or any regulations made thereunder*."

Subsequent to Malta's membership of the European Union, goods in "*free circulation*" within EU Member States are considered as intra-community trade and not subject to customs control and can leave a customs area once proof of community status is presented to the Maltese customs authorities. It is also possible that goods of non-EU origin may be imported to Malta through another EU Member State and that duty was paid when these goods first entered the Union. On other occasions, however, when duty would not have already been paid in another EU country and the items would have been transported to Malta under a TI (Temporary Import) document, duty has to be paid in Malta.

Legal Notice No 82 of 2003 designated the Hal Far Groupage Complex as an authorized place for the unloading of all groupage consignments including goods in free circulation. With the exception of Baldini's complaint, however, no objections ever arose about these arrangements after Malta's accession to the European Union in 2004.

The customs authorities pointed out to the Ombudsman that despite Baldini's claim that his agency's groupage operations consisted of free circulation goods from within the EU, there were in fact occasions, admittedly few, when this agency brought to Malta goods of non-EU origin on which excise duties were levied. According to these officials, this showed that complainant has no control over what clients bring to Malta.

The customs administration also explained that after Malta joined the EU, the Hal Far Groupage Complex was considered as a facility for the temporary storage of goods under Articles 50 and 51 of the Community Customs Code.[1] Since this Article grants the Department of Customs the

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[1] Chapter 5 *Temporary Storage of Goods* of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code states as follows:

"*Article 50*

Until such time as they are assignated a customs-approved treatment or use, goods presented to customs shall, following such presentation, have the status of goods in temporary storage. Such goods shall hereinafter be described as 'goods in temporary storage.'

Article 51

1. Goods in temporary storage shall be stored only in places approved by the customs authorities under the conditions laid down by those authorities.

2. The customs authorities may require the person holding the goods to provide security with a view to ensuring payment of any customs debt which may arise under Articles 203 or 204."

Article 203 of the Community Customs Code states that a customs debt on importation shall be incurred upon the unlawful removal from customs supervision of goods liable to import duties and that the debtors shall include any persons who were aware or should reasonably have been aware that the goods were being removed from customs supervision; who held the goods in question under customs supervision; and who were required to fulfil the obligations arising from temporary storage of the goods or from the customs procedure under which those goods had been placed.

Article 204 of the Community Customs Code states that a customs debt on importation shall be incurred through non-fulfilment of an obligation arising, in respect of goods liable to import duties, from their temporary storage or from the use of the customs procedure under which they are placed or non-compliance with a condition governing the placing of the goods under that procedure. The debtor shall be the person who is required, according to the circumstances, either to fulfil the obligations arising, in respect of goods liable to import duties, from their temporary storage or from the use of the customs procedure under which they have been placed or to comply with the conditions governing the placing of the goods under that procedure.

right to request security from every operator, the department held that by doing so it was not subjecting complainant to any unjust discrimination.

The Department of Customs further explained that following Malta's membership of the EU, complainant's bank guarantee was reduced to Lm4,000 and that this amount was established on criteria such as the area of Baldini's warehouse, his track record and good reputation as well as the level of his groupage operations at Hal Far.

The Department of Customs countered that a complete removal of bank guarantees was not considered in the best interest of the administration. It was feared that this could open the door to abuse and allow groupage operators the possibility to claim to operate only from within the EU when this might not be the case.

Finally it was held that Baldini was contesting a contractual clause that he freely entered into and the Department of Customs, as the other party to the contract, was equally free to agree or to refuse to waive this clause.

Complainant remained at odds with the department. Submitting that goods carried by his agency were coming from Italian ports although he did not rule out that certain items might originate outside the EU, Baldini proposed not to handle any non-EU goods while the Department of Customs would in turn waive the requirement for a bank guarantee from his agency. He argued that the fact that his agency did not have any representations that might involve groupage operations from non-EU sources ought to set the mind of customs officials at rest on this issue.

The department was, however, equally adamant and dismissed Baldini's claim that his agency had no representations for groupage business from outside the EU on the grounds that complainant may at any time change his representation without its knowledge and the department does not have the means to be aware of any such developments.

On his part complainant reiterated that this situation was unfair and was an unnecessary burden that non-groupage operators do not have to face. He argued that this situation was particularly unjust because his company was not allowed to use its own warehouse for the storage of groupage cargo and instead had to make use of the Hal Far Groupage Complex and to pay rent for this facility.

Baldini also insisted that existing arrangements regarding Hal Far were unnecessary especially after the introduction of new maritime transportation links to Malta made it possible for groupage operators to transport imported goods straight to the doors of their clients.

Complainant objected that the Department of Customs considered the bank guarantee as a form of security to cover outstanding duty by groupage operators since after Malta joined the European Union customs duties are no longer paid on EU goods. Baldini also explained that since his company paid rent for its Hal Far facility in advance while VAT and excise duties too are paid in advance by cargo receivers, there were no other fees chargeable by the department that could be covered by the bank guarantee. According to complainant, this showed that this guarantee served no purpose and amounted to an unnecessary burden on groupage operators when trade should be as unfettered as possible.

The Department of Customs disagreed sharply on this score and clarified that although goods in free circulation are not subject to customs control, it was still free to undertake any safeguards that it considered necessary. The department insisted that although duty and VAT are paid by the owner of the goods or by his representative, it is responsible to ensure that all the obligations undertaken by groupage operators regarding payments due to the Government are fully observed before certain goods can be removed out of a customs area. The bank guarantees given by operators at the Hal Far Groupage Complex, therefore, not only cover any pending duty but also serve to cover outstanding payments such as VAT to the Department of VAT and allow the Department of Customs to resort to these guarantees to make up for any such overdue amounts.

The department was firm in its stand that a bank guarantee serves as a deterrent and referred to several instances after Malta joined the European Union where groupage operators were put on notice that the department would exercise its right under the guarantee agreement. In these cases operators complied with the department's request and no further action was taken; and documentary evidence to this effect was shown to the Ombudsman during meetings with officials from the customs administration responsible for compliance. The department admitted that although it only avails itself of the bank guarantee as a last resort, its existence is useful because it ensures that groupage operators fulfil their

obligations. Furthermore, in case of failure, the department is in a better position to take effective action.

Considerations and comments

The Ombudsman pointed out in the first place that complainant had not contested arrangements for the storage and unloading of groupage consignments at the Hal Far Groupage Complex in terms of Legal Notice No 82 of 2003 and that Baldini had made it clear that he only objected to the bank guarantee in the light of changes brought about by Malta's membership of the EU. Nor had complainant alleged that since Malta is a Member State of the Union, this Legal Notice runs counter to the concept of free trade and free movement of goods. The Ombudsman felt, therefore, that there was agreement that the legal requirement in question is in line with EU law.

The Ombudsman noted that complainant restricted his grievance to the fact that the bank guarantee should be waived since his agency only offers groupage services from Italy and goods carried to Malta by his agency are either of EU origin or would already have been cleared by Italian customs. When considering the reaction by customs officials to complainant's request for an exception to be made in his case, the Ombudsman saw that the department rejected this proposal on the grounds that there is nothing to stop complainant from offering new groupage services from outside the EU and that on his part Baldini cannot guarantee the type and origin of goods that he may carry to Malta for his clients. The Ombudsman, however, dismissed this argument since he held that complainant knows his groupage business well enough and is in a position to know the guarantees that he can offer to the department.

The Department of Customs also held that since complainant is bound by a contractual obligation and any changes to this contract require the consent of both parties and once it was not willing to accept Baldini's proposal to waive the bank guarantee, there was nothing that could be done. Although the Ombudsman acknowledged that a contract is law between the parties involved and that the consent of all the parties is required before changes can be introduced into a contract, at the same time he stated that reasons behind the department's refusal to accept complainant's request were still subject to scrutiny by a competent review mechanism such as his Office.

In view of this, the Ombudsman considered whether the reasons given by the Department of Customs to justify its refusal of complainant's request, namely that any exceptions could lead to allegations of unfair and preferential treatment from other groupage operators, were acceptable in the light of *The Ombudsman's guide to standards of best practice for good public administration* issued by his institution in April 2004. In particular the Ombudsman considered that in order to deal properly and fairly with people, actions and decisions must:

- (be taken) *"objectively and in such a way that due weight is given to all relevant factors";*
- *"uphold a fair balance between the interests of private citizens and the general public"* and
- *"respect the principle of equality of treatment so that citizens in the same situation will be treated in a like manner".*

The Ombudsman also observed that dealing impartially with people means "*abstaining from arbitrary action that adversely affects members of the public as well as from any preferential treatment on any grounds whatsoever*" and "*avoiding bias between citizens.*"

Viewed against these guidelines the Ombudsman stated that clearly the Department of Customs was correct to refuse to make an exception to accommodate complainant's request. If it were to do so, it would be in breach of the obligation of an equal treatment of citizens who are in the same situation. It would also run the risk of being accused of bias by other groupage operators if it were to accept Baldini's proposal on the grounds that he handled groupage cargo exclusively from the Italian market and of his reputation as a reliable operator.

For these reasons the Ombudsman stated that in his opinion complainant could not expect to be given any preferential treatment over other groupage operators at the Hal Far Groupage Complex since this would amount to maladministration in not affording equal treatment in similar circumstances.

At the same time, however, the Ombudsman observed that this cannot be taken to mean that complainant cannot raise the charge of discrimination by the Department of Customs in the sense that the department allows

preferential treatment to other groupage operators who make use of other forms of maritime transportation from Italy that were introduced recently.

The Ombudsman noted that the April 2004 publication mentioned earlier expects the administration to "*uphold a fair balance between the interests of private citizens and the general public*". In this case the customs administration, entrusted with responsibility to administer public property and to protect the government's revenue streams, sought to balance these obligations of a general public interest against the interests of a private citizen in his role as a groupage operator. In the circumstances the Ombudsman found no reason to criticize the Department of Customs that sought to retain the safeguards allowed by law to ensure the performance of obligations that were entered into by Baldini's agency to settle any outstanding debts due to the Government. By adopting this approach the Department of Customs was merely fulfilling its responsibility towards the country and the administration.

The Ombudsman also referred to the guidelines mentioned earlier and in particular where it is stated that the administration should "*avoid penalties or charges which are out of proportion in order to ensure compliance with the rules*." On its part the department admitted that following Malta's membership of the EU the need of a bank guarantee from groupage operators had diminished and the amount of the bank guarantee was in fact reduced.

Viewed in this context the Ombudsman pointed out that the issue at stake was the extent to which the bank guarantee was proportionate in terms of monetary quantity to the result that the department sought to achieve by its requirements regarding groupage operators and their obligations *vis à vis* leased property at the Hal Far groupage facility.

The Ombudsman stated that, seen from this viewpoint, his Office is not the competent authority to determine whether the amount of the bank guarantee is too high or too low. He observed, however, that since there is no limit to the value of items that may be brought to Malta by a groupage operator and that in theory it is possible for goods imported from non-EU sources to entail the payment of duties and other dues to the Department of Customs while these goods are still in the custody of the groupage operator, it is not impossible that sums due to the department could exceed the amount of the bank guarantee. With this in mind and once criteria to establish this

amount seemed reasonable and the department had already reduced the original amount while Baldini did not contest the quantum of the guarantee, the Ombudsman concluded that this charge did not seem disproportionate to the intended end.

The final issue tackled by the Ombudsman was whether in the light of Malta's EU membership, the condition that groupage operators should provide a bank guarantee to the customs administration served any purpose. From evidence presented by the department it was clear that this guarantee in fact serves a purpose and that the department had not abused of the bank guarantee or ever capriciously recalled any guarantee. The Ombudsman therefore felt that the department's refusal of complainant's request was justified.

At this stage the Ombudsman made one final point. The agreement between Baldini and the Department of Customs stipulated that the bank guarantee was meant "*to cover any duties and any fees that may become payable against you or in relation to the said goods stored in the said bonded warehouse*[2] *and to cover any penalties that may be incurred by you under the Customs Ordinance or any regulations made thereunder*." The Ombudsman stated that it is clear that the extent of this guarantee was intended to cover dues well in excess of what the law defines as "*customs debt*".

The Ombudsman commented that although it was possible for a groupage operator not to have to pay any customs duties, there could still be other amounts payable to the Department of Customs that would need to be covered by a bank guarantee. In the circumstances there was nothing at law to prevent Government from taking such a measure to protect its interest and the provision of a bank guarantee is normal practice in the conduct of government business. Indeed the Ombudsman stated that action on these lines might even be considered as an act of good administration.

The Ombudsman observed that in truth Baldini's objection ought to have been directed against the present system of obligatory warehousing and that complainant might well be right in maintaining that, especially when groupage operators have their own warehousing facilities and can provide sufficient assurances regarding the payment of dues to the Department of

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[2] Which now reads "*temporary storage*".

Customs, the prevailing system of import procedures and regulations obstructs the free circulation of goods. The Ombudsman recommended that there is clearly a case for streamlining port practices and customs clearance particularly when these might provoke unnecessary costs and suggested that the issue should be considered as part of the wider process of port reform that was in hand at the time that he prepared his final report on this grievance.

The Ombudsman stated, however, that it is not for his Office to comment on these problems or suggest solutions since the jurisdiction of his Office is limited to intervention in cases where laws, regulations, policies and practices are manifestly unjust or improperly discriminatory. According to the Ombudsman the complaint, in its stated terms, cannot be considered to be such since the Department of Customs was essentially invoking a contractual obligation and expecting it to be observed across the board by all those who are by law bound to use the Hal Far facility.

The Ombudsman concluded that despite his findings, Baldini could still continue to insist with the government authorities for a review of the present policies and that these policies do not improperly discriminate against him. As things stand, however, the complaint in its stated form cannot be considered to refer to a measure that is improperly discriminatory insofar as the bank guarantee is being requested from all importers who are by law obliged to use the Hal Far facility.

Conclusion

Taking everything into account, the Ombudsman concluded that the refusal by the Department of Customs to waive the requirement of a bank guarantee to cover use by groupage operators of temporary facilities for imported goods could not be regarded as an act of maladministration and the complaint could not therefore be sustained.

At this stage he closed the file.

Case No G 441

VAT DEPARTMENT

A clear-cut case that took eight long years to be decided

The complaint

In a complaint that reached the Office of the Ombudsman from the former owner of a discount store, the Ombudsman was requested to investigate the outcome of a case that was lodged against the VAT Appeals Board for the period January 1995 to October 1996. Complainant felt aggrieved at the way in which the members of this Board dealt with her appeal because in her view they had failed to consider fairly the pleas that she had submitted to the Board.

In the first part of her grievance, complainant explained to the Ombudsman that the VAT Department had fined her Lm61.20 for underdeclared added tax even though she insisted that at the end of 1995 she decided to stop her business activity and had closed down her store. This was confirmed by documentation which complainant presented to the Appeals Board and that she also showed to the Ombudsman.

Complainant was, however, particularly irked by the fact that it took the Appeals Board more than eight years to reach a decision on her case and argued that since this delay was attributable exclusively to inefficiency on the part of the Appeals Board and the VAT Department, she should not have been fined the sum of Lm125.37 in accrued interest.

Complainant wondered why after more than eight years since she had presented her objection, she was being asked to pay interest that would cover this whole period when, according to law, the VAT Department may serve an assessment in respect of the taxable value of a taxable supply not later than six years from the end of the applicable tax period.

Considerations by the Ombudsman

The Ombudsman commented that in his view the documents submitted to his Office by complainant in connection with this grievance spoke volumes and there was not even the need for him to approach the VAT Department for its views and comments on this complaint. He pointed out that in fact there was not much to be said about the whole issue since facts spoke for themselves louder than any recommendation that he could propose.

The Ombudsman explained that to begin with, the opening section of the complaint did not fall within the jurisdiction of his Office because clearly the procedures of the VAT Appeals Board as well as any decision taken by this Board fall outside its jurisdiction. The Ombudsman Act, 1995 itself clearly prevents the Ombudsman from carrying out an investigation about procedures in front of a Tribunal set up by law. This restriction covers both the merit and the conduct of the process.

The Ombudsman is, however, allowed to investigate whether the administrative process followed by the VAT Department under the relevant legislation with a view to providing an effective remedy for complainant's appeal was in fact carried out properly or not and whether it amounted to an instance of maladministration that caused injustice and damage to the individual involved.

In this regard therefore the Ombudsman was at liberty to investigate whether complainant's allegation that she suffered an injustice because of undue delay before her appeal was determined was tantamount to an administrative failure and could be considered as an act of maladministration.

An investigation by the Ombudsman that would follow these lines could not be considered as a review of the operations of the Tribunal or as an intervention in a quasi-judicial process. Any such investigation by the Ombudsman would merely focus on the circumstances and on the administrative framework within which the Appeals Board ought to have carried out its task and specifically whether the administration had provided the Board with the necessary support to carry out its duties effectively and within a reasonable time.

The Ombudsman explained that this approach was relevant particularly in view of his conclusion in his Final Opinion on Case No F 264 which had covered expressly complainant's right to appeal against a tax assessment that was due to the department as well as against additional tax and interest that had been decided by the Commissioner of VAT. The Ombudsman explained that in this Final Opinion he had focused his attention on the procedures adopted by the Appeals Board in the case of taxpayers who receive estimates issued by the department.

The Value Added Tax Act states that an appeal against an assessment shall not be valid unless it is made within thirty days from the date of the service of the notice against which the appeal is made. Complainant had made use of this right to appeal when she had submitted her appeal to the VAT Appeals Board which had finally established the amount of tax due.

The Ombudsman also referred to his Final Opinion in Case No F 264 where he stated that a taxpayer could send an objection to the VAT Department with regard to fines, interest charges and other issues that are liquidated by the Commissioner. It did not appear that the law established a deadline within which any such objection had to be lodged. This objection could not, however, be presented in connection with an estimate of tax due.

Complainant was therefore fully entitled to submit an appeal to the VAT Department and to the Commissioner of VAT on the amount of additional tax, interest charges and other issues decided by the Commissioner as long as this did not concern the actual amount of tax due to the department. This means that the Commissioner has the discretion to decide about these amounts in the context of a just and fair decision while at the same time taking due consideration of all the circumstances of the case.

The Ombudsman explained that this was being said in order to show that the competence of his institution covers the investigation of complaints about instances of undue delay in decision-taking regarding appeals that are decided by the Appeals Board such as the one under consideration as a result of which complainant was made to shoulder the burden of added interest charges which lay at the core of her complaint.

The Ombudsman stated that undoubtedly every citizen has a fundamental right to have his civil obligations and rights determined within a reasonable

time by a tribunal that is impartial and at the same time independent. It is also accepted that a serious violation of this fundamental right gives rise to the award of appropriate financial compensation. The Ombudsman pointed out that there could be no doubt that an interval of eight years in order to determine an appeal is unreasonable unless there are special circumstances that would justify any such delay.

The Ombudsman observed that the case under consideration seemed to him clear-cut and ought to have been dealt with and concluded in a very short while. It seemed to require no detailed investigation and no complex circumstances were involved which might have justified the length of time taken to review this case. According to the Ombudsman, the Appeals Board could easily have decided the appeal by complainant in just one session; and indeed this was how her appeal had eventually been tackled. In this situation the Ombudsman admitted that he was at a loss to understand why the Appeals Board had taken eight years before it reached its decision on such a straightforward appeal.

The only reason which the Office of the Ombudsman was able to find in order to explain why a decision regarding this appeal had taken so long was the fact that for a considerable time there were great difficulties to set up an appropriate number of appeals boards as well as the administrative structures that are necessary to enable these boards to operate properly.

The Ombudsman held that since this problem gave rise to a considerable backlog for which complainant was in no way responsible, she should not have been made to suffer any negative consequences of the inefficient administration to which she had been subjected at the hands of the VAT Department.

Taking everything into account the Ombudsman was of the view that in this case the Commissioner of VAT should have exercised his discretion regarding the amount of interest charges imposed on complainant by taking steps to ensure that interest due would be capped to the time that in the circumstances would seem reasonable for the appeal to be heard and decided if the department's administrative structures were operating efficiently. The Ombudsman was of the view that this period should not exceed three years.

The Ombudsman also stated that the VAT Appeals Board could easily have resolved an appeal on the lines such as the one lodged by complainant within this timeframe. Indeed, given its straightforward and uncomplicated nature there was no reason why the case was not determined straightaway.

Conclusion

The Ombudsman concluded that in his view the complaint was justified insofar as the time taken by the Board to consider the issue was unreasonable and unacceptably long and that this delay was essentially due to administrative failure to enable the Board to function effectively and within an acceptable timeframe.

He therefore recommended that the Commissioner of VAT should consider anew the tax assessment that was issued to complainant with regard to the amount of interest due and limit this period to three years from the date when the appeal was lodged with the Appeals Board by complainant.

Case No H 101

ARMED FORCES OF MALTA

The soldier whose service pension needed more time to mature

The complaint

A member of the Armed Forces of Malta (AFM) promoted to Bombardier on 1 July 2006 and due to retire compulsorily in 2008 on attaining the age limit of 55 years felt aggrieved about his forced retirement in line with government policy because since he would not have held his new rank for at least three years, his pension would be computed on his previous rank.

He maintained in his protest with the Office of the Ombudsman that his last promotion was given in an exercise that had taken inordinately long and that on account of this delay he would be entitled to a lower rate of pension upon his retirement.

Facts of the case

The Ombudsman's investigation revealed that complainant is one of several AFM members who joined the Force at a mature age in the late 1980s. Since even if these AFM personnel were to retire at the age of sixty-one years (were they to be retained up to that age), they would still not have served the AFM for twenty-five years, it was held that this would badly affect their pension.

According to the Commander of the Armed Forces the pension entitlement of officers and men who have not served for at least twenty-five years will be much worse off if they are forced to retire upon reaching the age of 55 years than if they retire at age 61 although even in the latter case they would also not qualify for a full pension.

With regard to the implications of complainant's case, the Commander of the AFM explained that under article 3(a) Part I of the Third Schedule (Regulations 20 and 48) of the *Appointments and Conditions of Service of the Regular Force*[1], AFM members who retire either after having completed 25 years continuous service in the Force or after attaining the age of 55 years are entitled to a pension. In the case of the former the pension is equivalent to two-thirds of their basic salary while in the case of soldiers who retire from the Force after reaching the age of 55 years but without having completed 25 years of service, the pension is calculated on a *pro rata* basis. The Commander stated that there were about 120 soldiers who, on reaching the age of 55 years, would not yet have completed 25 years of service in the AFM.

The Commander further explained that as a result of the Government's decision to implement mandatory retirement as from 8 January 2008 for soldiers who will be 55 years or older irrespective of the number of years that they would have served in the AFM, complainant – who was promoted to a higher rank on 1 July 2006 – would find that, in accordance with the Pensions Ordinance, the pension to which he would be entitled upon his retirement in January 2008 would be calculated as if he were still a Lance Bombardier on his retirement date. This meant that complainant's claim that in terms of his pension entitlement he would not be reaping any benefit from his last promotion, would in effect be correct.

The Commander, AFM told the Ombudsman that to enable complainant and other AFM personnel who were in the same position to gain the full benefit of their last promotion, they had to retire on or after 3 July 2009 since this would signify that they would have occupied this post for at least three years from the effective date of their promotion. Although if this were possible, complainant would still be eligible to receive only a *pro rata* pension instead of a full service pension because he would not yet have

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[1] Article 3(a) of Part I *Pension Articles* of the Third Schedule (Regulations 20 and 48) of the *Appointments and Conditions of Service of the Regular Force* states as follows:
"*3. No pension shall be granted under these Articles and the Rules, to any officer or man of the force except on his retirement from the force in any of the following cases:*
(a) on or after attaining the age of fifty-five years or if he has completed twenty-five years' service in the force ……."

completed 25 years of service, nevertheless this arrangement would mean a tangible improvement for complainant who would in this way see a considerable increase in his service pension.

The Ombudsman noted that since complainant, together with others, had joined the AFM when they were 31 years or older, this effectively meant that upon reaching the mandatory retirement age of 55 years for AFM members, they will not be eligible for a full service pension since they would not have completed the full 25 years of service upon reaching 61 years which is the national pensionable age for government employees.

Considerations by the Ombudsman

Taking due note of the fact that there were about 120 members of the Armed Forces who would find themselves in complainant's predicament, the Ombudsman stated that in effect this meant that this grievance had implications that went beyond complainant's own circumstances. It gave rise to and involved matters of principle and policy as well as financial considerations that are by no means negligible.

The Ombudsman recalled that a letter by the Parliamentary Secretary in the Office of the Prime Minister that gave the Government's reaction to the issue raised by complainant, considered that his submissions were unjustified for the following reasons:

- the latest promotions exercise in the AFM included a substantial number of promotions that took place solely as a result of the review of the AFM's structure that was undertaken between late 2005 and early 2006. The Parliamentary Secretary argued that if this review did not take place, complainant might well not have been in line for a promotion and so this staff review worked in his favour despite his protestations about the situation in which he found himself;

- the policy decision that all AFM personnel aged 55 are to retire compulsorily in 2008 was taken by the Government way back in 1997 and started being implemented in 1998 and it was only the incoming administration after the 1998 elections that introduced a moratorium that would expire on 8 January 2008.

While stating that the Government is in favour of compulsory retirement for AFM members at age 55 and that this policy is vital so that Malta may have a smart and efficient organization, the Parliamentary Secretary expressed surprise at the fact that complainant was clamouring for an extension of his retirement date at such a very late stage when he had already been aware for a long time of compulsory retirement in 2008.

The Ombudsman commented that from his investigation it emerged that there was broad agreement on the facts that gave rise to this complaint. In December 1997 Commander, AFM was given instructions to put into effect changes in the retirement age of officers and soldiers in the AFM which had been indicated by the Prime Minister in a statement to the House of Representatives. These changes were intended to put into practice regulation 12(1) and regulation 26B of the AFM Regulations[2] that had been allowed by custom and usage over the years to fall by the wayside in the sense that all officers and solders who requested an extension in service were allowed to do so, on a year-by-year basis, until age 61 provided that they remained medically fit. In accordance with instructions issued on 5 December 1997 these regulations, which in effect already set an age limit of 55 years known at the "*normal retiring age*", had to be fully implemented with immediate effect and the year 2000 was chosen as the year when this age limit would be fully applied.

In December 1998, however, the incoming administration had partly halted this decision and resolved that "*as a policy, a ten-year notice should be given to members of the Armed Forces of Malta that compulsory retirement at age 55 will be introduced in the year 2008.*" This was announced in a

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[2] Regulation 12(1) of the *Appointments and Conditions of Service of the Regular Force Regulations* states that "*Except as otherwise provided by or under these Regulations, an officer shall retire on reaching the age of fifty-five years but may be allowed to remain on the active list beyond this age for such period or periods as the Minister may from time to time determine*".

Regulation 26B of the AFM Regulations (at that time) stated in respect of soldiers that "*Notwithstanding any other provision of these Regulations, a man of the force shall have his engagement terminated on reaching the age of fifty-five years, but may be allowed to remain on the active list beyond this age for such period or periods as the Minister may, from time to time, determine*."

letter dated 22 December 1998 by the Office of the Prime Minister to the Commander of the Armed Forces of Malta.

This ten-year notice was clearly intended to do away with the timeframe that was introduced earlier in such a way that all AFM personnel attaining the age of 55 years after 2008 would be required to retire without any exception. This policy was undoubtedly more advantageous than the previous policy and allowed all AFM personnel to be treated in the same manner. It also gave AFM personnel adequate notice of the change in policy regarding compulsory retirement from the AFM and at the same time introduced strict adherence to the established retiring age.

It is, however, undeniable, that this decision adversely affected the pension rights and entitlements of complainant and several of his AFM colleagues who were in the same situation because despite the ten-year notice, they would still not have adequate opportunity to serve the required twenty-five year period to be able to retire on full pension.

The Ombudsman stated that obviously the decision to strictly enforce the regulation on the established retirement age of AFM personnel is based on policy considerations and lies fully within the Government's discretion. He also noted that there appeared to be consensus between the House of Representatives and the AFM authorities that compulsory retirement of all personnel at age 55 was necessary and beneficial to the AFM itself if the country wanted to have an efficient Army.

The Ombudsman explained that as a rule he does not question or investigate matters of policy. Furthermore, the policy in question cannot in itself be regarded as unjust, arbitrary or improperly discriminatory. He observed, however, that he is competent to consider complaints on the negative effects of this policy on the pension rights of officers and men of the AFM and consequently proceeded to investigate this aspect of the grievance.

In the course of this investigation the attention of the Ombudsman was drawn to exceptions made to the policy regarding the normal retiring age of 55 years in the formal instructions issued to the Commander, AFM on 5 December 1997 regarding the detailed implementation of changes that were to be carried out as a result of the government policy announced on 3 December 1997. These exceptions appear to apply to complainant and

other AFM men in his situation as may be seen from the paragraphs that appear below:

"***The exceptions to the 55 year normal retiring age***

7. The graduated lead-time until 2000 before full application of the age limit of 55 is intended to allow for a period of adjustment of some 3 years. However, the exceptions to these rules which are proposed below are designed to show due regard for the special circumstances of those whose service pensions need time to mature.

8. The vast majority of those who will be due to retire mandatorily between 1998 to 2000 …… will have qualified for a full 2/3 Service pension. The exception to this concerns those who joined the AFM in 1986/87, together with members of the Revenue Security Corps, Air Traffic Control Corps and Airport Company, who were engaged in the AFM from 1978/1979 onwards. Most were not eligible for a British Service pension. Additionally, they were engaged at an older age and will not therefore have qualified for a full 2/3 Service pension by the time they reach 55 years. Special provision will therefore be made for this group of individuals so that those who have not yet qualified for a full Service pension will be permitted to take retirement at 61 years or on qualifying for a full 2/3 Service pension, whichever is the earlier, subject always to the provisions of the regulations governing extensions, retirements or discharges and to the exigencies of the Service as the Minister may determine."

The Ombudsman pointed out that while it was true that complainant was not due to retire mandatorily between 1998 and 2000 but in 2008, it was equally true, however, that he was first enlisted in the AFM in May 1989 or almost nine years before the coming into force of instructions issued by the OPM to the Commander of the Armed Forces on 5 December 1997. It was therefore fair to presume that complainant joined the AFM at a time when, according to paragraph 2 of these instructions, "*by custom and practice over the years all officers and soldiers requesting an extension in service have been allowed to do so, on a year to year basis, until age 61 provided they have remained medically fit.*"

The Ombudsman pointed out that it is a basic principle of the law that in normal circumstances, usage and practice can create rights and obligations in the same way as written law does. He therefore observed that he could

not understand why the special provisions issued in 1997 for a group of individuals who had not yet qualified for a full service pension to allow them to take retirement at age 61 or on qualifying for a full 2/3 service pension, whichever is the earlier, should be restricted to that particular group of individuals and not be extended to other individuals in the same circumstances albeit retiring at a later date.

During his investigation the Ombudsman asked the Commander, AFM to confirm whether complainant who was engaged at an older age and would not therefore qualify for a full 2/3 pension by the time he reaches 55 years of age, would have qualified for this special provision which the OPM document had envisaged at that time. The Commander's reply was in the affirmative and he went on to state that in his view the policy decision that was announced by the Office of the Prime Minister on 22 December 1998 simply postponed the process launched in January 1998 by ten years without affecting or changing any special provision that was established earlier by instructions issued on 5 December 1997.

The Ombudsman commented that it appeared that the Commander, AFM was supportive of complainant's position when he maintained correctly that the new administration in its policy decision of 22 December 1998 did not retract on the previous administration's undertaking to grant an exception to the 55 year normal retiring age to AFM personnel who on account of special circumstances needed more time to mature their service pension. This commitment by the previous administration had to be given its due weight since the decision to enforce the established retirement age appeared in these cases to run counter to the acquired rights that these officers and men gained through custom and usage.

The Ombudsman observed that while it is understandable that the Government is in these circumstances wary of creating a precedent that could constitute a hefty financial burden on the public purse, at the same time it is still bound to devise ways and means to cushion the impact of real or perceived discrimination through the implementation of policies thus avoiding unnecessary hardships.

The Ombudsman was of the opinion that the Government appreciated that the situation merited further consideration. As a matter of fact the Ombudsman found that the Government was offering positions of Casual Detention Guards with the Detention Service to ex-members of both the

AFM and the Police Force since the Government was aware that it would be practically impossible to find employment for persons of complainant's age. Government also made the necessary arrangements so that ex-members of the AFM and of the Police Force could take these positions without affecting their pensions and at the same time receive a full wage from this employment in addition to their pension.

The Ombudsman commented that the Government's offer of alternative employment to officers and men from the AFM who were adversely hit by this policy goes a long way towards alleviating immediate financial hardship especially since it would not affect any of their pension rights and entitlements. The Ombudsman considered this as a fair solution that showed the government's awareness of the hardship that complainant and his colleagues would suffer as a result of the policy decision of 1998.

On the other hand, however, the Government's offer did not show due regard for the special circumstances of these men whose service pensions need time to mature and for whom the Government was at some time even prepared to make an exception to the normal retiring age. The Ombudsman pointed out that one possible solution was to provide alternative employment to these officers and men within the public sector and have them seconded on the salary scale they enjoyed on their last effective rank till they complete twenty five years of service in full or reach the age of 61, whichever is the earlier. Such a move would have the advantage of ensuring strict observance of the policy that personnel should not remain in active service beyond the age of 55; retain these men in gainful and useful employment, paid for a service given to the country rather than forcefully retiring them on an inadequate pension; and also ensure that complainant and other AFM personnel in the same situation would retire on a pension that would reflect their salary and rank at the time of their secondment.

Conclusion

The Ombudsman concluded that in the circumstances if the Government decided to strictly enforce its declared policy decision taken in December 1998, he would not consider the Government to be committing an act of maladministration insofar as that policy was being fairly applied and officers and men had been given adequate advance notice.

It could, however, be argued with some justification, according to the Ombudsman, that this policy did not take into account the special circumstances of complainant and other AFM personnel who were in the same boat, whose service pension needed time to mature and for whom the Government had declared itself willing to make special provision.

The Ombudsman considered that in his view it was fair to recommend that the Government should revisit this policy and find ways and means to ensure that the application of this policy would as much as possible not adversely affect the service pension of these men within the provisions of regulations governing extensions, retirements or discharges and the exigencies of the service.

A few months after the presentation of his report on this grievance, the Office of the Prime Minister informed the Ombudsman that the Government had decided as follows:

- all AFM personnel with twenty-five years service would be required to retire from service upon reaching the age of 55 years on 8 January 2008 given that all these members of the Armed Forces of Malta would qualify for a full service pension;
- AFM soldiers who would not have reached twenty-five years service on the cut-off date of 8 January 2008 but are at least 55 years old would be retired from the Armed Forces but would be offered immediate employment in the Detention Service and offered favourable terms and conditions such as retaining their wage scales applicable on 8 January 2008; benefiting from the guarantee that they will retain their employment until they reach twenty-five years of service or age 61 years, whichever occurs first; while the duration of their employment with the Detention Service will, for pension purposes, be calculated in addition to the years that they would have served with the Armed Forces of Malta.

The Ombudsman agreed that these measures represented an equitable solution and would go a long way towards safeguarding the pension rights and future employment of complainant and other men in the AFM until their retirement.

Case No H 120

DEPARTMENT FOR THE ELDERLY AND COMMUNITY CARE

Two disconsolate pensioners

The complaint

A pensioner protested with the Ombudsman about the fact that whenever the Department for the Elderly and Community Care did not provide a part time Social Assistant, he was still required to pay for this service.

Facts of the case

Complainant explained to the Ombudsman that both he and his wife are housebound and that they make use of a part time Social Assistant employed by the *Ċentru Ħidma Soċjali* of the Department for the Elderly and Community Care under its Home Care Help Service to provide non-nursing assistance and carry out daily chores for them against payment of a fee of Lm1.50 per week. He was, however, irritated by the fact that whenever this helper was on leave or sick leave or otherwise unavailable and the department was unable to deploy a reliever to take her place, he was still charged the fee for a service that had not been provided. This payment was deducted automatically from his monthly pension regardless of whether the home help service was provided or not.

The Department for the Elderly and Community Care explained to the Ombudsman that its policy envisages a refund of payment for this service only when the department is not in a position to provide the service for three consecutive weeks. In the event that a Social Assistant is not able to provide the service, a reliever would normally be sent to households covered by the missing helper although the department admitted that at times occasions arise when it is unable to find a reliever at short notice. The department also stated that whenever a helper goes out on long sick

leave, it would generally find itself in a better position to deploy a reliever who would normally be expected to cover any emergency situation arising in respect of 100 households.

The Ombudsman noted that part time Social Assistants are not considered as government employees but are entitled on a *pro rata* basis to sick leave, vacation leave and bonus payments and to other benefits such as maternity, bereavement and injury leave as well as public holidays. These employees work a maximum of 30 hours per week.

Complainant was adamant that it is unfair that a refund to households that are entitled to receive this service by the *Ċentru Ħidma Soċjali* is only made after three consecutive occasions when this service is not provided and insisted that this refund should be made every time that, for whatever reason, the Social Assistant or the reliever fail to turn up. Complainant argued that home-help service provided by the private sector to households is only paid when the service is actually provided and that the *Ċentru Ħidma Soċjali* should adopt the same arrangements.

Considerations by the Ombudsman

The scheme to provide the services of a Social Assistant to pensioners by the *Ċentru Ħidma Soċjali* is a social service which is considered as a tangible sign of solidarity and help towards persons who on account of their personal circumstances are in need of support in their own homes. In view of this approach underlying the Home Care Help Service, the Ombudsman appreciated that criteria behind the running and organization of the system do not necessarily have to be based on a strict contractual relationship between an employer and an employee.

The Ombudsman was therefore of the view that the conditions behind this scheme and its practical organization and day to day management should be examined as a whole in order to consider whether the arrangements underpinning the Home Care Help Service are fair or not.

The Ombudsman pointed out that it was evident that the payment made by households for this service was minimal and was a token payment that only covered a marginal amount of the total costs that were involved. Besides, this payment is not linked to the number of hours that a Social Assistant

provides to any particular household per week but is linked mainly to the specific needs of pensioners that vary from one household to another so as to enable them to continue living in their community. At the same time the Ombudsman held that it is only fair and just that part time Social Assistants are entitled to sick and vacation leave as well as other bonuses and benefits on a *pro rata* basis as other employees.

Given this situation the Ombudsman was of the opinion that it is only logical to expect that senior citizens and pensioners who make use of the Home Care Help Service by the *Ċentru Ħidma Soċjali* should in some way or other contribute towards this service even if this payment by each household was merely a token payment that obviously needed to be supplemented in no small way by other financial resources that were made available by the Government.

This led the Ombudsman to conclude that in these circumstances, pensioners may be expected to carry a part of the burden themselves so that together with funds provided out of the government budget, the Department for the Elderly and Community Care will be able to organize this home-help service and at the same time allow both part time Social Assistants as well as their relievers to benefit from the entitlements to which other employees are generally entitled.

The Ombudsman stated that he also understood that the *Ċentru Ħidma Soċjali* should do its utmost to ensure that as much as possible pensioners who participate in this scheme will not be deprived of the assistance that they need. He therefore recommended that every effort should be made so that whenever a Social Assistant is not able to provide the service to pensioners, a reliever would be deployed instead to households covered by the unavailable Assistant. The Ombudsman, however, appreciated that it is not always possible to make these arrangements there and then especially because the number of part time Social Assistants is limited.

The Ombudsman, however, observed that he saw nothing wrong if employees under the Home Care Help Service who do not turn up for work without giving any valid reason to the management of the *Ċentru Ħidma Soċjali* have their pay deducted to make up for their absence. He agreed that a system of control should be in place so that employees who fail to report for duty are required to provide a valid reason for their absence. Failure to report for work must at all times be justified and valid reasons

must be given to explain an employee's absence from work and in this regard the department should be firm and take all necessary measures to ensure that there is no abuse.

On the other hand the Ombudsman pointed out that he understood that complainant was free to submit a complaint to the *Ċentru Ħidma Soċjali* with regard to the service that was being provided by the Assistant who was assigned to cover the needs of his household. Complainant was of course also free to request a replacement for this Assistant if he felt that she was not performing her duties properly. The Ombudsman also expressed his approval of the department's policy that in instances where a Social Assistant or a reliever fail to turn up at a household for three consecutive weeks, the household involved receives a refund for the whole three-week period when the service was unavailable. In this way the department sought to lessen the financial difficulties of the elderly since for these persons the reduction of even a relatively small amount from their weekly pension can leave a mark on their living standards.

Conclusion

The Ombudsman commented that after having been informed of the way in which the Home Care Help Service operates and how the system was being administered, he felt that there was nothing that was unjust or improperly discriminatory in its working. He agreed that the scheme was being managed in a uniform and just manner and sought to keep a balance between the interests of senior citizens and of part time Social Assistants and the role of the Department for the Elderly and Community Care to support elderly citizens in their own homes and enable them to live in their community.

As a result of his investigation the Ombudsman recommended that the *Ċentru Ħidma Soċjali* should do its utmost to ensure that a replacement is immediately available whenever a part time Social Assistant cannot report for duty. He also recommended that the department should be vigilant so that there will be no abuse by employees with the Home Care Help Service since any abuse is bound to harm the welfare of elderly citizens and disrupt the efficient working of the system. At the same time every effort should be made so that the service will, to the fullest possible extent, be customized according to the individual needs of every participant.

Since it is known that the needs of the elderly may vary from one person to another and some need more care and attention than others, it is recognized that the absence of a Social Assistant for three consecutive weeks is likely to give rise to serious problems and efforts should be made to avoid this situation from arising in any household.

Case No H 432

HEALTH DIVISION

Ambulance driving is for ambulance drivers

The complaint

A number of employees deployed as ambulance drivers in Gozo submitted a joint complaint to the Ombudsman and alleged that the hospital authorities had unfairly turned down their request for an on call allowance.

Facts of the case

Six employees at the Gozo General Hospital felt aggrieved that they were not given an on call allowance unlike their colleagues in Malta who, regardless of their substantive grade, are required to drive hospital ambulances. Despite various requests to the health authorities, these employees remained without a reply.

During a meeting with the Ombudsman, the employees explained that although none of them held the substantive grade of Ambulance Driver, they worked as drivers with the ambulance service at the Gozo General Hospital. During this meeting it also transpired that the only employee in this group who was substantively an Ambulance Driver before he was promoted to a higher position, had been asked to carry on with his previous duties even after this promotion. The Ombudsman found that at the same time other employees in the substantive grade of Ambulance Driver were assigned different duties elsewhere.

Complainants reported that the same situation happens in Malta where employees who do not hold the grade of Ambulance Driver but are asked to perform driving duties receive an on call allowance under a system that has been in operation for five years. They explained, however, that although unlike their fellow ambulance drivers in Malta they work on a shift instead

of an on call system, they are often required to work at night and paid at overtime rates. Complainants felt that they were also entitled to receive an on call allowance because in their view they were in fact operating under an on call system since whenever their services were needed, they would be summoned to report for work.

When the Ombudsman asked for an explanation, the Ministry for Gozo referred to the Agreement signed on 2 August 2002 between the *Union Ħaddiema Magħqudin*, the Health Division and the Management and Personnel Office (MPO) of the Office of the Prime Minister which states as follows with regard to employees in the grade of Ambulance Driver:

"*… seven Ambulance Drivers (5 from among Ambulance Drivers in Malta and 2 from among those in Gozo) will be deployed daily on an on call duty basis and will be paid an on call allowance according to the relevant provisions of the Public Service Management Code.*"[1]

The Agreement also stipulated that the Gozo ambulance service would be manned by three drivers during the day and by two drivers during the night to ensure a reliable service to the community. Paragraph 6 of the Agreement further laid down that the Health Division would itself indicate the rosters that are required to enable the on call system to operate properly in consultation with the *Union Ħaddiema Magħqudin*.

The Ministry stated that the provision of this Agreement that the on call allowance would only be given to employees in both Malta and Gozo who held the substantive grade of Ambulance Driver together with the other provision that 2 Ambulance Drivers in Gozo would work daily on an on call basis and be given an on call allowance were being followed carefully and there was no room for any misunderstanding.

Information gathered by the Office of the Ombudsman about the operation of an on call system in Malta showed that there were two Motor Transport Drivers who were assigned duties as ambulance drivers and who took turns

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[1] "*… seba' (7) Ambulance Drivers (ħamsa minn fost dawk li jsuqu l-ambulanzi f'Malta u tnejn (2) minn dawk li jsuqu l-ambulanzi f'Għawdex) ikunu on call kuljum u jitħallsu on call allowance skond il-provvedimenti tal-Public Service Management Code*."

with other employees whose substantive grade was that of an Ambulance Driver. These two employees benefited from an on call allowance in the same way as their other colleagues even though strictly speaking this incentive in the Agreement covered only employees in the substantive post of Ambulance Driver.

The health authorities considered that 15 drivers were adequate for the hospital ambulance fleet in Gozo and to drive coaches and vans for hospital inmates. The Ombudsman found, however, that in all 14 employees held the grade of Ambulance Driver; but since of these only 10 drove ambulances and this number was inadequate, complainants had for several years been deployed as ambulance drivers in order to make up for this shortage even though they had a different designation. The health authorities confirmed that these employees do not work under an on call system and are not paid an allowance; instead, only some time before the grievance had been lodged, agreement had been reached with complainants to work a 46-hour week like their Maltese counterparts whereby they are called to perform these duties whenever needed and are paid overtime for any overtime hours which they work.

The Management and Personnel Office in turn confirmed to the Ombudsman that according to the Agreement, all employees holding the grade of Ambulance Driver should be placed on an on call roster and that the interpretation given by the health authorities in Gozo amounted to a correct reading of the Agreement.

Although the grade of Ambulance Driver is in scale 17 of the public service salary structure, the Ombudsman noted that the six complainants in fact held substantive appointments in various different grades including Supervisor, Heavy Plant Driver, Operative and General Hand. This meant, for instance, that an employee in this group with the substantive grade of Supervisor worked as an ambulance driver despite its lower job weight than his substantive position and received a wage that was three scales higher than the pay scale attached to the post of Ambulance Driver.

Considerations by the Ombudsman

The Ombudsman pointed out straightaway that he was struck by this anomalous situation in Gozo where several employees in the grade of

Ambulance Driver are assigned other duties with the result that there are insufficient employees to perform driving duties for the Gozo ambulance service. In fact complainants had been asked to perform these duties for many years to make up for this shortage.

The Ombudsman commented that whereas for some of these employees these tasks represented duties higher than their substantive grades, in the case of others these duties were of a lower nature than their substantive post and they were therefore receiving a wage that was higher than their actual driving duties deserved. This situation gave rise to criticism.

With regard to whether complainants were entitled to an on call allowance once they were required to work on what was effectively an on call system, the Ombudsman pointed out that strictly speaking the 2002 Agreement did not extend any such automatic right except to those holding the substantive grade of Ambulance Driver and who are deployed on ambulance driving duties since the Agreement is aimed specifically at this category of workers. Looked at in this way, the Gozo administration was implementing the Agreement faithfully and correctly.

The Ombudsman ruled, however, that it is not enough to limit oneself to this Agreement since there are other important principles that must be considered, notably the spirit in which the Agreement had been concluded. The 2002 Agreement was signed in order to enable the ambulance service in both Malta and Gozo to provide reliable service to the community and to assure citizens of an improved and efficient ambulance service at all times. Fully recognizing this responsibility towards patients in the two islands, the health authorities needed to ensure an adequate number of employees in the grade of Ambulance Driver whose main task would be to drive ambulances.

The Ombudsman was of the view that from an administrative point of view it is not proper for the hospital authorities to continue to rely for a long time, possibly even years, on employees in a different grade for these duties with the result that some would come from a higher grade and get a higher wage than that given to an Ambulance Driver while others would come from a lower grade and get a lower pay. The Ombudsman pointed out that this situation was unfair, regardless of whether some of these employees themselves might prefer to carry out these duties instead of the normal

tasks attached to their substantive posts or whether they themselves asked to be given this type of work.

The Ombudsman stated that the health authorities could not simply latch on to a strict literal interpretation of the Agreement and ignore these aspects of the situation. At the same time these authorities had to ensure that genuine exigencies of the service existed before employees whose main task is to drive ambulances are deployed on other duties. The Ombudsman also pointed out that in any event if all employees whose duty is to drive ambulances perform their normal duties, the hospital authorities would have no option but to pay these workers the on call allowance that would after all be their due.

The Ombudsman stated that his investigation revealed that the hospital authorities in Malta had since 2002 placed employees who do not have the substantive grade of Ambulance Driver but who are detailed to drive ambulances under an on call system and even paid them an allowance. He also observed that in time only two employees remained in this situation once the system that Ambulance Drivers should do driving duties in the hospital ambulance service started to be enforced. In this way the problem in Malta had been gradually solved.

The Ombudsman observed that the hospital authorities in Gozo should adopt the same approach and ensure that employees should as much as possible carry out their substantive duties and not be deployed on other tasks. This is after all a matter of sound administration. In this way it should be possible to build a pool of Ambulance Drivers whose duty would be to drive ambulances and avoid having to resort to other employees to perform these duties.

Conclusions and recommendations

After having examined the issues that arose in connection with this grievance, the Ombudsman stated that:

- the situation that gave rise to this complaint was anomalous in the sense than several employees detailed to work with the hospital ambulance service were carrying out work which did not belong to their grade. This situation became even more peculiar when the

hospital authorities, to make up for the shortage of personnel, resorted to employees who are in a salary scale higher than that of an ambulance driver to carry out driving duties;

- it is an administrative shortcoming to ask employees to carry out duties that pertain to a grade higher than their substantive position for a considerably long time without any adequate remuneration and at the same time deprive them of an on call allowance on the back of a rigid interpretation of the 2002 Agreement. The Ombudsman stated that it is unacceptable for management to expect employees to carry out the same duties as other colleagues for a long time but under less favourable conditions.

The Ombudsman therefore recommended that employees who work as ambulance drivers but do not belong to this grade and have performed these duties for more than six months should be granted an on call allowance as their other colleagues who carry out similar duties. This arrangement should, however, only apply as long as the wage of these employees does not exceed the wage attached to the grade of an ambulance driver to which would be added the on call allowance due to them. Otherwise these employees should be given the option to decide not to be on call so that they would not be required to perform duties under conditions that are inferior to those enjoyed by their colleagues doing similar work.

The Ombudsman questioned the practice adopted by the health authorities in Gozo of deploying Ambulance Drivers on other tasks and was of the view that unless there are serious reasons which justify doing so, employees should perform duties that belong to their grades and tally with the job description of their substantive grades. This recommendation also applies for employees who carry out duties that pertain to grades that are lower than their substantive grades.

The Ombudsman also recommended that a detailed review be carried out to determine the exact number of employees required for the Gozo hospital ambulance service and that any shortage should be remedied by the issue of a call for applications.

Case No H 460

CENTRAL BANK OF MALTA

The employee who failed to make the most of her chances

The complaint

An employee of the Central Bank of Malta (CBM) who submitted an application to fill the post of Personnel Officer in the Bank's Human Resources Office early in 2007 was upset to find that she was unsuccessful even though she had worked for no less than twenty-two years in various departments in the Bank. Feeling that she had not been treated fairly, the employee took her grievance to the Office of the Ombudsman to ascertain whether the selection process had been conducted in an upright manner.

Complainant explained that when a similar call for applications had been issued in May 2005 she was placed second and claimed that when the employee who was chosen to occupy the post of Personnel Officer had resigned from the Bank in September 2006, a mere nine months after having taken up the appointment, she had been asked to carry out for various months most of the tasks pertaining to this post.

Complainant was also resentful of the fact that the second call for applications for this post had not been published as soon as the vacancy had arisen and it was only in February 2007 that this call was issued.

Facts of the case

When approached by the Office of the Ombudsman the CBM authorities explained that the candidate who was successful in the 2005 call for applications had in September 2006 in terms of the Bank's Collective Agreement been granted a period of one month unpaid leave followed by three months emigration leave up to the end of January 2007 to take up an

overseas assignment. Since it was only at this time that the employee formally submitted her resignation, the Bank management explained that in the circumstances the vacancy could not have been announced earlier and there had been no delay at all when the second call for applications had been issued early in February 2007.

In order to explain how developments unfolded, the CBM authorities pointed out that the second selection process took place in March 2007 in accordance with clause 12 entitled *Promotions and filling of vacancies* of the Collective Agreement which stipulates that *"…… any vacancies established by the Bank from time to time will normally be advertised internally on the basis of job and person specifications. Applicants for the post will be short listed for interview and evaluated taking into consideration their aptitude for the role, experience, previous performance classifications and academic qualifications, but not necessarily in that order*." There were in all seven applicants whose level of qualifications ranged from Advanced Level standard to a masters degree.

Given that the call for applications stated that "*eligible staff will be assessed through an interview and, if necessary, a written test*", the selection panel decided to hold first a written assessment which it considered a fair and objective method for a proper evaluation of applicants followed by an interview of all eligible candidates. It was agreed that this test would be conducted under a double index system in order to ensure anonymity and that it would be marked by two separate examiners with experience and professional qualifications in human resource management and personnel selection skills.

Since three candidates decided to withdraw their application before the selection process was set in motion, only four candidates sat for the written assessment. Upon its conclusion, the results were sealed and were not made available to the selection panel that proceeded to interview these four candidates. It was only at the end of the interviews that the results of the written test were made available to this panel.

The Bank authorities provided official documentation to the Ombudsman that confirmed that whereas complainant's final mark in her written examination was 37%, she scored 52% during her interview – an average of 45%. This was the lowest mark achieved by any of the four candidates and

in fact complainant was the only candidate with an overall combined mark that was below the 50% pass mark.

The Ombudsman also saw documentary evidence that confirmed that examiners had rated complainant's script as weak and had also noted that her analysis in response to certain questions was very brief and without any deep insight and not based on a critical review of the issues that were raised in this test. These observations were in sharp contrast with complainant's assertions regarding her experience during the years that she worked in the Bank's Human Resources Office. The Bank management also informed the Ombudsman that it was prepared to allow complainant to view her examination script if she wanted to do so in order to set her mind at rest about the way in which her script had been evaluated and marked.

The Ombudsman found that, in line with the Collective Agreement, the criteria that were applied by the selection panel in its assessment form for the interviews of the four candidates included aptitude, experience, performance and academic qualifications and that out of a total of 120 marks complainant obtained 62 (52%). The Ombudsman also found that the comments made by the three members of the selection panel in respect of complainant were as follows:

" … *(*complainant*) … could fill the administrative part of the job but lacks the technical abilities to develop the HR role*";

" … *although she has spent quite some time in HR, she still lacks the proper attitude to take on the Bank's role … she also lacks the necessary background*";

" … *(*complainant*) … has experience in a related job in HR.*"

The Ombudsman also questioned the bank management about complainant's claim that she had carried out the bulk of the work related to the post of Personnel Officer for various months while the person holding the post was away on unpaid and emigration leave. It was explained, however, that following the departure of the incumbent in September 2006, the HR Manager had to restructure the Bank's Human Resources Office in order to ensure that the workflow and targets of the Office would still be met.

To this effect the responsibilities and duties of the former Personnel Officer were distributed evenly among four employees in this section, including complainant. The duties that were assigned to each of these employees were individually listed and the Bank held that complainant's claim that she took over the bulk of the work was not correct since the burden was shared equally among the four officials.

The Bank also maintained that it had taken this step on purpose in order to ensure the continued smooth running of the HR Office and also with a view to ensuring that it would not give any false impression to an employee assuming additional responsibilities that the job had been allocated directly to this employee especially in view of the Bank's policy to fill vacancies by means of an internal call for applications.

The bank management pointed out that complainant had never been formally appointed acting Personnel Officer and other employees had also assumed part of the responsibilities of Personnel Officer. However, according to management, although the experience that complainant gained throughout this period could have served her in good stead and put her in a strong position to compete with the other applicants during the selection process, she did not seem to have made the most out of this experience. Indeed, at no point during the selection process, both at the written assessment stage and during her interview, had she given the impression that she had derived any advantage from this experience.

The Bank management also held that once it issued an internal call for applications as soon as the post became vacant upon the resignation of the previous incumbent, this gave the lie to complainant's claim that while the post of Personnel Officer was vacant it sought to obtain the same service from its employees at a lower cost in view of their lower pay.

In her defence complainant admitted in turn that she did not contest the marks that she was awarded in the written assessment and acknowledged that it was quite likely that she had not done well because she did not sit a written examination for many years and felt rather nervous throughout this assessment.

Complainant also referred to the comment by one of the members of the selection board that she lacked the technical ability to develop the HR role and pointed out that she had never refused to participate in any manpower

training programmes organized by the Bank. She also referred to her last Performance Management Report that was presented by the Bank's Manager for Human Resources which confirmed that she shows dedication to her work and that during the period that she was entrusted with responsibilities pertaining to the Bank's Personnel Officer she had carried out her new duties satisfactorily and had showed commitment and dedication.

Complainant expressed the view that the Bank needed to motivate employees like her who give their best even though they have no formal academic qualifications.

Considerations by the Ombudsman

The Ombudsman observed that complainant did not in any way challenge the results of her written test and of her interview and in fact admitted that she might not have performed well in the written examination which was an integral part of the selection process on account of the uneasiness and tension which gripped her during this test.

Similarly complainant did not challenge the explanation that was given by the Bank management in connection with her allegation regarding delay in the issue of the call for applications when in fact it appeared that there was no delay at all after the vacancy had arisen. Nor had complainant challenged the rebuttal by the Bank management of her claim that for several months she had done the bulk of the work of the post of Personnel Officer that she had applied for.

Conclusion

In view of these considerations, the Ombudsman felt that there were no grounds to sustain the complaint as presented and no evidence of maladministration or of injustice had emerged in the course of his investigation.

Case No H 549

MELLIEĦA LOCAL COUNCIL

The responsibility of a Local Council for proper road maintenance

The complaint

Tina Maxwell reported to the Ombudsman that while driving along Triq l-Armier iż-Żgħir, limits of Mellieħa, the two tyres of her car burst as she hit a massive pothole right in the middle of the road. Since she attributed this incident to lack of proper road maintenance by the Mellieħa Local Council, she asked for a reimbursement of the costs that she incurred to replace these two tyres.

The Mellieħa Local Council, however, turned down her request on the grounds that there was insufficient evidence to corroborate the circumstances leading to the incident.

Facts of the case

Complainant explained to the Ombudsman that the incident occurred late on a Saturday afternoon in September 2006 when she was leaving Little Armier beach. As she drove away, all of a sudden she noticed a huge pothole in the middle of the road but although she did her best to avoid it and turned her vehicle sharply, her manoeuvre was unsuccessful because the car still went over the hole and the two front tyres burst.

After her vehicle was towed back to her residence by a car-towing firm, Ms Maxwell found that both tyres were beyond repair and had to be replaced. On the following Monday when she replaced the two damaged tyres, her purse was lighter by the sum of Lm48.

Early in October 2006 complainant wrote to the Mellieħa Local Council where she enclosed photos of the pothole that had caused her this ordeal as well as a copy of the fiscal receipt for the purchase of two new car tyres and requested a refund of the costs that she had incurred.

The Executive Secretary of the Council merely acknowledged receipt of her letter on 17 October 2006 but failed to reply. Feeling frustrated that her request had been ignored, on 8 June 2007 complainant wrote to the Local Council to enquire about the outcome of her request and asked the Council to give the matter its urgent attention.

Four days later the Executive Secretary of the Mellieħa Local Council wrote back to inform complainant that she needed to produce a police report on the incident in line with established procedures before the Council could process her request any further. The Executive Secretary also suggested that she should at least produce documentary evidence regarding the incident such as a copy of the towing company's job card that she must have signed when the incident occurred.

Complainant complied with this request and on 20 August 2007 she sent a copy of this job card to the Council. The card confirmed that her car had indeed suffered a double puncture and breakdown on 30 September 2006 in an area that was described as being in the limits of Armier Bay.

Records seen by the Ombudsman confirmed that the matter was in fact raised during a meeting of the Local Council on 31 August 2007 and that the Council decided to turn down Ms Maxwell's request for reimbursement of the expenses that she had incurred because she failed to substantiate her claim that the accident happened as a direct result of the state of the road.

In the course of contacts between the Office of the Ombudsman and the Mellieħa Local Council concerning this case, the Mayor explained that despite the presentation of the job card by the towing company in connection with complainant's incident, the Council turned down her request for a refund of her expenses because she failed to submit a police report describing the circumstances in which the incident had occurred.

Considerations and comments

The Ombudsman observed that complaints on the bad state of various roads and resultant injuries to drivers and passengers and damage to vehicles are not uncommon and in recent years several similar complaints have been the subject of investigations by the Office of the Ombudsman. In fact in April 2003 the Office of the Ombudsman released a statement to the local media to draw attention to the responsibility of public authorities for road maintenance after a Local Council failed to compensate damages that were sustained by a vehicle as a result of a traffic hazard in a road for which the Council was responsible.[1]

This report highlighted the following points:

- the authorities concerned should henceforth agree to accept both moral and legal responsibility for accidents resulting from such hazards. Both the central government and local authorities are obliged to maintain properly roads that fall under their direct responsibility so as to avoid injury to drivers and passengers as well as damage to vehicles;
- drivers pay substantial amounts to the authorities in licences and car registration fees and are entitled to drive in hazard-free roads;
- whenever road conditions constitute a real threat to persons and property and damage ensues as a direct consequence of these conditions, it is unacceptable that the responsible authorities more often than not abuse disdainfully of their position of strength in relation to the individual and merely disclaim responsibility and refuse to accept liability for compensation;
- in terms of subsection 33(1) of the Local Councils Act the functions of a Local Council include provision "*for the upkeep and maintenance of, or improvements in, any street or footpath, not being privately owned*."

In a report to Parliament in June 2005 the Ombudsman noted that following the issue of this release to the media, Local Councils had generally started to accept to assume responsibility for the proper maintenance of roads that fall under their charge even if they remained somewhat reluctant to redress

[1] Case No C 275.

justified cases by the payment of damages incurred. He had also admitted, however, that the same could not be said of the Malta Transport Authority (ADT) that continued to refuse claims outright as a matter of policy.

In his report to Parliament the Ombudsman had referred to his initiative aimed at launching a new mechanism which would deal fairly with claims for damages, not exceeding an agreed limit, by aggrieved parties who are involved in relatively minor accidents caused by unattended road perils. Unfortunately, however, the Ombudsman's efforts to establish clear guidelines that could be followed by citizens in submitting claims for compensation of damages sustained as a result of unattended road hazards had come to naught.

The Ombudsman stated that in this complaint his role was twofold: firstly, to determine whether the damage caused to Ms Maxwell's car was the direct result of the bad state of the road through which she was driving when the incident occurred; and, secondly, whether the Local Council was justified to refuse her request in the absence of an official police report describing the circumstances which had caused the incident.

The Ombudsman observed that complainant had admitted straightaway that she had failed to report the matter to the Police. Nonetheless, he was of the opinion that although it would have been better if she had lodged a report regarding the incident at the time that it happened since the Police would have come on site to verify her statement and would have drawn up a report on the situation, her failure to do so was not enough to justify the Council's decision to turn down her request for a refund of the expenses which she had incurred.

The Ombudsman verified that complainant had submitted a copy of the towing company's job card when she was asked to do so by the Mellieħa Local Council. This card confirmed that Ms Maxwell's vehicle had to be towed because two tyres had burst and she had only one spare tyre in her car. The company's job card also indicated that the incident had in fact taken place on 30 September 2006 which was indeed a Saturday and that the tow truck had arrived on site at 1812 hours and had finished the job at 1920 hours. The card referred to the fault as "*a double puncture and breakdown*" which, according to complainant, required the replacement of the tyres that were beyond repair since they had been ripped. Complainant also produced a copy of a cash register fiscal receipt dated 2 October 2006

(the Monday following the day of the incident) issued by a petrol station for the sum of Lm48.

Together with her grievance, complainant also attached photos of the pothole in order to back her claim about the troubles that she had faced. Despite the rather bad quality of these photos, the Ombudsman remarked that it was still very clear that the pothole was quite deep and that since the pothole was located in the middle of the road, it was understandable that despite complainant's attempt to swerve the car to avoid this hole, this was to no avail and her efforts came to grief.

Other records seen by the Ombudsman confirmed that complainant was right to claim that although the Local Council sent an acknowledgement to her request, the Council had failed to keep her updated on the outcome of her claim and it was only after she sent a second letter in June 2007 (eight months later) that the Council bothered to reply. The Ombudsman commented that clearly this was an example of bad administration since citizens are entitled to receive a reply to their complaints and inquires with public bodies without unnecessary delay.

On the other hand the Ombudsman commented that the Mellieħa Local Council had never denied its responsibility for the upkeep of the road in question. Instead the Council had refused complainant's request on the grounds that she had not provided a police report or, as stated in the minutes of the Council meeting on 31 August 2007, there was no concrete evidence to show that the incident had in fact taken place as a consequence of the bad state of the road. According to the Ombudsman, however, this did not constitute sufficient reason to dismiss complainant's request in the light of the evidence that she had produced which by and large confirmed her account of the way in which the incident occurred.

The Ombudsman stated that a rigid application of rules and policies without any consideration of the particular background circumstances of the case might be considered to constitute bad administration. Although it is an accepted fact that the wear and tear of a road surface occurs naturally as a result of heavy use, the Council is bound to carry out regular maintenance of roads for which it is responsible. The Council did not in fact contest complainant's allegation that the road was in a state of disrepair.

The Ombudsman pointed out that he was convinced that had proper maintenance works been carried out on the road in question, the incident would not have occurred at all. The fact that two tyres of the car burst as a result of the vehicle's impact with the pothole in the middle of the road lent further credibility to complainant's claim since it is highly improbable that two tyres are damaged simultaneously as a result of the everyday use of a vehicle.

At this stage the Ombudsman recalled that article 1033 of the Civil Code states that "*any person who, with or without intent to injure, voluntarily or through negligence, imprudence, or want of attention, is guilty of any act or omission constituting a breach of the duty imposed by law, shall be liable for any damage resulting therefrom*."

Conclusion

The Ombudsman concluded that Ms Maxwell had provided reasonably acceptable evidence in support of her grievance that her car had sustained damage as a result of the faulty state of the road for which the Mellieħa Local Council was responsible. He therefore upheld the complaint and recommended that the Council should refund the sum of Lm48 in order to make amends for the damage sustained by her car.

On its part the Mellieħa Local Council continued to express its concern that since complainant had not bothered to report the case to the Police, there were various aspects of the incident about which it remained in the dark. The Local Council, however, decided to accept the Ombudsman's recommendation in view of the small amount involved but made it clear that in the case of a bigger claim, complainant would have had to resort to other remedies.

The Ombudsman in turn assured the Local Council that this payment did not constitute a precedent and agreed that each case would need to be examined on its own merits.

OFFICE OF THE OMBUDSMAN

PUBLICATIONS

Annual Report 1995/1996	*Rapport Annwali 1995/1996*
Annual Report 1997	*Rapport Annwali 1997 (fil-qosor*)
Annual Report 1998	*Rapport Annwali 1998 (fil-qosor)*
Annual Report 1999	*Rapport Annwali 1999 (fil-qosor)*
Annual Report 2000	*Rapport Annwali 2000 (fil-qosor)*
Annual Report 2001	*Rapport Annwali 2001 (fil-qosor)*
Annual Report 2002	*Rapport Annwali 2002 (fil-qosor)*
Annual Report 2003	*Rapport Annwali 2003 (fil-qosor)*
Annual Report 2004	*Rapport Annwali 2004 (fil-qosor)*
Annual Report 2005	*Rapport Annwali 2005 (fil-qosor)*
Annual Report 2006	*Rapport Annwali 2006 (fil-qosor)*

Case Notes No.	1 (April 1996)	13 (April 2002)
	2 (October 1996)	14 (October 2002)
	3 (April 1997)	15 (April 2003)
	4 (October 1997)	16 (October 2003)
	5 (April 1998)	17 (April 2004)
	6 (October 1998)	18 (October 2004)
	7 (April 1999)	19 (April 2005)
	8 (October 1999)	20 (October 2005)
	9 (April 2000)	21 (April 2006)
	10 (October 2000)	22 (October 2006)
	11 (April 2001)	23 (April 2007)
	12 (October 2001)	24 (October 2007)

INFORMATION

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Office open to the public as follows

October – May	8.30am – 12.00am
	1.30pm – 3.00pm
June – September	8.30am – 12.00pm