Ombudsman

CASE NOTES

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Contents

FOREWORD

As usual the publication of this eighteenth issue of **Case Notes** is meant primarily to bring to the attention of the Maltese community a sample of the wide range of cases which this Office comes across in the course of its work to protect citizens from maladministration. These instances also provide readers with an insight into the reasoning underlying the findings and recommendations of the Ombudsman in the mixed bag of grievances that constitute the caseload of this institution.

It is also my wish that Maltese public authorities will take a close look at the cross section of cases featuring in this issue of **Case Notes** as a means of ensuring that the citizens' right to good public administration is adequately safeguarded and that at the same time it remains at the forefront of their actions and decisions. There are a number of lessons to be learnt from these instances about the way in which citizens ought to be treated by public bodies and how their expectations are to be tackled and handled by those holding public office. It is felt that bringing these experiences to the attention of employees in the public service will in turn contribute towards an increased awareness of their responsibilities towards the community which they have pledged to serve with dignity and respect.

Joseph Sammut
Parliamentary Ombudsman **October 2004**

Case No C 305

LICENSING AND TESTING DEPARTMENT

Controversy whether a car was on lease or on hire

The complaint

The Licensing and Testing Department refused to renew the licence of a vehicle that was said to be on hire when its first renewal was due in mid-2001. As a result, the person who was in possession of this car was unable to use it any further and feeling aggrieved by what, in his view, was the department's arbitrary position which he regarded as maladministration, he raised the matter with the Ombudsman.

Facts of the case

In mid-2000 complainant entered into a contract with a car leasing company for the lease of a vehicle for five years. The contract referred to a penalty of Lm1000 payable by the lessee in case he refused to accept the car even though this was made within the period agreed upon between the two sides for its delivery.

Another section in this contract referred to a further liability by the lessee amounting to "*half the sum due for the remaining period of lease*" in case he was in breach of any of the conditions of contract which resulted in the company having to terminate the agreement and to repossess the vehicle.

The contract also stated that: "*The lessee may not unilaterally terminate this agreement. If, however, the company allows the lessee to terminate prior to the end of the period of lease, the lessee shall be obliged to pay the company the ____ for every remaining year or part of.*" The space in this section of the contract that was meant to include the penalty for premature termination was purposely left empty and the amount of the penalty was not specified in the contract.

When the road licence of the vehicle came for its first renewal, the Licensing and Testing Department refused to accept that the vehicle was on hire and insisted that the agreement between the two sides fell under the amendments to the Motor Vehicles Registration Tax Act which came into force on 1st January 2001 whereby the car was considered on lease to complainant. The department maintained that a copy of the leasing contract given to the Public Transport Authority at the time of the car's first registration indicated that the vehicle had been registered for leasing purposes and not for hire. This ruling by the department made a considerable difference.

The Third Schedule of the Motor Vehicles Registration Tax Act stipulated that registration tax had to be paid on vehicles that had been registered for leasing purposes during the years 1998 to 2000 before the renewal of their road licences expiring during 2001 and 2002. This meant that the road licence of the car in question could only be renewed upon refund of the tax relief that is granted to cars imported and registered with a view to being hired from a public service garage. Complainant disagreed with the department's interpretation of the status of his car and maintained that in terms of the Act the car was not a leased vehicle.

Considerations by the Ombudsman

In his review of the case the Ombudsman had to determine whether the contract of lease entered into by complainant and the car leasing company satisfied the requirements of the law for the car to be considered as a leased car and therefore subject to a much higher registration tax.

On his part complainant argued that the department's decision that his car was on lease was not valid at law since he was under no contractual obligation to pay any penalty or the full amount of the consideration that is typical of long-term leases under the terms of the amended Motor Vehicles Registration Tax Act if he decided to terminate the contract. Complainant argued that this essential requirement of the definition of lease in the Act was missing in his contract. Consequently, the car could not be considered as leased in terms of the law for the purpose of a registration tax applicable to leased cars.

Section 2 of the Act defines leasing as follows:

"*Leasing shall mean a contract under which the owner of a motor vehicle grants to another person the exclusive possession of the motor vehicle for an agreed period, in return for a consideration, and under such conditions that the possessor of the motor vehicle will be obliged to pay the full amount of the consideration, or a penalty, to the owner of the motor vehicle, should the contract be terminated before the expiration of the agreed period.*"

The Ombudsman's examination of the June 2000 contract revealed that this agreement contained three penalty clauses in the context of a possible termination of the lease:

- clause 4(m) referred to the right of the owner to exact a penalty in the event that the owner exercises his right to terminate the contract if the lessee does not accept delivery of the vehicle even if this takes place according to the terms of the contract;
- clause 8(a) contained a penalty clause following termination of the contract "*if the lessee is in breach of any of the conditions herein contained*";
- one of these conditions appeared in clause 8(b) where it was stated that "*the lessee may not unilaterally terminate this agreement*." Although this clause does not specify the amount of penalty payable in respect of every remaining year or part thereof, complainant would be in breach of the contract in the event that he decides to terminate the lease prematurely and may at law be liable to the full amount payable for the rest of the period of five years.

The Ombudsman held that it could be argued that a penalty could be inflicted under clause 8(a) upon the breach of any of the conditions of the contract. In other words there was no need to specify a penalty for breach of clause 8(b) by the unilateral termination of the agreement by the lessee since the lessor can sue for breach of contract or impose a penalty for termination of the agreement by the lessee following a breach of one of the conditions of the contract.

On this basis the Ombudsman was of the opinion that it could be validly argued that the June 2000 contract is a leasing contract within the letter of the law. Complainant argued in turn, however, that the intention of the legislator in this case was to safeguard owners of public service garages from abuses by lessees since investment in expensive cars would otherwise be very risky financially. In order to counter this situation, clause 8(b) features as a standard clause and serves to determine the penalty for any premature termination of contract. Complainant pointed out that since no intention ever crossed the minds of the two parties to the agreement regarding any penalty for unilateral premature termination of the contract, an essential requirement at law for the agreement to be considered as a leasing contract was therefore missing.

The Ombudsman, however, remained unconvinced by this line of reasoning and argued that this interpretation does not automatically invalidate the other interpretation that a penalty clause in fact exists under clause 8 of the contract that was signed in June 2000. The Ombudsman held that one could possibly argue differently had the obligation in clause 8(b) on the part of the lessee not to terminate the agreement unilaterally been deleted or had the lessee retained the right to terminate the contract unilaterally without any breach of the contract.

The Ombudsman was therefore not in a position to determine that the contract entered into by complainant was not a leasing contract even in terms of the law.

Outcome

Feeling that there were no grounds to conclude that there was maladministration on the part of the Licensing and Testing Department, the Ombudsman did not sustain the complaint.

Case No C 353

MALTA ENVIRONMENT AND PLANNING AUTHORITY

Alleged infringement of property rights

The complaint

Upon receiving an allegation from the owners of private land in a village in Gozo that a permit issued by the Planning Authority (as the Malta Environment and Planning Authority was then known) and a subsequent amendment for the development of a site in this village were contrary to law, the Ombudsman launched his investigations.

Facts of the case

The case raised by complainants concerned the issue of a development permit by the Planning Authority in July 2000 for the demolition of an existing building and the erection of two flats and underlying garage.

Complainants objected to this development because the windows opened onto a private alley that belonged to them and not to the developer. Claiming that the developer's action was illegal and that it created servitude, complainants also objected that the windowsills projected 15cms onto the private alley and that the height of the windows as constructed was not in accordance with approved plans.

In addition to this breach of design policies, complainants pointed out that the original permit was issued on the strength of a false declaration by the applicant. In their view this permit had been rendered null by the developer's failure to inform the Authority that the windows of the proposed development projected onto a private alley.

Other allegations by complainants were that the absence of a backyard in the new building breached sanitary regulations; that the development covering 159m^2 was larger than the site that featured in the application (137m^2) and

had encroached on property belonging to complainants; and that since the alley measured a mere 6'1" at its widest point, the Authority should have ordered the developer to recede inwards so as to widen the alley as had been done in a similar building development in the same village a few years earlier.

In their grievance to the Ombudsman complainants made it clear that they did not object to the proposed development but to the infringement of their property rights; and in fact they had instituted court action against the developer for breach of these rights. They also explained that they had not lodged third party objections in terms of the Development Planning Act because they were not even aware that an application had been submitted to develop the site in question.

In addition complainants were irked at the fact that when the developer infringed approved permits, enforcement action by the Authority had resulted in the sanctioning of these infringements whereas according to them, these illegalities ought not to have been sanctioned at all.

The Ombudsman's contacts with the Malta Environment and Planning Authority (Mepa) revealed that the application for this development was made in March 2000 and approved three months later; that the final go ahead was given in May 2001; and that it was only at the end of January 2002 that complainants raised objections with the Authority when the developer applied for approval to alterations to the original plans.

On its part the Authority maintained that acceptance of this application did not constitute a breach of planning policies. When the original application was approved, the Authority had received no objections in respect of the private alley owned by complainants and in any event all permits approved by the Authority are issued subject to third party rights. This had effectively safeguarded complainants' civil rights. As a result, issues raised by complainants (such as the windows that were alleged to open onto a private alley and the increase in the building area) were not planning considerations but were the subject of a civil dispute and appropriate action could be taken by the Authority only if the legal rights of complainants regarding the private alley were confirmed by a court decision that would declare the building development to breach sanitary regulations.

Mepa also stated that when the developer's application for minor alterations regarding the height of the windows was approved in 2002, these alterations did not adversely affect complainants' rights regarding the private alley since these windows had already been approved in 2000. In fact, this sanctioning was in line with planning policies whereby minor alterations regarding original applications can be considered without the need of a fresh application.

With regard to the fact that the windowsills of the building projected onto the private alley owned by complainants, it was explained to the Ombudsman that this *fascia* is a normal design that had been approved by the Authority and that was shown on the approved elevations and sections. The Authority furthermore added that in terms of its own **Development Control Policy and Design Guidance 2000** windowsills cannot project more than 0.15m from the façade of a building and since the windowsills in question met this design standard, they did not breach its planning criteria.

The Authority also dwelt on complainants' reference to a building in the same village which was similar to the one under review where the development had been made to recede inwards in order to widen the adjoining alley. The Authority explained that the issue of the permit for this particular development had taken due consideration of the fact that the nearby street was earmarked for widening in accordance with road alignment policies that were in place in 1990 when these works were approved. This was not the case with the alley in question.

Considerations by the Ombudsman

The Ombudsman noted that complainants blamed the Authority for the infringement of their property rights and for the fact that they had to take the matter to Court since they argued that if the permits had not been issued in the first place, this situation would not have arisen. The Ombudsman considered this viewpoint unacceptable because it was some twenty months after the permit had been approved that complainants first referred the matter to the Authority. There was therefore no way that the Authority could have known about and prevented the situation from happening even if it wanted to do so.

Furthermore, given that in his application the developer declared that he was the owner of the land to which the application referred, the Authority could not verify this statement and ascertain whether the rights of neighbours and owners of adjoining properties were being infringed. In the circumstances, once complainants failed to draw the attention of the Authority when the application was being processed, the only solution at this late stage was to await a decision by the Court since only in the light of this judgement would the Authority be in a position to reconsider the situation should this be found necessary.

The Ombudsman also considered the allegation that the development violated sanitary regulations because it lacked a backyard. It was ascertained that under section 97 (n)(iv) of the Code of Police Laws no backyard is required in a corner house; and the permit would therefore be considered to violate sanitary regulations only if complainants successfully proved in Court that the alley adjacent to the building development was private property. The Ombudsman, however, noted that despite the claim that the alley was private property, no evidence was brought forward that public passage was prohibited.

With regard to the allegation that the developer failed to declare that the windows of the proposed building open onto a private alley, the Ombudsman found that there was no particular obligation for him to do so. Nevertheless, the Authority had adequately safeguarded the rights of complainants by the issue of a permit that was subject to third party rights and in this way the rights of the owners had been protected in respect of any servitude that may be created or any other right that may have been infringed.

Outcome

In the light of these considerations, the Ombudsman held that there were no grounds to sustain that there was maladministration on the part of the Planning Authority when the original permit was issued in 2000 and when minor alterations to the windows were sanctioned in 2002. The approval of these alterations was in conformity with building policies and did not affect complainants' rights since the amendments did not involve any new window or encroachment.

The Ombudsman was therefore of the view that there were no grounds to sustain the complaint.

Case No C 363

MALTA ENVIRONMENT AND PLANNING AUTHORITY

A selection process that gave rise to doubts

The complaint

Following the issue of a call for applications and interviews for the post of Secretary to the Development Control Commission (DCC) of the Malta Environment and Planning Authority (Mepa), an employee of the Authority lodged a complaint with the Ombudsman that his failure in the interview was unjust. Maintaining that the evaluation by the selection board did not reflect his merit and capabilities, complainant also expressed concern that his request for the setting up of a promotions appeal board to consider his grievance in accordance with the provisions of the Collective Agreement had been turned down.

Facts of the case

An internal call for applications for the post of Secretary to the DCC listed the educational requirements, certificates and work experience which candidates needed to possess in order to apply for this position. When the results were published, complainant found that he failed to obtain the minimum pass mark and had not been considered for the post.

Complainant had subsequently written directly to the Chairman, Mepa to contest the marks which he had been awarded for *Interpersonal skills* and *Supervisory skills* and to request the setting up of a promotions appeal board because he felt that these marks did not adequately reflect his merit. A few weeks later complainant was informed by the Chairman, Mepa that following consultation with the chairman of the interviewing board, the appointment of an appeal board was not considered justified.

While these developments were taking place, the Authority issued another call for applications for the post of Senior Administrative Assistant (Land Survey and Mapping), a position that is considered analogous to the post of Secretary, DCC. Complainant applied for this post as well but was again unsuccessful. However, as things turned out, the same person was selected to fill both posts; and faced with this choice, the successful candidate selected the second position. As a result the post of Secretary, DCC remained vacant.

Considerations by the Ombudsman

Complainant brought forward a number of points in order to substantiate his claim that he deserved to be selected for the post of Secretary to the Development Control Commission. He argued that the marks which he had been awarded for *Communication skills* and for *Supervisory skills* were unfair and that the decision not to appoint the promotions appeal board was in violation of the provisions of the Collective Agreement.

The Ombudsman's investigations showed that the marks awarded to candidates in *Communication skills* were based on the subjective judgement formed by members of the selection board on the basis of the performance of candidates during their interview. Even marks allocated for *Supervisory skills* reflected candidates' performance during their interview. While it was admitted that complainant was experienced in supervisory work, members of the board were unanimous in their view, however, that complainant's experience in this field had not emerged in a particularly positive light throughout his interview.

In his investigations the Ombudsman ascertained that the three members of the selection board had separately given their marks to every candidate and that the final result of each candidate was the mean of these three scores. Obviously the Ombudsman is not in a position to verify the evaluation that was undertaken of complainant since this was based on subjective criteria adopted by each of the three examiners.

According to subsection 14(6) of the Collective Agreement for employees of the Authority, complainant's request for the appointment of a promotions appeal board had to be preceded by a letter to the Authority's Human Resources Manager through his Unit Manager. Although complainant did not follow these procedures, the Ombudsman found that Chairman, Mepa had sought the views and comments of the chairman of the selection board on the issues raised by complainant and had assured himself that in the circumstances the setting up of an appeal board was unwarranted and would not have served any useful purpose.

Outcome

The Ombudsman concluded that the evidence which he collected showed that complainant's plea that he was not awarded the marks which he deserved in *Communication skills* and *Supervisory skills* could not be substantiated. Neither was there any violation of the provisions of the Collective Agreement when the Chairman of the Authority failed to set up the promotions appeal board because complainant had failed to observe the established procedures.

Although the Ombudsman did not uphold complainant's grievance, he still felt that the following critical comments were appropriate:

- the fact that six months elapsed between the date of the interviews and the publication of the results might have given rise to suspicions;
- the method that was adopted for the award of points to candidates was somewhat doubtful;
- although the successful candidate as well as complainant did not possess all the necessary qualifications that were listed in the call for applications, yet both were asked to attend an interview;
- there were indications that the members of the selection board were not fully convinced that the two candidates in fact possessed the potential to fill the post successfully and although it appeared that members were of the opinion that taking everything into account the candidate who was placed first possessed a slight advantage, the board and management were hesitant until a call for applications for an analogous post was issued and the first placed candidate was awarded

a position which seemed to be more in line with her qualifications and work experience;

- Appendix F of the Collective Agreement states that: "*The selection board will communicate in writing to all interviewees, prior to the interview, the criteria upon which the assessment will be made and the weighting given to each criteria as well as the pass mark set for the position.*" The letter to complainant dated 14 November 2002 shows that Mepa did not observe these procedures.

The Ombudsman concluded by stating clearly that these critical comments should not in any way be taken to mean that the selection board had acted unjustly towards complainant. His comments were primarily meant to reflect a lack of transparency which might tend to erode the expectation that a staff selection process should at all times be limpid, straightforward and transparent and should also be seen to be so by all candidates.

Case No C 364

MALTA ENVIRONMENT AND PLANNING AUTHORITY

Unauthorised development on government-owned property

The complaint

A resident raised objections with the Ombudsman regarding development works taking place on a new apartment block in an area next to his residence and which had been approved by the Malta Environment and Planning Authority (Mepa). The objections were that the building protruded onto the road and obstructed the view of other apartments while causing traffic and parking problems in the area.

The resident explained that the developer was usurping public property by extending his construction activity some 14m outwards from the existing façade alignment and occupying government-owned land in respect of which he had no title. He stated that he had already drawn the attention of the Land Department and Mepa but had not received a satisfactory answer and that even the local council of the locality had made representations on the subject to the Land Department.

The Ombudsman informed complainant that he had no executive powers to stop this development as had been requested. However, since an act of maladministration was being alleged, the Ombudsman requested Mepa to inspect the site and to report whether the development that was taking place was in accordance with the approved permit. At the same time the Commissioner of Land was requested to state if any action had been taken subsequent to the letter by the local council regarding this alleged encroachment upon public property.

Facts of the case

The Ombudsman found that Mepa had approved a development permit for the demolition of existing premises and the erection of a residential apartment block. This permit had been issued subject to third party rights. Subsequent to the request by the Ombudsman, enforcement officials of the Authority inspected the site and confirmed that the works in progress were in conformity with the plans approved by the Authority.

The Ombudsman also learnt that the illegal occupation of government property had been brought to the attention of the Land Department. Following verification, it was confirmed that the developer had provided false information regarding the ownership of the front part of the site up to the schemed road alignment and that the development approved by the Authority had included a plot of government-owned property measuring some 60m^2. The developer was subsequently directed to halt his construction activity on government land to which he held no title while Mepa was requested by the Land Department to stop the developer from any further works on the project. Furthermore, a warrant of prohibitory injunction filed a few weeks later by the local council was upheld by the Court. Unperturbed, the developer submitted a request to the government authorities to be allowed to purchase the land which he had encroached upon.

Following these developments, the Land Department started to take the necessary steps for the disposal of all the government-owned land lying between the private properties in the area in question and the schemed road alignment. According to current policy, government land that lies between the set alignment and privately-owned land is parcelled off in line with the width of the different adjoining private properties at the back and is then offered for sale by tender. On such occasions, the right of first refusal is given to each of the private owners of property that is contiguous to the government land being disposed of.

Comments by the Ombudsman

The practice by the Land Department to sell public property that lies between private land and set road alignment and to offer owners of adjacent property the right of first refusal is considered justified in the sense that it serves as a source of income to government. In this case, however, facts showed that if a resident in the locality had not raised his objections to the ongoing works, government property would have been encroached upon without the knowledge of the Land Department. Clearly this is an administrative lacuna which is detrimental to the public interest.

The Ombudsman remains unconvinced by the fact that development applications that are approved by Mepa are conditional on the safeguard of third party rights since various instances have shown that this is not sufficient to protect government-owned property from abusive action. Indeed, it still allows maverick developers and speculators to try their luck first by encroaching upon public property and then by having their development proposals concerning any such property approved by Mepa if their luck does not hold and their illegal action is discovered. In all likelihood the public property which they would have usurped would still become theirs since after a call for tenders they would still be offered the right of first refusal for land which, once already built on, is not likely to generate much interest from any other genuine buyer.

The Ombudsman stressed that this situation calls for improved liaison between Mepa and the Government Property Division. The approval of development applications subject to saving third party rights may be appropriate in the case of land that belongs to private owners who are obviously more vigilant to notice any illegal building on their property and who can take prompt action to defend their rights. However, this does not necessarily work in the case of encroachments without any title on government-owned property which could possibly remain undetected unless there are objections by private individuals whose concern in putting forward complaints could possibly be motivated by personal interest.

Outcome

The Ombudsman confirmed that since in this case the Land Department took prompt and proper action when the matter was brought to its attention, this was not an instance of maladministration.

The Ombudsman, however, took this opportunity to point the lacuna in the processing of applications for building development that encroaches on public property since whenever such situations arise, the land which would have been usurped generally still falls in the hands of those who would have taken over possession without any effective bidding to the detriment of the public coffers.

The Ombudsman recommended that the Ministry for Home Affairs should do its utmost to eliminate the risk of encroachment and unauthorised development works on public property.

Case No C 404

MINISTRY OF JUSTICE AND LOCAL GOVERNMENT

Award of compensation to a victim of crime

The complaint

A high-ranking official in the Police Force who resigned in 1990 was grievously injured in December 1998 when a bomb that had been placed under his car which was parked in front of his private residence, suddenly exploded as he turned the ignition key. The explosion also caused considerable damage to the car.

When this person sought compensation awarded by Government to victims of crime, the Ministry of Justice and Local Government informed him that his request could not be considered unless clear and irrefutable evidence emerged that this case was directly related to his former duties.

Feeling that this was an unjust decision, the person concerned submitted a complaint to the Ombudsman and requested that the matter be investigated in accordance with the Ombudsman Act, 1995.

Facts of the case

Immediately prior to his resignation from the Police Force, complainant was responsible for criminal investigations which were under way on various pending cases. He maintained that throughout the eight years after his departure from the Police Force he had not been involved in any incident or experienced any hostility or antagonism that could have led to this outrage against him. During the magisterial inquiry, complainant also stated that although he had no suspicion about the identity of the perpetrator of this criminal act, he had reached the conclusion that the attempt on his life was related directly to his duties when he was serving in the Police Force.

In 1999 complainant submitted a request to the Ministry of Justice and Local Government for the award of compensation to victims of crime. He also included a certificate by a Consultant Orthopaedic Surgeon that he had suffered a permanent disability of 50%. This request was processed in accordance with approved procedures and the Ministry sought the advice of the Attorney General.

On 30 January 2001 the Attorney General expressed the view that in the absence of any indication that the bomb had been placed underneath complainant's car for any reason other than his former duties in the Police Force, his advice was that complainant's request should be considered in accordance with the policy established by Government regarding cases of persons who suffer bodily injury following bomb explosions. In the opinion of the Attorney General the award of compensation in this case was acceptable and it was recommended that following a previous court judgement, financial compensation on an *ex gratia* basis be awarded in final settlement of complainant's claim.

The Ministry of Justice and Local Government, however, did not share the view that until the contrary was proven, it was a fair assumption to believe that the bomb was placed underneath the victim's car because of his former position in the Police Force. Reference was made to the fact that considerable time had elapsed since complainant had left the Force and that the Police could not confirm beyond any reasonable doubt that they were convinced of the link which existed between the incident and complainant's former duties in the Force or confirm the motive behind this criminal act.

The Commissioner of Police pointed out, however, that during investigations in connection with this incident, there were allegations that this attempt was the result of police investigations which complainant had conducted when he formed part of the Force.

At this stage the Attorney General raised an important issue: if the attempt on complainant's life were to be linked to his former position in the Police Force, was it necessary to back this assumption by an assurance beyond any reasonable doubt that this was indeed so or was it enough on the balance of probability to consider the incident as having been related to complainant's former role in the Police Force?

Since the Attorney General considered that this was a policy decision, he sought a political directive on the issue. In the event that the Government decided that action would go ahead on the balance of probability, the Police would then need to confirm if there was a strong probability that the attempt on complainant's life had been related to his activities when he was still serving in the Force.

The official view was that past awards of compensation to public officials who were victims of crime were based on an undisputed link between the criminal act and the work done by the victim in his capacity as a public officer. It was argued that the main issue in this case was the extent to which it was plausible to state that on the balance of probability a criminal action which took place a long time after the resignation of a member of the Police Force was directly related to his former work.

In view of the directive that an unequivocal link had to be established between the criminal act and the victim's duties as a police officer and that this was to serve as the overriding yardstick for the award of compensation, the Attorney General advised that in these circumstances the request for redress should be turned down unless clear and conclusive evidence emerged to uphold this view. This decision was communicated to complainant.

Considerations by the Ombudsman

The Ombudsman's considerations in this case were largely guided by a cabinet decision in 1987 that *ex gratia* compensation should be given by the state to victims of crime who suffer bodily harm resulting from

- breakdown of law and order;
- those responsible for law and order, being themselves in breach of law, causing wilful harm to persons; and
- bodily harm suffered by members of the security forces in the course of their duties as a result of a criminal offence.

Cabinet also agreed that in such cases the quantum of damages is to be determined on advice given by the Attorney General's Office which is to follow norms used by the Court in awarding damages. Subsequent cabinet decisions were that the Ministry of Justice should also review the award of compensation in cases involving bomb explosions and that requests for the award of compensation are to be considered only in cases where a criminal act goes against the public interest.

The Ombudsman argued that although in this case complainant had not suffered any damages in the course of his duties, at the same time, however, he had been the victim of a bomb explosion. Consequently his case had to be considered in accordance with approved policy criteria.

The Ombudsman noted that the magisterial inquiry had not established the motive underlying the attempt on complainant's life. He also noted that, on the other hand, official opinion was that the overriding consideration was whether the attempt on the victim's life resulted from his former duties in the Police Force or from some other reason not connected to his previous work and which remained unknown.

Neither complainant himself nor the Police Force admitted to having any clue regarding the identity of any person or persons who might have had an interest in harming complainant after his resignation. On his part complainant explained that after his retirement from the Force he had no serious problems or concerns and police records confirmed this statement. At the same time, the Police confirmed that they were not in a position to state with a degree of certainty whether there were any cases which had been investigated by complainant and which were still awaiting court action when he retired from active service. According to the police authorities, however, before his retirement complainant had been responsible for criminal investigations for some twenty months and it was fair to assume that cases which he had investigated before his retirement in 1990 had been brought before the court by 1998.

From information provided by the police authorities to the Ombudsman, it did not result that when the explosion took place in December 1998 the Police were considering taking court action against any person in connection with

cases that had been investigated by complainant and where he would have been required to give evidence. When the accident took place, however, there was pending court action in connection with a string of burglaries which had taken place in 1982 and which had been investigated when complainant was still in active service.

This court case, which was still pending at the time of the bomb incident and which was subsequently concluded in December 2001, had involved two persons, A and B. During the inquiry held by a magistrate in connection with the bomb explosion, it resulted that in February 1999 accused A had given evidence under oath to the effect that accused B was responsible for the bomb explosion underneath complainant's car. Accused A subsequently admitted to perjury and retracted his evidence against accused B.

The Ombudsman also discovered that during the court case on the thefts that took place in 1982, accused B had given evidence in March 1999 that when complainant was investigating these thefts, he had been subjected to rough treatment by the Police in the office of complainant and in complainant's presence. Furthermore, the brother of accused A who was notorious for his involvement in criminal activity had once told the Police that accused B wanted to exact revenge on the police authorities for the case regarding the burglaries.

According to the Ombudsman these indications gave rise to serious suspicions that the bomb explosion could have had a direct connection with complainant's investigation of the 1982 burglaries. The Ombudsman, however, considered that these were legitimate suspicions which could not be produced as evidence that would be accepted by the Court. In fact investigations on the bomb incident and the attempt on complainant's life were not concluded although the *procès-verbal* by the magistrate was presented in November 1999.

Following consideration, the Ombudsman shared the view expressed by the Attorney General that since there was no indication that the bomb had been placed underneath complainant's car for any other reason, it seemed fair to conclude that the motive behind this criminal act was in some way linked to complainant's former duties in the Police Force.

Since during investigations a person had changed his evidence, the Police did not have enough evidence in their possession that would justify proceedings against the person who was suspected of having a sufficient motive to make an attempt on complainant's life. As a result, the Police were not in a position to provide irrefutable evidence of a definite connection between the criminal act and complainant's former duties in the Force.

The Ombudsman was of the opinion that the primary consideration in this case was that raised by the Attorney General who asked if it was enough to accept the likelihood of a connection between the explosion and complainant's work in the Police Force on the basis of a balance of probability.

The Ombudsman was fully in agreement that extreme care ought to be taken when requests are submitted for *ex gratia* payments out of the public purse. However, in order to ensure that a case such as the one in question is dealt with in a just way, it is important for the decision maker to weigh scrupulously all the facts together with all the relevant evidence and to take a good look at the way in which the signs are pointing.

Outcome

In his conclusion the Ombudsman pointed out that government policy on the award of compensation to victims of crime including bomb explosions is not linked exclusively to the condition that victims have to be public officers who suffer bodily harm in the course of their duties.

Despite the fact that in this case eight years had elapsed after the victim's retirement from the public service and this might have influenced the decision about his claim for compensation, no evidence emerged during the Ombudsman's investigations that the attempt on complainant's life occurred as a consequence of any reason other than his official capacity in the Police Force prior to his retirement.

Viewed in this light, there were indications that on the balance of probability, the criminal act was directly related to the victim's duties in the Force. The Ombudsman emphasized that it is in the national interest to ensure that public

officials who fill sensitive posts and whose work and decisions have long lasting effects should be afforded protection even after their retirement. Failure to attach due importance to this consideration could possibly influence the way in which a person who is on the verge of retirement undertakes his duties.

The Ombudsman concluded that on the strength of his evaluation of the way in which this case unfolded, the balance of probability pointed in favour of complainant. The Ombudsman therefore upheld complainant's submission and agreed that the amount of compensation which had been assessed by the Attorney General seemed justified. The Ombudsman's recommendation was finally accepted and complainant was awarded this amount of compensation on an *ex gratia* basis.

Case No C 436

POLICE FORCE

Where on earth is my car?

The complaint

A car owner complained to the Ombudsman that her car had been towed even though she had left it in an area where parking was not prohibited. Her frustration increased when after having paid the towing charge and she went to retrieve her car from the place indicated by the Police, the vehicle could not be traced. Finally, it emerged that due to a misunderstanding between the towing contractor and the Police, the car had been stored in a different location.

Since it had taken her about half a day in order to locate where her car was stored and to collect it, complainant claimed compensation for the towing fee and for the loss of a day's work.

Facts of the case

Complainant resides in the main square of a village where festivities in connection with the feast of the patron saint reach their peak. Fully aware of this, on the eve of the feast she found a parking bay marked with the appropriate white signs in a no tow zone some distance away from her residence where she left the car for the weekend when the village *festa* would be in full swing. Going to work two days later, she discovered to her dismay that her car had been towed away.

When complainant called at the police station, she was informed that after paying the towing charge of Lm45, she could collect her car from the Mosta Technopark. However, when she called at the Technopark, there were no towed cars in sight. After making several telephone calls in order to find out exactly where her car was being kept, she was informed that it was at Qawra. At the Qawra police station, however, no one knew where her car was.

Visibly upset, complainant again sought information about her car's whereabouts from the police station of her own village and was finally told to call again at the Qawra police station where an employee of the towing company was waiting to take her to the place where the car was stored. It was almost midday by the time that she managed at last to retrieve her car.

Contacts between the Ombudsman and the Police Force revealed that a few days before the feast was due to take place, a Police Notice in the *Government Gazette* stated that by virtue of section 52(1) of the Traffic Regulation Ordinance, the parking of vehicles was prohibited from 0700 to 1600 hours on the Sunday of the village feast in a number of streets in the locality. This list included the street where complainant had parked her car for the weekend.

According to police authorities, mobile No Parking signs were placed in the streets covered by this temporary parking ban and residents in this area were informed that owners of cars who disregarded these regulations could have their cars towed away. The Police held that once an official notice was published in accordance with the Traffic Regulation Ordinance, the complaint was unjustified at law.

The Police also explained that although proper instructions were issued to the towing contractor for the storage of towed vehicles, the contractor had misunderstood these instructions. This had given rise to the wrong information given to complainant that had in turn caused her so much inconvenience. In the circumstances, the police authorities were of the view that since it was the contractor who had caused the grievance, it was up to him to redress any damage suffered by complainant. The Police informed the Ombudsman, however, that despite their efforts to persuade him to compensate complainant for the loss of a day's pay, the contractor refused to accept any responsibility for his actions.

Outcome

The Ombudsman established that when complainant parked her car on the eve of the village *festa*, there were no mobile No Parking signs to indicate that parking would not be allowed in that area on the following day. In fact

mobile No Parking signs were placed there later and complainant had no opportunity to know that parking would not be permitted in that street on the day of the feast.

The Ombudsman stated that clearly the legal requirements in terms of the Traffic Regulation Ordinance were satisfied by the publication of the notice in the *Government Gazette*. The Ombudsman was of the opinion, however, that since it is widely known that the average citizen does not read the *Government Gazette*, the publication of an official notice a week in advance in a government publication cannot be considered as a sufficient and effective means of information to the public.

As the Ombudsman had occasion to comment in a similar case, the temporary prohibition of parking during religious processions and festivities gives rise to complaints which can be avoided or minimized if prior to towing an attempt is made to identify owners of parked vehicles so that their cars may be removed in time. Placing portable No Parking signs and the publication of notices in the *Government Gazette* may satisfy the law but do not constitute proper means of information to the public and especially to owners of vehicles.

In this case the Ombudsman ruled that no evidence emerged to show that any attempt had been made by the police authorities to contact the owner of the vehicle and to alert her to the consequences that she would have to face if the car would not be moved.

The Ombudsman drew the following conclusions:

- although the requirements of the law were satisfied by the publication of a Police Notice in the *Government Gazette*, the No Parking signs were placed in the street after complainant had left her car parked in an authorised parking bay;
- no attempt was made by the police authorities to contact the owner of the car prior to towing and since these were temporary parking restrictions, it was unfair to remove the vehicle without adequate notice to its owner;

- the inconvenience and loss of work as a result of the change in the place for the storage of complainant's car had been caused by the towing contractor but the Police were responsible for ensuring that the contractor acted properly.

The Ombudsman also pointed out that he has no jurisdiction over the towing organization since it is a private company; and although its actions may cause distress to members of the public, the Ombudsman cannot recommend that the company should redress complainant's grievance by compensating her for loss of a day's work.

The Ombudsman recommended that the Police should refund the towing fee on an *ex gratia* basis and continue to urge the towing contractor to compensate complainant for the inconvenience that had been caused to her. The Police agreed to abide by this recommendation. At the same time the Ombudsman recommended that in the event that the contractor failed to make amends, this negative attitude towards the public should be taken into account at the end of the contract between the Police and the towing contractor when new arrangements for towing services would be undertaken.

Case No C 444

LAND DEPARTMENT

Safeguarding the national interest in the disposal of government-owned land

The complaint

Although an offer submitted to the Land Department for the purchase of a tract of land in Gozo was the highest and exceeded the value that was established by the department for this plot, the person who presented this bid was irked by the fact that after more than fifteen months, no decision was taken regarding the sale of the land in question. In the meantime he had continued to extend his bid bond as requested by the department.

Presenting his grievance to the Ombudsman, this person alleged that the delay by the Land Department in reaching a decision was attributable to improper discrimination and/or maladministration with the result that he was being deprived of the opportunity to acquire this plot of land.

Facts of the case

An open call for tenders for the sale of a plot of land in Gozo issued by the Land Department required all tender submissions to be accompanied by a bid bond of Lm2,000. Since complainant had already showed interest in this site, he was informed directly by the department of the issue of this call for tenders.

When the period for the submission of offers expired, the department received two offers – the first was lower than its own estimate while the other offer by complainant was higher. This meant that although complainant had asked to be allowed the right of first refusal because he claimed to have already entered into a promise of sale to purchase a parcel of land, belonging to third parties, that was contiguous to this plot, there was in fact no need for this right to be given to him once he had submitted the best offer.

When the result of the call for tenders was sent to the Ministry for Home Affairs and the Environment before being referred to the Contracts Committee, the following comments were put forward:

- the department's own estimate was based on the market value of the site in question which, although within a development zone, did not have direct access to any road; and
- the land between the site in question and a nearby road belonged to the ecclesiastical authorities.

Since it resulted to the Land Department that complainant had not in fact entered into any promise of sale for the purchase of the property between the site and the nearby road, the Government Property Division of the department felt that on the basis of the 1991 Agreement between the Holy See and Malta this strip of land ought to be acquired by Government so as to permit easy access to the land which featured in the call for offers. In this way the commercial value of the site would be increased. It was understood, however, that in order to acquire this site from the ecclesiastical authorities, the property needed to be exchanged with land previously belonging to the Church that had already been transferred to Government and which the Church wished to get back for pastoral use; and although the terms of the Agreement envisaged such an exchange, clearly it was not possible to foretell when such an occasion would arise.

Following this proposal, it was decided not to turn down complainant's offer but to keep it on hold for some time. This meant that in the meantime complainant's bid bond needed to be extended because the department had not formally rejected his offer.

Considerations by the Ombudsman

It was widely known that for a long time complainant had showed interest in the land that was offered for sale by government even though in its state at that time this land had no direct access to any road.

While the evaluation of the two tender offers was under way, officials from the Land Department realized that the land linking the site that was offered for sale to a nearby road belonged to the Church. As a result it was agreed that it would be in the government's best interest to halt the award process since by obtaining the land that provided access to the site under the terms of the Agreement between the Government and the Holy See, the value of this site would increase.

The Government is legally empowered to reject any offer although this right is not to be used without any valid reason. In this case, once the department became aware of the potential of the site under consideration to fetch a higher price if it were linked directly to the road nearby, it was the department's responsibility, once it could still do so, to explore the possibility of acquiring the land that provided direct access to the site so as to enhance its commercial value. In fact complainant clearly planned to do the same thing if the site fell into his hands.

The Ombudsman insisted that it is in the national interest and in the best interest of public administration that the disposal of government-owned land should take place on the best possible terms to Government. The decision to halt the sale process could not therefore be viewed as an act of maladministration or as an illegal action. On the other hand, however, the Ombudsman stated that the decision to postpone the sale of the plot of land for more than a year was unjustified.

The Ombudsman pointed out that whenever a government department issues a call for tenders and receives an offer that fully satisfies its conditions – as happened in this case – the department is duty bound to accept or reject any such offer within a reasonable time. The Ombudsman viewed the department's decision to stall proceedings for more than a year as an instance of maladministration that deserved criticism.

Outcome

The Ombudsman's conclusions were as follows:

(i) since the Government was still in time to fetch a higher price for the sale of the land in question, the Government Property Division was justified not to accept complainant's offer;

(ii) there was no evidence that the action by the department was motivated by considerations that were improperly discriminatory in nature; and

(iii) the delay in reaching a final decision on complainant's offer deserves a critical mention even though this was done with a view to safeguarding complainant's own interest and the government's position before a firm rejection of the offer.

Taking these factors into account, the Ombudsman found that the government authorities involved in this issue did not act correctly when they failed to reach a decision within a reasonable time and allowed complainant to continue to nourish expectations that his offer would be accepted especially when he was required to extend his bid bond at an interval of three months for about fifteen months.

In the circumstances, the Ombudsman felt that the most equitable solution would consist in a definite refusal of complainant's offer and in the award of an *ex gratia* payment to complainant that would correspond to the expenses which he had incurred in connection with the various extensions to his bid bond.

Shortly after receiving the Ombudsman's recommendations, the Land Department agreed to refund all the expenses which complainant had incurred to extend his bid bond.

Case No C 568

MALTA TOURISM AUTHORITY

Unjust termination of apprenticeship

The complaint

In a letter to the Ombudsman, complainant alleged that the decision by the Malta Tourism Authority (MTA) to terminate its sponsorship of his apprenticeship was unjust because the Authority gave no reason why it chose instead to retain another trainee with allegedly inferior merits.

Complainant was also aggrieved because the abrupt termination of his sponsorship had prevented him from seeking alternative sponsors with adverse long-term effects on his career prospects. He also complained on the delay and the manner in which the decision by the MTA had been communicated to him.

Facts of the case

The Ombudsman's investigations with the Malta Tourism Authority and the Employment and Training Corporation (ETC) revealed that early in 2002 prospective apprentices under the Technician Apprenticeship Scheme (TAS) were invited by the Corporation to attend an introductory talk about the rights and obligations of apprentices joining the Scheme.

According to the guidelines of the Scheme that were distributed during this meeting, first year apprentices were required to undertake on the job training during the summer vacation at a work environment that would be approved by the ETC. TAS guidelines also stated that the first three months of an apprenticeship are considered as a probationary period during which the employer or the apprentice, upon giving three days' notice in writing, may terminate the apprenticeship agreement.

The Scheme also laid down that an apprentice's probationary period is preceded by an observation period of two months to enable an employer to determine whether the apprentice who has been selected is fit to join his organisation. While this period is not binding on either party and no engagement form needs to be filled, at the same time on his part the employer is not obliged to make any remuneration to an apprentice who is under observation. Furthermore, even during this observation period either of the two parties may terminate the relationship merely by giving three days' notice in writing.

Following interviews, the ETC informed the Malta Tourism Authority in the summer of 2002 that complainant had been selected for the course of telecommunications technician together with another applicant. The MTA in turn agreed to sponsor both candidates under the Scheme.

Shortly afterwards, however, following the employment of full time staff in its IT section, the MTA decided to sponsor only one apprentice and management had to select the apprentice who was best suited to meet the Authority's requirements. Although the two apprentices had been under observation for only six weeks, management concluded in its assessment that complainant deserved second placing because in spite of his inferior academic performance at MCAST, the other candidate understood computer basics better, showed more initiative and was able to work with minimum supervision. It was therefore decided to retain the sponsorship of this other apprentice and at the end of September 2002 complainant was informed of the MTA's decision to terminate his sponsorship.

Outcome

The Ombudsman ruled that the MTA's decision not to sponsor complainant was not in breach of ETC rules since complainant was still in the two-month observation period when this decision took place.

The Ombudsman ascertained that the Authority's decision to sponsor only one apprentice arose due to changes in the organisation's manpower requirements and that the MTA could rightfully invoke the period of

observation to go back on its decision to sponsor two apprentices. It was the view of the Ombudsman, however, that the MTA's original decision gave rise to a sense of vain expectation on the part of complainant and this attracted a critical comment.

The Ombudsman also pointed out that it is not within his competence to review the assessment that was undertaken by the MTA management of the aptitude of the two candidates and their potential suitability for the Authority's needs especially in the absence of any evidence of bias against complainant throughout the evaluation process.

With regard to the way in which the decision had been conveyed to complainant: the Ombudsman noted that the Malta Tourism Authority had informed the ETC of its decision not to sponsor complainant within the observation period stipulated by the Corporation and that the ETC had in turn informed complainant of this decision by means of a phone call a fortnight later. In the opinion of the Ombudsman, both the Malta Tourism Authority and the Employment and Training Corporation were obliged to inform complainant of the decision in a proper manner in writing and failure by the two organisations to do so merited criticism.

The Ombudsman concluded his investigation of this case by pointing out that since it was not feasible for the MTA to take back complainant, it was recommended that the Employment and Training Corporation should do its utmost to identify other suitable employers who would be prepared to sponsor the apprenticeship of complainant.

Case No C 577

MALTA ENVIRONMENT AND PLANNING AUTHORITY

The flawed approval of a development permit

The complaint

Mr and Mrs Casagrande (not the real name of the aggrieved persons) alleged that the Malta Environment and Planning Authority (Mepa) had taken them for a ride and that its actions had caused them hardship.

The couple stated that they had checked the status of their development application on the Mepa website before they decided to enter into a contract for the purchase of property in Dingli which they planned to use as their residence. On the basis of the information in this website and after having received written confirmation that Mepa had approved their application for alterations to the existing building, the Casagrande couple decided to enter into a final contract for the purchase of these premises.

Some time after entering into this deed, however, the couple was informed by Mepa that their application had not been approved in full in the sense that although they had applied for two balconies, only one of them had been approved by the Authority. The permit was therefore subject to acceptance by Mepa of new plans which they had to submit that would incorporate this amendment.

Feeling surprised by Mepa's action, the Casagrande couple approached the Ombudsman with their grievance and explained that they would not have bought the property if they had been made aware earlier that acceptance of their development application was subject to a change of plans. They expressed their concern that they had received confirmation by Mepa of its approval of their application when it later turned out that it had not been approved in full. The couple insisted that the two balconies were a crucial feature that had swayed their decision to purchase this property.

Facts of the case

In reply to the Ombudsman's query, the Authority admitted straightaway that by and large the sequence of events described by complainants was beyond dispute and that it had apologised to them for its administrative error. The Authority explained that this error arose when it failed to inform complainants that the approval of their application by the Development Control Commission was subject to the submission of fresh plans since it was felt that two balconies may be too much for the façade in question and only one balcony had been approved. The Ombudsman therefore had to decide whether and to what extent the mistake by Mepa had caused the hardship which complainants claimed to have suffered.

Documents seen by the Ombudsman confirmed that before complainants sent their application to Mepa on 15 July 2002, they had agreed to purchase this property by a promise of sale dated 19 June 2002 regardless of whether the permit was issued or not by Mepa. They had also agreed to sell their own residence by means of a deed dated 17 June 2002.

The Ombudsman felt that there was an important issue which had to be considered in his review of this case. The promise of sale had expired automatically three months later since the owners of the property failed to insist on their right to enforce the sale of the property during this period. This in turn left complainants free to withdraw from their obligation to purchase the property after 19 September 2002. It was however at this time that they had received a letter dated 18 September 2002 from Mepa stating that their application regarding this property had been approved and that before the relative permit could be issued they were required within thirty days to submit a bank guarantee "*to ensure that the existing aluminium apertures on the façade are replaced by timber*".

Also comforted by Mepa's website which announced to all and sundry that their application had been approved, it was at this stage that complainants proceeded to sign the final contract of purchase.

In the course of discussions with the Ombudsman, the Casagrande couple admitted that if their application with Mepa concerning the property had been unsuccessful, they could easily have selected other premises in the same area. However, it was on the strength of the information provided by Mepa, which later turned out to be incorrect, that they had finally made up their minds to purchase the property.

Complainants' situation was further compounded by the fact that at this point the person who had agreed to purchase their residence insisted that they should vacate the building. In order to gain some breathing space, complainants agreed to pay this person a rent of Lm150 per month for as long as they continued to reside in these premises and until they sorted out their problem with Mepa. Complainants maintained that they had no other option but to continue to live in their first house because the one which they had just bought was not habitable.

The Ombudsman's view on this point was that Mepa had not objected to the changes that were envisaged in complainants' plans to render the house habitable. These changes were in fact acceptable and the only exception concerned one of the two balconies on the façade of the building where Mepa's stand was that formal approval would only be forthcoming after submission of fresh plans that would provide for only one balcony instead of two. Complainants had reacted to this proposal by not sending any revised plans at all and by informing the Authority that this suggestion was not acceptable to them. Despite this reply, Mepa had not proceeded to refuse the Casagrande application.

It can be argued that since Mepa had not raised any objections to amendments that would have rendered the premises habitable, the consequences for the delay which meant that complainants had to incur additional expenses in the form of rent, cannot be laid at Mepa's door. On the other hand, had complainants decided to lodge an appeal against Mepa's conditions, these procedures would invariably have taken even longer. At the same time, on its part Mepa did not conclude the whole process by issuing a downright refusal despite insistence by complainants not to accept Mepa's conditional acceptance of their application.

Outcome

In his report the Ombudsman stated that he was not in a position to evaluate the alleged personal and psychological consequences on the Casagrande household in the aftermath of the Mepa decision. He appreciated the fact, however, that although the matter under consideration may seem somewhat trivial to an outsider, yet he could not remain insensitive to its effects on those who were directly involved.

The Ombudsman felt that Mepa cannot disclaim its responsibility at law for the material and other consequences of its administrative error simply by means of an apology to the Casagrande household especially when this error had led to the purchase of property worth Lm40,000 which complainants would probably otherwise not have purchased.

The Ombudsman pointed out that his Office has no jurisdiction to review the Authority's decision to refuse one of the balconies in the plans submitted by complainants and is not in a position to comment on the design and the number of balconies that would be most appropriate to the façade in question. Nonetheless, the Ombudsman upheld the grievance raised by complainants regarding the administrative failure by Mepa when it gave them wrong information about the status of their application. This attracts criticism.

The Ombudsman also felt that although Mepa was prompt to apologise for its failure, this does not release the Authority from its responsibility at law for the consequences of its action.

The Ombudsman finally recommended that Mepa should reconsider its position in the light of the way in which the situation had developed and that the Authority should issue a reasoned final decision that will enable the Casagrande household to develop the property without further hassle.

A few days after the Ombudsman's recommendations, the Development Control Commission agreed that in view of the Authority's administrative error, complainants' application for the two balconies ought to be accepted.

Case No C 619

OFFICE OF THE PRIME MINISTER

Going through the motions to select a head of department

The complaint

Feeling that he had been treated unfairly when he was not selected to a headship position in the public service following the issue of a call inviting senior public officers to fill this post, a high-ranking civil servant lodged a grievance with the Ombudsman. He claimed that his application had been rejected despite years of experience in the work of the office in question, qualifications and recognized creditable performance.

Facts of the case

In his investigations, the Ombudsman ascertained that complainant possessed the necessary requisites including professional qualifications in public administration and accountancy as well as experience in the work of the office where he had served since it was set up in 1993. Furthermore, his performance was consistently judged creditable by his superiors and exceeded performance targets and on various occasions he had been appointed Acting Director of this office.

The Ombudsman discovered that a few weeks before the issue of a call inviting applications for this headship post, the Office of the Prime Minister informed the Public Service Commission (PSC) that the Government intended to nominate an official who was serving in another department to fill this post. It was claimed that this person possessed the necessary experience, seniority and other qualities which rendered him suitable for the position. Despite this direct nomination, the PSC decided to launch a selection process and shortly afterwards issued a circular inviting applications from interested officials.

Complainant's name featured on a short-list of three candidates that was prepared by the Senior Appointments Advisory Committee (SAAC) from applications received in response to this call. After interviews and an evaluation of the three short-listed candidates had taken place, the Permanent Secretary at the Office of the Prime Minister in his capacity as Chairman of the SAAC reported that the Committee had no hesitation in finding that the candidate who had earlier been the subject of the direct nomination was the most suitable person on the grounds of experience, skills, positive attitude and relevant knowledge. Following the Prime Minister's acceptance of this recommendation, the PSC was consulted on the proposed appointment and agreed with the recommendation.

Upon being made aware of the outcome of the selection process, complainant submitted a petition to contest the appointment. The PSC in turn took into consideration the issues raised by complainant including:

- his long years of experience in all the tasks listed in the position description and his academic qualifications;
- the various occasions when he had served as Acting Director of the department;
- his track record in the office including the years when as Assistant Director his performance had exceeded targets; and
- his contribution towards setting up various sections within the department and his thorough knowledge of the relevant legislation.

After the PSC sought explanations from the Permanent Secretary, OPM on the points raised by complainant, the Commission concluded that in these circumstances it could not but be guided by the report of the SAAC and that it had no reason to doubt its conclusions.

Outcome

In his consideration of this case the Ombudsman was guided by the fact that the Public Service Commission is a constitutional commission whose decisions cannot be challenged, not even in Court, except on points of law.

In such cases, his investigations can only focus on the review process adopted by the Commission on the petition submitted by complainant and whether the PSC gave adequate proper consideration to complainant's petition on his failure to be appointed head of department. In the absence of any irregularities, the Ombudsman has no competence to contest the PSC's decision.

It is important to recall that the post that was to be filled constitutes the position of a head of government department and that, in accordance with article 92(4) of the Constitution of Malta, an appointment to such a position is made by the Prime Minister acting after consultation (not recommendation) with the Public Service Commission.

From a review of documents on this case, the Ombudsman confirmed that the PSC had given due consideration and advice when it was first consulted on the matter and when its attention was later brought to the direct nomination that was proposed by Government for this post. Faced with a situation where the Government intended to make the appointment without inviting public officers to apply in line with established practice, the PSC had recommended that the normal selection procedures should be followed and the Government had accepted this recommendation.

The Ombudsman also found that when the PSC was consulted on the proposed appointment after the evaluation of the short-listed candidates by the SAAC, the Commission had in fact given a thorough airing to this recommendation and sought additional clarification. In fact it was only after this detailed review that the PSC decided that in the circumstances it could not but be guided by the report of the SAAC and that it had no grounds that would justify its rejection of the SAAC's conclusions.

The Ombudsman confirmed that from evidence in his possession regarding this case, it appeared that complainant had more direct hands-on experience in the work of the department concerned; more academic qualifications; and a higher seniority standing than the candidate who was appointed. Notwithstanding this, even if the Ombudsman were to disagree with the decision of the competent authority, in the absence of evidence of any irregularity an outside reviewer such as the Ombudsman cannot substitute a decision reached by such an authority by his own.

The Ombudsman concluded his report on this case by stating that it was noticed that the appointment had already been decided even before the circular inviting applications for the post was issued. He expressed his view that clearly the SAAC had gone through the motions of a selection process merely to satisfy the Public Service Commission.

Finally, although the Ombudsman was of the opinion that his conclusions regarding this case did not imply that the final choice was wrong or that there were more suitable officers eligible for the post, he felt that the course of action taken in this case warranted a critical comment. At the same time, on the basis of the facts that emerged during the investigation, it was confirmed that the position of complainant insofar as it relates to the appointment of head of department had been given proper treatment by the PSC and there were no grounds to sustain the complaint.

Case No C 650

CIVIL AVIATION DEPARTMENT

Refusal to issue a Maltese commercial pilot licence

The complaint

A complaint reaching the Ombudsman alleged that failure by the Civil Aviation Department to issue a commercial pilot's licence constituted unfair and unreasonable treatment because the conditions attached to the issue of this licence were virtually unattainable.

Facts of the case

When in March 2001 complainant, who was in possession of a pilot's licence obtained in Australia in October 1999, inquired about the requirements to obtain a Maltese national pilot licence, he was informed by the Civil Aviation Department that he could only apply for the licence provided he was employed by a Maltese operator in the aviation sector. He was also advised that no more Maltese national licences would be issued after the transition period ended on 30 June 2002.

In October 2002 complainant referred to his earlier inquiry and asked the department what was holding back the conversion of his foreign licence to a Maltese Commercial Pilot Licence (CPL). The department replied that according to its records complainant had never applied for this licence and pointed out that in any event it was no longer possible to issue this licence after the end of the transition period which by then had already passed. The department also informed him that in order to be able to fly a Malta-registered aircraft for commercial purposes, he had to replace his non-JAA licence by a JAR-FCL 1 licence and explained that holders of this licence issued by a JAA member state (including Malta) which shared an agreement based on mutual recognition, needed to undertake no other licensing formalities.

In view of the condition by the Maltese civil aviation authorities that the person being awarded a Maltese CPL had to be employed with a Maltese operator and since complainant had not found employment with a local aviation company and in the meantime the time limit for the conversion of his foreign licence had expired, he requested the Civil Aviation Department to issue this licence for him on the strength of his original "request". The department stated that this was not possible because it would undermine the credibility and the reputation of the licensing standards of the Maltese civil aviation authorities and jeopardise the status of aviation practice in Malta. At the same time the department wanted to ensure that foreign aviation authorities would not consider the Maltese licensing system as a means of bypassing JAR-FCL examinations in order to secure a JAR-FCL 1 licence.

Background information

In order to examine this case the Ombudsman reviewed procedures followed by the Civil Aviation Department for the award of a pilot's licence. Malta is a member of the JAA (Joint Aviation Authorities) organization which is a group of European states that apply common regulations and standards in areas such as licensing of flight crews, operation of aircraft and certification of airworthiness. These regulations are commonly referred to as JARs (Joint Authorities Regulations) while regulations concerning flight crew licensing for aircraft are called JAR-FCL 1. By virtue of this harmonization, licences and certificates issued by any JAA member state are recognized in all other member states.

According to the JAR-FCL 1 provisions which Malta implemented from July 1999, no JAA member state is allowed to issue a pilot's licence other than the JAR-FCL 1 licence after 30 June 2002. The period between July 1999 and June 2002 was considered as a transition period prior to the entry of the JAR-FCL 1 licence and the local civil aviation authorities are not allowed to issue any other pilot's licence after this cut-off date. These arrangements meant that Malta could issue national licences on the basis of its national regulations only until this date and that these national licences could then be replaced by JAR-FCL 1 licences.

Since an airline pilot requires a basic professional commercial or airline transport pilot's licence and there are no flight training organizations in Malta that provide specialized training for pilots, all licensed Maltese pilots have to undertake training programmes in foreign institutions. However, since the Maltese national licensing system adopted by the Civil Aviation Department made it possible for holders of a foreign licence to be granted a Maltese licence, the necessary safeguards needed to be taken so that under the JAA system Maltese licence holders will not be able to convert their licence to a JAR-FCL 1 licence without undergoing most of the training and testing that would otherwise be required to get a JAR-FCL licence. The Maltese civil aviation authorities and the JAA took the necessary steps to ensure that the system would not permit the conversion of a non-JAA licence to a Maltese licence and then to a JAR-FCL 1 licence which would allow pilots to fly on aircraft registered in other JAA states without having completed the necessary examinations.

In April 2001 the Maltese civil aviation authorities requested the JAA to recognize licences issued in Malta. For this to happen and in order to ensure adequate safeguards, it was agreed to extend mutual recognition to Maltese licences by the end of 2001 while from 1 January 2002 to the end of the transition period in 30 June 2002 Maltese licences would only be issued to pilots who were employed with a Maltese operator and who were successful in ATPL theoretical examinations held locally.

Considerations by the Ombudsman

The Ombudsman established that complainant was in possession of a licence issued in Australia (which is not a member of the JAA) and that he had not taken the Malta ATPL examinations. Furthermore, in March 2001 his attention had been drawn to the fact that he could only apply for a Maltese licence if he were employed by a Maltese operator. He was also informed that upon the expiry of the transition period on 30 June 2002 it would not be possible for the Civil Aviation Department to issue Maltese national licences to those who do not meet JAA regulations.

The Ombudsman appreciated that complainant could not be awarded a pilot's licence for the following reasons:

- firstly, Malta had agreed to incorporate JAR-FCL 1 regulations in its set of regulations governing the civil aviation sector which laid down 30 June 2002 as the end of the transition period; and
- secondly, complainant was not employed by a Maltese operator and had not taken the Malta ATPL examinations.

The Ombudsman also ascertained that the Civil Aviation Department had informed complainant that in order to obtain a JAR-FCL 1 licence that would be automatically acceptable to the Maltese civil aviation authorities, he had to undergo a training programme in a flight training organisation overseas followed by the JAR-FCL theoretical and skills test to obtain this licence from the JAA state where this training organization is located. This is standard procedure in all countries which agreed to implement JAA regulations and is acceptable to the Maltese authorities.

Although complainant held that his Australian licence had been disregarded, the Ombudsman did not share this viewpoint. Clearly, each country issues licences for pilots in accordance with its own regulations. A pilot in possession of a licence issued in a country such as Australia is fully entitled to retain this licence but this does not mean that he has an automatic right to obtain a licence from another country, in this case Malta. Although no agreement exists between Malta and Australia for the mutual recognition of pilots' licences, this should not however be interpreted to mean that Malta had disregarded an Australian licence as alleged by complainant.

Outcome

The Ombudsman's conclusions regarding this case were as follows:

- firstly, the condition whereby in order to obtain a Maltese licence a pilot needs to be employed with a Maltese operator was introduced in 1979 after consideration was given to factors such as the lack of

adequate training facilities in Malta; resources available to the local civil aviation authorities; the needs of Maltese operators in the civil aviation sector; safety; and the need to ensure that the Civil Aviation Department will monitor effectively the performance of pilots holding a Maltese licence;

- secondly, the notice by the Civil Aviation Department that no further licences would be issued after 30 June 2002 if applicants do not conform to the JAR-FCL 1 conditions was issued on 28 July 1999. The Ombudsman felt that a period of three years constituted adequate warning regarding the entry into force of new procedures and the Civil Aviation Department deserves no criticism on this score.

The Ombudsman felt that the issue raised by complainant did not constitute an instance of maladministration and the claim that the department's failure to issue a pilot's licence to complainant amounted to a violation of his rights was not upheld.

Case No D 81

MALTA INTERNATIONAL AIRPORT plc

Payment of substitution allowance

The complaint

Following acceptance of recommendations by the Ombudsman, a number of employees of the Malta International Airport plc were awarded wage increases and arrears. However, on seeing that she was not given the same treatment as her colleagues, an employee of the company lodged a complaint with the Ombudsman and claimed that she had been a victim of discrimination.

Facts of the case

The case referred to by complainant and which had been dealt with earlier by the Ombudsman concerned the outcome of a call for applications for the posts of Security Assistant at the Malta International Airport which had been issued on 25 May 1998.

Investigations by the Ombudsman revealed that complainant had been employed as a charwoman with the Education Division and that a week before the 1998 call for applications was issued for the posts of Security Assistant, she was transferred to the Department of Civil Aviation and asked to perform duties of a frisker at the Air Terminal. She was then immediately transferred to the MIA where she continued to work as a frisker although her pay remained pegged to that of a charwoman. In the meantime the designation of other workers deployed as friskers was changed to that of Security Assistant.

Whereas complainant had not applied for the post of Security Assistant when the call for applications was issued in 1998, she applied for this post when another call was issued a year later but was unsuccessful. However, following the agreement reached in 2001 between Malta International Airport plc and trade unions representing company employees, complainant was appointed Security Assistant with effect from 2002.

Since complainant had not submitted an application when the call for applications for Security Assistants was issued in May 1998, the Ombudsman turned down her claim that her case was similar to the cases which had been tackled earlier by his Office and that were related to the outcome of this call for applications.

Notwithstanding this, it resulted to the Ombudsman that complainant had been allocated and had performed the duties of Security Assistant from May 1998 to December 2000. However, although the nature of these duties was much higher than that of a charwoman, during this period complainant continued to receive wages that were linked to the post of a charwoman.

Outcome

Section 14 of the Collective Agreement for employees of Malta International Airport plc refers to the payment of a substitution allowance whenever an employee undertakes duties that are higher to his/her substantive grade.

The Ombudsman found that although complainant carried out duties which fell under scale 5 under the terms of the Collective Agreement, she was not given the substitution allowance as laid down in this Agreement. Since the period from May 1998 to December 2000 covers a very long period, the Ombudsman felt that complainant was entitled to the difference in the pay between the post of charwoman and that of a Security Assistant for these months.

The Ombudsman concluded his investigations into this case by a partial acceptance of complainant's submission based on a recommendation that she should be paid the substitution allowance which was due to her for undertaking security duties. The company accepted this recommendation.

Case No D 182

MALTA TRANSPORT AUTHORITY

A spurious selection process

The complaint

An employee with the Malta Transport Authority lodged a complaint with the Ombudsman that he had been unjustly deprived of a management post. He also alleged that the selected applicant had a family relationship with a high executive of the Authority who was a member of the staff selection board. Complainant claimed that this unjust treatment meant a financial loss in terms of foregone salary and allowances.

Facts of the case

In September 2002 the Malta Transport Authority issued an internal call for applications for various management posts including the posts of Planning Manager and Licensing Manager in the Public Transport Directorate. Shortly after his interview, complainant was informed that he had not qualified for any of these two posts and had not been selected.

Since no other candidate was selected, in December 2002 the Authority issued an open call for applications for three posts of Manager in the fields of licensing and planning. Although complainant again applied for the posts of Planning Manager and Licensing Manager but was not even called for an interview, he soon discovered that another applicant had been interviewed for these positions. After some time he was informed that he had not been short-listed because he did not possess the necessary qualifications and the post of Licensing Manager was awarded to a candidate who, according to complainant, was related to the Authority's executive who had been directly involved in the selection process.

According to the management of the Malta Transport Authority, the internal call for applications had asked for no particular qualifications so that candidates who possessed leadership and management skills would stand a better chance of selection. In order to explain complainant's exclusion, the Authority stated that he obtained 46 marks for the post of Planning Manager and whereas one of the members of the selection board had short-listed him, the two other members had excluded him from this list. The Authority also stated that since none of the applicants obtained 50% of the marks, it was agreed that the candidates did not deserve a management position and had not been short-listed.

Documents seen by the Ombudsman in connection with interviews for the post of Planning Manager revealed that complainant obtained 46 out of a maximum of 90 marks. The Ombudsman ascertained that a member of the selection board recommended that complainant should be short-listed; another member felt that he should not; while the third member who had allocated complainant 17 points (out of a maximum score of 30) had not written any comments and had not signed the mark sheet.

The public call for the recruitment of three Managers indicated that the posts called for candidates who were professionally qualified with at least three years experience in a managerial position within a similar field. In order to explain to the Ombudsman why complainant had not been called for an interview, the Authority pointed out that he had no relevant professional qualifications and did not possess any managerial experience in planning and/or licensing operations in the transport sector. From documents submitted by the Authority, however, the Ombudsman found that although he was not in possession of any professional or academic qualifications related to the transport sector, the candidate chosen for the post of Planning Manager was still asked to attend an interview.

The Ombudsman also discovered that this person's interview took place much later than the other interviews because it was reported he was abroad when the other candidates were interviewed. He was awarded 102 marks (out of 150) and although this was the same score as the two other applicants, the choice fell on him. It was noted that a high official of the Authority was present during the interview of this candidate although he was not a member

of the selection board when the other interviews took place. Always on the strength of evidence gathered from documents presented to the Ombudsman by the Authority, in this interview only three of the five original members of the selection board were present.

With regard to complainant's work experience: documents viewed by the Ombudsman established that complainant was transferred on secondment with the Public Transport Authority in mid-1991 to take up the post of Operations Manager. He possessed a wide range of experience in the transport sector and continued to occupy this post even when the PTA became the Public Transport Directorate within the Malta Transport Authority in 2002.

To support his claim, complainant presented to the Ombudsman a testimonial prepared for him by the Director of the Public Transport Directorate in June 2002 when he had applied for the post of Assistant Director in the public service. This document provided information about the duties of complainant and contained a number of positive remarks about his work performance and left no doubt about his capabilities when it stated that: "*I am convinced that …(complainant's) … character is a great asset in positions where a personal input is required and have absolutely no difficulty to recommend him…*"

Considerations by the Ombudsman

The Ombudsman's investigations about the allegation that complainant had been subjected to unjust treatment revealed that after the first internal call for applications, complainant was considered to have failed to obtain 50% of the marks that were allocated for the interview. It was also stated that two out of the three members of the selection board had excluded him from the short-list.

Documents sighted by the Ombudsman showed, however, that facts were substantially different from the way described by the Authority. The fact that complainant had been awarded 46 marks out of 90 meant that he had obtained more than 50% of the marks. Moreover, according to these documents one of the board members felt that complainant should be included in the short list; another member was of the view that he should not; while the third

member had not written any comments on his evaluation sheet and had not even signed this document.

The Ombudsman discovered serious inconsistencies on the part of the Authority. The panel entrusted with the selection process of the open call for applications consisted of five members. With regard to the candidate who ranked first in order of merit, it was found that one member was against the inclusion of this person on the short list; two members were in favour; while the two other members did not express an opinion. The Ombudsman pointed out that in this case, quite unlike complainant's case, failure by members to express an opinion was not interpreted as an indication that the candidate should be excluded from the short list but on the contrary was taken as a positive sign. No explanation was forthcoming from the Authority in defence of this inconsistency.

The Ombudsman noted that in complainant's case the member of the selection board who had not expressed an opinion as to whether complainant should be included in the short list had in fact awarded him 17 out of a maximum of 30 points; and the Ombudsman pointed out that by no stretch of the imagination could this score be taken to exclude complainant from the short list. When asked to explain this divergence in the way candidates had been evaluated, the Authority could only maintain that a selection process does not depend merely on a mathematical exercise.

The views of the Ombudsman

The Ombudsman stated that it is widely accepted that marks awarded to candidates who are undergoing a selection process on the basis of a range of agreed criteria constitute a fair method to arrive at the final order of merit as long as the selection criteria are agreed upon before the process gets under way and these criteria are applied in a consistent and fair manner. Although serious and valid arguments need to be brought forward to justify any departure from this approach, no such arguments were presented by the Authority in defence of its actions.

When the open call for applications was issued and complainant submitted his applications, he was not called for an interview because, according to the Authority, he did not possess the necessary professional qualifications and work experience. Complainant, however, presented to the Ombudsman a certificate showing that he is a Chartered Member of the Institute for Logistics and Transport of the UK. This qualification was not, however, accepted because the Authority felt that it was not relevant to the posts that were advertised. This declaration is hard to reconcile with the fact that transport is an integral part of the functions of the UK institute which issued the certificate.

The Ombudsman also expressed concern at the Authority's failure to seek the advice of the authorities designated by law to establish the equivalence of certificates in order to evaluate complainant's certificates. This was a serious shortcoming which severely undermined the credibility of the whole selection process.

The Ombudsman regarded as wholly unjustified the Authority's claim that complainant lacked experience in a managerial position when he had served as Operations Manager in the transport sector since 1991. This was in sharp contrast with the fact that it was the successful applicant who did not possess any experience and qualifications in the transport sector and was therefore ineligible for the position.

Besides being wary of the fact that the interview of the selected person took place more than a month after the interviews of the other candidates, the Ombudsman commented on the composition of the selection boards. Whereas the first board consisted of five members, the second board included only three members of the original panel together with an executive of the Authority who had not formed part of the first panel.

Of particular interest was the fact that the candidate involved in the second interview obtained 102 marks, a score that happened to be equivalent to the marks obtained by the other candidates during their earlier interviews. Here too no plausible explanation was provided to the Ombudsman on what grounds the successful candidate had been selected especially since this candidate possessed fifteen years of managerial experience in the hospitality industry whereas the call for applications had asked for experience in the field of transport.

At the same time although the Ombudsman found that there is a relationship based on affinity through marriage between the applicant who was selected for the post of Licensing Manager and a high executive of the Authority, it was felt that especially in a small community such as ours, one need not read too much into such relationships. As a result, the Ombudsman was of the view that the affinity in this case was not such as to exclude the executive of the Authority from forming part of the selection board since even in the public sector, relationships based on affinity do not automatically exclude a person from participation in a selection board. In any event, the person being referred to was only one in a panel that included four other members.

Outcome

After having considered the various aspects of the case, the Ombudsman concluded that various shortcomings undermined the credibility of the whole selection process. In particular the Ombudsman referred to the following inadequacies:

(i) following the internal call for applications for management posts in the Authority, complainant had been unfairly excluded for the wrong reasons from the short list of candidates. This unfair exclusion was especially disheartening for complainant because if he had been included, he would have been the only contender for these posts;

(ii) when the open call for applications was issued, complainant was again treated unfairly and was not considered for selection because the Authority considered that he lacked managerial experience. This was an unfair decision because complainant had served as Operations Manager with the same organisation for a number of years. This exclusion was a glaring instance of improper discrimination because the successful candidate did not possess the professional qualifications that were required in the call for applications whereas complainant was in possession of a qualification which the selection board had failed to evaluate by reference to the national authority for the equivalence of certificates in order to ascertain its relevance to the position in question.

The Ombudsman concluded that a serious act of injustice had been committed towards complainant. For unfair reasons and because of improper discrimination, he had been denied on two occasions of the chance to be considered for a management position in the Authority. This treatment was particularly unfair since under the first internal call for applications, he would have been the only candidate who was eligible to be short-listed for two of the posts that were advertised.

Case No D 199

MANAGEMENT AND PERSONNEL OFFICE

The clerk who wanted to work in Gozo at all costs

The complaint

A Gozo-born female employee performing clerical duties in Malta requested to be transferred to Gozo on medical grounds. When this request was formally accepted and she was temporarily transferred to perform light duties in Gozo for almost four years this meant that, in line with approved policy for public sector employees on light duties, the employee was no longer entitled to any progression in her salary or to any increments during this period.

The employee felt that she had been treated unfairly because although during this time she was considered on light duties, she had carried out all the tasks associated with her grade. She also felt aggrieved because after receiving increments which were said to have been given to her in error, her salary was reduced when these increments were withdrawn.

In her complaint to the Ombudsman the employee expressed the view that after having been examined by the first medical board, she should have been informed straightaway of the conditions attached to her deployment in Gozo and of the financial consequences of this decision.

Facts of the case

Complainant joined the public service in 1996 and was assigned duties in the Health Division in Malta. In January 1998 she requested to be transferred to Gozo on health grounds (travel sickness). After a medical board certified that complainant was not able to work in Malta on a permanent basis, she was transferred temporarily to Gozo for three months with effect from 11 March 1998. Complainant subsequently underwent other medical

examinations and in May 1999 the Management and Personnel Office granted its approval for complainant to continue to work in Gozo on a temporary basis on the understanding that she would be considered to be performing light duties and that the provisions of Circular MPO 164/95 of 10 September 1996 would apply in her case. The MPO also stated that complainant would be re-examined by a different medical board in six months' time.

Following regular medical examinations in 2000 and 2001, the board on every occasion certified that complainant was unable to travel by sea on a permanent basis. However, when examined again on 15 February 2002, the medical board this time did not agree that she was still unable to travel to Malta. Despite insistence by the MPO and the Health Division that complainant should report for duty in Malta, she continued to work in Gozo.

According to the civil service reorganization agreement, employees in the grade of Clerk progress from salary scale 16 to scale 15 after five years in this grade; and at the start of 2001 when complainant had been employed for five years, despite the conditions attached to the MPO's approval in May 1999, the Health Division took steps in connection with her salary progression. It was the MPO which, in March 2001, reminded the Health Division that since complainant was on light duties, she was not entitled to any salary progression or to any increments.

At the same time, also in line with the policy decision adopted in February 1999 that employees from Gozo who are deployed to work in Malta but who are sent back to the sister island because they can only perform their duties in Gozo are to be considered on light duties, the Public Service Commission accepted the MPO's recommendation that complainant's progression be withheld as long as she remained on light duties. The MPO in turn wrote to inform complainant that Government had not approved that her salary should be linked to scale 15.

In the meantime complainant continued to perform duties in a school in Gozo even though she was repeatedly instructed to report for work in Malta and warned of disciplinary action if she failed to follow these instructions. Following other medical examinations in the second half of 2002, in September 2002 the MPO informed the Health Division of its approval for

complainant to remain in Gozo on a temporary basis on condition that she would be considered on light duties and that she would again be examined by a medical board in six months' time.

In May 2002, upon being made aware of the decision to withhold her salary progression, complainant protested with the MPO that:

- the decision to stop her salary progression should not have been taken almost three years after she had been transferred to Gozo;
- she ought to have been informed of the consequences of her transfer to Gozo as soon as the medical board issued the first certificate that she was unable to travel;
- it was unfair to deduct from her salary the payments that were made to her in error; and
- it was unacceptable to consider her on light duties when the medical board had certified that she was fit for work and she had carried out the whole range of duties in her grade.

In January 2003 complainant was officially transferred to Gozo on a permanent basis when her turn came to fill a vacancy there. As a result, complainant was no longer considered on light duties and she became entitled to her salary progression and increments.

Considerations by the Ombudsman

Although the Ombudsman did not contest the validity of the medical certificates, he expressed consternation that a person who cannot travel on a permanent basis to report at the workplace where she was originally assigned, continued to be allowed to work at a place of her own choice.

The Ombudsman agreed that the decision to consider complainant on light duties was in line with approved policy guidelines. At the same time complainant's view that she had carried out the full range of duties of her grade was unacceptable because the alternatives facing her were either to resign or to be boarded out. It is only fair that employees who "jump the queue" ahead of those who are waiting to be posted to work in Gozo give

something in return, regardless of the reasons behind this treatment. On this basis, the Ombudsman dismissed complainant's line of reasoning.

The Ombudsman also agreed that the decision to withhold complainant's progression in her salary scale was in line with approved policy. Although according to the reorganization agreement, she was due to enter salary scale 15 upon completion of five years' service, the fact that she was on light duties in Gozo rendered her ineligible for this progression. The Ombudsman was satisfied that all the procedures in connection with the postponement of complainant's progression had been followed by the Management and Personnel Office.

The Ombudsman noted that although increments to complainant should have been withheld from 24 May 1999 when there was formal approval for her to undertake light duties, yet for some reason or other, these increments were still paid to her and it was only in December 2001 that this mistake was discovered. In order to correct this situation, complainant was requested to refund the amount which had been overpaid by means of a number of monthly deductions from her salary.

The Ombudsman sought to discover whether complainant had been informed that she would not be entitled to the payment of annual increments when she was first allowed to work in Gozo on light duties. The Ombudsman found that in its letter to the Health Division on 24 May 1990 the MPO had clearly indicated that "*no progression or increments (are) to be given to persons on light duties other than as a result of injury on duty*." Although this letter had been copied to other government departments, the Ombudsman found no evidence that complainant herself had been informed about the repercussions of this decision.

The Ombudsman also found no evidence that a formal request was ever sent to the PSC so that complainant's increments will be withheld as long as she remained on light duties as laid down in Circular MPO 164/95. The Ombudsman stated that this was an administrative failure on the part of the authorities.

Outcome

In the light of his findings the Ombudsman concluded that:

- postponement of complainant's progression from salary scale 16 to scale 15 was justified and in line with official policy; and
- the withholding of increments to complainant when she was assigned duties in Gozo as a concession was also in line with approved policy guidelines even though official approval from the Public Service Commission had not been sought as required by the PSC's own regulations.

The Ombudsman's investigations on this case also revealed a number of administrative shortcomings which deserved a critical comment. In particular the Ombudsman commented that:

(a) since complainant was repeatedly certified by a medical board to be unfit to work permanently in Malta, this was a case where she should have been boarded out instead of being allowed to report for work at a place of her own choice until it was her turn to be officially transferred to Gozo;

(b) misgivings are bound to arise when on 15 February 2002 the medical board certified that complainant was able to travel for work to Malta and a few months later it was stated that she was "*to remain at her present place of work*."

(c) when in May 1999 approval was forthcoming for complainant to be posted in Gozo on light duties, the necessary steps ought to have been taken to withhold increments in accordance with the relevant MPO circular as well as to inform complainant of the implications of this circular. Since this was not done and complainant received her increments, it is not considered fair that she was asked to refund the amount involved in order to make amends for this "mistake" three years later;

(d) the withholding of increments without the recommendations of the Public Service Commission and the approval of the Prime Minister is irregular and runs counter to the provisions of MPO Circular 164/95.

Case No D 205

MALTA ENVIRONMENT AND PLANNING AUTHORITY

Extension of service beyond retirement age

The complaint

A female employee of the Malta Environment and Planning Authority (Mepa) lodged a complaint with the Ombudsman because as she neared her 60th birthday, her request for an extension beyond the official retirement age and to continue in her employment with the Authority till age 61 remained without a reply.

She also complained that for about three years no appraisal reports had been drawn up on her performance as required by the provisions of the Collective Agreement and that she had been deprived of her performance bonus.

Facts of the case

Although some three months before reaching the retirement age of 60 complainant applied for an extension of her employment by one year and in spite of various reminders, Mepa management failed to reply to her request. In her letter to the Ombudsman some four or five weeks before her 60th birthday, complainant stated that if the Authority were to give her a negative reply, she would be subjected to improper discrimination on two counts: firstly, because male employees are allowed to work until the age of 61; and, secondly, because another female employee at Mepa had been granted an indefinite work extension after the age of 60.

Complainant also informed the Ombudsman that for three years she had made various representations to management, through her trade union, in connection with the Authority's failure to complete her performance appraisal in breach of the provisions of the Collective Agreement. There was, however, no reaction at all to these requests by the Authority.

A few days before her 60th birthday, complainant was finally informed by Mepa that her request for an extension of service beyond the retirement age prescribed by law had not been accepted. With regard to her outstanding performance appraisals, it was pointed out that since complainant had referred the matter to the Court, the Authority felt that any comments on this issue would prejudice the position of both parties in Court.

The Ombudsman noted that according to Article 34 of the Collective Agreement, Mepa employees "*are required to retire at the age as established by la*w." The Ombudsman also noted that subsection 36(14) of the Employment and Industrial Relations Act (Act XXII of 2002) states that an employer "*can terminate the employment of an employee when the employee reaches retirement age as defined in the Social Security Act*". This Act in turn states quite clearly that "*pension age*" means "*in the case of a woman, the age of sixty years*."

The position therefore is that Mepa requires its female employees to retire at the age of 60 years. Although this may be considered as discriminatory, it is fully within the legal competence of the employer.

With regard to the decision by Mepa to retain another female employee in employment after her 60th birthday, the Ombudsman was informed that this employee is in a different grade and performs different functions from complainant. Investigations by the Ombudsman revealed that there were valid reasons for the retention of this employee and this decision therefore did not constitute an instance of improper discrimination.

Procedures in connection with a performance review for Mepa employees are covered by Appendix J of the Authority's Collective Agreement. Paragraph 2.7 of this Agreement states that at the same time that normal annual performance reviews are being prepared, employees will be assessed by management in connection with their performance bonuses. Moreover, according to paragraph 2.10, each employee is to be given a copy of the full performance review report.

Since in the case of complainant, Mepa did not provide any indication whether her performance review since 2001 had in fact been carried out, the Ombudsman considered this to be in breach of the relevant provisions of the Collective Agreement. No justification was given by the Authority for failure on its part to do so and invoking court action by complainant is not accepted as a valid reason for failure to give a reply to the representations by complainant and by her trade union on the matter.

Outcome

The Ombudsman concluded that although the different treatment given to males and females in connection with the retention of employees beyond normal retirement age is discriminatory, it was felt that Mepa's refusal of complainant's request did not appear to be contrary to law although the delay by the Authority to reply to complainant's request attracted a critical comment.

The Ombudsman was also of the view that Mepa's failure to complete complainant's performance appraisal reports without providing any explanation was in breach of the Collective Agreement and constituted an instance of maladministration. It was recommended that Mepa should determine whether complainant merited a performance bonus or not and that the Authority should inform her of the result of this review at an early opportunity.

Case No D 317

MALTAPOST PLC

The invalidated stamps that were already affixed on envelopes

The complaint

A representative of a local company engaged in the travel industry together with a colleague sent a letter to the Ombudsman alleging that they had been treated unfairly by Maltapost.

What gave rise to their complaint was the refusal by Maltapost to refund a sum of around Lm800 or give them stamps of the same value in exchange for stamps which were no longer valid for use as postage stamps. They also maintained that they had in their possession other stamps valued at Lm250 which they had not included in their request but which they wanted to exchange as well.

Facts of the case

Section 15 of the Post Office Act empowers the Minister, by the publication of a notice in *The Malta Government Gazette*, to direct that any postage stamps in use at the time of such notice are to be invalidated "*from and after any date stated in such notice*."

In exercise of these powers, the Minister for Transport and Communications had directed on 2 August 2002 by Notice No. 689 that "*postage stamps issued before and during 1997 shall no longer be valid for prepayment of postage as from and after 1st August 2002*." This meant that after this date any postage article stamped with postage stamps that had been invalidated were to be deemed not duly stamped for the purpose of the Post Office Act. The notice also allowed a period of two months from its effective date during which any such stamps could be exchanged for other valid postage stamps of an equal value.

Following applications in mid-August 2002 and in the third week of September 2002, one of the complainants was given mint stamps to a total value of some Lm16,600 in exchange for invalidated mint stamps of the same value. According to Maltapost, on both these occasions the Chairman of the Stamp Exchange Bureau had informed complainant in the presence of other members of the Board that henceforth only mint stamps issued prior to the date in question would be exchanged for valid mint stamps of equal value. Complainant did not, however, collaborate this statement.

In mid-September 2002 complainant had submitted another application for the exchange of invalidated stamps valued at around Lm800 which were already affixed on envelopes. However, the company refused to exchange them since these stamps were no longer in mint condition. Maltapost maintained that it had never before accepted to exchange unused stamps that were already affixed on envelopes and defended its policy of exchanging only mint stamps on the grounds that when it was set up, the Stamp Exchange Board had decided that only mint stamps would be exchanged for valid mint stamps. The company also held that for philatelic purposes, stamps that are affixed on envelopes do not have the same value as mint stamps and that the stamps in dispute had been presented by complainant more than three weeks after he had been informed that only stamps in mint condition would be exchanged.

On their part complainants argued that the stamp withdrawal notice was issued without adequate advance notice and no reasonable time had been allowed to enable them to mail or otherwise dispose of the stamped envelopes. The preparation and sale of stamped envelopes in fact formed part of their mail order business.

The Ombudsman noted that a "*postage stamp*" is defined in the Post Office Act as "*any stamp for denoting postage or other fees or sums payable in respect of postal articles, and includes adhesive postage stamps and stamps printed, embossed, impressed or otherwise indicated on any envelope …… or other article ……*". By this definition, an otherwise unused stamp that is already affixed on an envelope for mailing purposes is considered as a valid postage stamp.

The Ombudsman was therefore of the opinion that the stamps affixed on envelopes that were presented to Maltapost by complainants fell under the definition of postage stamps in terms of the law. As a result, since section 15 of the Post Office Act authorizes that postage stamps as defined by the Act itself without any limitation whatsoever may be exchanged for valid ones within two months from the date stated in the notice appearing in the *Gazette*, the Ombudsman held that the stamped envelopes in fact qualified for exchange in terms of the law.

Besides being fully justified at law, the Ombudsman felt that complainant's claim was backed by a further justification. Maltapost does not challenge the practice in the mail order business whereby companies prepare envelopes with stamps affixed on them and this is considered as a perfectly acceptable activity. As a result, since the notice published on 2 August 2002 in the *Gazette* did not give reasonable advance notice of stamps becoming invalid and in view of its retrospective effect, even if merely by one or two days, the Ombudsman felt that although the chosen date of 1 August 2002 was certainly within the law, the intention behind the law on the other hand was surely to allow for the selection of a date that was reasonably far away so as to enable those in possession of these stamps to dispose of them.

In the light of the relevant provisions of the law, arguments brought forward by Maltapost cannot be accepted since the decision by the company to accept only stamps in mint condition is not backed by law and is in fact *ultra vires*.

The Ombudsman took note of complainants' statement that in addition to the stamps valued at some Lm800 which Maltapost had refused to accept, they had "*for some odd reason*" another quantity of stamps valued at around Lm250 which had not been included in their application and which was awaiting to be exchanged. The Ombudsman, however, ruled that since complainants failed to submit an application for the exchange of these stamps in the time stipulated in the notice and since the reason put forward to explain this failure was vague and unconvincing, they had no valid claim for the exchange of this other quantity.

Outcome

The Ombudsman expressed his view that Maltapost's decision to limit the exchange of invalidated stamps to mint stamps was not valid at law and was unreasonable. He therefore recommended that the company should refund complainants by way of exchange in the form of mint stamps up to the value of their outstanding request on presentation of the relative stamped envelopes. Shortly afterwards the company agreed to abide by the Ombudsman's recommendations.

Case No D 333

HEALTH DIVISION

Selection of participants for a course of studies

The complaint

A State Enrolled Nurse with the Health Division lodged a complaint with the Ombudsman that despite the provisions of a government circular that the selection of participants in a conversion course leading to the qualification of State Registered Nurse would be based on seniority, he had been superseded by an employee who was his junior.

Facts of the case

DH Circular No 16/03 dated 9 January 2003 by the Director, Nursing Services of the Health Division informed State Enrolled Nurses that it was planned to organize a number of courses each lasting sixteen months and that upon completion of these courses, successful participants would qualify as State Registered Nurses. The circular also stated that participation in each course was limited to thirty-six nurses and that applicants, who required at least three years experience, would be chosen on the basis of seniority.

Before the first course got under way in March 2003, regulations were established by the Board of Studies regarding the organization of the course including the number of participants to be selected from each hospital. However, although the Board decided to select three SENs for each course intake from Mount Carmel Hospital where complainant was deployed, he was not chosen by the selection board for the first course because he was placed fourth. He was subsequently included in the list of candidates for the second intake and in fact he commenced his course in September 2003.

Since the Directorate Nursing Services received more than 700 applications in response to its circular and in the light of the decision to accept all eligible applicants, it was agreed to select participants by means of a range of criteria such as the number of years of working clinical experience and age. At the same time, since some State Enrolled Nurses who had followed similar courses that were held in the past but had failed their final examinations showed interest in taking part, it was decided to include the following new regulation (8.5.1) among the admission criteria:

"*Candidates from previous courses who had completed the course and failed in obtaining their qualification will be allowed to pursue the forthcoming courses. This decision is being adopted not as an exception but as a continuation of the previous courses*."

Another new regulation (8.5.2) stipulated that applicants nearing retiring age who would otherwise have no opportunity to be selected for future courses would be given the chance to pursue earlier courses according to their age.

The Ombudsman's review of this case revealed that the person about whom complainant raised his grievance was a colleague who also worked in Mount Carmel Hospital but who was placed after complainant in the order of merit for the March 2003 intake from this hospital because he ranked behind him in terms of seniority. Nevertheless, this colleague was accepted among the March 2003 intake by the Board of Studies which considered this course as a continuation of the one which he had undertaken in 1999. The Board of Studies also held that since the course structure had changed, complainant's colleague could not sit for the supplementary examination of the previous course.

Considerations by the Ombudsman

The Ombudsman's first consideration was whether the selection process had been carried out fairly in the light of the fact that the original call for applications had made it clear that the selection of applicants would be based on experience and seniority.

The Ombudsman felt that regardless of his views as to whether the criteria adopted to select candidates were the best ones, the original conditions that appear in a call for applications are binding upon all those who are involved in the selection process and no new criteria or guidelines should be introduced at a later stage when the process is in hand that are not in line with what had been announced earlier. In this case it emerged that new admission criteria such as 8.5.1 and 8.5.2 were introduced after the issue of the call for applications.

The course organizers explained to the Ombudsman that the new regulations were introduced after a number of cases concerning potential candidates were brought to their attention during meetings with SENs who were interested in participating in these courses. The Ombudsman noted, however, that the original circular had not been withdrawn and replaced by a new circular. Furthermore, since the document containing the new regulations for the 2003 conversion course was meant as an internal document and guidelines on course organization including admission criteria for use by the Board of Studies had not been distributed, the Ombudsman held that the contents of the original circular continued to apply.

The Ombudsman gave particular attention to the decision by the Board of Studies that consideration would be given to those who had undertaken similar courses (although with a different curriculum) but had failed their final examinations and that for such persons the course would be considered "*as a continuation of the previous courses*". According to the Ombudsman, however, candidates such as complainant's colleague who were selected to undergo what had been dubbed as "*a continuation of the previous courses*" in fact started to follow a course lasting sixteen months together with others who had never followed any such course in the past. This was therefore, fairly and squarely, a regular course and no continuation course at all.

Mention was also made by the Directorate Nursing Services of the fact that complainant had commenced a similar course in 1999 and that he had abandoned his studies for no apparent reason. He had never formally written to the Board of Studies to explain his action and had failed to turn up for the examinations. On the other hand, his colleague had followed the same course but had been unsuccessful in his final examinations and, according to the Board, he could still be considered as a course student.

Aware of the difficulties which arose in the evaluation of applications by the Board of Studies and the particular circumstances behind some of these applications, the Ombudsman expressed doubts about the condition in the original circular whereby the selection of participants would be based on considerations of seniority without taking into account other possible factors that could have an influence on the selection process. Furthermore, since in the opinion of the Ombudsman the course that commenced in March 2003 was not a continuation course at all but a new course for a group of new applicants, no valid reason existed which could justify the departure from the provisions of the original call for applications.

The Ombudsman also considered complainant's grievance that as a result of these developments and notwithstanding his participation in the course which commenced in September 2003, a colleague who was his junior in terms of seniority was being allowed the opportunity to apply ahead of him for promotion to State Registered Nurse and to place ahead of him in the order of merit for SRNs. The Ombudsman, however, stated that promotions are awarded after recommendations by the Public Service Commission following the issue of a call for applications by the PSC and that in such cases the order of merit is determined by the results of interviews that are held under the direction of the Commission.

Outcome

The Ombudsman concluded that the developments that were the subject of the complaint amounted to a breach of the original circular which invited applications for the conversion course. The complaint was therefore upheld.

The Ombudsman was also of the view that once the provisions of the original circular were not being observed and a colleague with a lower seniority ranking was being given the opportunity to complete the course ahead of complainant, this could in due course affect him in a negative way and prejudice his prospects in the event of the issue of a call for applications for State Registered Nurses and in the subsequent appointment of SRNs.

The Ombudsman therefore recommended that following the issue of any such call for applications by the Public Service Commission, complainant should draw the attention of the PSC to the grievance which he had submitted to the Ombudsman and to the Ombudsman's views on the matter as expressed in his final report on this case.

Case No D 351

MINISTRY FOR SOCIAL POLICY

But why don't I deserve a deputizing allowance?

The complaint

Feeling that she had been unfairly deprived of a deputizing allowance for the period which she had spent as Acting Head of the Accounts and Finance Section in the Ministry for Social Policy, a government employee submitted her grievance to the Ombudsman.

Facts of the case

Following staff depletions, as a short-term solution the Director, Corporate Services in the Ministry for Social Policy in September 2001 appointed complainant as the Acting Head of the Accounts and Finance Section of the Ministry. At that time complainant held the substantive grade of Principal Officer although the new duties that were assigned to her pertained to the grade of Assistant Director which is a higher grade.

The Ombudsman discovered that complainant was assigned to the Ministry for Social Policy when the Department of Corporate Services of the Ministry lost the services of two senior members of staff and asked the Management and Personnel Office to provide replacements. Seeing that she possessed an MBA, the Director of Corporate Services asked the new employee to head the Accounts and Finance Section in an acting capacity even though she was not the most senior Principal Officer in the Ministry. However, when more than a year passed and no help was forthcoming to her section, in October 2002 complainant asked to be relieved of her higher duties and to assume only responsibilities pertaining to her substantive grade.

Following the signing of the Collective Agreement for 2002-2004, OPM Circular No 19/2003 informed public officers that as from 1 April 2003 new provisions would apply for the payment of a deputizing allowance to employees on salary scales 1-10 who are asked to perform duties above their grade because of vacancies which are not filled immediately. In this way this allowance was extended beyond the headship posts mentioned in paragraphs 1.3.9 and 2.4.5 of the Public Service Management Code.

In the payment of a deputizing allowance the following conditions had to be satisfied:

"*(i) the position for which the allowance is to be paid is considered to be a key position within the department …… ;*
(ii) an officer has been formally assigned in writing by the Head of Department to deputize in a senior position;
(iii) the deputizing is made for a period exceeding three months…;
(iv) the senior position has been declared vacant following the promotion, retirement, resignation of the former incumbent…;
(v) the officer in receipt of the allowance continues to perform his day-to-day duties in addition to carrying out the duties and assuming the full responsibility of the senior position."

When in April 2003 complainant applied to be paid this deputizing allowance, her request was turned down because she had performed her higher duties at a time when no such allowance was payable.

Faced with this refusal, complainant backed her second request for the payment of this allowance by reference to subsection 2.4.5 of the Public Service Management Code that was in force before OPM Circular No 19/ 2003. This subsection stated, however, that when a public officer who is appointed to an acting headship position is not the most senior, the power to approve any such appointment is vested in the Prime Minister; and since in this case the appointment had not been made in this way, it was not in line with the previous Code. Furthermore, the appointment in question was not to a headship post.

Although the appointment failed to satisfy the relevant provisions regarding acting appointments for heads of department, the Ombudsman pointed out that this case concerned a situation where an employee in the grade of Principal was formally detailed to perform duties that were much higher than her grade. In fact, even though she was not the most senior officer in the department in this grade, she had accepted to undertake these duties for more than a year. However, at one point she was particularly irked by the fact that when a call was published for promotion to the next higher grade of Senior Principal, she found that she was not eligible to apply because she did not have enough years of service in her grade. This was the last straw which led complainant to ask to be relieved of her duties which were in fact higher than those of a Senior Principal even though according to her superiors she had always carried out her tasks in an efficient manner.

The Ombudsman took note of the fact that approval for public officers to benefit from the award of an allowance for acting positions came after complainant had already asked to be relieved of her higher duties. Since it resulted that she satisfied all the criteria laid down in this circular, complainant would have benefited from the deputizing allowance as from 1 April 2003 in the event that she had accepted to stay in her acting position. As a matter of fact the Principal Officer who took over from her started to benefit from this allowance as from this date.

The Ombudsman was of the opinion that public officers should be expected to perform duties pertaining to the next higher grade when cases of substitution or other exigencies arise and that such officers should not expect additional remuneration as of right provided that this substitution is only for a short period. According to the circular, a period of up to three months is considered reasonable.

The Ombudsman felt, however, that complainant's case was different. The period that she served in an acting capacity was considered excessive and the post of Head of the Accounts and Finance Section of the Ministry had remained vacant for more than two years. Furthermore, she was asked to perform duties pertaining to a post that is two grades higher than her own post of Principal when she was not even the most senior Principal Officer in the Ministry.

Since complainant satisfied all the criteria in the OPM circular regarding the award of a deputizing allowance and her only "shortcoming" was the period when she happened to undertake these duties, the Ombudsman felt there were strong grounds to justify her request for remuneration for the period when she served as the acting head of the section. One must also consider the fact that complainant had been handpicked to carry out much higher duties only to be told while she was still performing these duties that she was ineligible to apply for a post which carried lower responsibilities that those which she had held for more than a year.

Outcome

The Ombudsman concluded that complainant had no automatic right to be granted a deputizing allowance in terms of the relevant OPM circular. Nor did she have a good case in terms of the Public Service Management Code.

Complainant, however, had a strong argument to back her request to be awarded remuneration for performing duties well above her grade for over one year; and the Ombudsman recommended that complainant be awarded the allowance on an *ex gratia* basis for the period when she had carried out these duties. Subsequently the Government agreed to make an *ex gratia* payment in recognition of complainant's efforts for an extended period.

Case No D 427

MALTA ENVIRONMENT AND PLANNING AUTHORITY

Cleaning up the mess

The complaint

By means of an enforcement order issued by the Environment Protection Directorate of the Malta Environment and Planning Authority and which was served in accordance with Legal Notices No 128/97 and 337/01, the owners of a plot of land were informed that it had been noted that "*an illegal waste deposit site*" was being allowed to form in their plot. The Directorate ordered the owners "*to remove all construction waste, domestic waste, tyres, auto parts, white goods and any other waste within 30 days*" and warned that legal proceedings would be taken against them if they failed to obey the order within this period.

In turn the owners explained to the Directorate that the waste and building debris mentioned in its enforcement order was dumped on their site in the early 90s by workers of government departments and/or contractors engaged by these departments on site clearance and other works during the construction of a new road and government apartments on their property. They held that the Directorate cannot issue an enforcement order with retrospective effect in connection with dumping of construction waste and other material which had occurred years before the relevant law (the Environment Protection Act) was passed in 2001.

The owners also pointed out that they were not in any way involved in any waste management activity on this site and neither could they be considered as using their property as a waste deposit site for the storage of rubble and waste. Consequently the two legal notices referred to by the Environment Protection Directorate were not applicable.

The Directorate replied that the enforcement order had not been issued for illegal dumping because if this were so, the owners would have faced immediate prosecution. The persons concerned were owners of a plot of land that was serving as an illegal waste deposit site and as a result, they were subject to the two legal notices. The enforcement order was therefore to remain in place.

Feeling that the Directorate had failed to consider properly their original submissions, the owners of the land approached the Ombudsman and asked that the enforcement order be declared illegal and abusive in fact and at law. They claimed that:

(i) section 26 of the Environment Protection Act only authorizes the issue of a "stop order" and not an "enforcement order";
(ii) although Legal Notice No 337 of 2001 refers to enforcement orders, it was felt that the issue of such an order was an important procedure which requires specific authorization in the Environment Protection Act and not merely a legal notice;
(iii) the legislation is unfair since it does not provide the subject of the enforcement order with a right of appeal to an independent board in accordance with the principles of natural justice; and
(iv) the official from the Environment Protection Directorate who issued the enforcement was the same person who considered the submissions by complainants and reconfirmed the order.

Facts of the case

When the Ombudsman sought information about the case, Mepa confirmed that the issue of the enforcement order mentioned by complainants was in line with the procedures set out in the Environment Protection Act and Legal Notice No 337 of 2001. This Act allows the Minister to issue regulations in relation to matters involving the environment. Mepa also confirmed that the legal notice in question does not allow a right of appeal or a method of contestation against an enforcement order although it may be contested under section 469A of the Code of Organisation and Civil Procedure.

The Ombudsman noted that the ownership of the land and the fact that waste had been dumped on this site were not in dispute. Complainants merely resented the fact that they were accused of having dumped the debris themselves and that they were being compelled to clear up land which they had not fouled in the first place. They argued that since the material had been dumped by government workers and/or personnel employed by contractors engaged on government project works on their property, they should not be held responsible for clearance of the site.

Although complainants were not in a position to prove when or by whom the dumping of debris on their property had taken place, they expected the Environment Protection Directorate to order those who were responsible to clear up the plot. Following the Directorate's refusal to accept this proposal, they alleged that the Directorate had not even considered their submissions and were critical of the fact that the officer who issued the enforcement order had been allowed to review their case.

The Ombudsman did not share these views and pointed out that:

- letters sent to complainants were quality replies in the sense that the various points raised by complainants were in fact addressed by the Directorate;
- there was nothing wrong with the fact that the official from the Directorate who issued the enforcement order was the same person who considered the matter and dealt with correspondence sent by complainants;
- the Directorate had asked complainants to provide evidence to support their allegation that the waste was dumped by government departments and/or contractors carrying out works on behalf of Government; and this indicates that the Directorate was ready to consider the matter further if complainants provided adequate evidence since clearly it was up to them to do so.

The Ombudsman considered the legislation that is relevant to the case under review. Section 9 of the Environment Protection Act states that the Minister may make regulations whereby "*any person who acts in contravention of any regulation under this Act shall be guilty of an offence against this article.*"

This section also allows the Minister to establish the penalty "*to which any person so guilty may be liable*".

Regulation 2 of Legal Notice No 337/01 states "*waste management means any activity whereby waste is handled including …… the ownership …… of sites used for the storage, ……..deposit or disposal of waste …*"

In the opinion of the Ombudsman the above provisions endorse the enforcement order issued against complainants that, as owners of the site, they should clear the waste that had been dumped on it regardless of when or by whom the dumping had been done.

The Ombudsman was also of the view that complainants' contention that such legislation should form part of primary and not secondary legislation is no more than a subjective comment. Whereas primary legislation is subject to full scrutiny by Parliament, subsidiary legislation is faster to enact. However, as long as subsidiary legislation is authorised by primary legislation, as in this case, then it is equally legal and valid.

The Ombudsman considered complainants' plea that there is no right of appeal from an enforcement order and agreed that, at least up to a certain point, it is true that no *ad hoc* board exists to consider appeals that may be presented by those who receive such orders. There are, however, alternative actions including resort to court.

In the present case, for instance, the issue of an enforcement order by the Directorate was meant to draw the attention of the owners of the land where illegal dumping had occurred to comply with the law by cleaning up their property. The Directorate had also warned complainants that failure to comply with the order would lead to prosecution in court. In the event that any such prosecution occurs, the right of appeal which complainants claim they do not have, will be restored because they will be able to appeal against the sentence of the court in the court of appeal.

Outcome

For the above reasons the Ombudsman did not uphold complainants' grievance.

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)*

Case Notes No. 1 (April 1996)
2 (October 1996)
3 (April 1997)
4 (October 1997)
5 (April 1998)
6 (October 1998)
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17 (April 2004)

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