Ombudsman

CASE NOTES

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Office of the Ombudsman
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MALTA

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Foreword

The sixteen cases that appear in this twentieth edition of **Case Notes** reflect the way in which the Office of the Ombudsman generally handles complaints lodged by members of the public in respect of decisions by a government body or agency which they consider as unfair or unjust.

The purpose of this publication, as in previous issues, is to provide the basis of the Ombudsman's findings and the reasoning that underpins his recommendations to put right decisions which are wrong and to sustain those that are fair and reasonable in the first place. Another important aim of this publication is to provide typical examples of how the public sector in its widest sense should provide a service that is mindful and attentive to the needs of citizens.

The cases that are given coverage in this edition of **Case Notes** are also meant to demonstrate that in the Ombudsman's efforts to reach a fair solution to these grievances the main aim is to bring the parties closer without the need to resort to lengthy procedures in the courts of law and in the absence of any spirit of confrontation.

It is the wish of this Office that all those who are involved in the provision of public service to citizens will take note of the way in which the Ombudsman applies equity and fairness and promotes the principle of good administration including the right to redress in his assessment of the complaints that are brought to his attention.

Office of the Ombudsman
October 2005

Case No B 621

MALTA ENVIRONMENT AND PLANNING AUTHORITY

Keeping a proper distance between excavation works and third party property

The complaint

A new development consisting of the demolition of an existing building and the construction of apartments, shops and garages that was approved by the Planning Authority[1] gave rise to a complaint with the Ombudsman from the owner of the property adjoining the site in question.

Complainant alleged discriminatory treatment since plans for the proposed development approved by the Authority did not observe the minimum distance required by Article 439 of the Civil Code for excavation works along third party properties.[2]

Complainant also accused the Authority of inconsistency. He explained that he had requested the court to issue a warrant of prohibitory injunction to stop the Authority from processing the application on the grounds that the distance between excavation works and his property did not conform to the provisions of the law. The Authority had replied, however, that the processing of the application ought to go ahead regardless of these claims since there would be adequate safeguards to protect his interests in the full development permission.

Complainant said that this attitude was different from the approach adopted in court by the Authority in a similar case. On that occasion the Authority had requested a developer to submit new plans to show that the development would respect the distance from a third party wall as required by the law before processing his application any further.

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[1] The Planning Authority was subsequently renamed the Malta Environment and Planning Authority.

[2] Article 439 of the Civil Code states that "*it shall not be lawful for any person to dig in his own tenement any well, cistern or tank, or to make any other excavation for any purpose whatsoever at a distance of less than seventy-six centimetres from the party wall*".

Complainant claimed that the development approved by the Authority would cause damage to his property since weep holes along the boundary wall separating the two properties to allow free passage of rainwater run-off would be blocked even though it was important to leave these holes unencumbered for adequate drainage.

Facts and findings

The Ombudsman found that complainant followed his objections on the developer's original application and revised plans by means of several communications to alert the Authority to the situation that was brewing.

The Ombudsman also found that after consideration of the application, the Authority requested the developer to amend his plans so that excavation works at basement level would take place "*at a distance of not less than two feet six inches from third party property*."[3] A few weeks after the submission of revised plans for the basement floor, a full development permission was issued although this was followed two months later by a revised development permission which superseded the previous one and included the condition that "*excavations shall not be at a distance of less than 76cms from the party wall …… as provided in the Code of Police Laws*."

After the issue of this revised permission, complainant registered further objections with the Planning Authority which in turn insisted that his rights had been duly protected by conditions stating that the permission had been granted "*saving third party rights*" and that the developer had to obtain "*any other permission required by law*." The Authority countered that in the event of illegal excavations once site works got under way, complainant could seek remedial action by the issue of a court injunction. Complainant felt, however, that in this way the Authority failed to safeguard his civil rights and to make adequate provision for the observance of the legal distance for excavation works by the developer at a time when plans for the development were still under consideration.

According to complainant, when the Authority put the onus on third parties to

[3] This distance is equivalent to around 76cm.

ensure that legal requirements would be respected, if necessary, by means of court action, the Authority was encumbering the court with procedures that could have been avoided if it took appropriate steps at the outset to indicate the developer's responsibilities towards third party property. This would have made any breach of the building permission enforceable by the Authority's own inspection directorate. Complainant stated that by sanctioning a development that flouted the civil rights of a neighbour, the Authority was encouraging a breach of the law.

During his investigations the Ombudsman confirmed that although the Authority issued the first development permission after the submission of revised plans for the basement, a review of these plans revealed that excavation works were planned to take place at a distance that was still less than the legal distance of 76cm from complainant's property. It was ascertained that the footprint of the basement shown on these drawings failed to meet the provisions of the law and although excavations along third party property are required to maintain a distance of 76cm when measured from the nearest face of the wall, the Authority had instead allowed this distance to be measured from the centre of the dividing wall to the centre of the wall that was to be built under the development.

When the Ombudsman asked for an explanation, the Authority admitted that it had *"inadvertently erred"* by a few centimetres but had remedied the situation when it issued a revised permission that made reference to the distance that had to be observed by the excavation works.

The Ombudsman also considered complainant's fears that the proposed development would block the drainage of his garden and that this would cause flooding. Drawings seen by the Ombudsman confirmed that weep holes to drain complainant's side garden would be blocked. At the same time it was noted that although complainant repeatedly voiced his concerns before the issue of the permit, the Authority maintained that he was adequately protected by the condition that the permission was issued subject to third party rights and took no further action.

The Ombudsman pointed out that this failure by the Authority was

unacceptable. Since the effect of development works on the drainage of nearby premises is one of the guiding policies in the Structure Plan, the Ombudsman held that the Authority should have probed further into the matter. No evidence emerged, however, to show that this had been done.

Here the Ombudsman recalled a previous case that had been dealt with by his Office. Despite pleas by the Authority that decisions regarding third party rights can only be reached by the court and not by the Authority itself, the Ombudsman had concluded that whenever an application is alleged to breach third party rights, the Authority is duty bound to seek verification in the first instance from the developer.

By its failure to give consideration to planning issues which might give rise at a later stage to court litigation, the Authority failed in its obligation to ensure that, to the extent that is reasonably practicable, it should safeguard citizens from avoidable litigation arising from building development issues.

The Ombudsman next considered the allegation of discrimination as a result of the different stand adopted by the Authority in two legal protests whether an application should continue to be processed when differences arise concerning third party rights. While agreeing that in the cases mentioned by complainant the Authority adopted contrasting approaches, the Ombudsman felt that in this case the Authority had not shown any discrimination. In both cases before the issue of the relative permission, the Authority had requested evidence that the distance of 76cm was being respected even though in this case there was a wrong interpretation on the point from where this distance was to be measured.

Moreover, since the revised development permission stated that excavations should respect the distance of 76cm from the party wall laid down in the Code of Police Laws, the Ombudsman felt that reference to a legal requirement to be kept by the developer had served to clear the air.

Conclusion

The Ombudsman concluded that although complainant was justified to state that the Planning Authority had not adequately safeguarded the legal requirement concerning excavations, the matter had been resolved by the issue of a revised development permission which ensured that the development would be in accordance with the law.

At the same time the Ombudsman upheld the complaint regarding failure by the Authority to give due weight during its deliberation stage to the likely repercussions on complainant's property by the obstruction to the weep holes resulting from the development.

The Ombudsman did not uphold the allegation of discrimination that complainant claimed to have suffered at the hands of the Planning Authority.

Case No D 395

HEALTH DIVISION

The therapist who deserved a deputising allowance

The complaint

An occupational therapist who was seconded from the Health Division to a state hospital lodged a complaint with the Ombudsman that she had been unfairly deprived of a deputising allowance for the last five months of 2002 when she carried out duties that were higher than her substantive grade in the public service. This took place because the person who was responsible for the management and running of the Department of Occupational Therapy at this hospital was on maternity leave.

Facts of the case

Since there is no post of Head of Department of Occupational Therapy in the hospital where complainant was deployed, the occupational therapist who enjoys the highest seniority normally serves as the leader of the department. The incumbent has been in this position from 1993 and has been paid an allowance ever since.

Being next in the line of seniority in the department, complainant normally stands in for the incumbent in the latter's absence in addition to her normal duties. This happened, for instance, in 1999 when the senior therapist went out on maternity leave. On this occasion, according to complainant, no problems had arisen in connection with the payment of the allowance to her while her colleague was away from duty.

Early in August 2002 the person who was responsible for occupational therapy services in the hospital again went out on paid maternity leave till the end of October, following which she availed herself of her vacation leave for the last two months of the year. Throughout these five months this employee continued to receive her allowance. However, when at the start of 2003 the senior

therapist went on unpaid maternity leave, complainant started to receive an allowance instead of her. These arrangements for the payment of an allowance to complainant continued until the senior occupational therapist resumed her duties in April 2003.

The hospital authorities turned down complainant's claim that she was also entitled to receive an allowance for the last five months of 2002.

Considerations by the Ombudsman

The Ombudsman appreciates that circumstances at times arise when an employee may be required to undertake duties that are above his normal grade. In this situation, these arrangements may be considered as part of the experience that is necessary so that an employee may eventually be able to assume these responsibilities upon being promoted to a higher grade. When this period is relatively short, an employee should not expect to receive any additional remuneration.

In this case, however, the Ombudsman felt that the employee was required to undertake duties and responsibilities that were above her grade for a stretch of time that could not by any means be regarded as a short period.

The Ombudsman stated that it is not the practice to pay an allowance to an employee who needs to replace another employee who is out on vacation leave. In the case under review, however, complainant was asked to undertake additional higher responsibilities for no less than five months at a stretch without receiving any allowance and it was only from the sixth month that she started to receive the allowance that was normally paid to the employee who was responsible for the organization and running of occupational therapy services in the hospital.

The Collective Agreement for employees at the hospital in question contains no provision for the payment of a substitution allowance. This means in effect that the hospital management is not bound to pay this allowance to its own employees or even to employees who, like complainant, are seconded from the public service to the hospital.

The hospital authorities maintained that in this case the payment of an allowance was done on a personal basis to the most senior employee in the field of occupational therapy in the hospital. They provided documentation to the Ombudsman to show that this payment was approved in 1993 because of the extra duties which the employee had been asked to carry out in the overall management and operation of these services at the hospital. They also held the view that since these arrangements were of a personal nature, the payment of this allowance was not applicable to complainant when she substituted the senior therapist while the latter was absent from work on paid maternity leave and on vacation leave.

The Ombudsman pointed out, however, that the caption of the correspondence that was exchanged between the hospital management and the senior therapist way back in 1993 referred to the payment of "... *(an) allowance for extra duties*". Consequently, the allowance could not be considered as a payment that was effected on a personal basis but was linked directly to the extra duties that the employee was asked to perform.

The Ombudsman also pointed out that it was management itself which had of its own accord stopped issuing the allowance to the senior therapist when she went out on unpaid maternity leave as from January 2003 and instead started to pay this allowance to complainant. If, as the hospital management maintained, this allowance were paid on a personal basis, then it ought not to have been transferred to complainant as from the start of 2003.

The Ombudsman explained that this should not be taken to mean that when the employee was on paid maternity leave she should have stopped receiving this allowance. In fact the hospital management continued paying the allowance during this period and had only stopped these arrangements when she went out on unpaid maternity leave.

According to the Ombudsman it was very clear that the hospital management was averse to the payment of the allowance simultaneously to two persons for the same duties and responsibilities. In the circumstances what needed to be established was whether complainant was entitled to an allowance given that:

- she had undertaken additional duties for eight months at a stretch but had received an allowance for these added responsibilities only for the last three months;

- no reference exists to a substitution allowance in the Collective Agreement for employees at the hospital in question; and

- during the period covered by this case public service employees were not entitled as of right to a deputising allowance.

The Ombudsman was of the opinion that additional remuneration should be given to employees who for a substantial length of time undertake substitution duties whose nature are higher than those of their substantive grade. This principle should override any other consideration such as, for instance, situations where no formal right exists to the payment of a substitution allowance.

At the same time the Ombudsman affirmed that the payment of an allowance should be limited to extraordinary circumstances: thus, by way of example, no substitution allowance should be paid whenever an employee replaces another employee who is on vacation leave. In the case under review, this situation had occurred during the last two months of 2002 when complainant carried out substitution duties because the employee concerned was on vacation leave.

Conclusions

After having examined the various aspects of this case the Ombudsman concluded that the hospital management was morally obliged to pay the deputising allowance to complainant for the months that she replaced the holder of the post during her maternity leave with the exception of the months when this employee was on vacation leave. This meant that complainant should also be paid the allowance for the first three months when she had undertaken these duties.

The hospital management agreed to implement the Ombudsman's recommendation.

Case No E 93

MALTA ENVIRONMENT AND PLANNING AUTHORITY

The road alignment scheme that led to a deadlock

The complaint

By mid-2004 no decision had yet been reached on an application to the Malta Environment and Planning Authority (Mepa) for refurbishment works and structural alterations to the front elevation of a private residence. This delay was attributed to a pending scheme that involved the widening of the road where the residence was situated and that would have required the façade of the building to be set back by some 1.5m.

Acting upon advice by Mepa officials that he ought to seek first the views of the Malta Transport Authority (ADT), the owner of this residence was informed that the ADT is not responsible for the approval of plans involving extensions to roads and that the ADT only submits its reactions to proposals for road widening upon being asked to do so by Mepa.

Feeling frustrated that he was being merely pushed from pillar to post and that in the meantime no action was taken on his application even though he informed Mepa officials about the reply that he had received from the ADT, the applicant decided to present his case to the Ombudsman.

Facts of the case

During his investigations the Ombudsman found that although there were no official plans for the alignment of the road where complainant's dwelling was located, the drawings that were prepared some years earlier showed that the façade of this building was likely to be affected by the road widening works that were planned for the area. The Ombudsman also found that on the basis of the provisional alignment of the road under this scheme, an application that was similar to the one submitted by complainant concerning a site in the

same road a few metres away from complainant's dwelling had been turned down and the Planning Appeals Board had subsequently confirmed this decision.

The Ombudsman understood that complainant had first requested the Development Control Commission to postpone consideration of his application until the issue regarding the proposed extension of the road was solved. Some time later complainant had submitted a separate application which was based on a modification to the provisional road alignment scheme and requested that the official street alignment would follow the existing building line. Mepa officials, however, advised complainant to withdraw this application since they held that Mepa is not authorized to consider similar applications in sites outside the development zone and suggested that he should write instead to the Roads Directorate which forms part of the ADT.

When complainant withdrew the application and approached the ADT, it did not take long for the ADT to reply that it is not responsible for issues related to changes in building alignment and that this role pertains to Mepa. The ADT also advised complainant to send his application in the first place to Mepa since the ADT only gives its comments on proposals concerning road alignment upon being requested to do so by Mepa.

In turn Mepa attributed its delay to process complainant's application to the fact that the local plan for the area had not been finalized and there was insufficient information to take a decision on the matter. At the same time, it was pointed out that there were indications that at a later stage this particular stretch of road might form part of a wider road network to allow the neighbouring area to be designated as a pedestrian zone. Mepa officials also admitted that they had not sought the views of the ADT on whether it was desirable to widen the stretch of road in question.

Considerations and comments

During his investigations the Ombudsman was informed that during consultations which took place between ADT and Mepa subsequent to his intervention, ADT officials expressed their opinion that the road in question

should be widened in order to conform to the requirements set out in Legal Notice No 364 of 2003 regarding standards for road works especially in relation to road and footpath design. This widening would mean that the façade of this building would have to be demolished.

On his part the Ombudsman stated that while respecting the decision reached by Mepa's Planning Appeals Board on a similar case, he could not understand why the fact that road widening and realignment works might one day take place should serve to hinder the issue of a permit as long as any new building under this permit would not be allowed to extend beyond the existing building line.

Conclusions

After having examined this case, the Ombudsman reached the conclusion that Mepa was guilty of maladministration on three counts:

- firstly, for its unjustified delay to process complainant's application;

- secondly, when although Mepa officials knew that the ADT might shed light on the matter, they had shirked their duty and failed to approach the ADT directly themselves while suggesting that the person involved should do this task himself; and,

- thirdly, when they again failed to address the issue even though the ADT had submitted its views on the matter.

The Ombudsman concluded that in this respect the grievance that was raised by complainant was justified.

In order to remedy the situation the Ombudsman recommended that before reaching a final decision on the application, Mepa's Development Control Commission and the ADT should consider whether future plans for the development of the area could be safeguarded in a different manner. In this regard the Ombudsman suggested that the Development Control Commission could ask complainant to forego the compensation that might be due to him

for any authorized building development that might later need to be demolished to make way for the widening of the section of the road where his residence was located as part of the scheme for improved traffic management in the area.

The Ombudsman also suggested that complainant could be asked to provide any other assurances which Mepa might deem appropriate to safeguard the street from any development that might compromise the road network system that might be launched in the area in future and to ensure that the permit for alterations would not allow any encroachment on the future alignment of the road as shown at that time on provisional unofficial drawings.

Case No E 113

DEPARTMENT OF SOCIAL HOUSING

The case of the employee who was not aware of his suspension from work

The complaint

A public official employed with the Department of Social Housing was suspended from duties after the Prime Minister had approved his interdiction. According to disciplinary regulations for officers in the public service, this meant that he was only entitled to receive half his salary during the period of his suspension.

The employee, however, submitted a complaint to the Ombudsman because the salary which he had received during the first five months of his interdiction was less that what was due to him for these months.

Facts and findings

In accordance with paragraph 10.2.2.1 of the Public Service Management Code, complainant's Head of Department submitted his recommendation to the Public Service Commission (PSC) that complainant should be interdicted from his duties for an alleged disciplinary offence. Acting on the advice of the Commission, the Prime Minister approved complainant's interdiction. The date of the Prime Minister's approval was almost a month after the Head of Department had submitted his recommendation to the PSC.

However, although paragraph 10.2.2.2 of the Public Service Management Code states that the Prime Minister's decision authorising the interdiction of an officer *"…… shall be communicated forthwith by the Permanent Secretary, OPM to the Head of Department, who shall then inform the officer concerned",* another fortnight had to pass before this decision was communicated in writing to the Head of Department concerned. It then took more than another week before complainant himself was made aware of this decision and told not to

report for duty until further notice. In the meantime, however, he had continued to report for work and even received his salary in full up to the end of the last month prior to being informed about his interdiction.

The review by the Ombudsman of the facts surrounding this grievance revealed that upon receiving a copy of the letter from the Office of the Prime Minister approving complainant's interdiction, the Treasury Department had mistakenly considered that the suspension from work of complainant started as from the day when his Head of Department first wrote to the PSC on the matter. As a result, when steps were taken to pay the half salary to the suspended employee, the department made arrangements to deduct by means of instalments from his first five monthly payments the sum which it considered as overpayment and which covered the period when the matter was first raised with the Public Service Commission up to the last day when complainant had reported for work and in respect of which he had received his full salary. A total sum of around Lm280, considered as overpayment, was subsequently deducted from his half salary by means of monthly instalments during the first five months of his suspension.

Following queries raised by the Ombudsman, the Treasury Department admitted its mistake when it reduced complainant's salary by half with effect from the date of the first letter to the PSC by his Head of Department when instead complainant ought to have been put on half pay as from the date when the Prime Minister had approved his interdiction. The department agreed that as a result of its mistake, a refund of the amount that was unjustly withheld from complainant was due to him.

Considerations and comments

The Ombudsman's investigations revealed that the decision by the Prime Minister on complainant's suspension had not been communicated forthwith to his Head of Department as laid down in the Public Service Management Code and that there was a delay of two weeks before the necessary action was taken. Furthermore this communication was sent by ordinary mail with the result that notice of complainant's suspension was only made known to him with a lapse of more than three weeks. Being unaware of these developments,

complainant had continued to report for duty regularly up to the day when the decision regarding his suspension was at last brought to his knowledge.

The Ombudsman stated that on the basis of an employee's right to be paid for work which is carried out and in the light of the way in which events in this case had unfolded, complainant was entitled to be paid in full up to the day when he was informed of his suspension and not up to the date when the Prime Minister had approved his interdiction. This meant that there should not have been any reduction in complainant's pay for all the days when, unaware of his suspension, he had continued to report for duty. The Ombudsman pointed out that complainant should not be made to suffer any adverse consequences for a failure that was not of his own making.

The Ombudsman's recommendation that complainant should be refunded the sum which had been unfairly deducted from his salary was accepted by his Head of Department and by the Treasury Department.

Case No E 135

MALTACOM plc

…… but what exactly was complainant doing throughout all those years?

The complaint

A.V., a Maltacom employee who applied for the posts of Technical Executive and Principal Technical Officer with a member company of the Maltacom group and was among the successful candidates, was surprised to learn that after the selection process had been completed, the company management discovered that he was not eligible in the first place to submit an application because he did not possess the experience that was required in the calls for applications.

Claiming that this decision was unjustified, the employee submitted his complaint to the Ombudsman.

Facts of the case

In an internal call for applications for two technical posts, candidates were required to possess at least six years' work experience in the access networks or the external plant within Maltacom plc or its predecessor Telemalta Corporation. Complainant believed that he was in possession of the necessary work experience and duly applied for both positions.

After the decisions of the Maltacom Appeals Board (Promotions) regarding the selection process were taken into consideration by the selection board and the whole process came to an end, A.V. was ranked in eighth position for the post of Technical Executive and third in the order of successful Principal Technical Officers. He selected the position of Technical Executive which ranked higher than that of Principal Technical Officer and was looking forward to his new appointment.

However, while the Board of Directors of Maltacom plc was in the process of approving these appointments, a candidate in another internal call for applications who was declared ineligible by the selection board because he lacked the necessary experience, presented his case to the Ombudsman. When verifications were made by Maltacom management on the eligibility of some candidates under this third call, it resulted that there were candidates even under the two previous calls for applications for the posts of Technical Executive and Principal Technical Officer who did not possess the work experience that was required of them.

Since A.V. featured on this list, the process to appoint him Technical Executive was stopped in its tracks and he was declared ineligible because he was considered to lack the necessary six years' experience in the company's access networks or its external plant.

At this stage A.V. sought the help of the Ombudsman. He pointed out that according to the Collective Agreement for Maltacom employees, the decisions of the Appeals Board (Promotions) are final and claimed that once this board already had its say, its decisions regarding the final outcome of applications for the posts in question had to be respected.

Records regarding manpower deployment that were made available to the Ombudsman showed that throughout a career spanning some thirty years in the telecommunications sector with the Posts and Telephones Department, Telemalta Corporation and Maltacom plc, A.V. had worked among a wide range of other duties on the company's exchange and switching equipment; the cardphone system; and network security. Maltacom management, however, was of the opinion that these duties did not constitute work in its external plant or access network sections.

In order to shed light on this impasse, the Ombudsman laid hold of additional information from A.V.'s former superiors who knew him throughout his career with the company. These superiors corroborated his claims regarding his work experience and confirmed that during these years he had been deployed on a wide range of assignments in sections and departments that were generally associated with the maintenance, operation and repair of the organization's external plant.

Considerations and comments

In his report on this grievance, the Ombudsman first considered A.V.'s argument that according to the Collective Agreement, the decisions of the Appeals Board (Promotions) are final and that once the appeals stage had been concluded, Maltacom management had no right to disqualify him.

Although agreeing that according to the Collective Agreement, decisions by the company's board of appeals on issues related to promotions are final, the Ombudsman felt, however, that this provision should not be interpreted in a restrictive manner as complainant had done. He could not, therefore, share A.V.'s view that in the event that a successful candidate is found to have been ineligible after the selection process is completed and the candidate should not even have been called for an interview, the company is still obliged to go ahead with the selection of this applicant. Besides, issues related to the eligibility of candidates do not feature among the terms of reference of Maltacom's board of appeals on promotions and so the board does not even look into such matters.

The Ombudsman then considered whether complainant could rightfully claim to possess six years' experience in the company's access networks or external plant to enable him to apply for the two posts. In this connection the Ombudsman took note of the fact that in 1997 the company's access networks department took over all the responsibilities of the external plant section.

In its submissions to the Ombudsman Maltacom management maintained that complainant was never attached to sections which formed part of its external plant section or access networks. On the other hand A.V.'s insistence that he was regularly deployed on external assignments was backed by evidence given by his former superiors who confirmed that while under their charge A.V. was mainly associated with work that concerned the company's external infrastructure and installations. Even his present superior stated that A.V.'s current assignments covered mainly technical aspects of exchange line management and maintenance.

Faced with this divergence between Maltacom's viewpoint and complainant's affirmation regarding his experience, the Ombudsman drew comfort from the fact that A.V.'s claims were largely corroborated by his former superiors who

were responsible for the company's external plant section for various years. On its part while insisting that its views were based on official records regarding the deployment of A.V. and his responsibilities within the company, Maltacom management at the same time indicated that it was prepared to accept the version of events as given by complainant's erstwhile superiors and wrote to the Ombudsman that "*…… we feel that it is not incumbent upon us to doubt or refute the statements made by Messrs B … … and G …… who both occupied the post of Head of Internal Communications with Telemalta Corporation*".

On the strength of this evidence, the Ombudsman concluded that there were rather serious reservations with regard to the statement by Maltacom that complainant had never been deployed on external plant duties.

The Ombudsman pointed out that after the whole selection process with all its tortuous procedures had been held, it needed a watertight case in order to declare that a candidate who had qualified for a higher position in his own right was not eligible in the first place to submit an application for this post. Since there was no such incontrovertible evidence and serious questions arose about the whole situation, the benefit of the doubt should be given to complainant.

Conclusions and recommendations

The Ombudsman concluded that although all along Maltacom management had acted in good faith on the basis of official manpower deployment records, serious doubts arose as to whether these records faithfully reflected the tasks that were undertaken by A.V. during his long years of service with the company. Indeed, there was ample evidence that despite these records, complainant had worked for various years in a section which at that time was considered by management to constitute the company's external plant department. The Ombudsman also stated that even if any doubts still lingered on this score, when all is said and done the tip of the scales would still be in complainant's favour. On this basis the Ombudsman sustained A.V.'s grievance.

In order to remedy the situation the Ombudsman recommended that complainant should be promoted to the post of Technical Executive to which he had qualified on his own merit. The Ombudsman also recommended that

this appointment should take effect from the same date of the issue of appointments to other candidates who were placed after complainant in the final order of merit of successful candidates.

Shortly afterwards the Board of Directors of the company agreed to implement the Ombudsman's recommendations.

Case No E 204

FOUNDATION FOR MEDICAL SERVICES

The reticent applicant

The complaint

Upon being informed that he had been selected for employment with the Foundation for Medical Services (FMS) and after having agreed on the date when he would commence his new duties, one of the successful candidates tendered his resignation from work.

However, before he took up his new job, the Board of Directors of the Foundation felt that there were sufficient reasons to justify the withdrawal of its job offer to this candidate. Finding himself out of work and feeling aggrieved by this unexpected turn of events, the candidate reported the matter to the Ombudsman.

Facts of the case

Following the issue of a call for applications by the FMS for a middle management post and after interviews were held, complainant was told by means of a phone call that he was successful and asked to give a date when he could commence his new duties. After making arrangements to terminate his employment from the private firm where he was employed, complainant informed the FMS that he could report for duty in a month's time.

At that time recruitment procedures by the FMS made the engagement of a new employee conditional on a favourable character reference. As a result, a few days after this telephone conversation complainant was asked to allow the FMS management to seek references from his previous employers to be able to continue to process his application. Although in his application form complainant had not mentioned any of his previous employers as a source for a character reference, he agreed to this request. Two months later the FMS management was informed by complainant's former employer in the public

sector that a few years earlier applicant had been dismissed from the public service.

Following this development, the Board of Directors of the FMS decided not to confirm complainant's employment and three months after having been informed that he had been successful, complainant was told that the offer of employment was being withdrawn because of this unfavourable reference. Since by that time complainant had already submitted his letter of resignation to his employer, he found himself out of work.

Considerations by the Ombudsman

In the Ombudsman's contacts with complainant and with representatives of the Foundation for Medical Services, divergences emerged between the versions given by the two sides on the way in which events unfolded.

Complainant admitted that when he was asked to allow the FMS to approach his former employers for a character reference, he was taken aback since he felt that the Foundation ought to have examined and reassured itself of his references before informing him that he had been selected for the post. Nonetheless, he raised no objection and believed that his prospects of employment with the FMS would not be prejudiced by his earlier problems with his former employer in the public service.

Complainant also explained that a few days before he was due to start his new job, he asked the FMS where he should report for duty. To his surprise he was told that he could not commence his assignment before the Foundation received a reference from his former employer in the public service. Although the matter dragged on for many weeks, he could not withdraw the notice of termination of his employment which he had already handed to his employer since efforts to identify his replacement were already under way.

On its part the FMS management maintained that at no point during the telephone conversation when complainant was told that he was successful was he ever given to understand that he risked losing the job if he did not start his new work within a month. According to the FMS, all three successful applicants were told about the pending issue of a letter of appointment but it

was only complainant who resigned outright from his previous job without waiting for a formal letter of appointment.

FMS management also pointed out that when complainant was informed that it would be seeking a character reference from his previous employers, this could easily have been construed as meaning that his employment was not assured until this reference would be considered. In fact the other successful candidates had not commenced work before the FMS received favourable references about them.

The Ombudsman was informed that procedures for the recruitment of new employees when this case took place were such that even if complainant commenced his duties with the Foundation, his employment would still have been terminated at a later stage upon receiving an unfavourable reference.

The FMS management informed the Ombudsman that complainant told the selection board in his interview that he left the public sector of his own accord because of frustration at being denied the opportunity of career advancement. The FMS management maintained that despite these words, complainant had in fact been dismissed from the public service.

On his part complainant told the Ombudsman that he had informed the selection board that his resignation from the public sector was due to personal problems and incompatibility with his superior and had also referred to his aim to improve his prospects for career advancement.

FMS representatives insisted, however, that during his interview complainant made no mention whatsoever of his clashes with his superior and did not give the true reasons about his departure from the public service. The FMS held that this constituted a proper reason as to why it had withdrawn its offer of employment.

In the light of his findings the Ombudsman considered that:

- although complainant had not been told that he would jeopardize his prospects if he did not commence his work within a month, he immediately resigned from his job and had not waited for a formal letter of appointment from the FMS. Upon receiving an unfavourable reference about complainant

and upon being made aware that he had been dismissed from the public service, the FMS had no other option but to withdraw its offer of employment;

- although when complainant was told that the FMS would seek a reference from his previous employers he ought to have realized that the true circumstances surrounding his departure from the public service would surface and that this was likely to prejudice his prospects of employment with the Foundation, nevertheless he did not try to withdraw the notice of termination of his employment and did not take any steps to safeguard his position;

- the system used at that time by the Foundation for the recruitment of new employees was not only peculiar but also defective because it tended to make prospective FMS employees hasten to resign from their employment to commence work at the Foundation even though they ran the risk that an unfavourable reference would endanger their employment prospects. Although following this incident the FMS changed its procedures for the employment of new personnel, the Ombudsman was of the opinion that the old system used by the FMS at the time that this case took place contributed towards the loss of complainant's employment;

- the FMS management was right to insist that complainant had not been sufficiently forthcoming during his interview about the true reasons behind the termination of his employment in the public service;

- the fact that the Foundation received an unfavourable reference from complainant's former public sector employer justified the withdrawal of its offer of employment.

Conclusions

After having thoroughly examined the facts of this case, the Ombudsman concluded that:

- complainant lost his work because he had already submitted his letter of resignation to his employer when he was informed that the Foundation had withdrawn its offer of employment. This situation arose largely as a result of the defective system adopted by the FMS to recruit new employees and would

not have arisen if the FMS adopted a sound recruitment policy;

- complainant misguided the selection board when he did not explain during his interview why he had been dismissed from the public service. If complainant had been forthcoming throughout his interview, the selection board would have been fully justified to turn down his application even at that stage – and this is what happened when all the facts were eventually revealed to the FMS management.

In view of these considerations, the Ombudsman concluded that despite the defective recruitment system adopted by the FMS, responsibility for the loss of complainant's employment with the Foundation was attributable solely to the fact that he failed to tell the whole truth during his interview by the selection board.

Although selection procedures followed by the board deserved criticism, the Ombudsman felt that the claim by complainant that these procedures led to the loss of his employment was not justified and the grievance was turned down.

Case No E 215

WORKS DIVISION

The plot of privately-owned land that was turned into a public square

The complaint

The owners of a plot of land measuring some 220 square canes which had been incorporated in a larger area and converted into a public square felt that they had been subjected to unfair treatment by the government authorities. There were indications that no formal declaration had ever been issued that the land was required for a public purpose and procedures for the expropriation and acquisition of their property remained shrouded in complete mystery.

Despite the owners' claims for compensation which was theirs by right, no government department or public body was willing to assume responsibility for the decision to develop the area into a public square or seemed prepared to find a solution to the problem even though the land had been acquired by Government some thirteen years earlier.

Feeling lost, the owners resorted to the Office of the Ombudsman.

Facts of the case

The Ombudsman's investigations confirmed that no public body was prepared to shoulder responsibility for the way in which this property had been taken over way back in 1990.

The Roads Department which now forms part of the Malta Transport Authority (ADT) confirmed that the area was laid out as a small public garden surrounded by service roads some thirteen years earlier but was emphatic that it was not involved in the project and that its role was merely limited to providing manpower for construction works.

On the other hand the Local Council of the locality in question stated that it has no records concerning this project because the works were carried out before the Local Council was set up. The Local Council admitted, however, that soon after the completion of these works it had taken over responsibility for the maintenance and upkeep of the area – and this involvement resulted from records of maintenance bills for this public square.

The reaction by the Land Department was equally frustrating. This department informed complainants that it could not proceed with the expropriation and subsequent acquisition of the property unless it received a formal request to do so by a government department or a public body and unless this request was also endorsed by the respective Minister. Since no such request had ever been submitted and there was no official correspondence with any government authority on this project, the Land Department disclaimed responsibility for any pending obligations in respect of this property.

The Ombudsman commented that this was a strange case in the sense that although there was all round agreement that private land had been taken for a public purpose, no public body seemed willing to accept responsibility for the decision to take over the land in question. The Ombudsman also pointed out that even following his intervention, no public body was prepared to take the first step in order to remedy the situation by making a formal request to the Land Department so that the process of compensation to the rightful owners of the property would be set in motion.

The Ombudsman was highly critical of the fact that despite a thorough investigation of the various files and other documents belonging to the Land Department, the Works Division and the Roads Department which had been indicated to his Office as being relevant to the case, it had still proved impossible to discover who had given the go-ahead at the time that the project was carried out.

The Ombudsman concluded that regardless of which government department or public body was responsible for the project, it was clear that some government authority had issued the initial request so that the area would be developed as a civic amenity. Although efforts to discover who had been the promoter of this project proved unsuccessful, there was no doubt that ultimately

it was the Government which was responsible for what had taken place. As a result, the Ombudsman was adamant that it was up to the Government to find a solution to this impasse so that due compensation would be paid to the former owners of the property.

Conclusion

Faced with this failure to identify who was responsible in the first instance for this project, the Ombudsman recommended that in these circumstances the Office of the Prime Minister should take the initiative and issue the necessary instructions so that the long-awaited compensation would be duly issued to the former owners after the necessary verification as to the ownership of the property had taken place.

Following this recommendation, consultations got under way between the ministries responsible for urban development and land management with a view to the provision of funds for the payment of compensation to the former owners of the land.

Case No E 262

JOINT OFFICE

Awaiting registration for years on end

The complaint

In 2000 the Government Property Division launched a scheme for the registration of occupiers of government-owned agricultural land. A person who was cultivating a tract of land submitted an application to the Joint Office early in 2001 to register this land under his name. However, after more than three years, his request remained unanswered.

In the interval another farmer who claimed to be the rightful tenant of this land, was alleged to have dumped debris into the field and to have demolished a section of the boundary wall. Although the applicant reported the matter to the Police, the Malta Environment and Planning Authority (Mepa), the Joint Office and the Local Council of the village, no steps were taken to remedy these unwarranted intrusions.

Feeling aggrieved by this utter lack of action by the authorities, the applicant raised his concerns with the Ombudsman.

Facts of the case

The Ombudsman was informed that when in the past this land belonged to the ecclesiastical authorities, it had been allocated to a farmer tenant on an agricultural lease. However, for many years this tenant showed no interest in this land and not only failed to pay the annual rental that was due under the terms of the lease but had even allowed a third party to make use of the site as a quarry. Notwithstanding this situation, when ownership of the land was transferred to the Joint Office, the agricultural lease covering the land still referred to the original tenant.

The Ombudsman found that in 1994 the Joint Office initiated court action to stop the third party from making any further use of the site as a quarry and that in 1996 the Joint Office requested the original tenant and the third party to pay Lm3,000 by way of damages which had been caused to the site. The Ombudsman further found that following the demise of the third party, his relatives informed the Joint Office that they were willing to pay this amount as long as complainant would be recognized as the new tenant of the land. Although the Office was prepared to accept the payment, it asked for more time to review the request.

When the Ombudsman intervened and raised complainant's grievance about the dumping of debris and the demolition of the boundary wall, the Joint Office asked the person who was allegedly responsible for these actions to stop causing any further damage to the property. The Ombudsman found, however, that no follow-up action was subsequently taken even though the Joint Office had issued this warning without prejudice to any further action which it might take.

Also soon after the Ombudsman's intervention, the Joint Office by means of a letter terminated the original agricultural lease on the grounds that the annual rental payment had not been effected for a long time and that outsiders had been abusively allowed to make use of the land. However, some time later the Joint Office received legal advice that under Maltese law this communication was not sufficient since legal proceedings need to be instituted to terminate an agricultural lease.

Considerations and comments

In his report on this case the Ombudsman stated that this grievance was characterized by failure by the Joint Office to process the application presented by complainant in a timely manner and to take adequate action to safeguard government-owned property.

The Ombudsman was critical of the fact that for a number of years payments due to the Government under the terms of the agricultural lease had not been made and the authorities had taken no effective remedial action. The Ombudsman felt that in this case failure to safeguard government-owned

property was particularly frustrating because although the Joint Office had taken legal action some years earlier against the original tenant and against the person who was making unauthorised use of the land as a quarry, court proceedings were stopped without any explanation and the Ombudsman was unable to establish why this had happened.

Although the Ombudsman admitted that the foregone lease payments involved were small, it was still felt that failure by the Joint Office to collect these dues represented a shortcoming on its part. In fact it was only subsequent to the Ombudsman's intervention that the Joint Office took the first steps to withdraw the original agricultural lease although it was later found that even this action was inadequate and that instead legal proceedings needed to be instituted to terminate this lease.

The Ombudsman pointed out that this case had not been treated in accordance with the basic principles of good administration. His investigations showed that as a result of staff shortages, applications sent to the Joint Office in 2000 and 2001 under the scheme for the registration of government-owned agricultural property had still not been processed by the end of 2004 – and this failure deserved a critical comment by the Ombudsman because citizens are entitled to good public administration including the right to receive a reply or a decision by a public body within a reasonable time.

The Ombudsman also deemed that the Joint Office had erred when, upon being made aware of these developments, it failed to find out whether the original tenant was prepared to relinquish voluntarily the lease when it was clear that he was not interested in making any further use of the land.

Furthermore the Ombudsman was unimpressed by action taken by the authorities to safeguard government's interest against damage by third parties who made unauthorised use of the land since it was clear that this action was ineffective and failed to serve its purpose.

Conclusions and recommendations

The Ombudsman's conclusions and recommendations were as follows:

- the plea by the Joint Office that it failed to process applications that were submitted two or three years earlier because it lacked the manpower resources to tackle this backlog is unacceptable;

- although the grievance by complainant regarding the delay by the Joint Office was justified, this did not mean that he had an automatic right to be recognized as the lease holder of the property;

- the Joint Office was guilty of maladministration when for many years it did not safeguard government rights and failed to collect payments due by tenants under existing agricultural leases and to ensure that the conditions of these leases were being observed;

- although the Joint Office had warned the person who was involved to refrain from causing any further damage to the property, at the same time it failed to ensure that this damage was repaired – and this attitude attracted a critical note.

The Ombudsman recommended that:

(i) since there were valid grounds to terminate the original agricultural lease of the land in question, the Joint Office should use all the means at its disposal to terminate this lease without any further delay and process complainant's application for an agricultural lease for this site in a reasonable time; and

(ii) the Joint Office should take more effective steps so that wilful damage to government-owned property would be repaired by those who were responsible.

Case No E 297

MINISTRY FOR RURAL AFFAIRS AND THE ENVIRONMENT

Ten angry butchers

The complaint

At the end of their one-year training programme to qualify as butchers, the ten successful participants felt aggrieved that they were not employed with the government service on the conditions which they had expected. Instead they were offered a definite work contract under salary scale 16 in the public service.

They also felt aggrieved that for two whole years after having completed this programme and until they were engaged on a three-year contract, they were paid as trainee butchers and were not given any arrears to make up for the difference between the pay of a trainee butcher and of a trained butcher.

These butchers furthermore alleged that before the training programme got under way, they were promised permanent employment upon its completion with the Food and Veterinary Regulation Division of the Ministry for Rural Affairs and the Environment with the same conditions as those enjoyed by butchers under a previous intake. They were, however, upset because these promises were not kept.

The ten butchers submitted a joint complaint to the Office of the Ombudsman.

Facts of the case

The second paragraph of the contract covering the training programme between complainants and the Ministry of Agriculture and Fisheries (as the Ministry was then known) stated that " …… *successful completion of the traineeship under this scheme will in no way guarantee employment with the employer*". However, when this training programme came to an end, the Director of Veterinary Services recommended that the butchers be kept on a contract basis

for a period of six months when they would receive the minimum pay of senior operatives in the government service.

This proposal was meant to serve as a temporary solution since at that time the Government was evaluating the suggestion that as a long-term solution, the Food and Veterinary Regulation Division should secure the services of butchers for the abattoir from employment agencies and private contractors instead of having these workers directly on its payroll. After two years these efforts failed and the Public Service Commission issued a call for applications for the engagement on contract of butchers in the Division. The call stated that selected candidates would enter into a three-year performance contract and that the salary would be equivalent to the minimum of scale 16 in the public service.

The ten successful participants in the training programme submitted their applications and were all duly employed by the Division.

Considerations and comments

Complainants based their grievance on the grounds that they were not treated on the same lines as the previous intake of butchers. They were also irked by the fact that during the two years when they worked under successive six-month contracts they were paid as trainee butchers when they had carried out the duties of fully-fledged butchers and claimed to have a right to receive a butcher's pay.

Complainants referred to the undertaking which they claimed to have been given before they commenced their training programme that their work conditions which would be at par with those of the previous intake.

On the other hand officials from the Ministry for Rural Affairs and the Environment denied that they ever gave any such promise. They pointed out that butchers under the previous intake had undertaken their training five years earlier and that the two groups were employed under different work conditions in accordance with the respective contracts which they had signed and which were approved by the Public Service Commission. This meant that the first group had indefinite work contracts while complainants were offered a definite

three-year work contract and that their pay scales were different as well – and whereas complainants were placed straightaway in salary scale 16, those who formed part of the previous intake were only included in this scale after five years.

Another point raised by complainants concerned payment for the two years between the completion of their course until they were offered a performance contract. Complainants maintained that during this period they could no longer be considered as trainees and were entitled to the wage of a trained butcher while on the other hand officials countered by pointing out that the Ministry was not obliged to recruit them at the end of their training programme. It was also explained that complainants had been retained on a number of successive six-monthly contracts as an extension to their training programme until the Government would reach a decision whether to resort to private sub-contractors for the provision of butchers or else recruit directly its own employees.

Conclusions and recommendations

After having considered the issues involved, the Ombudsman pointed out that the Government is entitled to recruit employees under conditions which it deems appropriate in the interest of the public service. The conditions that regulated the employment of complainants with the Ministry for Rural Affairs and the Environment appeared in the call for applications and in the work contracts which complainants themselves had signed. There were no conditions which could be considered as irregular or of an improperly discriminatory nature in these contracts and complainants' expectations that they were entitled to the same treatment and conditions as those given to employees under the previous intake were not considered justified by the Ombudsman.

At the same time the Ombudsman was of the opinion that although upon completion of their training course until the time when they were engaged on a performance contract complainants were paid as trainee butchers (salary scale 20), they had in fact worked as trained butchers (salary scale 17) and were entitled to receive the wage of a trained butcher. This arrangement took place not because their services were not required but because it took two full years for the Ministry to reach a decision whether to have its own butchers at the abattoir or not.

Although it was agreed that the Ministry was not bound to provide permanent employment to participants who were successful in the training programme, the Ministry had nonetheless availed itself of their services and was obliged to compensate them by means of an appropriate wage that would correspond to scale 17 in the public service.

Although complainants' grievance that they were not treated in the same way as the previous intake was not justified, the Ombudsman recommended that if for two years complainants had undertaken the full range of duties of trained butchers in a satisfactory manner, they should be awarded the difference in pay between the minimum wage of scale 20 and that of scale 17 for this period.

A few days after the Ombudsman submitted his recommendations, the Ministry for Rural Affairs and the Environment accepted these proposals and took the necessary steps to pay the arrears to complainants.

Case No E 376

LAND DEPARTMENT

The caravan site that was hotly contested

The complaint

The Ombudsman received a complaint about the way in which the Land Department handled a tender for the lease of a caravan site at Għadira Bay that was first leased in 1984. Complainants expressed concern at the fact that their offer had been refused even though it was the highest one.

Complainants raised suspicions about the claim by the Land Department that their bid failed to match its estimate and stated that they were surprised to learn that the previous occupier had been allowed to change his mind and decide not to relinquish the site.

They also questioned whether the department acted correctly when it issued a call for tenders when the site was not in its possession. On the other hand, if the site was already in the government's hands, complainants inquired whether it was possible for the previous owner to reclaim it when the Land Department had received a more attractive offer.

Facts of the case

For many years the Land Department followed an established practice whereby tenants of a caravan site at Għadira are allowed to reach an agreement with third parties for the sale of structures built on their site if they no longer want to make use of the site. Upon receiving information of any such agreement, the Land Department would issue a call for tenders from persons interested in the lease of the site being renounced by the occupier. Although the department would normally consider granting the right of first refusal to the third party appearing in the agreement, this right of first refusal would not be declared in the call for tenders. Offers received by the Land Department in response to its call would then be judged on the basis of the department's own estimate of

the current annual rental value of the site although this value too would not be revealed to prospective bidders in the call for tenders.

The caravan site in question was taken on lease in the mid-80s for the sum of Lm50 per annum by way of rent. However, by mid-2003 the person leasing this site was prepared to relinquish it as long as he would be able to recover the costs which he incurred to build the structure on this plot of land.

Upon reaching an agreement with another person for the purchase of this structure, the occupier duly informed the Land Department of his intention provided the third party who bought the structure was granted the right of first refusal. The department in turn issued a call for offers but when offers were evaluated, it resulted that the person who had been identified by the occupier made the lowest offer while complainants submitted the highest offer. However, the department turned down all the offers which it received because they did not match its estimate.

Realizing at this stage that the property carried a substantial rent which he was unable to meet, the person who showed interest in the site cancelled his first agreement with the occupier and entered into a second agreement where he indicated that he was not interested in the site at the price offered by complainants and agreed that the occupier would retain the lease. A copy of this second agreement was presented to the Land Department.

Following these developments, the Director of Land issued instructions for an inspection of the site to establish the identity of the person who was in fact making use of the facility and to ensure that if the person who first showed interest in the site was using the facility instead of the occupier, the lease would not be extended when it came up for renewal. Like other similar lease agreements, the agreement for the site in question stipulated that the lessee may not renounce to this site or sublet the site, wholly or partly, or enter into any type of agreement regarding the site. The Ombudsman's investigations revealed, however, that this inspection did not take place.

Conclusions and recommendations

During his investigations the Ombudsman found that the Land Department had acted in accordance with established procedures when it received the request by the occupier of the site as well as when procedures for the evaluation of tenders were under way. Among other things the department turned down all the offers when it was found that they did not match its estimate and all participants were informed that their offers were rejected.

In the light of his findings the Ombudsman ascertained that although the offer by complainants was the highest one, it failed to meet the department's estimate. As a result complainants had no right to claim that they had won the tender and their grievance regarding the refusal by the Land Department to accept their offer was not justified.

In his report on this case the Ombudsman pointed out that despite written instructions by the Director of Land, officials of the department failed to carry out inspections at the height of summer to check whether the site had been sublet and to establish who was making use of it. This failure deserved a critical mention and could give rise to suspicions.

The Ombudsman was also critical of the fact that when the tender was not awarded, the occupier was allowed to change his mind and retain possession of the site for an annual rent of Lm50 when others were prepared to pay Lm300. The Ombudsman commented that it is not in the government's interest as owner of the land in question to allow the first occupier to retain possession of the site for an indefinite period when he had already declared that he wanted to relinquish use of this land and the Land Department had in fact issued a tender for the site in question.

In similar circumstances the Land Department is entitled to terminate the lease agreement and to recover the land without the payment of any compensation to the occupier. The Ombudsman recommended, however, that in this case it would be fair for the department to terminate the existing lease and issue a new call for offers on the basis of the current value of the site as established by the department and on condition that the person with the best offer would reach an agreement with the first occupier regarding the amount of compensation for the structure that he had erected on the site.

The Ombudsman also recommended that in the event that no agreement would be reached within three months, the new occupier would undertake to pay compensation to the owner of the structure on the basis of an estimate that would be prepared by the Land Department for this structure.

Case No E 409

OFFICE OF INLAND REVENUE

The English taxpayers

The complaint

Following the purchase of property in Malta, a British couple felt aggrieved because the Capital Transfer Duty Department of the Office of Inland Revenue did not mail directly to them its assessment on tax due to be paid but sent it instead to the Maltese notary who drew the deed of transfer.

As a result the assessment did not reach them in time and they incurred a penalty that was four times higher than the penalty that they would have incurred if the tax assessment had been sent directly to them and they would have settled the amount straightaway.

When the Maltese tax authorities turned down their request for a refund of the excess penalty that they claimed to have incurred through no fault of their own, the couple turned to the Office of the Ombudsman.

Facts and findings

Investigations by the Ombudsman showed that the Maltese notary who drew the deed of transfer remitted the tax due and duty on documents payable to the Capital Transfer Duty Department according to the valuation of the property as shown on the deed. The form submitted by the notary in terms of the law included the UK address of the purchasers of the property which was typewritten in the appropriate box while the local address of the notary was handwritten inside this box as well.

In line with the Duty on Documents and Transfers Act, the Capital Transfer Duty Department of the Office of Inland Revenue made its own valuation of the property and assessed the real value of the property for tax purposes at a sum that was higher than that which appeared in the deed of sale. Since the

original declared valuation by complainants was below 85% of the real value as estimated by the department, in terms of the law the relative unpaid tax due to the department together with an equivalent amount to be paid by complainants as additional tax or penalty had to be paid within a stipulated period from the date that the notice of assessment was served. As a concession, however, the law allows that only a percentage of the additional tax may be paid if in addition to the unpaid tax amount, settlement of the penalty takes place within a stipulated time window ranging from 10% of the penalty if the amount is paid within 90 days of the date of the assessment to 100% if paid after 330 days from such date.

The department's original assessment was sent to complainants by registered mail at the address of the Maltese notary while reminders regarding this assessment were also sent by registered mail to the same address. Complainants claimed, however, that it was only after five months that they received from the Maltese notary the documents that were sent by the department. They immediately lodged a protest with the Capital Transfer Duty Department to object that the correspondence had not been sent directly to them but to the Maltese notary who had filed the deed of transfer of their property.

On the next day after receiving the assessment, complainants paid to the local tax authorities a sum which represented the total unpaid tax plus a 10% penalty that would have been due if the penalty had been paid within 90 days from the date of the original assessment. Officials of the department insisted, however, on payment of the balance in terms of the law since settlement had been effected more than 90 days after the issue of the assessment. Complainants subsequently paid an additional amount by way of penalty which in the end amounted to 40% of the total unpaid tax since this penalty was paid some 160 days from the date of service of the original assessment.

Considerations and comments

The Ombudsman noted that complainants had not disputed the fact that in terms of Maltese law, tax was unpaid – and this meant that in addition to the underpaid tax, a penalty was due to the local tax authorities which depended on the time within which it was paid. Records showed in fact that complainants

settled the penalty between 150 and 180 days from the date that the assessment was served.

In response to the query why the notice was not sent directly to complainants, officials of the Capital Transfer Duty Department explained that whenever two addresses appear on a deed of transfer – one being a foreign address and the other a local address marked at the care of – it is the department's standard procedure to forward correspondence to the local address since this is considered a more reliable and punctual method for the delivery of documents.

It was pointed out that in this case the department had in fact served its tax assessment on complainants. However, since complainants had provided no information on the date of their move to their new property in Malta and had not requested the department to direct its correspondence to their new address, the department had adopted its normal system and mailed the tax assessment and subsequent correspondence to the only local address it was aware of and which appeared on the deed of transfer.

The Ombudsman noted that in terms of article 54 of the Duty on Documents and Transfers Act a notice of assessment indicating the amount of duty payable is to be served by the Commissioner of Inland Revenue on the person liable to pay duty or on his lawful representative. Article 55 states that for all purposes of the Act an assessment is deemed to have been made by the Commissioner on the date of service of the relative notice.

Conclusion

Having examined the various aspects of this case, the Ombudsman concluded that decisions taken by officials of the Capital Transfer Duty Department cannot be considered as an act of maladministration on the part of the department since the provisions of the law had been observed in full.

The tax assessment had been effectively served in terms of the law as could be ascertained from the date of its delivery on Maltapost's website. Given that the notice of assessment and tax due had been served on complainants at one of the addresses which appeared in the notice on the deed of transfer in accordance with the provisions of the law and payment by complainants was

effected with a delay of between 150 and 180 days from the date of service of notice in terms of the law, this rendered them – in the absence of evidence of any maladministration on the part of the department – liable to a penalty of 40% of the unpaid tax and no refund was due to them.

On this basis the Ombudsman concluded that the complaint could not be upheld and closed the file.

Case No E 416

DEPARTMENT OF CIVIL REGISTRATION

The fee for a new passport that was higher than shown on the application form

The complaint

A person who approached the Department of Civil Registration in connection with the issue of an urgent passport was surprised to find that he was charged Lm13 although both the department's website and the application form indicated that the fee for this service was Lm5.

He reported the matter to the Ombudsman and argued that since it is illegal for private commercial establishments to charge prices that are higher than those on display, the same reasoning should apply in respect of services that are provided to citizens by government departments.

Facts of the case

The Ombudsman learnt that new fees for passports and visas were introduced with effect from 7 July 2004 by means of Legal Notice No 356 of 2004 which appeared in the supplement to the *Government Gazette* (number 17,619) of 6 July 2004.

The Ombudsman was informed that copies of this legal notice were displayed prominently at the entrance to the reception room at the Department of Civil Registration, inside the reception room itself and at the various counter windows where applicants are served by members of staff of the department. A copy of the legal notice was also displayed on the notice board at the first floor of the department.

Findings and recommendations

The Ombudsman commented that complainant's grievance that the increase from Lm5 to Lm13 was quite a steep rise fell completely outside the terms of reference of the Office of the Ombudsman and the institution would not be drawn into this issue.

At the same time the Ombudsman was of the view that the change in fees for services rendered by the Department of Civil Registration was perfectly legal since it had been made by means of regulations issued by the Minister of Justice and Home Affairs with the concurrence of the Prime Minister and Minister of Finance in exercise of the powers conferred by article 2 of the Fees Ordinance (cap 35 of the laws of Malta). These regulations are referred to as the Fees (Passports and Visas) (Amendment) Regulations, 2004 and form part of the Fees (Passports and Visas) Regulations, 2000.

The Ombudsman next considered whether the public at large had been sufficiently informed and made aware of the new fee structure. He agreed that on its own the publication of a legal notice in the *Government Gazette* is not enough and that an official press release on the local media would have been more helpful to the general public and would have captured the attention of a much wider audience.

The Ombudsman took note of the fact that notices were displayed in a prominent manner in various strategic areas in the premises of the Department of Civil Registration. Nevertheless, he pointed out that a printed note stating that new fees were being charged for the issue of new passports as from 7 July 2004 and showing the new amounts involved should have been attached to the old application forms. Besides being more informative this system would have ensured that the new fees would have been noticed by all applicants and would have served its purpose well at least until the existing stock of old application forms for passports would be exhausted and new ones displaying the revised tariffs would be printed.

Conclusion

On the basis of his findings the Ombudsman concluded that even though the fee for the issue of a new passport was not the one that appeared on the application form, the introduction of revised fees had been done according to law. As such, the complaint could not therefore be sustained.

Nevertheless, the Ombudsman felt that until new forms became available, it would have been more appropriate for the department to take a number of initiatives such as the issue of a media release that would have given wider publicity to the department's new fee structure; the insertion of a printed note in the old application forms for the issue of a new passport that would announce the new fees payable to the Department of Civil Registration for the provision of this service; and the updating of the department's website on a more regular basis.

The Director of the Department of Civil Registration agreed to implement the Ombudsman's recommendations and a slip was attached to the old stock of application forms informing applicants of the new charges that were applicable.

Case No E 469

MALTAPOST plc

The letter that went astray

The complaint

Despite making the necessary arrangements with Maltapost so that all incoming mail would be re-directed to his new address, the head of a household alleged that through negligence on the part of the company a registered letter from the Office of Inland Revenue was not directed in time to his new residence and had been returned to the sender.

As a result, an assessment sent by the Capital Transfer Duty Department of this Office to the household's former address was delivered with a considerable delay to the new residence. Feeling upset by the fact that this delay made him incur an additional penalty of Lm80 which he would otherwise not have been liable to pay, the head of the household brought the matter to the attention of the Ombudsman.

Facts and findings

Early in August 2004 complainant received by hand a notice of assessment dated 17 March 2004 to pay additional duty/penalty amounting to Lm400 in connection with the transfer of property he had made.

Regulations under the Duty on Documents and Transfers Act regarding additional duty/penalty stipulate that if payment takes place within ninety days from the date of assessment, the penalty shall be reduced to 10% of the amount. This percentage, however, increases the longer the person concerned takes to pay the penalty after the lapse of these ninety days. In the case under review, the delay of almost five months until complainant received the department's notification meant that the penalty rose to 30% or Lm120. However, if the department's claim had been delivered and settled in time, complainant would have been liable to pay only Lm40 by way of penalty.

Given that complainant had made arrangements with Maltapost so that his mail would be redirected to his new address, he attributed the delay from the date of issue of the assessment until the date when delivery took place, to the postal authorities and held them fully responsible for the consequences of their failure to deliver this document on time to his new address. In fact it emerged that despite these arrangements, when the letter from the Capital Transfer Duty Department was sent to the old address, the postal authorities failed to redirect it to his new residence and instead marked the envelope with the words "*gone away*."

When the Ombudsman sought the views of the Capital Transfer Duty Department, officials were adamant that a waiver cannot be acceded to since section 52(4)(a) of the Duty on Documents and Transfers Act prescribes the penalty to be paid in similar circumstances to an established time window and states that no objection shall be entertained with respect to the additional duty/penalty.

Considerations and comments

During his investigation the Ombudsman ascertained that this was a case where a citizen found himself penalized by the tax authorities because Maltapost failed in its obligations towards him even though he had taken all the necessary steps for the delivery of mail to a new residence that would normally assure that all incoming mail would reach this new address.

While admitting that the tax authorities had imposed a penalty on complainant as a result of a mistake that was committed by company personnel, the company management contended, however, that section 29 of the Postal Services Act grants the postal operator an exemption from liability for loss, delay or damage to customers. This section states that:

"*The postal operator shall not incur any liability for compensation by reason of loss, misdelivery, or delay of, or damage to, any postal article in the course of transmission by post, unless such compensation -*

(a) has been agreed to by the postal operator and the sender, or

(b) has been established by regulations as may from time to time be prescribed under this Act, irrespective of the value of the article:

Provided neither the Authority or any of its officers or any officer of a postal operator shall incur any liability by reason of any such loss, misdelivery, delay, or damage, unless the same has been caused in bad faith or recklessly."

Closer scrutiny of the Postal Services Act by the Ombudsman, however, revealed that this provision of the law does not exclude compensation altogether. Section 29 of the Act in fact provides for Maltapost to pay compensation in situations arising from bad faith or recklessness on its part; and the Ombudsman felt that the case in point was an act of culpable maladministration that was the result of negligence.

At the same time, however, for compensation to be paid in terms of the law there has to be an agreement on compensation between the postal operator and the sender of the letter that has been misplaced or delayed – in this case, the Capital Transfer Duty Department. Failure to reach such an agreement would constitute lack of respect for a citizen's right to good administration and would also represent unfairness towards the party which would have suffered damage, loss or injury as a result of failure by the postal authorities.

The Ombudsman stressed that the principles of justice and fair administration demand that citizens obtain redress for acts of bad administration which cause damage to them. The aim of any such redress is to put citizens back into the position in which they would have been had maladministration not occurred in the first place.

The Ombudsman stated that it would be considered as an act of bad faith if Maltapost, while admitting responsibility for its failure, would still refuse to accept that adequate compensation was warranted by objecting to enter into an agreement with the Capital Transfer Duty Department as the sender of the letter in order to satisfy the provisions of the law with regard to the added penalty of Lm80 which complainant had unjustly incurred.

The Ombudsman was also of the view that on its part the Capital Transfer Duty Department too should find no objection to enter into a similar agreement

with the postal operator and accept an eventual payment with a view to the eventual refund of this sum by the department to complainant who had already settled the penalty in full. The Ombudsman pointed out that a more practical solution would be for Maltapost to compensate complainant directly for the added penalty that was imposed on him by the tax authorities.

Conclusion and recommendations

The Ombudsman concluded that the grievance raised by complainant was justified. Maltapost had failed complainant and this failure meant that he had to face a penalty of Lm120 in terms of the law instead of Lm40 if the department's tax claim had been delivered in time and he had settled the amount within the period that is allowed by the department. In fairness sake, Maltapost should therefore compensate complainant for its error.

One of the tests to determine whether a public body is delivering good standards of administration is the extent to which it is prepared to make adequate and appropriate redress when things go wrong.

Mindful of its social responsibility and despite the limit of Lm16 as compensation stipulated by the Universal Postal Union, Maltapost management in the end accepted to pay the sum of Lm80 as compensation directly to complainant.

Case No F 36

MALTA TRANSPORT AUTHORITY

Unjustified refusal to issue a public service garage licence

The complaint

An individual who applied for a permit to convert his private car garage to a public service garage was surprised when his request for a change of use of these premises was approved by the Malta Environment and Planning Authority (Mepa) but was turned down by the Malta Transport Authority (ADT). He therefore referred his case to the Office of the Ombudsman.

Facts of the case

Complainant stated that when he asked ADT for permission to operate a public service garage, he was advised that as a first step he needed to obtain approval by Mepa for a change of use of the premises. After having secured this approval, complainant referred the matter to the ADT but was greatly surprised to learn from ADT officials that this approval was not acceptable since the area of the garage was less than 24m^2.

Complainant contended that the requirement regarding the availability of 24m^2 for two cars is unfair and *ultra vires* because it emerges from a legal notice that had not been brought into force. He held that once Mepa had approved his request, approval by the ADT ought to follow as a matter of course.

Complainant further alleged that in the past garages having the same area as his garage had been approved and he felt that therefore there ought to be no objection to his request. He felt upset that although he had provided information to the ADT about the address of a garage which had been extended to accommodate two cars, he was informed that in this case it had been the police authorities who had issued the permit.

During a site meeting with a representative of the Office of the Ombudsman, complainant stated that he was prepared to do away with a restroom facility at the back of his garage to provide the 24m^2 of space that was required by the ADT even though he only planned to operate one vehicle from this garage. He claimed that he did not really require all this space since he merely wanted to operate this vehicle to increase his income.

The ADT explained to the Ombudsman that since 2002, responsibility for the approval of public service garages had been transferred from the Police to the Authority. However, whereas the Police used to reject an application unless the premises could accommodate a minimum of four vehicles, the ADT adopted a different policy in the sense that the space inside a garage had to be enough to accommodate two garage hire vehicles or four self-drive cars. In this regard the ADT made reference to condition 13 of the Second Schedule of the Public Service Garage Licences Regulations (Legal Notice No 196 of 2002) which states that a public service garage "… *shall have the space for at least two chauffeur driven four-wheeled motor vehicles or four four-wheeled self-drive motor vehicles as the case may be and used exclusively for this purpose*."

The ADT furthermore explained that its calculations of the area to be allocated for vehicle parking is based on Mepa Circular 3/93 according to which space is worked out on the basis of 2.4m x 4.8m per vehicle to which should also be added room for access to the garage.

The Ombudsman looked at the measurements of the garage that was at the centre of the controversy. According to the ADT the garage measured 20.4m^2 while according to complainant's architect it measured 26.4m^2 inclusive of the area that was taken by the restroom facility. ADT representatives, however, countered this claim by pointing out that even if this facility were to be eliminated, the garage would still not be acceptable because of its configuration.

As contacts between the Ombudsman and the ADT progressed further, ADT officials admitted that although Legal Notice No 196 of 2002 had been published but not brought into force, yet it was still applied as a matter of policy.

Considerations and comments

The Ombudsman's initial comment in his report was that he disagreed with complainant's stand that the approval by Mepa entitled him to the ADT's consent as a matter of right. At the same time the Ombudsman stated that in his view it was unfair on complainant who had spent a considerable amount of money to seek Mepa's approval only to be told at a later stage that his application had been rejected by the ADT. The Ombudsman stated that this situation could have been avoided if better coordination existed between two public bodies which after all form part of the same government administration.

The Ombudsman pointed out that in the circumstances, it would have been proper for the ADT to advise complainant straightaway that his application did not conform with the two-car rule rather than directing him to apply to Mepa in the first instance. The ADT ought to have given better guidance to the applicant by drawing his attention to its own policies before requiring him to submit his application to Mepa.

The Ombudsman then considered the allegation by complainant about the garage which was said to have been given a permit so that it would take two cars. According to the Ombudsman, even if this allegation was true and a permit had been issued in breach of the policy of the day, this did not constitute a precedent in complainant's favour.

On the other hand the Ombudsman considered objectionable the reference by the ADT to a published legal notice when all along its officials knew quite well that it had not been brought into force. The Ombudsman was highly critical of the fact that the ADT failed to point this out during its communications with his Office.

The Ombudsman also disagreed with the interpretation given by the ADT to the two-car rule. First of all the dimensions given by Mepa in respect of vehicle space take into account room for access to the car and to the garage since no car is 2.4m wide. As a result, although the Ombudsman found no difficulty with the approach by the ADT to adopt a circular issued by Mepa as its benchmark, at the same time he was of the view that ADT officials ought to have kept in mind that the dimensions in the Mepa circular are not for an

average sized car but also take into account other requirements such as adequate manoeuvring space.

The Ombudsman expressed disagreement with ADT's rigid stand on the matter and was of the opinion that the ADT should not have been so difficult with an individual who was only trying to boost his income. He recommended that if complainant were to remove the restroom facility and in this way the garage would have an area that would not be less than $24m^2$, the permit should be issued without any further ado.

Conclusion

The Ombudsman concluded that the ADT was being unnecessarily rigid and unfair towards complainant and sought to create obstacles where none should have existed. Perhaps the aim behind this attitude was to limit permits as much as possible with a view to protecting operators who are already in existence. This approach was mirrored in the explanation given by a high-ranking official in the ADT that Legal Notice No 196 of 2002 had not been brought into force because of strong objections to the reduction of the four-car space rule to two spaces.

In the Ombudsman's view the closed shop policy being adopted by the ADT was anachronistic and its penchant to create bureaucratic obstacles, most probably to avoid issuing another licence, was unacceptable.

Case No F 106

EMPLOYMENT AND TRAINING CORPORATION

The youth who failed to find a sponsor to provide on-the-job training

The complaint

The parents of an apprentice under the Technician Apprenticeship Scheme (TAS) organized by the Employment and Training Corporation (ETC) reported to the Ombudsman that despite its promise before the 2003 course got under way that the Corporation would provide a sponsor for their son as from the second year of the course, the ETC failed to identify a sponsor to enable him to proceed with his apprenticeship.

As a result their son ran a serious risk of not being able to continue taking part in this course. They also stated that despite this difficulty that beset the 2003 course and affected various apprentices, the course was again launched in 2004 and further expressed concern that other students were likely to undergo the same ordeal that was faced by their son.

Facts of the case

In September 2003 complainants' son was enrolled in the Technician Apprenticeship Scheme for a course leading to a certificate in Computer Engineering which commenced the following month.

This Scheme was due to last four years. The first year consisted of full time instruction at the Malta College for Arts, Science and Technology (MCAST) while in the remaining three years participants would spend a substantial amount of their training at the workplace of a sponsor whom they would themselves need to identify and who would employ them for these years. At the end of the course students would sit for a final trade test that leads to a Journeyman's Certificate at technician level in their area of specialization. One of the conditions stipulated that students would not be allowed to continue

the course if they failed to attend more than 80% of the time allocated for practical on-the-job training at an approved place of work to obtain the necessary work experience.

Before the 2003 course got under way, the ETC organized a meeting to brief apprentices and their parents about the duties and responsibilities of apprentices under the Scheme. During this meeting various documents were distributed including a set of guidelines to enable participants and their parents to understand the operation and administration of the Scheme. Complainants stated that they attended this meeting with their son.

ETC management told the Ombudsman that during this meeting officials spoke about the Corporation's willingness to assist students to identify sponsors. It was emphasized, however, that the ETC itself does not provide any guarantees because efforts to identify a sufficient number of sponsors depend on various external factors over which the Corporation has no control such as the situation in the labour market as well as the performance of apprentices during their studies and during their interviews with potential sponsors.

In a document captioned *Guidelines for Apprentices – 2003 Intake* that was distributed to participants during this meeting, it was stated that:

"*The Employment and Training Corporation (ETC) will assist you in finding an employer with whom to carry out your practical training related to the calling you are following for the duration of the apprenticeship. It is to be noted that the Corporation does not create jobs and can only avail itself of existing vacancies within the labour market*."

Complainants' son successfully completed his first year of studies at MCAST and sought a sponsor who could provide him with on-the-job training. But despite various interviews, the youth was unable to find a sponsor.

Responsibility for the organization of the Technician Apprenticeship Scheme lies with the ETC while MCAST provides the vocational education and training programme that form part of the Scheme. Furthermore, MCAST is not involved in the administration of trade testing programmes for apprentices and has no direct responsibility to find sponsors who provide the workplace

environment for the training of apprentices to undertake their training or to offer apprenticeships.

Although there were various apprentices in the 2003 intake who encountered the same difficulty as complainants' son, the Ombudsman was informed that at that time there were no other full time training programmes at MCAST that could be followed by youths who found themselves in this predicament.

In January 2005 complainants' son was warned that his name would be struck off the list of apprentices and he would not be able to sit for the trade testing leading to the Journeyman's Certificate unless he attended at least 80% of the practical training component of the scheme.

Considerations by the Ombudsman

The issue that featured in this grievance was whether the ETC failed its obligations towards complainants' son when the youth found himself without a sponsor and ran the risk of losing his apprenticeship.

It resulted to the Ombudsman that the ETC gave sufficient warnings to students in the 2003 TAS intake that although the Corporation would assist them to identify a sponsor, it could not guarantee that every apprentice would succeed in finding on-the-job training opportunities. The Corporation's guidelines about the Scheme also pointed out clearly that it does not directly provide training opportunities but depends on openings that are available in the labour market for the successful running of the TAS. In view of this position that was adopted all along by the ETC, the Ombudsman declared that he could not sustain complainants' grievance.

The Ombudsman went on to state, however, that his investigations had revealed the extent of the problem since the experience of complainants' son was not an isolated case and there were various other apprentices who met similar difficulties. This problem has in fact existed for various years and was felt in the different skills by most TAS intakes in accordance with fluctuations in the labour market. Indeed, apprentices in the subsequent TAS intake and in other apprenticeship schemes experienced similar problems and some apprentices had even resigned when they failed to find a sponsor.

The Ombudsman was informed that both the ETC and MCAST were aware of the problems faced by apprentices who do not have a sponsor and noted that the two institutions had decided that as from October 2004 students who find a sponsor shall acquire the status of apprentices whereas the rest of the students will follow the training programme as full-time students. As a result of these changes, the ETC offered complainants' son to participate under these new arrangements although this meant that he would not be eligible for MCAST maintenance grants and for a stipend. Neither could he sit for the Journeyman's Certificate.

The Ombudsman noted, however, that the upshot of these arrangements was that complainants' son would still find himself in a slightly disadvantaged position because he would miss the on-the-job training experience which other apprentices would have acquired throughout their sponsorship.

Conclusions and recommendations

Although the Ombudsman concluded that the grievance that the ETC failed to observe its commitment to find a sponsor for complainants' son was not justified, this complaint served to focus attention on a serious problem in apprenticeship schemes when despite the combined efforts of MCAST and ETC, a sufficient number of sponsors is still not found.

Seeing that both institutions fall under the responsibility of the Ministry of Education, Youth and Employment, the Ombudsman suggested that the Ministry should intervene directly in the matter and possibly review its policies with a view to ensuring that the system of vocational education will respond better to the problems that are faced by participants.

Case No F 328

MANAGEMENT AND PERSONNEL OFFICE

The indispensable applicant

The complaint

A public official lodged a complaint with the Ombudsman and asked for redress following a refusal by his Head of Department to endorse his internal application for a senior management position with Malta Information Technology and Training Services Limited (MITTS Ltd.).

The employee felt aggrieved because this refusal effectively blocked his application for this position from being considered by the selection board and was also likely to prejudice his prospects of career progression and to obstruct his chances in other recruitment competitions for public officers in his grade.

Complainant requested the Ombudsman to intervene and stop the authorities from acting in an abusive and discriminatory manner and to ensure that the recruitment process would be conducted fairly while providing an equal opportunity to all eligible candidates.

Facts of the case

MPO Circular No 27/2005 issued in May 2005 by the Management and Personnel Office of the Office of the Prime Minister invited applications from suitably qualified employees in the public sector to fill the vacant post of Human Resources Manager in MITTS Limited under a three-year contract. Upon termination of this contract the successful candidate would revert to his substantive appointment in the public service.

Candidates were asked to channel their applications through their Head of Department and advised that this endorsement of their application signified that no replacement would be required during the contract period.

A few days after complainant presented his application, he was informed that the selection board was unable to proceed further with this application unless he submitted a written endorsement from his superior to signify clearly that no replacement would be needed in the event that he were chosen to fill this post.

Upon approaching his Head of Department, however, complainant was surprised to find out that his superior was adamant that he was not in a position to endorse the application since he could not confirm that a replacement would not be required to carry out applicant's duties during the contract period. Attempts by complainant for a review of this decision were fruitless.

Complainant also approached the Management and Personnel Office. He sought to overturn this requirement on the grounds that it favoured candidates whose duties enable them to be released from their workplace without any replacement while placing at a disadvantage other candidates who are considered to provide a vital service and who would invariably need to be replaced in the event that they are allowed to move on to another employer. These efforts were also turned down.

In the light of this situation, complainant approached the Office of the Ombudsman and asked that:

- the selection process be halted straightaway because it was vitiated by an unfair requirement;

- the call for applications be issued again without the exclusion of candidates who need to be replaced because of the nature of their duties so that the selection will be truly based on the merit of applicants; and

- necessary action be taken to address this injustice and ensure that it will not be repeated in subsequent calls for applications in the public service so that transparency and the principle of natural justice will be respected.

Considerations by the Ombudsman

The Ombudsman approached the Principal Permanent Secretary at the Office of the Prime Minister as the head of the public service regarding the issue that had been raised by complainant. He pointed out that the requirement in MPO Circular No 27/2005 that candidates applying for the vacancy at MITTS Ltd. had to provide written evidence by their head that a replacement would not be required, constituted a *prima facie* case of improper discrimination. The Ombudsman emphasized that it was unreasonable that in a call for applications issued by the Government it was deemed fit to exclude applicants whose services were considered indispensable and who would therefore inevitably need to be replaced in the event of their departure.

The Ombudsman stressed that the eligibility of a candidate for a post should depend on relevant job requisites and the selection process should be based exclusively on merit. The restriction that featured in the call for applications, besides being unfair to eligible and deserving applicants, implied that it would reward officers whose services could easily be done away with by their superiors and who could be considered as unnecessary. This was an anomaly which should be sorted our straightaway.

The Ombudsman commented that if the intention behind this condition was to identify surplus manpower in the public service and promote a more productive use of manpower resources in the context of an exercise for the redeployment of public officials, there are surely better and more orthodox methods to identify these officials other than by resort to a discriminatory strategy that rules out applicants whose services are considered indispensable by their superiors.

The Ombudsman stated that in his view this restrictive condition was an instance of improper discrimination and constituted maladministration. He therefore recommended that this restriction be removed and that the call for applications be open to candidates who are in possession of the necessary qualifications and experience and are suitable for the position involved.

Outcome

Soon after the Ombudsman submitted his recommendations, the Office of the Prime Minister replaced the old circular by a new one where there was no mention of the previous restriction regarding the eligibility of candidates.

OFFICE OF THE OMBUDSMAN

PUBLICATIONS

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

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

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Monday, Tuesday, Thursday, Friday	0830 - 1500 hours
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August:	0830 - 1230 hours