Ombudsman

CASE NOTES

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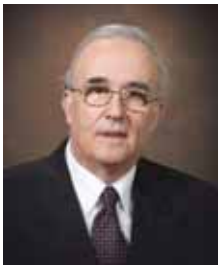
From the Ombudsman's Caseload

Foreword



The main aim of the Office of the Ombudsman is to promote administrative justice in the day-to-day contacts of citizens with the long arm of public administration. Another important goal is to contribute towards an improvement in the quality of administrative practice among departments, authorities, agencies and bodies that together constitute the public sector in its widest sense.

This Office recognizes that the values that drive it forward in the service of the community need to be accompanied by a high level of visibility. In this way citizens will be aware of their rights as daily customers of public service and of the Ombudsman's mission and his accessibility while public officers will share his commitment in favour of fairness, accountability, good governance and best practice in their administrative actions and decisions.

On its own, however, mere provision by the Ombudsman of an efficient and equitable investigative service is not enough. Outreach activities and contacts that project the institution's image among the members of the pubic are necessary for a stronger awareness of the Ombudsman's role as a staunch defender of the people.

In the last few years the internet site of the Office of the Ombudsman has developed into an effective means of communication that allows easy and direct access to citizens. This is confirmed by the 9,000 or so hits that were registered on this website during the first nine months of the year. This touch with citizens is backed by the publications that are issued by this Office, notably its annual reports and the biannual *Case Notes* and, more recently, by a regular contribution in *Il-Ġens Illum* by the Ombudsman.

It is gratifying to note that over the years the publication *Case Notes* has become fairly well established and has succeeded in attracting a wide and diverse readership. Cases to acquaint citizens with the Ombudsman's work that are normally selected on the strength of their general interest and application and their human touch while respecting the privacy of complainants, serve to show how fairness, reasonableness and impartiality

should lie at the root of each and every decision by government administrative bodies.

At the same time these case profiles enable public officials to learn from the experience of this Office and to appreciate the reasoning that backs the Ombudsman's recommendations. They assist public officials to take decisions that are equitable and that are based on respect for citizens' right to good administration. They also demonstrate how in sustained cases the Ombudsman contributes towards good governance by recommendations that rectify poor decisions and restore aggrieved persons lodging a grievance to the position in which they would have been if the act of maladministration had not taken place at all.

It is my wish that the readership of this publication will widen further to make an even stronger and more positive impact on the quality of decision-making and also to underscore the effect that an impartial and reliable complaint handling mechanism can have on public administration.

Joseph Said Pullicino **October 2007**
Ombudsman

Case No E 503

MANAGEMENT AND PERSONNEL OFFICE

An obvious injustice

Background information about the complaint

An employee who was for several years on secondment with the public service, held a substantive post of Manager with the Malta Development Corporation (MDC)[1] which was broadly comparable to grade 4 in the salary scale of the civil service.

In an exercise to assimilate a number of employees seconded to the public service, the Management and Personnel Office (MPO) on 14 November 2003 wrote to this employee that subject to her acceptance, the Office would recommend to the Public Service Commission (PSC) her permanent assimilation in the public service in a grade which would correspond as much as possible to her substantive grade in the MDC.

A few days later this employee was interviewed and selected for a post at Malta Enterprise where she would retain her grade and her emoluments at the MDC and given two days to indicate whether she accepted this offer. However, before giving her reply she sought an assurance from the Head of Department in the department where she was deployed that her assimilation would be in grade 4 of the civil service. Upon receiving this assurance, she turned down the offer by Malta Enterprise.

However, when the employee joined the public service in 2004, much to her surprise she was placed in salary scale 10 instead of scale 4 as she had been promised although her salary was pegged to her salary at the MDC on a personal basis. In a letter by the Management and Personnel Office on 6 April 2004 she was told that this salary would be augmented by cost of

[1] In 2003 the functions and powers of the Malta Development Corporation were taken over by Malta Enterprise.

living increases until such time as the substantive salary of the public service grade to which she had been assimilated, or any higher salary reached by virtue of her public service status, would reach the salary that she enjoyed on a personal basis and that this salary would then rise in accordance with that of her grade in salary scale 10.

Complainant protested with the MPO that these arrangements meant that in effect she had been demoted and that the Government had breached the commitment given to her earlier. She petitioned the Prime Minister who in turn referred the matter to the Public Service Commission (PSC). She also eventually sought recourse to the Office of the Ombudsman.

The Ombudsman gave his preliminary opinion on 26 July 2005 and sought the views of the PSC on this opinion. The Commission, however, did not accept the Ombudsman's recommendation and on 13 September 2005 the Ombudsman informed complainant of his findings and of the views of the PSC.

On 28 September 2005 complainant again wrote to the Office of the Ombudsman and submitted various arguments to point out statements in the PSC's letter that were incorrect. When her comments were brought to the attention of the PSC, for the second time the Commission refused to budge from its previous position.

Considerations and comments

The Ombudsman pointed out straightaway that without any reasonable doubt, there was evidence that the Government had unequivocally committed itself to recommend to the PSC to appoint complainant in a grade in scale 4 that would broadly correspond to her previous grade in the MDC. Clearly this commitment by the Government had not been observed when complainant was placed in a post in salary scale 10.

The Ombudsman stated that it was likely that the official who gave this commitment to complainant may not have been aware of the difficulties that this commitment entailed and that these problems only emerged when complainant had already declined an offer for a management post at Malta Enterprise and when it was too late to rectify matters.

The Ombudsman observed that this was grossly unfair to complainant. It was in defiance of the basic norms of good administration to ignore the negative consequences of an administrative error that had serious repercussions on her career and to plead instead that the administration had acted correctly.

At the same time the Ombudsman considered the MPO's claims about complainant's promotion prospects and that on the basis of her qualifications it was possible for her to advance even to a headship position in the civil service. He ruled, however, that it was clear that her chances of ever reaching scale 4 as she had been promised could not be considered fair and reasonable.

The Ombudsman's findings

While making it clear that in his opinion complainant was the victim of gross even if involuntary maladministration on the part of the MPO, the Ombudsman bluntly described this episode as a mere travesty of justice and lambasted the MPO for turning a blind eye to this serious failure on its part as if no wrong had been done at all. He insisted that this injustice called for a just and effective remedy and that it was the responsibility of the MPO to ensure that complainant be given a reasonable chance and not merely live on the off chance of promotion to the status that she previously enjoyed at the MDC as she had been unequivocally promised.

The Ombudsman said that a possible fair remedy for this situation could be provided by article 110 of the Constitution of Malta that states that the power to make appointments to public offices "*shall vest in the Prime Minister acting on the recommendation of the Public Service Commission*." Article 92(4), however, provides that an appointment to a headship position is made following "*consultation*" with the Public Service Commission. This means that in respect of headship positions the Prime Minister has the final say in case of disagreement with the PSC and also implies that conditions for eligibility for headship positions fall within the competence of the Prime Minister.

The Ombudsman further stated, however, that even this solution would not satisfy the basic element of a fair remedy since it would not put complainant in the position that she would have been had the injustice not

been perpetrated at all. According to the Ombudsman the only just remedy in this case would be represented by a permanent appointment to complainant to a post in a grade in scale 4 of the civil service although he acknowledged that any such appointment could only be made on the back of a recommendation issued by the PSC.

In spite of the Ombudsman's suggestion, the PSC decided to stand by its former decision of 4 March 2004 that complainant should be appointed officer in scale 10 for the following reasons:

- the conditions of assimilation offered to a group of 27 persons (including complainant) had been explained clearly and each employee was free to accept the offer of absorption within the civil service or to remain an employee of the parent entity;
- the commitment given by the Government to these employees was to provide assimilation in the most appropriate grade and to guarantee that upon assimilation each employee will retain the higher emoluments enjoyed when engaged at the parent entity;
- at no point was complainant ever offered by the MPO a grade that would be equivalent to her former position at the MDC;
- the PSC did not agree with the view that it was virtually impossible for complainant ever to move on and reach the top positions in the civil service as she was led to believe. According to the Commission, the assimilation exercise had allowed complainant an opportunity to enter the civil service stream at a level which is normally attained through a competitive selection process and it was up to her to make the most of the opportunities for career advancement that are available in the service;
- in her new position complainant would still continue to enjoy higher emoluments and her pay would remain higher than in the grade where she was placed after assimilation.

On his part the Ombudsman continued to insist that this was a wrong interpretation of the unequivocal commitment given by Government to complainant in the MPO's letter of 14 November 2003 that made her turn down the offer by Malta Enterprise and submit her resignation. This commitment was worded as follows: "…(*il-Gvern*) *jassimilhom b'mod permanenti fis-servizz pubbliku fi grad li jaqbel ma' dak li l-ħaddiema*

għandhom ma' l-entità"[2] – and the Ombudsman felt that in view of this pledge he could not share the stand by the PSC that at no point during the assimilation exercise was complainant ever offered by the MPO a grade that was comparable to her former position at the MDC. He emphasized that clearly the PSC was mistaken on this point of fact.

The Ombudsman further noted that in its letter to complainant the MPO wrote as follows: "*… il-ħatra fis-servizz pubbliku tkun fi grad li kemm jista' jkun iqarreb dak li għandek ma' l-entità*"[3] – and in his opinion one could not reasonably conclude that scale 10 where complainant was placed had satisfied this promise.

The Ombudsman also expressed concern on the appropriateness of the PSC's statement when it commented on complainant's promotion prospects in the public service.

The Ombudsman concluded that in terms of section 22(1) of the Ombudsman Act and in line with the understanding reached between his Office and the Public Service Commission in 1997 the Commission's ruling in this case was unreasonable and based wholly or partly on a mistake of fact and was therefore incorrect. He insisted that it was clear that the commitment to complainant was twofold:

- firstly, that complainant would be assimilated and given a permanent appointment in the public service in grade that would be comparable, as far as possible, to the one that she enjoyed at the MDC; and
- secondly, that her basic salary in her new grade would not be inferior to the salary that she was receiving in her former employment at the time of her assimilation in the public service.

The Ombudsman stated that whereas the Government honoured its second commitment towards complainant, it steadfastly refused to honour its first pledge. He pointed out that the precise terms in which the Government's

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[2] "*… (the Government) … will absorb these employees permanently in the public service in a grade that will correspond to the grade that these employees occupy in their parent entity*."

[3] "*… your appointment in the public service will be in a grade that will be as close as possible to your current grade in your parent entity*."

promises to her were couched left no doubt that she was being assured that by accepting the Government's proposal she would not only be financially prejudiced but that her career prospects would be safeguarded if not enhanced. The Ombudsman commented that it was unfortunate that the Government failed to honour its explicit undertaking in violation of the basic principles of good administration and that the reason why the Government failed to do so was immaterial.

Even if the Government sought to justify its action by invoking rules and regulations governing recruitment in the public service, ways should be found to ensure that the administration would honour the bond that it had given not only by word but also explicitly in writing. This was written in a way that left little or no room for any other interpretation and that would provide complainant with sufficient grounds to institute judicial proceedings to vindicate her rights. The Ombudsman felt that this would serve as an embarrassment that the Government would do well to avoid.

The Ombudsman stated that in his opinion it was neither correct nor advisable for the Government to justify its stand by reference to the decisions of the PSC especially since the apparent blatant contradiction between the facts as proven and the Commission's conclusions led him to believe that the PSC might not have been made fully aware of all the material facts supporting complainant's claim.

The Ombudsman admitted that although the PSC might have been correct in its assessment of this case particularly in the light of existing regulations governing entry into the public service at a level that normally requires competitive selection, exceptional circumstances at times arise which might even warrant and justify an exception. In the opinion of the Ombudsman this was one such exceptional case that was triggered by a government commitment that was surely made but only partly honoured.

Conclusion and recommendation

The Ombudsman concluded that independently of the decisions taken by the PSC, it was the Government's duty to find ways of honouring its commitment to complainant; and his recommendation sought to identify how this can be done within existing regulations and without usurping the province that is proper to the PSC.

After having ruled that complainant was the victim of an injustice because of a serious administrative failure, the Ombudsman strongly recommended that the MPO of its own accord should send a direct recommendation to the Commission for the appointment of complainant to the grade of officer in salary scale 4.

The MPO, however, continued to disagree with the Ombudsman's ruling. It explained that in the assimilation exercise in which complainant was involved, employees had been absorbed in grades that were equivalent to entry grades for external recruits since entry cannot take place into posts that are reserved exclusively for the promotion of serving public officers. The MPO also expressed disagreement that complainant's former post of Manager in the MDC was considered equivalent to the post of officer in grade 4 of the civil service merely by means of a comparison of the relative salary scales of the two posts and insisted that a public officer can only be appointed to the substantive grade of officer in grade 4 after six years of service in one of the higher headship positions of the civil service.

On his part the Ombudsman insisted that since it was apparently not possible for the MPO to implement his recommendation of a fair remedy in favour of complainant if existing regulations are rigorously applied, this case merited an exception and a decision at a political level was required to rectify what he considered as an obvious injustice.

At the moment of writing the Ombudsman understands that the outcome of a recommendation in complainant's favour by the Management and Personnel Office to the Public Service Commission is still awaited.

Case No F 131

HERITAGE MALTA

The extra hours of the heritage worker

The complaint

A former shipyard worker whose employment was terminated as a result of the restructuring of the local ship repair sector and who was subsequently seconded to Heritage Malta (HM), lodged a complaint with the Office of the Ombudsman. He alleged that Heritage Malta refused to pay overtime rates for extra hours that he had worked and to give him a bonus payment of Lm100 that was awarded to other agency employees.

Facts of the case

Under the shipyard restructuring exercise surplus workers were absorbed by Industrial Projects and Services Limited (IPSL) and seconded to government organizations and agencies. These workers were allowed to retain their basic conditions as shipyard employees and the right to return to IPSL if the place of work where they had been seconded would cease operations while it was also agreed that they would continue to receive their wages directly from IPSL. Complainant was seconded to Heritage Malta under these arrangements in December 2003.

In May 2004 Heritage Malta concluded negotiations on a Collective Agreement that established that henceforth its employees would be required to work up to 1600 hours all year round. Since this meant that the agency would abolish the half-day system in summer, its employees were given a once-only payment of Lm100 to make up for the loss of this benefit.

Complainant, who had worked an extra 3/4 of an hour every day between January and June 2004 in anticipation of the half-day system for the summer of 2004 before it was abolished, claimed that he should be

remunerated at overtime rates for these extra hours. He also claimed that he was entitled to receive the lump sum payment of Lm100 that was given to other HM employees.

Heritage Malta management pointed out that complainant had not been asked to work overtime during the months in question but had merely worked according to the hours of work in force at that time like all other agency employees. It was held that although complainant joined the agency before the Collective Agreement was finalised, he was aware that the half-day system in summer was on the way out and that new hours of work were to be introduced.

With regard to complainant's request for payment of Lm100, HM management considered this sum as a benefit awarded under the Collective Agreement to employees who were on the agency's payroll at the time of the signing of the Agreement. HM management maintained that this sum was given as a sign of goodwill to workers who renounced to their half-day system and since complainant never worked under similar arrangements when he was a shipyard employee, he had not renounced to any such system.

HM management rejected complainant's claim that one of his conditions when he joined the agency was that he would work on a half-day system during summer. Even at that stage the Collective Agreement was under discussion and agency employees knew that this system would cease once the Agreement came into effect. Complainant could not therefore claim that this development was completely unexpected.

Considerations by the Ombudsman

The Ombudsman recognized that public sector employees work more than 40 hours per week from October to mid-June to make up for shorter hours of work in summer – and in line with this practice, complainant clocked an extra 33/4 hours per week in the first six months of 2004. HM management had not contested complainant's claim regarding these longer hours but insisted that although on secondment from IPSL, he was obliged to work in accordance with the agency's own timetable. Although this work schedule meant that employees seconded with HM had to work longer hours than in their former workplaces, management held that it was

not responsible for this situation especially since these workers were not directly on the agency's payroll and strictly speaking could not even be considered as its own employees.

The Ombudsman felt that the HM management was not fair to adopt this attitude. He noted that when complainant was seconded to Heritage Malta he was engaged on the same conditions as other HM employees even though his pay continued to be issued by IPSL and although it was correct to state that complainant remained on the books of IPSL, it had been expressly agreed that these workers would retain the conditions of work which they had at their previous workplaces – and one of these conditions was that their working week would not exceed forty hours.

The Ombudsman was of the opinion that although complainant kept the right to revert to IPSL in the event that he was no longer required at his new place of work, this did not mean that while he was deployed at HM he had to work under conditions that were inferior to those that he enjoyed before his secondment to the agency.

The Ombudsman felt that complainant's grievance was substantiated and that his extra hours of work during January/June 2004 and for which he had not been given any financial compensation or time in lieu were over and above the hours of work that he was bound to give to the agency. The Ombudsman stated that HM was therefore obliged to give adequate compensation to complainant for this extra work and since Heritage Malta had compensated its own employees at time and a half for weekly overtime hours, there were no grounds why he should not be compensated in the same way as these employees.

According to the Ombudsman the fact that complainant remained on the books of IPSL which continued to issue his pay while he was on secondment at HM, did not justify the fact that the agency made use of his services for a longer working week than he was bound to work under the agreement that former shipyard workers had with IPSL.

The Ombudsman stated that if work practices were changed as a result of the introduction of a Collective Agreement in 2004 and employees renounced to their previous half-day system, this should not prejudice complainant's rights and work conditions. If HM had turned down his request for payment for the extra hours that he had worked, the agency

ought to have allowed him at least to take time off in lieu as he had himself requested.

During contacts with the Ombudsman HM management sought to justify its decision not to award compensation to complainant by alleging that some IPSL employees who were seconded to the agency were at times reluctant to observe the agency's disciplinary rules. The Ombudsman pointed out that this argument was completely irrelevant since it is the duty of management to ensure discipline among its employees on the basis of the Collective Agreement. In any event in this case there was no indication that complainant was guilty of any indiscipline and indeed a member of the HM management had referred to him in a testimonial as a "*reliable worker tackling all tasks assigned to him with diligence*."

The Ombudsman held that HM management was not correct to claim that it was not responsible for the extra hours worked by complainant since he could not be considered as an employee of the agency and was not even on its books. Even if this line of reasoning were to be accepted, it is clear that the new hours of work of IPSL employees on secondment to HM arose as a result of changes in the working hours of HM upon the introduction of the Collective Agreement which was ultimately in the agency's own interest. The agency should therefore assume full responsibility for the negative repercussions on the rights and conditions of workers brought about by changes in its hours of work.

The Ombudsman considered as being to some extent valid the insistence by HM management that complainant's extra hours could not strictly be considered as overtime hours since he had worked these hours during his normal working hours under the conditions that were then applicable. Nonetheless he recommended that the compensation to complainant should be equivalent to that given to other HM employees for similar work carried out during the first six months of 2004 since if this arrangement were not followed, it would constitute an instance of unfair discrimination against complainant.

Conclusion

The Ombudsman concluded that in his view complainant deserved to be compensated for the extra hours that he had worked in the first half of 2004

to make up for the reduced hours that he was expected to work during the summer of that year in the same way as other HM employees had been compensated. The management of Heritage Malta accepted this recommendation.

On the other hand, the Ombudsman felt that complainant's request for the payment of Lm100 as bonus should be turned down.

Case No F 200

MANAGEMENT AND PERSONNEL OFFICE

The saga surrounding the pension of a senior official

The complaint

Under the terms of his performance agreement a Director with a substantive grade in scale 5 of the civil service had his salary linked to scale 4 of the service pay structure. However, after he was boarded out on medical grounds his service pension was based on scale 5 since the Management and Personnel Office (MPO) held that he had not been in a headship position for a sufficiently long time to satisfy the condition based on satisfactory performance that appeared in his agreement.

Feeling aggrieved that he was treated in an improperly discriminatory manner, this retired civil servant submitted a complaint to the Ombudsman where he contested the decision on two main counts:

- firstly, other public officers who held a headship post and had not served for the whole duration of the period covered by their performance agreements were still granted a pension that was based on their salary at the time of their retirement; and
- secondly, the award of a pension to a former public officer that is not based on the salary held at the time of the employee's retirement is contrary to the Pensions Ordinance.

Facts and findings

Complainant was appointed to a headship position on salary scale 4 under a performance agreement in August 2004 but was boarded out on medical grounds in March 2005. Records showed that during these seven months he took 97 days sick leave and 7 days vacation leave. In the assessment report where complainant's superior officer reviewed his performance up to

February 2005, it was stated that although away from duty for a considerable time as a result of health problems, complainant's overall performance was "*commendable*".

Feeling wronged at the amount of his service pension, complainant made representations on the matter. He was informed, however, by the MPO that although his track record in the service was good, it was not enough to have merely occupied a position for a few months to satisfy the condition linked to creditable performance and that a period of at least 12 months was needed that would correspond to the probationary period of appointments in a new grade. It was stated that performance is not assessed in terms of an employee's performance in previous positions but is linked to the position held on retirement.

Considerations and comments

Tackling first complainant's grievance based on improper discrimination, the Ombudsman found that complainant's pension entitlement was covered by paragraph 4 of his performance agreement which stated that "*An officer entitled to a pension under the Pensions Ordinance shall, subject to creditable performance, be entitled to a pension based on: (a) the salary attached to the position held by that officer on retirement …*"

The Ombudsman also found that in February 2003 the OPM clarified certain issues regarding the pensionable emoluments of public officers appointed to headship positions on a performance agreement. OPM Circular No 8/2003 referred to the provisions of the Pensions Ordinance and stated that:

"*… … pensionable emoluments are invariably subject to creditable performance in accordance with the provisions of section 5 of the Pensions Ordinance, which in the case of Heads of Department and Permanent Secretaries has to be so certified by the Permanent Secretary, OPM after taking into account related appropriate reports by the supervisory officers*."

In order to determine whether complainant was treated in a discriminatory manner and whether a similar situation had already arisen, the Ombudsman examined the pension records of officers holding positions equivalent to

that held by complainant upon his retirement and who had retired since 2002. It was found that during these years only one officer who was substantively in grade 5 in the civil service structure and held a headship position for less than a year was granted a pension based on scale 4.

The Ombudsman ruled that in order to determine whether complainant had a right to receive the same treatment, two basic issues needed to be addressed, namely, the duration of service in post and whether the Permanent Secretary, OPM used his discretion properly.

The Ombudsman ascertained that after deducting complainant's sick and vacation leave, his active service in his headship post lasted only 112 days. Since a performance agreement normally spans three years, the Ombudsman was of the view that an officer's performance that covers a very short period in relation to the full duration of the agreement does not qualify as creditable irrespective of how commendable it is and of personal health conditions.

The Ombudsman held that in a similar situation it is the prerogative of the Permanent Secretary, OPM to assess whether an officer has satisfied the condition stipulated in the performance agreement. He observed that it is also the prerogative of the Permanent Secretary, OPM to change this yardstick for valid reasons and that as long as a new basis for the evaluation of performance by officials is applied uniformly and consistently, there would be no improper discrimination.

The second issue related to the legal aspect of this case and the alleged lack of observation of the Pensions Ordinance.

Although service pensions of public officers are regulated by the Pensions Ordinance, it appeared that this case was another instance of decisions taken on the strength of administrative procedures that, even if well-intentioned and motivated by the principles of good governance, may be considered to fall foul of existing legislation.

The executive arm of government should at all times not only take note of existing laws but also adhere to them. Laws have to be observed in word and spirit and it is not permissible to extend legislative provisions through regulations or administrative practice unless this is done in the exercise of delegated powers conferred by legislation. It is unfortunate that at times

laws are not amended to keep pace with progress registered in the field that they regulate while legal drafting too sometimes lacks clarity or does not adequately reflect the legislator's intentions. As a result, laws are occasionally inadequate to meet new situations and this leads to uncertainty, misunderstanding or conflict.

According to the Ombudsman the impasse between complainant and the OPM arose because both sides gave divergent interpretations of section 8E of the Pensions Ordinance that reads as follows:

"*Pension of certain public officers*

8E. (1) … … where a public officer retires from the offices referred to in subarticle (2) or retires from the public service after having served for a term of three years in such an office, the pensionable emoluments of such officer on retirement shall be those attached to the salary scale, at the date of the officer's retirement, of the highest or higher of the offices referred to in subarticle (2) held by such officer as aforesaid at any time before his retirement:

Provided that nothing in this article shall be deemed as reducing any pension to which such officer would but for the provisions of this article have been entitled to.

(2) The offices referred to in subarticle (1) are the following:
(a) Cabinet Secretary;
(b) Permanent Secretary;
(c) headship positions under a performance agreement."

Complainant maintained that since he had retired on health grounds from an office mentioned in subarticle (2c), the pensionable emoluments to which he was entitled should be those attached to the salary scale of the position that he occupied on the date of his retirement. He contested the provisions of OPM Circular No 8/2003 that subjects the pension of officers in headship positions to a creditable performance that should be assessed over a minimum one-year period.

Focusing first on the interpretation of section 8E, the Ombudsman pointed out that this section provides for two distinct situations – firstly, when a public officer retires from an office referred to in subarticle (2) and

secondly, when a public officer retires from the public service after having served for a term of three years in such an office.

The Ombudsman held that in the first instance the only possible interpretation referred to public officers mentioned in subarticle (2) who upon retirement are occupying that office, irrespective of their substantive grade at that time. He pointed out that this subarticle makes it clear that officers in this category under a performance agreement normally occupy a position that is higher than their substantive grade and it is clear that the legislator wanted an officer who, for any reason, retires when occupying one of these headship positions to qualify for a pensionable emolument attached to the salary scale at the date of his retirement.

On the other hand the second situation refers to a scenario where a public officer retires "*from the public service*" as distinct from any of "*the offices*" mentioned in subarticle (2). The Ombudsman stated that a proper appreciation of this distinction is fundamental for a correct understanding of this clause.

In the first situation the pensionable emolument of these officers is not in any way bound by or conditioned to the length of time during which they would have occupied the office. It is only bound to the fact that on the date of their retirement they were occupying such an office.

Article 8E of the Pensions Ordinance was intended to protect and guarantee the pensionable emoluments of the top echelons of the public service. The offices of Cabinet Secretary, Permanent Secretary and headship positions held under a performance agreement are positions of trust whose tenure depends not only on the competence of the officials concerned but on other important considerations that are extraneous to their performance and which could prejudice the continued tenure of office through no fault of these officers. The Ombudsman stated that this is why the law rightly provides for this blanket protection of the pensionable emoluments of these officers and commented that the law purposely does not condition this benefit to the length of time in which the officer concerned has served in the higher position.

The Ombudsman pointed out that there is a perfectly legitimate and plausible reason why the law distinguishes between the two situations. It does not distinguish between the offices of Cabinet Secretary, Permanent

Secretary and headship positions under a performance agreement and all these offices enjoy the same identical benefits under the first situation. As a result the Ombudsman observed that he saw no reason why it should not also be applied in complainant's case especially since it had not been contested that his retirement on health grounds was genuine.

The Ombudsman then considered a completely different scenario where a public officer retires from the public service some time after having served for a term of three years in such an office. In this instance an officer's pensionable emolument upon retirement will be attached to the salary scale of the higher office that the officer would have held at any time before his retirement provided that this position features under subarticle (2c). The Ombudsman commented that the law here provides for cases where an officer who would have served for at least a term of three years in an office mentioned in subarticle (2), for any reason, reverts to his substantive grade which would be lower than the listed office that he previously occupied.

In this second situation the law considers the case of a public officer who, upon retirement from the public service, does not occupy one of the offices referred to in subarticle (2c). It is only in this instance that the time factor becomes relevant for the computation of pensionable emoluments. The law considers that a public officer who has served in one of these offices for at least three years is entitled to a pensionable emolument attached to the salary scale of that higher office in recognition of service given and regardless of the time that was later served in an inferior position and irrespective of the substantive grade.

The Ombudsman stated that he did not share the legal advice given to the OPM that since in his last headship position under a performance agreement complainant had only served for seven months, he did not meet the three-year service requirement laid down in the Pensions Ordinance and was excluded from a higher pension. He suggested that this position should be revisited by the authorities to take due account of the first part of the section providing for the situation which applied to complainant's case.

The Ombudsman next turned his attention to the creditable performance clause and in particular whether the law as it stands today sanctions the statement in OPM Circular No 8/2003 that "*officers eligible under the Pensions Ordinance are entitled to a pension based on the salary attached to the position held on retirement subject to creditable performance*."

The Principal Permanent Secretary of the OPM maintained that he considered the words "*subject to creditable performance*" as a key factor that implied that retirement on the salary attached to the position held on retirement "*is not an automatic right*." The Principal Permanent Secretary went on to state that in similar circumstances what needs to be determined is "*what qualifies as a creditable performance*."

The Ombudsman stated that he did not question that the yardstick used by the Principal Permanent Secretary to determine whether an officer on a performance agreement has performed creditably or not is good from an administrative viewpoint. He agreed that it is important to devise ways and means to ensure that officers deliver well and are accountable for the proper execution of their duties under the terms of their appointment and that failure to deliver should result in administrative sanctions or loss of benefits. The Ombudsman, however, made it clear that he did not agree that these sanctions could take the form of burdens that imply loss of statutory rights and insisted that administrative policies and sanctions should only be introduced if they are within the letter and spirit of the law.

On its part the OPM continued to insist that the proviso regarding creditable performance with regard to pensionable emoluments which appears in performance agreements and in OPM Circular No 8/2003 is fully within the parameters set out by law because subarticle 8E(1) needs to be considered in the light of what appears in section 5 of the Pensions Ordinance that no officer shall have an absolute right to a pension.

The Ombudsman disagreed with this statement and reiterated his view that the interpretation being given to this section of the Pensions Ordinance was outdated. He also drew attention to subsection 5(2) of the Ordinance that states that a pension may be reduced or withheld "*where it is established to the satisfaction of the President of Malta that an officer has been guilty of negligence, irregularity or misconduct*." This subsection, introduced in 1974, defines the particular circumstances in which a service pension can be prejudiced and the right of an officer to a pension under the Ordinance. This in not an absolute right and can be reduced or withheld only in those circumstances which are mandatory and cannot be extended or reduced unless by legislative amendment.

The Ombudsman stated that according to his interpretation of subarticle 8E(1) regarding retirement by a pubic officer from an office referred to in subarticle 2, complainant was by law entitled to a pensionable emolument attached to the salary scale of the post that he occupied on retirement. To condition that right to a creditable performance clause would be tantamount to extending the reasons for which his pension could be reduced or altogether withheld. The Ombudsman therefore concluded that the condition of creditable performance found in performance agreements and in OPM Circular No 8/2003 appeared to be contrary to law.

The Ombudsman continued to hold this view despite legal advice to the contrary that was submitted to the Government. He observed that although the administration might choose to rely on advice given by its legal office, he still recommended that this case be reviewed in the light of his considerations because of its far-reaching implications and pointed out that if the Government felt that its administrative policies on this issue are valid, then the necessary amendments should be taken in hand.

Finally the Ombudsman stressed that his considerations were made in the exercise of his functions that enable him to register an opinion on matters that in his view appear to be contrary to law or based, partly or wholly, on mistake of law or fact; but since his opinion on the interpretation of laws is neither binding nor conclusive, the last word rests with the Courts.

Conclusions and recommendations

In the light of his appreciation of facts that emerged during his investigation, the Ombudsman did not uphold complainant's claim of improper discrimination on the grounds that there were special circumstances that justified the treatment given earlier to another senior official whose situation was similar to complainant's.

The Ombudsman concluded by stating that although he found no maladministration in this case, he was of the opinion that the law does not sanction subjecting pensionable emoluments to creditable performance and so the condition of creditable performance included in performance agreements and in OPM Circular No 8/2003 appeared contrary to law. He recommended that this case should be re-evaluated in the light of his considerations.

Subsequent to the Ombudsman's report, the Principal Permanent Secretary reconsidered the matter with his legal advisers but was again advised that his stand was legal. However, the Principal Permanent Secretary was prepared to compensate complainant on an *ex gratia* basis by means of a *pro rata* increase of his gratuity and pension to reflect the period for which he had served at a higher grade as a proportion of the period for which he would have been required to serve in order to be able to be assessed as having had a creditable performance in that grade.

The Ombudsman considered this offer as a compromise offer which might not have met the complainant's expectations in full and decided that his Office should close the case without prejudice to complainant's right to pursue the matter in terms of his civil rights.

Case No F 226

INLAND REVENUE DEPARTMENT

The cheque that went astray

The complaint

A taxpayer contended with the Office of the Ombudsman that he was unfairly charged interest by the Commissioner of Inland Revenue for tax due even though he sent his tax return for the year of assessment 2004 together with a cheque to settle the amount due well before the end of June 2004. In his complaint this taxpayer claimed refund of the interest payment that he had made to the Commissioner.

Facts and findings

In November 2004 complainant received a tax statement from the Inland Revenue Department for payment of Lm1,450 plus Lm75 as interest for late payment. Although he pleaded that he sent the payment well on time and provided details of his cheque payment, the Commissioner of Inland Revenue dismissed his pleas on the grounds that he provided no proof that he had paid on time.

Complainant also explained that he sent the tax return as well as the payment in the same envelope and insisted that it was not his fault if the Inland Revenue Department mislaid his cheque. However, even though he showed the acknowledgment dated 2 July 2004 that was sent by the department to back his contention that the tax return had in fact been received, in the face of the department's determined stand complainant had no other option but to pay tax due to the department together with additional interest charges.

In order to support his position complainant provided to the Office of the Ombudsman monthly statements of his current account in a local bank with

records of all transactions in this account during June/October 2004. These statements showed that at the start of June 2004 there was a credit balance in this account which was higher than the amount due to the Inland Revenue Department and that no cheques drawn by complainant were encashed during the same month when he claimed to have sent his tax payment to the Commissioner by means of cheque number 745. There were no transactions at all in complainant's current account during July 2004.

Considerations by the Ombudsman

The Ombudsman commented that obviously complainant cannot produce any evidence to show that he enclosed cheque number 745 for the sum of Lm1,540 to the Inland Revenue Department with his tax return in June 2004. He pointed out, however, that complainant's word that he had done so was to some extent supported by the fact that his bank balance was more than adequate to enable him to effect payment to the department while the counterfoils of his chequebook indicated that on 22 June 2004 he had issued cheque number 745. The Ombudsman concluded that there was no reason not to believe complainant's word that he had sent the cheque at that time to the Inland Revenue Department even if he could only take his word for it.

The Ombudsman affirmed that the acknowledgement issued on 2 July 2004 by the Inland Revenue Department was only in respect of complainant's tax return and did not acknowledge receipt of the cheque that he had issued. Complainant, however, declared that since he had enclosed his cheque for payment of tax in the same envelope as his self-assessment, upon receiving the acknowledgement he took for granted that the department received in time both the cheque and the tax return.

According to complainant this also explained why at that time he was not unduly bothered that he had not received a receipt for his payment from the department even when he later noticed from his bank statement that even after several months cheque number 745 had not been encashed. He said that he attributed the lack of a receipt for his payment to a delay on the part of the department to cash his cheque and that it was only following receipt of the tax statement from the Inland Revenue Department early in November 2004 that he realized that the Office considered that his payment

was still outstanding and issued a stop payment order to his bank on cheque number 745.

Conclusions and recommendations

Taking all the evidence into account, the Ombudsman saw no reason to doubt complainant's statement that he sent the cheque in due time to the Inland Revenue Department and that for some unknown reason this cheque had been mislaid in transit. The Ombudsman stated that is not fair upon taxpayers that the Commissioner of Inland Revenue adopts a rigid stand and requests taxpayers to produce evidence regarding their payments when it is all too well known that no such evidence can be produced.

Moreover, the Ombudsman observed that in this case it took the Inland Revenue Department an unduly long time to inform complainant that tax due had not been paid. Considering that any delay in the payment of outstanding tax results in the infliction of a penalty based on interest charges to defaulters, it is obvious that the department should take the necessary steps in a timely manner to minimise as much as possible the imposition of any such penalties in the form of interest charges. The department's delay in informing complainant that his cheque payment had not been enclosed with his tax return served to increase the penalty.

The Ombudsman concluded that when all is said and done there was in his opinion enough corroborative evidence to give weight to complainant's version that he had sent the cheque in time to the Inland Revenue Department. He therefore recommended that, considering the particular circumstances of this case, the Commissioner of Inland Revenue should waive the penalty imposed upon complainant.

Some time later the Inland Revenue Department informed the Ombudsman that without prejudice it would not continue to insist upon payment by complainant of the penalty for late payment. The department also informed the Ombudsman that as from the following year it planned to issue clearer guidelines. Taxpayers would be provided with two separate envelopes so as to forward their tax return and their payment in the respective envelopes and would also be reminded in plain language that non-observance of regulations may henceforth result in a presumption of non-payment.

Case No F 264

VAT DEPARTMENT

The small business owner who was left in the lurch for five years

The complaint

The former owner of a small business which he set up in 1991 and closed down eight years later, reported to the Office of the Ombudsman that in April 2000 the VAT Department issued outstanding assessments of tax including penalty and interest due amounting to Lm855 in respect of his business for the years 1995-1997. However, it was only in September 2000 that these assessments reached him.

In the interval, in June 2000, he received updated tax assessments in connection with the same years where the amount owing to the department had by that time risen to Lm873 on account of interest due and penalty up to that date. A few weeks later he protested in writing to the VAT Department against these assessments and was informed shortly afterwards that his case would be investigated.

Complainant told the Ombudsman that despite this assurance, he was left in the lurch for almost five years until one fine day in May 2005 he was informed by the VAT Department that he owed the sum of Lm1,242 on account of the interest and penalty to which in the meantime he had been subjected. He was also told that the department would institute legal proceedings against him according to law if he did not settle this amount within two days. Complainant felt that he had been treated badly and that the VAT Department failed to guide him properly about his rights and obligations.

On its part the VAT Department denied that it misled complainant and stated that he was responsible for his own failings. The department regarded this as a clear case of ignorance of the law on the part of

complainant who was unaware that he had the opportunity to submit an appeal within a stipulated time window and had failed to do so.

Facts of the case

The VAT Department confirmed that in April 2000 it issued tax assessments to complainant including interest charges and penalty after an inspection of his accounts when his business was still in operation had revealed undeclared sales from his outlet. The department explained that it had only served these assessments at complainant's home address by means of the Revenue Security Corps in September 2000 because in the meantime his business premises had closed.

The department also confirmed that in the interval it issued updated tax assessments to complainant that covered up to June 2000 and that a few weeks later complainant had protested in writing about these assessments.

The VAT Department acknowledged that although complainant had been told that his case was being investigated, he should have been aware that according to law a taxpayer can only submit a written objection with regard to penalty, interest charges and other related issues and can only contest a tax assessment through an appeal that has to be submitted within 30 days from the receipt of the assessment.

On his part complainant admitted that it was only after contacts with the Office of the Ombudsman in 2005 that he had appealed against the department's assessments that he had received way back in September 2000. However, since he lodged this appeal long after the 30 days allowed by law elapsed, his appeal was time-barred.

Considerations by the Ombudsman

The Ombudsman emphasized at the outset that any grievance concerning the amount of tax established by the VAT Department can only be determined in accordance with the provisions of the law and can only be contested according to procedures established by the relevant legislation. This meant that in his review of this case the Ombudsman only gave consideration to complainant's grievance that as a result of the letter by the

VAT Department which stated that his case would be investigated and the department's silence for almost five years, he had laboured under the impression that the VAT Department had accepted his letter as a valid appeal against the amount of VAT, interest charges and penalty that appeared in his tax assessments.

The Ombudsman's investigation and his analysis of the relevant legal provisions served to put in a bad light the procedures adopted by the VAT Department regarding taxpayers who feel aggrieved by decisions regarding settlement of assessments of tax and related matters. The points raised by the Ombudsman were as follows.

Article 43 of the Value Added Tax Act provides that a taxpayer who is aggrieved by an assessment served upon him may appeal to the Value Added Tax Appeals Board that is set up by virtue of the Act while the Ninth Schedule (Article 46) of the same Act provides that an appeal against an assessment must be made within thirty days from the date of service of the assessment against which the appeal is made. However, there seems to be no time limit for the submission of an objection that a taxpayer can submit to the department about interest charges, penalty and other issues raised by the Commissioner for VAT.

The Ombudsman pointed out that the tax assessments received by complainant in 2000 stated that to avoid interest charges, tax due to the department had to be settled within 30 days but made no reference to any such period regarding an appeal about the amount of tax raised in a tax assessment.[1] Furthermore, a letter attached to the tax assessment sent to complainant stated that a taxpayer who feels aggrieved by an assessment could appeal in terms of section 32 of the Value Added Tax Act, 1994 to the Value Added Tax Appeals Board.

Complainant's letter in protest against the department's assessments covered various issues on which he felt aggrieved including the amount of tax, penalty and interest charges that were lumped together in the tax assessments that he received since he was unaware that appeals against assessments should be lodged with the Value Added Tax Appeals Board

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[1] "*Taxxa li trid titħallas għandha tkun imħallsa mill-aktar fis possibbli biex ma jiżdiedx l-imgħax u mhux aktar minn (30) tletin jum.*"

and not with the Commissioner. This led to serious misunderstandings on the part of complainant that in turn gave rise to his grievance.

The Ombudsman noted that a tax assessment by the VAT Department together with any interest charges and penalty appear together in a document entitled *Assessment of VAT* or *VAT Declaration*. This document refers to the total amount due to the department as *Tax due* regardless of its components and fails to make the distinction that is made by law on the manner in which a taxpayer can raise an objection to the different components of an assessment. It is therefore hardly surprising that taxpayers are led to believe that they can raise an objection on this amount as a whole.

The Ombudsman noted that since this is possibly the only instance where the law provides two separate methods whereby a taxpayer can raise an objection regarding different components of a tax assessment, the department should exercise even greater caution to ensure that citizens are fully informed of their rights regarding any appeals or objections that they may wish to submit. The department should also take all necessary steps to draw the attention of taxpayers to the manner in which they ought to proceed to make full use of their rights should they decide to do so.

In his review of this case the Ombudsman was guided by the following considerations:

- a taxpayer who is aggrieved by an assessment issued by the VAT Department should immediately be alerted by the department itself to the distinction made by VAT legislation between an appeal on the amount of VAT raised and an objection on interest charges and penalty;
- a taxpayer who appeals against the amount of VAT ought to be informed straightaway by the department that the Commissioner for VAT is not the appropriate person to consider such appeals and should be told about the right to appeal before the Value Added Tax Appeals Board set up by law for this purpose;
- an aggrieved taxpayer ought to be warned that only an objection on interest charges and penalty can be raised with the Commissioner;
- an aggrieved person should be told clearly about the circumstances under which it is possible to appeal before the Value Added Tax Appeals Board and about conditions attached to the presentation of

an appeal such as the manner, time and place where to lodge an appeal. Likewise, an aggrieved person ought to be informed about procedures that are to be followed to raise an objection with the Commissioner.

The Ombudsman stated that it is an established principle of good governance and proper administration that "*a decision …… which may adversely affect the rights or interests of a private person shall contain an indication of the appeal possibilities available for challenging the decision. It shall in particular indicate the nature of the remedies, the bodies before which they can be exercised, as well as the time-limits for exercising them.*"[2] This information ought to be given on time and in a clear and correct manner. This principle also appears in the leaflet *The Ombudsman's guide to standards of best practice for good public administration* issued in April 2004 by the Office of the Ombudsman.

The Ombudsman commented that in the case under review there was evidence to suggest that the VAT Department did not satisfy its obligation to inform citizens properly and correctly of their right to contest tax assessments issued by the department including the options that are available to submit appeals or objections according to the nature of their contestation. The Ombudsman confirmed that in its tax assessments the department does not refer to the distinction between the right of appeal to the Value Added Tax Appeals Board and an objection that a taxpayer may raise with the Commissioner for VAT.

The Ombudsman observed that although in a letter attached to complainant's tax assessments the Commissioner stated that taxpayers may appeal to the Value Added Tax Appeals Board with regard to settlement of VAT in terms of section 32 of the Value Added Tax Act, the Commissioner did not indicate how or where these appeals are to be lodged and, perhaps more importantly, gave no information on the period within which such appeals are to be launched from the date of service of the assessment. In the Ombudsman's view these failures constituted a grave weakness by the department that served to erode the rights of citizens.

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[2] Article 19: Indication of the possibilities of appeal (*The European Code of Good Administrative Behaviour).*

The Ombudsman also stated that although the Commissioner refers taxpayers to a particular section of the law, this does not release him from his obligation to provide the information that is necessary to enable them to ascertain their rights about the possibilities of appeal especially in issues where the law itself allows citizens the right to lodge appeals.

In view of the situation that was revealed by this complaint, the Ombudsman recommended that the VAT Department should henceforth ensure that citizens are given all the necessary information to safeguard the manner in which they may contest its decisions before the Commissioner for VAT or the Value Added Tax Appeals Board as the case may be. These details should be given clearly in the tax assessment itself or in documentation that generally accompanies a tax assessment.

The Ombudsman went on to point out that this complaint presented other disturbing aspects. When complainant lodged a protest with the Commissioner for VAT in July 2000, he was merely informed that the department would investigate his case. According to the Ombudsman it was at this stage that the VAT Department seriously wronged complainant.

It was obvious – and should also have been obvious to officials of the department – that complainant was contesting the total tax claim that had been issued consisting of VAT, penalty and interest charges. However, since VAT legislation provides different routes to object or to appeal against the various components of tax, the Commissioner was obliged to inform complainant in time that he would only investigate the section of the objection that fell under his jurisdiction and to guide him on the other section of the objection that had to be dealt by the Value Added Tax Appeals Board since he was still in time to submit this objection to this Board. The fact that the department failed to give adequate guidance to complainant when he was still in time to seek a remedy was a serious failure.

At the same time the Ombudsman was highly critical of the fact that for five years the Commissioner had kept a stony silence on the protest lodged by complainant in July 2000 which was only broken when the department informed complainant that it would institute legal proceedings against him if he did not pay all outstanding dues within two days.

The Ombudsman concluded that in this case there was an element of maladministration by the department. Not only was there an unacceptable delay in the determination of the issues raised by complainant but the very fact that the Commissioner did not even respond to the section of the objection that fell under his own jurisdiction went against the principle of just and transparent administration.

Conclusion and recommendation

The Ombudsman concluded that complainant's grievance was justified and that the VAT Department had seriously prejudiced his right as a citizen to contest tax charged by the Commissioner under options that are available as of right to taxpayers under the provisions of the law to safeguard their interests.

The Ombudsman recommended that the VAT Department should withdraw the assessments issued to complainant because of its failure to provide proper information regarding his right to appeal and to present an objection against these assessments. In this way these assessments would be considered as having never been issued and allow them to be replaced by new ones that would indicate the remedies available so that complainant could contest these assessments and make use of remedial action open to him as a taxpayer while allowing procedures under VAT legislation to follow their normal course.

Finally, the Ombudsman recommended that the VAT Department should straightaway modify the forms that are sent to taxpayers and amend its procedures so as to better safeguard the right of citizens who feel aggrieved and would like to contest tax assessments issued by the department in their various forms.

Case No F 442

MANAGEMENT AND PERSONNEL OFFICE

The unjust withholding of a service pension

The complaint

A former member of the Malta Pioneer Corps who was loaned to the Police Department in 1977 while his five-year engagement with the Corps was under way, felt aggrieved by the decision of the Management and Personnel Office (MPO) that he would not be entitled to a service pension upon his retirement from the public service on the grounds that his years of service with the Corps do not count for pension purposes.

Facts of the case

In August 1976 when complainant was serving with the Malta Pioneer Corps, the MPO issued a call for applications from public sector employees and members of the Corps to be transferred on loan to perform duties as Bus Dispatchers with the Police Department. Complainant was among the successful applicants and in July 1977 he was sent to the Police Department to carry out these duties and started to form part of the civil police force even though he was technically on loan from the Army. In August 1977 the Commissioner of Police issued an identity document that attested his new employment and subsequently, on the recommendation of the Public Service Commission (PSC), he was appointed Bus Dispatcher in the Police Department with effect from 1 April 1979.

In terms of the Pensions Ordinance persons who joined the public service as from 15 January 1979 are not eligible for a service pension. However, under article 6 of this Ordinance any service on probation of a public officer does not count for pension purposes unless "*without break of service he is confirmed in a pensionable office*" and on this basis a pension

was granted to officers appointed after 15 January 1979 but who had served Government without any interruption before that date.

Regulation 2 of the Pensions Regulations states that "s*ubject to the provisions of the Pensions Ordinance …… every officer holding a pensionable office in Malta, who has been in the service of Malta in a civil capacity for 10 years or upwards, may be granted a pension …… subject to the limit described in article 10 of the Ordinance*."

The MPO held that prior to his appointment in April 1979 complainant was a member of a disciplinary corps and does not satisfy the provision in regulation 2 that only service "*in a civil capacity*" is reckonable for pension purposes. For the MPO, service in the Pioneer Corps was considered as military service and so up to 31 March 1979 complainant was still reckoned to be providing military service even though at that time he was on loan with the Police Department.

Considerations by the Ombudsman

The Ombudsman held that this was a rigid and unfair way of looking at the issue. Documents provided by complainant confirmed that he was deployed at Police Department as from mid-August 1977, well before the deadline of 15 January 1979 for pension eligibility, and the fact that he was a member of the Corps should not preclude him from being considered in the country's service in a civil capacity during that period.

The Ombudsman observed that as a Bus Dispatcher, complainant carried out civilian duties in the same way as other employees who responded to the call for applications and were successful. The Police Department even had a service record as well as a leave record of complainant, confirming that service as a bus dispatcher was, by its very nature, service in a civil capacity.

The Ombudsman observed that the MPO accepted that employees with no permanent appointment prior to 15 January 1979 but who worked on a temporary basis prior to this cut-off date for service pension entitlement, were eligible for a pension if that temporary service was immediately followed by a permanent appointment. He stated therefore that there was

no valid reason why complainant should be treated differently and section 6 of the Pensions Ordinance did not rule him out.

The MPO argued that service "*in a civil capacity*" in terms of regulation 2 of the Pensions Regulations ought to be interpreted in the sense that to be eligible to a Treasury pension under the Ordinance, an employee had to hold a substantive grade in the public service. According to the MPO this stipulation was not observed because between August 1977 and March 1979 complainant did not hold a substantive grade in the service but was merely on loan from the AFM to the Police and was still under military service as a member of a paramilitary corps and as a result this period did not count for pension purposes under the Pensions Ordinance and rendered him ineligible for a pension. On the contrary, the Ombudsman held that complainant would be eligible to a service pension in terms of the Pensions Ordinance on reaching retirement age.

Other considerations by the Ombudsman

The Ombudsman stated that there were other considerations in favour of complainant and that arise from an interpretation of the facts surrounding this case in the light of applicable laws and regulations.

The Ombudsman pointed out that where two equally valid interpretations may be given to the merits of a grievance, it is only fair to adopt the interpretation that is most favourable to complainant. He insisted that a complainant ought not to be penalised by a restrictive interpretation of legal provisions and that pension rights should be favoured by good governance and not prejudiced or lightly dismissed by a strict view of legal provisions that can be subject to an equally valid interpretation.

The Ombudsman noted that complainant was enlisted in the Malta Pioneer Corps on a five-year engagement in August 1973. Army records showed, however, that although his engagement should have lapsed in August 1978, his name continued to appear on the books of the Corps until his formal discharge on 16 February 1980.

Army authorities admitted that the scant documentary records in their possession including complainant's personal file confirmed that during his engagement with the Corps, complainant was deployed at the Police

Department. They could not, however, explain why he was discharged in February 1980 when this discharge should have taken effect in August 1978 or on the same date of his appointment as a public officer as from 1 April 1979 and admitted that this was an administrative mistake.

This admission led the Ombudsman to state that the Army's failure to find documents in complainant's personal file relative to the period of his posting with the Police Department and beyond showed that the Army did not consider him any longer during this period as a member of the Corps except for record proposes and in any case surely not on active military service. This attitude by the Army was understandable since the Corps was intended to provide relief until unemployed persons were placed in alternative employment.

The Ombudsman presented another argument to challenge the MPO's view that complainant's service in the Corps did not count for a service pension. Although under Corps regulations when complainant's contract lapsed on 23 August 1978 he should have been discharged, no evidence emerged to show that he remained on the books of the Army after this date or that he was re-enlisted on a new or extended contract or that he was engaged in any way in the regular Army. In fact the only document to go by was the declaration from the Records Office of the Army that complainant remained in the Corps until the date of his discharge on 16 February 1980 on finding alternative employment even though he found this job much earlier. As a result, the Ombudsman saw no reason why the PSC did not backdate complainant's appointment with the Police Department to 23 August 1978 when his five-year contract with the Corps ought to have come to an end.

The Ombudsman observed that Army records in respect of complainant were inaccurate and showed that for a time he was enlisted when he should have been discharged. The Army had lost track of his movements until it was time to close his personal file upon his formal discharge from the Corps and although he should have been discharged on finding alternative employment, this was not done in a reasonable time. This administrative oversight seriously prejudiced complainant.

The Ombudsman insisted that complainant was engaged on duties that were of a civil nature and had no connection with military or paramilitary work. These duties were in fact identical to the ones subsequently assigned to him

when he held an official appointment as Bus Dispatcher with the Police Department as from 1 April 1979 and the same as those performed by other bus dispatchers chosen under the same call for applications but who came from the public sector.

The Ombudsman also observed that it was unexplainable that although complainant was appointed following a recommendation by the PSC, he was appointed Bus Dispatcher as from 1 April 1979 when he had started to perform these duties much earlier. He felt that instead this appointment should have been backdated either to mid-1977 when he had started these duties or, at least, to 24 August 1978 when his contract with the Pioneer Corps should have expired.

The Ombudsman pointed out that since the law provides that the time prior to appointment during which service is given to Government is to be reckoned for pension purposes, if the decision to backdate complainant's appointment to 1 April 1979 was motivated with the intention of depriving him from a service pension to which he should have been entitled for duties in the post which he was occupying albeit on loan, then this decision was mistaken in principle and discriminatory. If, on the other hand, it was the result of an oversight, this should not be allowed to prejudice complainant's legitimate exceptions to a service pension.

The Ombudsman expressed his view that the backdating of complainant's appointment either to 24 August 1978 when his contract with the Malta Pioneer Corps should have lapsed or to 1 April 1979 would in any event be arbitrary since it was amply proved that applicant had performed these duties at least since August 1977. In any of these options, backdating was justified since it would reflect his years of service and also safeguard his pension rights.

Additional considerations

The Ombudsman drew attention to other considerations regarding the MPO's refusal to sanction the award of a service pension to complainant.

The MPO held that complainant had not been in the service of Malta in a civil capacity before 15 January 1979. It maintained that the term "*service in a civil capacity*" in article 2 of the Pensions Ordinance does not mean

that to qualify for a Treasury pension an employee has to be performing duties in the public service but means instead that eligibility is linked to a substantive grade in the public service.

The Ombudsman, however, gave a different interpretation to this article and insisted that it does not impose a requirement that to be eligible for a Treasury pension an employee has to be in continuous employment for a specified term and that the employment has to be rendered while the person is holding a substantive grade in the public service. According to the Ombudsman article 6 of the Pensions Ordinance sanctions as an accepted practice that those employed with Government in a temporary capacity are able to avail themselves of that period of service for pension purposes when they are eventually appointed to a substantive grade.

According to the Ombudsman, although in a way the OPM is correct to state that to be eligible to a Treasury pension under the Pensions Ordinance an employee has to hold a substantive grade in the public service, this refers to the time when an employee becomes eligible to the payment of a pension and not to the method used to reckon the term that is required to qualify for a pension. Regulation 2 of the Pensions Regulations states that "*every officer holding a pensionable office*" is entitled to a pension – and this means that only employees in the public service who hold a substantive grade at the time of their retirement qualify for a pension. The Ombudsman observed that it was not disputed that complainant was occupying such a grade on retirement.

Regulation 2 of the Pensions Regulations provides that a person holding a pensionable office is only granted a pension on condition that the employee "*has been in the service of Malta in a civil capacity for 10 years or upwards*." The Ombudsman commented that the law does not say that such a person has to be holding a substantive grade in the public service for that term but only says that this person has to be in the service of Malta – and undoubtedly complainant was in the service of Malta during the period that was being contested when he gave service in a strictly civil capacity as a member of the Police Department since, according to the Ombudsman, the term "*in a civil capacity*" defines the nature of the service given rather than the personal quality of the officer and his employment status with the Government.

The Ombudsman finally noted that rights are given to be enjoyed and can be forfeited only if certain conditions occur. Laws, regulations and their interpretations determining the enjoyment and forfeiture of rights should, as far as possible, be applied uniformly and indiscriminately. It is not correct to deprive an employee of his right to a pension enjoyed by fellow workers employed in identical situations and giving the same service to society and for the same number of years. One should not refrain from giving officers who have given years of valid service their due, as their fellow workers were given, if an alternative interpretation of legal provisions allow it.

Conclusions and recommendation

The Ombudsman's final opinion was that complainant had successfully proved his case and his claim for a service pension upon his retirement was sustained on the following grounds:

- the MPO was interpreting the Pensions Ordinance rigidly and in a restrictive manner despite other possible interpretations and this restrictive interpretation amounted to an injustice. The Ombudsman stated that his interpretation of the law was that complainant met the requirements of the Pensions Ordinance for the grant of a service pension on retirement; and
- without prejudice to the above, the decision to limit the backdating of complainant's appointment to 1980 when he had provided a service to Government since 1977 was unfair and resulted in excluding him from enjoying his pension rights in terms of the cut-off date incorporated in the law in respect of the 1979 entitlement.

The Ombudsman recommended that the MPO should adopt a fairer and less restrictive interpretation of the Pensions Ordinance that would allow another no less valid interpretation in favour of complainant or else take the necessary action so that his appointment is backdated to a date prior to 15 January 1979. The Ombudsman pointed out that either of these two options would re-instate complainant's pension rights.

The MPO did not share the Ombudsman's views. Among other things, the Office held that although complainant was transferred on loan to the Police Department, he could have been recalled at any time during that period to perform military tasks. The MPO also held that it never considered as

pensionable the service given by personnel engaged in paramilitary corps even if corps members were subsequently given an appointment in the public service.

Faced with continued resistance to his findings, the Ombudsman urged the MPO repeatedly to implement his recommendation not only because the administration is not strictly in order to challenge the merits of a ruling by the Ombudsman but also because on such an issue it is the Ombudsman, as an independent arbiter appointed by Parliament, and not an interested party – in this case the MPO – who can take an objective decision.

Case No F 512

EDUCATION DIVISION

The teacher who lost his health and safety duties

The complaint

A teacher who also held the post of Health and Safety Teacher at a girls' secondary school lodged a complaint with the Office of the Ombudsman and alleged that the selection board had unfairly failed him in an interview to be reappointed to this post. He contended that the board awarded him very low marks for aptitude and was also upset at his low marks for experience despite having served in this post for five years.

In addition complainant protested that marks awarded to lesser-qualified candidates were much higher than his own marks and alleged that another person who did not even apply for the post was appointed Health and Safety Teacher although there was no third vacancy in the school.

Facts and findings

In May 2005 the Education Division issued applications for Health and Safety Teachers in state schools on a two-year assignment. Successful applicants would not be entitled to a higher salary but would have a reduced teaching load to allow them to carry out their additional tasks.

The Ombudsman found that together with two other applicants complainant was interviewed for this post in the school where he had already carried out these duties for five years. He also found that the selection board allocated complainant the following marks: relevant experience: 10/30; relevant qualifications: 6/20; aptitude: 17/35; and personality 8/15 – a total of 41 marks out of 100 which meant that complainant failed. The two other candidates passed.

The Education Division told the Ombudsman that information gathered during its own internal investigation on allegations raised by complainant which it had already carried out and contacts with other members of staff at complainant's school revealed that complainant hardly ever applied notions disseminated to Health and Safety Teachers during in-service training courses. It also emerged that his contribution to health and safety standards in his school was negligible.

The Education Officer at the Division with responsibility for health and safety standards in state schools admitted that he was not at all impressed by complainant's work practices. He confirmed that on various occasions he had drawn the attention of complainant to his performance in the area of health and safety and that he had asked him to perform properly the duties that appeared in his job description. The Education Division added that the head of complainant's school too had often expressed misgivings about complainant's performance.

The Ombudsman also found that the selection board saw no evidence, not even in complainant's Performance Management Programme, to support his claim regarding his health and safety duties. This information contrasted sharply with complainant's claim that his head of school had earlier referred to him as "*a responsible and hard-working person who is committed to his career*."

When the Office of the Ombudsman established direct contact with complainant's head of school, she confirmed that she had spoken highly about complainant but added that these remarks concerned his performance as a schoolteacher and not his duties regarding health and safety matters at the school. She admitted that in her view complainant was not delivering results in his role as a Health and Safety Teacher and had even refused to support his application with regard to this particular aspect of his duties at the school.

Members of the interviewing board explained to the Ombudsman that they evaluated the competence and aptitude of applicants on the basis of their performance during their interviews and in particular on the way in which they fielded questions put to them by the board. They explained that marks awarded to candidates for relevant qualifications in the field of health and safety reflected qualifications in their possession such as the Diploma in

Health and Safety issued by the University of Malta and/or higher qualifications.

During his investigation the Ombudsman found that no points were awarded to a candidate who had no qualification in health and safety. With regard to the two other candidates, however, complainant's qualifications were better than those of his rival although none of them was in possession of the Diploma in Health and Safety that was the preferred qualification for applicants.

In view of these circumstances the Ombudsman was somewhat perplexed that the board only awarded complainant 6 marks out of a maximum of 20 while the other lesser-qualified candidate got 16 marks. The Ombudsman observed that if complainant had been awarded at least the same number of points for his qualifications as the other lesser-qualified candidate, he would have passed the interview even though he would still not have gone beyond third place in the final order of merit.

The Ombudsman was even more disturbed when evidence regarding relevant experience showed that complainant only scored 10 marks out of a maximum of 30 despite his experience in the field of health and safety lasting five years while another candidate with no documented experience as a health and safety teacher was awarded 17 marks on the basis of his performance during the interview. The third candidate with practically the same experience as complainant was given maximum marks.

In line with his usual stand in similar complaints, the Ombudsman reiterated that marks awarded for aptitude and personality are not verifiable since they result from a subjective assessment by members of the selection board and he had no grounds on which to test their judgement on the performance of candidates during interviews and on marks awarded under these two criteria. However, in a bid to justify marks given to complainant for aptitude and personality, the board referred to comments by officials of the Education Division in respect of his prowess and overall performance as a Health and Safety Teacher.

The Division maintained that complainant was not a team player and had even refused to collaborate with other members of staff in the preparation of a risk assessment report for the school. Members of the selection board also stated that answers given by complainant during his interview to

questions on health and safety matters confirmed that his aptitude in this area left much to be desired.

The Ombudsman investigated complainant's allegation that a third person who had not even applied for the post was still appointed Health and Safety Teacher even though the school only had two vacancies. The Education Division confirmed that at the time that it conducted its own investigation, the two selected candidates had already commenced their assignment while another teacher who had applied for a similar post in another school was also deployed on these duties at complainant's school. The Ombudsman found, however, that after the Education Division concluded its investigation, this teacher was retained at complainant's school in addition to the two other candidates who were selected earlier because of the range of health and safety duties that were said to be required at this school.

Considerations and comments

Complainant's grievance arose from the low marks that he was awarded for the criteria that were applied in the interview by the selection board that contributed towards his third position in the final ranking.

The Ombudsman reiterated that of the criteria applied during the selection process, only relevant experience and qualifications are in theory verifiable. The two other criteria, namely aptitude and personality, depend on the subjective evaluation of members of the board of a candidate's performance during an interview and the Ombudsman cannot challenge or replace these opinions when he was not even remotely involved in this process. On the whole, however, the Ombudsman found that the Education Division was unanimous in its view that complainant's overall performance as a Health and Safety Teacher was not up to scratch and that he was not suitable for re-appointment.

The Ombudsman insisted, however, that in a selection process marks awarded to applicants for qualifications that are relevant to the post under consideration should reflect their true educational and academic attainment. Marks that are objectively due on the basis of a candidate's qualifications cannot therefore be altered on the grounds of the candidate's performance and any unfavourable reports should not be allowed to influence marks due to a candidate on the merits of his qualifications since this aspect of a

person's eligibility to the position applied for can be considered under other criteria in the selection process.

The Ombudsman's findings indicated that in awarding marks for qualifications, the selection board failed to adopt an objective approach and awarded marks to complainant that were far below what he deserved and that did not reflect his qualifications. This approach was especially manifested when his overall mark in this field was compared with the mark awarded to another candidate with lower qualifications. According to the Ombudsman, this departure from normal practice in the objective evaluation of a candidate's strengths and merits constituted a serious flaw in the selection process and vitiated its final results. This approach attracted serious criticism.

The Ombudsman explained that the experience of his Office with respect to the outcome of interviews on staff issues was that there is an increasing tendency to evaluate experience on the basis of the extent to which this experience effectively contributes to an applicant's potential for a particular job. Other watchdog institutions in Malta have accepted this approach and although this might impinge on the transparency of a selection process, there are arguments both in favour of and against this development. As a result, the yardstick of experience has ceased to be a purely objective and therefore verifiable benchmark and the Ombudsman refrained from entering into the merit of the mark that complainant should have been awarded for his experience.

The result of the Ombudsman's investigation was that on the basis of the criteria established by the selection board and their respective weighting to evaluate applicants, there was evidence to show that points awarded to complainant for his qualifications were substantially lower than he deserved especially in relation to the qualifications of the two other candidates. The Ombudsman, however, reckoned that even if complainant were to be awarded a maximum score of 20 for his qualifications instead of 6, this would only enable him to achieve 63 marks in all whereas the second-placed candidate had scored 67 marks without even earning one single mark under this field. As a result, the Ombudsman concluded that even if complainant's final overall mark were to be adjusted, he would still not have enough marks to be placed second in the final order of merit.

The Ombudsman also considered the claim by complainant that the selection process was vitiated by prejudice against him by officials at the Education Division when a third person who had applied for the post in another school was *de facto* assigned responsibilities and benefits pertaining to, and enjoyed by, those who were appointed to the post for which he had applied. The Ombudsman recommended that the Education Division should review the complement of health and safety officers to meet the needs of its schools and to observe the staffing requirements in the light of the results of this exercise.

Conclusions and recommendations

The Ombudsman concluded that the result of the interviews was seriously flawed because of the way the selection board awarded marks to applicants for their qualifications. This had prejudiced complainant.

The Ombudsman concluded, however, that although the grievance was partly justified, he could not issue a recommendation in complainant's favour because even if complainant had been given at least the same number of marks allocated to the second-placed candidate for his qualifications, he would merely have passed the interview. At the same time even if complainant were to be awarded maximum points on this score, he would still only place third in the final order of merit and not qualify for an appointment as Health and Safety Teacher at his school.

On the other hand, the Ombudsman recommended that since it resulted that a third vacancy had arisen at complainant's school for the post for which he had applied and in practice this vacancy had been filled, the Education Division should investigate the situation at this school and in particular whether other more appropriate steps should be taken.

Case No F 543

ENEMALTA CORPORATION

The piper who refused to pay the tune

The complaint

Representatives of Biarritz Enterprises[1], a company providing engineering equipment and services, complained with the Office of the Ombudsman that they felt aggrieved that after having made all the alterations suggested by Enemalta Corporation in their original submissions under a call for tenders for the supply of equipment, the Corporation had turned down their offer.

To add insult to injury, soon after rejecting this offer the Corporation issued a second call for tenders for the same equipment with drawings and specifications that included additional items recommended by the company during its earlier contacts with the Corporation.

Facts of the case

Following the evaluation of submissions in response to a call for tenders issued by Enemalta Corporation for the supply of a soft starter panel which found that Biarritz Enterprises submitted the cheapest offer, Enemalta management requested the company to submit various modifications as well as revised drawings. The exchange of correspondence on these issues between the two sides dragged on for six months and during this time the company provided all the revisions and additional items requested by the Corporation including an itemised price list even though this list did not form part of the original tender.

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1 A fictitious name.

Company representatives told the Ombudsman that they were irked that a short while after their technical staff submitted revised drawings and gave their advice to the Corporation, a fresh call for tenders was issued by Enemalta based on specifications that were largely derived from data and information supplied by the company.

Enemalta Corporation defended its actions by declaring that the offer by Biarritz Enterprises was not up to specification and that since alterations and additional items introduced in the company's original offer had raised its price, this submission was no longer valid. The Corporation explained that drawings included in its second call for tenders and which the company claimed to have provided were in effect the same drawings that appeared in the first call with some modifications that were introduced by the Corporation's own engineers.

Considerations by the Ombudsman

The Ombudsman noted that Biarritz Enterprises did not contest the Corporation's right to accept or to turn down its offer, either whole or in part, after an evaluation of its proposals. The company merely resented the fact that after it had presented the most competitive offer and entered into a lengthy exchange of correspondence regarding various modifications and the inclusion of additional items that were requested by Enemalta, all contacts were then abruptly stopped and the Corporation issued a second call for tenders.

Documentation seen by the Ombudsman confirmed that it was the Corporation itself that asked in the first place for additional details and variations and that its officials were satisfied by the company's answers to its technical queries. On revised drawings presented by the company the Ombudsman found handwritten comments by Enemalta engineers to the effect that they were acceptable to the Corporation.

Representatives of Biarritz Enterprises insisted that drawings that appeared in the Corporation's second call for tenders were based mainly on drawings prepared by company staff and on amendments and additional information submitted by the company. They also maintained that despite additional items introduced in the company's offer, this did not mean that its first

submission was flawed or that it failed to meet the Corporation's original specifications.

The Ombudsman noted that although amendments that were requested by the Corporation raised marginally the overall value of the company's offer, documentation that he saw had confirmed that its offer remained the most competitive and that Biarritz Enterprises provided the additional items requested by the Corporation in time. He commented that this increase did not seem to justify the issue of a second call for tenders at this stage and that it was likely that administrative costs and other expenses incurred by the Corporation to issue the second call were even higher than this price variation.

It is an accepted principle that in its calls for tenders Enemalta Corporation keeps the right to reject even the most advantageous offer and to ask for additional information and clarification from suppliers. It is also accepted that this process should not as a rule involve Enemalta in any additional expense. This does not mean, however, that an organization which issues a call for tenders should not expect to incur extra costs if before the award, it requests a supplier to provide additional inputs which entail work that goes beyond the original scope of works.

In the case under review Enemalta Corporation had requested Biarritz Enterprises to undertake additional work and to provide an itemised cost of this work; and this was an indication that the Corporation knew that its demands after the closing date of the call for tenders meant an increase in the overall tender price.

The Ombudsman observed that there did not seem to be any reasonable justification for the formal issue of a second call for offers by Enemalta Corporation. The least that the Corporation could have done at this stage was to inform participants under the first call for tenders that their submissions had not been accepted and explain why their offers were turned down while inviting them to submit revised tender proposals in the light of its adjustments. In this way the Corporation would still have ensured a favourable outcome for its call for tenders and enabled the supply of equipment that would be more efficient than originally planned.

In the opinion of the Ombudsman it appeared, therefore, that even though not necessarily in bad faith, there was in the attitude adopted by Enemalta

Corporation an element of maladministration as a result of which Biarritz Enterprises suffered financial damage for which the company ought to receive adequate compensation.

On this basis the outstanding issue that needed to be considered next by the Ombudsman covered the extent of the compensation due to the company as well as the grounds for this award. Since this is a purely technical issue the Ombudsman sought outside technical advice in line with subsection 10(2) of the Ombudsman Act, 1995.

The advice given to the Ombudsman was that the Corporation should not have asked for information about additional costs needed to upgrade the equipment since this went beyond Enemalta's standard procurement procedures. In the consultant's opinion, the company deserved adequate compensation for costs that it incurred to modify and upgrade the designs in its submissions and to prepare itemised prices and technical details in connection with the revision of its original offer. The Ombudsman was also advised that the Corporation was within its right not to pay for any royalties for designs of the modified circuits submitted by complainants.

The management of Enemalta Corporation did not agree with this advice and held that Biarritz Enterprises was aware that its cooperation in the tender adjudication process was not compulsory. The company was familiar with the Corporation's tendering procedures and knew that it is an accepted practice in a tender evaluation process to request bidders to provide clarification and additional information without any obligation on the part of the Corporation. Enemalta insisted that the award of compensation to bidders who provide additional information on their own tender proposals runs counter to its policies.

The company too did not subscribe to the views of the technical adviser and maintained that the design changes were undertaken at the express request of the Corporation and that it upheld full professional responsibility for its new designs.

Its representatives also stressed that its modified circuit diagrams formed an integral part of the technical details requested by Enemalta Corporation and that the Corporation had used these designs without its prior authorisation. The Corporation had no right to make use of these drawings and to include

them in its second call for tenders and once this had been done, the company was entitled to receive adequate compensation.

Liquidation of compensation

On the basis of recommendations by the technical expert, the Ombudsman agreed that compensation due to the company should be limited to the additional inputs that it had provided when it was requested by the Corporation to submit fresh proposals and revised designs. The Ombudsman noted that the fact that the Corporation introduced the company's proposals and revised designs in its second call for tenders was an admission that this work was quite useful.

With these circumstances in mind, the Ombudsman held that Enemalta Corporation could not be exonerated from its responsibility to pay Biarritz Enterprises for the work that it had requested the company to carry out by maintaining that the supply of the equipment in question did not in fact take place. However, even though the company indicated the amount of damages that it suffered in the form of foregone profits once its tender submissions had not been accepted, the Ombudsman ruled that this amount was not in fact due because the Corporation is entitled, as in fact it had done, to reject even the most advantageous offer.

The company claimed that, besides other expenses, it was entitled to fees to cover design work and the preparation of drawings after the closing date for the first tender because Enemalta had used this information in its second call for tenders. The Ombudsman pointed out that insofar as these expenses were concerned, the company was entitled to a refund in accordance with limits indicated by the technical expert which were based on an hourly rate of Lm12 for time spent by company staff on new design work and modification together with an assumption of the total input in terms of man-hours that this work entailed. The Ombudsman found no reason not to accept this estimate.

Conclusion

The Ombudsman concluded that the company's allegation that there was an element of maladministration in the processing of its submissions had been

substantiated and recommended that the Corporation should provide compensation for the extra work done by the company and which was not directly linked to the first call for tenders on the basis of the advice given by the consultant.

The Ombudsman closed the file when the Corporation accepted his recommendation and without prejudice paid this amount to the company.

Case No G 215

MANAGEMENT AND PERSONNEL OFFICE

The quandary about Laura Marchetti's leave entitlement prior to her retirement

The complaint

Laura Marchetti[1], an employee in the public service, pleaded with the Ombudsman that the Management and Personnel (MPO) unjustly prevented her from making use of her full vacation leave entitlement prior to her retirement.

Facts of the case

In July 2005 complainant informed her departmental manager that she planned to retire on reaching the age of 61 years on 6 December 2006. Marchetti's vacation leave entitlement during her last year at work was regulated by Circular No 9/2006 issued on 12 January 2006 by the MPO which stipulated that with immediate effect "*for public officers who …… are due to retire …… the vacation leave entitlement is on a pro rata basis for the service given during that calendar year*."

A few days after the issue of this circular, however, complainant informed her manager that she now planned to retire earlier than she had already indicated and brought forward the date of her retirement to 10 March 2006. In line with Circular No 9/2006, Marchetti's vacation leave was calculated on a *pro rata* basis up to that date and given her accumulated leave entitlement for 2005 and her share of the 2006 entitlement, this made a total of 15 working days.

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1 A fictitious name.

In another circular issued by the MPO on 22 February 2006 (Circular No 47/2006), the Office informed employees that since its earlier circular might have caused hardship in the sense that they were not given adequate prior notice regarding this new *pro rata* entitlement of vacation leave during their last year at work, this requirement for retiring employees would only come into effect on 1 July 2006.

As a result of this development Marchetti became entitled to the full vacation leave allocation of 24 days for the whole for 2006 instead of on a *pro rata* basis. However, with her retirement due on 10 March 2006 and not enough time to avail herself of her restored full leave entitlement, she requested financial compensation for the amount of days of her entitlement that she would not be able to make use of. The Management and Personnel Office, however, turned down this request on the grounds that it is not government policy to reimburse unutilised vacation leave.

When on 24 February 2006 Laura Marchetti went out on vacation leave prior to her retirement, in addition to her accumulated leave entitlement for 2005 she was only allowed to avail herself of 5 days from her 2006 entitlement instead of the year's full allocation of 24 days.

Considerations and comments

The Ombudsman noted that Marchetti based her claim for a reimbursement of her salary in respect of the days of vacation leave that she had foregone on the strength of MPO Circular No 47/2006 which admitted that the previous circular on the issue had not given employees nearing retiring age enough prior notice of the new provision regarding a *pro rata* utilisation of vacation leave in their last year of employment.

The Ombudsman stated that in this case an additional issue needed to be taken into account. In mid-2005 Marchetti had made it known that she intended to retire on the due date upon reaching age 61 on 6 December 2006. This meant that despite the first MPO circular she would still have been able to benefit from her full vacation leave entitlement for 2006 had she not at a subsequent stage opted to retire earlier than December.

However, when a few days after the first MPO circular complainant changed her mind and indicated that she would retire nine months earlier

than she had previously stated, this could have been taken to mean that she accepted the MPO's new position regarding a *pro rata* entitlement for retiring employees.

The Ombudsman observed that when in February 2006 the second MPO circular restored Marchetti's full vacation leave entitlement, complainant claimed compensation. However, since at that stage she had not yet gone out on leave, there was an alterative that would have allowed her to safeguard her paid leave entitlement. This could have consisted in a request on her part to postpone the date of her retirement in such a way that would have allowed her to avail herself of her leave entitlement in full. The Ombudsman gathered from the MPO that such a request would have been acceptable but Marchetti had not done so.

In his review of this grievance the Ombudsman noted that instead of advising Marchetti to submit this request which would not have infringed the government's policy of non-reimbursement of unutilised vacation leave, the MPO simply shrugged off her request and cited government policy as the reason behind its refusal of this request. The Ombudsman pointed out that if the MPO had told complainant that it would not object to a request to postpone her retirement date as a way of resolving the issue following the second MPO circular, her hardship would have been avoided.

The Ombudsman stated that in reaching his decision on this complaint, he was mindful of the following considerations:

(a) it is not up to his Office to question the government policy of non-reimbursement of vacation leave that is not availed of and since the matter pertains strictly to the field of industrial relations, it can best be resolved directly between management and employees' representatives;

(b) an alternative solution that would have enabled Marchetti to resolve her problem in time could have consisted in the postponement of the date of her retirement without the need to have to report for work beyond this date and at the same time enabled her to avail herself of her paid vacation leave entitlement in full. However, she had failed to do so and not even the MPO had advised her of this option;

(c) the MPO admitted that its second circular which restored the vacation leave entitlement in full to employees in the same situation as

Marchetti was meant to prevent any hardship brought about by the first circular; and it was appropriate that in the spirit in which this circular was written, the MPO ought to have contributed towards finding an equitable solution to resolve complainant's problem.

Conclusion and recommendations

The Ombudsman concluded as follows:

(i) refusal by the MPO of Laura Marchetti's request for payment of outstanding vacation leave was in line with government policy and it is not for the Office of the Ombudsman to enter into the merits of an issue which rightly belongs to the field of industrial relations;

(ii) once the MPO admitted that its first circular might have caused hardship and since the date when this directive would come into effect was postponed, it was the duty of the MPO to see whether there were other ways how to remedy complainant's hardship without infringing the policy not to refund outstanding vacation leave to retiring public officers.

The Ombudsman concluded that there were enough grounds to sustain the complaint and recommended that the MPO should explore alternative ways of restoring what complainant had lost as a result of the first circular. One such way out could consist in amending Marchetti's vacation leave records in a way that her effective retirement date would be postponed and the intervening period be considered as approved paid vacation leave. This would make it possible to pay her salary for this period and at the same time respect the government's policy not to issue any payment in respect of any vacation leave not availed of.

The MPO, however, differed with the Ombudsman on the proposal to postpone complainant's retirement date since it was held that Marchetti had ample opportunity to do so prior to her actual retirement but had not done so. While appreciating this viewpoint, the Ombudsman also decided not to proceed any further with complainant's grievance in the light of the determined stand by the MPO that as a matter of policy it was not prepared to give financial compensation for any vacation leave that is not availed of by public officials.

Case No G 484

EDUCATION DIVISION

With heart set upon a transfer to a new College

The complaint

A teacher who up to the scholastic year 2005/2006 held the post of Teacher-Librarian in a state school alleged in her complaint with the Office of the Ombudsman that she was unfairly excluded from this post in another school despite her qualification and seniority. She alleged that librarian duties were given instead to two junior teachers and that one of them did not even possess the qualification that was necessary for the post.

Facts and findings

In March 2006 the Education Division issued a call for applications for transfers from teachers who wished to move to other schools. Complainant submitted her application to the Education Division early in April and a few months later she was posted as a teacher of Maltese to a new College that she had indicated as her first preference.

A call for applications for the post of Teacher-Librarian in schools where vacancies existed that was issued in April 2006 was open to candidates holding the Diploma in Library and Information Studies. It stated that while in the case of more than one teacher in the same school having this qualification, seniority would be a determining factor and other qualified applicants would be posted to other schools, applicants not in possession of the necessary qualification would need to sit for an interview.

In her application complainant wrote that she had carried out these duties since 2001 in the school where she was serving at that time and requested a renewal of this post. She also indicated in her application form that she had already applied for a transfer and even though she was not required to

indicate the school where she wished to carry out these duties, she nonetheless wrote that her first preference was a new College where the library was in its early stages of development.

The processing of applications under this call was finalised in August 2006. In its report the selection board stated that of the 44 applicants, 15 were already in post and had an appointment up to the end of the scholastic year 2006/07; 16 applicants were not interviewed since there were no vacancies in their schools; while of the remaining 13 candidates who were interviewed, 11 passed and the board recommended that vacancies be filled according to the needs of each school.

In the report by the selection board the Ombudsman found that two applicants from the school where complainant was posted at that time were successful and subsequently given duties at that school. He also found that an applicant from the College which was complainant's first preference but who did not possess the necessary qualification was successful in his interview and selected to perform duties at this College.

The Ombudsman also found that another teacher with the necessary qualification who at the time of the call for applications taught at a school close to the College in question but where no such position existed, had also applied to join the College. This candidate was successful and was subsequently posted there according to his wish.

Considerations and comments

The two main issues that were looked into by the Ombudsman in this case were whether the selection board was justified to exclude complainant *a priori* from the process for the selection of a Teacher-Librarian for the College and the circumstances that influenced the decision on complainant's request for a transfer to this institution.

The Ombudsman observed that in June 2006, one week before interviews were held, complainant was told by means of a letter that since she was already in post and had an appointment as Teacher-Librarian up to the end of the scholastic year 2006/2007, she did not need to apply. The board, however, should have been aware that complainant had earlier also applied under the first call for applications for a transfer to the new College where

vacancies existed since members of this board were also interviewing candidates under this call. The decision that it was unnecessary for complainant to apply since she already held the post of Teacher-Librarian had effectively excluded her from being considered for this post in the College where she wished to be transferred although by that time no decision had yet been taken about her first request.

The Ombudsman's investigation revealed that under the second call for applications the selection board interviewed two other candidates who applied for duties in the school where complainant was posted at the time of her application. The board also interviewed another applicant from a nearby school who was not already a Teacher-Librarian and who was subsequently posted at the College.

During contacts with the Education Division, the Ombudsman heard various explanations about the way in which developments unfolded. He was told that the College where complainant wished to be posted needed a teacher of Maltese with a full load of teaching duties which complainant would not have been able to carry out if at the same time she had to double as a Teacher-Librarian. The Ombudsman was also told that final decisions on transfers and postings were taken by the board on 1 September 2006 and communicated to teachers a few days later.

The Education Division explained to the Ombudsman that it was due to complainant's insistence to be posted at the College as a Teacher-Librarian that her transfer was delayed and it was only when she finally accepted to teach only Maltese that her transfer was approved. Indeed, if complainant had not accepted to do so, she would not have been transferred to this College at all. The Division also held that if complainant wanted to ensure that she would retain the post of Teacher-Librarian she should have chosen to retain her post at her former school.

The Division further pointed out that according to established practice, posts of special responsibility in schools are allocated to persons who are already members of staff provided they would pass an interview and that as a teacher in this new College, complainant would be able in due course to apply for the post of Teacher-Librarian in this institution.

Complainant denied that she ever insisted on being transferred to the College only as a Teacher-Librarian and admitted that on the contrary she

was willing to go there to teach Maltese because she was aware that transfers only take place in subject areas where vacancies exist. She also knew that the assignment of special duties, in this case library duties, could come later and only if a vacancy for these duties would arise.

Complainant further explained that when she sought an explanation from the Education Division why she had not been transferred to the College, she was told that her application for the post of Librarian-Technician was not accepted because there was no vacancy in that area. She explained that when some time later she was offered a transfer to the College to teach Maltese, she accepted even though she still felt that she was entitled to be appointed Teacher-Librarian at this College.

Complainant raised doubts about the statement by the Education Division that the practice in cases regarding special responsibilities is to give preference to teachers already posted at the school where special duties are needed. Complainant's views were confirmed by the Malta Union of Teachers which held that its agreement with the Education Division gives preference to those in possession of a related qualification. On the other hand the claim by the Education Division that preference for such posts is given to teachers already teaching at a school where these duties are needed was not backed by the call for applications or by the agreement between the two sides.

According to the Ombudsman it is not his function to interpret the relative provision especially in view of the ambiguous way in which it is couched. However, although insisting that it was purely a matter of industrial relations that should be clarified by the parties involved, he stated that the policy followed by the Education Division on this issue should have found a place in the agreement or in the call for applications.

The Ombudsman found that an applicant from another school who was not on librarian duties and did not possess the diploma mentioned in the call for applications and in the agreement between the Education Division and the Union, was successful in the interview and selected for these duties at the College. The Ombudsman saw nothing wrong in this decision since it was perfectly legitimate under the terms of the call for applications. The Ombudsman stated, however, that had complainant been treated in the same manner as this applicant, in terms of the call she would have had preference over this candidate.

Evidence gathered by the Ombudsman showed that an applicant from another school who did not possess the necessary qualification and had never done librarian duties before, attained high marks during his interview and was posted at the College where he was given librarian duties. The Ombudsman considered this situation as anomalous in the sense that a candidate with a pending application for a transfer to the College was given this position at the College even though he was not involved in librarian duties before while at the same time complainant was refused an interview and placed in a situation that effectively made her lose her position as Teacher-Librarian at her former school.

Although the Education Division countered by asserting that this teacher's transfer to the College had been sanctioned to allow him to work on an ongoing literacy project, the Ombudsman was unimpressed by this claim. He insisted that it did not justify the preferential treatment given to this applicant and also dismissed the claim that applicant's former school formed part of the College.

The Ombudsman observed that the selection board committed a serious error when it decided to exclude complainant from an interview for the post of Teacher-Librarian in the College where she had applied to be transferred on the grounds that she was already in post as a Teacher-Librarian in her school up to the scholastic year 2006/07. He pointed out that it should have been obvious to the board that although she was already a Teacher-Librarian at her former school, this did not mean that she would automatically retain this post if she were transferred to the College even though there was a vacancy for this position.

Taking the evidence that he gathered into account, the Ombudsman was of the opinion that procedures applied by the board and decisions that were taken subsequent to its report were manifestly unjust and potentially damaged complainant's interest. There was no justification to exclude complainant from the selection process especially since she had applied for a College where there was a vacancy for a Teacher-Librarian.

The Ombudsman felt that this injustice was even more blatant when an applicant from a school where the post of Teacher-Librarian did not exist, was successful and deployed on librarian duties at the College where complainant too had applied to be transferred. He stated that complainant

was right to claim that she had been treated differently from others and that the decision of the selection board as subsequently applied amounted to maladministration. This attracted criticism from the Ombudsman.

The Ombudsman considered the explanation by the Education Division that since the College needed a teacher of Maltese with a full load of teaching duties, complainant could not be given a reduced teaching load to perform librarian duties. It resulted, however, that with the transfer of four teachers, including complainant, the College had in all six teachers for Maltese and that although these teachers were given a full teaching load, one of them soon had her load reduced to allow her to teach Music when the Music teacher at the College was given a reduced load to carry out librarian duties. The Ombudsman stated that this ruse raised serious doubts whether it was possible in the first place to give complainant a reduced load so that she could perform these duties herself.

Conclusions

The Ombudsman concluded that complainant was wrongly excluded from interviews for the post of Teacher-Librarian on the grounds that she already had an appointment in this position when the selection board ought to have been aware that she had earlier requested a move from the school where she held this position to the new College. This unjust exclusion prejudiced her interest.

The Ombudsman criticized the report by the selection board that lacked the basic elements of transparency and did not give a breakdown of marks for the individual criteria applied by the board for the award of marks to candidates. This approach attracted criticism although the Ombudsman noted that this failure had not harmed complainant's interest because she had already been incorrectly excluded for other reasons.

The Ombudsman expressed reservations on the stand by the Education Division that it was not possible in the first place to transfer complainant to the College as a Teacher-Librarian on the grounds that the College required a teacher of Maltese with a full load of duties when some time later one of the teachers of Maltese had her load reduced in order to replace a Music teacher who was allocated librarian duties even though without the necessary qualification.

The policy by the Education Division to give preference to teachers who are already posted at a school that was challenged by complainant was also contested by the MUT. The Ombudsman commented that this consideration should have been spelt out in the call for applications so as to leave no room for contestation at a later stage and declared that this issue amounted to an interpretation of the agreement between Government and the Malta Union of Teachers which, as a matter of industrial relations, should be resolved directly between the parties involved so as to avoid any future misunderstanding.

On this basis the Ombudsman upheld the complaint.

Case No G 499

MALTA MARITIME AUTHORITY

The boat that belonged to the late Tom Zardi's father

The complaint

In a complaint lodged with the Ombudsman, Tom Zardi[1] protested about the insistence by the Malta Maritime Authority (MMA) on the payment of arrears of the annual registration fee of a boat that had belonged to his late father even though it had been garaged for the last seven years.

Facts of the case

Zardi explained that the boat had been stored in a garage ever since his father's accidental death seven years earlier and objected to the request by the Malta Maritime Authority for payment of the boat's yearly licence which, according to the MMA, was in arrears ever since the demise of its former owner.

The Authority explained that boat owners are required to pay an annual registration fee and that in contrast with arrangements sanctioned by the *Awtorità dwar it-Trasport* (ADT) for the suspension of the road licence of a motor vehicle if its number plates are returned and the car is kept in a garage, no such system exists with regard to boats.

The Ombudsman was also informed that under Legal Notice No 129 of 2001 (Small Ships Regulations) a certificate of registry ceases to have effect on the expiry of its validity date, its substitution by another certificate or on closure of registry. However, the MMA management may authorise in writing that a certificate is kept in abeyance for a specified period if the owner of the boat covered by a certificate can justify the non-renewal of the

[1] A fictitious name.

certificate such as, for instance, in the case of a serious illness. According to the MMA management, an owner who leaves his boat in a garage without providing any valid reason for doing so is not considered to have a good enough reason to justify the suspension of its certificate.

Considerations by the Ombudsman

During the Ombudsman's investigation, the MMA management explained that no information had ever reached it about the accidental death of the boat's erstwhile owner and that it was only a few weeks before the Ombudsman was brought into the picture that the Authority became aware that the boat had been stored in a garage for various years.

The MMA management pointed out that there is no provision in the Small Ships Regulations that regulates the garaging of a boat and referred to regulation 17 in connection with instances where a certificate of registry shall cease to have effect and allow the owner of a boat to close its registration. However, these Regulations also state that if a boat is put back into use or sold, a new registration process will be required that will entail payment of the initial registration fee.

The Authority confirmed that so far it had issued the authorisation to keep a certificate in abeyance only on three occasions on the grounds of serious ill-health against the presentation of medical evidence. On each occasion the medical certificate only covered one year and at the end of each year the case was reviewed in connection with the issue of certification for the following year.

The MMA stated that since waiting for the sale of a boat is not considered as a justified reason to suspend payment of a boat's annual registration fee, Tom Zardi had to choose either to close the boat's registration or else to continue paying the boat's annual registration fee until it would be sold or transferred to another owner.

At this stage the Ombudsman observed that complainant failed to explain why for many years he had not informed the Authority that the boat had been stored in a garage and was no longer being used following the death of its owner. In the circumstances he pointed out that the Authority can only consider waving payments due, if at all possible, on humanitarian

grounds if it was at least made aware of what had led to the owner's tragic demise. The Ombudsman stated that there was nothing morbid in this request and that unless the Authority was aware of circumstances that rendered the case worthy of special consideration, it was obvious that payments due in connection with the registration of the boat could not be waived.

The Ombudsman also pointed out that complainant seemed to be completely unaware of Legal Notice No 129 of 2001 that regulates the registration and closure of registration of small ships and which also applies to other craft. He stated that Tom Zardi was clearly mistaken when he laboured under the impression that the MMA ought to distinguish between a small ship and a 16-foot long speedboat and when he maintained that once his boat, unlike a small ship, can be stored inside a garage, then Legal Notice No 129 of 2001 is not applicable.

The Ombudsman explained that complainant should realize that the MMA is bound by law to apply regulations as approved by Parliament and that is cannot bypass applicable delegated legislation insofar and unless it is given, by regulation, specific discretionary powers to do so. Complainant should therefore not expect any preferential treatment from the Authority and the Authority was correct to state that according to existing regulations Zardi had no option but to close the registration of the boat or else continue to pay annual registration fees until the sale of the boat or its transfer to a new owner.

The Ombudsman pointed out that the first option clearly implied that upon the sale or transfer of the boat, any new owner would have to bear the cost of a new registration process including payment of the initial registration fee and that although complainant would not be required to meet these costs, this consideration would influence the final sale price of the boat. On the other hand, if Tom Zardi chose not to close the boat's registration, he would have to pay the annual registration fees applicable.

The Ombudsman commented that the regulation itself cannot be said to be unreasonable or unjust and that the choice lay solely in the hands of Tom Zardi. The boat bore a valid registration with the MMA and as a result, its registered owner or his heirs were rightfully expected to continue to pay the boat's registration fee as long as the boat remained in their possession or until it was sold or transferred to a new owner. The Ombudsman insisted

that complainant could not impute unfair treatment or maladministration to the MMA for correctly applying regulations and ensuring that boat owners in possession of a valid certificate pay registration fees that are due.

Taking everything into account the Ombudsman held that complainant's request can only be considered as an exception to the rule based on humanitarian grounds and despite his anguish following his father's tragic disappearance, it had to be made clear that any acceptance of his request would be merely a concession and not a right. The Ombudsman's investigation showed that the Authority had reacted positively to the request within the limits of the discretion allowed to it by law.

The Ombudsman also understood that the MMA was prepared to withdraw its insistence that the boat had to be covered by an insurance policy even for the years that it had been garaged. Since insurance premia are not due to the Authority, the Ombudsman observed that if it were conclusively proved that the boat's new owner had not made use of it prior to any eventual sale, this would in itself be an argument for not insisting on an insurance policy for these years. The Ombudsman recommended that the Authority should examine the matter especially since it should not be difficult to find ways how to ensure that in such cases a boat that is kept in a garage can be secured and temporarily put out of action as a definite proof that it was not in use during this time.

On the other hand the Ombudsman admitted that the issue regarding registration fees is more complex. Renewal of a certificate of registry depends on the payment of the applicable fee and payment of this fee in turn constitutes proof of renewal. However, on the basis of regulation 17 of the Small Ships Regulations that "*if the Executive Director* (of the MMA) *is satisfied that the reason for the non-renewal of the certificate is justified, he may authorise in writing that the certificate is kept in abeyance for a specified period*", the Authority was correct to decide that waiting for the sale of a boat to take place cannot be accepted as a justified reason for suspension of the boat's annual registration especially since it is likely that a potential buyer would expect it to be regularly registered.

The Ombudsman expressed his view that the MMA management should consider a new way how to deal with cases where the heirs of a boat owner declare that they have no further interest in making use of the craft and that they intend to sell it. He suggested that in such instances the Authority

might allow, say, five years during which the certificate of registration would be kept in abeyance if the Authority felt that in the circumstances such a period is justified for non-renewal of the certificate. The Ombudsman understood that the Authority was prepared to consider this recommendation.

Conclusion

The Ombudsman concluded that no element of maladministration emerged from his investigation and recommended that:

- the MMA would not insist on insurance cover of the boat during the years that it was effectively secured inside a garage upon the death of its owner until the time when Zardi would sell or otherwise dispose of the boat if it can be ascertained that during this period the boat was not in use;
- the MMA should consider whether, given the particular circumstances of this case, it could on humanitarian grounds waive the boat's registration fees for such time as the MMA management would consider this arrangement to be feasible; and
- the Authority could also consider whether regulations and/or policies on the suspension of vessel certification by its registry should be amended so as to allow the non-payment of such registration fees in cases where the heirs of a boat owner declare that they have no interest in making any further use of the craft and make proper arrangements to secure the boat from any usage until its sale or disposal within a reasonable and definite period of time.

Case No H 40

EMPLOYMENT AND TRAINING CORPORATION

They seek him here, they seek him there, they seek him everywhere

The complaint

In a complaint with the Office of the Ombudsman it was alleged that an injustice had occurred when an applicant was not notified in time to attend an interview following a call for applications by the Employment and Training Corporation (ETC) for the post of care officer.

Complainant stated that as a result of negligence by the ETC he was unaware of this interview and did not turn up and lost the opportunity to compete for the post in question. Complainant claimed that whereas he had not been notified by post, another applicant received a letter from the ETC to inform him of the date, time and place of the interview.

Facts of the case

According to the Employment and Training Corporation several attempts were made to contact complainant before 14 December 2006 to inform him about an interview that was due on 8 January 2007. ETC staff had phoned him on various occasions at his residence and at his place of work to pass on this message but these efforts were unsuccessful. The ETC believed that it was finally able to notify complainant of his interview by means of an email dated 14 December 2006.

Complainant, however, was adamant that he had never been alerted about any incoming telephone calls for him from the ETC or that the ETC wanted to get in touch with him in connection with the interview by any member of his family living at his residence or by the telephone operators at his place

of work. He was equally adamant that he had not found this email in his inbox as well but was unable to give a reason for this failure.

The ETC management explained that in view of the problems that were encountered to contact complainant and another applicant, letters were mailed to both candidates on 15 December 2006 about their pending interviews. However, although it was claimed that the letter sent to complainant never reached him, the other candidate received his letter in good time and in fact attended the interview.

The Ombudsman found that no further action was taken by the ETC to inform complainant of his interview between the day when this letter was sent and the date of his interview on 8 January 2007.

When complainant realized that he had failed to turn up for his interview, he requested the ETC to be given another opportunity but this request was turned down.

Considerations by the Ombudsman

The investigation on this complaint led the Ombudsman to establish that:

- the ETC made no fewer than five telephone calls to the numbers given by complainant himself in his application form both at his private residence and at his place of work. Four of these calls were duly answered while a fifth call remained unanswered and the Corporation produced logs of its outgoing telephone calls which confirmed that these calls were in fact made;

- on 14 December 2006 the ETC sent an email to complainant at the address which he had himself provided to the Corporation and this too was backed by records that were made available to the Office of the Ombudsman;

- on 15 December 2006 the ETC mailed a copy of its email of the previous day to the address which complainant had given to the Corporation; and a copy of this letter was seen by the Ombudsman.

The Ombudsman noted that in correspondence with the Office concerning his grievance and in his application to the ETC, complainant gave two different addresses. In this regard the Ombudsman recalled that in a separate grievance raised by complainant a few months earlier, similar problems arose when correspondence mailed to him by the Office of the Ombudsman at the address that appeared in his letter and that was the same one on his application to the ETC, was not received as well.

Seeing that various efforts to trace complainant proved unsuccessful and that he seemed generally unavailable and that the ETC and even his own Office had severe problems to get in touch with him, the Ombudsman commented that complainant seemed to be very elusive. Phone calls by ETC staff to his private residence which were taken by members of his own household were apparently not even brought to his attention and there was no evidence to show that complainant ever returned any of these calls even though he must have been aware that at that time it was quite likely that the ETC would be on the look out for him subsequent to his application a few weeks earlier.

The Ombudsman concluded that these occurrences seemed to indicate that complainant had either supplied a wrong address to the ETC – as indeed he had also done to the Office of the Ombudsman – or that he failed to give proper and prompt notice of a change of address. The Ombudsman also observed that while there were indications that the email address which complainant supplied was correct, at the same time communication problems seemed to concern only his incoming email connection and there were no such problems with his outgoing service.

The Ombudsman wondered how for quite some time complainant seemed incommunicado but then when he started to contest the actions of the ETC all these communication problems immediately vanished. Phone calls to him were duly received and telephone messages were invariably passed on to him; emails started flowing; and letters were delivered without any undue problems.

In the circumstances the Ombudsman concluded that complainant must have suffered from a series of extremely unfortunate coincidences for which there seemed to be no explanation. To cap it all, this happened at a time when complainant was waiting to be notified of the date of an interview and when he ought to have checked regularly about the outcome

of his application and to have been on the look out and generally accessible while making his whereabouts known.

At the same time the Ombudsman recommended that it is essential for the ETC to have in place clear and specific procedures to notify applicants in time and well in advance about the date and time of their interviews, tests or examinations and that this notification should be done by all normal available means including modern technology, whenever possible. It is also important that as far as possible the ETC will ascertain that notices to applicants and candidates are delivered properly and reach them in time.

On the other hand the Ombudsman stated that applicants are not only in duty bound to make regular inquiries about the status of their applications but also to provide correct, up to date and reliable contact details. It is after all also in their own interest to instruct dependants at home and fellow employees at their workplace to inform them straightaway of any telephone calls or messages that are received on their behalf during their absence from home or from their workplace.

The Ombudsman's investigation led him to conclude that complainant had not taken the necessary safeguards to ensure, as he was in duty bound, that any information which the ETC was reasonably expected to deliver to him following his application would reach him in time and without difficulty. Although the Ombudsman was unable to provide any explanation for the ETC's repeated failure to establish contact with complainant on his interview, he concluded that surely complainant could not lay the blame for this failure at the door of the ETC.

The Ombudsman stated that clearly something was amiss. Complainant failed to give any justification to explain why all the ETC's efforts to communicate with him by phone, email and post had failed and his failure to promptly advise the ETC of his apparent change of address must therefore be considered as the main reason why efforts by the Corporation to inform him of his interview had gone astray.

The Ombudsman was convinced that the ETC did everything in its power to contact complainant by using all the means at its disposal and that it had given full attention to his case. Besides the various phone calls and emails the Corporation had sent a letter to him at the address that he had given in his application and it was only fair and reasonable for the ETC to assume

that this letter had been delivered to his address within a day or two. The only plausible explanation why this letter failed to reach complainant was that the address which he himself gave was not, at least at that time, the correct one – and if this was indeed so, then complainant himself was only to blame for this failure and the ETC shouldered no responsibility at all.

Conclusion

Finding no evidence to support complainant's allegation that the ETC had committed an act of maladministration, the Ombudsman closed the file.

From the Ombudsman's Caseload

Case 6 (June 2007)

Revision of scripts in examinations in the public sector

(own initiative report by the Ombudsman)

1. From time to time the Ombudsman receives complaints regarding the outcome of selection procedures for posts in the public sector. While there is an intrinsic difficulty in the formulation of an opinion on criteria that depend on the subjective interpretation of the members of the selection board as to how candidates performed during the interview, it is possible to verify whether the objective elements that form part of the selection process have been correctly interpreted. There are instances where candidates contest the result of a written examination, request a revision of their script or even demand a copy of their script as marked by the examiners.

2. This situation is not limited to calls for applications for a post in the public sector. Indeed it is more common in other areas and especially in academic institutions and educational establishments. Since I believe that the process of revision of candidates/students' scripts should be guided by the same principles, I considered it necessary to carry out an own initiative investigation, in terms of sub-article (2) of article 13 of the Ombudsman Act, 1995 on the legislation and/or policies regulating requests for revision of papers and/or verification of such scripts.

3. For this purpose I identified various institutions in the public sector which, based on the past experience of my Office, had received requests for revision of candidates' examination scripts.

These are:

(i) The University of Malta and the Institute of Health Care
(ii) The Malta College of Arts, Science and Technology (MCAST)
(iii) The Education Division
(iv) The Institute of Tourism Studies
(v) The Public Service Commission

These institutions were requested to provide details in respect of legislation/policies and practices applied in their sector whenever there was a request for a revision of examination papers, including what happens when a candidate requests a copy of his/her script as marked by the examiners.

4. The University of Malta and the Institute of Health Care

4.1 The University of Malta and the Institute of Health Care which is an institute within the University, regulate such a request by the University Examinations Regulations (subsidiary legislation 327.88) and specifically by regulation 6 thereof, which provides as follows:

"*6. Revision of Examination Papers*

6.1 Subject to the provisions of regulations and to any procedural guidelines made by the relevant University authority, a candidate may, within two weeks from the publication of the examination results, request that a revision of his examination scripts be undertaken for the purpose of ascertaining that no error was made in the award of marks or grade obtained in a particular examination paper.

6.2 The revision of examination scripts will be undertaken by the same Board of Examiners together with an additional examiner appointed by the Senate for the purpose. The provisions of regulation 3 apply mutatis mutandis.

6.3 The academic judgement of the original examiners is not reviewable by the Board of Examiners considering the appeal and the result will only be altered if the change can be justified by objective criteria.

6.4 The result of the revision of papers will be communicated to the candidate in the form of a short report giving the motivation of the result.

6.5 If the request for revision is found justified, all records, including possible changes in final classification, will be amended accordingly, and any fee paid in connection with the appeal will be refunded."

Regulation 3 of these regulations deals with the conduct of the examination and how the Board of Examiners judges the merits of a candidate.

4.2 In the academic years 2003-04, 2004-05 and 2005-06, there was a total of 1854 requests from University students for a revision of paper. In 149 cases (8%) the original mark was changed. The figure of 1854 includes requests made to the Institute of Health Care.

4.3 The MATSEC Board conducts examinations at 3 levels – SEC, Intermediate and Advanced, and these too are regulated by the above-mentioned regulations.

4.4 Information given by the MATSEC Board reveals that over the three-year period 2004-2006 there was a total of 4500 requests for a revision of paper and in 209 cases (around 4.5% of the requests) a higher mark than that originally given was awarded following revision. These figures must be interpreted in the context of around 160,000 scripts at SEC level, 32,000 at Intermediate level, and 22,000 at Advanced level.

4.5 In examinations conducted by the University, requests for a copy of the script would not be approved even if requested; however a number of examiners at the Institute of Health Care volunteer to explain to students where their replies were incorrect.

5. MCAST

5.1 The Chief Executive Officer, MCAST explained that his institution is a relatively young one and most of the courses are based on continuous assessment. When students fail in an assignment, they are given the opportunity to discuss their work and resubmit it. Such procedures are transparent and eliminate many complaints. This process has been developed and refined over the last five years.

The College informs students that they can appeal against a decision and this information in included in the Student Handbook which is given to all students at the beginning of the academic year. This contains details on how a student can appeal against an assessment of the work he had carried out and how an appeal is to be presented. Moreover it intends to implement, in 2007, a draft Appeals Policy that has been prepared.

According to this document, students are advised that if they wish to complain about an internal assessment (that is made by the college examiners) they can either complain verbally or in writing and their complaint would be investigated by an assessor who is to reply to the candidate within two weeks. If the candidate is not satisfied an appeal may be made in writing to an assessor who was not previously involved in the case. Even at this stage, the student can appeal from the independent assessor's decision to the Head of the respective Institute within the College and eventually to the Board of Studies of that Institute. A further appeal from the decision of the Board of Studies can be made to the Examination and Accreditation Body of the specific course followed by the student.

This document also contains information in respect of results published by External Examining Bodies.

5.2 A relatively small number of courses are based on final examinations. Between 2004 and 2006 three complaints were received and the examination scripts were reviewed. Though the marks were not changed in any of these cases, the candidates involved were allowed a re-sit.

6. The Education Division

6.1 In 2006 the Education Assessment Unit announced in a Press Release that students would be receiving the results of Form One Junior Lyceum Entrance Examinations at home. The press release thus stated in respect of eventual requests for a revision of paper:

"*Parents/guardians of candidates wishing to apply for a revision of paper are to fill in the appropriate application form either at the Customer Care Office, at the Education Division, Floriana, or at the Education Office, Victoria, Gozo as applicable. The said form may be filled between 8.00am and 12 noon as from Monday 26th June…*"

Those who apply for a revision were to be given the opportunity to view their script, together with their parent or a teacher of his/her choice. Between 2004-2006 there were a total of 914 requests for revision of papers in different subjects.

6.2 In February 2007, the Director, Curriculum Management, Education Division issued a Letter Circular to Heads of Schools (state and non-state), stating as follows:

"*Half-yearly examinations are meant to provide teachers, parents and students with information concerning academic achievement. Providing parents and students with a mark merely gives a vague indication of this achievement.*

Half-yearly examinations are an excellent opportunity for teachers to provide their students with formative feedback. The provision of such feedback to students contributes immensely towards the enhancement of learning. Students benefit enormously when they become aware of the strengths and weaknesses they demonstrate in examinations. Besides improving learning, such feedback would help them know what to do in order to improve their performance in forthcoming examinations.

The Department for Curriculum Management is aware that some schools are already providing their students with such formative feedback and have established this practice as a whole school policy. In other schools this practice is left to the discretion of the teachers whilst in others it is non-existent.

Heads of School are hereby being encouraged to make formative use of the half-yearly examination papers and to establish this good practice as part of their School Assessment Policy."

7. The Examinations Department

7.1 The Examinations Department within the Ministry of Education recognises the right of every candidate to request a revision of his examination script if he fails an examination. As soon as the results are published the candidates are informed individually about this right. Upon receipt of such request, the following steps have to be followed –

- the script/s is/are handed over to the panel of examiners to check for clerical errors and re-marking;
- a report is then compiled to confirm whether the original result stands or not. The report should include:
  - details of the subject and particulars of the candidate;

- confirmation of the verification carried out in respect of marks awarded; and
- an overall comment such as to confirm the marks originally given or to justify the recommended changes;

o the report is then discussed with Director, Examinations. If there is agreement on the outcome, a copy of the report is sent to the candidate;

o if the candidate is still unsatisfied with the examiners' decision, he is allowed to view his script together with a tutor of his own choice in the presence of the Director of Examinations.

He may then submit a written reply giving reasons for his objections. These will be examined by the Board of Examiners.

Throughout the process, the identity of the examiner is not revealed.

8. Institute of Tourism Studies

8.1 The Institute informed this Office that ITS and students enter into a learning contract at the start of the course. ITS adopts a modular system and each module has two components tested in two distinct methods. One is the assessment, which could be continuous or based on homework or tests and the other requires a final exam at the end of a semester or academic year.

Regarding the assessments, details of the revision process can be found in Appendix iii of ITS Rules and Regulations. Within seven days of the result of an assessment, a student who wishes to appeal against the result should give reasons and submit evidence. The assessor will consider the facts and ensure that the student understands the examiner's judgement. If the assessor finds reasons to change the result this will be done and the student is informed. If there is still disagreement, the decision is forwarded to the Director General. The Deputy Director will discuss the appeal with both the student and the assessor and if necessary with a second assessor and the student is informed of the decision within seven days. If the student still disagrees, the appeal is referred to the Director General.

As regards the written exam, a student may request a revision of paper by writing to the Registrar within 10 working days from receipt of the official

result. The Registrar will check the paper to ensure that there are no mathematical errors in the computation of the mark awarded. If this is found to be correct the paper is given back to the lecturer for re-assessment. If the result is confirmed the student will be informed accordingly. A student can then appeal and the paper will be examined by a Board appointed by the Board of Governors who can request an independent assessment from another lecturer.

It is not the official policy of ITS for students to be allowed to view their script as marked by the examiner or to give the student a copy of his script. However, in practice various lecturers allow the students to see their script and indicate to them where they fared badly.

9. The Public Service Commission

9.1 The PSC had recently to decide on a request to view an examination paper from a candidate who sat for a public examination that was part of a selection process for the post of Senior Principal. (This request is also the basis of a complaint submitted to this Office – Case No G 0534). The Commission stated that it agrees in principle with the policy that in future similarly structured selection processes, it would consider raising with the Administration the matter of the feasibility of allowing candidates to view their papers. It had also considered that care would however need to be exercised in the drafting of any such provision.

9.2 The Commission subsequently provided for the issue of a call in which the process included a written examination. It had ruled that the written examination should be conducted by the Board of Local Examinations and not by the Selection Board. The Commission insisted on this (change), in the knowledge that it was the policy of the Board of Local Examinations to allow candidates who so requested, to view their script according to established procedures.

Considerations and comments

10. Every administrative act should reflect the transparent process that led to a decision that affects the citizen. When the process is not transparent this may give rise to suspicions (sometimes justified) of injustices that however in many instances may not exist. Every

administration should ensure that, as much as possible and practical, its actions that negatively affect the citizen are subject to verification. This should apply also to the conduct of examinations.

11. It results that various sectors responsible for conducting written examinations in Malta adopt established procedures so that whoever feels aggrieved at an examination result, has the opportunity to ask for and obtain a revision of paper. The extent of this remedy varies from one institution to another. In the case of the University of Malta and its institutes, this review takes the form of a revision of the script by an additional examiner in conformity with published regulations. Moreover, notwithstanding that, officially, candidates have no right to view their script, various lecturers in practice allow students to view their script and indicate to them where they replied incorrectly.

In this context, I find many positive points in the circular issued by the Director, Curriculum Management of the Education Division regarding Half Yearly Examinations especially when it states that –

"*Half-yearly examinations are an excellent opportunity for teachers to provide their students with formative feedback. The provision of such feedback to students contributes immensely towards the enhancement of learning. Students benefit enormously when they become aware of the strengths and weaknesses they demonstrate in examinations. Besides improving learning, such feedback would help them know what to do in order to improve their performance in forthcoming examinations*."

12. I consider that the above approach should not only apply to half-yearly examinations. It should also apply in respect of all examinations since a student should be shown where he answered correctly and where he was wrong. This would allow him to learn from his mistakes and would benefit him when he re-sits the examination or sits for a similar examination in future. Such a system obviously also has the merit of verifying genuine mistakes of examiners as well as clerical errors thus ensuring remedial action.

13. The Examinations Department within the Ministry of Education is, in my view, one step ahead in respect of transparency of the processes. This Department is responsible for conducting various public examinations. In the process of revision of examination scripts, the candidates who

request such revision have the right to examine their script together with a tutor of their own choice in the presence of the Director of Examinations and are therefore given the opportunity to better defend their case if they need to have recourse to the Board of Examiners.

14. On the other hand, and probably because it never had a request to this effect, the PSC does not appear to have established procedures in respect of revision of examination papers when such examinations form part of the selection process following a call for applications issued by the same Commission. When it first received a request from an applicant to be given a copy of a marked script, the Commission did not accept to do so. However, the Commission appreciated the need for transparency in such cases and immediately took steps to ensure that in future calls, the right to a revision of paper is safeguarded to the extent that candidates would be allowed to view their script in accordance with procedures referred to above as set out by the Examinations Department.

15. To date no institution grants the right to candidates to be given a copy of their marked script.

16. In this respect, it is relevant to refer to a decision of the European Ombudsman on a complaint he received in October 2003 (complaint 2028/2003 (MF) PB) from a candidate who participated in a job competition within the field of contract management in an institution of the European Union. After failing the written examination, this candidate requested the European Personnel Selection Office (EPSO) to send her a copy of her marked examination paper and the evaluation sheet. EPSO had sent her a copy of her script without annotations and the evaluation sheet. The candidate referred her case to the European Ombudsman since she considered that she was not given access to her marked script.

What is relevant to the present investigation is that in his decision, the European Ombudsman referred to the Special Report which his Office had sent to the European Parliament on 18 October 1999 (after an own initiative investigation). This contained a formal recommendation that in future recruitment competitions, the Commission should allow access to candidates to view their marked script on request. The President of the European Commission had welcomed this recommendation and at that time (1999) had stated as follows-

"*The Commission welcomes the recommendations you made in this report and will propose the necessary legal and organisational arrangements to give candidates access to their own marked examination papers, upon request, from 1 July 2000 onwards*".

In respect of the complaint under his investigation, the European Ombudsman noted that the procedure that was in practice at that time was that the examiners' comments were not written on the script but on the evaluation sheet. Since there was no regulation prescribing otherwise and the complainant had in fact been provided with a copy of the evaluation sheet together with a copy of her script, he did not find the Commission guilty of maladministration in that case.

17. The Treaty of Amsterdam of 1997 added Article 255[1] to the Treaty Establishing the European Conventions resulting in the introduction of a new regulation – Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents. Article 2 of this Regulation states as follows:

"*Any citizen of the Union …… has a right of access to documents of the institutions, subject to the principles, conditions and limits defined in this Regulation.*"

while Article 4 (3) (ii) states that:

"[a] Access to a document containing opinions for internal use as part of deliberations and preliminary consultations with the institutions concerned shall be refused even after the decision has been taken if disclosure of the document would seriously undermine the institution's decision making process, unless there is an overriding public interest in disclosure".

According to Article 10 of the same Regulation:

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[1] "*Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to European Parliament, Council and Commission documents, subject to the principles and conditions to be defined [….]*"

"The applicant shall have access to documents either by consulting them on the spot or by receiving a copy…… according to applicant's preference. The cost of producing and sending copies may be charged to the applicant. This charge shall not exceed the real cost of producing and sending the copies. …….".

18. In my opinion, the above-mentioned provisions that regulate the actions of European institutions constitute valid principles that should serve as a guideline to local authorities in the conduct of public administration. In the context of this investigation I consider that there exists an overriding public interest in the application of these principles because of the need to ensure justice and transparency in public sector examinations.

19. An internet search shows that the right of candidates to view their script is recognised by various authorities. I quote from a report of the UK Department of Education entitled "*Report on the Inspection of CCEA, GCEA and AS Examination Procedures*" for years 1998-2001. Paragraph 10.2 of the report states as follows:

"*As part of its suite of re-mark services, the Council offered the option of a written report to accompany the re-marking of a candidate's script. This service has been discontinued for all subjects from 2001; these developments are linked to the fact that candidates can now ask for and obtain, copies of their marked scripts*". (The underlining has been made by this Office).

This step is in conformity with the provisions of Article 10 of Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001.

20. In his decision, the European Ombudsman drew the attention of the European Commission to Article 41 (2) (ii) of the European Charter of Fundamental Rights that refers to the right of every person "*to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional or business secrecy.*"

The European Ombudsman considered as follows:

"*In the Ombudsman's view, it is open to individuals who have participated in recruitment competitions to request access to their application file on the basis of this right*"

21. It must be pointed out that in 1999 the European Ombudsman had made his recommendations in respect of future cases and not on what had happened in the past.

Conclusions

22. It clearly results from this investigation that, at least in Europe, it is accepted that a candidate can access his script as part of the exercise of his right to a revision of paper. In Malta, save for the Examinations Department, this principle is still not officially included in the policies of the various departments and agencies responsible for conducting examinations in the public sector. It however results that, in general, there is an increasing awareness of the right of examination candidates to be informed not only of the result itself but also of the details how the examiners reached their conclusions. Public institutions responsible for conducting examinations are in turn becoming more aware of their obligations in this respect and are striving to ensure that this right is put in practice even if varying methods are applied with different degrees of enthusiasm. This sector has to be regulated in a most clear and transparent manner even if there need not be uniformity in approach. There is moreover an absolute need to ensure that not only is the process fair and free from abuse, but also that the integrity of the examiner and the seriousness and authority of his final judgement are not put in doubt without valid reason.

23. As stated earlier, access by an examination candidate to his file (and in this respect I consider the script to be part of a candidate's file) is a right of a citizen of the European Union as sanctioned in the Charter of Fundamental Rights of the EU. This Charter is an integral part of the proposed Constitution for Europe which although not in force, was unanimously approved by Malta's Parliament. It is therefore recommended that as far as possible, every individual, and certainly for the future, these rights are assured. Where it results that they have been breached, an adequate remedy has to be provided.

24. Recommendations for the future

24.1 I therefore consider that institutions within the public sector in Malta that have not yet officially recognised within their policies regulating the conduct of written examinations the right of examination candidates to access their script should review such policies so as to incorporate this right of access.

24.2 Access can vary from that given to the candidate alone, or accompanied by a tutor of his own choice to view the script as marked, to giving the candidate a copy of the marked script. When examiners do not put down their personal annotations on the candidate's script, the documents on which such annotations are kept should also be accessible to him.

24.3 As a corollary to the preceding paragraph, the respective institutions should ensure that the criteria how examination scripts are to be marked are properly and preventively established by regulation. These regulations should provide that, when a candidate is given access to the script and/or the documents containing the relative annotations, these should be legible and decipherable in a way as to provide the candidate with a clear message of the examiner's evaluation of the replies given by him.

24.4 In any case, procedures regarding access must be set out in advance in a precise and uniform manner so as to ensure the highest degree of transparency and seriousness in the examination process. Nothing should be done to diminish the citizen's faith in the process as a fair means of certification of a candidate's level of competence. The public examination, in all of its various forms, should remain an effective tool to evaluate the candidates' qualities and abilities.

Case 7 (July 2007)

The transfer of pharmacy licences

The complaint

In a complaint to the Ombudsman the owner of a licensed pharmacy felt aggrieved by a decision by the Medicines Authority to allow the transfer of another licensed pharmacy to new premises that was significantly nearer to her own pharmacy. She contended that this decision was in breach of the Medicines Act and without legal basis and that the owner of the pharmacy in question had a conflict of interest. She further contested this decision on the basis of the distance between the location of her pharmacy and the one that was transferred near hers.

Facts and findings

2. Complainant approached the Ombudsman when she learnt that after the owner of another licensed pharmacy in the same town had applied to transfer her pharmacy to another street in the same locality at a distance of some 287m from complainant's pharmacy, this transfer was approved on 18 May 2006 after certain structural changes that were required were carried out.

3. The Medicines Authority confirmed that the decision was taken at a meeting of a Tripartite Committee made up of government officials and representatives from the GRTU and the Chamber of Pharmacists that was set up by Government on 2 September 1998 following an agreement between the three parties. The Committee was mandated to draft a national plan based on geographic and demographic criteria that would serve as a basis for the issue of pharmacy licences in the community. The Office of the Ombudsman was informed that the Committee had established a set of criteria in connection with the transfer of pharmacy premises which included the following:

i) the new premises must be in same locality;
ii) they must offer better facilities to the public;
iii) be situated no less than 250 m from another premises; and
iv) the transfer must not negatively impact on pending pharmacy applications.

Since all applications for the transfer of pharmacies are processed through the Tripartite Committee and since the request satisfied the above criteria, the Medicines Authority, as the authority designated by the Superintendent of Public Health (the Licensing Authority in terms of the Medicines Act for such purpose), approved the transfer of the pharmacy in question.

4. In connection with this transfer, the Medicines Authority referred to an early transfer of premises of the same pharmacy that was approved after the owner had sought the help of the Office of the Ombudsman (Case No E 0129), when the Public Health Department (which was then responsible for processing such applications) had postponed its decision for an unduly long time because of pending discussions.

In Case No E 0129 the owner had applied for a transfer in respect of name of licence holder in March 2002 before the enactment of the Medicines Act when there was no restriction whatsoever on the siting of pharmacies since the Medicines Act was enacted on 5 June 2003 and came into force the following November. In respect of that complaint, the Ombudsman had stated as follows:

"*It is not for this Office to determine whether the request should be granted or not. However the decision on a request made over a year ago should have and still ought to be made on policies pertaining at the time and not on what will happen when the amended policy will, at some unknown date, come into force*".

After giving details on pending applications, this Office sought further comments from the Director General, Health who replied that it had been decided to approve that application.

The Medicines Authority also referred to a recommendation given by this Office in respect of another transfer of a licence. This case was very similar to the previous one except that it had been pending since 1996. This advice was given before the Medicines Act was brought into force.

5. With the enactment of the Medicines Act, 2003 through which the Medicines Authority was delegated the function of issuing pharmacy licences, a legal provision was introduced under section 66 of the Act which includes the following-

"*Title IV – Pharmacies and Related Pharmaceutical Activity*

66. (1) It shall not be lawful for any person to open or keep a pharmacy unless he is in possession of a pharmacy licence issued in accordance with the provisions of this Act or any regulations made thereunder.
(2) Licences are to be issued in accordance with geo-demographic criteria as may be established by regulations made under this Act[1].
(3) Regulations under this article shall not be made unless the Minister shall have first published a draft thereof in the Government Gazette allowing any person a period of at least four weeks to make representations to the Minister.
(4) The Minister shall request the Licensing Authority to report on any representation made to him after hearing such person or taking such expert advice as it considers expedient, together with any views it may have and the Minister may, upon receipt of the report by the Licensing Authority proceed to revise the draft regulations and to promulgate such regulations in accordance with such revision."

The Minister did in fact publish draft regulations in 2002 (that included "*geo-demographic*" considerations) for consultation purposes as requested by law but following disagreement between the parties concerned, these were shelved. As a result, to date there are no such criteria as are referred to under subsection 66(2).

6. Section 71 of the same Act provides that in authorising the transfer of a pharmacy licence, the Licensing Authority must be satisfied that "*the new licensee complies with any requirement established by or under this Act …*"

Section 77 of the Act refers to "*a direct or indirect interest in a pharmacy*" and such interest is defined in the Third Schedule to this Act that includes the following provisions:

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[1] The Maltese text of the law states as follows – *"skond kriterji ġeo-demografiċi stabbiliti permezz ta' regolamenti taħt dan l-Att."*

"(1) No person shall qualify for a licence if he is a medical practitioner, dental surgeon, dentist or veterinary surgeon or if he is the husband or wife of any such medical practitioner, dental surgeon, dentist or veterinary surgeon.

(2) No licence shall be granted or renewed if a medical practitioner, dental surgeon, dentist or veterinary surgeon has any direct or indirect interest in a pharmacy.

(3) It shall not be lawful for any medical practitioner, dental surgeon, dentist or veterinary surgeon or any other person authorised to issue prescriptions under the Medicines Act or any other Act, to enter into any agreement with any pharmacist or any other person for any share in the profits of a pharmacy, or to have any direct interest of whatever nature in any pharmacy.

(4) It shall not be lawful for any pharmacist:

(a) to carry on the business of a pharmacy on account of, or in partnership with any medical practitioner, dental surgeon, dentist or veterinary surgeon or any other person authorised to issue prescriptions under the Medicines Act or any other Act;
(b) to enter into any agreement with any medical practitioner, dental surgeon, dentist or veterinary surgeon or any other person authorised to issue prescriptions or aforesaid, for any share in the profits of a pharmacy;
(c) to lend his name in order that the business may be carried out by some other person."

Considerations and comments

7. Three distinct allegations have to be considered and this will be done in this order –
(i) conflict of interest
(ii) distance
(iii) breach of the Medicines Act.

8. It is clear from the Third Schedule to the Medicines Act that for the conflict of interest alleged by complainant to exist, the relationship must be one listed in this Schedule. The licensee is not herself a medical

practitioner, dental surgeon or dentist or veterinary surgeon; nor is she the spouse thereof. No evidence was produced as to any specific interest of any such professionals within the context of these specified relationships or that the business of the pharmacy was being carried out with any such professional or that there was any agreement with any of them. I will refer to this issue later on (vide para 15xiii). However, as such there is no legal justification for complainant's allegation of conflict of interest.

9. Complainant also alleged that the distance between the pharmacy in dispute and hers is below that established under standard practice, which distance was a condition under the old regulations. Although at 266m complainant's own estimate of the distance is slightly less than the Authority's estimate of 287m, in any case it is greater than the minimum distance which was being applied in practice (i.e. 250m) even if there is no valid legal basis for this yardstick.

Moreover the "*old regulation*" does not exist, but if for the sake of argument one were to consider it (for what it is now worth!), the specified distance under former regulation 5 of the Dispensaries (Licensing) Regulations 1984 (when the quota was not satisfied) was 200 metres. A distance of 500m was specified when a pharmacy licence above the quota was granted because of newly developed areas with over 1000 inhabitants. However this regulation was repealed over 10 years ago.

On the basis of the above considerations, the allegation of distance cannot be sustained.

10. The main issue in this complaint is the allegation that the transfer was not in conformity with the Medicines Act. Complainant contends that the law does not give the authorities any powers to effect the said transfer and that therefore they have acted *ultra vires*. Complainant bases her argument on the fact that no regulations have ever been issued under the Medicines Act regarding the acquisition and transfer of pharmacy licences. Therefore there is no legal basis for the authorisation of the transfer.

The Medicines Act does not provide that there should be *ad hoc* regulations specifically in respect of transfer of a licence. The Medicines Authority on its part stated that the transfer was affected in line with section 71 of the Act that deals with the transfer of licences. This section states the Authority must be satisfied that "*the new licensee* (not licence) *complies*

with any requirement established by or under the Act". Complainant is not precise when she states that this section pre-supposes the existence of licence requirements established by regulations, and that therefore once no regulations exist, no transfer can be effected in terms of this section. Had the law stated "*by and under this Act"*, one could perhaps have understood the argument of a pre-supposition of the existence of regulations in respect of what is provided under section 71 of the Act. This is not the case.

11. Notwithstanding the above, complainant pointed out in her submissions that the Act "*speaks of respect of geographical and demographic criteria*". In actual fact section 66(2) specifies that "*licences are to be issued in accordance with geo-demographic criteria as may be established by regulations made under this Act*". The law does not define the term "*geo-demographic*" and this term is not included in the New Oxford Dictionary of English first published in 1998. The Maltese text of the law refers to "*kriterji ġeo-demografiċi*" which does not give any better indication. It would however not be unreasonable to consider these criteria as related to geography and demography. However the major difficulty in this case is that these criteria are those "*as may be established by regulations made under this Act*". The term "*may*" has been interpreted by the Courts in similar circumstances to mean "*shall*". The Maltese text is perhaps more clear. The text states *"skond kriterji ġeo-demografiċi stabbiliti permezz ta' liġi"*. It is therefore a mute point whether in the absence of such regulations, licences issued that are not in accordance with geo-demographic criteria as regulated under the Act could be considered to be valid. A strict interpretation of the law could suggest that once section 66 does not refer to "*new licences*" but to "*licences*", this interpretation should apply to every occasion when a licence is issued, including every renewal, and therefore no renewed licence (including complainant's) issued after the coming into force of the Medicines Act (November 2003) is valid. In other words, if this is the case, not only has the freeze imposed since 1996 become "*legal*", but all existing pharmacies are to be closed since every licence expired on the 31st December of each year also in terms of the Dispensaries (Licensing) Regulations 1984 that were retained as if prescribed under the Act. This is certainly not what the legislator intended and a more reasonable interpretation has to be sought.

It is valid to point out that the above-mentioned 1984 regulations do not contain any "*geo-demographic*" criteria/conditions since what can be considered as such were repealed in 1996 when regulation 5 of these

regulations was repealed. The same regulations, however, contain specific provisions regarding the condition and layout of the actual premises besides others in respect of the person applying for the licence, the materials and equipment to be kept as well as the way the pharmacy is to be run. It is moreover true that regulation 3 of these regulations lays down the conditions under which a licence "*may be granted or renewed*" but since this provision does not include geo-demographic considerations, it does not override the provision of the main law in respect of geo-demographic criteria.

12. I consider that it would be correct to interpret the law in the sense that once a licence has been granted to operate a pharmacy from specified premises, that licence gives a vested right to its holder to conduct his business therein. When the licence is due for renewal, such renewal has, as a rule, to be carried out unless there has been a breach of the conditions of the licence or incapacity of its holder.

Further considerations

13. From a purely legal standpoint I cannot but feel deeply concerned at a situation that, in my view, is highly unsatisfactory in so far as it has been allowed to develop in a way that does not appear to be in conformity with existing legal regulation. It seems that the licensing of pharmacies that the law rightly seeks to regulate in the public interest has been practically taken over and is, in substance if not in form, being controlled by interested commercial players. Essentially we have a situation where the parties, which the legislator seeks to regulate, have established themselves as regulators – a situation that might have been brought about through unavoidable expediency but is completely unacceptable because the policies and procedures being followed regarding licensing of pharmacies do not appear to be in conformity with specific legal provisions and, in some cases, are outrightly in conflict with them. I shall limit my comments to relevant provisions in Title 4 of chapter 458 The Medicines Act (Pharmacies and related pharmaceutical activity) – and to the relevant sections of the Dispensaries (Licensing) Regulations dated 6 July 1984 (Subsidiary Legislation 458.16) to which reference has already been made and which are still in force.

14. I should also point out that article 22 of Act XXI of 1995 imposes on the Ombudsman the duty that if, in his opinion, the subject matter of an investigation on a decision, act or omission of the public administration appears, *inter alia*, to have been contrary to law or was based wholly or partly on a mistake of law, to highlight this fact and to recommend an appropriate remedy. I have on various occasions pointed out that my opinion on the interpretation of legal provisions is not final. It is only the Courts that are vested with the authority to give a final and binding interpretation to legal provisions. The public administration is, however, bound to take note of my views in this respect and I expect that my opinion should be evaluated by legal officers advising the competent departments with a view to taking remedial measures where appropriate.

15. My investigation has given me an indication that my preoccupation on the way the relevant legal provisions regarding licensing of pharmacies are being applied or ignored is shared, to some extent, by the authorities. There are indications that measures are in hand to take steps that might, at least in part, allay my worst fears. In this context I shall highlight a number of the more important issues that to my mind require immediate attention.

(i) The Medicines Act provides that only one licence is required to open a pharmacy. That licence, issued in accordance with the provisions of the Act or any regulations made thereunder, is in respect of specific, identified premises that satisfies the established requirements. A licence certifies the quality of the building as possessing the required facilities (including equipment and materials) within which pharmaceutical activities can be exercised in conformity with existing regulations. That licence is therefore inextricably linked with the premises. It does not exist independently of it. It cannot therefore be transferred from the site to which it refers to another site.

(ii) The law provides for only one licence to be granted to the person whose name and address shall be indicated on the application, which has to identify the address of the premises that is to be used for the purpose of the retailed sale of the medicinal products and on which the pharmacy licence will be issued. The law does not, therefore, request or provide for a separate licence relative to the person who opens or keeps a pharmacy. That person (the holder of the licence) does not acquire any right to operate a pharmacy independently of the place identified in the licence. That licence therefore has no intrinsic value to its holder unless it can be utilised

and exercised within the premises to which it is addressed. This consideration is important when considering the issue of transfer of pharmacy licences.

(iii) Article 66(1) of chapter 458 provides that a pharmacy licence has to be issued "*in accordance with the provisions of this Act or any regulations made thereunder*". These regulations are in the main intended to ensure that the premises for which a license is applied for, structurally and otherwise, conforms strictly to established standards and criteria. The Third Schedule of chapter 458, on the other hand, defines the "*conditions and criteria where any person can have or not have a direct or indirect interest in a pharmacy*" as laid down in article 77. These include circumstances in which a person shall be disqualified from holding a pharmacy licence or from having that licence renewed. Relevant to the present case, it provides that no licence should be granted or renewed if *inter alia* "*a medical practitioner … has any direct or indirect interest in a pharmacy*".

(iv) This limitation to the capacity of a person to apply for and hold a pharmacy licence is only one, albeit essential, of the constitutive elements to be satisfied before the licence is granted. The personal incapacity of the applicant, if proven, would inevitably result in the rejection of the application for the issue or renewal of the licence. On the other hand, the grant of a licence to a person capable of holding such licence does not grant him the right to operate any pharmacy. It only grants him the right to operate a pharmacy in the premises specified in the licence. It is only that licence to operate a pharmacy within the strict parameters of its conditions and in the specified premises that has a marketable value and can be transferred by its holder through procedures established by law and regulation and after satisfying the authorities that the transferee also has no incapacity to acquire and hold such a licence. The licence remains valid till its expiry unless its holder becomes incapable, though the pharmacy would only be able to operate if transferred to a capable person.

(v) The Medicines Act only provides for the transfer of a pharmacy licence from one holder to another. It does not provide for the transfer of that licence from one premises to another. Article 71 stipulates that "*no person may transfer a licence unless authorised by the Licensing Authority which authorisation shall not be issued unless the Licensing Authority is satisfied that the new licensee complies with any requirement established*

by or under this Act …". This can only mean that the licensee has to be capable to hold the licence in the sense that he would not be disqualified from doing so because of a legal incapacity. He has also to satisfy the Licensing Authority that he would comply with any requirements established for the proper running of the pharmacy at the premises to which the licence refers.

(vi) In an effort to avoid this limitation, policies have been evolved on the so-called "*relocation*" of pharmacies. To my mind, this is a very dubious procedure which is not provided for either by law or regulation. The law does not provide for the transfer of premises for the operation of a pharmacy in a location different from that specified in the licence. In my view, the criteria set out by the Tripartite Committee (in which the regulator established by law is in a minority!) to regulate the processing of such applications are arbitrary and have no legal base or validity. The Committee exceeded its specific mandate under the 1998 agreement referred to earlier when it started to implement its policy when considering individual applications.

(vii) To avoid any misunderstanding, I point out that I am not suggesting that the established criteria are not intrinsically valid or that there should be no opportunity for the holder of a pharmacy licence to transfer his business to another premises in certain specific circumstances. I am only saying that, as the law stands today, such an application would require a new licence that has to be processed and approved within the context of all existing legislation at that time. It is therefore recommended that the principal law should be revisited to provide for this eventuality.

(viii) An even more serious matter is the failure of the Minister to issue regulations for the opening or keeping of a pharmacy. Article 66 of the Medicines Act categorically lays down that it shall not be lawful for any person to run a pharmacy unless he is in possession of a pharmacy licence issued in accordance with the provisions of the Act or any regulations made thereunder. To date no regulations have been made and, as stated, the regulations of 1984 (with the notable exception of former regulation 5 that regulated distances but which was repealed in 1996), are still being applied. Sub-clause 2 of article 66 expressly lays down that licenses "*are to be issued in accordance with geo-demographic criteria as may be established by regulations made under this Act*". As stated earlier, the term "*may*" has

been interpreted by the Courts in similar circumstances to mean "*shall*". It is therefore a moot point whether in the absence of such regulation, licenses issued that are not in accordance with established geo-demographic criteria as regulated under the Act could be considered to be valid.

(ix) Undoubtedly the criteria established by the Tripartite Committee that in the case of the so-called transfer of premises "*the new premises must be situated no less than 250 metres from another existing pharmacy*", and that "*the transfer must not negatively impact on a pending pharmacy application*" can in no way be considered to satisfy legal requirements. Geo-demographic criteria can only be established by regulation made under the parent Act and as provided in article 66(3) and (4). These provisions lay down with precision the *iter* to be followed by the Minister in formulating these regulations, in conjunction with the Licensing Authority, following a process of proper consultation. When the draft regulations finally become law, they are binding on every person including the Minister. Not even the Minister, let alone a consultative body made up of a majority of interest groups, would be able to change, amend or nullify them other than by further amending legislation observing the same procedure laid down by law.

(x) I have been given to understand that agreement may at long last be in sight on a draft of these regulations. It need not be stressed that any such draft has to be submitted for public consultation in terms of article 66(3) and (4) before being finally promulgated. It is regretted that four years have passed since the enactment of the Medicines Act without effective steps being taken to regulate in a proper manner the opening and keeping of pharmacies – an area which cannot but be considered to be an essential service, vital to public health. One augurs that in the formulation of the draft regulations, consultations by Government would have extended beyond discussions with interested bodies like the GRTU and the Chamber of Pharmacies and that the views of other bodies representing consumers, medical practitioners and NGOs have also been taken into account. One also expects that when the draft is published in the *Government Gazette*, due publicity be made to allow any person to make representations to the Minister within the period established by law for this purpose.

(xi) It is true that the Medicines Authority "*may, for the proper exercise of its functions … … also establish such advisory committees, as it may*

deem necessary, either for general or specific purposes" (subarticle 2 of article 6 of the Medicines Act).

I understand that the Medicines Authority participated in the Tripartite Committee to help it exercise its function "*to issue, renew, amend, vary, suspend or revoke any authorisation or licence that may be required by or under this Act*" which I must assume was delegated to it by the Licensing Authority as per subarticle 3 of article 3 of the Act. Irrespective of any reservation one could have on its composition, the Tripartite Committee can, at best, only qualify as a purely advisory committee with a specific purpose to recommend or otherwise the issue of new pharmacy licences. It had therefore no *vires* to impose criteria that, by law, have to be set out through subsidiary legislation. It certainly has no right to assume the power to approve applications, as it seems to have done in the present case and others.

(xii) The situation is even more unacceptable if, as I have been given to understand, the Superintendent of Public Health, personally, by law, appointed as the sole Licensing Authority, is *de facto* bound, if not forced, to abide by the Committee's decision. The Agreement stipulates that the Committee can only decide if there is the unanimous consent of the three parties represented on it. There is therefore another anomalous situation in which the Licensing Authority sits on a Committee together with two directly interested parties in the issue of pharmacy licenses, in a minority. In the absence of unanimity, the Authority is unable to exercise its functions at law. It is thus a situation that obviously renders suspect the advisory quality of the Committee through which all applications regarding pharmacy licences are being processed.

(xiii) Finally there is one other aspect that requires attention. This refers to the practice of issuing licences in the name of limited liability companies rather than in the name of an individual, physical person. In the latter case, that person is clearly personally responsible for the proper observance of the conditions of the licence and the duties imposed on him under the Medicines Act. In the former, where the licensee is a limited liability company, that responsibility may sometimes be difficult to establish. Moreover the applicability of the third schedule that regulates conditions and criteria where any person can have or not have direct or indirect interest in a pharmacy, could be neutralised unless the term "*indirect interest*" is better defined.

16. In this case not only was there a transfer of premises a long distance away from its former licensed location, but there was a personal transfer from one legal person (an individual) to another legally distinct person in a company. This is tantamount to issuing a new licence and besides not being acceptable in terms of the above-mentioned provision of the Act, also constitutes an improperly discriminatory application of the freeze that the Division has for several years been enforcing. This decision attracts criticism from this Office.

17. There are other issues of a legal nature that need to be addressed in this case. I refer to human rights issues.

The administrative decision freezing the granting of licences for the opening of pharmacies that has been enforced since 1996, has assumed new dimensions. What was apparently imposed on the strength of arbitrary discretionary powers, often used or abused by successive governments as a convenient administrative tool *inter alia* to monitor and control essential commercial activities, could, in my opinion, also as a result of the failure to issue regulations on geo-demographic criteria as implied in section 66(2) of the Act, be sanctioning the freeze. The exercise of powers (including those implied under this section) has today to be thoroughly examined and tested as to their conformity not only to the principles guiding a free market economy to which Malta subscribes but also to EU directives that promote and verify the workings of such a market. One has to recognize that Maltese citizens are rightly becoming more aware of the fundamental rights and liberties they enjoy in this field. It is a duty of this Office to focus on and highlight situations in which administrative actions appear to be in contrast, if not outright violation, of these rights. Actually freezing the issue of such licences because of failure (for whatever reason) to issue regulations under the Medicines Act as required under subsection 66(2), falls within this context.

18. It could be contested that the freeze under review violates the fundamental human right to work and is in conflict with EU directives and regulations on fair competition. I gave my considered opinion on this important issue in at least two earlier complaints, including Case No F 0533 published in *Case Notes No 22* issued in October 2006. This opinion is accessible on the Ombudsman's website and I will not repeat the same arguments.

I am however to reiterate that it is in my opinion high time that the whole situation be urgently reconsidered in the light of present circumstances and of the political and legal developments that have recently taken place and that must necessarily condition and guide government's action. In this case, the issue of regulations prescribing geo-demographic criteria is long overdue and is administratively untenable.

Conclusion

19. In the light of the above considerations, my conclusions are as follows:

- complainant is not correct in citing conflict of interest because of family relations of the owner of the pharmacy that was transferred nearer to her (complainant's) pharmacy since this relationship is not one that the Medicines Act specifies as an interest. Nor is complainant correct in quoting distances between the two pharmacies as one outside policy or old regulations;

- complainant's claim that the transfer of the pharmacy in question is not sanctioned by law is in my opinion justified since subsection 2 of section 66 of the Medicines Act would seem to require that geo-demographic criteria be prescribed by regulations prior to the issue of new pharmacy licences. The transfer in question, in view of the requested change of premises and change in the name of the licensee, amounts to the grant of a completely new licence; and

- it is not legally and administratively correct for Government to perpetuate the stagnant situation in respect of pharmacy licences by further postponing the issue of regulations in respect of geo-demographic criteria for the grant of pharmacy licences in terms of subsection 66(2) of the Medicines Act.

20. Since the freeze has now lasted nearly eleven years, I again strongly urge Government to resolve the present impasse. Considering that, in my opinion, the situation in question besides being legally and administratively untenable, constitutes a violation of fundamental human rights or, at least is a threat to them, I am recommending that such solution be reached as soon as possible. Government is obliged to publish without

further delay regulations on geo-demographic criteria in terms of subsection 66(2) of the Medicines Act.

I am communicating this opinion to the Attorney General for his attention and for any action he might deem proper and appropriate in the light of my considerations made in terms of article 22 of Act XXI of 1995.

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PUBLICATIONS

Annual Report 1995/1996	*Rapport Annwali 1995/1996*
Annual Report 1997	*Rapport Annwali 1997 (fil-qosor*)
Annual Report 1998	*Rapport Annwali 1998 (fil-qosor)*
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