Ombudsman

CASE NOTES

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Office of the Ombudsman
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MALTA

CONTENTS

From the Ombudsman's Caseload

Foreword

The central mission of the Ombudsman is to ensure that the right of every day people to quality service is respected and at the forefront of actions and decisions by government departments and state agencies.

This mission is fulfilled by the investigation of individual complaints that arrive at the door of the Ombudsman from citizens from all walks of life and whose limited resources are no match for the strength wielded by powerful public authorities. It is achieved by the sustained pursuit and the active promotion of the values that should guide public administration at all levels of authority and underpin the provision of public services to citizens in a fair, honest, transparent and accountable manner.

Equally important is the need to ensure that the wide service network that is available to citizens by public service providers is underpinned by a human touch in full homage to citizens' rightful expectations, aspirations and dignity. This Office believes that throughout the years it has been largely successful in its efforts to further promote the view that in its daily contacts with citizens the Maltese public sector should not only be guided by a customer-focused approach but should ensure that, regardless of people's background and situation, there is a genuine awareness of their individual concerns.

A complaints management system, whether across the large spread of government departments and public sector authorities or whether operated by the Office of the Ombudsman, can only be good, effective and adequate as long as it is based on respect for persons and guarantees a genuine response to remedy administrative shortcomings that may harm a citizen's quality of life, lead to distress or serve as obstacles in the path of administrative justice.

This publication looks at various diverse situations that were reported by citizens to the Ombudsman and which caused anxiety, frustration or a feeling of indignity. The case studies in this edition of *Case Notes* portray, among others, the concerns of employees who perform duties that pertain to

a higher grade for a long time without any proper recognition or remuneration; the anxiety of a patient undergoing treatment under the state system of healthcare services who is dismayed to learn that she will no longer be supplied the medical product which she had been using successfully for the last twenty years for the treatment of her condition; and the disappointment of a person who applied some fifteen years earlier to take over and reclaim a plot of government-owned land but whose application was dumped unceremoniously aside.

Other cases capture the dismay of a teacher who was aggrieved by the government's prolonged failure to constitute the Scholastic Tribunal to consider her appeal to be awarded a permanent teacher's warrant; the frustration of an employee whose case against his former employers was not handled properly by the Department of Industrial and Employment Relations; and the pain felt by a patient upon finding that he had to travel for urgent medical treatment abroad at his own expense when the government turned down his request for financial assistance.

The Office of the Ombudsman believes that in addressing these various concerns and providing fair and fast outcomes to complainants even in instances where outcomes are not favourable to them, the institution gives a human face to the relationship between citizens and public administration. This in turn helps to make government bureaucracy more approachable and more sensitive to citizens and at the same time less rigid and less towering above them.

Joseph Said Pullicino
Ombudsman

October 2008

Note

The names that appear in some of the case studies are fictitious and are meant to preserve the identity of complainants.

Case No G 233

ENEMALTA CORPORATION

The premises which were left empty for twenty years but still ran a hefty bill for electricity consumption

The complaint

The representative of a person born in Gozo but living in the USA who owned an old house on the island was visibly perturbed when Enemalta Corporation sent a bill for the payment of arrears amounting to Lm4,500 for the consumption of electricity in these premises. This person complained with the Office of the Ombudsman that once this property was closed and uninhabited for the last twenty years, the arrears claimed by the Corporation caused serious doubts because it was impossible that there had been any electricity consumption on such a massive scale in the premises during these years.

Facts of the case

The sequence of events as ascertained by the Ombudsman was as follows.

After a reading was taken of the electricity meter inside these premises, in November 2002 Enemalta Corporation issued a bill to complainant for arrears of electricity consumption amounting to Lm4,500 for March-July 2002. A similar reading had not been taken for several years and previous invoices, which were always duly settled, only referred to rental charges for the indoor electricity meter.

Complainant immediately informed the Corporation that the premises had been uninhabited for twenty years and asked for a revision of the bill. However, although the Corporation took into account the bulk entitlement of free units from 1996 to 2002 and reduced the amount by Lm950, she refused to accept even this revised bill. As the dispute dragged on, early in

December 2003 the Corporation changed the electricity meter inside the premises. In March 2005 Enemalta informed complainant that it would not revise again or withdraw this invoice since the old meter had been tested and found to work properly while the bill was worked on the basis of the last reading of the electricity meter in the premises.

After the old meter had been tested, Enemalta did not keep it in safe custody but instead, as it did in similar cases, put the meter away in a store for scrap equipment and after some time sent it with other disused items and parts to a crushing plant where the whole lot was destroyed. Although it was found that this electricity meter had been installed in the premises in November 1996, records held by the Corporation did not explain whether the meter had been changed as a result of a request for the installation of a new meter in the house. These records also indicated that the first reading on this meter stood at 1 unit and at 99,831 units by the time it was removed and sent for testing in late 2003.

When the old electricity meter was removed on 1 December 2003, the reading showed the same consumption level as on 10 July 2002 and this same reading was again registered in another inspection in November 2006; and these readings confirmed that no electricity consumption took place in these premises in the previous four years or so. Enemalta officials remained unimpressed and maintained that since the tests confirmed that the meter was in good working order, it was likely that the consumption recorded in the premises was due to leakage of electricity.

When asked to explain how it is possible for electricity consumption as registered by the meter to reach a daily average of 45 units – a consumption level that is on the high side even for an average family, let alone for uninhabited premises – technical personnel of the Corporation explained that there is no limit to the extent of electricity leakage when the installation is damaged.

The Corporation's file on these premises provided no information on what led to a reading of the electricity meter in this house in 2002 or that complainant had ever applied so that the meter would be tested. Neither was there any indication that she was asked to attend this test or to send a representative during the test that took place in an in-house facility belonging to Enemalta. This test revealed that the anti reverse mechanism

had not been broken and tampered with and so there was no suspicion that the meter had worked in a reverse direction.

It is possible for owners of unoccupied residences to fill a form so that invoices would only be issued in respect of electricity meter rentals and to bind themselves to pay for any electricity consumption that might be recorded inside their premises, regardless of the way in which it would have occurred. Although it did not appear that complainant ever filled any such form, the Corporation considered these premises as unoccupied and only issued invoices in respect of meter rental charges.

Considerations and comments

The Ombudsman made the initial observation that although the Ombudsman Act only allows him to consider complaints brought to his attention not later than six months after a complainant first knew about the matter and this grievance was time-barred, given that between the time when the problem arose and the submission of her grievance complainant did her best to resolve the matter, the Ombudsman decided to use his discretion and to investigate the issue.

The Ombudsman also decided to do so because the complaint brought to the fore that no internal procedures exist within Enemalta Corporation for the settlement of disputes that might arise from time to time with consumers. In this regard the Ombudsman was guided by the leaflet captioned *The Ombudsman's guide to standards of best practice for good public administration* published by his Office in May 2004 which states that in their dealing with citizens, employees should treat the public properly, fairly, openly and impartially; and dealing fairly with people means "*taking actions and decisions that …… allow for an internal review system so that adverse decisions can be reviewed by someone not involved in the first decision*."

The Ombudsman observed that it was heartening to note that complainant never lamented about the treatment given to her by the Corporation during the dispute or complained that the Corporation did not heed her concerns. Throughout his investigation he came across evidence that Enemalta's Customer Care Section gave its full attention to complainant's situation and correspondence exchanged with her was marked by a sense of cooperation

and understanding and a keen resolve to settle the issue in a positive manner.

The Ombudsman commented that it might be argued in this situation that once the meter was found in good working order, the person who was responsible had no alternative but to settle the bill. It might also be argued that it is not the responsibility of the Corporation to establish who was responsible for this consumption especially since, according to technical personnel, in old and deserted buildings it is likely that electricity consumption happens as a result of deterioration in the internal installation for which the owner is responsible.

Notwithstanding this, the Ombudsman observed that if the Corporation had in place a formal system of internal review that would be autonomous and independent, complainant's interest would have been safeguarded better. In this way the case would not have dragged on for several years but would have been settled in a shorter time. It would also have meant that it would have been easier for the persons involved to recall the way in which events developed and could also have enabled the meter at the centre of the dispute to be preserved for a second check by independent technical personnel before being destroyed.

The Ombudsman commented that this case showed that by itself an efficient customer care facility is not enough to provide an effective remedy in disputes that may arise between consumers and Enemalta Corporation. It also showed that whenever consumers contest issues about the quality of the service provided to them as well as payments due, it is proper to expect an appropriate mechanism to be in place that can investigate complaints thoroughly and provide a satisfactory solution as an alternative method of dispute resolution without resort to the courts of law. By means of a proper formal system of internal review, the rights of consumers would be better upheld and investigations could be undertaken under a set of established procedures that would be made known to all and sundry.

The Ombudsman agreed that Enemalta regulations were right to provide that tests indicating that a meter is in good working order are considered as conclusive proof on the consumption of electricity in the premises where the meter is registered. He stated, however, that this is merely a presumption *juris tantum* in the sense that a consumer should always have the right to justify his claim to be released from payment of a disputed amount in the

courts of law on the grounds that the consumer was not responsible for the consumption that was recorded. This explains why the Corporation ought to have taken all necessary precautions to preserve the meter so that it could be tested with complainant's knowledge and, possibly, also in her presence.

Since any consumer is entitled to contest in court a bill issued by the Corporation on the grounds that the meter was not functioning properly or that it was not properly maintained, this places upon the Corporation an added obligation to preserve the meter in a good condition so as to be able to exhibit it as evidence in court.

On this basis the Ombudsman was of the opinion that Enemalta's failure to take appropriate measures to keep the meter in safe custody constituted a grave shortcoming on its part and that this shortcoming was aggravated by the hefty amount of the bill. He considered the explanation given by Enemalta that there might have been deficiencies in the electrical installation inside the building which over the years had fallen into a state of disrepair as merely a hypothesis and stated that the Corporation should have undertaken a technical exercise to establish whether the consumption that was registered was due to actual consumption or to a leak from a defective installation. The Corporation, however, failed to do so and gave no explanation about what might have caused the excessive consumption to allow complainant an opportunity to verify this strange occurrence.

The Ombudsman considered Enemalta's failure to ensure the proper storage of the meter as another shortcoming. Although the Corporation relied on regulations 61 and 62 of its Electricity Supply Regulations that state that its own tests are binding and that consumers are obliged to settle bills according to the results of these tests[1], it is vital for the Corporation to apply its regulations in a reasonable manner, especially when there are grounds to

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[1] Regulations 61 and 62 of the Electricity Supply Regulations state as follows:

"61. Meters shall be tested by Enemalta Corporation on application being made by the consumer, who may be present for the test.

62. The result of the test shall be binding on the consumer as well as on Enemalta and the consumption of current from the date of the commencement of the period covered by the account which is challenged up to the test or the removal of the meter for the purpose of testing, shall be calculated in accordance with the result of such test and charged accordingly."

believe that the contestation of an invoice is well founded and when results of any such technical tests should only be binding as long as they are done properly and in accordance with these regulations.

Since his investigation confirmed that complainant had not submitted an application to have the meter tested, the Ombudsman observed that if she had sent any such application she would have been bound to accept the conditions that are linked to these tests including the condition that results of these tests are binding on both parties. On the other hand, however, since the Corporation unilaterally removed the meter from the premises and carried out technical tests even though complainant had not sent an application for these tests, the Ombudsman was of the opinion that she was not bound to accept the results of these tests as binding despite claims by the Corporation that results were final. Nor was she bound to accept Enemalta's insistence that payment was due once the meter was found in good working order.

The Ombudsman stated that he was not implying that the Corporation was wrong to carry out these tests as a first step to check whether the consumption that had been registered was correct but argued that in his view the Corporation had not acted properly when it carried out its tests without having earlier informed complainant and without allowing her to be present or to send a representative on her behalf to attend these tests. If Enemalta's Electricity Supply Regulations allow consumers who contest a bill to request to have the meter tested and allow them the right to be told when these tests will be done and to attend, complainant was even more entitled to these rights when the test was being done at the sole initiative of the Corporation, the bill was exceptionally high and it was known all along that the meter would be shortly destroyed.

The Ombudsman was critical of the destruction by the Corporation of the meter at a time when the dispute was not yet resolved. This meant that Enemalta destroyed the best evidence that it could ever have to prove beyond any reasonable doubt that the arrears were in fact due and as a result it had no proof regarding actual consumption level in the house except for the reading taken by the meter reader. However, once this meter no longer existed, the technical investigation carried out *ex parte* on it had little probatory value and the reading of consumption in the premises by Corporation personnel did not constitute the best proof that could be presented on the amount of electricity consumed on the premises.

Complainant was therefore in a position to claim that the Corporation was unable at this point to prove conclusively that the contested amount was really due even if the Electricity Supply Regulations were observed.

The Ombudsman admitted that Enemalta management has necessarily to be rigid in the application of its rules and regulations to ensure that consumers pay what is due for services rendered to them and that these regulations should be based on the assumption that whoever asks for a service and is provided with this service should be held responsible for settlement of all dues arising from the supply of this service.

At the same time, however, despite the Ombudsman's appreciation of the Corporation's efforts to develop a stronger customer-oriented mentality and to be more transparent in procedures concerning the provision of its services and payment for these services while giving consumers appropriate explanations about their complaints, the Ombudsman commented that in his view the Corporation at this stage needed a quality leap so as to offer additionally to its customers a service that respects administrative justice. In this way when consumers contest on well-grounded considerations any invoices issued by the Corporation, these contestations can be given a fair airing and a decision can be reached in an impartial and independent manner in full observance of the principles of good administration.

The Ombudsman finally referred to other considerations in this case that militate in favour of complainant. Enemalta management insisted that the account holder failed when for many years she did not make arrangements for the meter to be read by the Corporation. If this had been done and Enemalta was allowed periodic access to the installation, the reading of the heavy and abnormal actual consumption levels in these uninhabited premises would have taken place before and the problem would have been detected earlier.

The Ombudsman, however, commented that there was a counter argument to this point of view. He wondered why for several years the Corporation had sent invoices that covered only rental charges when complainant had not followed established procedures and had not applied to the Corporation to classify the premises as uninhabited. He stated that only if she had done so would she have been bound to settle amounts that would have resulted as being due.

The Ombudsman's investigation revealed other shortcomings by Enemalta such as the absence of any details in its files regarding the premises in question. As a result the Corporation was unable to provide information regarding circumstances in 1996 that led to the removal of the meter installation in these premises and why this had been done.

Conclusion

Although Enemalta Corporation held that on the strength of its own Electricity Supply Regulations its reading was correct and that electricity consumption in these premises was that registered on its meter, the Ombudsman was of the opinion that the Corporation's claim would have been acceptable if any of the following options had been followed:

(a) if complainant had sent an application for the Corporation to classify the premises as uninhabited since in this way she would have been bound to accept to settle bills for any consumption registered during this period; or
(b) if complainant herself had applied so that the meter would be tested since in this way she would have been deemed to have accepted regulation 62 of the Electricity Supply Regulations; or
(c) if the meter had been tested in the presence of complainant or her technical representative since this would have implied that she accepted the results of the test.

Since none of these options had been followed, the Ombudsman was of the view that Enemalta had no grounds on which it could insist on settlement by complainant of the arrears and recommended that the Corporation should:

- no longer insist on payment of the outstanding amount;
- take due account of the administrative shortcomings that emerged from his investigation and take the necessary steps so that a similar case will not happen again; and
- consider the setting up of an appropriate review mechanism where consumers with well-grounded reservations about service provision by the Corporation or about its billing will be able to resort so that their grievances will be considered and resolved in an impartial and independent manner.

Following an exchange of correspondence with the Office of the Ombudsman, Enemalta Corporation agreed to implement a number of general recommendations that were put forward by the Ombudsman and also agreed to revise in a drastic manner the amount of its bill to complainant which went down to Lm110.

Case No G 374

INLAND REVENUE DEPARTMENT

The couple who insisted on receiving their full due

The complaint

A middle-aged couple complained with the Office of the Ombudsman that the Inland Revenue Department failed to send a refund that was due to them following an additional *causa mortis* declaration that they filed in their income tax return for the year of assessment 2005 under the item for income derived from capital gains.

While the Ombudsman's investigation was under way, the Inland Revenue Department issued a refund to complainants. The couple insisted, however, that they ought to be given the correct amount of interest due to them by the department as a result of its mistake in withholding capital gains tax amounts that were not owed in the first place.

Facts of the case

Like two other co-owners complainants were entitled to a refund of Lm1,050 following the sale of property which was sold in one contract. However, whereas the share of the refund due to the other co-owners was issued to them in January 2006 without the need to send an *ad hoc* application, things were somewhat different in the case of complainants because the Inland Revenue Department merely sent them an unsigned and undated Adjustment Form (Form AF) without any explanation and without the payment of any refund. This was in sharp contrast with the way in which the department treated the other co-owners who were not required to fill in Form AF and were refunded the money due to them without any delay or any further enquiry by the department.

When complainants expressed their concern with the Taxpayer Service Unit of the department about this different treatment, they were merely told to fill in the form and to send it back and even warned that payment of the refund might take some time. Complainants were taken aback by this reply because they had filled their income tax assessment forms in an identical manner and had submitted identical attachments giving accurate and detailed information as the other co-owners.

Although the Inland Revenue Department eventually settled the refund of Lm1,050 on 3 October 2006, complainants maintained that since the department was bound to pay this refund by 1 January 2006, they should be paid interest on this amount by the department as from this date up to the time when payment was finally effected.

When approached by the Office of the Ombudsman, the Commissioner of Inland Revenue explained that Adjustment Form AF was mailed to complainants following their objection to their tax statement for the year of assessment 2005. While admitting that no accompanying literature was sent to them with this Adjustment Form and that no explanation was given to them about the department's action, the Commissioner pointed out that since the Adjustment Form was dispatched in reply to complainants' letter of objection, officials of his department assumed that complainants would understand that they had to fill in this form and return it to the department. The Commissioner also confirmed that complainants had called personally at his department for clarification and asked for advice on the forms that needed to be filled so that the refund would be issued and were given an explanation about the procedures that had to be followed so that the matter would be settled.

The department explained that the misunderstanding arose because of the difference between an Adjustment Form (AF) and an Adjustment Form I (AF1). Upon filing an income tax assessment form with the Inland Revenue Department, a taxpayer may receive an AF to indicate that a mistake had been made by the department that needed to be corrected. It is the department's policy to process these Adjustment Forms as soon as these forms are returned by taxpayers so as to avoid paying interest on any amount due.

On the other hand an Adjustment Form I also indicates that a mistake, attributable to a taxpayer, was being verified and might need to be

corrected. The department is bound by law to process these forms within twelve months so as to allow both the taxpayer and the department itself adequate time to make the necessary adjustments in the notice of assessments.

It emerged that in this case instead of an Adjustment Form that was applicable in their situation, complainants filled an Adjustment Form I. They insisted, however, that the presentation of the wrong form was not their fault and that they had been badly advised by officials of the Inland Revenue Department. As a result they were adamant that interest due to them should be paid in full as from 1 January to 3 October 2006 and not only up to April 2006 as the department had in fact done.

At the same time the department held that it was not to blame for complainants' mistake and stuck to the view that if complainants had filled in and returned the Adjustment Form sent to them in March 2006, it would have processed this form and settled the amount due by April 2006. If this procedure had been followed, the department would have been bound to pay the sum of Lm42 in interest to complainants up to April 2006 – and this was the amount that it was prepared to pay.

Considerations by the Ombudsman

The Ombudsman pointed out that complainants did not contest the fact that the Adjustment Form sent by the Inland Revenue Department was the correct one. This meant that if they had filled it properly and sent it on time, the maximum amount of interest that the department would have been liable to pay them would have been Lm42 – and the department had shown its readiness to pay this amount and had in fact done so.

At the same time despite efforts to unravel the way in which the issue developed, the Office of the Ombudsman was not able to determine conclusively whether complainant's blunder in sending the wrong form was the result of mistaken advice given to them by officials of the Inland Revenue Department. Doubts remained whether complainants gave the correct facts to officials of the department to whom they had spoken or whether these officials had understood properly the facts of the case.

Since it proved difficult to establish who was responsible for the way in which events happened, the Ombudsman concluded that all in all the whole incident was somewhat unfortunate. The department on its part had shown its willingness to be understanding towards complainants and had offered to go half way by proposing to pay the maximum amount of interest that complainants would have been entitled to if they had filled the proper adjustment form.

The Ombudsman also noted that in the meantime the Inland Revenue Department had taken steps to accompany all adjustment forms sent to taxpayers by an explanatory note to provide better guidance to taxpayers and avoid the possibility of misunderstandings.

Conclusions

Taking everything into account the Ombudsman was of the opinion that in the circumstances complainants should accept the sum of Lm42 in interest up to April 2006 that had been offered by the department in full and final settlement.

The Ombudsman also commented that once the Inland Revenue Department had readily recognized its shortcoming when it used to mail forms to taxpayers without providing any explanatory background information and once it had already taken remedial action to avoid any misunderstanding, there was no need for him to make any further recommendations.

Case No G 518

HEALTH DIVISION

A delicate decision on a patient's entitlement to a medical product under free medical aid

The complaint

A patient undergoing treatment under the system of healthcare services provided by the government lodged a complaint with the Office of the Ombudsman. In her grievance she alleged that the Health Division had acted in an unjust manner when it turned down a request made on her behalf by the specialist who was responsible for her treatment to continue to be supplied free of charge a medical product which she had been using for the last twenty years for the treatment of her medical condition.

Complainant explained that the health authorities decided not to provide this preparation any longer but to supply instead a different product which had the same active ingredient but in different doses. She claimed that this new product was not as effective as the first product and that it was causing several side effects that were detrimental to her overall health and to her general standards of wellbeing.

Findings and considerations

The Ombudsman found that the medical product which complainant wanted to continue to use was listed in Malta's national formulary that contains a list of the various medicines available under the government healthcare system. For several years complainant had been regularly supplied with this product for her medical condition which is listed as one of the conditions in respect of which free medical aid may be provided under the Fifth Schedule of the Social Security Act.

The Ombudsman learnt that early in 2006 the Health Division decided to stop providing this product to patients and deleted it from the national formulary on the advice of specialists in the field to which complainant's medical condition pertained who recommended its replacement by a new product that was found to produce less adverse side effects than the previous preparation. This new product was introduced in the national formulary despite the fact that it is more expensive.

The Health Division explained that since its policy excludes the supply of specific branded products for individual patients, reasoned requests by specialists to the authorities to provide these products are turned down; and this was what had happened in complainant's case. In the circumstances the division suggested that since the product which complainant was asking for was no longer being made available to patients, she could request her physician to make arrangements with the local importer to bring this product to Malta at her own expense.

The Social Security Act provides that a person who satisfies the means test or suffers from a chronic medical condition listed in the Fifth Schedule to the Act is entitled to free medical aid. Another condition that entitles a person to free medical aid is that the Chief Government Medical Officer must recognise that the particular medicine being given to the patient is beneficial and that it is available.

The Ombudsman noted that although complainant satisfied all the conditions listed in the Social Security Act for the free supply of the item in question, the product was not, however, available within the government health service. On these grounds it could be argued that since one of the basic conditions laid down by law, namely availability, was not being satisfied, complainant cannot claim that she is entitled to the supply of this product free of charge from the national health service.

This approach, however, begs the question as to what is meant exactly by the word "*available*" in subarticle 23(1) of the Social Security Act[1] especially since the Act itself does not provide any definition and this

[1] "*Subject to the provisions of this Act, a person who is the head of a household shall be entitled to such free medical aid as is specified hereunder, that is the supply of such drugs, spectacles, dentures and other prosthetic aids as in the opinion of the Chief Government Medical Officer are indicated in his case and are available …*" [subarticle 23(1) of the Social Security Act]

renders the term open to interpretation such as, for instance, whether availability of any such medical product refers to the government health services or whether it should it be given a broader and wider meaning. The Ombudsman pointed out that this could mean that even if not acting arbitrarily, the Health Division can stop providing a medical product that has been proven to be effective and remove it from the national formulary and argue that it cannot be given to patients because it is no longer available despite the fact that a patient genuinely needs this preparation and cannot use an alternative preparation that is available within the national health system. The Ombudsman observed that this in turn raises the question whether there should not, for a very valid reason, be exceptions to this interpretation given to the policy adopted by the Health Division regarding availability.

The Ombudsman understood that the policy of the health authorities is that for the treatment of various chronic conditions listed under the Fifth Schedule of the Social Security Act there is an established range of medicines in the national health formulary that can be prescribed for free to patients suffering from these conditions. The Ombudsman also understood that whenever a consultant decides that a patient requires a medicine that is not included in the formulary, the only option to the patient involved is to make arrangements to procure this medicine himself. Furthermore, it is not the policy of the Health Division to procure a different brand of product having the same active ingredient as that available in the hospital pharmacy.

Since the Ombudsman gathered that complainant's request was turned down for the above reasons, he remarked that it is the function of the health authorities to set and establish national health policies and as long as these policies are not discriminatory or manifestly unjust, it is not the function of his Office to interfere with these policies or to question the grounds of these decisions. Nor could he find fault with or criticize the refusal by the Health Division to make an exception to this policy in this case although one cannot but sympathize with complainant's predicament while at the same time appreciating the implications that are bound to arise if the Division were to make exceptions to this policy.

The Ombudsman pointed out that although in this case it could be argued that an exception could be made because the product that was first supplied to complainant was cheaper than the second product that was in stock and the Health Division could in fact make savings by resorting to the first

product, this line of reasoning was rather precarious. Occasions might arise in future where the product being requested could turn out to be more expensive than the one that is in stock and that appears on the national formulary – and a refusal by the authorities to accept this request could lay them open to the charge of cutting down on costs against the interests of the health of their patients.

The Ombudsman observed that in this case a patient who had been coping well with her chronic condition for several years while being administered a specific product, found herself in a situation where this product was substituted by another product which contained a more concentrated form of the same active ingredient as that found in the first product. Since it had been found, however, that complainant could not tolerate the new product because it caused health and other associated problems, the Ombudsman pointed out that in his opinion this situation would argue for special consideration and for an exception to be made.

The Ombudsman confirmed that the decision by the Health Division to replace the first product with a substitute product was based on the advice of specialists in the field of complainant's medical problem. However, though according to these specialists the new product was more effective and caused less irritation to patients, this was not so with complainant.

At this stage the Ombudsman pointed out that it would not be amiss to reflect on the interpretation of article 23 of the Social Security Act that provides for the supply of free medical aid and also allows free treatment for diseases and conditions that are specified in Part II of the Fifth Schedule to the Act. In this regard he observed that:

- the law expressly lists the criteria which enable a person to be "*entitled*" to free medical aid and makes no reference to the need for any such person to undergo a means test and in fact subarticle 23(3) of the Act states that the condition set out in subarticle 23(1b) which relates to the means testing of a patient does not apply to treatment that is applicable to any disease or condition that is specified in Part II of the Fifth Schedule to the Act;
- in the context of subarticle 23(1) reference to a person "*entitled*" to free medical aid confers a right upon any person who qualifies for this aid that the local health authorities have a duty to respect and to satisfy. This is not an option for them; neither is it discretionary. The

health authorities have therefore the duty to provide an individual who suffers from the diseases or from the conditions that appear in the Schedule with the necessary treatment and without any discrimination;

- the Ombudsman insisted that the patient's right is unconditional and is only subject to two specific requirements that the Chief Government Medical Officer has to observe, namely that the medical aid being provided to the patient "*is in the opinion of the Chief Government Medical Officer ….. indicated ….. and ….. available*." The law also provides that the CGMO is to form his opinion on the strength of a consultation process that, according to the Ombudsman, is being strictly followed on the basis of a set of transparent and fair guidelines.

The Ombudsman observed that the law imposes upon the CGMO the duty to determine the type of treatment that is indicated according to the specific circumstances of the individual patient once it has been ascertained that the patient suffers a condition that is listed in the Fifth Schedule. This means in effect that it is not sufficient for the CGMO to determine in a general way what treatment should be made available for a particular condition or disease. The CGMO has also to establish whether the treatment is indicated in the case of an individual who submits medical evidence that the type of free treatment given is not indicated to his condition but could, possibly, even be detrimental to his overall sense of wellbeing.

The Ombudsman also pointed out that in the event that in the opinion of the CGMO it is found that the type of free treatment made available by the Health Division is indicated in the case of a patient, this individual could not then in the exercise of his right to entitlement for free medicine establish himself what type, brand or quality of drug he would wish to take. In similar circumstances the patient is bound to take the drug that is available and if he refuses to take this particular drug, he can only take alternative treatment at his own cost. If, however, on the other hand, the treatment is in the opinion of the CGMO not indicated, the CGMO cannot direct him to take what is available, regardless of the consequences. Nor can the CGMO refuse to provide an appropriate treatment to which the individual is by law entitled since it is his duty to make available to any such patient the treatment that is considered necessary after ensuring that the patient's condition is one that entitles this patient to free medical treatment under the Fifth Schedule.

The Ombudsman applied the above considerations to the present case and reached the following conclusions:

(i) it has to be objectively established that complainant is suffering from one of the conditions listed in the Fifth Schedule;
(ii) if it is proved to be so, complainant has the right to receive free treatment that is appropriate to her condition;
(iii) for this purpose the treatment appropriate to complainant's condition has to be decided upon by the CGMO in consultation with his expert advisers as laid down by law;
(iv) the decision by the CGMO on this issue is final and not subject to scrutiny;
(v) if the CGMO is of the opinion that complainant's condition cannot be relieved with the available treatment, it is his duty to provide and to make available appropriate alternative treatment and complainant has no right to dictate what free treatment she should be given as long as the one which is offered is suitably indicated for her condition;
(vi) if the CGMO is of the opinion that her condition can be treated with the available treatment following an expert specialist assessment of her case, complainant cannot expect to be treated differently from other parties suffering from the same condition and the CGMO would be justified to refuse to accept her complaint.

The Ombudsman understood that these basic considerations might not correspond completely with the interpretation of the legal provisions given by the national health authorities. Fully aware of the administrative difficulties that such an interpretation might give rise to, the person heading these authorities told the Ombudsman that he favours a more rigid approach that would exclude any individual assessment of particular individuals in an effort to ensure uniformity and curb abuse.

The Ombudsman, however, expressed his own serious reservations whether this interpretation is correct and strongly advised the department to revisit the issue and to take proper legal advice to ensure conformity with the law. Pointing out that he understood that there was a time when attempts were made to adapt the system of dispensing free medicines under the Fifth Schedule in conformity with the general lines of his recommendations, the Ombudsman believed that as far as this case is concerned it was proper to

consider this complaint on its own taking into account the exceptional circumstances that had given rise to this situation.

Conclusions and recommendations

In the light of these considerations the Ombudsman concluded that:

- there was no doubt at all that in this case the Social Security Act did not entitle complainant to this medical product on the basis that it was not available;

- since the decision to replace the first product was taken on the advice of specialists on the grounds that this new product was known to be more effective even if more expensive, this decision was based on sound arguments. However, in view of the difference in concentration of the active ingredient it is not a question of the same product under a different brand name;

- the health authorities' policy in respect of the treatment of patients suffering from listed chronic conditions is to supply them with medicines that are included in the national formulary. It is not the policy to provide in the formulary a different brand of a product having the same ingredients and while understanding the difficulties of introducing exceptions to a policy, the Ombudsman considered that in this case there might exist special circumstances that would warrant special consideration.

The Ombudsman concluded that his Office does not have the competence to decide that complainant should be provided with the second medical product instead of the first one. He therefore recommended that in view of the special circumstances of this case, the health authorities should appoint a panel that would include a senior medical administrator and two dermatologists, one of whom had been party to the original advice to replace the first product with the second one, in order to examine complainant and advise whether an exception should be made in her case.

Following a detailed investigation of the issue and aware of the fact that complainant had declined to try out any other reasonable alternative treatment recommended by her consultant dermatologist, the medical board

that was set up by the Health Division agreed that there should be no exception to the policy adopted by the health authorities that once a drug is deleted from the formulary, branded products are not to be provided to individual patients on a non-formulary basis.

Case No G 553

DEPARTMENT FOR THE CARE OF THE ELDERLY AND COMMUNITY CARE

The ups and downs in the career of a social carer

The complaint

A Social Worker in the Department for the Care of the Elderly and Community Care who, among other duties, was entrusted in 2004 with responsibility to head the Social Work Unit felt aggrieved when the department failed to issue calls for applications to fill long-standing vacancies in the grades of Principal Social Worker and Senior Social Worker.

In her complaint with the Office of the Ombudsman the employee alleged that this was in breach of the collective agreement for Social Workers in the public service whereby calls for applications for vacant posts are to be issued within a period of six months that vacancies arise. She claimed that if these calls for applications had been issued at the time when they were due, the calls were bound to be internal ones restricted to employees already in post and in this way she would have been the only qualified person who could fill the vacancy.

The employee also claimed that she deserved financial compensation for having performed higher additional duties since 1996 when she had been assigned the role of Officer-in-Charge of the department's Home Help Service and since 2004 when she had also served as Head of the Social Work Unit where these duties were above her substantive grade.

Reactions by the Health Division

When the Office of the Ombudsman referred these complaints to the Health Division, it was found that complainant had been deployed on social work duties since 1987. She had been responsible for the Home Help Service since 2004 and was subsequently entrusted with administrative duties at the Social Work Unit together with other clinical responsibilities in the same way as the five other Social Workers working in the department.

The Health Division explained that all the six Social Workers in the Social Work Unit in the Department for the Care of the Elderly and Community Care have their own separate catchment area that virtually generates the same workload. At the same time, being the employee with the greatest relevant seniority in this Unit, complainant was also required to perform administrative work such as the keeping of records on a database and the compilation of monthly and annual reports for the department. The Health Division did not agree, however, that by performing these duties complainant was in any way being asked to deputize for either a Senior Social Worker or a Principal Social Worker and explained that as the most senior member in the team, she was merely being asked to carry out some administrative duties that are considered an integral part of her responsibilities.

The Division also referred to complainant's assumption that if a call for applications for a Senior Social Worker or a Principal Social Worker had been issued when it was due, she would have qualified as of right for this appointment. The Division explained that this was far from being the case since any such call would have been open to all Social Workers and the appointment would only have been made after a thorough selection process in which there was no guarantee that she would have been the successful candidate.

The Health Division went on to explain that although the Department for the Care of the Elderly and Community Care requested authorization to issue a call for applications for the post of Principal Social Worker in July 2006, however, in view of budgetary constraints and of the widespread shortage of human resources in the caring professions, manpower requirements were ranked in accordance with a priority list so as to reflect better overall service needs. In the light of this exercise the recruitment of a Principal Social Worker was not considered to deserve a high priority status also in view of

the main concern at that time on the recruitment of staff needed for the opening of Mater Dei Hospital in 2007.

Facts and findings

The Ombudsman noted that in a call for applications issued a few years earlier in the *Government Gazette* by the Health Division for the post of Senior Social Worker, the main duties included:

- responsibility for areas of practice requiring advanced techniques in social work intervention;
- monitoring of staff performance with agreed objectives and standards;
- supervision of social work staff through regular group sessions, case conferences and review meetings to ensure that reviews, assessments and decisions about clients are effected by staff in line with patients' needs;
- contribution to the development of the division's policies in the field of service delivery in social work;
- ongoing appraisal of needs with a view to the production of a service development plan aimed at meeting the policies and requirements of the Health Division;
- evaluation of the impact of the service by the Social Work Unit on the quality of life of clients; and
- keeping of case records, preparation of reports and the performance of other duties to ensure the smooth running of welfare services.

Complainant insisted that for several years she had been performing all these duties in addition to her own workload as a Social Worker.

When the Ombudsman requested the Department for the Care of the Elderly and Community Care to provide information about the duties that complainant was performing, it was established that she carried out most of the duties pertaining to a Senior Social Worker and to a Principal Social Worker. The Ombudsman also learnt from two other employees who held an appointment as a Principal Social Worker and as a Senior Social Worker in the department before they left to take up other duties elsewhere that the tasks being performed by complainant were the same tasks that they previously used to do. On these grounds there was therefore no doubt that

complainant was performing duties that were above her own substantive grade as Social Worker.

The Ombudsman found that the agreement between the government and trade unions representing Social Workers in October 2001 changed the grading structure of the class of Social Workers into Principal Social Workers, Senior Social Workers and Social Workers. He also noted that paragraphs 4.5 and 4.7 of the 2001 Agreement provided as follows:

"*4.5 Entry into the grade of Senior Social Worker will be by a public call for applications open to persons in possession of a post graduate qualification related to social work. Applications will also be accepted from Social Workers with ten years satisfactory service in the grade of Social Worker and/or in the previous grades of Registered and/or Accredited Social Worker.*

…..

4.7 Entry into the grade of Principal Social Worker will be by a public call for applications open to persons in possession of a higher postgraduate qualification related to social work. Applications will also be accepted from persons in possession of a postgraduate qualification related to social work and four years full time social work experience. Senior Social Workers with five years satisfactory service in the grade are also eligible to apply."

This meant that the 2001 Agreement replaced previous conditions for career advancement and that henceforth a vacancy for a Senior Social Worker or for a Principal Social Worker was to be filled following the issue of an open call for applications by the department.

The Ombudsman also considered the section in the Public Service Management Code that provides for the award of a deputizing allowance to officials in salary scales from 1 to 10 who are required to perform higher duties. Section 2.4.5.7 of the Code (as it was at the time that the Ombudsman reviewed this complaint[1]) stated as follows:

"*The payment of this allowance is only made in cases which satisfy all the following conditions:*

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[1] Now section 2.4.5.6 as per the Public Service Management Code, 9th edition, June 2008.

(a) the position for which the allowance is to be paid is considered to be a key position within the department (e.g., at least a head of large section or branch or of an area office or of a small department);
(b) an officer has been formally assigned in writing by the Head of Department to deputise in a senior position;
(c) the deputising is made for a period exceeding 3 months (the payment of the allowance will start after the third month of deputising but will cover the whole period of deputising);
(d) the senior position has been declared vacant following the promotion, retirement, resignation of the former incumbent; absence on long leave by the holder of the senior position does not qualify for payment of the allowance; and
(e) the officer in receipt of the allowance continues to perform his day-to-day duties in addition to carrying out the duties and assuming the full responsibility of the senior position."

During contacts with the Ombudsman regarding this grievance, the national health management authorities insisted that they did not agree that complainant was deputising for any other official. They explained that she was merely assigned responsibility to lead the Home Help Unit in the Department for the Care of the Elderly and Community Care and that it was only from 2004 that she was entrusted with duties that involved coordination of the activities of the Social Work Unit.

From further contacts between the Ombudsman and the two employees whom complainant had substituted, it was confirmed that besides performing duties pertaining to the grades of Principal Social Worker and Senior Social Worker when they were employed in the Department for the Care of the Elderly and Community Care, they were also involved in the running of the Home Help Unit and in the setting up of Day Centres as well as other duties related to the Telecare Service. The Ombudsman understood that complainant's range of duties covered these tasks as well.

Considerations and comments

The Ombudsman observed that two issues needed to be determined in connection with this complaint: the alleged failure by the Health Division to issue a call for applications to fill an existing vacancy; and the issue whether complainant was performing duties that were above her grade.

The Ombudsman noted with regard to the first issue that the Health Division did not deny the existence of a vacancy but deemed the post in question did not deserve priority in view of more urgent priorities in its manpower plan as well as budgetary constraints. In the circumstances the Ombudsman was of the opinion that it was not within his remit to decide or to pass judgement on the manpower requirements facing the Health Division and the way that it established its own priorities. Nor was it his function to determine if and when a call for applications should be issued to fill vacancies in a government department.

In view of this stance, the Ombudsman felt that he could not consider complainant's argument that if a call for application had been issued before 2001 this call would have been restricted to existing employees and in this case she would have been an automatic choice.

The Health Division maintained with regard to the second issue that complainant's duties were compatible with her grade and position as the most senior Social Worker in the department. The Ombudsman reasoned, however, that although the health authorities would be correct to hold this view if they compared her current range of duties with those carried out by the employees whom she substituted, on the other hand the only yardstick that should be applied in this case to guide his judgement was the official job description of a Senior Social Worker and not the tasks that her predecessors used to perform.

Evidence available to the Ombudsman confirmed that when complainant's current duties were compared to those of a Senior Social Worker, it emerged clearly that for several years she had been performing the duties of a Senior Social Worker. Moreover the Ombudsman understood that a vacancy existed in the grade of Senior Social Worker and that this post forms an integral part of the department's complement of Social Workers.

The Ombudsman stated in his Final Opinion that in analogous situations his Office had repeatedly held that an employee is expected to perform duties pertaining to a higher grade for some time as long as this period is not unduly long and that after a few months, if such a situation persists, the employee ought to be remunerated for these higher tasks. In the case of complainant it had been established beyond any doubt that the period during which she had been performing higher duties without any proper

remuneration was unreasonably long. There were therefore valid grounds to invoke the provisions of the Public Service Management Code on the award of a deputising allowance for the performance of higher duties for an extended period.

Conclusions

On the basis of his findings the Ombudsman concluded that it is not the function of his Office to establish or to approve of priorities established by public authorities in the filling of vacant posts in government departments. This conclusion was without prejudice to complainant's entitlement to appropriate remuneration in terms of the relevant provisions of the Public Service Management Code.

The Ombudsman therefore upheld the grievance only in respect of complainant's right to a deputizing allowance and recommended that she be granted this allowance with effect from approximately six months prior to the date when she lodged her complaint with his Office.

Soon after the presentation of the Final Report by the Ombudsman, the Department for the Care of the Elderly and Community Care took the necessary action to implement his recommendation on the award of a deputizing allowance to complainant.

Case No H 48

HEALTH DIVISION

The employee who was unfairly charged with simulation of sickness

The complaint

A Staff Nurse working in one of the health centres in the Primary Health Care Department of the Health Division alleged in her complaint with the Office of the Ombudsman that she had been unfairly charged with simulation of sickness by the head of her section and found guilty.

Facts of the case

Complainant explained that on 14 November 2006 she had asked to be authorised to leave her place of work on sick leave because of severe back pain and a doctor in the health centre where she worked had certified that she was suffering from low back pain. Since she continued to feel unwell, her sick leave was extended on a couple of occasions.

On 21 November 2006 a doctor from a private medical services group who was requested by the Health Division to ascertain her condition, certified that she still suffered from low backache and that she would be unfit to resume work before 29 November 2006. This doctor stated in his medical certificate that complainant had to be confined indoors although she was free to visit her general practitioner at any time.

Complainant also explained that she had been summoned to attend a court hearing on 27 November 2006 at 0930 hours in connection with urgent family matters. Upon consulting her own general practitioner who issued a medical certificate stating that though she was unable to report for work before 29 November she could still attend the court sitting, complainant went to the courts of law on the appointed day.

During his investigation the Ombudsman found that in January 2006 the Director, Corporate Services of the Ministry of Health, the Elderly and Community Care issued an Office Memo stating that employees who need to visit their family doctor or to go to hospital while on sick leave should inform their head of section beforehand of their intentions and should also provide details of the time that they planned to leave their residence as well as the estimated time of their return. The Memo also stated that employees needed to provide written proof "*to allow the consideration of any exculpations during disciplinary procedures*."

On the same day when the court session took place, at about 1245 hours the same doctor from the medical services group who had earlier visited complainant again called at her residence upon receiving instructions from the Health Division to check her condition for a second time. However, despite knocking on the door of her residence several times the doctor got no reply.

Since despite the Ministry's directives complainant failed to inform her immediate superior at her place of work that she would be leaving her residence to attend court, on 6 December 2006 the Health Division issued a charge against her. The charge stated that she would be given a written warning in terms of regulation 19 of the Public Service Commission (Disciplinary Procedure) Regulations, 1999 because on 27 November 2006 while away from work on sick leave, upon instructions from the Division a doctor called at her residence to check her medical condition and found that she was not there. Complainant's behaviour was considered to constitute simulation of sickness[1] and she was told to defend herself from this charge within ten working days.

Complainant vehemently denied the accusation that was levelled against her that she had feigned sickness and to prove that on the day in question she was unable to go to work, she presented the medical certificates in her possession that covered her absence from work. These certificates confirmed that she was not able to report back for work before 29 November 2006 and stated clearly that while she could leave her residence to visit her family practitioner, she could also go to court on 27 November 2006. She also presented a copy of the court summons and admitted that

[1] Simulation of sickness is considered a minor offence under the Schedule of Offences and Penalties (regulation 29) of the Regulations of the Public Service Commission (Disciplinary Procedure).

her only shortcoming was her failure to inform in advance the head of her section that she needed to leave her residence on that day and the time when she would be away.

Early in January 2007 the Health Division informed complainant that her pleas had not been accepted and that the charge that had been issued against her would still stand. As a result she was given a warning that would be included in her service record and rescinded after a period of twelve months.

Considerations and comments

Complainant felt that she was unjustly declared guilty of simulation of sickness especially since the doctor appointed by the Health Division itself had certified on 21 November 2006 that she was genuinely sick and unable to report for work up to 28 November 2006. She was also visibly upset that even though this opinion was backed by her own medical practitioner who had stated that she was in a position to attend the court sitting on 27 November 2006, the Health Division had turned down these certificates.

The Ombudsman observed that it is the practice in the public service to subject to disciplinary procedures employees who are not found at home when on sick leave. In line with this practice the Ministry's Office Memo had warned that employees on sick leave who need to leave their residence to visit their general practitioner or to go to hospital, are obliged to inform their head of section in advance and that they need to have written documentary evidence to confirm their whereabouts in the event that disciplinary proceedings would be instituted against them.

The Ombudsman declared that complainant herself was the first one to admit that she failed to inform her head of section that she needed to leave her residence on that particular day and that this failure to observe the regulations justified the Division's resort to disciplinary procedures against her. He pointed out, however, that since the charge levelled against complainant that she had not been found at home made no reference to the fact that she had not followed the directives of the Ministry's circular to inform her immediate superior that she needed to leave her residence, the charge had equated her absence from her residence with a simulation of sickness.

The Ombudsman observed that whenever a charge is levied against an employee it is important to ensure that the accusation is supported by ample evidence and by an element of proof that would sustain the charge and insisted that this tenet needs to be followed at all times especially in an instance such as the one under consideration where complainant was facing a serious accusation that in effect meant that she continued to receive a salary which she did not deserve because she had not turned up for work without any proper reason. The Ombudsman commented that the fact that complainant was not at home when she was specifically allowed to leave her residence by the doctors who examined her, including the doctor who had been asked to visit her by the Health Division, could never have been taken to justify the charge that she feigned sickness.

According to the Ombudsman, the accusation against complainant could reasonably have stated that she failed to observe the rules and regulations of the disciplinary code of the public service – a failure that is considered as a minor offence in the Schedule of Offences and Penalties of the PSC Disciplinary Regulations that was applied against complainant by the Health Division. This is in fact an offence that leads to the issue of a written warning as was done in complainant's case.

The Ombudsman added that what could be considered as unjust in this incident was not the fact that complainant was given a written warning but that she was found guilty of simulation of sickness when there was not even the slightest proof of any such misdemeanour. Complainant had in her possession certificates issued by two medical practitioners including the doctor who had been instructed by the Health Division to check upon her actual condition and verify whether she was sick which confirmed that at no point in time had she ever feigned sickness.

The Ombudsman stated that complainant had provided all the necessary documents issued by the Courts to confirm that on the day when she was not found at her residence she was summoned to attend court and that she had been there till 1330 hours. Furthermore, that day happened to be the last day of her sick leave or of her period of convalescence and at that stage she seemed to be in no medial condition that required her to stay indoors. Taking all these considerations into account, the Ombudsman was of the opinion that there was no reason why complainant should have been found guilty of simulation of sickness because she had not been found at her residence.

Conclusions and recommendations

The Ombudsman concluded that complainant had been charged with simulation of sickness without any proof to back this charge and that on the contrary there was evidence that her absence on sick leave had been verified and confirmed by the Health Division itself. On these grounds the Ombudsman held that complainant's grievance was justified. At the same time complainant herself admitted that she failed to observe the directives issued by the Ministry of Health, the Elderly and Community Care to employees on sick leave and this failure rendered her liable to a written warning; and this warning had in fact been issued to her.

The Ombudsman insisted that there is an enormous difference between finding complainant guilty of simulation of sickness which amounts to cheating and constitutes fraud and finding her guilty of failure while on authorised sick leave to inform her immediate superior that she needed to leave her residence for a valid reason at a time when she was still unavailable for work but could attend a court session without any harm to her health. There was nothing wrong when complainant acted in this manner especially when she had to attend court in connection with urgent family issues – and this reason should have been given due consideration by the Health Division when determining complainant's behaviour.

In the circumstances the Ombudsman recommended that the Health Division should:

- include a record in complainant's personal file that although she was found guilty of simulation of sickness, this charge should be dropped and replaced by a charge of failure to observe regulations; and

- include a copy of the Ombudsman's report in complainant's personal file.

The Ombudsman also recommended that instructions be given to heads of departments to give greater attention in similar circumstances as to how changes are to be issued against employees and to the evidence backing any such charges. Moreover, in view of the service-wide implications of his recommendations regarding this complaint, the Ombudsman stated that it

would be appropriate to send a copy of this recommendation to the Head of the Civil Service for any action that he may deem appropriate.

Case No H 82

INLAND REVENUE DEPARTMENT

A case of sheer bad administration

The complaint

In a complaint with the Office of the Ombudsman Rosa Bellini, a frail spinster in her early nineties, accused the Inland Revenue Department of maladministration when back in 1999 it merely sent acknowledgements to her letters and for years on end failed to give a reply to the issues raised in these letters. She was also upset that other correspondence sent to the department in 2006 was returned back to her and considered as if it had not been sent at all.

The lady claimed that the department abused its administrative powers when it applied the provisions of an amendment to the law that was approved in 2003 in respect of a matter that had been pending since 1999 and which the department in the meantime failed to address. She also claimed that the department ignored the Ombudsman's ruling in another case that was based on identical merits.

Facts of the case

The grievance concerned a tax assessment issued in October 1999 in respect of year of assessment 1999 (basis year 1998) where the Commissioner of Inland Revenue claimed Lm228 by way of tax and warned complainant that if she did not settle this payment by the end of 1999, interest would be charged as from the start of 2000.

On 29 October 1999 Bellini's representative raised an objection and asked the Commissioner to revise this claim on the grounds that the amount requested by the department contained an element of tax in respect of

arrears of social security pension received in 1998 but which were due for previous years. On 11 November 1999 Bellini sent to the Commissioner a breakdown of these arrears which she had received from the Department of Social Security and showing that out of Lm1,250 only Lm80 referred to basis year 1998. Though the department acknowledged both letters, the various telephone calls by her representative merely resulted in promises of a reply that never materialised.

Like a bolt from the blue, seven years later in August 2006, Bellini received a Statement of Account where the Commissioner of Inland Revenue claimed Lm228 together with Lm180 as accumulated interest since 1 January 2000 – a total of Lm408. In her reply Bellini referred to her first objection including the breakdown of pension arrears to which she had not yet received a reply. She also objected strongly in particular to the department's claim of interest for the years during which her objection remained pending and insisted on an adjustment of the original assessment which she had asked for back in 1999.

Soon after complainant received an Adjustment Form for year of assessment 1999 where in the "*earnings*" column the department had already printed the amount that it considered complainant to have earned in basis year 1998. As instructed by the department, complainant adjusted this amount and sent the form back to the Inland Revenue Department on 16 August 2006. Bellini was, however, taken aback when this Adjustment Form was sent back to her in February 2007 by the department with an accompanying note stating that "*The Adjustment Form which you sent is not valid for tax purposes … there is no basis for your request … and the Adjustment Form is being sent back to you and considered as if it has not been sent at all*."[1]

For the first time, however, enclosed with this Form complainant found a reply by the department stating that the arrears that she received during basis year 1998 had been correctly brought to charge to tax in year of assessment 1999 in terms of article 50A of the Income Tax Act.[2]

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[1] "*Il-Formola ta' Aġġustament li int bgħatt mhix valida għal skopijiet ta' taxxa, m'hemmx bażi għat-talba tiegħek, il-Formola ta' Aġġustament qed tintbagħtlek lura u qed titqies li ma ntbagħtitx*."

[2] Article 50A that was added to the Income Tax Act by means of Act II of 2003 states as follows:

"*50A. Notwithstanding anything to the contrary contained in this Act, where during the year immediately preceding the year of assessment 2004 or during subsequent years of*

When the Ombudsman sought the views of the Commissioner of Inland Revenue on this complaint also in the light of his predecessor's ruling on a similar case which had been cited by complainant, the Commissioner reiterated that "*the revision and spreading back of ….. arrears for tax purposes is only possible if the arrears resulted from an error by a government department as stated by the Minister in his budget speech*."

The Ombudsman recalled that in the earlier case cited by complainant the Department of Social Security had explained that arrears were due because of an amendment to the social security legislation. In that case too the Commissioner maintained that arrears are only distributed to the years when they were due in instances where these arrears arose from an error by a government authority. Since the department held that this was not so with regard to Bellini's grievance, her complaint had to be treated in the same way as other identical cases.

The Office of the Ombudsman was aware that in the earlier case mentioned by complainant, the person involved had taken legal action in order to reverse the Commissioner's decision but the case at that time was still pending before the Courts.

While taking note of the Commissioner's position, the Ombudsman pointed out that the department had not thrown any light on its failure to reply to correspondence sent by complainant in 1999. He commented that this failure meant that Bellini was considered to have accumulated additional tax in the form of interest accrued between 2000 and 2007 that could have been avoided if the department had replied in good time.

In his reply the Commissioner explained that the introduction of the self-assessment regime in the year of assessment 1999 brought about several legal and procedural changes and that ample coverage had been given in the media at that time to changes in the system of compliance by taxpayers. He

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assessment a person receives income subject to tax under the provisions of article 4(1)(d), insofar as it refers to income accrued during an earlier year of assessment, such income shall be brought to charge to tax in the year to which it refers:

Provided that any such income referring to any year of assessment prior to the year of assessment 1999 shall be brought to charge in the year of assessment 1999."

pointed out that subsequent to these changes, the correct way for taxpayers to show disagreement with a tax statement was not by writing a letter of objection but by filing an Adjustment Form.

The Commissioner stated that under the Income Tax Act, interest starts to accrue on the day following the tax settlement date; and in the case of year of assessment 1999 this was 31 August 1999. He went on to explain that when a taxpayer files an Adjustment Form and there are no grounds for such adjustment, the taxpayer is legally bound to pay interest from the tax settlement date to the date of actual settlement of the balance due.

While the Ombudsman's investigation was under way, early in May 2007 complainant was served with a judicial letter issued by the department for payment of the original claim of Lm228 together with Lm180 in accrued interest – a total sum of Lm408. Two weeks later she received a second judicial letter, this time for Lm426 that included further interest charges that had accrued in the meantime. Complainant was highly irritated and objected strongly to the Commissioner's use of what she considered as "*draconian powers against defenceless senior citizens*."

When asked to explain this seemingly intransigent attitude the Commissioner of Inland Revenue explained that the Enforcement Section of his department had withdrawn its first judicial letter as soon as it became aware that complainant had a pending grievance with the Office of the Ombudsman while the second judicial letter was merely meant to safeguard the department's interest and ensure that the case against her would not fall by the wayside because of prescription.

Considerations and comments

The Ombudsman considered this complaint to cover three separate aspects:

- firstly, the charge of maladministration by the Inland Revenue Department which for seven years failed to reply to correspondence sent by Bellini;
- secondly, the charge of administrative abuse when the department applied retrospectively a law enacted in 2003 regarding a dispute concerning tax due which arose in 1999; and

- thirdly, the charge of harassment by the Inland Revenue Department when it sent two judicial letters to complainant while her case was still under investigation by the Ombudsman.

The Ombudsman also considered this overall treatment of complainant by the Inland Revenue Department to have been aggravated by the fact that she had reached an advanced age and suffered from poor health.

While agreeing that the Commissioner of Inland Revenue is in duty bound to insist that citizens pay tax due in terms of the Income Tax Act, the Ombudsman insisted that parallel to this duty, and certainly not a lesser one, the Commissioner is obliged to exercise good administration and to respect the rights of taxpayers.

Article 41 of the Charter of Fundamental Right of the European Union that is incorporated in Part II of the Treaty establishing a Constitution for Europe refers to the citizen's right to good administration.[3] Even if this Charter is aimed at institutions within the EU, it is not limited to these institutions but also applies to the various sections of public administration and many EU Ombudsmen apply the principles that appear in this Charter in the handling of complaints in their own country. In particular Article 41 of the Charter states that "*… every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time*" and that the right to good administration includes "*the obligation of the administration to give reasons for its decisions*."

On his part the European Ombudsman had published *The European Code of Good Administrative Behaviour* that was approved by the European Parliament. This Code is meant to serve "*as a useful working tool for public administration and as a reference point for citizens all over Europe*" and "*as a useful guide and a resource for civil servants, encouraging the highest standards of administration*." The Code rejects discrimination and abuse of power and promotes objectivity in decision-making and respect of legitimate expectations and provides standards how matters concerning the everyday public are to be dealt with by officials.

[3] Although not yet binding, the Constitution was unanimously approved by the Maltese Parliament.

The Ombudsman pointed out that Article 17 of this Code stresses the duty of officials to ensure that decisions on requests from members of the public are taken in a reasonable time and that if the limit of two months proposed in the Code cannot be respected because of the complexity of the issue under consideration, officials are bound to inform the citizens involved as soon as possible of this situation and in such a case the final decision must still be communicated in the shortest possible time. Officials are also bound to give reasons for their decisions under Article 18 of the same Code.

The Ombudsman recalled that in April 2004 his predecessor published an updated set of guidelines for good public administration and copies of this flyer were distributed to all public authorities. He insisted that public officials should follow these guidelines to the fullest possible extent.

The Ombudsman stated that it had been ascertained without a shadow of doubt that for seven years the Inland Revenue Department ignored Bellini's letters even though her request needed an urgent reply especially in view of the threat of interest accruing if the sum claimed in the original assessment in October 1999 was not paid by the end of the year. However, although this threat of interest imposed an added obligation on the department to address complainant's letters before the expiry of the deadline imposed by the department itself, its own officials ignored these letters and the several phone calls by complainant's representative and allowed seven years to pass before any action was taken on correspondence sent by Bellini.

The Ombudsman referred to the department's efforts to justify its failure to address complainant's concerns by arguing that the introduction of the self-assessment regime brought about far-reaching legal and procedural changes that were given ample coverage on the media and that the proper way for a taxpayer to show disagreement with a tax statement is not to write a letter but to fill an Adjustment Form. The Ombudsman commented, however, that even if Bellini's objections were not presented correctly in terms of the department's procedures, all that the Commissioner needed to do was to inform complainant about the new procedures that she was now bound to follow.

The Ombudsman stated that when the Inland Revenue Department sent a Statement of Account in August 2006 to complainant to claim Lm180 in interest for unpaid tax which she had contested seven years earlier, this action was imprudent since the department blamed complainant for a failure

that it was in duty bound to avoid if it had replied in time to her first objection. He commented that he was inclined to argue that if any interest was due in terms of the law, this should be paid instead by officials who were responsible for this failure and not by complainant.

The Ombudsman also raised doubts about the department's action when it first mailed an Adjustment Form to complainant where she adjusted amounts that were already entered by the department and then informed her a few months later that this form was not valid and was to be considered as if it was not even sent. In his opinion this action by the department breached most if not all the principles of good administrative practice that it is obliged to respect and the department was guilty of administrative failure to the detriment of complainant.

The Ombudsman also pointed out that to add insult to injury while his Office was awaiting comments by the Commissioner of Inland Revenue on this grievance, in the space of two weeks complainant received two judicial letters issued by the department; and while the first one was soon withdrawn, it resulted that the second letter was sent merely to avoid prescription. The Ombudsman commented that regardless of the reason for this action, he considered that the despatch by the Enforcement Section of the department of these two judicial letters at a time when it was aware that the case was being investigated by the Ombudsman as another administrative failure and as a classic case of lack of coordination between different sections of the same department.

The Ombudsman went on to consider complainant's original request that the arrears of pension should for tax purposes be allocated to the years to which they apply. He pointed out that when dealing with similar cases his predecessor had found that up to 1997 arrears of income used to be apportioned to the years when they were due although according to the Inland Revenue Department this was only done by way of a concession. His predecessor had also found that this concession had been withdrawn without any proper adequate warning to taxpayers with the introduction of the Final Settlement System. Amongst other things his predecessor had recommended that:

"*In cases where arrears have accumulated because of delay in the revision of pension rates following changes in the Social Security Act and/or due to errors by the Department of Social Security in working out the appropriate*

rates, these arrears should be taxed on the basis of the years when this income was in fact due ….."

At that time, however, the Inland Revenue Department had not accepted these recommendations and based its arguments on the principle that all arrears should be taxed in the year when any such amounts are paid to a taxpayer while failing to cite any specific provision of local income tax legislation. The Ministry of Finance subsequently agreed to apportion any such arrears only in the case of an error for which the department was responsible and introduced an amendment to the Income Tax Act in 2003 as a new article 50A which sanctioned at law this principle in respect of years prior to year of assessment 2004 and specifically provided for this to apply to year of assessment 1999 to which both the case mentioned by his predecessor as well as this case referred.

The Ombudsman stated that while agreeing with the conclusions of his predecessor, he had serious reservations as to why the amendment of 2003 was being retroactively applied to a case that, even at the time of the enactment of the amendment, had been left unaddressed for several years. In the circumstances he felt that while he should refrain from giving a ruling in view of a pending court case on these merits, the rights of complainant in this respect should remain unprejudiced especially since she had already declared her readiness to pay the original amount of tax claimed by the department as long as she would incur no additional tax or interest or any other payment.

Conclusions and recommendations

Taking everything into account the Ombudsman concluded as follows in his Final Opinion:

(i) the Inland Revenue Department failed to observe several principles of good administration when for seven years it disregarded correspondence sent by Bellini in respect of a tax claim sent to her in 1999. Once the tax claim imposed a deadline upon complainant and gave her up to the end of 1999 to effect payment failing which interest would start to accrue, the department imposed on itself the added responsibility to address complainant's letter before the expiry of this deadline; and because of its

failure to reply in time the department itself had to assume responsibility for the loss of interest;

(ii) the department had seriously failed in its obligation towards complainant not only by insisting that interest had to be paid but also by sending two judicial letters in the space of two weeks while the case was under investigation by the Office of the Ombudsman. The Ombudsman commented that he found no justification for the department's letters and considered this attitude as harassment of an elderly taxpayer;

(iii) even while agreeing with his predecessor's conclusion in respect of the principle of charging arrears to the year when actually received and even while harbouring reservations on the retroactive application of a law enacted in 2003 in respect of Bellini's objection to the year of assessment 1999 which had been pending for several years, the Ombudsman considered that in view of a pending court case on identical merits he should refrain from giving a ruling in this case.

The Ombudsman therefore upheld the complaint in respect of points (i) and (iii) and recommended that:

- the Commissioner of Inland Revenue should not insist on the payment of interest or any another charges;
- if complainant paid the sum of Lm282 that appeared in the department's original tax claim as she had stated that she was ready to do, she should still be entitled to the apposite refund if the Courts eventually decide that such arrears should be apportioned to the respective years for which they were due; and
- by way of remedy the Department of Inland Revenue should at least send an apology to complainant for failing in its obligations towards her.

On a general note the Ombudsman recommended that the department should ensure that correspondence from citizens be addressed in time in full respect of the principles of good administrative practice and that the Commissioner should also ensure that there is better coordination between the various sections of his department.

The Ombudsman's Final Opinion gave positive results. In a letter to the Ombudsman the Commissioner of Inland Revenue admitted that when

Bellini sent her complaint in October 1999 the department was passing through a period of transition with the introduction of new processes and a change from paper files to an electronic system. He agreed that it was unfortunate that in this situation complainant had not received a reply to the letters that she wrote and stated that the department would apologize for the inconvenience that had been caused to her.

The Commissioner also stated that considering the special circumstances of the case, his department was prepared to withdraw the interest that had been charged to complainant on the understanding that she would settle the original amount of tax that had been claimed within an agreed period.

Case No H 164

LAND DEPARTMENT

The coveted land

The complaint

Bastian Pinter who had applied to the Land Department back in 1988 to take over and reclaim a plot of land adjacent to his property that belonged to the government, complained with the Ombudsman that the department treated him unfairly when it turned down his application.

Facts of the case

Complainant explained that in 1999 he asked the Land Department to allow him to take over this land but was told that in line with established procedures he needed first the necessary permit from the Planning Authority[1] before his application could be processed. This permit was issued in 2001. However, when on various occasions in subsequent years he inquired about the status of his application with the Enforcement Officer of the Land Department he was told that the department had still to take a decision about his request before he could commence the works that he planned to undertake on this site.

Years passed by and for some unknown reason Pinter was still without a reply when the permit issued by the Authority expired in May 2006; and it was at this stage that the Land Department issued a call for tenders for the lease of this land. Upon realizing that the department had received an offer that was higher than his own and that he was at the risk of losing this opportunity, Pinter approached the department to be allowed the right of first refusal. Department officials merely told him, however, that if he had

[1] As the Malta Environment and Planning Authority (Mepa) was then known.

alerted them to his situation before he submitted his offer, they would have advised him on the best way to proceed.

Feeling that he had been let down by the department and that the attitude by the Land Department towards him and its decision were unfair, complainant sought refuge in the Office of the Ombudsman.

In its reply to the Ombudsman about this issue the Land Department confirmed that in 1988 complainant submitted an application to reclaim a plot of land adjoining his own property and that this request had been accepted by the Department of Works. This enabled him to remain in possession of the property even though he had no legal title to this land.

In July 1998 complainant asked to be allowed to spread soil on this land and to enclose it with a boundary wall. The Land Department reacted favourably and told Pinter in November 1998 that following the introduction of new procedures by the Land Department subsequent to the setting up of Mepa, it was prepared to consider his request to reclaim this land on condition that he would obtain the necessary permit from the Authority. Following discussions between complainant and Mepa's Development Control Commission where it emerged that for several years Pinter had already carried out various improvements to the site, in May 2001 Mepa finally issued complainant with this permit.

In the meantime, unknown to Pinter, S.P. sent an application to lease the land; and after the Estates Management Department carried out its own survey and prepared its plans for the site, it gave its approval for the issue of a call for tenders. When this call was published, it resulted that complainant offered a lease of Lm60 p.a. whereas S.P. offered Lm170; and of course it was S.P.'s more attractive offer that won the day.

Shortly after the award of this tender Pinter lodged a protest with the Land Department about its outcome because he claimed that he ought to have been allowed the right of first refusal. Complainant was told, however, that according to the department's policy he was not entitled to be given the right of first refusal at all and that the department was not bound to give him this right. Department officials also explained that he should have asked in the first place to be given this right when he submitted his offer since if at that time the department was aware of his longstanding interest in this plot he would have been advised to ask to be given the right of first refusal and

to provide reasons to back this request. At the same time he was warned that even if he had submitted this request, this should not be taken as a guarantee that he would have been given this right of first refusal because under the department's policy he was not eligible though his suggestion would have been given due consideration.

Considerations by the Ombudsman

The department's submissions to the Ombudsman to a large extent confirmed complainant's concerns in the sense that although he had tried for almost twenty years to lay his hands on the land in question, he had then lost his claim to this land because a third party submitted a higher offer when the call for tenders took place.

The Ombudsman remarked that on the one hand the Land Department was right to point out that it merely followed established procedures. Under subarticle 3(1) of the Disposal of Government Land Act the department is bound to follow the government's policy on the transfer on lease of public property for non-residential purposes which lays down that such land can only be transferred on lease in accordance with a resolution passed by the House of Representatives at the time of the disposal. This meant in effect that complainant should not have expected any preferential treatment and that the authorities should not have held back from following these procedures because he had been the first one to show interest in this land or because for many years he sought to acquire ownership of this property.

On the other hand, however, the Ombudsman held that complainant was right to expect that the interest which he had shown in this property during all those years and the works and improvements that he carried out should have been given due consideration when the department finally decided to dispose of this land by way of lease. In truth this was Pinter's position and he only insisted that he should have been allowed the right of first refusal. Complainant's grievance with the Ombudsman in fact centred mainly on this score – that he had not been given this right.

The Land Department in turn maintained that complainant was not eligible for the right of first refusal under section 17 paragraphs i-viii of the policy guidelines established by government on the disposal of non-residential

government property and so it could not accept that Pinter should be given this right.

According to the Ombudsman, however, a close reading of this section shows that the department's interpretation was not strictly correct and that section 17 did not exclude complainant *a priori* from this right. This section considers the award of the right of first refusal from two viewpoints that are separate and distinct. The first part of this section concerns cases where, according to its policy, the Land Department is obliged to extend the right of first refusal in the event of the lease of government-owned immovable property; and paragraphs i-viii of this section which are clearly not applicable in complainant's case, not only oblige the Commissioner of Lands to extend the right of first refusal to persons eligible under these paragraphs but also to extend the right to these persons to demand that they be given an opportunity to take this property on lease on the same terms as the highest bidder.

Section 17 concludes by stating that "*all other requests for the granting of a right of first refusal will be decided upon according to the merits of the request*." This means that every bidder has the right to ask to be given this right regardless of whether the bidder qualifies or not under paragraphs i-viii of this section and that any such request is to be decided by the Land Department according to the merits of the case. This in effect meant that Pinter had every right to ask to be given the right of first refusal and that the department was obliged to consider whether this request deserved to be accepted.

The Ombudsman pointed out that these provisions amount to an exercise of discretion on the part of the Commissioner of Lands – a discretion that has to be exercised reasonably, fairly and free from improper discrimination. At the same time the exercise of this discretion should take place according to circumstances that are relevant in the case of a person who does not have as of right the power to ask to be given this right of first refusal but to ask that his request to be granted this right be viewed in an objective and fair manner.

In the light of these considerations the Ombudsman was of the opinion that the Commissioner of Lands should not have concluded that complainant was not eligible to qualify for this right and that instead he was obliged to exercise his discretion in a positive and transparent manner and in a

reasonably justified way. According to the Ombudsman this meant that the Commissioner could not have decided that Pinter did not qualify under this clause and that the right of first refusal in this case could not be recommended.

The Ombudsman held that whenever the law, a regulation or government policy allows a public official a measure of administrative discretion, the official is bound to take this responsibility and to exercise this power. The official cannot put aside this power and neither can he choose to exercise it by maintaining, as the Commissioner had done in this case, that it was not covered by the regulations. Indeed, the Commissioner is granted discretionary power so as to take a decision in instances where policy considerations do not allow the right of first refusal to be given as of right.

In the course of his inquiry the Ombudsman noted that the Commissioner of Lands seemed to imply that complainant had not asked to be given this right. Since at that time the authorities were still considering Pinter's request for the lease of the land and no reply was given to his request to be granted the right of first refusal, according to the Commissioner of Lands this could not be taken to mean that the department was prepared to consider granting him the right of first refusal.

The Ombudsman observed that he could not share these views. In his letter dated 19 May 2004 complainant stated clearly that when public tenders for the acquisition of the site in question would be issued, he expected the right of first refusal to acquire this land to be reserved solely for him since he already had in his hands the development permission issued by Mepa.

The Ombudsman pointed out that although this letter could be considered as a declaration rather than a formal request, there was no doubt that the Commissioner of Lands could not have considered this letter as anything but a specific request by complainant to be given the right of first refusal. Although it was true that on that date the Land Department had not yet issued a public call for tenders for the lease of the land, it was obvious that at that time this process was being considered by the department as the only way that the land could be transferred under existing policy guidelines. The Ombudsman pointed out that official policy does not establish the way in which and how a person could ask for the right of first refusal but that this request needed to take place in the context of a process for a call for tenders for the lease of the property.

The Ombudsman commented that undoubtedly in this case complainant could not be penalized for the fact that in order to ensure that after so many years his rights would be safeguarded, he put forward this request as soon as it became known that a call for tenders would be published. Once it was established that complainant requested in writing to the department to be granted the right of first refusal within the prescribed time, the Commissioner of Lands was obliged to examine this request on the strength of the case history and of the facts that emerged from Pinter's file and to exercise his discretion to decide whether complainant should be given the right of first refusal; and this decision should have been communicated to complainant.

The Ombudsman observed that there was no doubt of Pinter's ongoing and sustained interest in this property which was manifested in his attempts for several years to acquire it on lease from the Land Department and by the fact that he spent a lot of time, effort and financial resources on his pet scheme to possess this land. The Ombudsman also pointed out that the department acted in a perfectly legitimate manner when it reminded Pinter that the improvements which he was carrying out in this property could not guarantee that he would be awarded this plot because in the final analysis the department is free to dispose of government-owned land in the way that it feels best to safeguard the national interest.

Complainant was, however, justified to expect that in the event that the department decided to allocate this property to third parties, all his efforts and his continued interest in this land would not be undermined because somebody else would be allowed the chance to take advantage of the improvements which he had done to this property.

The Ombudsman found evidence that following the issue of the permit by the Authority, complainant was in regular contact with the department so that the transfer on lease of this property would be finalized at an early opportunity. Throughout these discussions Pinter was never given the slightest indication that the land could be transferred to somebody else without an opportunity being given to him at least to exercise the right of first refusal by accepting to take this property against payment of at least the same amount as that offered by the highest bidder. The Ombudsman held that in the circumstances complainant was right to expect to be allowed this right of first refusal.

Conclusion

After having taken due consideration of these developments, the Ombudsman was of the opinion that the decision by the Commissioner of Lands not to recognize complainant's request to allow him to exercise the right of first refusal in the call for tenders for the lease of the land was flawed. He felt that the Commissioner of Lands was equally wrong to decide not to exercise his discretion to determine whether circumstances were such as to entitle Pinter to this right.

The Ombudsman stated that complainant was treated unfairly because the department failed to take into consideration his previous initiatives to reclaim the land even though it was fully aware of his endeavours. He pointed out that from his investigation no reasons were established why preference was given in this case to a third party instead of Pinter except for the fact that this third party offered a higher lease which Pinter might have been prepared to match had he been allowed the chance to do so.

The Ombudsman observed that good and fair administration required complainant to be allowed the opportunity in this case to benefit from his own efforts because it was blatantly unfair that someone else was allowed to reap the benefit of his work to rehabilitate the land in question. From the Ombudsman's investigation there was no evidence to justify the way in which the Land Department acted.

Recommendation by the Ombudsman

The Ombudsman concluded his Final Report on this case by pointing out that since the lease by the Land Department to the third party was renewable on a year to year basis, his recommendation was that since the process to consider offers for the plot of land had been concluded a long time ago, this process should not be disturbed. This also meant that the ongoing lease agreement with the third party that was under way should be allowed to run its full length right up to its proper end. At that point in time, however, complainant should be allowed the opportunity to exercise the right of first refusal and in the event that he decides to do so, the land should be leased to him with the same conditions that appeared in the original call for offers.

The Ombudsman understood that a few months before the lease of the land in question was due to come to an end, the Land Department informed the tenant by means of a judicial letter that this lease would not be renewed and that he had to vacate the property and return it back to the department. In the light of this development complainant was advised to resubmit to the Land Department a request to be allowed the right of first refusal when a new call for offers would be issued for this land.

Case No H 177

MINISTRY OF EDUCATION

The repercussions of prolonged failure to constitute the Scholastic Tribunal

The complaint

The Ombudsman received a complaint from a full-time teacher at a private educational institution who felt aggrieved that she was not granted a permanent teacher's warrant despite her diploma in physical education from the University of Malta and a master's degree in Early Childhood Education from a UK University in November 2005. When her appeal to the Scholastic Tribunal in March 2007 remained unanswered, she approached the Office of the Ombudsman and alleged that the Ministry of Education was giving a wrong interpretation to the relevant provisions of the Education Act.

Facts and findings

Complainant explained to the Ombudsman that her first application for a permanent teacher's warrant was turned down in terms of sub-article 11(3) of the Education Act, 1988 which was then in force. In March 2007 she appealed against this decision with the Scholastic Tribunal and claimed that other teachers who had qualifications that were equivalent to hers or even lower qualifications than she had achieved, were in fact granted a permanent teacher's warrant. She therefore saw no reason why her application was turned down. However, since the Tribunal had not been constituted, her appeal could not be heard.

Sub-article 11(3) of the Education Act in force at the time of complainant's first application and when the Ombudsman considered her grievance stated

that in order to qualify for a permanent warrant under this sub-article applicants needed to have graduated as a Bachelor of Education or obtained a doctor's or master's degree from the University; or followed a full course at the former St. Michael's Training College or at the former Mater Admirabilis Training College or a similar course at the Malta College of Arts, Science and Technology (known as the Polytechnic); or completed a course of study in Malta or in a university or recognized institute outside Malta being a course which, in the opinion of the Minister responsible for education, is equivalent to any of the courses referred to in this sub-article.

The Education Act at that time also stated that a warrant might be granted to a person who has taught in Malta or outside Malta for a period of not less than fifteen years and is, in the opinion of the Minister responsible for education, of the required academic ability.

Also in terms of the Education Act in force at that time a person who felt aggrieved by a decision of the Minister refusing an application for a teacher's warrant, may appeal to the Scholastic Tribunal set up under article 42 of the Act. The Ombudsman, however, confirmed that this Tribunal had not been constituted for several months and could not therefore hear appeals against any such decision.

Act No. XIII of 2006 which amended the Education Act and whose various provisions came into force on different dates as established by the Minister responsible for education by notice in the *Government Gazette*, among other things changed the requirements in respect of the award of a warrant to enable a person to exercise the teaching profession or to be considered as professionally qualified to do so. With regard to persons eligible for a permanent teacher's warrant, a saving provision under a new article 41 of the Education Act, however, enabled persons already in possession of a permanent warrant obtained before the entry into force of this part of the amending act to be deemed as warrant holders with the same rights as if their warrant had been issued in accordance with the provisions and conditions of the amended Education Act. Under these new provisions (when they eventually come into force), the Minister of Education acting under the advice of a newly established Council for the Teaching Profession will be responsible for the award of permanent warrants to teachers.

The amended Education Act also introduced changes in respect of the appeal facility for persons who feel aggrieved by the refusal of an

application for a warrant or by the suspension or cancellation of a warrant in the sense that this function would no longer be entrusted to the Scholastic Tribunal. Upon coming into force, the new section 32 of the Education Act envisages that any appeal concerning the refusal, suspension or cancellation of a warrant will need to be made to the Court of Appeal in its inferior jurisdiction.

The Ombudsman commented in his Final Report, however, that at the time that he presented this document none of the provisions of the amending act had yet come into force. He observed that this development was very relevant to the present case.

Considerations and comments

The Ombudsman declared that it is not the function of his Office to investigate the reasons behind the refusal of complainant's application for the issue of a warrant. Such competence at the time when he drew his Final Report was still vested in the Scholastic Tribunal even though the amendments introduced in the Education Act by Act No. XIII of 2006 envisaged that this Tribunal would no longer have any such functions when the amendments are brought into force.

The Ombudsman pointed out that the issue at stake was that the Scholastic Tribunal had not been re-constituted for some time and there seemed to be no intention of its reconstitution by the Ministry of Education in view of the new appeal mechanism that will come into force when the 2006 amendments will take effect.

The Ombudsman observed that this situation meant that complainant and others in her position were effectively being deprived of a means of appeal against decisions that affect their right to work, even if they can still bank on their temporary warrant to teach. According to the Ombudsman this situation was administratively unacceptable and unfair and he called for its immediate rectification.

The Ombudsman agreed that in all fairness it would make no sense at that late stage to reconstitute the Scholastic Tribunal when its days were numbered and especially in view of the elaborate procedures to set up this Tribunal including the holding of elections for the appointment of certain

members. He was of the opinion, however, that since the enactment of Act No. XIII in August 2006 enough time had passed to complete the preparatory work that was needed to bring the amendments into force.

Given that complainant's grievance was based on allegations of unfair treatment and lack of action by the Ministry of Education arising mainly from the fact that despite Parliament's approval of amendments to the Education Act in 2006, these changes had not yet taken effect but were expected to do so shortly, the Ombudsman agreed that this was indeed a delicate situation. At the same time he was of the view that since procedures for the award of a teacher's warrant and the appeal system were on the verge of being amended, it did not seem proper or practical to recommend that the Scholastic Tribunal be reconstituted merely to consider the appeal of complainant and possibly of other colleagues who were in the same position.

The Ombudsman also reflected on complainant's allegation that the Ministry of Education had stopped issuing permanent warrants to applicants who had not read for a bachelor's degree in Education at the University of Malta even though they had read for a master's degree and that this went against the law.

Faced with this recrimination the Ministry of Education pointed out that it was incorrect to state that students in possession of a master's degree were not being given permanent warrants. It held that sub-article 11(3) of the "old" Education Act clearly indicates that in order to be awarded a permanent warrant an applicant should be a graduate of the University as defined in the proviso to the article including the institutions which used to be known under the names of The Old University, The New University, the Royal University of Malta and the University of Malta and so a master's degree from a UK University, as was the case with complainant, was not contemplated by the legislator.

The Ombudsman, however, stated that in his opinion the Ministry's statement was incomplete since the law at that point in time on this particular issue and as applicable to complainant included another option to obtain a permanent warrant. Sub-article 11(3) also indicated that in order to obtain this warrant an applicant could have completed "*a course of study in Malta or in a University or recognized institute outside Malta being a*

course which in the opinion of the Minister is equivalent to any course" that is referred to in earlier paragraphs of this sub-article.

The Ombudsman, nonetheless, pointed out that although it was under this provision that complainant's application could have been considered and that this matter was the essence of her appeal, it was not for his Office to determine this issue unless it was proved that the Minister was never advised in respect of the opinion which he has to give as regards equivalence of degrees.

Conclusions and recommendations

The Ombudsman observed that it could be argued that complainant's appeal had not been addressed properly by the educational authorities even though when she presented her appeal in March 2007 and at the time that the Ombudsman conducted his investigation and concluded his Final Report on this grievance, it was still possible to lodge an appeal to the Scholastic Tribunal in terms of the law as it then stood. Moreover, from the explanation given both to complainant and to himself as to why her request for a permanent warrant had not been dealt with, it appeared that the possibility of considering complainant eligible under sub-article 11(3) of the Education Act had not been fully explored.

Taking everything into account the Ombudsman recommended that the Minister responsible for education should consider in the first place the possibility of complainant qualifying under this particular provision of the law and also, if necessary and appropriate in her case, applying the relevant EU provisions if the curriculum which she followed for her master's degree programme at the UK university fell short of the academic requirements of the law.

As a second step the Ombudsman observed that since before complainant's case arose the House of Representatives had replaced the system to process applications for the award of a teacher's warrant and also eliminated the possibility to appeal to the Scholastic Tribunal, the only pending matter was the Minister's administrative decision as to the date when to bring these changes into force. In the circumstances the only remedy was for the Minister responsible for education to bring the provisions of Act No. XIII of 2006 into force as a matter of urgency followed immediately by steps to

constitute the Council for the Teaching Profession in terms of the amending legislation.

Once this had been done, complainant could then request this Council to review her case as a new application following which, if her warrant is not approved, she could appeal to the Court of Appeal in terms of the law.

This complaint was brought to a successful conclusion a few months after the submission of the Ombudsman's recommendations when the Ministry finally presented a permanent teacher's warrant to complainant.

Case No H 258

WATER SERVICES CORPORATION

The would-be Senior Administrator

The complaint

Maya O'Connor, an employee at the Water Services Corporation (WSC), felt aggrieved at the outcome of a call for applications for the post of Senior Administrator issued by the Corporation and contested the results in a complaint lodged with the Office of the Ombudsman. She asserted that following what she considered as an injustice, her salary went down and she suffered financial hardship.

O'Connor based her grievance on the fact that her application was turned down even though for three years she acted as Senior Administrator and was paid a deputising allowance for these additional duties. She questioned the marks awarded to her by the selection board for previous experience and claimed that the work experience of the successful candidate was very limited when compared to her own.

Complainant also alleged that she was subjected to further discrimination because other Corporation employees who served in an acting capacity were assigned higher grades on the strength of a mere evaluation of their performance without having to sit for an interview whereas she had been singled out to undergo a selection process as well as an interview. She added that although Corporation officials responsible for human resource management earlier led her to believe that she would be treated as other employees and that she would be automatically assimilated to the post of Senior Administrator, this had not been the case and a call for applications was issued for this post.

O'Connor also expressed concern that although management was reportedly not in favour of filling vacant positions by the assimilation of Corporation employees, she had evidence that another staff member had been

assimilated to the grade of Administrator; and she presented documents issued by the Corporation to back her claim.

O'Connor insisted that the issue of a call for applications in her case was merely a ploy to eliminate her from the post and that marks that she was awarded for suitability and experience strongly confirmed her suspicions.

Facts of the case

When the Office of the Ombudsman approached the WSC about this dispute, the Corporation admitted that O'Connor was paid a deputising allowance in line with its Collective Agreement during the period when she was assigned duties other than those specified in her current job description and grade. This meant that it was incorrect to state that her salary dropped when she no longer performed these additional tasks.

The Corporation management insisted that it was also not correct to state that O'Connor was the only employee who was not assimilated directly to the post of Senior Administrator. In fact a few months earlier a post equivalent to the Senior Administrator grade in the Corporation's Head Office was not filled by assimilation but following a call for applications.

The WSC management assured the Ombudsman that the assimilation exercise did not cover the Senior Administrator grade and that no employee in the Corporation was appointed to this grade as a result of this exercise but following a call for applications.

The Ombudsman also understood that complainant's Manager had issued a warning to her for repeated lateness and that there were reports that she regularly carried out work related to her private business interests during office hours. It was made clear, however, that though this official was on the selection board, he did not reveal these aspects of O'Connor's work performance earlier to other members so as not to influence them unduly.

The Ombudsman understood from the WSC management that during her interview O'Connor had a poor showing. The selection board was unfavourably impressed by her lack of assurance and confidence and agreed that she did not possess the required maturity to lead a team of employees. Furthermore, judged on the basis of her overall experience, suitability and

qualifications, the board concluded that complainant was not the best candidate for the job and that she was unlikely to be able to create the right atmosphere in her office. This contrasted with the unanimous view of the board that the selected candidate possessed the necessary maturity, personality and experience to manage the department.

Complainant's Manager confirmed his written warning to complainant in mid-January 2006 for repeated lateness when reporting for work. This official admitted that he kept back from issuing other warnings to her for the same offence as the selection process drew closer since these repeated warnings could have compromised her selection prospects. He explained that he had done so instead of resorting to disciplinary measures in a bid to allow O'Connor herself to improve her work ethic.

On her part O'Connor continued to insist that she suffered financially as a result of the board's decision not to select her for the post of Senior Administrator. She argued that with her experience in running this section for various years, she was confident that she fared well during the interview and that she gave correct replies to all the questions that were put to her. She also contended that contrary to what was stated by the selection board, she possessed the maturity and experience to lead a team of employees and this was confirmed by the fact that a few weeks prior to her interview two other sections were placed under her wing.

Complainant attributed the adverse reports about her to problems that her Manager had with members of her family and insisted that he had put obstacles in her way during the interview. Insofar as the disciplinary measures taken against her were concerned, she explained that this action had lapsed since it took place nine months before the interview and under the Collective Agreement any such action should be deleted from her records after six months.

O'Connor also explained that the warning that was issued because she turned up late for her work had been withdrawn when it was ascertained that on that day she had represented the Corporation in legal action instituted against a defaulting client. She contended that she had never received any other warnings.

Complainant strongly denied that she reported regularly late for work and this could be verified from her attendance records and from the fact that no

disciplinary action was taken against her. She vehemently denied that she used the office telephone service to make calls of a private nature.

Considerations and comments

The Ombudsman commented that upon O'Connor's failure to be selected as Senior Administrator after having served in an acting capacity in this post for three years during which she had been assigned the full range of responsibilities while receiving an allowance for performing higher additional duties, she challenged this decision on the grounds that she ought to have been assimilated directly to this post as was done with other employees. She reiterated that in her view she performed well in her acting capacity and also performed creditably during her interview and so she fully merited this appointment. O'Connor felt that the way in which she was treated by the Corporation amounted to sheer injustice.

On its part the Corporation insisted that complainant was not the only employee who was not assimilated automatically to the post of Senior Administrator and referred to other posts of a comparable standing that were not filled by assimilation. The WSC management defended itself from O'Connor's claim that assimilation had taken place in the Corporation by observing that she had failed to mention even one single instance of a grade in the Senior Administrator level that was determined by assimilation and that the instance to which she referred concerned an employee in the Administrator grade.

The Ombudsman observed straightaway that since no evidence was brought of any post at the level of Senior Administrator that had been treated differently, the issue of improper discrimination did not arise; and so O'Connor had no automatic right to assimilation to this post. He agreed, however, that once the Corporation had decided to fill this post by means of a call for applications, complainant was probably right to consider herself among the front runners for this position, if not actually the favourite, on the strength of her experience in this post.

The Ombudsman pointed out that the selection process was based on a set of established criteria namely qualifications, suitability and experience. The board awarded 21 marks out of 30 to O'Connor for her educational

qualifications and this was even higher than that of the selected candidate. O'Connor had not challenged this mark.

Insofar as experience was concerned, complainant obtained the highest mark – 17 out of 40, divided into 15 for individual experience and 25 for direct experience in areas directly related to the post at stake. Although experience has been generally considered as a criterion which can be assessed in an objective manner and marks awarded for experience can easily be verified in the sense that they would be linked to the years of service in a grade or post, some selection boards, however, now prefer to assess candidates not merely on the number of years occupied in a post or grade but on the strength, depth and value of the experience gained by persons holding the post as shown by their replies to questions put during their interviews and meant to demonstrate and to extract the real personal benefits that they have derived from their experience and that they can bring with them to their new job.

In this case the selection board awarded marks according to replies given to five standard questions put to candidates to assess their knowledge of account keeping procedures and functions in view of the duties covered by the position in question and the direct relevance of the WSC's billing system to this position. The board also evaluated the direct work experience and performance in the current work area of each applicant.

A review by the Ombudsman of the marks awarded to candidates showed that O'Connor was unsuccessful because of the low marks awarded to her for suitability for the post: a mere 6 out of a total of 30. It was confirmed that these marks reflected the assessment given by members of the board to each candidate's personal attributes such as personality, persistence to attain objectives, initiative, flexibility and assertiveness considering the responsibilities attached to the post.

The Ombudsman pointed out that since this was a subjective evaluation and marks awarded to candidates would reflect the personal judgement of each member of the board in the light of the member's evaluation of how applicants would respond throughout the interview, neither the Ombudsman nor any other review body can change this evaluation of what emerges in the course of interviews where only these members and the candidates are present.

Members of the selection board shared the opinion that in her interview complainant fared badly and this led them to agree that she did not possess enough maturity to lead a team of employees. Although O'Connor challenged this evaluation and even presented testimonials attesting to the contrary, the Ombudsman held that what was under scrutiny here was her performance during the interview that led her to receive very low marks for suitability for the post. The Ombudsman stated that it is not his function to challenge marks awarded in such a situation since he does not possess any valid means of justification to believe one party at the expense of the other in case of conflicting statements and versions.

The Ombudsman also gave due consideration to statements made by O'Connor's Manager about her work performance and her attitude towards work. Further verification with the chairman of the selection board confirmed that it was complainant's performance more than anything else that led to her downfall even before the negative aspects about her work performance were brought to the attention of the board. These reports simply set a seal on a decision that was already formulated by the board and the Ombudsman rejected complainant's allegation that her superior had masterminded her failure.

The Ombudsman next turned his attention to O'Connor's financial loss. While there was no doubt that she suffered financial loss as a result of what happened, however, this loss was in respect of a foregone allowance for higher duties that she no longer performed following the substantive appointment of a Senior Administrator. This meant that while she retained her salary, she no longer had a claim to an allowance.

On these considerations the Ombudsman concluded that complainant was not the victim of an injustice when she was not appointed Senior Administrator.

Other considerations by the Ombudsman

The Ombudsman took this opportunity to point out that this complaint brought to the fore a situation which undermines the concept of proper administration. This hinges upon the fortune of employees entrusted for several years with higher responsibilities and who, on being subjected to the rigours of a selective interview for permanent appointment to this position,

are judged inadequate to fill on a substantive basis the post that they would have filled in an acting capacity for a long time. This was clearly an anomalous situation that indicated that somewhere along the line something was wrong.

The Ombudsman pointed out that though O'Connor's Manager admitted that all along he was aware of her allegedly serious failures which he was in duty bound to control, however, his investigation revealed that with the exception of one episode, this situation dragged on and he failed to take appropriate action, arguing that he tried to make complainant herself realize that she should change her ways instead of taking disciplinary action which this situation called for. The Ombudsman observed that if he were to accept this version, failure to stop the alleged abuses attracted criticism from his Office.

Conclusions and recommendations

The Ombudsman concluded that:

- there was no valid argument or evidence to sustain O'Connor's claim of automatic assimilation to the post of Senior Administrator on the grounds that she had acted in that capacity for three years and no evidence was presented to show that assimilation had taken place at that level of responsibility or higher;
- the selection process was based on criteria that were mostly assessed through an interpretation of how candidates performed during their interviews and it is not the function of the Ombudsman to change this subjective evaluation by members of the board. At the same time the Ombudsman found no evidence of an unfair allocation of marks in respect of criteria that could be objectively assessed by an independent observer;
- no evidence emerged in the course of his investigation to support O'Connor's contention that her Manager unduly prejudiced the other members of the board against her and on the contrary, there was evidence to show that a negative opinion was reached on her performance before the issue even arose;
- although admittedly complainant's income decreased because she no longer received the allowance that she was previously entitled to, however, since she no longer performed any additional duties or had

responsibilities that were higher than her substantive position, clearly she no longer had any claim for this allowance;

- the attitude of O'Connor's superior in allowing failures on her part without taking any effective action to stop them in time amounted to an administrative failure and attracted criticism from the Office of the Ombudsman although this did not affect the validity of the unanimous decision by the board about the successful candidate.

For these reasons the Ombudsman felt that he was not in a position to sustain this complaint. He recommended, however, that the outcome of O'Connor's interview should not prejudice her future interest or chances should the Corporation at a later stage issue another call for applications for the post of Senior Administrator.

The Ombudsman also recommended that in view of the allegations which arose in this case, once complainant claimed that the presence of her superior on the selection board constituted a possible conflict of interest, it would smoothen matters if this person would in future abstain from participating in a selection process where complainant would be involved.

Case No H 273

GĦARB LOCAL COUNCIL

Unnecessary delays to implement approved plans for improved traffic management

The complaint

A resident in Għarb, Gozo was upset at the difficulties which he regularly faced to park his car because the section of the road where he lived narrowed considerably and this bottleneck caused serious obstruction to the free flow of traffic. Since this narrow stretch of road also hardly permitted the parking of other vehicles, his neighbours too were virtually unable to drive their own car out of their garage in their residence.

This also meant that whenever these neighbours parked their car in this stretch of road, as they often did, this made it virtually impossible for this resident to drive his car out of his garage and turn right alongside the street to proceed on his way.

The problem was referred to the Office of the Ombudsman when various efforts to solve the issue remained unsuccessful.

Facts of the case

When this difficult situation between these neighbours was brought to the attention of the police authorities in the village, the Police sought to calm down matters by suggesting that a solution could consist in the painting of yellow lines along this neck of road to ensure that cars will not be allowed to park there at any time and in this way all the residents' concerns would be solved.

Although a letter to this end was written to the Għarb Local Council on 4 January 2007, the Council failed to take any action and it was only after

other contacts that the Mayor of the Council confirmed to complainants that these yellow lines would be painted. However, when workmen turned up one day to carry out this job they were unable to do so because at that time the car of complainant's neighbours happened to be parked right on this spot.

A few days later the Mayor informed complainant that the Local Council needed to approach the Malta Transport Authority (ADT) in order to get proper advice about how best to tackle this situation. However, even this time the Council again failed to take any action.

Faced with this impasse, complainant wrote to the Ombudsman to point out that both the Għarb Local Council and the police authorities had failed to carry out their responsibilities when they had not addressed his grievance about this parking situation. He asked the Office of the Ombudsman to intervene so that the situation would be finally resolved.

Considerations by the Ombudsman

Following the intervention by the Ombudsman, by means of a letter dated 11 September 2007 the Għarb Local Council informed the Office of the Ombudsman that after discussions had taken place between all interested parties, including ADT representatives, about the parking problem in this road, it had been established that since the road was very narrow at this stretch, parking would not be allowed to take place in front of garages because this would hamper accessibility and the manoeuvring of vehicles both in and out of these garages. This meant that parking should be banned at a distance of one metre on either side of garages in this street and at a distance of five metres near its corner with another street.

Upon agreement being reached that the proposed parking arrangements should be adequate to improve the situation and ensure that there would be no hazards, these new restrictions were indicated on a site plan of the area by the Għarb Local Council which proceeded to seek the approval of the ADT. It was agreed to introduce these new parking procedures including the painting of yellow lines and the installation of the necessary traffic signs in the area once this approval was secured so as to remove once and for all any inconvenience to residents in this area.

The Gozo section of the ADT on 2 October 2007 wrote to the Għarb Local Council and stated that the Gozo Traffic Management Unit found no objection in principle to the proposed new arrangements including the painting of a double yellow line in the street as shown on the Council's site plan. The ADT also advised the Council to ensure that all traffic management changes including the siting of traffic signage and painting of road markings would be carried out in accordance with the Traffic Management Unit Guidelines and Legal Notice 364 of 2003[1] as well as the Traffic Signs and Carriageway Markings Regulations as laid down by Legal Notice 94 of 1969 and subsequent amendments.

The Ombudsman stated in his Final Report on this complaint that at that stage it seemed as if the whole issue had been settled to the apparent satisfaction of all the parties concerned and once the ADT accepted the proposals of the Għarb Local Council there was nothing to presage that there were any other reasons why the decisions which were already agreed upon would not in fact be implemented.

The Office of the Ombudsman was informed, however, that the Għarb Local Council had dithered uselessly in implementing this decision and it was alleged that this decision was not in fact carried out on the excuse that the ADT's formal approval to the proposed new arrangements was still pending. The Ombudsman observed that if this were so, this attitude was completely unacceptable.

The Ombudsman recommended in his Final Opinion on this case that the points that were agreed upon between all the parties that were involved in this dispute should be implemented as soon as possible not only in the interest of complainant but also in the best interest of all car drivers who regularly make use of this particular stretch of road.

The Ombudsman saw no reason why an incident of this nature should lead to the issue of a censure by his Office to the Għarb Local Council especially since consensus had already been reached that the new traffic arrangements would serve the common interest of the locality.

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[1] Road Works (Design and Construction Standards) Regulations, 2003.

Conclusion

Taking all these factors into account the Ombudsman concluded that the grievance raised by complainant was fully justified. He recommended that within two weeks from the issue of his Final Report and its transmission to the Mayor and to the Għarb Local Council, all the measures that were agreed upon and that had already been sanctioned by the Gozo branch of the ADT would be put in place to ensure improved traffic management in the area.

However, in the light of further objections that were raised regarding some aspects of the proposed new traffic management plans, the issue was only resolved after some modifications were agreed upon between all the parties concerned during other meetings which took place on site during visits which the Ombudsman made to Gozo a few weeks after the submission of his Final Report.

Case No H 635

DEPARTMENT OF INDUSTRIAL AND EMPLOYMENT RELATIONS

Failure to safeguard adequately the rights and interests of an employee

The complaint

In November 2007 the Office of the Ombudsman received an electronic complaint from an employee who alleged that the Department of Industrial and Employment Relations had shown gross incompetence and negligence in the handling of his case.

Facts of the case

Complainant explained that he had reported to the Department of Industrial and Employment Relations that upon the termination of his employment, his former employers had failed to pay him, as required by law, for vacation leave which he had not availed himself of.

He added that during proceedings in Court it was found that the department had instituted the case against the wrong party and this led the presiding magistrate to dismiss the case. Complainant therefore requested the Office of the Ombudsman to urge the department to carry out an internal investigation to establish what led to this blatant mistake. He also asked the Office to hold the department responsible for the loss of Lm580 that he suffered and to recommend that the department should make good this amount in view of the fact that his claim for this amount was time-barred.

From documents presented by complainant as well as from a review of the case file held by the department the Ombudsman found that according to the termination of employment form issued by the Employment and Training

Corporation (ETC), complainant terminated his employment with the company Dempsey Malta on 18 July 2006 for personal reasons. He resorted to the Department of Industrial and Employment Relations on 14 September 2006 and claimed that his former employers still owed him Lm580 for unavailed vacation leave.

The Ombudsman's investigation revealed that on company payslips which complainant handed to the department, the employer was indicated as Dempsey Malta. However, the declaration form which complainant signed on the day that he first approached the Department of Industrial and Employment Relations and which was also signed by the department's case officer indicated Dempsey Limited as his former employer. On his part complainant was adamant that when he signed the form which authorised the department to act on his behalf, this read Dempsey Malta although he did not retain a copy of this document.

Departmental records showed that on 14 September 2006 the department wrote to Dempsey (M) Limited to inform the owners that complainant was claiming Lm580 for outstanding leave. The letter also stated that complainant considered that the sum given to him prior to the termination of his employment was a bonus by his former employers for having worked on a project while he was due to be on leave. There was evidence in the department's case file that this letter had been copied to complainant and that it had reached his household.

Complainant's former employers wrote back to the department on 28 September 2006 claiming that Dempsey Malta Limited had not only paid complainant the amount that he requested but that on the contrary he still owed an amount of money to the company. Upon receipt of this letter, the case officer asked complainant in a letter dated 5 October 2006 to fix an appointment with the department "*in connection with your case at Dempsey (M) Limited*." Complainant explained, however, that no meeting with the department's case officer had ever taken place since when he spoke to him on the phone, he was told that efforts by the department to reach an amicable solution were unsuccessful and he was merely asked to confirm that he still wanted the department to proceed with legal action.

In another letter dated 21 February 2007 the company contended that it had already paid complainant an amount that was in settlement of paid vacation days that he had worked and that if he still considered that the sum of

Lm580 was paid by way of a bonus and that he was still entitled to the same amount for unutilised vacation leave, the company would in turn put forward a counterclaim to set off the amount being claimed with an amount still due by complainant to the company.

When efforts to reach an amicable settlement came to nought, the department forwarded a draft charge to the Commissioner of Police for the institution of criminal proceedings in terms of the Employment and Industrial Relations Act against two directors and legal representatives of Dempsey Malta Consultancy Services Limited. In this charge the Court was asked to order the accused to pay complainant the sum of Lm580.

The Ombudsman found that although in mid-March 2007 the Department of Industrial and Employment Relations wrote to inform complainant of the institution of criminal proceedings against Dempsey (Malta) Consultancy Services Limited, there was no registered mail receipt in the department's case file to confirm that he had in fact received this letter. Complainant claimed that since this letter had never reached him, he was unaware that proceedings were being instituted against Dempsey (Malta) Consultancy Services Limited.

When court proceedings took place on 30 October 2007 the accused were acquitted since the Court accepted the plea raised by their lawyer that the charge issued by the department was against the wrong party. Although the Department of Industrial and Employment Relations asked the Commissioner of Police to appeal this judgement, the Attorney General decided not to do so while the department was unable to issue another charge against the company because the offence was by then time-barred.

Considerations by the Ombudsman

When approached by the Ombudsman the department insisted that it took all the necessary steps to ensure that complainant's former employers would answer to the accusation that they were in breach of the law. It had instituted court proceedings against them in respect of their alleged breach of the law and the Court was additionally asked to decide on monies reportedly still due to complainant.

The department flatly rejected complainant's charge that it was negligent in the defence of his interests since it had instituted proceedings as in duty bound against the persons who appeared from the evidence available to have a case to answer. The department also pointed out that complainant "*was fully aware that he could proceed to file a civil case to recover any moneys allegedly due to him*" and that he had even signed a statement to this effect during his first meeting with department officials.

The explanation given by the department for the use of the name Dempsey (Malta) Consultancy Services Limited on the draft charge was that records at the Registry of Companies showed that this was the only company in Malta that corresponded to the name that appeared on payslips and on ETC forms provided by complainant and whose directors were the persons who were mentioned by complainant as being the ones who still owed him compensation for services rendered to the company while in its employment. The department was resolute that all along complainant was aware that proceedings had been instituted against Dempsey (Malta) Consultancy Services Limited.

On his part complainant insisted that the department showed negligence when it gave the name of his previous employer as Dempsey (Malta) Consultancy Services Limited on the draft charge forwarded to the Police since he always indicated that his ex-employer was Dempsey Malta and that given the company's line of activity, it could not operate through a limited liability company. He added that if the department's case officer had any doubts on this point he could easily have contacted him but recalled that when he offered to meet this official before court proceedings got under way he was assured that this was unnecessary.

After a review of the relevant documentation the Ombudsman concluded that in his opinion the department failed to exercise the due diligence required of it by the Employment and Industrial Relations Act and consequently it had failed to adequately protect the interest of the employee as it is bound to do in terms of the law.

The Ombudsman confirmed that complainant had never indicated Dempsey (Malta) Consultancy Services Limited as his employer. Besides, in the mandate that he signed on 14 September 2006 he had indicated Dempsey Limited as his employer and this showed that the decision by the department's case officer to issue the draft charge in the name of an entity

that was completely different to the one that he had given or that appeared on the ETC form was not justified. The Ombudsman observed that if the case officer had any doubts regarding the name of complainant's former company, it was his duty to contact him for clarification particularly since the name in the draft charge had never been indicated anywhere else.

The Ombudsman underlined that it is the department's duty to protect employees from abuse or breach of statutory obligations by employers and that it is obliged to follow cases submitted by employees in an active and diligent manner as from the point of initiation. This is even more so in terms of subarticle 44(1) of the Employment and Industrial Relations Act[1].

The Ombudsman stated that he was convinced that complainant had followed closely the progress of his case with the department and it was likely that his version of facts was correct when he explained that he had not received the letter of mid-March 2007 which was the only document addressed to him in which his employer was referred to as Dempsey (Malta) Consultancy Services Limited. In any event, according to the Ombudsman the department cannot be exonerated from its responsibility by claiming to have sent this letter to complainant since it was its duty to ascertain that the letter had in fact reached him.

The Ombudsman finally pointed out that although when complainant first approached the Department of Industrial and Employment Relations he signed a declaration to the effect that he was aware that he could institute separate civil proceedings besides those instituted by the department, this did not justify the department's failure to exercise the necessary care in the handling of his case and in the protection of his interests. This was even more so since the department itself had also asked the Court to order his former employers to pay the amount reportedly still due to him.

Once the department had assured complainant that it would take up the case on his behalf and that the Court of Magistrates would order his former

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[1] Subarticle 44(1) of the Employment and Industrial Relations Act states that "*in criminal proceedings instituted by the Police before the Court of Magistrates for an offence against the provisions of this Act the Director or any officer of his department deputed by him may, notwithstanding the provisions of any law to the contrary, lay the charge before the court, produce the evidence, plead and otherwise conduct the prosecution instead of the Police*."

employers to pay him the amount under dispute if the case would be won, complainant had no reason at all to institute a civil action himself. In practice this meant that he was deprived of his right to compensation as a result of the department's failure and the fact that he was aware of an alternative route did not exonerate the Department of Industrial and Employment Relations.

The Ombudsman stated that it is recognized that an employer's failure to comply with his contractual obligations towards an employee can expose an employer to both criminal and civil action to ensure compliance. Exceptionally the Employment and Industrial Relations Act gives employees dual protection for the recovery of payments due from an employer. Exceptionally, too, the law provides that what is essentially a civil debt can be claimed and recovered through a criminal action instituted by the department through the Executive Police.

The Ombudsman observed that once the department opts to proceed also for the recovery of an amount due to an employee, it is in effect acting on the employee's behalf and as the employee's mandatory. It is therefore bound with the primary duty of a mandatory to look after and safeguard the rights and interests of the person it is representing and is also answerable for negligence in carrying out the mandate if it fails to act with the due diligence of a *bonus pater familias.* According to the Ombudsman it had been proven that in this case that level of diligence was found to be lacking.

The Ombudsman declared that the department could not therefore plead that complainant should have taken steps to protect his interests by ensuring his right to exercise the civil action to which he is at law entitled since it was reasonable to expect him to desist from doing so once the department itself acted to press his claim against his former employers on his behalf through criminal procedures. At the same time the Ombudsman agreed that it is advisable for an employee, as a creditor, to take timely steps in similar cases to interrupt the running of the prescriptive period barring a civil action during the time in which criminal procedures are pending since this would ensure that an employee would not irredeemably prejudice his rights to recover by civil action any amount that is due in the eventuality that the employer is acquitted in criminal proceedings.

In this regard the Ombudsman recommended that the notice that employees are asked to sign by the Department of Industrial and Employment Relations

at the onset of similar cases should not be limited to a declaration that they are aware that they can safeguard those rights through a civil action but they should also declare that they are aware that they should take steps to protect that civil action from being time-barred by interrupting it through the filing of an appropriate judicial act. This additional precaution, however, even if adopted, would not exempt the department from tortuous liability if it is found to have been negligent in its handling of the criminal action that is also intended to recover what is due to employees.

Conclusion

In the light of the above considerations the Ombudsman concluded that:

- the Department of Industrial and Employment Relations failed to properly safeguard the interests of complainant and this administrative failure caused him the loss of an opportunity to redress his grievance; and
- the Director of Industrial and Employment Relations should compensate complainant by an *ex gratia* payment that would be equivalent to the financial loss which he suffered.

Some time later the Department of Industrial and Employment Relations adopted the Ombudsman's recommendation and effected an *ex gratia* payment to complainant that was equivalent to the amount that he had foregone.

Case No I 33

HEALTH DIVISION

The patient who went abroad
for urgent medical treatment at his own expense

The complaint

The Ombudsman received a complaint from a person who underwent urgent surgery in the UK costing £stg18,000 at his own expense because this type of treatment was not carried out in Malta.

Complainant explained that although he sought financial assistance from the government to have this operation abroad, he did not receive any help "*apparently because the medical board thought that the chances of survival were practically zero*." In dismay he asked the Ombudsman to recommend that the government should reimburse the expenses that he had incurred as it does with other patients.

Findings by the Ombudsman

The Ombudsman found that after complainant had undergone a major operation in 2005 in Malta, he went privately to the UK in February 2007 to undergo a PET scan since this facility is not available in Malta. A few weeks later the UK consultant wrote to complainant's surgeon in Malta that his patient's chances of survival were practically nil unless he had surgery for his liver metastasis "*as soon as possible*". However, although complainant's surgeon agreed that a liver resection operation could allow his patient better chances of survival for several years, he refused to do this operation on the grounds that it involved considerable risk and that in Malta there is no surgeon specialized in liver diseases whose presence is essential for this type of operation.

Upon making inquiries with the health authorities, the Office of the Ombudsman found that following a request by complainant's surgeon that his patient be sent abroad for this treatment, the Treatment Abroad Advisory Committee (TAAC) decided in March 2007 to turn down this request in the same way that it had already refused similar requests in the past in line with its policy not to refer abroad cases requiring liver surgery for metastatic disease. However, since complainant urgently required this operation, he had no option but to go to a specialized hospital in the UK entirely at his own expense.

The Ombudsman's investigation revealed that after receiving several requests for a review of this policy, the TAAC in March 2007 referred this policy for scrutiny by the Health Policy Board, the highest policy advisory board of the Ministry of Health, the Elderly and Community Care. The Committee explained to this Board that although metastatic disease of the liver is a particularly common situation and clinical evidence pointed increasingly towards more tangible benefits in providing liver surgery for metastatic disease, in its view referral of these cases abroad was still not sustainable because of the need to refer most patients to repeated MRI and PET scans to determine the onset of liver metastasis and proceed with surgery. For this reason the TAAC requested the Health Policy Board to confirm that no cases of liver surgery for metastatic disease were to be referred for treatment abroad.

When the Health Policy Board agreed not to amend the guidelines that were being followed by the TAAC regarding persons suffering from this disease and confirmed that cases of liver surgery for metastatic disease were not to be referred abroad, this stand was taken to vindicate the Committee's decision on complainant's case.

Considerations and comments

In recent years the Office of the Ombudsman reviewed several aspects of the national health service such as the policy for patient referral abroad for treatment not available locally and the supply of medicines that do not feature in the formulary of medicines available under this service. In complaints that consisted of requests for the refund of expenses incurred by patients on private medication or treatment abroad, the health authorities maintained that it is not government policy to refund patients for treatment

received privately out of the country when such treatment is not available in Malta's national health scheme.

The provision of free medicines is regulated by the Social Security Act that lays down several conditions that must be satisfied by patients such as, for instance, that the medicine indicated in a patient's case must be available under the health service provided by the government. There is, however, no *ad hoc* legislation which requires the government to provide medical care or which refers to the range of hospital services that must be made available to citizens. The Social Security Act defines "*medical treatment*" as "*medical, surgical or rehabilitative treatment including any course or diet or other regimen, and any surgical and pharmaceutical aid*" but this definition exists only in respect of references in the Act to this term and these references have nothing to do with the right of the citizen to medical care.

Medical care is provided by the government to Maltese citizens as a matter of policy and is underpinned by the financial, human and technical resources allocated to the national health authorities in the government's annual budget. Free hospital care was introduced in the late 70s by means of a Ministerial Statement in Parliament and in recent years such free treatment exists for citizens as of right by being excluded from the Healthcare Fees Regulations (Legal Notice 201 of 2004). Again, no reference is made in these Regulations to the range of services that have to be made available to citizens and the type of services provided by the government is only determined on grounds of policy.

Recent declarations about the level of care and improved standards of health care have underlined that these services are to remain free but made no reference to the actual range of services to be provided. Similarly the *Patients' Charter of Rights and Responsibilities* issued by the Hospital Management Committee of St Luke's Hospital in 2001 made no reference to the range of services to which citizens are entitled.

In the circumstances the Ombudsman understood that the policy of the health authorities applicable to this case was that since the laparoscopic liver resection required by complainant is not included in the range of health services provided as a matter of policy by the government, this implied that a patient seeking treatment that is excluded from these services would have to bear the costs involved for this treatment.

This situation led the Ombudsman to consider whether the health authorities can arbitrarily stop providing a service that is already being effectively provided to citizens or turn down the introduction of a new service that is genuinely needed by patients. The Ombudsman questioned whether there should be, for valid reasons, exceptions to the interpretation or to the policy adopted by the Health Division.

The Ombudsman observed that it is the function of the health authorities to set policies and as long as these policies are not discriminatory or manifestly unjust, it is not the function of a watchdog authority such as his Office to interfere with such policies.

The Ombudsman confirmed during his investigation that it was the health authorities themselves who, in the absence of a service provided locally, introduced a policy not to send abroad for treatment patients suffering from a condition comparable to that of complainant. No evidence was submitted to the Ombudsman to the effect that other patients who were similarly affected had been treated differently.

At this stage the Ombudsman recalled that the merits of this complaint were analogous to a case decided by the Constitutional Court in January 2007 on whether the health authorities could withhold treatment to a patient who needed a very expensive drug which was recommended by a specialist in a UK hospital where this patient had received treatment. In its ruling the Constitutional Court referred to the State's obligation "*to take appropriate steps to safeguard the lives of those within its jurisdiction*" and considered that while the right to safeguard life imposes a clear and unequivocal obligation to protect the life of all concerned, this right does not specify that any such obligation applies whatever the circumstances and regardless of considerations about persons suffering from equally serious diseases or without regard to financial limitations on the part of the health authorities. The Court held that if the State had unlimited financial resources, the patient would have been right; however, this was not the case. There was, moreover, in the case considered by the Court no clear and unequivocal evidence of a sure remission or cure or prolongation of life of this patient for a long period.

The Court had also accepted that once this patient was given adequate care by the health authorities, the government could not consider this case in isolation and ignore the needs of other patients with different requirements.

The Court had in this context cited a case instituted against the Cambridge Health Authority where it was argued that "*difficult and agonising judgements have to be made as to how a limited budget is best allocated to the maximum advantage of a maximum number of patients. That is not a judgment which the Court can make.*"

On these considerations, the Constitutional Court had ruled in favour of the decision taken by the health authorities.

The Ombudsman observed that since complainant's case was to a significant extent analogous in merits to the one decided by the Constitutional Court and its judgement was relevant to this complaint, for the same reason as the Constitutional Court he could not take it upon himself to make such a decision.

The Ombudsman commented that despite indications that in this case treatment could hold reasonably better prospects of short and medium term survival than if surgery was not carried out, he felt that in the final analysis it remained within the exclusive competence of the health authorities to determine the priorities and the services that can provide the best health gain in the context of available financial resources. This consideration applies also but especially where demands are made for services that are not yet available. The Ombudsman pointed out that in the end it all boils down to financial resources that are not unlimited.

The Ombudsman stressed that it is not his function to set or to adjust established health priorities even if on humanitarian grounds he may recommend that policies be regularly reviewed. Nor is it the function of his Office to substitute in any way the discretion of the health authorities by his own especially when no evidence of any discrimination between patients suffering from the same conditions was brought up.

Conclusion

In view of the ruling by the Constitutional Court on an analogous case which is significantly relevant to this complaint and in the light of the reasoning that led to the Court's decision, the Ombudsman felt that he was not in a position to sustain complainant's grievance that the Health Division did not provide financial assistance for his treatment abroad.

The Ombudsman nonetheless strongly recommended that the health authorities should review the matter and re-assess the situation in terms of the number of potential beneficiaries for such treatment after taking due account of the latest information available on the benefits derived from this treatment. This would enable the authorities to be in a better position to evaluate the cost effectiveness of introducing such treatment in Malta.

From the Ombudsman’s Caseload

Case 8 (October 2008)

The elderly lady who was injured in an ambulance

The complaint

While accompanying her husband who was being rushed to hospital in an ambulance because of a medical emergency, an elderly lady was injured when the ambulance was involved in a collision with another vehicle. With the impact of the crash, she was thrown off her seat and fractured her left wrist while her spectacles were damaged beyond repair.

In the next few weeks as the injury to her wrist rendered her unable to continue with her daily activities and limited the attention that she could give to her sick husband upon his discharge from hospital, she had to engage a helper. She also replaced her spectacles.

Feeling that the damages that she sustained had arisen because the ambulance had no seat belts for persons accompanying patients, the lady asked the Health Division for financial compensation amounting to €400. However, when the health authorities made short shrift of this request and turned it down brusquely on the grounds that they were unable to meet her demand, she approached the Office of the Ombudsman.

Considerations and comments

The Ombudsman stated at the outset that, regardless of the amounts involved, it is not his function to establish which party was to blame for the collision or to determine claims for financial compensation since these matters are decided by the courts of justice. The primary function of his Office is to establish instances of maladministration by government authorities in cases that are brought to its attention.

The Ombudsman considered complainant's plea that the absence of seat belts in the ambulance contributed towards the damages that she incurred. In this connection he noted that the Motor Vehicles (Wearing of Seat Belts) Regulations, 2003 include the obligation of adults to wear a seat belt when travelling inside a vehicle as long as the seats are fitted with this equipment. The ambulance involved in this incident was, however, on the road before these regulations came into force.

The Ombudsman also referred to paragraph (8) of the preamble of Directive 2005/39/EC of the European Parliament and of the Council of 7 September 2005 relating to motor vehicles with regard to their seats, their anchorage and head restraints which states that "*research has shown that it is not possible to provide side-facing seats with safety belts ensuring the same level of safety to the occupants as front-facing seats*." The Directive prohibits the installation of side-facing seats in vehicles of various categories although this provision does not apply to ambulances while there is no provision that requires the installation of anchorages for seat belts in such cases.

As a result the Ombudsman decided to consider this incident from a different perspective, namely the government's failure to provide for insurance cover for its own vehicles.

The Ombudsman noted that subarticle 3(1) of the Motor Vehicles Insurance (Third-Party Risks) Ordinance states that "… *it shall not be lawful for any person to use or to cause or permit any other person to use a motor vehicle on a road unless there is in force in relation to the user of the vehicle … such a policy of insurance in respect of third-party risks …*". Subarticle 3(4) states, however, that this provision "*shall not apply … to any motor vehicle owned by the Government of Malta when such vehicle is used and employed exclusively in the service of the Government of Malta.*"

In view of this exception at law it is government policy not to provide insurance cover for its vehicles since it is considered more sensible to meet the costs of any damages that may from time to time arise by resort to public funds. This also means that although the law requires that, as a general rule, a vehicle that is on the road must at least be covered by an insurance policy in respect of third-party risks, the government exempts itself from the legal requirement that it imposes upon citizens in respect of these risks.

The Ombudsman, however, argued that this action in turn places a moral duty on the Government to provide an alternative way to meet its obligations towards citizens who find themselves in the same situation as complainant and are involved in an incident involving a government-owned car. Through its policy of not covering its own vehicles by an insurance policy the Government *de facto* assumes direct responsibility for damages caused to third parties and to pay compensation in any such instance that would otherwise be payable by insurers.

The Ombudsman found that in similar instances claims for compensation by third parties are treated on a case-by-case basis where the government department involved ascertains first whether a basis exists for any such claim. In the event that this is so, a recommendation is sent to the Ministry of Finance to authorise payment of the claim.

The Ombudsman felt that in this case complainant satisfied this requirement. Beyond any doubt a third party on board an ambulance on its way to hospital had sustained damages and from this point onwards the Health Division was responsible for the consequences. It could not merely wash its hands of its responsibilities towards the passenger without even bothering to ascertain whether a basis existed for her claim in terms of government policy especially since the damages involved a small amount of money. The health authorities, however, simply brushed her claim aside.

The Ombudsman held that, in his view, the issue of who was responsible for the accident in question was irrelevant. There is a difference between acceptance by the Government of liability for the accident and, consequently, accepting all damages sustained by either party involved in the crash and acceptance to pay damages to a third party who was in the ambulance at the time of the incident.

The Ombudsman emphasized that this did not imply that the Health Division should have accepted complainant's claim without any verification. A person who suffers damages has an obligation to limit the amount of compensation that is due to costs that are real, fair and reasonable while the right to redress means that a victim is restored as much as possible to the position before the accident occurred. The Ombudsman pointed out that in this case there was evidence that complainant's claim for compensation was more than reasonable and that her complaint was justified.

The Ombudsman's recommendations

The Ombudsman pointed out that he does not enter into the merits of the government's decision, as a matter of policy, not to insure its vehicles and instead to assume direct responsibility for third-party risks that would otherwise be covered by an insurance policy on the grounds that payment of justified claims would be less expensive than a blanket insurance for all its vehicles. However, he held the view that once the claim by complainant was justified, it was the duty of the health authorities to recommend to the Ministry of Finance the award of compensation after having duly verified the reliability of this claim.

The Ombudsman ruled that in this case the Health Division acted unfairly and seriously failed its responsibilities towards complainant and recommended that the Division should compensate her for damages that she sustained. At the same time he explained that his recommendations were without any prejudice to precautions that the Division might additionally need to take to safeguard its interests as well as the rights of the ambulance driver should it eventually result that responsibility for the accident lay partly or fully on him.

In his report the Ombudsman also referred to the terse reply sent to complainant by the health authorities to reject her grievance. He observed that this attitude breached an element of good administration since the authorities are obliged to give the reasons for decisions that affect the interests of citizens in a negative way. The reply given to complainant in this case was reminiscent of an outdated approach towards citizens; and this was unacceptable especially since the right to good administration is enshrined in the Charter of Fundamental Rights of the European Union.

The sequel

This was not, however, the end of the story since the Health Division expressed its concern about the implications of the Ombudsman's recommendations.

In his Further Opinion the Ombudsman again underlined that it is the Government itself that imposes on every car owner an acceptance of third-

party liability so that a car may be licensed on the road. However, when the Government exempts itself from the burden of legislation on third-party liability so as not to bear costs associated with the payment of insurance premia, this does not mean that the Government can also exempt itself from the moral duty to meet its obligations to citizens in this respect. As a result of its failure to insure its own vehicles, the Government had, in the opinion of the Ombudsman, assumed direct responsibility for third-party damage.

The Ombudsman downplayed the concern by the Health Division that implementation of his recommendation to pay compensation to complainant would introduce a new expense to the Government and pointed out that the Government had paid for third-party damage in several similar situations. He insisted that this situation arose directly as a result of the government's decision not to insure its vehicles since if it insured them, any such additional expenditure would have to be met by insurers.

The Ombudsman lambasted the suggestion by the Health Division henceforth to affix notices on government ambulances warning patients and relatives that they travel at their own risk and admitted that he found this proposal incomprehensible. Besides having reservations about its validity at law, the Ombudsman expressed surprise since this proposal implied that persons travelling in a government-owned ambulance would be unsafe – and this was likely to upset patients whom the Division has a duty to transport in the fastest and safest way to hospital in the event of an emergency. At the same time the Ombudsman recalled judicial pronouncements that such notices do not exempt carriers from the duty of due care and diligence in the transport of passengers and goods.

The Ombudsman also pointed out this proposal by the Health Division to disclaim *a priori* liability would be in sharp contrast with the government's declared policy to accept responsibility for the payment of proven damages to third parties even if these claims are treated on a case-by-case basis.

Final comments by the Ombudsman

The Ombudsman explained that in his opinion the proviso exempting the Government from compulsory third party insurance of its vehicles is unjust and discriminatory insofar as it is not accompanied by a corresponding legal obligation on Government to compensate third parties for any damages

suffered, irrespective of who is ultimately held responsible for the accident. It is unjust because an innocent victim of an accident involving a government-owned car runs the risk of being deprived of just compensation for any damages suffered. It is discriminatory because a citizen who suffers damage as a third party in an accident in which a government vehicle is involved ought not to be treated differently than another third party who suffers damage in an accident in which no government vehicle is involved.

All citizens are to be treated equally before the law and it is unacceptable that third parties who are the victims of a traffic accident do not have the same rights to compensation that they would otherwise be entitled to *ex lege* simply because the vehicle involved is government-owned. The Government has the duty in such cases to assume the full role and all the obligations that the law imposes on an insurance company to satisfy claims for damages suffered by injured third parties.

The Ombudsman recommended that the law, as it now stands, needs to be clarified by an additional proviso ensuring that the duty of Government in this respect is clearly spelled out. This proviso should also ensure that in such cases the Government, after satisfying the third party's claim for damages, following proper verification, would be subrogated in his rights against the person who is eventually found and held responsible for the accident.

In short, once the Government exempts itself from the obligation to insure its vehicles against third party liability, it should be expressly bound by law to assume all the obligations that a commercial insurance company is bound at law to assume in respect of every other privately owned vehicle so insured.

The Ombudsman argued that it is wrong to argue that the assumption of such an obligation would introduce a new expense to the Government. Since the Government has chosen not to insure its own vehicles against third party liability and to assume the role of an insurer itself and pay consequential damages in accidents in which its vehicle are involved where a basis exists for the payment of such claims, it is to be assumed that the Government has considered the implications involved and has decided that it is financially more convenient to adopt this policy and to meet the cost of these damages out of public funds. In line with this policy, it was astonishing that the Health Division should refuse to compensate a third

party for damages sustained when the victim was completely extraneous to responsibility for the accident.

The Ombudsman pointed out that it was preposterous to suggest that an innocent victim in a traffic accident in which a government-owned vehicle is involved has no right to ask for compensation from the Government, irrespective of who is to blame for the incident, or to wait for judicial determination of responsibility for the accident. It was even worse to suggest that a victim's right to recovery of damages depended on the financial means of the driver involved since the vehicle that was held responsible for the accident was government-owned and was not insured.

The Ombudsman commented that the injustice of such a situation is blatant and called for immediate remedy. He declared the present procedures inadequate and inequitable and stated that it would be proper and conducive to good administration to have the principle of governmental responsibility enshrined in a positive law provision. Payment of compensation to which citizens are entitled from the government should not be granted as a gesture of largesse but in satisfaction of their right to be properly compensated at law for damages sustained through no fault of their own.

In view of the implications of this case, the Ombudsman forwarded a copy of his recommendations to the Head of the Civil Service, the Attorney General and the Minister for Justice and Home Affairs for their consideration as to what steps should be taken to implement his recommendations.

OFFICE OF THE OMBUDSMAN

PUBLICATIONS

Annual Report 1995/1996	*Rapport Annwali 1995/1996*
Annual Report 1997	*Rapport Annwali 1997 (fil-qosor*)
Annual Report 1998	*Rapport Annwali 1998 (fil-qosor)*
Annual Report 1999	*Rapport Annwali 1999 (fil-qosor)*
Annual Report 2000	*Rapport Annwali 2000 (fil-qosor)*
Annual Report 2001	*Rapport Annwali 2001 (fil-qosor)*
Annual Report 2002	*Rapport Annwali 2002 (fil-qosor)*
Annual Report 2003	*Rapport Annwali 2003 (fil-qosor)*
Annual Report 2004	*Rapport Annwali 2004 (fil-qosor)*
Annual Report 2005	*Rapport Annwali 2005 (fil-qosor)*
Annual Report 2006	*Rapport Annwali 2006 (fil-qosor)*
Annual Report 2007	*Rapport Annwali 2007 (fil-qosor)*

Case Notes No.

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19 (April 2005)
20 (October 2005)
21 (April 2006)
22 (October 2006)
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INFORMATION

Address:	11 St Paul Street Valletta VLT 07
e-mail address:	office@ombudsman.org.mt
Telephone:	21247944/5/6
Fax:	21247924
Website:	www.ombudsman.org.mt

Office open to the public as follows

October – May	8.30am – 12.00am
	1.30pm – 3.00pm
June – September	8.30am – 12.30pm