Ombudsman

# CASE NOTES

APRIL 2009 NUMBER 27

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

## CONTENTS



## List of cases

**From the Ombudsman's Caseload**

## Foreword

The main aim of the Office of the Ombudsman is to promote fair, democratic and transparent public administration by the investigation of claims by citizens of unfairness, failure or inconsiderate treatment at the hands of public service providers so that hardship, inconvenience or injustice is healed and appropriate redress awarded to an aggrieved party. Another important objective of this Office is to ensure that policies, rules and procedures that are found wanting or that are identified as having given rise to maladministration are changed and put right so that in future complaints on similar grounds will not occur.

Responsibility for the institution's duty to serve as a vehicle for administrative justice falls to a large extent on the investigating officers in my Office who assist me in reaching a fair conclusion on the eligible complaints that constitute our caseload. At the same time the wider thrust in favour of changes in administrative practice that are recommended by my Office springs not only from my Final Opinion but also from the coverage given by summaries about case-by-case or systemic administrative shortcomings that appear in a publication such as this one even though, admittedly, only a few of these cases make it to reach the public eye given that this publication *Case Notes* appears only biannually.

As a general rule my Office does not publicize its work but acts in silence, leaning on gentle persuasion and on the recognized soundness of its recommendations for the resolution of conflicts brought to its scrutiny. Neither does my Office point fingers or cast aspersions on public service providers that are found responsible for maladministration. In this context this publication gains an added significance in efforts to widen the impact of the institution on the country's landscape in the field of public administration.

Besides meeting the usual selection criteria for inclusion in this publication – namely that they must be informative, worth narrating and able to capture the impartial and fair stand taken by my Office – the case summaries in this twenty-seventh edition of *Case Notes* that refer to sustained grievances serve to illustrate how public bodies are nudged into reviewing policies,

procedures and practices that are found to cause administrative unfairness. These summaries provide an insight into the work of the institution as it sets to dissect cases under scrutiny and, where necessary, promote and encourage administrative change that is beneficial to citizens as final consumers of public service.

I remain of the view that the inclusion in this publication of my recommendations on areas in the public service that warrant an upgraded standard of service delivery helps these proposals to gain sharper focus and rallies greater support in their favour for the benefit of citizens at large. It is then of course up to the authorities to accept and to implement these recommendations.

**Joseph Said Pullicino**
**Ombudsman** **April 2009**

---

***Note***

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

**Case No H 197**

**GOVERNMENT PROPERTY DIVISION**

**Moving the goalposts**
**whilst a selection process is under way**

## The complaint

A public official felt aggrieved and lodged a complaint with the Office of the Ombudsman when he was declared ineligible for an Assistant Director position in the civil service. He contended that since he satisfied the requirements of the call for applications, the decision to declare him ineligible was unjust and had prejudiced his professional career prospects and sought financial compensation for the moral and financial damages which he had suffered.

## Facts and findings

Following the issue of Circular 3/2006 on 19 July 2006 by the Ministry for Justice and Home Affairs inviting applications for the position of Assistant Director (Services) in the Estate Management Department of the Government Property Division, complainant decided to submit his application. Paragraph 5 of this circular listed the various types of officers who were eligible to apply for this position that was considered as a position of a specialised nature. These included:

(i) officers who hold a substantive appointment of Officer in Grade 5;
(ii) officers in the grade of Senior Principal; and
(iii) officers in the grade of Principal who on the closing date of the call for applications had already progressed to salary scale 7 or had completed twelve years service in the grade of Principal and were entitled to progress to salary scale 7 in terms of the Addendum to the General Services Grade Agreement although

> officers in this latter category, if successful, would only be considered for appointment if they were favourably reported upon by their superior officers.

Subparagraph (iv) of paragraph 5 of the circular went on to state that since the call covered a position of a specialised nature, applications would also be accepted "*from public officers who on the closing date of this call for applications are in* (a) *salary scale not below scale 7*."

Complainant explained that at the time of his application he was a public officer serving in the grade of Principal on salary scale 7 by virtue of his posting in terms of the 1993 Classification Agreement on the Nursing and Paramedical Class between the Government and unions. He also admitted, however, that he was aware that he enjoyed this position until such time as he continued to hold this post and that in the event that he would be transferred from this posting, he would revert to his lower substantive grade in salary scale 8.

Complainant informed the Ombudsman that before submitting his application he had sought the advice of the Management and Personnel Office (MPO) and was told by the Director (Resourcing) in this Office that with regard to applications for positions of Assistant Director that are of a specialised nature "*officers from all grades of the service may apply, on condition that they are in salary scale 7*."

A few weeks after the closing date for applications, however, by means of a letter from the Ministry for Justice and Home Affairs complainant was informed that his application could not be considered because he failed to satisfy the provisions of paragraph 5 of Circular 3/2006. Upon challenging this decision that he was ineligible for this position and asking whether the result had been published, early in January 2007 complainant was told that his grievance had been forwarded to the selection board for its comments. A month later he was told that the matter was being discussed with the Public Service Commission and that he would be told of the outcome in the very near future.

On 26 March 2007 the three members of the selection board wrote directly to complainant to reconfirm that they had not found him eligible for the position of Assistant Director in the Estate Management Department of the

Government Property Division on the grounds that "*your substantive grade is in scale 8*." They went on to state that "*… in order to be eligible, applications were to be accepted from officers not below scale 7*."

It was at this stage that complainant sought the help of the Office of the Ombudsman which considered his request as a complaint against a decision on his appeal regarding his eligibility which had been given by the PSC to whom his appeal had been referred even though it was not strictly a petition in terms of the Public Service Management Code (PSMC). In turn the Office of the Ombudsman approached the Public Service Commission about this issue.

The investigation by the Ombudsman found that after the selection process for the position in question had been concluded, the only candidate who had been successful opted not to take up this post. The Ministry, therefore, issued another circular on 5 April 2007 for the same position which had of course remained vacant but this time subparagraph (iv) of paragraph 5 dealing with the eligibility of candidates was amended to read that applications will also be accepted "*from public officers who on the closing date of the call for applications are in a substantive grade which is not below salary scale 7*." In view of this new requirement, complainant was ineligible to apply under this second call.

On the advice of the Office of the Ombudsman complainant submitted a formal petition in terms of the PSMC which was duly considered by the Public Service Commission. On 16 May 2008 the PSC informed complainant that in its view the selection board had been correct to consider him ineligible for the position of Assistant Director on the basis of the fact that in the case of calls for applications for the post of Assistant Director the words "*public officers in salary scale not below scale 7*" had always been taken to mean a substantive post in the public service.

The Ombudsman referred to the seventh edition of the Public Service Management Code that was in force in 2006 that contained a *Specimen Call for Applications for the Position of Assistant Director*. It was noted that the original call for applications for the position that was issued in July 2006 and which gave rise to complainant's initial apprehension was fully in line with the wording which appeared in this specimen call.

The eighth edition of the PSMC dated May 2007 – in other words, after complainant's case arose – however, amended the *Specimen Call for Applications for the Position of Assistant Director* in the sense that applicants in the case of similar positions which are of a specialised nature were now required to hold "*a substantive grade which is not below scale 7*" and also clarified matters further by the introduction of a new subparagraph which stated that:

"*For the avoidance of doubt it is being made clear that public officers who, by virtue of their having a contractual appointment to a position in government service, are in salary scale 7 or above, but whose substantive appointment is in a salary scale below scale 7, are not eligible to apply for this position*."

The Office of the Ombudsman confirmed that the PSC had considered at length the arguments raised by complainant in his petition. In its consideration the Commission recalled that there were several other instances where candidates were deemed ineligible because of a long established rule whereby applicants had to be tenured in a particular substantive post.

The Commission had also considered that complainant was substantively in salary scale 8 but was occupying a position in the same grade but in scale 7 only in virtue of his posting in line with the Classification Agreement on the Nursing and Paramedical Class and was entitled under this Agreement to salary scale 7 during such time as he was performing duties in this position. In order not to create an injustice with other public officials who in the past had their applications turned down for similar reasons, the PSC had agreed that it should not reverse the selection board's decision on complainant's eligibility.

The Ombudsman also found that upon the submission by complainant of his petition in terms of the PSMC, the Commission had sought clarification from the Management and Personnel Office (MPO) of the Office of the Prime Minister with regard to the date when the assumption took ground that applicants for the position of Assistant Director of a specialised nature had to hold a substantive appointment in scale 7; whether there was any written internal or external documentation to this effect; and how many calls for applications falling in this category had been issued by the various ministries.

In its reply the MPO pointed out that the first call for applications for the post of Assistant Director was issued in January 1999. In this call the eligibility requirements for posts in this position where special professional or technical expertise was required, stipulated that the call was open to public officers who were in salary scale 7 and no reference was made to applicants having to hold a substantive grade in salary scale 7.

The MPO explained, however, that at the time no applicant for the position of Assistant Director could have held a contractual position that was at a level that was different from the substantive grade held by the applicant since it was only when the concept of definite contractual positions started to develop, concurrent with an officer's substantive grade, that doubts started to raise as to whether the reference to officers in salary scale 7 meant a contractual position or a substantive grade in scale 7. Indeed, it was only when the number of officers in possession of a substantive grade concurrently with a definite contractual position started to abound in the public service that in February 2007 the Commission clarified the issue to all and sundry for the avoidance of doubt that only officers with a substantive appointment in scale 7 were in fact eligible to apply for the position of Assistant Director.

The Ombudsman noted that in this reply to the Public Service Commission the MPO made no reference to the fact that in 2005 complainant was told by the MPO itself that officers from all grades of the service might apply for the position of Assistant Director of a specialised nature as long as they were in salary scale 7. The Ombudsman also noted that the PSC had not insisted on a clarification by the MPO regarding the advice given to complainant in 2005 that was at odds with the position that was now being adopted by this Office on this issue.

The Ombudsman also took note of the point made by the MPO in its reply to the Commission that it was unable to provide any information regarding how many individuals had been declared ineligible because of the new requirement to hold a substantive grade not below scale 7 because since 2001 the issue of calls for applications for the position of Assistant Director had been delegated to Permanent Secretaries of ministries where such vacancies occur and as a result no database existed in the MPO which contained this information.

**Considerations and comments**

The Ombudsman noted that in terms of the Ombudsman Act the role of his Office in such cases is to inquire whether the PSC had given due consideration to the points raised in the petition submitted by complainant and to determine whether there was anything in the Commission's deliberations which was contrary to law, mistaken in fact or at law, improperly discriminatory, oppressive, unjust or otherwise unfair.

In his investigation the Ombudsman found that the PSC had reached its judgement on this case on the basis of what it considered as its standard and longstanding policy in respect of analogous situations. However, there was no mention of any specific decision concerning a situation that was similar in all respects to that of complainant where the wording of the call for applications was the same and the PSC had declared the applicant as ineligible to apply. As a result doubts remained about the interpretation being given by the authorities to candidates who were strictly eligible to apply for the position of Assistant Director and about whether an applicant for this position needed to be an officer already holding a substantive grade in scale 7.

The Ombudsman expressed his opinion that the advice given by the MPO to complainant in 2005 in reply to his query that officers from all grades in the public service could apply for the position of Assistant Director of a specialised nature as long as they were in salary scale 7 was the most logical interpretation of the relevant sections of the call for applications and of the provisions of the PSMC as these stood at that time. Notwithstanding this, when a few years later the PSC sought clarification from the MPO about this issue, the advice given was in sharp contrast with that given earlier to complainant that in order to be eligible to apply an officer need not be in a substantive grade in scale 7 but could be in any grade as long as his salary scale was 7.

The Ombudsman observed that the context of the paragraphs that made reference to eligibility considerations was another important indication of how to interpret the way in which the call for applications of July 2006 had been formulated. Whereas each of the first three sub-sections of this paragraph in the call for applications made direct reference to a specific grade (for instance, officers holding "*a substantive appointment of Officer in Grade 5*" or "*in the grade of Senior Principal*" or "*in the grade of*

*Principal*"), the particular subparagraph under scrutiny does not refer to any grade or substantive appointment but only states that applications would also be accepted "*from public officers who on the closing date of this call for applications are in (a) salary scale not below scale 7*."

The Ombudsman explained that he had no doubt that these words clearly indicated that a substantive grade was not stipulated or required when the first call for applications was issued. As a result he felt that the issue should not have arisen at all and that no doubts ought ever to have been raised about complainant's eligibility under the first call for applications.

The Ombudsman stressed that the issue of a call for applications imposes obligations not only on applicants but also on the public bodies and authorities that are responsible for any such calls. The terms and conditions that appear in a call for applications are binding upon both parties and it is unheard of to move the goalposts when a selection process is already under way.

The Ombudsman pointed out that if it had been found that there were ambiguous statements in the original call for applications, the authority responsible for the call should have withdrawn the call and reissued the call with more clear terms and conditions. Another option once doubts had arisen was to adopt a less rigid interpretation and leave the evaluation of candidates in the hands of the selection board which would judge applicants on their merits and on the basis of the eligibility criteria that featured in the original call which after all were faithful in all respects to the specimen application in the PSMC.

The Ombudsman's investigation found that despite the contestation that arose, the PSC opted to continue processing the other applications and had even selected one of the candidates to fill the post. This led the Ombudsman to observe that his impression was that after complainant challenged the original interpretation of the eligibility clause by the selection board, doubts seemed to have crossed the minds of members of the PSC with the result that at a later stage in the process the PSC sought information from the MPO on the date as from when the assumption started to gain ground that applicants for the post of Assistant Director of a specialised nature had to be substantively in scale 7. According to the Ombudsman the fact that the PSC sought an assurance on this point could

be taken as an indication that the Commission no longer felt itself threading on solid ground.

The Ombudsman also pointed out that when complainant aired his grievance, in order to eliminate any doubt the MPO decided to amend the PSMC. In the view of the Ombudsman the way in which the eligibility criteria in the first call for applications had been worded and structured was clear enough and binding even though he did not rule out that it was poorly worded and may not have properly reflected the intention of the MPO to restrict the officials who in its view ought to have been eligible to apply for the post of Assistant Director.

The Ombudsman observed that the PSC's final decision confirming the selection board's disqualification of complainant on the basis of ineligibility was based on the argument that it would be unfair upon past applicants who were also excluded on similar grounds. The Ombudsman stated that in his opinion this consideration breached a basic element of justice and that it is not correct to deny justice to a person on the grounds that previous injustices had been committed or that incorrect or doubtful decisions had already been made in the past. Apart from this important consideration, not one single case had been identified where an applicant had been disqualified on the basis of this same interpretation.

The Ombudsman stated that there is no validity in arguments based on reference to inexistent precedents or to precedents that might have existed but had not been traced or identified so as to eliminate any doubts as to whether the situation in these instances was indeed relevant to the one under consideration by the Ombudsman. The Ombudsman also observed that although the Commission tried to uncover any similar situations that might have arisen in the past, it had not insisted on its efforts in this direction.

**Conclusion**

In his Final Opinion the Ombudsman concluded that the PSC's decision had seriously prejudiced complainant's interests in the sense that he had been excluded from the selection process without any valid grounds. He stated that had complainant's eligibility been accepted – something that

was fair and proper in the circumstances – he would have been able to compete on an equal footing for the position in question.

In the Ombudsman's opinion this chance had been unfairly denied to complainant who was the victim of an unjust decision based on a mistaken interpretation of one of the conditions that appeared in the original call for applications in July 2006 since the subsection in question did not specify at that time that an applicant had to hold a substantive grade in salary scale 7 but only required an applicant to have a salary in scale 7. The Ombudsman observed that this interpretation should have been obvious from the context of the whole paragraph where the various eligibility criteria were listed.

The Ombudsman also expressed the view that if there was any doubt about the way in which this particular condition for eligibility had to be interpreted or if there was any ambiguity, the less rigid interpretation ought to have been adopted; and according to the Ombudsman this would have been in order once it had been decided to proceed with the call for applications.

In addition no precedents cited in the decision by the PSC had ever been identified or proven to be quite similar to the case under consideration. In any event the Ombudsman insisted that a previous wrong decision could never justify the perpetration of another incorrect or unfair decision.

On this basis the Ombudsman upheld complainant's claim that he had been unjustly and incorrectly excluded from competing in the original call for applications. The Ombudsman ruled, however, that given the *fait accompli* he was not in a position to submit a recommendation for an appropriate remedy to complainant.

## Outcome

Subsequent to the release of the Ombudsman's Final Opinion, complainant wrote to the Office of the Ombudsman where he showed his appreciation that his grievance had been upheld but expressed his disappointment at the fact that the Ombudsman was unable to recommend the award of an appropriate remedy in order to make up for the moral and financial damage that he had suffered and for the hindrance to his career progression. The Ombudsman, however, ruled that there were no grounds for a change in his

Final Opinion and explained to complainant that although it was true that he had been unjustly declared ineligible, this did not mean that he would automatically have been appointed Assistant Director since it would have been necessary for him to pass an interview which formed the basis of the whole selection process.

On its part the Public Service Commission placed on record its rejection of the conclusions reached in the Ombudsman's Final Opinion. It made reference to its recommendations on this case in a meeting that was held on 6 December 2007 when the Commission, aware that it had been inherently unfair to retain complainant in a grade for several years without declaring that grade as his substantive grade, recommended that complainant should forthwith be declared as being substantively in grade 7 and eligible to apply in any future calls for applications that required candidates to be in this grade.

The Ombudsman noted, however, that the government had not accepted the PSC's suggestion and as a result the case remained unresolved.

**Case No H 501**

**ELDERLY AND COMMUNITY CARE DEPARTMENT**

**The inmate in a residence for the elderly who paid a high contribution for his care and upkeep**

## The complaint

A resident at the St Vincent de Paule Home for the Elderly lodged a complaint with the Office of the Ombudsman where he lamented about the minimum amount that had been left at his disposal after the deduction that was made by the Elderly and Community Care Department as his contribution to the Government for his care and upkeep at the residence for elderly patients. This deduction was based on the percentage rates that were applicable for his various income streams in accordance with the State Financed Residential Services Rates Regulations, 2004.[1]

## Facts of the case

Complainant stated that he had declared the following income in the year 2006: social security pension (Lm1,860); social security bonus (Lm185); and bank interest (Lm455) – a gross income of Lm2,500. He did not contest the fact that on this total income a weekly sum of Lm36.50 was due to the home for the elderly where he resided; and on this basis he contributed Lm1,900 and was left with Lm600.

With regard to income derived from interest on funds that he had invested in a local bank, complainant explained that he had received the amount of Lm455 in February 2005 and that in line with the applicable regulations he had declared this income in his 2006 declaration. He went on to add, however, that when the deposit which yielded this interest matured in mid-February 2006 and was placed again with the same bank for another year,

[1] Legal Notice 259 of 2004 (Social Security Act, Cap. 318 of the Laws of Malta).

this time around the interest rate was considerably lower and his investment only yielded Lm285 in interest a year later.

Upon realizing that despite this drop in his income from bank interest his contribution towards his upkeep for the year 2007 (income derived from the preceding year) had again been based on an estimated combined income that included the sum of Lm455 in bank interest when clearly he would not be earning this amount, the resident sought the Ombudsman's intervention. In his opinion the way in which the Elderly and Community Care Department had calculated his contribution for 2007 went against the spirit of regulation 3(4) of the State Financed Residential Services Rates Regulations, 2004 under the Social Security Act which states that:

"..... *any resident who becomes a resident* ..... (in a state financed residential service) …… *shall contribute 80% of any pension, social assistance and bonus receivable, net of income tax, and 60% of any other income received during the calendar year immediately preceding the year in which the assessment of such other income is made for the purposes of these regulations net of income tax.*

*So however that such contribution made by the resident shall not be such as to leave the resident with less than Lm600 per annum at the resident's disposal.*"

Complainant told the Ombudsman that although these regulations laid down clearly that he should not be left with less than Lm600 at his disposal, the way in which the department had reckoned his contribution meant that he would remain with a mere Lm476.15 in his pocket in 2007. He maintained, therefore, that he was entitled to a refund.

When approached by the Office of the Ombudsman, the Elderly and Community Care Department did not share complainant's view that the computation of his upkeep at St Vincent de Paule Home for the Elderly for 2007 was inconsistent with Legal Notice 259 of 2004 of the Social Security Act. The department explained that the Act stipulated how the computation should be worked out and clearly indicated that these calculations are to be carried out on 80% of all pensions, social assistance benefits and bonuses to be received during the year when the assessment is being done, net of income tax while 60% of any other income received during the preceding calendar year is also to be taken into consideration, net of income tax.

After providing information about the amounts that had been considered in connection with complainant's 2007 assessment and how his contribution towards his upkeep for 2007 had been worked out, the Elderly and Community Care Department clarified that in complainant's case during its revision for 2008 it would take into consideration the pension to be received during 2008 and any other income or bank interest received during 2007. The department also assured the Ombudsman that the smaller amount derived from bank interest payments that had influenced adversely complainant's income level for 2007 would be taken into consideration when the 2008 contribution would be determined. The department added that if what complainant had asserted was correct, this would no doubt be reflected in his 2008 contribution.

The department went on to explain that its legal advisers interpreted the section of the legal notice which stated that any contribution made by a resident shall not be such as to leave a resident with less that Lm600 per annum at the resident's disposal to mean that since the contribution assessments are made at the beginning of each year, interest payments and other income received by a resident must be based on that of the previous year.

**Considerations by the Ombudsman**

The Ombudsman set forth the following considerations on which he based his evaluation of this case:

(i) the proviso of the various paragraphs of regulation 3 of Legal Notice 259 of 2004 was clearly intended by the legislator to ensure that residents in state-financed institutions are assured of a basic minimum income of not less than Lm600 per annum and the law guarantees that this amount should be "*at the resident's disposal*" to ensure that it will be possible to provide for a resident's day to day needs; and

(ii) it is clear that the law intended to provide a minimum safety net to allow residents to lead a normal life and not to feel completely dependent and at the mercy of state aid and as indigent paupers and the amount of Lm600, established by regulation, can be considered a basic minimum that works out at less than a meagre Lm2 per day.

In the light of these considerations the Ombudsman stated that it is difficult to avoid the conclusion that this basic amount that the law requires to be at a resident's disposal should be available to a resident during the year in which this resident receives this amount. The law does not consider the possibility of refunds or set-offs and requires residents to have cash in hand to spend as and whenever needed.

This interpretation led the Ombudsman to conclude that it is unacceptable to envisage a situation in which a resident is deprived of this paltry amount for a whole year or part of it and then living in the expectation of receiving a refund or to be allowed a larger allowance in the following year.

The Ombudsman commented that the department is correct to conduct assessments at the beginning of each year and, therefore, any income derived from interest payments must be based on the amounts earned during the previous year. This is in fact in line with what is provided in regulation 3 of Legal Notice 259 of 2004 which provides that any resident shall contribute a prescribed percentage of any pension, social assistance and bonus receivable, net of income tax and of any other income "*received during the calendar year immediately preceding the year in which the assessment of such other income is made for the purposes of these regulations net of income tax*."

The Ombudsman was of the opinion, however, that this yardstick by which the amount to be paid by a resident is to be established has to be reconciled with the department's obligation to ensure that the total contribution by a resident should not be such as to leave a resident with less than Lm600 per annum at his disposal.

According to the Ombudsman the assessment of a resident's contribution is conditional to this overriding principle of ensuring the basic minimum subsistence to which a resident is entitled. The department has, therefore, no right to materially deduct monies from the income of a resident in excess of that amount and in such a way that the resident would be left with less than the prescribed minimum allowance. It is also arguable, according to the Ombudsman, whether the department could deduct more than the prescribed percentage from a resident's pension, social assistance and bonus receivable.

The Ombudsman argued that irrespective of which interpretation is correct, it is clear that an anomaly can arise, as had arisen in the case under scrutiny, by which a resident could be deprived of his basic minimum maintenance allowance in the sense that this amount would not be at the resident's disposal during the year in which the resident would be entitled to use it and when he would be expected to need it most.

The Ombudsman was of the opinion that the department should revise its procedures to ensure that this proviso in the paragraphs of regulation 3 of Legal Notice 259 of 2004 is fully respected both in word and in spirit.

**Conclusions and recommendations**

In the light of the above considerations, the Ombudsman concluded that this complaint was justified since the Elderly and Community Care Department failed to ensure that in line with Legal Notice 259 of 2004 the resident who had submitted this grievance would be left with a minimum of Lm600 at his disposal for 2007 and instead was left with much less than this minimum amount. He recommended that this resident be refunded the difference that was due to him to ensure full compliance with the regulations.

The Ombudsman also stated that the problem regarding fluctuations in the income of residents could best be redressed by finding administrative ways and means to allow for periodic assessments of the amount that the department should withhold from a resident's income within the legal parameters. In order to avoid increased and unnecessary bureaucratic burdens on the administration, it was recommended, however, that such revisions could only be made following an application by an aggrieved resident and at established time windows, say, every quarter. Such a simplified system would not only be in line with the government's declared policy to have a personalised social security service but would also avoid the need for the department to review all assessments during the year.

The Ombudsman finally commented that it is imperative that residents who are most badly hit and who are deprived of their minimum subsistence be adequately protected and he therefore recommended that the department should revise its procedures to allow for such a periodic review.

Upon receiving the Ombudsman's Final Opinion, the Elderly and Community Care Department on its part reserved its position with regard to the assessments of contributions due by inmates in state financed residential institutions but agreed to issue a refund to complainant which would be equivalent to the additional amount which he had been made to pay and as a result of which he was left with less than Lm600 at his disposal throughout 2007.

**Case No H 515**

**MALTA ENTERPRISE CORPORATION/**
**MALTA INDUSTRIAL PARKS LIMITED**

**A stormy salvage operation**

## The complaint

Jack Kramer, an entrepreneur who successfully salvaged the jobs of several workers employed with Vanzetti & Brown when this firm ceased operations, alleged in a complaint with the Office of the Ombudsman that conditions for the lease of factory premises at the San Ġwann Industrial Estate were changed arbitrarily by Malta Enterprise Corporation (ME) and Malta Industrial Parks Limited (MIPL).[1]

Claiming an unfettered right to undertake any manufacturing process in these premises and that he should not be restricted to the manufacture of textile products and steel furniture, Kramer took exception to insistence by these two state agencies on payment by his company of utility and rent arrears due by Vanzetti & Brown when it was earlier agreed otherwise and to a steep increase in the rent of the factory used by his company.

## Facts of the case

The timeline of this case ran as follows.

In March 2006 the owner of Vanzetti & Brown, a textile manufacturing company on the verge of bankruptcy, sought approval by Malta Enterprise for a takeover of his firm and its manufacturing process by Kramer who was reportedly willing to retain the company's workforce and settle arrears of factory rent. He was also said to be ready to reach an agreement

[1] Malta Enterprise Corporation is the government agency responsible for the promotion of foreign investment and industrial development in Malta while Malta Industrial Parks Limited provides industrial space and business premises to support enterprise and business undertakings in the country.

covering rent for the factory premises previously occupied by Vanzetti & Brown under the same terms while the owner of the company on the brink of failure would settle all pending utility and factory insurance bills. Kramer was prepared to submit an application to the Corporation for the approval of his project to continue the manufacture of garments and to undertake any other production activity that he may deem fit.

In a letter of intent issued in April 2006 Malta Enterprise agreed with the proposed takeover subject to acceptance by Kramer of various conditions including use of the factory solely for manufacturing purposes and the exclusion of any retail, importation or storage activity; the registration of a new company to take over the work of Vanzetti & Brown; a guarantee to retain the company's workforce for at least one year; the submission of a business plan; and settlement of rent arrears due by Vanzetti & Brown for its San Ġwann factory amounting to Lm10,000. Kramer was warned that this letter of intent would be revoked if he did not accept these conditions within four weeks. At the same time ME instructed MIPL to commence negotiations with Kramer on a new lease agreement for the San Ġwann factory although when a few weeks later MIPL told Kramer to pay rent arrears as a lump sum, he immediately retorted that he would stop the project in its tracks if MIPL insisted on this method of payment.

In June 2006 Kramer filed an *Application for assistance under the Business Promotion Act* stating that his new company would manufacture garments and would also be engaged in the production and assembly of outdoor street furniture.

In December 2006, the Board of Directors of Malta Enterprise established a rent of Lm4 per m² for the business premises used by Kramer's company instead of the previous rate of Lm1.75.

In a second letter of intent issued in March 2007, ME informed Kramer that assistance would be extended to his company on condition that he would continue the textile manufacturing process on the same lines as Vanzetti & Brown together with the manufacture of garments; that any additional activity would only consist in the manufacture and assembly of stainless steel outdoor street furniture; and that he would settle all outstanding rent and utility bills as well as pending factory insurance payments. Although aware that the letter of intent would be revoked if he did not accept these

conditions within four weeks, by April 2007 Kramer was still seeking more favourable conditions from the Corporation.

Late in August 2007 the Corporation revoked these two letters of intent since Kramer had not yet signed them and requested him to clear the factory premises and return them to ME with immediate effect.

During the Ombudsman's consideration of this grievance, Malta Enterprise management referred to its policy to specify the activity that can be carried out in factory premises allocated to investors and clarified that once a particular manufacturing activity is approved, in order to change this industrial process an operator has to submit an application to cover a proposed new activity. This meant that although ME regarded the Kramer project primarily as a salvage operation to rescue jobs lost with the closure of Vanzetti & Brown, his proposal to add a new activity by the manufacture and assembly of street furniture changed the whole picture. It also meant that his project could no longer be regarded as a takeover of the manufacturing process of Vanzetti & Brown or that his company would enjoy the same rental conditions.

The Corporation also informed the Ombudsman that after its approval of a business plan for a new investment proposal, it is up to MIPL to allocate business premises to the entrepreneur backing the project.

On its part MIPL claimed it was unaware of Kramer's proposal to change the use of the premises and insisted that decisions on changes in the use of factory space allocated to tenants fall under its sole responsibility. MIPL confirmed that the new rent of Kramer's factory was based on current rates and policies.

On being made aware in mid-October 2007 when his inquiry was still in progress that Kramer had been asked to evict the factory, the Ombudsman expressed concern at this development to the Chairman of Malta Enterprise and Malta Industrial Parks Limited. While not questioning the validity of the eviction order, he stated that he considered this action as showing disrespect to the right of citizens to complain to the Ombudsman and requested suspension of this action pending conclusion of his inquiry. In its reply MIPL management pleaded that the eviction order was issued in September 2007 when it was not even aware that Kramer had lodged a complaint with the Office of the Ombudsman.

In turn Kramer continued to insist that the Corporation was unreasonable to expect him to sign letters of intent that did not reflect the agreement reached in May 2006 and while lease conditions and the title to the property remained unsettled. Claiming that a section of the factory was already in use with several employees engaged in textile operations while materials related to steel furniture production were in the factory awaiting installation and not by way of storage, Kramer warned that he would lay off his workers if the eviction order were to be carried out.

Kramer was also aggrieved at the increase in the rent of the factory to Lm4 per m² because he felt that in return for this higher rate the repairs that the factory badly needed should be carried out by MIPL and not at his own cost. Besides, Kramer felt wronged that ME and MIPL overturned an agreement that he reached earlier with officials from the Office of the Prime Minister (OPM) and insisted that the Water Services Corporation and Enemalta Corporation had already accepted that outstanding utility bills were to be settled by the owner of Vanzetti & Brown and had even installed new meters in the San Ġwann factory.

Kramer was adamant that he took over the Vanzetti & Brown workforce on condition that rent would be pegged at its previous level and that he could introduce any additional activity as he may deem fit. He was also annoyed that he was expected to settle all outstanding rent arrears in one sum since he felt that this went against what was agreed earlier.

Kramer was equally upset that despite his investment in the street furniture business and his growing workforce as well as his plans to upgrade the factory at his own cost, both the Corporation and MIPL only seemed interested in increasing rental revenues and in the collection of monies due to Enemalta Corporation and the Water Services Corporation. He argued that this case revealed a singular lack of coordination between these two agencies and that it was up to them to honour an agreement he had already reached with the OPM on several issues related to his project.

Kramer claimed that the two public bodies violated article 3 of the Malta Enterprise Act that provides that "*the Government shall cooperate with the private sector to promote private enterprise in Malta*" and that by its actions Malta Enterprise went against the very purpose for which it was constituted.

MIPL stated that Kramer's claims that it had gone back on promises made in the past were unfounded and countered these accusations by stating that it never agreed to allocate to Kramer the factory previously used by Vanzetti & Brown at the same rent that was charged to this company. It explained that agreement with Kramer on settlement of rent arrears for the San Ġwann factory envisaged that he would spend Lm5,000 on improvements to the factory and would settle the balance of Lm5,000 by means of a cash payment; and this agreement was reflected in the draft letter of allocation issued to Kramer in April 2007. At the same time MIPL denied that it ever imposed conditions for the payment of arrears of utility charges since this matter falls outside its competence.

MIPL officials also explained that a change of use of factory space is tantamount to a new project and that any such proposal would first need to be scrutinized and approved by Malta Enterprise. They underlined that eviction procedures are only taken in hand if the allocation of factory premises is revoked and that MIPL is the sole entity that can establish terms and conditions for the lease of government-owned factories.

On its part ME rejected Kramer's claim about employment levels at the San Ġwann factory and stated that the production area in the factory was abandoned while the workshop floor was used for the storage of stainless steel outdoor furniture, billboards and other products. There was no machinery for the manufacture and assembly of outdoor furniture and this implied that these products were being imported or bought from third parties and the factory was only used for the storage of these items.

ME management confirmed that when in March 2006 the Corporation was told by an official from the Office of the Prime Minister that the owner of Vanzetti & Brown agreed to transfer his business to Kramer's company, at that stage the Corporation considered this step as a takeover of the manufacturing process of Vanzetti & Brown. However, when in July 2006 Kramer presented an application to resume this process and also to undertake the production and assembly of street furniture, this led ME to consider this new activity to fall outside the previous agreement and to recommend that the section of the factory used for this new activity would fall under a different lease agreement. As a result in March 2007 ME's Board of Directors issued a second letter of intent to Kramer that allowed

him to extend manufacturing activity at the San Ġwann factory to the production and assembly of street furniture.

ME officials admitted that at this time the Corporation came under considerable pressure from the Office of the Prime Minister to conclude negotiations with Kramer. They also declared that although MIPL was aware of ongoing contacts with Kramer, problems arose when MIPL and complainant failed to reach an agreement on the payment of arrears of rent although, according to the Corporation, it was accepted that failure by Vanzetti & Brown to settle outstanding bills would make Kramer himself liable to effect these payments.

An unexpected twist took place on 23 October 2007 when MIPL representatives together with police officials forced workers to vacate the factory used by Kramer's company and sealed off the premises without any prior warning and irrespective of the understanding that eviction would be suspended pending the Ombudsman's investigation.

Upon learning of this development, the Ombudsman contacted the MIPL management and referring to his earlier request to MIPL to withhold action until the conclusion of his investigation, pointed out that he expects public authorities to suspend all action while his investigation on a complaint is in hand. The Ombudsman said that in his view enforcement of the eviction order during an ongoing investigation was an act of contempt to the authority of a constitutionally appointed institution.

In its reply to the Ombudsman MIPL insisted that it was acting within its legal rights and once no impediment to enforcement of the eviction order existed at the time when this action was taken, there was no illegal or abusive action or contempt of the authority of the Ombudsman on its part. MIPL held that the complaint was lodged by a company that only had squatter status over the property and that it is in duty bound to ensure that public property that it administers is occupied under proper arrangements and contributes to the generation of public revenue.

Furthermore, MIPL maintained that enforcement of its eviction order on the occupation without title of these premises did not preclude the Ombudsman from continuing to investigate the complaint or from issuing his Final Opinion at a later stage. MIPL management felt that on these grounds it should not reverse the enforcement process.

Complainant was annoyed that ME and MIPL were putting at risk the employment of his workforce and observed that since both agencies had the same chairman, it was hard to understand how MIPL could refuse to honour commitments made by the Corporation that it considered prejudicial to its interests. He insisted that agreement had already been reached on pending utility arrears and rent on the San Ġwann factory and expressed disappointment that both agencies seemed intent on going back on their commitments towards his company. Kramer also strongly denied that the San Ġwann factory was used for storage and said that items in the workshop related to street furniture were awaiting assembly and transportation to their respective installation sites.

**General considerations by the Ombudsman**

The Ombudsman pointed out that when the issue arose, Kramer first approached the Office of the Prime Minister. However, instead of referring the issue straightaway to Malta Enterprise so that the normal procedures would be followed,[2] the OPM took it upon itself to try to resolve the situation and pushed forward the view that Kramer should absorb the employees of Vanzetti & Brown. The OPM also put its weight on ME to allow Kramer to take possession of the ex-Vanzetti & Brown factory at the same rent as this company.

The Ombudsman found evidence of strong pressure by the OPM on ME to approve this plan of action to salvage the jobs of the Vanzetti & Brown workforce. He also found that it was only when this rescue plan had reached an advanced stage that MIPL was brought into the picture; and feeling annoyed at having been left out for so long, MIPL retaliated by claiming that ME overstepped its authority. The Ombudsman observed, however, that public bodies are all segments of one and the same government; and the Court of Appeal in its superior jurisdiction had confirmed this observation on 20 March 1989.[3]

---

[2] These procedures could have consisted in the liquidation of Vanzetti & Brown; the return of its San Ġwann factory to MIPL; and an application by Kramer to ME for factory space and assistance for his venture.

[3] The Court of Appeal in its superior jurisdiction on 20 March 1989 held that "*… id-diviżjoni tax-xogħol tal-Gvern f'dipartimenti differenti, hija diviżjoni li saret għall-kumdità tiegħu …… jekk tolqot b'xi mod liċ-ċittadin, din għandha tolqtu bl-effiċjenza akbar tiegħu billi taqdi liċ-ċittadin aħjar u mhux agħar.*" [Alfred P Farrugia noe v. Commissioner of Inland Revenue]. *("… the division of government work among different departments is a division which is done merely for the government's own*

The Ombudsman remarked that any disagreement between the Corporation and Malta Industrial Parks Limited was of no interest to Kramer and it was their responsibility to resolve any internal turf war, though not at Kramer's expense or to his detriment. This also meant that the two bodies should honour any agreement reached with complainant by government representatives.

On the other hand the Ombudsman agreed that ME has every right to show concern for pending electricity and water bills. Electricity and water are produced by government entities; and the principle of one government upholds the concern shown by ME for collection of arrears due to Enemalta Corporation and the Water Services Corporation.

In his investigation the Ombudsman sought to unravel what had been agreed between the parties as opposed to the terms which complainant sought to achieve and which the OPM tried to secure on his behalf. While it was recognized that the OPM enjoys supreme authority and has the power to override both agencies, at the same time it was clear that in this instance the OPM sought to obtain for Kramer's new venture the allocation of factory space at the old rent as well as a free hand to undertake any manufacturing process. Despite the OPM's involvement, however, the Ombudsman found no evidence that Kramer was promised industrial space at a low rent or freedom to undertake any manufacturing activity since any such arrangements needed formal approval by ME.

In truth, the OPM never indicated to Kramer that it had the power to deliver these conditions itself but merely put pressure on ME to meet his demands; and if it was unsuccessful, this was due to the fact that ME judged Kramer's proposals on the basis of its normal criteria and it was not before he submitted full details on the proposed use of the San Ġwann factory space, including his business plan, that his project was approved. The Ombudsman noted in fact that whereas the first letter of intent had approved use of the factory as initially proposed and limited rent and other conditions to those of the previous tenant, the decision to increase the rent of the factory allocated to Kramer was taken in combination with approval for additional use of this factory; and this was confirmed by the second

---

*convenience …… and if this division of responsibilities is to influence citizens in any way, it should do so in a positive way by means of promoting greater efficiency and serving citizens better and not worse."* [Alfred P Farrugia noe v. Commissioner of Inland Revenue].

letter of intent which approved the proposed additional use of the premises for the manufacture and assembly of steel furniture and established a new rental value for the San Ġwann factory.

The Ombudsman referred to the withdrawal of the letters of intent on the grounds that complainant failed to sign them. Since by that time Kramer had *de facto* already met the most important requirement, namely that of retaining the workforce of Vanzetti & Brown, the Ombudsman was of the opinion that Kramer could not be criticized for not having signed these documents since it could be said that this was merely a formality.

The Ombudsman considered as unacceptable the comment by MIPL that the commitment to allocate the San Ġwann factory to complainant came from ME as it wilted under pressure exerted by the OPM. In his view whether or not ME had the right to do so was of no concern to complainant but was an internal matter between the two agencies. Moreover, given that the factory at the San Ġwann Industrial Estate was allocated with the sanction of the OPM, complainant could surely not be accused of illegal occupation.

The Ombudsman also regarded as unacceptable MIPL's reference to Kramer as a "*squatter*" because he did not have a formal title after he had agreed to retain all the employees of Vanzetti & Brown and in return the factory premises was *de facto* allocated to him although at the same time he observed that this situation did not give him the right to dictate terms and conditions to the Government.

The Ombudsman was critical of the disregard by MIPL to Kramer's right to resort to his Office by attempting to enforce the eviction order even while his investigation was under way. This disregard for the citizen's rights and disrespect for the ombudsman institution amounted to sheer arrogance that no public authority should ever display.

**Further considerations by the Ombudsman**

In his Final Opinion the Ombudsman observed that:

(i) it is not the function of his Office to pronounce itself on or interfere in the work of competent authorities set up by law for a specific purpose when these authorities operate within their respective mandates;

(ii) in undertaking their functions state agencies are bound to take into account government policies which often have a wider social dimension;

(iii) although ME and MIPL both promote maximum utilisation of government-owned business space, this does not release them from their duty to act in good faith and to be accountable for their decisions to the executive as well as to the Office of the Ombudsman as guarantor of the rights of citizens against bad administration.

The investigation by the Ombudsman on Kramer's allegation that the two agencies failed to honour their commitments towards his company led to the conclusion that the players involved in this salvage operation seemed to be operating at cross purposes. It became amply clear during this investigation that what started as a rescue operation by the OPM to safeguard workers whose employment was in jeopardy ended as a means of ensuring that MIPL would derive the maximum gain from the use of government-owned property.

Evidence gathered by the Office of the Ombudsman showed that when Vanzetti & Brown faced the prospect of having to discharge its employees, the OPM sought immediately and virtually at all costs to save the workers' livelihood. After ascertaining that Kramer offered what seemed a feasible approach aimed at ensuring the continued employment of the workforce and that there were good prospects that the impending collapse of Vanzetti & Brown would be followed by a credible takeover, the OPM encouraged negotiations with Kramer on the way forward and pressed ME to seek viable solutions. To its credit ME recognized the social considerations motivating the intervention by the OPM and acted on these lines in its discussions with Kramer.

Despite this approach by ME problems arose when MIPL became involved in order to establish conditions for the handing over to Kramer of the factory used by Vanzetti & Brown. At this stage MIPL did not factor in these discussions considerations grounded on the government's obligation to uphold employment and applied the same yardsticks that it would apply in normal circumstances in the allocation of factory space to a new

enterprise. It was obvious, according to the Ombudsman, that MIPL did not regard this task primarily as a salvage operation but sought to ensure that Kramer would not take advantage of the situation to strike a deal and secure a government-owned factory on more favourable terms than would otherwise have been possible.

While recognizing efforts by Malta Enterprise and Malta Industrial Parks Limited to ensure the best use of government property, the Ombudsman appreciated that complainant too, as an entrepreneur, wanted to strike the best possible terms. In the circumstances he saw nothing wrong if Kramer tried to take advantage of the situation to strike a better deal with ME and MIPL especially since from his point of view his proposal to take over Vanzetti & Brown would have meant the acquisition of readily available government-owned factory space on the same favourable rental terms that were applicable to its previous tenant.

The Ombudsman pointed out that complainant presumably felt that by insisting on this request he would be given priority for factory space and press his claim even further for these premises. Indeed, this seemed to be the most important *quid pro quo* that Kramer was requesting from Government for taking on the burden of keeping all the workers of the other company for one year. The Ombudsman felt that these demands by Kramer could not be considered unreasonable or unacceptable.

The Ombudsman remarked that when the Corporation appeared in principle to approve the takeover and agreement with Kramer was within reach, the two sides started to implement this agreement even before a formal contract was signed. Kramer took over the Vanzetti & Brown employees as well as material possession of the factory; and these developments took place with the full knowledge of Malta Enterprise. It appeared, however, that when Kramer absorbed the Vanzetti & Brown workforce before he entered into a binding contract with ME and MIPL, he suddenly seemed to lose his negotiating edge to take over the premises previously used by the company. This led the Ombudsman to state that MIPL was not fair to impose a set of conditions for use of the factory by Kramer that did not respect the original terms laid down by ME.

The Ombudsman also pointed out that it was not correct for MIPL to consider Kramer as a squatter or claim that he occupied the factory under false pretences or through the exercise of a pretended right. At most

Kramer could be said to have occupied the factory on tolerance or on a precarious title and that as such his occupation could be terminated forthwith even though it was adequately proved that Kramer occupied the factory with the full knowledge and consent of both ME and MIPL.

The Ombudsman's investigation found an element of serious maladministration and lack of coordination between ME and MIPL, which are after all arms of the same government, in their negotiations with complainant. This situation was highlighted by insistence that MIPL is the "*sole entity entitled to communicate terms and conditions of occupation*" of government-owned factories and that it would not honour commitments by ME that were prejudicial to its interests. It was also in evidence in the issue of rent due by tenants of government-owned factories since MIPL was adamant that all arrears ought to be collected whereas ME favoured a lenient approach with defaulters. The Ombudsman observed that the MIPL approach was at odds with that of the OPM and ME whose main concern throughout this long-running saga was to safeguard employment.

The Ombudsman noted that since after the *de facto* takeover of the San Ġwann factory Kramer met his commitment to salvage jobs that were at risk, ME and MIPL were not correct to state that he failed to honour his commitments. Kramer met his primary obligation towards ME on the maintenance of employment levels and in the circumstances conditions on payment of rent arrears should have been regarded as important but secondary obligations in a case where a vital consideration, namely the livelihood of several workers, was at stake. Clearly, if negotiations were to fail Kramer had no option but to discharge all the employees that he took over; and upon consideration of these consequences, the Ombudsman felt that financial implications involved for the Government did not warrant risking the livelihood of these employees especially when differences between the parties seemed small.

The Ombudsman insisted that in these circumstances good administration requires that every effort should be made to reach an equitable settlement that upholds the government's interests and ensures the best use of government-owned property while promoting new enterprise and safeguarding employment. He remarked that engaging in lengthy negotiations over a relatively paltry amount and threatening an entrepreneur with eviction did not reflect good administration on the part of a public body that promotes investment and employment.

The Ombudsman recalled that his investigation revealed that the Office of the Prime Minister and Malta Enterprise did their utmost to convince Kramer to go in for the takeover and discussed terms meant to encourage him to conclude the deal. These arrangements were in order and reflected a proper understanding of good administration even if the final agreement was not in line with what MIPL would normally conclude with an applicant wishing to lease government factory space for a new venture.

It was in this spirit and after weeks of negotiations that ME issued its first letter of intent to Kramer where it signified its agreement to the proposed takeover of the industrial process carried out by Vanzetti & Brown, including the allocation of its San Ġwann factory "*under the present conditions*." The Ombudsman insisted that this clearly showed that the Corporation was prepared to allocate the factory previously used by Vanzetti & Brown to Kramer under the same rental conditions as before.

ME was also prepared to agree to Kramer's takeover subject to various conditions including the one stating that "*the factory shall continue to be used exclusively for manufacturing purposes* " – and it was this that led to a misunderstanding between the two sides. Whereas Kramer believed that there was no restriction to the use that he could make of the factory as long as he was only engaged in manufacturing, the Corporation held that this condition only allowed him to use this factory for the same line of manufacturing formerly carried out by Vanzetti & Brown. The Ombudsman felt that the restrictive interpretation given by ME did not reflect the spirit and the wording of the agreement between the parties as set out in the letter of intent of April 2006.

According to the Ombudsman, when Kramer submitted details about his proposed expansion into a new line of business and ME agreed with his takeover of the San Ġwann factory "*under the present conditions*", this meant that he need not limit its use to the process previously undertaken by Vanzetti & Brown but could extend his operation to a different line of manufacturing so long as ME approved his plans for this new process.

The Ombudsman commented that in such a situation ME should not have unreasonably withheld its permission if the company's business plan met its policies for business development. In fact there were indications that ME supported Kramer's plan for the manufacture and assembly of street furniture since to a large extent he met the conditions in the letter of intent

of April 2006 despite the delay of one month to submit his business plan for the project – a submission which was in any event approved by the Corporation. According to the Ombudsman, since in the meantime Kramer took on the Vanzetti & Brown workforce and its manufacturing process, this delay could not be considered a material one or such as to prejudice the outcome of negotiations or the final agreement on the issue; and the Ombudsman agreed that ME was correct to act in this way.

The Ombudsman observed that although the letter of intent laid down that pending utility bills and factory insurance bills had to be settled, payment was not yet made by the time he released his Final Opinion and Kramer was still seeking to avoid responsibility for these liabilities on the grounds that he should start his salvage operation on a clean slate. However, since he understood that the owner of Vanzetti & Brown was willing to settle these payments, the Ombudsman expressed the view that a solution to this matter seemed well in sight.

With regard to a second condition in the letter of intent that Kramer had to settle all outstanding rent due by the first company, the Ombudsman pointed out that this letter assumed that Kramer would take over the factory under the same conditions, including rent, as Vanzetti & Brown, and that after much discussion on this issue Kramer agreed to settle half the pending rent in cash and to offset the balance in the form of works to bring the factory to a state of proper maintenance. However, when MIPL became aware of these conditions for the takeover of the factory, it felt that the Corporation overstepped its functions and resenting the stand taken by ME, insisted that Kramer's company be considered as a new venture. This attitude, according to the Ombudsman, contrasted with the approach by ME on Kramer's venture and was surprising since the two bodies were led by the same chairman.

Despite this disagreement, ME continued to seek an equitable solution and in November 2006 it was agreed that although Kramer had not met all his obligations under the letter of intent of April 2006, his company should still be allowed to operate from the San Ġwann factory. These operations would, however, be subjected to a rent of Lm4 per m² for the section of the factory utilised for the manufacture of outdoor street furniture and Lm1.75 per m² for the area utilised for production activity previously undertaken by Vanzetti & Brown. The Ombudsman agreed that this approach by Malta

Enterprise honoured the spirit of the letter of intent and represented a fair compromise.

The Ombudsman expressed surprise, however, that when the matter seemed to be reaching a successful conclusion, the Corporation decided in December 2006 that since it was not permissible to charge rent at a rate lower than Lm4 per m², Kramer had to pay a flat rate of Lm4 per m² for the whole factory premises. While observing that this decision went against the letter and spirit of the letter of intent issued in April 2006 and was in conflict with a commitment given earlier to Kramer by ME, the Ombudsman showed concern that several jobs should be put at risk for a relatively minor shortfall in revenue from the rent of factory premises.

Taking everything into account the Ombudsman concluded that ME and MIPL conducted negotiations on Kramer's proposed takeover somewhat haphazardly and that the ambiguous attitude which they displayed in some way justified his refusal to sign the two letters of intent.

The Ombudsman stated that as this case unfolded, Kramer was caught in the web of rivalry that marked the relationship between Malta Enterprise and Malta Industrial Parks Limited. It seemed that MIPL failed to accept that ME has the right to conduct a salvage operation to protect jobs and to propose terms to a prospective investor that would bind the Government even without its prior approval; and once ME issued its letter of intent in April 2006, there was no doubt that the Government, through MIPL, had to honour this commitment.

**Conclusion**

The Ombudsman concluded that since a final agreement was not reached, Kramer could only claim a precarious title of occupation for the factory which he had been using and this on mere tolerance albeit with the knowledge, consent and approval of the Government as its owner. This failure arose largely from Kramer's reluctance to sign the letter of intent issued by ME in April 2006 that substantially reflected the lines of the agreement reached between the parties. In the Ombudsman's opinion, Kramer should have signed this document and secured his title of lease and deferred clarification of the conditions laid down to a later stage.

The Ombudsman stated that good governance requires government authorities to be clear in their dealings with citizens and to honour commitments given to third parties. This case pointed towards a need for clarification between the functions and decisions that are proper to ME and to MIPL and showed that the two entities did not work in harmony.

The Ombudsman held that, considering the employment gain derived from Kramer's takeover, ME should have involved MIPL even before having committed itself by issuing the letter of intent in April 2006 since this would have avoided most of the misunderstandings that arose later.

In his Final Opinion the Ombudsman concluded that even at this late stage there was room for the matter to be resolved amicably, particularly in the interests of workers whose livelihood depended on Kramer's rescue plan while respecting the original letter of intent. He commented that though Kramer had no legal claim to title for occupation of the factory premises except in the limited sense mentioned earlier, there seemed to be enough good will for all the parties to reach an agreement as follows:

- the rent of the factory premises as established by ME's Board of Directors at the end of 2006 reflected the spirit of the letter of intent and was a fair compromise that recognized the government's social responsibility to safeguard employment;
- the restriction in the use of the factory to the manufacture of garments and outdoor street furniture, while not excluding Kramer's right at a later stage to request authorisation for other manufacturing activity as long as this would be within guidelines set by ME, should also be acceptable to Kramer;
- the agreement reached on the payment of rent arrears should be put into effect immediately; and
- Vanzetti & Brown should honour its commitment to settle arrears of payment for utility services.

**Outcome**

Although these proposals were considered to represent an acceptable way forward by Malta Enterprise and Malta Industrial Parks Limited, the Office of the Ombudsman understands that subsequent discussions between the

interested parties were unsuccessful and that the project eventually fell by the wayside.

**Case No H 557**

**MALTA MARITIME AUTHORITY/**
**OCCUPATIONAL HEALTH AND SAFETY AUTHORITY**

**The Berthing Assistant who claimed that he had been relieved of his duties**

## The complaint

A Berthing Assistant with the Malta Maritime Authority (MMA) alleged in a complaint to the Office of the Ombudsman that he was subjected to unfair discrimination when the Authority informed him that from July 2007 he would no longer carry out the duties listed in his job description because these tasks would be done by employees of a private company. He claimed that following this decision, he was transferred to another building that lacked the basic facilities normally found in an office and ended with no work at all.

Complainant gave the Ombudsman a copy of a letter which he sent in the same month to the Occupational Health and Safety Authority (OHSA) to explain that he was in remission following severe illness which necessitated medical treatment in Malta and abroad and that he was still under medical care. The letter stated that he was suffering from a low immune system and it was important that he should not work in unhygienic conditions or be exposed to any infection.

In this letter complainant protested with the OHSA that although the MMA management was aware of his condition, he was left to work in a small cubicle that was dirty, shabby, badly ventilated and directly exposed to the sun. He also claimed that this cubicle was full of dust, strewn with animal droppings and was rarely, if ever, cleaned.

Complainant told the Ombudsman that although he personally delivered this letter to OHSA, he had not received a reply.

**Facts of the case**

In order to learn more about the section of the grievance concerning the unacceptable environment at complainant's workplace, the Ombudsman asked the Occupational Health and Safety Authority to explain the action that it took subsequent to his letter.

The OHSA admitted that it first became aware of the issue in July 2007 when during a meeting with one of its case officers, complainant referred to dirt and unhygienic conditions abounding at his workplace that were detrimental to his health. During this meeting he raised other issues that were extraneous to the functions of the Authority such as his conditions of employment, overtime, shift work and the range of his duties and so the Authority could not intervene. The Authority said that complainant was told to provide copies of his medical certificates and informed that his grievance would be investigated only insofar as occupational health and safety aspects were concerned.

Two weeks later complainant again called at the OHSA offices and from the outset was verbally abusive and adopted a threatening attitude towards its officials. The Authority stated that although complainant was again told to leave copies of his medical certificates, he refused to do so.

Following this second visit, the Authority sought details from the MMA management about complainant's report in preparation for a site visit that its case officer planned to carry out. However, when this information was not forthcoming, OHSA personnel carried out an unannounced visit at complainant's office and in the light of their findings sought additional information from the MMA.

The OHSA explained that since complainant failed to present any medical certificates, it was not possible to form an objective opinion about any link between the state of his health and conditions at his workplace because the Authority cannot take action solely on verbal information provided by a respondent. The OHSA clarified that this was the reason behind its insistence that complainant should present all available medical certificates.

OHSA management issued instructions to the case officer to continue investigating aspects of the grievance that were directly related to its functions until finally it was felt that there was not much that could be done

by way of assistance to complainant. The OHSA stated that it was satisfied that its staff acted correctly in the way in which it handled this case.

OHSA also observed that even in his complaint with the Ombudsman the Berthing Assistant had not raised issues that were related to occupational health and safety but to the conditions of his employment with the MMA. According to OHSA, the attitude shown by complainant during meetings with its representative gave rise to suspicions that his resort to the OHSA was more of an afterthought, as a means of adding leverage to his complaints with the MMA concerning his employment conditions.

In turn complainant stated that although it was true that OHSA personnel visited his place of work, there were indications that this was no surprise visit at all and that it had been announced in advance to staff at the Authority. He claimed that despite this visit, no improvements at all were registered at his workplace.

Complainant denied that the OHSA case officer whom he met had asked for his medical certificates. He pointed out that every worker has a right to work in a clean office with access to basic hygienic amenities and not to be left cooped up in a hot cubicle and that no worker should be allowed to work in a dirty environment.

Complainant also insisted that it was not on for the OHSA to exclude investigations on an incoming grievance simply on the assumption that a complainant is healthy; and to back his case he attached certificates issued by his medical consultants as well as photos that showed conditions at his workplace.

Complainant took umbrage at comments by the OHSA that he objected to the environment at his place of work simply to add leverage to his complaints concerning his work conditions. He insisted that the OHSA should not refuse to undertake action or to report objectively on the state of a workplace simply because a complainant had pending grievances with his employer.

During further contacts with the Ombudsman the OHSA continued to assert that complainant was initially reluctant to pass his medical certificates to the Authority and that at no time was he ever told that his complaint would not be investigated unless he provided these certificates. This was

confirmed by the fact that his complaint was investigated at an early stage even though the certificates that he was requested to provide only reached the offices of the Authority at the third attempt.

OHSA management maintained that the Authority is not empowered to take action on matters raised by an individual that concern employment conditions. It rebutted the allegation that it refused to act or to report objectively on the state of complainant's workplace simply because he had other outstanding issues with the MMA and insisted that it had found no difficulty to initiate action on matters raised by complainant falling under its competence despite his non-cooperative attitude.

In a letter to the Ombudsman on 27 December 2007 complainant again lamented strongly that his duties as a Berthing Assistant were allocated to personnel from a private security firm. As a result he was no longer involved in such tasks as the control of activities on and around the various quays and pontoons of the Maritime Authority; checks on the observance of customs and immigration formalities; keeping logs with information on yacht arrivals, movements and departures and length of stay; and ensuring that quarantine restrictions were observed.

Complainant was also upset that since personnel of the private firm who allegedly took over the duties of Berthing Assistants were required to gather information on yachts entering and leaving the marinas and Berthing Assistants had no access to these details, he could no longer ensure whether vessels entering or leaving marinas had complied with customs and quarantine regulations or whether berthing charges had been paid. He protested that Berthing Assistants were not able to record the time when they completed their patrols since the punch clock system was no longer in operation and neither could they use the fire fighting system since it too was out of action. Furthermore, equipment previously used by Berthing Assistants to communicate yacht movements to the MMA's central office had been removed. As a result complainant was unable, through no fault of his own, to carry out his duties properly.

Complainant referred to the dismissal by the MMA of his claim that he was transferred to a room without the basic amenities and to its explanation that his work involved mainly providing assistance to yachts to berth and this activity of its very nature is done outdoors. He stated that although most of his work consisted of external patrols, it was inhumane to expect him to

spend a twelve-hour shift outdoors, sometimes in adverse weather conditions, without even the possibility to take shelter for brief periods.

The Berthing Assistant insisted that, irrespective of an employee's medical condition, standards of safety and hygiene in places of work should be high and maintained that given his condition, it was even more important not to allow him to work in an unhygienic work environment.

In turn MMA referred to the position description given to complainant when he was first appointed Berthing Assistant in 1996 and explained that with the exception of two tasks that were withdrawn from the range of duties to be performed by Berthing Assistants, all other duties still fell under their responsibility. The Authority denied that responsibility for the observance of immigration and quarantine procedures, the compilation of berthing lists and the operation of the fire fighting system had ever formed part of the duties of Berthing Assistants.

The MMA management also held that despite the removal of two specific tasks from the range of duties of Berthing Assistants, as recommended by the Authority's internal auditors, by no stretch of the imagination could it be said that these employees had been rendered redundant or that they were idle for most of their time.

At the same time the MMA management explained that it was satisfied that it took all necessary steps to investigate complainant's allegations about safety and standards of hygiene in his office.

On its part the OHSA reiterated that whenever complainant called at its office, he referred to the inadequate facilities at his workplace and their adverse effects on his health although he persistently refused to provide any certificates about this ailment. He also referred to other issues that seemed to be causing him concern, in particular the alleged withdrawal of his former duties by the MMA even though this issue fell outside the remit of the Occupational Health and Safety Authority.

The OHSA management explained too that in line with its policies and due to staff constraints which limited its ability to undertake inspections in workplaces without delay, complainant's grievance had been classified as a minor one that did not deserve immediate attention over other more pressing issues on the Authority's agenda; and complainant was informed

straightaway that an investigation would be taken in hand in due course. This investigation was in fact launched on 23 August 2007 when the OHSA case officer sought further clarification from the MMA while on 16 October 2007 a surprise inspection of complainant's workplace took place without any prior warning to the parties concerned.

The OHSA case officer stated that according to the MMA's Berthing Master, although complainant was told to alternate between one week at the Authority's Msida office and one week at its Ta' Xbiex office, he insisted on performing his duties at the Msida Marina. He also stated that the inspection revealed that on the whole facilities for basic personal hygiene at complainant's place of work were acceptable; complainant had easy access to these facilities; and his office was generally clean even though he uttered remarks to the effect that someone at the MMA must have been aware of this visit because the place was only cleaned a couple of days earlier. The inspection also found that complainant's office was in a reasonably good state and was provided with a fridge, basin and some lockers while it was well ventilated.

The OHSA case officer said that during his meetings with complainant and also during his inspection, complainant repeatedly said that he wanted to get back at some unnamed person at the MMA.

**Considerations by the Ombudsman**

The Ombudsman observed that he would consider separately the issues raised in this complaint on the behaviour of two public authorities – the Malta Maritime Authority and the Occupational Health and Safety Authority. The grievance against the MMA was based on the claim that complainant had been relieved of his duties as a Berthing Assistant and on the unhygienic conditions at his place of work whereas the complaint against the OHSA concerned the delay before his case was investigated.

With regard to the first complaint the Ombudsman observed that the allocation of duties to employees is a prerogative of management and that he cannot look at similar issues as long as duties allocated to workers are compatible with their grade. Once the range of duties given to an employee falls within the worker's job description, it is not the function of the Ombudsman to intervene.

The Ombudsman explained that his investigation found that out of twelve tasks that Berthing Assistants used to perform, they had been relieved of two specific tasks and were left with several other duties to perform. He noted that despite complainant's lament that the change in his duties had been effected without any prior warning or advice, this change in the responsibilities of Berthing Assistants took place following proposals by the Authority's internal auditors. The Ombudsman was also aware that the Authority consistently rejected complainant's claim that he was left with no duties or responsibilities at his place of work.

Following an evaluation of the evidence submitted, the Ombudsman agreed that complainant still had a wide range of tasks to carry out. He therefore turned down the allegation that his duties had been taken away from him since this claim was unfounded.

The Ombudsman reviewed the way in which complainant's contacts with the OHSA had unfolded including his repeated reference to several issues at his place of work which were outside the jurisdiction of the OHSA, the Authority's refusal to get involved in these matters and the controversy regarding the presentation of complainant's medical certificates. Noting that complainant had not denied that the OHSA case officer had told him that his grievance did not deserve priority, the Ombudsman commented that this must have been the reason why the first contact between the two authorities on this issue only took place on 23 August 2007 while an inspection of complainant's office was not held before 16 October 2007. In this way seven weeks were allowed to pass before the first contacts were established between the organizations while another eight weeks elapsed before an inspection of complainant's workplace took place.

When the Ombudsman sought an explanation for these apparent delays before it took action on complainant's objections, the Authority explained that its work at that time was handicapped by an acute shortage of site inspectors and priority was given to more urgent cases. Moreover, during that time OHSA officials were deeply involved in staff training and updating programmes financed by the European Union.

The Ombudsman referred to earlier indications of the existence of this problem and particularly to comments by the Auditor General to the Public Accounts Committee of the House of Representatives in 2005 about lack of a proper number of employees to enable the Occupational Health and

Safety Authority to perform its duties. Notwithstanding these problems the Ombudsman was of the opinion, however, that it was unacceptable for the OHSA to allow seven weeks to elapse before it drew the attention of the Malta Maritime Authority to complainant's situation. He felt that even after taking into account the shortage of personnel, the Authority should have made arrangements with the various organizations and bodies that fall under its purview and devised a system to alert them to complaints and issues brought to its attention and which, though not urgent, still needed to be resolved within a reasonable time.

Mindful of the fact that complainant continued to allege that the MMA was forewarned of an inspection by OHSA officials in October 2007 that found no evidence to support his claims regarding standards of hygiene and cleanliness in the premises where he was deployed whereas the MMA consistently denied this allegation, the Office of the Ombudsman decided to deal with this issue head-on.

During a meeting on 21 April 2008 at the Office of the Ombudsman with OHSA officials on this grievance, it was decided to make a surprise inspection of the Msida office there and then. In less than fifteen minutes representatives of OHSA and the Office of the Ombudsman visited the premises and inspected complainant's room.

They found that this room was a small one that formed part of the complex of offices housing the MMA's yachting office at Msida. This was at odds with complainant's description of his room as a small cubicle exposed to all weather conditions and was also a far cry from his claim that it was in a state of total neglect. Members of the team agreed that although the area surrounding the office was shabby, the room itself was in a tolerably clean condition and had the basic amenities although it could certainly be better furnished. Toilet facilities were also clean and in good condition while insofar as ventilation was concerned it was found that the office had two doors facing each other and one of them led to a public garden and to the sea.

During this visit it was learnt that MMA offices are cleaned every two days by a private cleaning company; and this meant that if complainant was aware of any areas where dirt had accumulated, all that he needed to do was simply to draw the attention of the person responsible for this cleaning service to this situation.

Taking everything into account, the inspection showed that complainant's claims regarding unhygienic conditions at his place of work had been blown out of proportion and could not be sustained. In addition the Ombudsman could not fail to comment that since to a large extent complainant's duties consisted of the supervision and monitoring of the movements of yachts sailing in and out of the marina, the main purpose of an office for Berthing Assistants is to serve as a place where they can put their personal effects and belongings inside appropriate lockers. Complainant was, however, right to point out that once a shift lasted twelve hours at a stretch, he was entitled to expect that this room would also serve to provide him shelter during slack periods and whenever weather conditions were unfavourable.

**Conclusions by the Ombudsman**

Having given due regard to the facts that emerged from his investigation, the Ombudsman concluded as follows:

(i) it is the sole prerogative of management to allocate duties to workers and to update their responsibilities to enable an organization to meet its functions under the law and in the manner that it feels best according to circumstances; and the Ombudsman should not intervene in similar issues as long as duties allocated to a worker are compatible with an employee's grade. Although complainant alleged that he had no work to perform, this allegation was found to be nowhere near the truth since only two out of twelve tasks that featured in his original job description had been removed;

(ii) since it resulted that complainant's grievance about the unhygienic conditions at his workplace and about the lack of facilities was somewhat exaggerated and given that complainant never bothered to rebut the impression that he merely lodged his complaint to avenge himself on an unidentified MMA official, this tended to lend credence to this suspicion. The inspections in October 2007 and April 2008 had not revealed any lack of hygiene on the scale described by complainant and showed that the allegation regarding unhygienic conditions was unsubstantiated. Equally unfounded was the claim that the premises consisted of a cubicle that was exposed to all types of weather and in a state of total neglect.

Despite these conclusions the Ombudsman was of the opinion that there was undue delay between the time when the complaint was lodged and the time when OHSA took its first steps on this issue. This delay was unacceptable despite the fact that the OHSA informed complainant that his grievance was not considered urgent.

The Office of the Ombudsman, while appreciating that the OHSA lacked the necessary manpower resources when the complaint was lodged to carry out inspections on worksites due to other more urgent commitments, was pleased to note, however, that in the meantime the Authority's situation had improved mainly because of the recruitment of additional personnel.

**Case No H 588**

**HEALTH DIVISION**

## A selection process that could not be faulted

### The complaint

Under OPM Circular 14/07 issued on 31 July 2007 by the Staff Development Organisation (SDO) of the Management and Personnel Office of the Office of the Prime Minister, the Government offered a number of sponsorships to public officers who wished to develop their professional competence and enhance their career prospects by following distance learning or part-time evening Masters degree programmes offered by recognized educational institutions.

One of the applicants under this scheme was a State Enrolled Nurse in the Health Division who was interested in a sponsorship to follow a distance learning programme leading to the award of Master of Business Administration (Human Resource Management) by the University of Leicester. However, upon finding that he was not among the selected candidates, this employee lodged a complaint with the Office of the Ombudsman where he implied that although he was fully qualified to be awarded the sponsorship under the terms of the call for applications, he had been denied the chance to undertake further studies and lost the opportunity to participate under these arrangements. Complainant requested the Ombudsman's assistance so that the Staff Development Organisation would reconsider his application.

### Facts of the case

The Ombudsman's investigation revealed that some time after the SDO accepted complainant's application when he was found to possess all the necessary qualifications and considered eligible under the terms of the call, he was asked to attend an interview.

In his review of the manner in which complainant's interview was conducted so as to establish whether it had been done fairly or not, the Ombudsman found that complainant had failed his interview and only scored 47 out of a total of 100 points when the pass mark had been set at 60%. An analysis of complainant's performance and of his score according to the Selection Process Assessment Criteria that was adopted by the selection board to guide its evaluation process, showed that he had fared badly under *Relevant Experience - exposure to activities related to subject applied for* where he obtained only 2 out of 10 marks and under *Personal Attributes/Aptitude - self-confidence and adaptability* in which he was only allotted 3 out of 10 marks.

The Ombudsman found that complainant had also failed in three other sections; and the records showed the following:

- *Relevance to Current Duties*
  – *relevance to current job responsibilities* 6 marks out of 15
- *Competencies/Abilities*
  – *knowledge of subject applied for* 4 marks out of 10
  – *ability to work on own initiative* 4 marks out of 10

Under other criteria such as *Qualifications - first degree* and *Relevant Experience - length of service* complainant obtained full marks; a mere pass mark under *Relevant Experience - quality and variety of experience* and *Personal Attributes/Aptitude - commitment* and a mark that was slightly above the pass mark under *Relevant Experience - tangible achievements*.

The Ombudsman ascertained that in response to the circular the Staff Development Organisation received 55 applications and that when due account was taken of the number of applicants who did not meet all the eligibility criteria and the four eligible applicants who did not turn up for the interview, all eligible candidates were in fact interviewed. Of these, sixteen were successful while others, including complainant, failed.

**Considerations by the Ombudsman**

The Ombudsman found that this complaint was manifestly unfounded and in his Final Report on the grievance made reference to a few points which easily illustrated his conclusion.

The OPM circular which invited public officials to apply for sponsorships for Masters degrees had set out several conditions to regulate the grant of these sponsorships and expressly stated that "*courses require a high level of academic performance and personal commitment on the part of applicants, and only officers with a sound academic background and a proven track record will be considered for sponsorship*."

The Ombudsman commented that it was only proper that the grant of government sponsorships at this level should be subject to stringent quality assessments of applicants to establish that they had the potential to successfully conclude their chosen fields of studies. The interview to which eligible applicants were subjected was therefore meant to serve as a highly competitive exercise that would identify the candidates who were best qualified and who showed most promise to benefit from the funding that the Government was prepared to provide under this initiative to strengthen the public service in a number of identified key areas.

The OPM circular also made it clear that the Government expected a thorough assessment to be made of the potential of eligible candidates who were considered to hold the most promise that they would be able to conclude their post graduate studies successfully and that only the topmost applicants should expect to benefit from this scheme.

The Ombudsman agreed without the slightest hesitation that the Government was perfectly right to set these high criteria and standards and that the selection board in turn acted properly when it followed them to the letter.

At this stage the Ombudsman observed that the results of the evaluation of eligible applicants showed that complainant was not only below average but also that he actually failed to obtain the pass mark. These results also showed that only sixteen candidates out of the total number of candidates who were interviewed actually obtained a pass mark and that out of these, the selection board only recommended the best placed eight applicants to proceed to the award of a sponsorship. The Ombudsman also noted that the lowest placed candidate out of these eight successful applicants had obtained a total of 76 marks or 29 marks more than complainant's score.

The Ombudsman concluded that no evidence had emerged that the selection board had treated complainant unfairly or that the board had

improperly discriminated against him. While it is true that most of the criteria under which applicants had been judged contained a strong subjective element and this meant that a lot depended on the extent to which each member of the selection board evaluated the suitability of candidates to successfully conclude their post-graduate studies, the Ombudsman found not the least shred of evidence that the selection board had been unfair or unjust in its assessment. Indeed, complainant had never made any such allegation.

The Ombudsman, as he is wont to do in similar situations, stressed that under criteria that could be objectively assessed, it had been ascertained that the selection board had allotted to complainant the marks that he deserved and that reflected in a correct manner his true worth. He commented that there was absolutely no reason to doubt that the selection board had not performed its duties correctly and in a competent manner and it was obvious that even if complainant had made the grade and had been successful in his interview by reaching as a minimum the 60% pass mark, he would still have been quite a far way off from being in line for a sponsorship.

**Conclusion**

The Ombudsman concluded that after taking everything into account, he was of the opinion that the complaint was a frivolous one that could not be positively considered.

**Case No I 004**

**AIR MALTA plc**

**The youth who was not considered suitable to become an airline pilot**

## The complaint

A Maltese youth who completed a full time course at an approved foreign flight training organization and was also a JAA licence holder, claimed that he was in possession of all the qualifications and licence requirements that were necessary to enable him to be recruited as a Trainee Pilot with Air Malta under a call for applications issued by the national airline in July 2006.

However, after he underwent no less that three separate personality assessment tests only to be told that he had not been selected, he lodged a complaint with the Office of the Ombudsman. In his grievance he asked the Ombudsman to intervene since he felt that he had been discriminated against and that his application had been rejected for no valid reason.

## Facts of the case

Complainant recounted to the Ombudsman that for around four months after he sent this application he received no information whatsoever about its outcome until one day in November 2006 he was told by an Air Malta official to attend a clinical psychological assessment to evaluate his personality.

A month later complainant received a telephone call from Air Malta where he was told to undergo a second test and assured that this was a normal procedure adopted by the company as part of its staff selection process. During this test the psychologist informed him that she had been asked by Air Malta management to evaluate the first report and to carry out another

psychological assessment of his character and personality. At the end of a lengthy interview and after a prolonged discussion including a personality assessment test, the examiner stated that she formed an opinion about complainant that was different from that of the previous interviewer.

Several weeks passed and complainant again remained unaware of the outcome of his application until in March 2007 he was asked to meet the company's Head Manager, Human Resources. During this meeting he was told that the company was unable to take a final decision about his application despite the two tests that he had already been through and that it had been decided that he should undertake yet another psychological assessment by a third psychologist. This took place in April 2007 when a third personality assessment test was administered together with a two-hour interview.

For some time complainant again remained in the dark about the outcome of this third assessment until in October 2007 he was summoned by the company's Chief Pilot, Training and Standards. During this meeting he was told that his application to join Air Malta as a Trainee Pilot had been turned down and was also told quite bluntly that the company would again reject any other application that he might in future submit to join the national airline in this position.

After hearing complainant's version of the way in which events had unfolded, the Office of the Ombudsman asked Air Malta management to provide an explanation. Company officials clarified that Air Malta had in fact received complainant's first application for the post of Trainee Pilot in response to an external call for applications for pilot vacancies that was issued in August 2003 and that this application was turned down because at that time he lacked a pass at Advanced level which was a basic educational qualification for the post. The company informed him, however, that should he obtain an Advanced level pass at grade C or better by 31 March 2005 it would still be prepared to consider his application. Air Malta subsequently extended this deadline further to the end of May 2005 following a request to this effect by complainant.

In July 2005 complainant informed Air Malta that he had obtained the Advanced level pass that was needed and in November 2005, after he had undergone the necessary medical tests and was declared fit, he was sent to Oxford Aviation Academy in the UK for technical and operational

assessments. However, after a review of the results of these tests, Air Malta's Training Board concluded that complainant was not successful and invited him to meet the Flight Operations Department to discuss his application. During this meeting complainant was advised that the company was not prepared to reconsider another application from him before the lapse of at least one year and that in the event that he would apply again in the future, he would need to attend a clinical assessment as part of the overall evaluation process and to show evidence of remedial development training in a number of areas that were indicated to him.

When complainant submitted another application to join Air Malta as a Trainee Pilot in 2006, in line with what he had been told earlier he was requested to undergo psychological assessments by three different psychologists. However, upon the conclusion of these tests the company formed the view that it was not in a position to accept his application without reservation and consequently informed him that he had been unsuccessful.

The Office of the Ombudsman sought further clarification from Air Malta management about several other aspects of this complaint. It was established, for instance, that the tests which complainant underwent in 2005 in the UK including an Advanced Compass Assessment, Psychometric Profile Testing and a Simulator Assessment, represent a normal procedure in the case of applicants for Trainee Pilots and are used to assist Air Malta's Training Board to establish whether to accept or to reject an applicant.

The national airline also explained that Psychometric Profile Testing has the ability to evaluate certain personality traits that require further investigation and that its Training Board does not interpret the results of this test in isolation but in relation to other assessment methods and tests such as interviews to confirm their validity and to form an overall conclusion on a candidate's aptitude and suitability as a pilot.

The company's Chief Pilot, Training and Standards admitted to the Ombudsman that the Training Board was mostly concerned by the results obtained by complainant in the psychometric testing. He pointed out that the Director of the UK flight training organization where complainant had undertaken this test stated that his results were "*very unusual*" and emphasized that the full report prepared on complainant's performance during this test should be interpreted "*by those with appropriate training*

*and expertise*." He also recommended that these results should be treated "*with caution*" and should "*serve as a basis for some focussed questioning during* (an) *interview*." He concluded that "… *in sum, whilst the personality profiling indicated a high match when compared to a group of UK candidates, the result should be further investigated during* (an) *interview, and by a qualified assessor*."

In addition to this aptitude assessment of complainant the Ombudsman was presented with the *Summary of the Training Board Conclusions* which confirmed that complainant had a low average score in the compass test and that the very poor score in a particular section of this test was validated by the company's own simulator assessor during the simulator check.

The main concern of the Training Board was, however, the score on complainant's personality profile. This score led the Training Board to believe that complainant's result in the psychometric test could be "*an indication of some underlying personality disorder that can only be investigated in a clinical manner by a qualified psychologist*." Given that, according to the Training Board, in the past Air Malta had some negative experiences in similar instances and that complainant's performance in his simulator tests was generally unfavourable, the Board concluded that he was unsuitable for selection and that his application should be rejected.

The Training Board explained that when complainant again applied for the same position in July 2006, his application was not rejected outright but he was asked to undergo a psychological assessment. The company further explained that it was even decided to send the whole group of applicants to attend clinical psychological assessments so that complainant would not feel that he had been singled out for this test.

The Training Board went on to state that although on the basis of the report drawn by the first psychologist it could easily have turned down complainant's application, however, as a result of outside pressure that was exerted on the company, Air Malta management decided to commission a second psychological assessment by a different clinical psychologist. However, since the two reports reached somewhat different conclusions, a third clinical assessment was considered necessary.

Air Malta management insisted that it has to be very cautious when there are doubts or whenever unclear results emerge about an applicant's

potential especially in view of the nature of the duties of a airline pilot. In fact it is the company's policy not to allow even the slightest margin of error in the selection of pilots in view of the potential risks that are involved and also in view of the fact that a certificate issued by a national carrier has considerable weight in the international airline industry.

In view of the marginality of complainant's suitability and given that there had been a precedent in a similar case, Air Malta management agreed to endorse the Training Board's view that complainant could not be accepted without reservation and upheld the recommendation by the Board not to accept his application.

On his part complainant countered that no significance or value should be attached to the tests that took place in connection with his 2005 application and that these tests ought not to have been considered by the company in its evaluation of his 2006 application. He claimed that this application had been rejected without a valid reason and insisted that once the company had commissioned three clinical assessments in order to test his suitability for the post and only one report had cast come doubts as to whether he was fit to be selected, the two other reports should not have been discarded by the Training Board but should have been given their due weight. He was confident that if Air Malta management had acted in this way, his application would not have been turned down.

**Considerations by the Ombudsman**

The Ombudsman pointed out that his investigation established that complainant was determined to pursue the career of a pilot and had even obtained a licence at considerable personal sacrifice and financial cost by undertaking training abroad from his own pocket. In fact way back in 2003 he had submitted his first application to join the national airline as Trainee Pilot but since he did not possess all the necessary qualifications, his application was turned down.

The Ombudsman observed that Air Malta had always shown a positive disposition towards complainant and had even gone so far as to accept that if by May 2005 he were to meet the requirements stipulated in its original call, his application would be duly processed by the company. As a matter of fact when the company was made aware that complainant was in

possession of all the qualifications that were specified in the call for applications, in November 2005 he was asked to undergo a medical examination and was sent with other candidates to a UK-based pilot training and aircraft engineering company for technical and operational assessments.

The Ombudsman's investigation showed that as is customary in similar instances, the results of these tests were evaluated by the Training Board that is responsible to recommend the consideration or the rejection of applicants to the company's Selection Board. The investigation also revealed that following this evaluation, the Board's conclusion that complainant's application should be rejected seemed well grounded on account of his low average score in the compass test and his personality profile which gave rise to concern among members of the Board that this might be an indication of some underlying personality disorder that could only be investigated by a qualified clinical psychologist.

Complainant was duly informed of this decision by Air Malta in December 2005 and as laid down in the company's training guidelines, he was given the reasons that led to this refusal as well as advice about the way in which he could improve his handling skills in the case of an eventual reassessment. The Ombudsman also noted that Air Malta took this opportunity to warn complainant that the company would only reconsider his application after a lapse of one year and that in any such event he would need to attend a clinical assessment as part of the evaluation. According to the company this meant that when complainant applied again in 2006 he was already fully aware that he would be required to undergo a clinical assessment – and this assessment is normally carried out only in the case of prospective candidates where doubts arise about their personality profile in the psychometric tests.

The Ombudsman noted that complainant's grievance was not that he had been subjected to a psychological assessment but that the company, after having commissioned three different psychologists to carry out separate psychological assessments, had ignored two of these reports which, according to complainant, had reached conclusions that were in his favour and on the basis of which his application should not have been refused. Complainant was upset because in his view Air Malta had attached undue importance to the first report that concluded that he suffered from a narcissistic personality disorder even though this had been ruled out

completely by the second report which confirmed that complainant did not suffer from any such disorder and by the third report which also asserted that there were no signs of any personality pathology in complainant's profile.

The Ombudsman stressed that his Office has the function to investigate the administrative aspects of the selection process that was done by Air Malta and that he does not have the competence to decide on the technical aspects that are involved in a selection process. The duty of the Ombudsman is to ascertain that all those who were involved in the selection process treated complainant in a fair and just manner and the Ombudsman cannot exercise the discretion given to the Training Board particularly in the light of the fact that its members include high ranking company officials and the Chief Pilot, Training and Standards who possess several years of experience as well as the expertise required to come to a decision as to whether complainant possessed the skills, the potential and the ability required for the post.

The Ombudsman commented that from a review of the documentation presented by Air Malta to his Office on this grievance, he found no reason whatsoever to doubt the integrity of the Training Board or any evidence which indicated that the company or the Board were involved in any intrigue so that complainant would fail the selection process. On the contrary, the Ombudsman found that on several occasions the company had been more than obliging towards complainant and considerate of his situation to the extent that when the Training Board received a first assessment by a psychologist who had been commissioned by the company and could easily have reached a decision on the strength of this report, it had appointed two other psychologists to obtain a more accurate personality inventory of complainant.

The Ombudsman pointed out that on the one hand the commissioning of three separate reports on one applicant by Air Malta management could be criticized and considered as bad administrative practice especially since there was evidence that the company had done so as it wilted under outside pressure. On the other hand, however, the Ombudsman stated that it could be said that this action was justified and showed that the company was cautious before excluding complainant from any further consideration especially since he was already a licence holder who had spent a

considerable amount of time and money to undergo training overseas under his own steam to obtain this licence.

The Ombudsman insisted that he could not take over the mantle of responsibility of the Training Board and reach a decision instead of the Board on complainant's eligibility. Neither could he interpret reports that were prepared by three qualified psychologists who were commissioned by the company or conclude that the Training Board was incorrect in its conclusion that complainant's application could not be accepted.

The Ombudsman stated that even if one could argue, in the same vein as complainant, that Air Malta's Training Board might have erred on the side of caution, one could not say that in the circumstances such an approach was unjustified. In a crucial decision that has far-reaching repercussions, there can be no doubt that the national airline is right not to allow even the least margin of error. Indeed it is imperative for the national carrier to act in this manner.

The Ombudsman concluded that in the absence of any proof of any improper discrimination or abuse that might have served to prejudice complainant's prospects to join Air Malta, the final decision on such a crucial issue clearly has to be left in the hands of the competent interviewing authority.

**Conclusion**

In view of the above considerations, the Ombudsman concluded that the decision by Air Malta not to recruit complainant as a Trainee Pilot did not constitute an instance of maladministration and fully exonerated the management of the national airline from any wrongdoing.

**Case No I 044**

**ENEMALTA CORPORATION**

**A selection process that went awry**

## The complaint

A Senior Distribution Technical Officer with Enemalta Corporation sought the Ombudsman's help when he found that after he applied for the post of Principal Distribution Technical Officer and was interviewed by a selection board that was set up by the Corporation's Board of Directors, he was ranked fifth in the final order of merit and was not selected. In his submission to the Office of the Ombudsman he claimed that he had better qualifications than the applicants who were placed first and second and alleged that "*the necessary qualifications and skills required for this position were tailor made for some individuals*."

Complainant told the Ombudsman that following the publication of the results of the interviews, he was informed by the Corporation's Chief Officer, Human Resources & Corporate Services that whereas full marks were awarded by the selection board to every applicant in possession of a Higher Technician Diploma, any other academic achievement or qualification such as a diploma in management which he held, was not considered relevant to the position in question.

Complainant insisted that this was not correct since the post of Principal Distribution Technical Officer requires a substantial level of management skills and that on the strength of his qualifications, he was better qualified than the first two applicants who had started the diploma course in management but had given up after a couple of months.

## Facts of the case

Circular No. 96/2007 issued by Enemalta Corporation in July 2007 invited applications for the post of Principal Distribution Technical Officer at the

Distribution Branch of the Electricity Division from Senior Distribution Technical Officers with five years continuous experience in this branch on the date of publication. A job description of the position attached with the circular stated that a Principal Distribution Technical Officer is responsible "*for the administration and control of a district office or section, comprising both technical and clerical staff*" and "*the good and effective administration and control of the section and personnel under his charge*."

The duties of a Principal Distribution Technical Officer are varied and include tasks of a technical nature such as the preparation of schedules of quantities for electrical distribution, development and metering projects on high and low voltage systems; supervision of works on electrification schemes including cable laying works, erection and commissioning of equipment in distribution centres, substations and overhead line works; collection of information and data on system load conditions, substation loads, voltage drops and assessment of consumption; cable fault location and attendance to repairs on high voltage lines and cables; and switching operations in line with the Corporation's Code of Practice.

The post also covers a range of administrative tasks such as the issue of tools, materials and equipment; the custody and safekeeping of stores and equipment; maintenance of discipline; attendance at cases of suspected theft of electricity; and responsibility to ensure that personnel under the charge of the Principal Officer work in accordance with safety standards and follow the Corporation's Code of Practice.

During his investigation the Ombudsman found that although the selection board consisting of two officials from the Corporation's top management and an engineer from the Distribution Branch had established four broad selection criteria and their relative weighting to guide them in their evaluation of eligible applicants during their interviews, they had not laid down any sub-criteria or benchmarks that could provide guidelines for the allocation of marks to candidates in a fair and consistent manner. As a result during their interviews candidates were examined on the following general criteria:

| | |
|---|---|
| Qualifications | 25 marks |
| Experience | 20 marks |
| Communication/Personality | 25 marks |
| Attitude/Leadership | 30 marks |

Complainant was awarded 25, 12, 19 and 22 marks under these criteria; and with 78 marks he ranked fifth in the final order of merit with four marks less than the two applicants who were jointly placed in third position. As a result he was not chosen for the post.

When in April 2008 the Ombudsman met Enemalta representatives on this grievance, the chairman of the selection board admitted that although applicants who were holders of a diploma in management were awarded full marks for this qualification, it was decided not to attach much importance to this diploma since the duties and responsibilities of a Principal Distribution Technical Officer were considered to a large extent of a technical nature. He added that marks awarded for qualifications were weighted in a way as to reflect the year when an applicant obtained his qualifications since there were several developments in electricity distribution technology over the years.

It also emerged that although the selection board agreed to rate highly certificates in courses on customer care and safety, the marks awarded to applicants holding certificates in these areas had not been established before interviews got under way. It was apparent that at the end of the selection process the board did not evaluate the marks obtained by each candidate in relation to the score obtained by the other contestants but merely relied on the marks that had been awarded to candidates after each interview.

The Ombudsman also found that the score given to candidates for their work experience was not based on the number of years that each applicant had been employed with the Corporation. Instead it was determined by the extent of initiative, involvement and commitment shown by each employee at his workplace – and since the Manager of the Distribution Branch where applicants worked was a member of the board and being quite familiar with the qualities, abilities and aptitude of each candidate given their frequent work contacts, the board agreed to give weight in particular to an evaluation of the overall performance standards of each employee in terms of work interest, motivation, ability to meet deadlines and interaction with co-workers. The chairman of the board explained that this was the reason why applicants who had been employed with the Corporation for the same number of years were awarded different marks.

On his part complainant did not share the view of the selection board that a diploma in management did not deserve any special consideration in its evaluation of a candidate's suitability for the post of Principal Distribution Technical Officer since he believed that a person in this position also needs to possess management skills to undertake properly the administrative functions of a district office or of a section under his charge including the allocation of duties to personnel, regular contacts with consumers, complaint handling and the preparation of progress reports.

Complainant alleged that even before interviews were held and while the selection process was under way, it was common knowledge among Enemalta employees that the result was a foregone conclusion and the names of the persons who would be placed first and second in the final order of merit were mentioned openly. As things turned out, these rumours proved to be true and these two persons were in fact the ones who were selected even though complainant claimed that he possessed a much wider range of experience.

**Considerations by the Ombudsman**

The Ombudsman clarified in his Final Opinion that it is not the function of his Office to review the results of interviews that appeared by all accounts to have been valid and to have been conducted in a fair manner. It is also not his function to substitute the judgement or replace an assessment made by members of a selection board with long years of experience in their respective technical fields. The Ombudsman insisted, however, that these principles apply only as long as no evidence emerges that an irregular action was committed throughout the selection process or that an action by the board was done in bad faith and without due regard to the actual merits of each candidate.

The Ombudsman observed that marks awarded during the selection process were awarded under four broad criteria, namely *Qualifications*, *Experience*, *Communication/Personality* and *Attitude/Leadership*; of these, only those given for *Qualifications* and *Experience* were in theory verifiable while marks under the two other criteria depended on the subjective evaluation by board members of a candidate's performance during an interview. Since no representative of the Office of the Ombudsman would have been present, the Ombudsman was not in a position to even remotely challenge or

substitute opinions and evaluations by members of a selection board who conducted the interviews themselves.

The Ombudsman observed in his Final Opinion that for reasons of their own, members of the selection board had considerably reduced the weighting set for objective criteria and opted instead to attach greater importance to purely subjective methods for the assessment of candidates. The Ombudsman felt that this approach prejudiced in a somewhat appreciable manner the possibility of a fair and impartial review of the selection process in the event that doubts arose about its outcome and tended to blur the element of transparency that is a crucial feature in any process for staff selection or advancement.

The Ombudsman was also critical of the way in which marks were awarded to candidates for their qualifications. Since the selection board failed to establish any sub-criteria before interviews got under way, members were not aware of the marks that were to be awarded for qualifications in the wide range of technical, vocational and specialised fields presented by candidates. In the absence of any such guidance, it appeared that the board somewhat arbitrarily decided to attach importance in particular to courses in safety and customer care.

From verification of marks awarded to candidates, the Ombudsman found that complainant had been wrong to assume in his grievance that all the candidates in possession of a Higher Technician Diploma had been awarded the maximum score under *Qualifications* (25 marks). In fact the only two candidates who were awarded full marks for their qualifications were those who held a diploma in management – and this included complainant. However, upon finding that a candidate who did not hold a diploma in management at the closing date of applications was awarded 24 marks, just one mark less than the maximum, the Ombudsman expressed the view that in his opinion marks awarded to some candidates for their qualifications did not seem to reflect their true educational and academic attainment.

Faced with this somewhat loose method of rating qualifications, the Ombudsman stated that it could be argued that either the diploma in management was not considered of much relevance to a Principal Distribution Technical Officer and was consequently awarded only 1 out of the 25 marks that were available or else that the candidate in question was

awarded marks for the diploma even though he had not yet completed his studies. The schedule of candidates prepared by the selection board and seen by the Ombudsman indicated clearly that this candidate was still in the first year of his diploma course. According to the Ombudsman, it was unacceptable to award marks to an applicant for a qualification that he did not yet hold by the closing date of the call for applications.

The Ombudsman commented that in the absence of a clear and convincing justification by the selection board, his impression was that it was more likely that this candidate had been compensated by the award of this mark for a diploma which he did not yet possess, especially since the diploma must have been allocated more than two marks given that undoubtedly the post of Principal Distribution Technical Officer requires an element of management skills – and this was confirmed by the job description which stated that an officer in this position was required "*to ensure the good and effective administration and control of the section and personnel under his charge*." The Ombudsman stated that his interpretation of the situation was strengthened by the fact that the candidate who ranked second only obtained 18 marks out of the 25 points available to candidates for their qualifications when he held qualifications that were similar to complainant but no diploma in management.

The Ombudsman also referred to his review of Enemalta's submissions on this case and stated that even though the schedule of candidates showed that the applicant who was placed first in the final order of merit attended courses in Customer Care, Health and Safety, Fire Fighting and First Aid, no certificates of attendance in these courses had been attached to his application. The Ombudsman pointed out that the circular advertising this vacancy had indicated that " … *applicants are to state clearly their qualifications and/or experience which have to be supported by testimonials and/or certificates*"; and all applicants, including complainant, had duly attached documents to verify their qualifications and experience with the exception of the candidate who was placed first.

An examination of the documentation made available by Enemalta to the Office of the Ombudsman confirmed that there were no hard and fast criteria for the award of marks to candidates for their qualifications even though they were required to submit certificates and testimonials which would have made it possible to verify the marks awarded to each candidate under this score.

The Ombudsman stated that the only conclusion that could be reached from his findings was that the award of marks for qualifications, a process that can at all times serve as a purely objective and verifiable basis for comparison among candidates, lacked transparency and betrayed an approach that was rather shoddy. All this raised doubts as to whether the whole process was conducted properly and led the Ombudsman to comment that this process cast serious reservations on the board's ability to pass judgement in respect of other criteria that were adjudicated in a purely subjective manner.

The Ombudsman next turned his sights on candidates' experience. Here complainant scored 12 marks out of 20; and this was one of the lowest scores registered by any candidate under this yardstick.

The Ombudsman noted that the first four successful candidates who, like complainant, were all Senior Distribution Technical Officers scored respectively 19, 20, 17 and 17 marks for their overall work experience. Documentation attached with the applications of these candidates showed, however, that the candidates who scored 19 and 20 points had joined Enemalta in 1978 and 1979 while the two other candidates who were each awarded 17 marks for their experience had joined the Corporation one year after complainant became an Enemalta employee in 1979.

The selection board tried to justify this difference in the grading of applicants by stating that experience had been assessed by having regard to the initiative and commitment that candidates showed in their workplace and not merely by means of the number of years that they had been in the Corporation's employment. The board also insisted that considerable weight was given under this yardstick to the opinion of the Manager of the Distribution Branch who formed part of the selection board and who worked virtually side by side with them on a daily basis.

The Ombudsman stated straightaway that he tended to disagree with this approach since in his opinion candidates' eligibility and prowess ought to have been considered under more objective and clear-cut considerations rather than under a subjective assessment of their capabilities, even though this was given by their immediate superior. According to the Ombudsman what had happened was that the selection board chose to dilute a purely objective benchmark by resort to a subjective element and in this way blurred an important element of transparency in the selection process,

namely the need to maintain throughout the whole process a fair balance between objective and subjective criteria.

**Conclusion and recommendation**

At this stage the Ombudsman concluded that the selection process under scrutiny was seriously flawed because of the way in which the selection board conducted the exercise and which had served to prejudice seriously complainant's claim for the position and undermined his promotion prospects. The Ombudsman felt that this complaint was sustained since serious doubts arose on the manner in which the selection panel exercised judgement on the merits of the candidates for the post.

In order to avoid the recurrence of similar situations the Ombudsman recommended that in future a range of criteria and sub-criteria to guide members of a selection board on the allocation of marks to candidates should be established, preferably even before a call for applications is issued. He observed that such an approach would ensure that, as far as reasonably practical, assessments of the suitability of candidates would be done in a transparent and fair manner.

In view of the prejudice that complainant suffered in this case and mindful of the fact that despite its original intention to appoint three Principal Distribution Technical Officers the Corporation had subsequently appointed four persons since two candidates obtained an identical final mark, the Ombudsman recommended that this injustice could only be redressed if Enemalta Corporation agreed to adopt one of the following options:

i) annul the whole selection process, rescind the appointments that had been made and issue a fresh call; or, alternatively,
ii) create an additional post of Principal Distribution Technical Officer, appoint complainant to this new position and distribute the responsibilities associated with this grade among all the five successful candidates.

In the circumstances and considering the small number of applicants for the position in question as well as the fact that all the other candidates except for complainant would in any case not have qualified for promotion had the

serious failures in the selection process been avoided in the first place, the Ombudsman was of the opinion that the second alternative seemed to represent the most appropriate solution.

**Outcome**

In its reply Enemalta Corporation assured the Ombudsman that the selection process that was the subject of his investigation had been carried out in good faith but pointed out that the implementation of any of the two solutions that were put forward would give rise to difficulties. The first recommendation that envisaged cancellation of the results of the original selection process would deny successful employees an appointment to a higher position that they were considered to deserve whereas with regard to the second solution it was pointed out that the Corporation at that time already enjoyed a full complement of employees in the grade in question and the appointment of an added Principal Distribution Technical Officer would disrupt the process already in place for the appointment of other Corporation employees to this grade.

The Corporation therefore proposed to extend the validity of the result of the selection process that had been reviewed by the Ombudsman and in this way ensure that complainant would be promoted to the post of Principal Distribution Technical Officer as soon as a vacancy arose in this grade without the need to undergo another selection process. This proposal could be implemented in a short while since a number of officials in the grade were nearing retirement age and this would give rise to vacancies in the not too distant future.

Upon being informed by Enemalta Corporation that it was prepared to appoint complainant to the post of Principal Distribution Technical Officer within a year from the issue of his Final Opinion, the Ombudsman informed complainant that in his view this proposal to a large extent served to redress the injustice that had given rise to the complaint even though it did not address the issue of backdating the promotion to the date when the other successful candidates had received their promotion.

At this stage the Ombudsman closed the file.

**Case No I 205**

**DEPARTMENT OF CIVIL REGISTRATION**

***What's in a name?***[1]

## The complaint

Frank Richard di Gennaro, a Maltese citizen alleged in a complaint which he raised with the Office of the Ombudsman that when he applied at the Malta High Commission in Australia in 2008 for the renewal of his passport, he was told that his new passport could not be issued under this name as had been done in the last fifty years but under the name of Frankie di Gennaro.

Complainant was perturbed by this decision since the name on his old passports had always been the same as the one that appeared on the Identity Card that was issued to him several years earlier before he left the island to migrate to Australia. He explained that it was this name too that appeared in the document that attested to his Australian citizenship.

Complainant explained to the Ombudsman that while he was on holiday in Malta he tried to resolve this issue with the Maltese authorities regarding the name on his renewed passport but all these efforts were to no avail. He therefore approached the Ombudsman to establish whether the Passport Office in Malta was right to turn down his request so that his full and proper name would show on his passport.

## Facts of the case

The Ombudsman found that complainant's act of birth issued in 1933 showed that under the column captioned *Names given* there appeared the five names given to complainant at the time of his birth with the first name

[1] "*What's in a name? That which we call a rose by any other name would smell as sweet.*" (*Romeo and Juliet*, Act II Scene II).

that showed on this list being Frank while under another column captioned *Name or names by which the child is to be called* there was the name Frankie. These entries were based on declarations made by complainant's father at the time of the registration of his son's birth with the Maltese civil authorities. The shorter version of complainant's act of birth (a true extract from the records of the year 1933 in the civil status records relative to acts of birth in the Public Registry in Valletta) simply gave the name Frankie under the column entitled *Name of the Child*.

Complainant produced evidence in the form of photocopies of old passports issued to him back in the 60s – and all of these were issued in the name of Frank Richard di Gennaro or Frank R di Gennaro. His last passport, issued in 1998 by the Malta High Commission in Canberra, was under the name of Frank di Gennaro. This was also the name entered in complainant's Australian passport. Furthermore, complainant's old Identity Card had been issued under the name of di Gennaro Frank R.

Upon receiving this complaint the Ombudsman asked the Department of Civil Registration for its comments including the legal basis for the decision to issue complainant's renewed passport with the name of Frankie di Gennaro instead of Frank R di Gennaro.

In his reply the Director, Department of Civil Registration explained that when the Passport Office receives an application for a new passport, the Office verifies data given by the applicant on the application form with the data registered at the Public Registry through the common database. From these verifications it resulted that in the case of complainant's original act of birth under the column *Name or names by which the child is to be called* his father, as the declarant on this document, had stated that the name of the child was Frankie and had also signed the original act of birth to confirm that this information was correct.

The Director went on to state that the extract from complainant's original act of birth confirmed that the name of the child in this case had been registered as Frankie. On this basis the Director felt that his department was fully justified to indicate the name of complainant on the passport as Frankie as had been registered after his birth on his act of birth.

The Director went on to point out that complainant's act of birth had been drawn up in accordance with article 278 of the Civil Code whereby:

"*Every act of birth shall be drawn up in accordance with Form C in Part II of the First Schedule to this Code and, saving any other provisions, it shall contain the following particulars: .....*
*(d) the name given to the child, and, where more names are given, a special indication of the name or names by which the child is to be called and the surname of the child;*"

The Director further explained that since no act of civil status may be amended unless by court order, complainant had no option but to institute legal proceedings under article 253 of the Civil Code requesting the Court to order the correction of the details of his name as registered in his act of birth on the grounds that he had always been known by a different name. If he would be able to prove his claim to the satisfaction of the Court, the Court would then order the Director of Public Registry to correct the act of birth by way of an annotation to this effect and any such correction would subsequently be reflected in the extract. The Director concluded by stating that on these grounds, the allegation by complainant that his department had acted improperly in his regard was both incorrect and unfounded.

When copies of complainant's old passports were sent to the Department of Civil Registration to show that his name had earlier appeared in these documents in a different manner to the one that the Passport Office was now insisting on, the department referred to article 278(d) of the Civil Code and argued that "*the name … by which the child is to be called*" undoubtedly refers to the official name given to the child by the declarant on the act of birth and no other legal interpretation may possibly be given.

In the department's opinion complainant's old passports must have been issued erroneously through a Maltese Embassy or a High Commission abroad. It was also likely that complainant's original application for his first passport was accompanied by identification other than the birth certificate issued by the Public Registry.

**General observations**

The Ombudsman confirmed that there is no specific legislation which defines the way in which the name of an applicant is to appear in a passport and that the Passports Ordinance does not mention anything to this effect. The Passport Regulations issued on 28 September 1993 (subsidiary

legislation 61.02) require that an application for a passport must be made on Form A that may be obtained from the Passport Office although this Form is not prescribed by any regulation. These regulations, however, make a specific provision under regulation 5(2) regarding an applicant's surname and state that:

"*When a surname is composed of more than one surname and all surnames are altogether of a greater length than is technically possible to be written down on the passport, the passport officer may limit such surnames as are to be written down on the passport, in such manner that he shall always include the predominating surname or surnames*."

There is, however, no analogous provision in respect of the name of an applicant.

Although Form A lists the *Name* of an applicant as one of the details to be filled in an application for a passport, however, the *Notes to Form A* that are intended to provide information to applicants do not give any details on the manner in which the name is to be entered.

**Considerations and comments by the Ombudsman**

The Ombudsman pointed out that complainant had argued that the name appearing on his passport should be Frank or Frank Richard because these were his "*official*" names while Frankie is "*a pet name*" for family and friends. To support this claim he produced copies of several passports that had been issued to him for over fifty years where his name had been entered as Frank Richard di Gennaro or Frank R di Gennaro, the names given to him by his father when his birth had been registered. In his outdated Identity Card complainant appeared as di Gennaro Frank R.

The Ombudsman observed that the Department of Civil Registration defended the stand taken by the Passport Office on the grounds that upon receiving an application for a new passport, it has the duty to verify the information given by an applicant in the application form with the data registered at the Public Registry through the common database, including the data appearing in the applicant's original act of birth. Complainant's act of birth showed that he was given five different names with the first two being Frank Richard; and when more than one name is given to a newborn

child, the declarant is required under the terms of the Civil Code to indicate the name by which the child is to be called. In such situations it is the name by which the child is to be called which is considered as the official name on official documents in respect of the person concerned.

The Ombudsman commented that while only the Courts can give a definite ruling on the correct legal interpretation of the relative provision of the Civil Code, he could state in all truth that he could not find fault with the position taken by the Department of Civil Registration. Nor could he question the policy that was being applied even though he felt that in this case a less rigid approach would not have been amiss.

This notwithstanding, the Ombudsman pointed out that even if one were to accept the legal interpretation given by the Department of Civil Registration in line with its policy, it was difficult to understand the reason why at the time of the declaration of complainant's birth back in 1933 the official concerned accepted a name for the purpose of meeting a legal requirement to establish the name by which the child was to be called which was not even listed among the five names given to the child.

According to the Ombudsman, although the purpose of the law was to have a clear indication of the name that is to be a child's official name out of the several names that are customarily given to a newborn child at baptism and subsequently recorded at the Public Registry, it was likely that when complainant's father registered his son's birth, he gave the name Frankie as a popular version of the name Frank (which was the first name he gave to his son) without being aware of the consequences that this version of his son's name could possibly land him in later on in life.

The Ombudsman commented that complainant provided evidence to the effect that at least since the early 60s the Government of Malta, either through its Passport Office in Valletta or through its diplomatic or consular offices abroad, issued him with several passports in accordance with the name/s given to him by his father at the time of the registration of his birth with the civil authorities and not in keeping with the "*name …… by which the child is to be called*." Complainant's surprise and frustration so many years later was therefore quite understandable upon finding that the Passport Office in Malta was now adamant that it would no longer issue his passport in the same way it had always done before.

The Ombudsman observed that this position by the Department of Civil Registration was in itself an admission of the fact that originally through the Passport Office and, in later years, through Maltese diplomatic missions abroad, the Government of Malta repeatedly issued passports for complainant that were based on technical and administrative errors. Even if one were to accept the department's latest interpretation of the provisions of the relevant legislation, the reasons given to justify these continued errors did not absolve the Government of its repeated failures.

The Ombudsman pointed out that although complainant had, following these developments, requested the Maltese High Commission in Canberra to issue his passport in the name of "*Frank Richard also known as Frankie*", this request was turned down. The Ombudsman understood that the reason behind this refusal was that in doing so it could be taken to mean that the Department of Civil Registration was recognizing complainant's name as Frank Richard when according to its policy and its interpretation of the applicable legislation, his name was Frankie.

Taking everything into account the Ombudsman suggested that even if the legal interpretation of the department were to be accepted, there ought to be no legal difficulty to adopt a compromise solution and issue a new passport to complainant in the name of "*Frankie, known as Frank Richard*". The authorities, however, continued to insist that if complainant wished to have his new passport in the name of Frank Richard, he had merely to institute legal proceedings in accordance with article 253 of the Civil Code requesting the Court to order the correction of the details of his name as registered in his act of birth on the grounds that he had always been known by a different name.

The Ombudsman understood, however, that complainant had not expressed any concern in respect of data appearing in his act of birth and was reluctant to commence court proceedings to correct his act of birth.

As it continued to prove difficult to find a practical solution to rectify an unfortunate situation that could give rise to even further inconvenience to complainant, the Ombudsman said that he felt he should point out that an objective assessment pointed to a shared responsibility in the way that this issue had unfolded. In particular complainant's father who made a statutory declaration at the time of his son's birth and indicated the names to be given to him and the name by which he was to be called, had

erroneously declared that his son was to be called by a name that was not one of those given to him. Moreover, as complainant himself affirmed, the name that was indicated as the one he was to be called with was "*a pet name*" for family and friends and not his official name.

The Ombudsman also observed that even though he was referring to something which took place way back in 1933, it was obvious that the official who received details from complainant's father to put down on his son's act of birth ought to have realised not only that Frankie was not in reality a proper name but also, and perhaps more importantly, that it was not one of the proper names given to complainant. The entry in complainant's birth certificate appeared therefore to be erroneous and contrary to the express requirements of article 278(d) of the Civil Code.

It was evident, according to the Ombudsman, that officials authorised by the Malta Government to issue passports, both in Malta and in diplomatic missions abroad, were also mistaken when they had on several occasions issued passports to complainant that did not conform to the name by which he was to be called according to his birth certificate. In the best hypothesis for complainant, his passports could only have been issued under the name "*Frankie known as Frank Richard*" if they were to be in line with his birth certificate. The passport authorities were therefore to be held responsible for these repeated mistakes and for failing to indicate to complainant the discrepancy between the names that he was in effect commonly known by and the name in the last column of his birth certificate which was not in conformity with the letter of the law.

A person's birth certificate is, according to Maltese law, conclusive proof of a person's identity and civil status. It cannot be tampered with, amended or changed arbitrarily except by Court order through the proper court procedures as set out in the Civil Code. One cannot invoke change of name through usage or custom unless this is sanctioned by a court decree. The situation in Malta, therefore, unlike some other countries, does not allow for a change of name, or indeed surname, by other simpler methods such as, for instance, by means of deed poll.

The law lays down rigid rules on the drawing up of acts of civil status as conclusive evidence for the identification of persons and their civil status in life. Moreover, precise and well-established procedures are to be followed, as laid down by law, to effect corrections that can only be authorised by a

Tribunal with a specific jurisdiction or the Civil Courts and the Passport Office has no right to depart from the contents of an act of birth acting on its own initiative but is bound to respect and reproduce its contents. The Ombudsman explained that in this context the government authorities could not be faulted for their insistence that complainant should follow the correct procedures and obtain an order for the correction of his act of birth from the competent judicial authority.

The Ombudsman commented that at the same time this did not exonerate the Passport Office from its responsibility in misleading complainant for several years by issuing him with a passport that was not in conformity with the law. Nor did it relieve the Director of Public Registry from his responsibility for the registration of information in complainant's birth certificate that was not in line with the Civil Code.

In the opinion of the Ombudsman when article 278 (d) of the Civil Code provides that every act of birth drawn up by the civil authorities has to contain "*the name given to the child, and where more names are given, a special indication of the name or names by which the child is to be called*", this means that the name that is chosen by which the child is to be called has to be one of the names given to the child and that in the act of birth this name has to be shown in the appropriate section of the document. Any different interpretation would mean that the child would have to be called by a name that was not given to the child at the moment of registration of its birth; and clearly such an interpretation would be a *non sequitur*.

The Ombudsman explained in his Final Opinion that this consideration was being made to illustrate that in his view complainant had good grounds to ask for and obtain a correction of some of the details appearing in his birth certificate although any such correction can only be made through a court order and there is no way in which this stipulation could be short circuited. On the other hand, the Ombudsman stated that since the law provides complainant with adequate means of redress in his predicament and which he was bound to take to correct this situation, this precluded him from any further investigation of the complaint.

The Ombudsman noted that it is in complainant's interest to obtain a judicial order for the correction of his birth certificate showing that he wants to be called by the name Frank. This would enable him to get a Maltese passport that would finally put things right and avoid any further

inconvenience that could arise from technical complications regarding his civil status in matters concerning inheritance, contracts and other acts of civil life that require proper and precise personal identification.

**Conclusion and recommendations**

In view of the above considerations the Ombudsman concluded that:

(a) although the final legal interpretation of a provision of the law rests with the Maltese Courts, he could find no fault with the legal interpretation given by the Maltese government authorities to the matter raised in the grievance and, moreover, the department had acted within the policy which it had itself applied at least in recent years;

(b) acceptance of the interpretation by the Department of Civil Registration implied that the Government as represented either originally by the department itself or through its overseas representations, had committed a series of errors for some fifty years and it was only now that these errors had come to light;

(c) a possible compromise solution which would not conflict with the law as interpreted by the department would be for complainant's passport to be issued in the name of "*Frankie known as Frank Richard*". The Ombudsman also suggested that in the event that his proposal would be acceptable to complainant, he would go so far as to recommend that the Government, mindful of its past errors in the issue of complainant's passports, would agree to release him from payment of the fee that is normally charged for the issue of passports to Maltese citizens.

An alternative put forward by the Ombudsman was that complainant would proceed judicially for the correction and amendment of his birth certificate before a competent tribunal. However, since in his opinion the Director of Public Registry could also be held jointly responsible for accepting mistaken declarations that appeared in the registration of complainant's birth certificate, the Ombudsman recommended that if this line of action were to be followed, the Director of Public Registry should accept to bear the costs of judicial proceedings except for fees due to complainant's legal counsel. In this connection reference was made to article 908 of the Code of Organization and Civil Procedure by virtue of which a person instituting

proceedings for the correction or cancellation of any act of birth, marriage or death may do so by means of an Advocate for Legal Aid who is not entitled to collect fees other than the honorarium from Government.

Finally the Ombudsman recommended that the Director of Public Registry should issue instructions so that officials in his department would ensure that when registering an act of birth, the name by which the child is to be called and which is inserted in the last column of the act of birth should correspond to one of the names given to the child and which is also registered in the penultimate column of the document.

The Ombudsman concluded that since complainant had adequate means of redress at his disposal to remedy the situation in which he had found himself, he did not consider that it was appropriate for him to make any further recommendations.

**Case No I 278**

**MINISTRY FOR RESOURCES AND INFRASTRUCTURE**

**A selection process that was completely above board**

## The complaint

A public official alleged in a complaint that he sent to the Office of the Ombudsman that the process to select a Principal Technical Officer in the Marine and Storm Water Unit of the Ministry for Resources and Infrastructure was heavily biased and that he was again unjustly passed over for this position. He claimed that with the exception of one question, he gave correct replies to all the other questions that he was asked during his interview that dealt exclusively with various technical issues related to marine works even though he was deployed on stormwater management.

Complainant was also highly critical of the fact that none of the four members of the selection board were familiar with the management and supervision of stormwater projects and that when during his interview he tried to refer to his day-to-day duties in stormwater management, he was told that there was no need to discuss this aspect of his work.

Complainant pointed out that when the selection process consisting of interviews with eligible candidates in order to assess their suitability came to an end, he was placed third with a total of 59 points, a mere two points behind the second placed candidate. Complainant went on to admit that he was somewhat wary of the fact that the first two candidates in the final order of merit and who were subsequently appointed Principal Technical Officers both came from the marine section of the Unit.

Complainant also told the Ombudsman that although he sent two petitions to the Public Service Commission (PSC) in accordance with the Public Service Management Code (PSMC), the Commission, however, was not in favour that the final result should be overturned.

**Facts of the case**

On 11 June 2007 the Ministry for Resources and Infrastructure issued a call for applications that was regulated by the Public Service Commission which invited serving public officers with the appropriate technical qualifications and with at least five years experience in site project management and/or workforce supervision to apply for the post of Principal Technical Officer (Marine & Storm Water) in the Office of the Director General, Services Division (MPO Circular No 96/2007). The main duties of a Principal Technical Officer as listed in the circular included the management of personnel in the Marine and Storm Water Unit of the Ministry; the supervision, planning and coordination of their duties; the preparation of regular reports regarding the allocation of staff and the issue of materials; and the monitoring of the work, productivity levels and efficiency of the workforce in order to meet the overall objectives and key tasks set for the Unit.

Upon discovering that he was unsuccessful, complainant sent two petitions in October 2007 to the Public Service Commission where he raised several arguments to back his allegation that the selection process had been clouded by injustice. In particular he claimed that:

(i) whereas he held the post of Senior Technical Officer for twenty years and possessed considerable experience in the management, direction and supervision of personnel deployed on projects and programmes for the collection, storage and control of surface water run off, the candidates who were placed first and second had held a similar position for only two and four years respectively and had rather limited experience in this area of the Unit's operations;

(ii) since the post of Principal Technical Officer is in scale number 9 in the Schedule of Grades in the public service and the candidate who was placed first was still in scale 15 only two years earlier, complainant raised doubts about the fast paced career of this applicant despite his alleged lack of experience and was rather critical of the way in which this person had climbed up the ladder;

(iii) the first placed candidate had not undergone any construction courses whereas complainant had followed an apprenticeship in construction and

held a stonemason's licence and had also attended two courses in middle management as well as several other courses;

(iv) although the call for applications made no mention that applicants were required to possess experience in marine works, however, questions put to complainant during his interview focussed on this type of work;

(v) in the last three years complainant worked on assignments in the Marine and Storm Water Unit that were described in the call for applications as constituting the main duties that needed to be undertaken by the successful candidate/s selected to fill the position whereas the candidate who was placed first had never carried out any similar tasks;

(vi) complainant's performance record showed that in a career in the public service spanning thirty two years, he had made use of his sick leave entitlement sparingly.

In his second petition complainant gave the reasons why he felt aggrieved by his marks under the various criteria by which applicants were judged by members of the selection board and explained that:

(a) although the call for applications made no reference to underwater operations and works and repairs on marine structures, complainant had been asked several questions about works of this nature during his interview while he was not asked any questions at all about stormwater management which was the main component of his daily work in the Marine and Storm Water Unit; but nonetheless, given his vast experience in construction works and the fact that he was in possession of a stonemason's licence, he felt that the marks that he was awarded for *Related Technical Knowledge* (only 15 out of a maximum score of 30) were on the low side;

(b) he had been treated in a similarly unjust manner when he was only awarded 16 out of 25 marks for *Relevant Experience* – and he attributed this score, which he considered as rather low, to the fact that the selection board refused to hear about or even consider his work experience in the stormwater section of the Marine and Storm Water Unit and seemed to give no regard to this aspect of his work which represented most of the duties that were listed in the ministry's circular as representing the main duties of the post that was being advertised;

(c) complainant also held that under *Leadership/Managerial Abilities* he deserved a mark higher than 16 out of 20 especially since he served for a considerable number of years as a General Foreman in the Marsaxlokk port project where he was responsible for the deployment of manpower resources and equipment in various phases of the project and later had been responsible for the management of embellishment works and upgrading schemes in two large districts each with about a hundred employees and in another region with sixty workers of different skills, trades and abilities;

(d) the poor mark that he was awarded under *Qualifications* (a mere 4 out of 15) meant that he had been denied several marks for certificates which he acquired when he attended a course in middle management in construction that was organized jointly by the Building Industry Consultative Council and the University of Malta; another course in middle management held by the Employment and Training Corporation; a three and a half year apprenticeship in the construction industry including the award of a stonemason's licence; a three-week course in health and safety as well as several other short courses; and complainant was of the view that his attendance at these various courses coupled with his wide work experience enabled him to claim that he reached the Higher Technician Diploma standard which is rated at level 4 within the National Vocational Qualifications framework.

The Ombudsman found that complainant's petition had in fact been considered at length by the Public Service Commission and that the Commission gave due consideration to the comments that were submitted regarding this grievance by the Director General of the Services Division in the Ministry for Resources and Infrastructure. The PSC had also asked the selection board for its views and comments on the issues raised by complainant and also sought clarification about the way in which the board had awarded marks to complainant and to the two other candidates for their qualifications.

The Ombudsman found that contrary to what had been claimed by complainant, the duties associated with the post of Principal Technical Officer in the Marine and Storm Water Unit also cover marine works and in fact these works constitute an integral part of projects connected with stormwater management. The selection board also told the Public Service Commission that complainant's replies during his interview had demonstrated his somewhat limited technical knowledge on marine

construction works and related works procedures while his replies on personnel management and particularly on health and safety procedures to be adopted by personnel deployed on these works were found rather wanting.

The selection board was also not particularly impressed with the knowledge which complainant had shown in his replies to technical questions about routine construction procedures with special reference to marine works. The board explained that despite these weaknesses, complainant was still awarded 50% of the marks for his non-related technical knowledge on embellishment projects and personnel management.

The selection board insisted that although the Marine and Storm Water Unit was relatively new and had only been set up some five years earlier, this did not mean that marine projects or stormwater schemes for surface run off were not carried out before the setting up of this Unit. The board in fact maintained that the first two candidates in the final order of merit had a much wider experience regarding marine construction works that went as far back as 1991 while in the meantime complainant was deployed on embellishment projects that were undertaken by the Department of Public Works. The selection board explained that despite these different levels of work experience, it had still amply recognized complainant's longstanding experience and had in fact awarded him 64% of the marks available for experience – and this was indeed the second highest mark awarded to any applicant.

The selection board further explained that it had given due recognition to complainant's leadership qualities and management abilities when it awarded him 80% of the marks under this criterion; and this too was the second highest mark given to any candidate in this field.

The board had similarly fully appreciated complainant's integrity and work ethic that were confirmed by his track record at the Department of Public Works while his superiors had duly recognized his overall performance. This led the selection board to award him 80% of the available marks – and here again this mark was the second highest among the marks awarded to candidates under this category.

The review by the PSC also found that before the selection process got under way, the selection board agreed on the marks that were to be awarded

for applicants' various levels of educational qualifications and had also agreed that the maximum number of marks that could be allocated to candidates for these qualifications would not exceed 15.

From records seen by the Public Service Commission that showed the marks awarded by the selection board for the educational qualifications of the first three candidates, it was confirmed that this process had been conducted in a fair manner and that the points that were given to applicants adequately reflected the educational level and attainment of each candidate. Furthermore, the selection board provided satisfactory explanations regarding certain issues that were raised by the PSC about the rating that was given to some of the educational qualifications of the first two candidates.

The Ombudsman noted that in the final analysis the PSC had been generally satisfied by the way in which the selection board carried out its duties and was firmly convinced that the whole process was above board and just and that the respective merits of each candidate had been evaluated in an objective, consistent and informed manner.

**Considerations and comments**

The Ombudsman observed that complainant had asked his Office to review and to change a decision taken by the Public Service Commission regarding two petitions which he had sent upon feeling aggrieved that he had not been selected for the post of Principal Technical Officer.

According to the Ombudsman Act, 1995 the role of the Ombudsman in similar circumstances is to examine whether the Commission had given adequate consideration to the issues that were raised in the petition and to establish whether in the Commission's deliberations its members had acted in a way that was wrong in fact or at law, in a discriminatory or improper manner or in any other way that was unjust.

The Ombudsman stated that he was convinced that in this instance the PSC had seriously considered all the points raised by complainant and found no reason not to accept the explanations given by the selection board about its evaluation of the abilities, aptitudes and merit of each of the first three successful applicants.

The Ombudsman stated that after he examined the explanations that were given by the selection board to all the issues that were raised by complainant as well as by the Public Service Commission, he found that the PSC was fully justified to agree that there were no grounds to depart from the selection board's original decision. In particular the Ombudsman found that no evidence whatsoever had emerged in the Commission's deliberations on the petition that could be faulted or that these deliberations had been guided by considerations that were in any way discriminatory or otherwise unjust.

The Ombudsman also fully supported the PSC's statement that although in his petition complainant had quite understandably highlighted his own merits, the selection board's responsibility was to assess and to rank the strengths and merits of all eligible applicants. In a process that was both qualifying and selective, the respective merits of each candidate were not only assessed in an objective manner against established criteria but were also ranked against the merits of other candidates.

**Conclusion**

For these reasons the Ombudsman concluded that complainant's grievance could not be upheld.

**Case No I 418**

**MALTA COLLEGE OF ARTS, SCIENCE & TECHNOLOGY/ EMPLOYMENT & TRAINING CORPORATION**

**The applicant who claimed unfair discrimination in the selection process for an Administration Manager**

## The complaint

The Office of the Ombudsman received a complaint from an unemployed person who was aggrieved that his submission for the post of Administration Manager at the Malta College of Arts, Science and Technology (MCAST) in response to a call for applications issued by the College was turned down even though he was not called for an interview. He said that after MCAST management informed him that this vacant post had been filled, he found that the choice had fallen on another unemployed person who was on the Register kept by the Employment and Training Corporation (ETC) for persons in search of work.

Complainant felt that he was subjected to unfair treatment by the College authorities and that this was an instance of sheer discrimination because although his name was on this Register as well, he was not even considered for the post.

## Facts of the case

On 4 July 2008 MCAST published an advert in the *Government Gazette* inviting applications up to 21 July 2008 for the post of Administration Manager at the College on a definite three-year contract.

The issue of this call was approved by the Management and Personnel Office (MPO) of the Office of the Prime Minister and MCAST was authorised to commence procedures with the ETC for the recruitment of a new Administration Manager since the person filling this post was shortly due to retire. This approval by the OPM was subject to the condition that in every advert that appeared in the media for this post, reference had to be

made to the MPO file that authorised the issue of this call for applications and to the number of the ETC permit.

On 27 June 2008 the College management told the ETC that it had received the green light to go ahead with the call and urged the Corporation to give urgent attention to its request to fill this post in view of its importance in the day-to-day running of the College. After MCAST submitted to the Corporation a detailed job description and the academic requirements that were necessary, on 3 July 2008 the ETC put forward for consideration by MCAST the names of two persons who at that time were on Part One of its Register of unemployed workers. At the same time the ETC told these two persons to submit their *curriculum vitae* to MCAST before 13 July 2008.

However, while these developments were under way and given the urgency with which MCAST wished to fill this position, the management of the College made arrangements so that the call for applications would appear in the *Government Gazette*. This was in fact done on 4 July 2008.

It was at this stage that MCAST decided to give priority to the two candidates whose names had been submitted by the Employment and Training Corporation itself. On 18 July 2008 or three days before the closing date of the open call for applications, the College management interviewed these candidates and upon finding that one of them possessed the necessary qualifications and experience, selected this person to fill the position of Administration Manager. Following this decision MCAST management saw no need to interview candidates, including complainant, who sent their applications in response to the advert in the *Government Gazette* on the grounds that this position had already been filled.

Sub-article (6) of article 110 of the Constitution of Malta states as follows:

"*Recruitment for employment with any body established by the Constitution or by or under any other law, or with any partnership or other body in which the Government of Malta, or any such body as aforesaid, have a controlling interest or over which they have effective control, shall, unless such recruitment is made after a public examination duly advertised, be made through an employment service as provided in sub-article (2) of this article*."[1]

[1] In respect of the power for recruitment to public offices from outside the public service, sub-article (2) of article 110 of the Constitution of Malta states that unless such recruitment is made after a public

Subarticles (1) and (2) of article 15 of the Employment and Training Services Act also make reference to these procedures.[2]

The Ombudsman observed that under the Employment and Training Services Act whenever the ETC receives a notification of a vacancy from a government body or organisation, the Corporation is obliged as a first step to send the names of persons who possess the necessary qualifications or experience to fill the post and who appear on Part One of the Register of unemployed persons. This has to be done before the submission of the names of other persons on Part Two and Part Three of this Register.

The Ombudsman also understood that legal advice given earlier to the ETC by the Attorney General was that the process to interview candidates following the issue of an open call for applications in the *Government Gazette* could be considered a public examination for the purpose of sub-article (6) of article 110 of the Constitution of Malta.

MCAST management defended itself from complainant's charge that he was not called for an interview despite his claim that he was registered with the ETC as an unemployed person in search of work by pointing out to the Ombudsman that complainant was not included in the list of candidates given to the College by the ETC.

On its part the ETC explained to the Ombudsman that according to subarticle 13(2) of the Employment and Training Services Act whenever a person who is registered for employment refuses without a good and sufficient cause to accept a suitable opportunity for employment or training that is offered to him by the Corporation, this person should lose his

---

examination advertised in the *Government Gazette*, this power shall "… *be exercised only through an employment service provided out of public funds which ensures that no distinction, exclusion or preference is made or given in favour or against any person ……*".

[2] "*15. (1) All employees required by the Government of Malta from outside its service or by any body corporate or company referred to in article 110(6) of the Constitution whether these are, in each case, employed on a contract for a specified time or for an indefinite period, shall, save as provided in the Constitution and in subarticles (2) and (3) of this article, be recruited through the employment service provided by the Corporation.*

*(2) Where the recruitment of employees by the Government or any other employer to which subarticle (1) refers is in connection with the employment of –*

*(i) persons required to fill posts, on the basis of a contract for a definite time requiring a special trust or posts for which academic or professional qualifications are necessary …… the Corporation may cause or authorise recruitment, whether through referral by it or otherwise, under such conditions or in such manner as the Corporation may deem appropriate ……*"

priority for referral for employment and should be notified accordingly in writing. Furthermore any such person has the right to appeal to the National Employment Authority within fifteen days from the date of notification of any such decision by the Corporation.

The Corporation told the Ombudsman that complainant's name was struck off the Register because on 24 April 2008 he failed to attend a seminar organized by the ETC on job searches for adult workers even though he was notified of this seminar. On 10 June 2008 complainant sent a medical certificate to cover this absence but the certificate was rejected by the ETC because it was not submitted within ten days from the date when the medical examination took place.

On 26 June 2008 complainant was told by the ETC that his name had been struck off its Register in view of his failure to attend this meeting and even though he was told of his right to appeal against this decision within fifteen days, he did not present an appeal in accordance with the provisions of the law.

**Considerations by the Ombudsman**

The Ombudsman commented that he would investigate two aspects of this complaint:

- firstly, failure by MCAST to summon complainant for an interview despite the fact that his name appeared on the ETC Register of persons in search of work; and

- secondly, the issue by MCAST of an open call for applications for a vacant position at the College and its decision to choose the person to fill this post before the closing date of this call.

With regard to the first issue: after having seen documentary evidence showing the sequence of events that led the ETC to remove complainant from Part One of its Register and confirming that this exclusion was fully justified, the Ombudsman stated that in the circumstances he did not uphold this aspect of complainant's grievance.

In his consideration of the second aspect of this complaint the Ombudsman pointed out that according to the ETC the call for applications issued by the College did not need the Corporation's approval once this call appeared in the *Government Gazette*; and as a matter of fact the ETC had not issued a formal authorization for the release of this call for applications.

Facts showed that as the vacancy due to arise in MCAST for the post of Administration Manager drew closer, the College management told the Corporation of the MPO's approval for the issue of a call for applications on the media and that it had to show the number of the ETC permit in its adverts for this call. The ETC, however, made no reference to this requirement and submitted to MCAST the names of two candidates on its Register of out-of-work persons in search of work in the area covered by the call for applications while also telling these two persons to submit their *curriculum vitae* to the College. Upon receiving these documents MCAST management proceeded to interview these candidates and went on to fill the vacancy before the deadline for the call had even passed.

The Ombudsman observed that the issue at stake here was whether the College was obliged to interview all eligible candidates who responded to the advert in the *Government Gazette*. The issue hinged around the question whether MCAST was bound to interview all eligible applicants and the two candidates whose names were put forward by the ETC once MCAST did not need a permit by the ETC to issue the call for applications since an open competition for the post had been announced in the *Government Gazette*. This in turn led to a second question as to whether the College authorities acted properly to ignore the applications that it received following the issue of call for applications in the media. The College authorities held that since the interviews with the two candidates submitted by the ETC enabled them to identify a person with the necessary qualifications and experience to fill this post, there was no need to interview the other applicants.

The Office of the Ombudsman sought further clarification on this issue from both the ETC and MCAST.

The ETC confirmed that:

- MCAST was at liberty to issue the call for applications in the *Government Gazette* because a public competition was going to be held

as laid down in the Constitution; and on these grounds, MCAST did not need the ETC's permit to go ahead. The situation would have been different if the call for applications appeared only on the other media and not in the *Government Gazette*;

- besides issuing a call for applications in the *Government Gazette*, MCAST also contacted the ETC about the vacancy. As a matter of policy, whenever the Corporation issues a permit, it always places the condition that a candidate on its Register whose name it would put forward should be given priority over all other applicants; and it was according to this policy that MCAST gave priority to persons whose names were given by the ETC. This meant that effectively MCAST did not need to issue the call for applications and could easily have gone ahead solely on the basis of the nominations made by the ETC.

The Corporation further commented that in this case where a public call for applications was issued at the same time that it submitted the names of eligible candidates on its Register, the preference to persons who had applied through the ETC was not applicable since the College did not need any authorisation from the ETC to issue the call for applications.

The ETC explained that the obligation to give preference to persons on its Register of unemployed workers when a call for applications is issued following authorisation by the Corporation arises from provisions in the Employment and Training Services Act which allow the ETC the right to make arrangements that it may deem proper with regard to permits that it issues to public bodies for the recruitment of employees. The ETC maintained that the spirit of the relevant provisions of the Constitution of Malta and of the Employment and Training Services Act is such as to ensure that priority is given in the employment sector to persons in search of work whose names appear on the Register if they are found to possess the qualifications, aptitude and work experience of the job vacancy that is the subject of the call for applications.

The Ombudsman commented that in effect if the call for applications had not been issued in the *Government Gazette*, MCAST would still have been able to fill the vacancy of Administration Manager directly through the ETC and this process would have brought about the same result. However, according to the Ombudsman, from a review of the way in which the whole selection process had gone ahead, it appeared that it would have been better

if the public call for applications was not issued at all. In the circumstances the fact that MCAST issued the call for applications before it even received a reply from the ETC was an administrative oversight and the Ombudsman was of the view that despite urgent efforts by the College to fill the vacancy, the postponement of the call by a few days would not have caused any problems.

The Ombudsman went on to observe, however, that MCAST's original request to the Corporation was based on the stipulation laid down by the Management and Personnel Office that the College had, among other things, to quote the ETC permit number in its advert for applications for the position of Administration Manager. In its reply to MCAST the Corporation made no reference to this point but merely sent the names of two persons who were on its Register and it was likely that it was this that led the MCAST management to understand that these two persons were to be given preference over any other candidates and proceeded to interview them straightaway even before the closing date for applications from outside candidates. The mistake in this case was that MCAST hastened to issue the call for applications in the *Government Gazette*.

It could be argued, according to the Ombudsman, that once MCAST did not need an ETC permit to issue the call for applications given that a public competition was due to take place, the call was a valid one and the College was obliged to interview all eligible candidates who applied together with those persons whose names were given by the ETC and should not have ignored the applications that reached MCAST following the call in the media. MCAST management maintained, however, that since interviews with the two candidates who were proposed by the ETC enabled them to find a person who was suitable for the position, there was no need for them to interview the other eligible applicants.

According to the Ombudsman the principles of good management envisage that whenever one line of action is followed out of two possible options, the second option should be discarded. In this case sub-article (6) of article 110 of the Constitution of Malta provides expressly for two possible routes for the recruitment of employees in the public sector in the sense that whenever a recruitment process does not take place following a public examination that would have been duly advertised, this process should be carried by means of the employment service as laid down in sub-article 2 of this article of the Constitution.

The Ombudsman's investigation revealed, however, that events had unfolded in the following sequence:

**27 June 2008**

- the OPM granted approval for the commencement of recruitment procedures for the engagement of an Administration Manager;

**3 July 2008**

- the ETC advised two persons on Part One of the Register who were considered eligible to fill this vacancy to send their *curriculum vitae* to MCAST for consideration by the College management and also sent details to MCAST about the employment record, experience and qualifications of these two persons to enable a preliminary assessment of their suitability to fill the vacancy in question;

**4 July 2008**

- the advert to fill the vacancy appeared in the *Government Gazette*.

The Ombudsman pointed out that according to the ETC, the College management was under no obligation to approach the Corporation in connection with this vacancy if the College authorities decided to fill this post by means of a call for applications in the *Government Gazette*. On the other hand, once MCAST made use of the ETC, the College was obliged to employ persons on Part One of the Register if these persons possessed the appropriate experience and qualifications.

The Ombudsman observed that there was no doubt that a selection process driven by the ETC's intervention was already firmly in hand – and, from the Corporation's perspective, was already concluded – even before the call for applications appeared in the *Government Gazette*. This meant in effect that the College had already chosen the first option and the second route should have therefore been dropped. As a result the Ombudsman felt that the College authorities had not acted in a proper manner when they proceeded with the publication of call for applications in the *Government Gazette*.

Taking everything into account, the Ombudsman was of the view that MCAST erred when it rushed the selection process by means of a public call for applications and did not wait to find out whether the candidates suggested by the Corporation were in possession of the qualifications and experience that were considered necessary to fill the position. Indeed, as things turned out it was found that at least one of the applicants was qualified to fill the vacancy.

The Ombudsman's investigation found that according to the established procedures the candidate who was selected to fill the post of Administration Manager at MCAST in fact enjoyed the right to be given priority over any other candidate. This meant that in truth it was not the interviews with complainant and with the other eligible applicants that would have been unnecessary if they had taken place but it was the call for applications itself in the *Government Gazette* that was unnecessary and that ought not to have appeared at all.

The Ombudsman stated that this act of maladministration by MCAST gave rise to false expectations and frustration among applicants; and on this score at least complainant was right. This did not, however, mean that there were any grounds to sustain his complaint that he was deprived of the opportunity to be selected for the vacancy because he was not even asked to attend an interview. If nothing else, complainant lost the chance to be selected for the position when he prejudiced his inclusion on the ETC Register for persons in search of work.

**Conclusion**

The Ombudsman concluded in his Final Opinion that his investigation showed without the least shadow of doubt that what had happened was not the result of any bad intention or any ulterior motive or an act of maladministration on the part of the MCAST authorities with the aim of favouring one candidate at the expense of another in an underhand or improper manner. There were in fact clear indications all along that this issue arose as a result of a misunderstanding by the College authorities regarding procedures that had to be followed in order to fill the vacancy.

It had emerged from the Ombudsman's investigation that persons on Part One of the ETC Register for out-of-work persons had to be given

precedence even over complainant if the procedures used by MCAST to fill the vacant position were based on a request for authorization to issue the call for applications. Besides, the vacancy could have been filled without the need to issue a public call for applications.

On the strength of this reasoning the Ombudsman turned down the complaint.

## From the Ombudsman's Caseload

**Case 9 (January 2009)**

**The Ombudsman on the urgent need of a fair and transparent system of waiting list management in state hospitals**

**Background information**

In June 2003 a foreign detainee at the Kordin Correctional Facility wrote to the Ombudsman and described how on 21 November 2002 he had been referred to an orthopaedic surgeon at St Luke's Hospital who decided that he needed an operation on his left knee and placed him on the waiting list of patients requiring arthroscopy. The detainee went on to complain that seven months after this diagnosis he was still waiting for the operation to be done and protested about excessive delay by the Maltese health authorities to make arrangements for him to undergo this intervention in a state hospital.

Upon being approached by the Ombudsman, the surgeon stated that there were other patients who had been waiting for their turn on his waiting list since January 2002 and that he considered it "*unethical*" to fast track patients from this list. As a result of the Ombudsman's investigation, complainant's operation was tentatively set for February 2004 on the assumption that it would not have to be delayed or cancelled because of influxes of emergency cases and that the consultant would not be required to operate on these patients at the expense of others.

After informing complainant of these developments in a letter dated 23 September 2003, the Ombudsman decided that no further involvement was warranted on his part and closed the file.

In March 2008, however, complainant again approached the Office of the Ombudsman because surgery on his left knee had not yet taken place. Considering this as a *prima facie* case of procrastination, the Ombudsman asked the management of St Luke's Hospital for an explanation why complainant's case had been left unattended for such a long time.

Three months later, in June 2008, the hospital authorities informed the Ombudsman that the surgeon involved would perform the operation on complainant within a couple of weeks. They also reported that the surgeon objected to what he termed "*outside pressure*" by the Office of the Ombudsman which, in his view, would result in complainant "*jumping the surgery queue of about 400 Maltese citizens*."

The Ombudsman took exception to these comments. Resenting the consultant's attitude and this snipe at his integrity, he pointed out that he was appointed under the Constitution of Malta with the function as well as the duty to ensure that citizens are not subject to discrimination on grounds of race, colour, creed or sex. He declared that he investigated this grievance because although complainant was not a Maltese citizen, responsibility for his well-being and the state of his health fell upon the Maltese government and if international organizations find that foreign detainees in Malta are treated in a degrading or inhuman manner, the government is liable to censure.

The Ombudsman made it clear that he merely requested an explanation from the hospital management why complainant's case had been deferred for so long after seeing that complainant was told that his operation would take place in February 2004 and that four years later he was still waiting for this operation. He insisted that he never even slightly hinted that any patient on the waiting list should jump the queue.

The Ombudsman recalled that it was the consultant himself who stated that unless he would need to deal at short notice with cases that require urgent care, he would operate on complainant in February 2004; and so his claim that hundreds of Maltese patients were on the waiting list before complainant was, to say the least, baffling. Although admittedly emergency orthopaedic cases rose sharply in the last few years and several routine operations were postponed to later sessions while hospital records confirmed a sustained rise in the number of elective operations on patients on the waiting list as well, the Ombudsman insisted that the hospital authorities should provide a proper explanation and check the list of patients operated by this surgeon since 2003.

When the hospital management failed to come up with this information, the Ombudsman met these officials to discuss the situation. During this meeting the authorities admitted that they have no control on the way that

waiting lists for operations at the hospital are established and on managing the admission of patients on these lists. Waiting lists are kept on the appointments diary of individual consultants and only in ophthalmic and cardiac cases are the lists of pending operations recorded in a centralized system. The officials disclosed that only consultants establish the urgency of any particular case and determine priorities for individual patients who need to undergo an operation.

The Ombudsman, however, continued to demand an explanation about the excessive delay that occurred in this particular case especially since surgery only took place on complainant after he had launched his second investigation on the matter. What rendered this situation more galling was the fact that despite repeated endeavours to establish the reasons for this delay, no proper explanations were given to his Office why the earlier date for the operation fell by the wayside and the real reasons remained shrouded in mystery.

**Considerations by the Ombudsman on the merits of the case**

The Ombudsman appreciated that long waiting lists in the state healthcare system constitute a serious and persistent problem and that the local health management authorities are fully aware of its magnitude and of the need to find an urgent remedy to this backlog of work because it causes anxiety and pain among patients. They admitted that it proved difficult to find a solution to this festering situation and that efforts to introduce a system that would verify the way in which waiting lists were administered and managed had drawn a blank. They were also aware that the state-of-the-art facilities including the larger number of operating theatres at Mater Dei Hospital heightened the expectations of citizens regarding a solution to this problem.

On his part the Ombudsman recalled that earlier in 2008 the Minister for Social Policy himself went on record that the situation regarding hospital waiting lists was nothing less than scandalous.

The Ombudsman described this situation as serious and downright anomalous because it is ultimately the responsibility of the Health Division and of the officials who are responsible for the management and administration of state hospitals to exercise proper and rightful safeguards

regarding the full range of care that is provided to patients including the care given to patients awaiting an operation. It appeared that this state of affairs is attributable to failure by the authorities to exercise control over consultants who keep a stranglehold on current waiting lists in their departments that does not allow an independent check on how these active lists are compiled and managed.

According to the Ombudsman the management of the country's healthcare system is, and should continue to be, subject to the scrutiny of overview mechanisms that are entrusted with the audit of administrative behaviour. These include not only *ad hoc* medical watchdogs to monitor the medical profession and check the service by the Health Division but other review mechanisms such as the Office of the Ombudsman which has a wider jurisdiction that extends over health professionals who are responsible for the public healthcare service. Any intervention by an institution for administrative scrutiny such as this Office cannot be considered as undue interference in the affairs of a public body.

The Ombudsman admitted that he was shocked by the fact that emerged from his investigation that there is no internal monitoring of the management and administration of hospital waiting lists which remain shrouded by a thick veil of unaccountable criteria. As thousands of patients await their intervention, there are no official waiting lists of these patients with the exception of ophthalmology and cardiac cases and the hospital management has no records or data at its disposal to indicate the date when a patient was first included on a waiting list or to tell patients on a waiting list when their turn is due. The Ombudsman commented that although well known to the hospital management, this fact is generally withheld from the public.

The investigation revealed that consultants not only decide the patients who are to be included on the list of those awaiting elective surgery but also determine the order of precedence of each patient. Waiting lists are left solely in the hands of consultants who are not obliged to establish these lists in accordance with any accepted procedures or criteria and who are not held accountable for their decisions on the way in which these lists are managed. Nor do these consultants expect any authority to interfere in their decisions or to override any sequence or order that they may choose to follow in the selection of patients on their waiting lists. In short, waiting

lists of patients are not subjected to any scrutiny, supervision or inspection by the hospital management.

The Ombudsman pointed out that he had no reason to doubt that consultants at Mater Dei Hospital are dedicated and provide their specialist professional services in a fair and unimpeachable manner. He observed, however, that human nature being what it is, it is not beyond anybody to succumb to pressures especially in a situation where there is no transparent system to oversee the way in which waiting lists are drawn up and the risk of abuse can rear its head at any time. The Ombudsman remarked that since absolute power is bad, it is vital to have in place a system of checks and balances even in the management of hospital waiting lists to ensure systematic routine monitoring and an equitable treatment of all patients on these lists.

The Ombudsman admitted that the process to rationalise hospital waiting depends mainly on a clinical evaluation of patients by specialists to establish the priority rating of each patient, based on the urgency of the treatment required and the nature of the patient's medical condition; and clearly these assessments have a crucial role in these decisions. However, in the way the current system is administered, inadequately documented and marked by lack of transparency and accountability to the hospital management by those who take it upon themselves to draw up these waiting lists, there is no way how management may be aware when a patient's name was first put on a waiting list or verify if patients are being given the service which they need and to which they are entitled without any improper discrimination and at the right moment under a publicly funded healthcare system. There is no focal point in the hospital's administration that collects information about patients' position on a department's waiting list or the progress as patients wait their turn.

The Ombudsman insisted that hospital services should be accessible according to criteria that are known to all and that can be verified by an independent regulatory mechanism to ensure fair treatment to all patients. The underlying principle in these circumstances should be that all patients who are in the same condition should receive the surgical treatment that they require according to the date when it was first decided that they need this intervention. This system would ensure that exceptions are only allowed in clearly defined cases and permit an objective and transparent

assessment of the way in which consultants draw up the order of precedence.

Lack of control and verification invariably gives rise to suspicion and doubt, which may not necessarily be well founded, of manipulation and abuse by those who draw up these waiting lists because the system allows a very wide span of discretionary power in the hands of consultants who are the sole arbiters regarding the date when surgery is to take place and who are also allowed the right to take a decision on the precedence to be given to a patient's intervention, including a patient's transfer to a fast track, possibly at the expense of other patients.

The Ombudsman made it clear that in a situation where specialists have full rein to exercise their own discretion, the hospital management should disseminate good practice and ensure the existence of a fair and equitable verification process that would remove any shade of suspicion of preferential treatment of patients. This system would guarantee transparency in the management of waiting lists. He observed that these safeguards are even more necessary when consultants who determine the order of patients to undergo interventions in state hospitals and perform these operations themselves are also allowed the private practice of their profession. The Ombudsman was of the opinion that these arrangements are a fertile breeding ground to give rise to situations that are likely to constitute a conflict of interest.

The need to introduce measures to verify the way in which waiting lists develop on a day-to-day basis is also crucial at a time when the number of people waiting for hospital treatment has reached an alarming level even to the point of provoking widespread and justified indignation among citizens who might be in pain or require serious elective surgery. In fact this situation might even lead patients to decide to take out private medical insurance or to pay to have their operation in a private healthcare institution because they cannot wait months and even years for an operation in a public hospital. The Ombudsman stated that waiting for a long time for an operation can be cruel especially when suspicions might arise among long waiting patients that preference was shown to others on grounds that were not justified.

For these reasons the Ombudsman proposed that guidelines should be established to which clinicians should refer regarding the way in which

waiting lists in the various specialities are to be compiled and that would also give due recognition to the role of consultants in decisions about patients who deserve to be given priority in hospital waiting lists. The ultimate objective in this exercise would be to allow an audit trail that would permit checks to verify a patient's entire waiting period including the dates when a patient's name was first included on a waiting list and the date an intervention on a patient is due to take place together with the reasons for any departure from the original date for an operation. It is understood that the IT system at Mater Dei Hospital is able to capture this data and enable a uniform management of waiting lists in the various departments.

The Ombudsman understood that the hospital authorities have already done a lot of work to identify a feasible system that would provide guidance to waiting list management and contribute towards a solution of this problem. He emphasized that it is important to reach an agreement between all stakeholders so that all hospital departments will follow the same procedures and criteria when scheduling surgical interventions on patients and decisions regarding waiting lists will be taken in consultation between the hospital management and clinicians who undertake these interventions. This system would be backed by an appropriate review mechanism to scrutinize these decisions as happens in various other spheres of decision-making in public administration. In this way citizens would be assured that they have access to the healthcare needs and to the hospital treatment that they require according to clinical need in a transparent manner and without any improper discrimination.

The Ombudsman remarked that he believed that if such a system was in place, the hospital management could have readily addressed complainant's claim that he was forced to wait for treatment longer than he should have done and ascertained whether he was subjected to any improper discrimination by the consultant; whether the consultant had operated on other Maltese patients before their turn at complainant's expense; and whether complainant was subjected to discrimination on grounds of race or as a detainee at the Kordin Correctional Facility.

The Ombudsman commented that since the way in which the system of waiting lists currently operates renders an explanation virtually impossible, this situation led him to conclude that complainant suffered discrimination as a result of maladministration for which the consultant had to bear the full

brunt of responsibility while on its part the hospital management too was responsible though in an indirect manner for the excessive period that complainant waited before his operation took place. The Ombudsman also observed that it was likely that this intervention on complainant might not have gone ahead if he had not launched his investigation. He declared that beyond any shadow of doubt this was wrong and the fate of hospital patients should not be determined in this way.

The Ombudsman observed that his findings and comments on this grievance were meant to engage the attention of the authorities to tackle this serious situation straightaway. His investigation underlined the need to regulate the way in which waiting lists are managed so as to protect the interests of citizens and patients in state hospitals in line with the *Patients' Charter of Rights and Responsibilities* issued in 2001 by the Hospital Management Committee of St Luke's Hospital and to promote Mater Dei Hospital as a successful organization with best practice standards in terms of the service that it provides to patients.

The Ombudsman maintained that operating theatres and beds in state hospitals are not and should not be considered as the exclusive domain of consultants and specialists but should fall under the responsibility and control of the hospital management and should be managed in the best interest of patients. Waiting list management too should not be left exclusively in the hands of consultants.

**Conclusions and recommendations**

The Ombudsman stated that his investigation found no justification why complainant had been made to wait for so long for his operation and in the absence of an explanation by the health authorities, he had no alternative but to conclude that there was no plausible reason why complainant had missed his turn on the waiting list. He could therefore only conclude that the hospital authorities had failed to meet their responsibilities and were guilty of a serious breach in the way in which they treated complainant. In the opinion of the Ombudsman the complaint was fully justified.

The Ombudsman further stated that the consultant involved failed to justify his behaviour and his treatment of complainant and that his inquiry was unable to discover any reasons for this exaggerated delay. Notwithstanding

these circumstances, the consultant had the temerity to allege that the Office of the Ombudsman sought to exert undue pressure on him to perform the operation and give complainant preferential treatment over several other Maltese citizens on the waiting list when the Office merely asked for an explanation, as it was in duty bound to do, for this delay. The Ombudsman stated that these allegations were unfounded and condemned the attitude of the consultant as arrogant and unacceptable.

Finally the Ombudsman strongly recommended that the health authorities should conduct a detailed review of waiting list management that would enable them to set in place a system with appropriate measures based on transparency, accountability and best practice, not least in the best interest of patients, and improve the overall management of hospital waiting lists. He also suggested that the authorities should pledge to implement these measures with urgency in the national interest and reassure patients that they should have full confidence in the new procedures for managing waiting lists.

**Outcome**

The Ombudsman understood that following the submission of his Final Opinion the consultant who was involved in this complaint was severely admonished by the health authorities. It was also understood that a working group was set up to submit recommendations to the Ministry for Social Policy regarding a national policy for waiting list management based on procedures that are routinely monitored, well defined and widely known.

**January 2009**

## Case 10 (March 2009)

## The abusive use of an apartment in a residential block as a place of worship or gathering

### The complaint

A number of residents of an apartment block in Sliema felt aggrieved at the attitude of the Malta Environment and Planning Authority (MEPA), which failed to follow a Stop and Enforcement Notice which it had issued in 2007 against the owner and tenant of a ground floor apartment in the same block. They argued that as a result of this failure, they are suffering various inconveniences and cannot reside peacefully in their apartments.

They also complained that while in 2004 the MEPA Audit Officer to whom they first complained, had confirmed that the activity at the apartment was illegal and required a MEPA permit for change of use, less than eighteen months later he changed his opinion and declared that the previous decision was mistaken at law.

In essence, the complaint was that there was an abusive change of use of an apartment since the law requires that a permit was required for such change. The premises in question were no longer being used for residential purposes as was being alleged but for the purpose of public worship by the Muslim community. The complainants repeatedly argued that the premises was and continued to be used solely by a group of persons as a venue for religious meetings. The person responsible for the apartment, where the abuse was being perpetuated, argued that the premises was and still is being used as a residence by tenants who have a right to invite the Muslim community for prayers at their residence. On the other hand, MEPA re-iterated that the fact that a premises is no longer used for the purposes for which a permit had originally been issued, i.e. as a residence, and such premises starts to be utilised solely for public worship in a place where nobody had, as a matter of fact, his residence, this constitutes a change of use.

Following his investigation on the complaint, the Ombudsman recommended in his Final Opinion dated 23 February 2007 as follows:

1. MEPA should make further verifications in order to determine whether the apartment where the contested activities are taking place is used as a *bona fide* residence;

2. MEPA should verify the content of the various notices affixed on the internal door of the block serving as entrance to the apartment since these can shed further light on the intended or actual use of the apartment;

3. MEPA should not take a stand when it decides not to follow up what is taking place at the apartment. At the same time it should prudently and in full respect of the rights of every party involved, including the fundamental right of religious freedom. The Ombudsman recommended that MEPA continues to follow up the activities taking place at the apartment in question.

**New developments**

Both the Ombudsman and MEPA followed up the case. Meetings were held with those involved, including the persons responsible in connection with the cult meetings in the premises in question. On their part, the residents of the block of flats who had complained to this Office insisted on the need of effective executive action on the part of MEPA in view of major inconveniences they were suffering. The crucial issue remained that of establishing whether the apartment in question was, or was not, in fact used as a residence by a person or persons who had such title whether as tenant or otherwise.

In November 2007, around nine months after the Ombudsman's Final Opinion, and following intensive further investigations, MEPA decreed that there was a breach of Development Control in view of the fact that a development had taken place without the required permit, which breach consisted of a change of use from a residential premises (Class I of the Schedule to the Development Planning (Use Classes) Order) to a place of gathering.

MEPA considered that it had to issue another Stop Notice in virtue of powers under articles 51 and 52 (1) - (4) of Act I of 1992. This Notice was notified to the person responsible for the apartment (who however resides in Birkirkara) and he was enjoined to stop forthwith the change of use or other development and to ensure that no further work or development be carried out on the site. This Notice was to have immediate effect.

There was no evidence that this Stop Notice was contested in Court or in terms of procedures established under the Development Planning Act. This means that as from that date, the use of the premises in question as a place of gathering for whatever reasons was illegal and sanctionable at law.

However, notwithstanding that another year had passed, the situation remained the same and no effective action was taken in respect of the Stop Notice while the residents of the block of apartments persisted in their allegations of the inconvenience they have to bear with and continued to insist on a definite resolution of their complaint.

**Further considerations by the Ombudsman**

In view of the above, the Ombudsman updated his Final Opinion by the following further considerations:

1. The primary function of the Office of the Ombudsman is to respect, strengthen and enforce the rule of law. The exercise of fundamental rights, including those of freedom of conscience and of worship, as well as freedom from discrimination should be safeguarded for all persons without distinction. Such exercise however is not an unlimited one. It should be within the parameters established by the Constitution of Malta and the European Convention on Human Rights, specifically in order to protect the fundamental rights of others. For this reason, the Ombudsman cannot condone authorities that tolerate a state of illegality. Nor can he accept that under the excuse of an alleged intolerance, the legitimate rights of others be downtrodden.

2. For this reason the Ombudsman insisted that once MEPA had made all the necessary verifications in order to review the situation in the light of developments taking place at the premises (also in view of the fact that part of the premises had been partitioned off as a shop) and after it had

effectively concluded that a state of illegality existed because of an unauthorised change in use, as a consequence of which it had issued a Stop Notice, it should have proceeded forthwith to enforce the Stop Notice.

3. MEPA failed to give a satisfactory reason why it took no steps to restore the rule of law despite the Ombudsman's opinion recommending such action if it resulted to MEPA that the circumstances justified another Stop Notice, as in fact so happened. The Office of the Ombudsman was however informed that MEPA had held meetings at high levels to find a solution; however it did not find the necessary cooperation to abate the serious nuisance. MEPA was insisting that without the assistance and protection of the Police Department, it could not enforce its Notice.

It must be also stated that while MEPA was carrying out its further investigations, the Office of the Ombudsman was trying to convince the representative of the Islamic community that was making use of the premises in question, so that they:

(a) provide clear evidence that the premises was, in effect, rented to persons who are identified and who are residing in it, as well as of the title they held for such use; and

(b) if this was not the case, all efforts should be made by them so that, with the assistance of MEPA, they find an alternative place where they could meet and profess their faith in full respect of the rights of others.

In one of the meetings which the Ombudsman had with the representative of the Muslim community (who was also responsible for the apartment in question) on 28 November 2007, i.e. after the issue of the Stop Notice by MEPA, the Ombudsman informed this representative that this Office could not tolerate the state of illegality and that the members of his community had to confirm with the laws of the state. He had agreed with the Ombudsman that in the circumstances, there was no alternative but to try and find another place where they could hold the religious services. Even at this stage, the Ombudsman offered his services for a fair and adequate solution to be found, which solution respected their rights as well as the rights of the residents of the block of apartments. But the Ombudsman had also made it clear that if there was no clear evidence that the premises in question was effectively rented to persons who could invite others for prayer meetings at a premises that was actually and truly their residence,

they had no right to use this premises for such meetings. MEPA had every right, as in effect it did, to issue the Stop Notice, which in the opinion of the Ombudsman should have immediate effect.

4. The Ombudsman repeatedly requested this representative to provide concrete evidence of the title allegedly held by the persons in possession of the premises as well as proof of their identity. The representative repeatedly declared that he was ready to provide such information but he never did so. He was also informed that failing to do so, his case would be seriously prejudiced.

5. The Ombudsman's investigation indicated that there was no serious effort on the part of the community using the apartment in question exclusively for the practice of cult, either to obtain alternative adequate accommodation that could be so used, or to provide the required proof contesting the Stop Notice. They refused to give details of the persons allegedly residing in the premises. They did not give their names, let alone their identity document, also despite that through their legal counsel, they insisted they were residing there. Nor did they provide the required proof of title.

On 28 December 2007 they declared that they were considering legal action on the basis of a threat to their fundamental rights with special reference to their right of freedom of conscience and of worship as well as and on the grounds of racial discrimination. It is to be noted that their consultant did not fail to draw the attention of the Ombudsman that such action *"gives a right of final judgement to a Supranational Court without inherent prejudice that exists on these islands"*.

This consultant is entitled to his opinion, an opinion which however ignores any reference to one's obligation to observe the laws of the state so long as these are just and applied uniformly without distinction. Nor does it make any reference to the equally fundamental rights of others, this apart from the fact that both the Ombudsman and MEPA against whom when the grievance was directed, would have acted in the same manner and applied the same rules if the premises were *de quo* being used in same way and circumstance by prayer groups professing the Christian belief or any other kind of belief.

6. After all, the motivation of the Stop Order was in no way related to the religious activity exercised abusively in the premises in question. It was only limited to the circumstance, in itself a simple one, that there was change of use from a residential one to that of a place of gathering. The persons could have been gathering there not only for purposes of worship, but also for any other purpose including sport, education, leisure or other activity.

The crucial issue therefore remains that the laws of the State should be respected by all, whether individual persons, groups of people, sects, religions, etc. Any contestation of a law or action under these laws should be made in the manner established by law. It cannot be done by ignoring a state of illegality. Such action is inadmissible, whether carried out by persons responsible for the abuse, and all the more so by MEPA which is in duty bound to ensure that development planning legislation is observed. In the Ombudsman's opinion, MEPA was tolerant enough, indeed over tolerant.

The delay in enforcement cannot but weaken MEPA's credibility in respect of enforcement in the same manner irrespective of the abuser. MEPA should not give the impression that it is strong with the weak but weak with the strong.

As a matter of fact, the freedom of cult should not have featured in this case. MEPA was not preventing anybody from the exercise of his fundamental right to freedom of conscience or freedom to worship. It was only insisting that in this exercise, the applicable laws be observed by those who exercise such right, irrespective of their religious beliefs or otherwise, and whatever the circumstances. These rules are accepted in a democratic society and I have no doubt that the Courts, including the European Court of Justice, consider these to be reasonable and useful to ensure peace, order and peaceful co-existence among citizens.

**Conclusion and recommendation**

In the circumstances, considering the efforts by MEPA and by the administration to reach a solution that respects the interests of all those involved, I cannot but conclude that the complaint is justified and should be sustained.

Once MEPA has twice decreed that the premises in question is being used without the necessary permit required by law, for a different purpose from that originally permitted, it was in duty bound to act so as to restore the rule of law. It was wise and prudent that efforts be made to find an amicable solution. Unfortunately there was no cooperation and the required commitment to move from words to action was lacking. MEPA was not to blame for this. However there should be no further delay to enforce the law as applicable in this case. This Office understands that the authorities were and are prepared to help the Islamic community in respect of the facilities it needs to practise its cult so long as this is done according to law and in full respect of the rights of others.

For these reasons, in November 2008 the Ombudsman recommended that MEPA enforces forthwith its Stop Notice issued on 7 November 2007 with all means available to it by law, and that the competent authorities provide the necessary assistance to MEPA as may be required.

The Ombudsman also iterated that the Islamic community which is abusively using the premises in question should show that it truly accepts to observe the laws and regulations of this community and at the same time also accepts the invitation of the authorities who offered to help it identify adequate place/s where members of the community can practise their belief in full respect of the rights of others. In any case, however, nothing should prevent the enforcement of the Stop Notice.

The Ombudsman has continued to follow up this case with MEPA officials and has recently been informed that MEPA will be taking the necessary step to enforce its Notice.

The Ombudsman has also received an identical complaint in respect of an apartment at St. Paul's Bay where MEPA has also issued a Stop Notice. MEPA has informed this Office that it will be taking enforcement action also in respect of this apartment.

**March 2009**

**Case 11 (March 2009)**

**Armed Forces of Malta (AFM) promotion exercise 2006**

**Collective report by the Ombudsman**
**in accordance with section 29 (2) of Act XXI of 1995**

## 1. Introduction

1.1 Coming a full five years after the previous one, the 2006 promotion exercise was much anticipated by Army personnel. This made the exercise delicate, and inevitably led to disappointment amongst those who, after so many years waiting for promotion, were not promoted. This disappointment led to 153 complaints being received by this Office, out of which 124 were actually investigated.[1] What follows in this report is a description of the method of investigation, the main issues raised, the findings and main observations.

In this report, the use of masculine gender, unless specifically stated otherwise, is intended to include the feminine.

## 2. Method of investigation

2.1 Complaints were accepted for investigation, irrespective of whether they were lodged before or after they had been interviewed by the Commander, Armed Forces (CAFM). A copy of each and every complaint lodged was sent to the Commander together with a covering letter requesting comments on those complainants already interviewed by the same CAFM, or requesting to be kept informed of developments in those instances where complainant still had to be interviewed.

2.2 The Army was asked to send a copy of the 2006 Promotion Assessment Report (PAR), in each and every case. At a later stage, copies

[1] Vide Annex One for detailed statistics.

of the 2007 PAR and copies of recent Confidential Reports, were also requested.

2.3 CAFM started to reply to the complaints going into much detail, but eventually it became clear that a more expeditious method of information-gathering and analysis was required. It proved simply impossible for the CAFM to reply to every case, and every issue raised, while interviewing the men, preparing for the 2007 Promotion Exercise which was also in the offing and eventually the next promotion exercise, earmarked for the end of 2008/beginning of 2009. By the time CAFM had replied to around seventy complaints (no mean feat considering the amount of work each reply involved, but far from enough considering that seventy amounts to less than 50% of the total number of cases) it was obvious that another, more effective method of information-gathering had to be found. A different method was tried: in December 2007 the Investigating Officer who handled these cases highlighted the fifteen most 'advanced' cases and went over in person to Army Headquarters. It took the CAFM and the Office's Investigating Officer the best part of a working day to discuss the various issues these cases involved and several days to transcribe the recording of the meeting. In January 2008 the Office settled for the CAFM forwarding the requisite documentation (i.e. copies of PARs and of Confidential Reports). The Office analysed the contents of these documents, and then asked the CAFM to clarify specific issues as these arose.

2.4 Meetings were held with a substantial number of complainants. These were held either at the request of the individuals, in accordance with the general policy of this Office to accept requests for meetings, or on the Investigating Officer's own initiative where he felt that a meeting was called for. Thus, for example, if a person was not promoted because he did not have enough points and the number of points required for promotion was very small, the Investigating Officer would call the complainant to a meeting to review the points together, in order to determine whether they were correctly assessed or whether it was possible, in the circumstances, to make up the missing points e.g. not taking note of a qualification would lead to additional points. In most cases, these meetings were followed up by correspondence with CAFM, requesting the Army's reaction to the main issues which emerged during the meeting and which it was felt, required further investigation.

2.5 In April 2008 the Office started drafting the individual replies to the complainants. In August 2008, the drafting was ready (including vetting and editing) and the letters of reply were issued. Each and every complainant received an individual reply, informing him about the outcome of the investigations. The same letter also either informed the complainant that his case was not sustained and therefore was being closed or that the complaint was being upheld at least in part and consequently being sent back to the Army for reconsideration and implementation of the Ombudsman's recommendation in the particular case. He was also subsequently informed that this remittal would not necessarily result in his promotion.

Ombudsman requested the Army to reconsider the complainant's 2006 PAR in the light of his findings and criticism. The exercise of reconsideration was completed by the end of 2008. The Army sent the Ombudsman individual letters for each complaint sent for reconsideration explaining the outcome of this further examination. These letters were all dated 31 December 2008. This correspondence was considered by the Ombudsman's Office, and on the 27 February 2009, final opinions were sent out in all but five cases, which five cases could not be concluded at that stage because the Office of the Ombudsman and the Army had not yet reached a mutually acceptable position. These five individuals were informed in writing that their cases were still open.

## 3. Main issues identified during the course of the investigation

3.1 The three main issues noted by the Office of the Ombudsman concerned:

a. the lapse of time from the previous promotion exercise;
b. lack of information about the Confidential Reports and on the promotion exercise; and
c. the manner in which points were allotted in the subjective parts of the PAR, namely Part II A 1-3 (*Efficiency*) and Part D2 (*Suitability to fill vacancy*).

3.2 On the other hand, the complaints as such tended to follow the same pattern. The bulk of the complaints were written by two lawyers who sent in succinct letters alleging practically without fail that their clients merited

promotion because they possessed the required qualifications, seniority and experience.

3.3 Particular reference was made to seniority, with older Members of the Force feeling aggrieved at being overtaken for promotion by younger, more academically qualified, but less experienced colleagues.

3.4 Also common was the allegation of preferential treatment given to 'favoured' members of the Force who were sent on courses leading to trades, Army Certificates of Education (ACE's) and other military courses. This gave these men an advantage in the award of points in the Promotion Assessment Report. It was further alleged that marks allotted in Part II A 1-3 (*Efficiency*) depended on whether the Officer Commanding (OC) wanted a particular individual to be promoted or not. If, for example, an individual 'favoured' by his OC was poorly qualified, it was alleged that the OC would compensate by awarding high marks in Part II A 1-3. A person who was well qualified but was 'disliked' by his OC, could have his promotion prospects prejudiced by being awarded low points in Part II A.

3.5 Other less frequent allegations of abuse include those regarding points awarded for Army Physical Fitness Test (APFT) to members of the Force who never sat for the test, or failed the test, as well as allegations of manoeuvring by transferring personnel to other sections where their promotion prospects were better.

3.6 There were allegations that persons who notoriously did not merit promotion, were promoted just the same. Such allegations were investigated, but the personal details of the findings were not divulged to complainants and the third party's privacy remained fully respected.

3.7 Further grievances raised by the complainants included:

- the reduction in weighting given to seniority and the shift towards qualifications was considered to be unfair. It was argued that this system favoured the younger members of the Force, who were joining up with 'O' levels and other certificates, and therefore enjoyed certain advantages when it came to promotions, over older members of the Force who joined at a time when 'O' levels etc. were not required and were given little consideration. Some felt that this amounted to a shift in the goal posts. They argued that persons who joined years ago should be promoted

according to the old procedures, with a system based on qualifications slowly phased in for those persons who joined in later years when schooling certificates acquired recognition;

- also on the subject of qualifications, a number of individuals alleged that they used to apply to attend courses leading to Trades and ACEs, but their applications were refused. A related allegation concerned the fact that the following year, when an ACE course was repeated, it was much longer than the one held the previous year, and was held after office hours. Award of points was also more onerous. Some complainants mentioned that this constituted an unfair advantage for the persons who attended the course the previous year. Others went so far as to allege that this was a ploy on the Army's part so that few would pass the course and obtain the qualification;

- quite a number complained about medical exemptions. They generally felt that it was unfair to penalise someone for a situation over which the individual had no control. They felt that it was not fair to penalise somebody because he was unlucky and got sick. Others felt that the system of 'consequential' exemptions was unfair and particularly onerous. The odd complainant alleged that 'favoured' persons were given exemptions but these were not recorded, thereby leading to points not being deducted. Conversely, one person alleged that the Army Doctor did not amend his records to reflect the fact that the individual was no longer on a medical exemption. This led to further and unnecessary loss of points.

- some felt that it was unfair to consider only the last APFT: this is held every six months and it would have been more equitable to take an average of the four APFTs held in the period under consideration;

- it was felt that the awarding of points for taking part in parades and drills was unfair. This allegation was made in particular by those who played a 'supporting role' and for which they were awarded no points;

- members of the Force who are not fitted with ceremonial uniforms (No 1, No 2 and No 3 Dresses) do not take part in ceremonial duties such as the 13 December Parade, Guard of Honour, Credential Ceremonies, Streetlining, dooropening and other events that require the appropriate uniform. This means that men who do not have this attire cannot be ordered on such duties and consequently lose points in the process.

## 4. Main findings and Ombudsman recommendations

### *A. Timing of the promotion exercise and delays from the previous exercise*

4.1 It is of course the Administration's prerogative to determine when a promotion exercise is to be carried out, in the interest of the Service and according to its exigencies. Even here however care should be taken not to prejudice unduly the legitimate expectations of employees or, in this case, the Members of the Force.

4.2 While it is obvious that one could disagree with the timing of promotion exercises especially when vacancies are known to exist, the Administration cannot be held legally accountable for deciding when to carry out or not carry out a promotion exercise. The Administration should however be aware that an unreasonable delay, without adequate justification, could be qualified as an act bordering on maladministration since it could *inter alia*:-

i. lead to inefficiency in the Service;
ii. result in employees or in this case Men in the Force being detailed to perform duties above their grade for an unacceptable length of time possibly without receiving the remuneration attached to those duties;
iii. provoke general job discontent and disillusionment;
iv. result in material wage loss and other benefits to those who would be entitled to promotion but were denied it when due; and
v. result in material pension loss in the case of those personnel who have to retire before the conclusion of the promotion exercise and could also affect their rate of pension.

4.3 These negative effects of unjustified delay have of course a wider impact in the case of general promotion exercises. One could say that the wider the scope of the exercise and the larger the number of ranks involved, the greater would be the negative effect. Experience has shown that undue delay in conducting general promotion exercises often generates more dissatisfaction and discontent. Delay results in uncertainty and blurred appreciation. It becomes difficult to effect promotions justly and transparently since the large number of vacancies to be filled could more easily lead to mistakes in assessments and inaccuracies in appreciation. Situations that often instigate the Administration to conduct supplementary

promotion exercises that attempt to rectify matters but with relative chances of success. It is accepted that no promotion exercise is perfect, nor can it be free from justified or unjustified criticism. However, every effort should be made to achieve the best possible result within the parameters of justice and fairness, limiting damage to the minimum.

4.4 It is therefore being suggested that, after due consideration of the exigencies of the Service and all other relevant factors, a policy decision is taken that general promotion exercises in the Army should be conducted within a definite time frame, possibly even annually. I understand that the Army is currently favourably considering such a commitment. Before each exercise is conducted the Army should carry out an appropriate assessment to establish the number of vacancies available in the different ranks.

4.5 General promotion exercises conducted at pre-established regular intervals not only better satisfy career prospects and expectations of Members of the Force, but also allay fears of undue outside pressures and unwarranted interference. Finally it has to be noted that care should be taken not to give the impression that the timing of promotion exercises could be conditioned by considerations that were extraneous to the exigencies of the Force or even worse dependent on political convenience. Allegations in this sense have been made in the past though they do not appear to have been voiced in respect of the promotion exercise under review.

4.6 It is a fact, however, that both this exercise, the one before it (AFM Promotion Exercise 2001), as indeed others before them, were finalised at a time close to a General Election. This does not necessarily imply political discrimination. Indeed complainants in this exercise did not markedly allege this. It does however leave the Administration open to the charge that extraneous considerations might have influenced the timing of the exercise. This could in turn materialise into allegations of undue pressure in an area which should in principle be entirely within the exclusive competence of the military authorities that have to act within the limits of established rules and procedures. This is what transparency and accountability require.

4.7 The 2006 promotion exercise came a full five years after the previous one. As a result expectations for promotion were high across the ranks. It was therefore inevitable that the exercise led to a high degree of

disappointment amongst those who, after so many years waiting for the promotion exercise, were not in fact promoted. The considerations just made to the effect that it is advisable to conduct general promotion exercises at regular pre-established intervals apply *in toto* to this exercise in so far as the negative repercussions caused by the inordinate delay were evident from the nature of the complaints received. It is noted that as a result of the reaction to the 2006 exercise, the Army authorities decided to conduct a further promotion exercise the following year and the 2007 exercise could, in a sense, be considered to be a corrective one.

**5. Regarding the absence of information available to the men and transparency of procedures in general**

5.1 The investigation showed that it was evident that Members of the Force were as a rule unaware of the assessment made by their superiors in the PAR that were in a number of cases not up to the required standard.

Particular reference is made to the section on 'Additional Remarks' in the PAR. According to the same PAR, Footnote 6, in case of a non-recommendation, specific reasons should be given in the space provided under 'Additional Remarks'. It was noted that certain Officers Commanding – but by no means all – put down remarks even to justify positive recommendations and positive PARs. These were considered most helpful and for this reason it is recommended that the recording of such remarks be made a general rule. In other words the reporting Officer Commanding should be instructed to give reasons for filling in the PAR the way he did, especially (but not only) to justify points awarded in D2.

5.2 Of even more concern is the very common claim about lack of information available to the Members of the Force. The Army should make available to all the method to be adopted when filling in the PARs. In other words, (in this case) Standing Instructions Serial No. 3 of 1 June 2006 should have been made available to Members of the Force so that they would know how many points they would lose for sick leave, how many points they would be given for their 'O' levels, etc.

5.3 This Office does not see any reason why the PARs should be marked and retained as confidential to the extent that the person to whom the report refers has no access to it. On the contrary, even under Data Protection rules

and forthcoming Freedom of Information legislation a Member of the Force might be entitled to a copy of his own PAR as well as a copy of his own Confidential Reports. This transparency will serve two purposes: firstly the individual will know his own strengths and weaknesses, where he did well and where not so well; secondly it will ensure that the Reporting Officers will take even more care when filling the Confidential Reports and PARs, because they know that they are exposed to the maximum level of scrutiny possible.

5.4 Transparency also dictates that information should extend to the number of vacancies available. Members of the Force should be made aware of the number of posts open for promotion. These should as a rule be pre-determined and this information should be made available to those contesting for the vacancies. They would then have the right to expect that these vacancies would be filled if qualified, competent candidates are available.

## 6. On the manner in which the subjective parts of the PAR were filled in and parity with the Confidential Reports

### *A. General considerations*

6.1 It is pertinent at this stage to set out the principles that should guide the Public Administration including the AFM in the conduct of promotion exercises to ensure a fair and just process.

6.2 It has been said that the Ombudsman is oriented towards maximising transparency, equity and uniformity in promotion procedures to ensure that people are treated impartially and consistently by the Authorities. Minimising the subjective elements in promotion decisions cannot however come at the expense of completely divesting the AFM of its discretion to reward performance and initiative and to promote the persons best fitted for particular tasks. Transparency on the other hand requires above all that the promotion exercise should not be shrouded in secrecy but follows open, preset and published procedures.

6.3 These two positions, however, need not be conflicting. They are perfectly reconcilable so long as the exercise of discretion in determining subjective elements is correctly contained within the parameters of pre-

established practices and procedures that can be verified. It is obvious that the subjective element cannot be completely eliminated in assessments for promotion. It is however my opinion that assessment on subjective criteria should also be consistent and verifiable not only with performance of the candidate at the time of the promotion exercise but also with the previous assessments made by his superiors. That is precisely why during my investigation on this promotion exercise, I have laid emphasis on the need to compare PARs with previous Confidential Reports since all these performance assessments of a candidate for promotion presumably considered and took into account the same subjective elements.

6.4 Transparency therefore requires not only that all reports are objectively, faithfully and comprehensively made since a candidate's career prospects depended upon them, but also that these assessments are such as to be able to compare like with like. That means that there should not be as a rule, within a reasonable time frame, a marked discrepancy between one assessment and another, and that, if that occurred, there should be an objective justification for it. The exercise of discretion should not allow for improper discrimination. It should be seen to be correctly and justly exercised and it should, as much as circumstances allow, be verifiable.

### ***B. Specific issues***

6.5 These general considerations lead me to an analysis of the issues raised by complainants who generally resented the lack of consistency in the assessments of their performance. This analysis has to be seen in the light of the principles just enunciated.

6.6 The recurring issue concerned Part IIA 1-3 (*Personal & supervisory qualities* and *Powers of discipline*) and Part D2 (*Suitability to fill vacancy*). Both Parts require that the Officer Commanding passes a highly subjective judgement on the person being reported. An element of subjectivity also comes into the recommendation or otherwise for promotion.

6.7 The Ombudsman is not against the inclusion of an element of subjectivity in the PARs. While insisting that the criteria should be, for the most part, objective in nature, room must be left for the Army to use its judgement in order to reward performance and initiative and to promote the

persons best suited for a particular task. The position taken by this Office is that the judgement of the Officer Commanding (as confirmed by the Commanding Officer and Commander, Armed Forces) is to be respected, provided that it:

(i) falls within the limits of the Army's discretion;
(ii) the judgement appears to be reasonable;
(iii) it is essentially substantiated by the Confidential Reports; and
(iv) in certain instances is consistent with the marks awarded in the subsequent PAR.

**(i)** ***Limits of discretion***

6.8 It is not up to the Ombudsman to determine, for example, the amount of Team Spirit that a particular Member of the Force displays, or his Instructional Ability. Indeed, the Ombudsman does not work with the Men, nor does he know them. He cannot therefore query such a subjective judgement on its merits. On the other hand, the Ombudsman can enquire into the basis of the decision. The Ombudsman can, and in fact did, require substantial parity between the judgement passed in the Confidential Reports and the PAR. This however led to a certain amount of disagreement between the Ombudsman and the Army, because the latter felt that while there should be some parity between the Confidential Reports and the PAR, one had to consider that the Confidential Reports were filled under different circumstances than the PAR. The former were filled in a vacuum, with each case considered in isolation, considering each individual on his own merits, whereas when PARs were filled the Officer Commanding had to compare the Men with a view to identifying who was most suitable for promotion, and allocate points accordingly. The Ombudsman on the other hand, while accepting that a certain amount of comparison was at that moment in time inevitable, considered that there was no reason why, when filling in Confidential Reports, one had to do so in isolation and not keep in mind that these will have a bearing on the PARs.

6.9 The Ombudsman furthermore felt that when filling in Part IIA 1-3 (as opposed to D2), more PAR – CR parity was called for than the Army was ready to admit. In Part IIA 1-3 of the PAR, the Officer Commanding had to consider the individual as such (i.e. in isolation) and judge his personal

qualities etc., on their own merits. On the other hand, in part D2 (*Suitability to fill vacancy)* the Officer Commanding was expected to consider who out of all the promotion candidates was most suitable to fill the (pre-determined) vacancies. It is felt that this difference in considerations when filling Part II A 1-3 and Part D2 was not fully appreciated by the Reporting Officers. The Ombudsman accepts that even when filling in Part II A 1-3, a certain amount of comparison between the men is inevitable: e.g. it is natural to consider who out of a team displayed the most integrity and to mark the rest in a relative manner. The main point remains, however, that while allowing for a certain amount of comparison when filling in Part II A 1-3 and while accepting that one could not expect perfect parity between the Confidential Reports and the PARs, the bulk of comparisons between the Men is to be reserved for Part D2 and PAR / CR parity should be given a lot more weight than the Army gave it.

**(ii)** ***Reasonableness***

6.10 In certain cases the Ombudsman made a number of observations on the reasonableness or otherwise of points allotted. These were based on the same PARs and the Ombudsman never sought to substitute his discretion to that of the Officer Commanding. Where it was felt that certain marks allotted were not reasonable or required justification, the case was sent back to the Army for reconsideration or justification (as the case required).

6.11 Likewise, decisions not to recommend a person for promotion had to be based on reasonable considerations. In some cases individuals were not recommended for promotion because there were no vacancies. The Army accepted and corrected this, agreeing with the Ombudsman that where the sole reason for non-recommendation was that no vacancy existed, the non-recommendation was to be reversed and replaced by a positive one.

Explanations and reasons were often sought with regard to the points awarded under D2.

**(iii)** ***Confidential Reports***

6.12 Here lay the root of the problem and the core issue to be tackled in this Ombudsman's review of the 2006 Promotion Exercise. The position taken by this Office is that Confidential Reports serve as a record for the Army on each and every individual, on his strengths and weaknesses. They

serve the individual as encouragement insofar as his good points are concerned and as an eye opener vis-à-vis any weaknesses. Given these purposes, Confidential Reports should be drawn up punctually (i.e. within a short time from the end of the year reported on) and in sufficient detail. During our exercise of review, we came across far too many cases where reports were either not drawn up at all, or drawn up late, or not of the requisite standard. The last counts in particular for Gunners where the confidential reporting system is different from Lance Bombardiers upwards. Whereas in the latter case the Confidential Report is made up of a set of criteria for which points are allotted (many of these criteria are identical to those in Part II A 1-3 of the PAR), with space for comments and observations at the end, in the case of Gunners the Confidential Report does not involve allotting points for particular criteria but merely gives an indication of what the Reporting Officer should comment about. The result, unfortunately, was that the Reporting Officer did not take the time to report on the individual's strengths and weaknesses: reports were short, sometimes restricted to single lines, which shed no light on the strengths and weaknesses of the individual.

6.13 The position taken by the Ombudsman was that the marks allotted in Parts II A 1-3 and to a certain extent D2 of the PAR should reflect the points awarded in the Confidential Reports (from Lance Bombardier upwards) and the observations made in the same Confidential Reports (all ranks, including Gunners). Good Confidential Reports should translate into good points in the PAR. If a Member of the Force was not criticised for certain weaknesses during the years, the absence of criticism resulted in the weaknesses not being brought to the individual's attention in time for him to take corrective action. Where points were deducted in the PAR Part II A 1-3, and to a certain extent in D2 as well, in the absence of negative remarks in the Confidential Reports, the Ombudsman asked the Army to reconsider the points awarded and verify their correctness. The Ombudsman deemed that the points in the PAR could be correct, the fault lying in the Confidential Report, and therefore sought such verifications.

6.14 The Ombudsman based his position on the European Court of Justice judgement on Case 61-76 that evaluates the relevance and justice of reports on the performance of employees:

*"44. This document must compulsorily be drawn up for the good administration and the rationalisation of the services of the Community*

*and in order to safeguard the interests of officials. It constitutes an indispensable criterion of assessment each time the official's career is taken into consideration by the administration.*

*45. One of the bounden duties of the administration is therefore to ensure that the report is drawn up periodically on the dates laid down by the Staff Regulations and that it is drawn up in proper form.*

*46. The file shows that the competent authority failed to fulfil its obligations by drawing up a report in 1969 the regularity of which is contestable in so far as it gives an appraisal, without details, of the ability, efficiency and conduct in the service of the applicant and by omitting to draw up the periodic reports concerning him in 1971, 1973 and 1975.*

*47. The Commission has been in breach of the Staff Regulations of officials and it will be very difficult and doubtless impossible in view of the time which has elapsed and the dispersal or departure of the authorities who draw up the reports to fill objectively the lacunae in the applicant's personal file.*

*48. Although the applicant cannot prove that he has suffered material damage, it is not in dispute that he suffers non-material damage resulting from the fact that he possesses a personal file which is irregular and incomplete, when the compulsory periodic report is a guarantee to an official for the regular progress of his career.*

*49. The absence of periodic reports owing only to the Institution, put him in an uncertain and anxious state of mind with regard to his professional future."*

6.15 The Army should in the light of this judgement:

i) consider revising the format of Gunners' Confidential Reports, drawing up a form similar to that of the other ranks (from Lance Bombardier to WO I);

ii) ensure that all Reporting Officers understand the purpose which the Confidential Reports serve and strive to ensure that reporting is done on time, accurately and in sufficient detail, thereby ensuring that the purposes for which Confidential Reports are drawn up are fulfilled;

iii) consider the possibility of reviewing and correcting recent Confidential Reports (where these are not up to standard);

iv) consider giving the individual a copy of his Confidential Report, for his own personal record and to refer to and reflect on, with a view to overcoming any perceived deficiencies. It will also serve to avoid future misunderstandings: the Members of the Force will know where they stand with their peers and what is expected of them. They will also have a good idea about what to expect when promotions are published e.g. if a particular person is marked as having 'reached his ceiling' he will be in time to enquire into the reasons for this and seek to overcome them. If he fails to do so, he will know that he is not to expect a promotion and therefore should not feel disappointed when he is not promoted.

**(iv) Comparisons with the 2007 PAR**

One may question the fairness of comparing the marks awarded for the subjective criteria in the 2006 PAR with those awarded in 2007. The Army for example insisted that the pool of candidates was different and smaller in 2007 because the promotion exercise competition was conducted between those who were not promoted in 2006. The standard was lower too because the 'better' and more deserving ones had been promoted the previous year. Notwithstanding all this, this Office availed itself fully of the unforeseen opportunity that presented itself to compare the points awarded in Part II A 1-3 in 2007 with those in 2006, apart from comparing them with the Confidential Reports, especially where the same CO filled in both PARs. Although it was understood that a person could make an effort to improve his performance, with the hope of being promoted the following year, where points varied considerably, explanations were sought unless the Confidential Report for that year indicated the factors which led to the difference in points.

**7. On the efficacy of internal complaints procedures**

7.1 Some individuals complained about the absence of a real opportunity to contest Confidential Reports, where one does not agree with their contents. Complainants alleged that they are asked to sign the Report, thereby indicating that they have seen it. Their signature does not imply

that they agree with the contents. Many alleged that their superiors did not take the time to explain the Report to them in sufficient detail.

Where this was done and they disagreed with the Report, they had the possibility of lodging an internal complaint, taking it right up to the Commander. Complainants often stated that such complaints do not lead anywhere.

7.2 This of course can mean many things. It could mean that the complaint was not given serious consideration or not considered at all. Of course, one must watch out for cases where the Member of the Force alleges that the complaints procedure is ineffective merely because it did not yield the desired result i.e. to an improved Confidential Report. It is possible that the Army disagrees with the complainant's position and confirms the Confidential Report as is. Provided that the internal complaint is given serious consideration, this is perfectly acceptable. The Army is certainly under no obligation to change a Confidential Report merely because the Member of the Force reported on is not happy with it. On the contrary it is bound to ensure that it reflects a just and proper assessment of the positive and negative traits of the member's performance in the Force.

## 8. On dearth of opportunities to improve one's qualifications

8.1 The Army is striving to build a more qualified, more professional Force and is giving greater weight than it used to in the past to qualifications in the promotions exercises. A big demand for Education Certificates and Trades has been created. The Members of the Force know that not being in possession of such qualifications could mean non-promotion, either because they will be ineligible for the next grade or because they will not score enough points to fill one of the vacancies.

8.2 Complainants consider the refusal of applications to attend courses leading to Trade and/or ACEs as an unjust disadvantage. The Ombudsman accepts that it is a question of resources: the Army simply does not have enough funds to send all the applicants on the courses they apply for. On the other hand, it is a fact that when personnel make an effort to become more qualified, they do so for their own benefit and the Army also benefits from having more qualified Members. It is therefore recommended that the Army seeks to explore ways how to encourage its Members to improve

their qualifications on their own steam and without relying on the Army and its resources to do so. It could, for example, introduce schemes whereby costs of courses are subsidised by the Army. Such a scheme of cost-sharing would result in available funds being better utilised and more persons benefiting. More persons will be trained under a cost-sharing scheme than in a situation where the Army bears the full expense.

8.3 Others complained that there are few opportunities to obtain qualifications in certain trades or lines of duty. This is true, especially where Military Qualifications are concerned. Personnel performing specialised tasks are sent on more courses. It is less true in the case of Trade and ACE qualifications and even less in the case of Civilian Qualifications. This is because the last group depends entirely on the inclination and will of the individual. On the other hand, those in specialised sectors compete with others in their own sector and therefore should have little or no effect on personnel who happen to be in a particular section of the Army where less training and qualifications are required.

## 9. On non-consideration of certain qualifications

9.1 The non-consideration of certain qualifications led to loss of points, sometimes crucial points. The reason cited was that the Army gave clear instructions on submission of qualifications after problems with Army records were identified. Many individuals claim that these instructions never reached them. Other queried why a person needed to register a qualification when the Army itself sent him on that particular course and, in certain cases, even presented the certificate too. For the most part, this Office found in favour of the Army although one cannot but appreciate the point made that many courses were attended in reply to applications by the Army itself. In this respect it is recommended that:-

i. the achievements registered by men following courses organised by the Army itself should be recorded in their personal files and need not be presented by them; and

ii. in future it should be made clear that men should present other certificates that would entitle them to gain qualification points when required to do so.

## 10. On alleged unfair transfers to other sections

10.1 As regards the unfairness of transfers to other sections where promotion prospects are better, while this complaint deserves recognition, it is considered to be beyond the scope of this Office. If a person feels that he has better promotion prospects in another section and his superiors accept his request to be transferred, then he has every right to make this move. I do not consider such a move to be an abuse. It was not possible to prove the real motivations behind a transfer: perceived and actual motivations can vary. Alleged favouritism in attending courses or choosing personnel for parades, unregistered medical exemptions, tampering in points and score sheets, are also easy to allege but next to impossible to prove.

## 11. On favouring younger, more qualified personnel

11.1 It is a fact that the younger recruits tend to be better qualified; it is also a fact that the Army promotion exercise has shifted away from seniority in favour of qualifications. This might seem tough on the older, more experienced but less qualified personnel. However, it is hard to criticise the Army for seeking and availing itself of younger, more qualified personnel. Qualifications, not seniority, expedite the way up the career ladder.

## 12. On loss of points for medical exemptions

12.1 As regards the unfairness of points deducted for medical exemptions, while it is true that one has no control over the state of one's health, the Army has a duty to guard itself against abuse and against, for example, feigned ailments such as backaches, simply aimed at shirking duties. There are of course exceptions such as medical exemptions for injury during the course of one's duties.[2] On the other hand, the amount of points deducted and the system of consequential exemptions can, in certain cases, be taking things a little bit too far. On one particular occasion, an individual was 'Excused Boots' for three days. This led to four consequential excuses: PT, drill, parades and night duties. At the rate of three points per month or part

[2] In the absence of negligence.

thereof, the individual might as well have availed himself of three and a half weeks exemptions; secondly the loss of fifteen points due to four consequential exemptions seems a bit excessive.

## 13. On points awarded for parades and drills

13.1 With regard to points awarded for parades and drills, the Commander submitted that these should not be regarded as 'lost points' by those who do not carry out duties, but as gained rewards by those who do take part in parades. This of course is hard to sell to personnel, for example, who are seconded to the Detention Services and who never take part in parades. However, the Ombudsman is not in favour of eliminating this criterion from the PAR for the simple reason that without the prospect of more points in one's PAR, Army personnel might lose some of their motivation for taking part in these parades and for putting in the required effort involved in attending rehearsals, etc.

13.2 Objections were also raised by individuals who performed 'supporting roles' at parades, for which they were not awarded any points. The Army in reply proposed a system of awarding half points to persons who played a supporting role in parades. It was explained that supporting roles require less effort and the extra effort made by those who attend rehearsals (as well as on the day of the parade) should be rewarded. The Ombudsman accepted this proposal but recommended that, where possible, the Army seeks to introduce a system of rotation between direct participation and supporting roles to balance out the burden and to give all those who want to (and are considered to be 'parade material'), a chance to score higher marks in their PARs.

13.3 It is further recommended that the Army seeks to resolve the problems of Men of the Force who are not fitted with Ceremonial Dress and are consequently precluded from performing ceremonial duties.

## 14. On points lost for APFTs

14.1 As for APFTs, the fact is that points in the PAR of 2006 were granted on the performance of the individual in the last Test prior to cut-off date. The Ombudsman proposed that the PAR should take consideration of all APFTs undertaken during the period considered for the purposes of

promotion. The Army favoured this proposal for future Promotion Exercises.

**15. On transparency in criteria**

15.1 The above considerations trace their origin to complaints on lack of transparency in the criteria adopted in the conduct of the promotion exercise. One can elicit the following essential elements that have to be taken into account:

i. It goes without saying that complete transparency in the criteria to be adopted to assess candidates is a key factor to ensure a just and fair promotion exercise, not only in regard to the personal qualities and suitability of a candidate but also in relation to those of other colleagues competing with him for the post. Transparency requires not only that these criteria should be predetermined and known but also and more importantly that they be uniformly applied across the board.

ii. As indicated earlier, criteria that may vary from one promotion to another, should be modelled on a mix of objective and subjective elements. The objective elements should be capable of being verified against set standards and markings and be such as to enable the Adjudicating Board to create a common denominator for candidates upon which to build a just and fair opinion. The subjective elements necessarily require an assessment based on the personal judgement of the Adjudicating Board. This assessment depends on the Board's discretion but should be verifiable to the extent that it can stand the test of inquiry that it was not improperly exercised. It should therefore stand the test of fairness and reasonableness. It cannot be manifestly unfair and unreasonable.

**16. On timing of publication of promotion results**

Finally, the fact that the promotions were issued so close to Christmas may seem to be a small, trivial matter. Those who are promoted will have reason to have a happy festive season. However, the effect on (at least some of) the rest has often been mentioned: the disappointment ruins the season's spirit. With PARs filled in round about September, there should be no

reason for not timing the publication of the promotion result with a little bit of sensitivity towards those who, although not getting promoted, are no less valid Members of the Force. It is recommended that the date of publication of results be moved by a few weeks, to early January instead of in mid-December.

## 17. Conclusions

17.1 A number of positive factors were noted during the course of this Office's investigations into the 2006 Army Promotion Exercise. The first regards the points awarded for the objective criteria: few errors were noted insofar as the objective criteria were concerned, whether of the complainants themselves, or of the many references to other Members of the Force, alleging that they were less qualified, had more exemptions, charges, etc. These aspects of the promotion exercise were closely scrutinised by this Office and revealed that points were deducted correctly and in accordance with the Standing Orders.

17.2 This Office's second positive observation concerns the issues that arose in the 2001 Promotion Exercise, when the Ombudsman upheld a general complaint that the Army acted unfairly when it considered substantial numbers of personnel to be non-eligible for promotion for not possessing the requisite minimum qualifications (including Trade), without granting them opportunity to obtain the same. The Army's efforts in ensuing years to ensure that its Men are given opportunity to obtain at least the minimum required trade and Army Certificate of Education, in time for the 2006 Promotion Exercise, was noted by this Office. It is hoped that in reviews of future Promotion Exercises, the Office of the Ombudsman will be able to make similar observations regarding the shortcomings noted in this review, particularly where the subjective criteria are concerned.

17.3 In a number of cases I encountered glaring inconsistencies between the PAR and Confidential Reports that prevented me from making a correct assessment as to whether the ranking given was fair and just. I have considered it appropriate to refer a number of complaints back to the Commander AFM requesting him to reconsider the points awarded in their PARs in the light of their Confidential Reports, and to consider whether as a result the marks given should be upgraded. My emphasis on the need for transparency and consistency in assessments of performance and abilities

need not and did not necessarily result in a promotion where this was not justified. There were cases where obvious injustices were rectified by a review of the marks allotted.

17.4 My main concern remains, however, to establish a *modus operandi* for the future to ensure that Officers who have the responsibility to compile periodic Confidential Reports and Promotion Assessment Reports (PARs) are made aware of their responsibility to make honest, unbiased and just assessments in the knowledge that these could be, when taken holistically, a determining factor in granting promotions. It is my considered opinion that the judgement passed by the Officer Commanding on the subjective criteria in Confidential Reports has to stand the test of verification when compared to PARs. Substantial consistency must result if transparency is to be assured. I note that this problem was already raised in previous investigations, though I must say it did not appear to have been a central issue.

17.5 The experience of this Office in the conduct of this investigation shows that the army authorities are becoming increasingly aware of the application of these standards in army promotion procedures. There is scope for increased fine-tuning, especially in the drafting of PARs and Confidential Reports. I need not at this stage emphasize that in promotions within a disciplined force, the opinion of Commanding Officers and of the Commander, AFM must be given considerable weight. The principle however remains that at all levels the exercise of discretion has to reflect what an ordinary man would consider, on the elements of evidence available, to be a reasonable judgement on a candidate's qualities and adaptability for the post.

17.6 This Office would like to put on record its appreciation for the Army's cooperation during the course of enquiries and for the thoroughness of the exercise carried out in reaction to the Ombudsman's recommendations to review no less than fifty-eight cases which required such reconsideration and were upheld in part.

17.7 Finally the experience gained by my Office in this investigation and previous ones seems to suggest that it might be useful to have closer liaison between the Ombudsman and the Armed Forces. One could consider the feasibility of identifying areas within which this cooperation is possible and fruitful. An official from my Office could then be delegated to focus on

Army activities that fall within my jurisdiction, thus gaining inside knowledge on the workings, practices and operations of the Armed Forces. It is my belief that such cooperation would be of mutual benefit.

**J Said Pullicino**
**Ombudsman** **12 March 2009**

**Annex One** - Statistics
**Annex Two** - Reply by Commander, Armed Forces of Malta dated 23 March 2009

**Annex One – Statistics**

**Number of complaints received: 162**

| | |
|---|---|
| *Not sustained* | *66* |
| *Reconsidered following investigation* | *58* |
| *Abandoned by complainant* | *14* |
| *Withdrawn by complainant* | *14* |
| *Backdating of promotion by Army during investigation* | *2* |
| *Instituted legal proceedings* | *2* |
| *Concluded during the investigation with a verbal explanation* | *1* |
| *Others* | *5* |

## Annex Two

*The Commander Armed Forces of Malta was notified with a pre-publication copy of this Collective Report for his attention and consideration. The following is his reaction to it. It is being published with his authority and will no doubt help towards a healthy debate on the issues raised.*

**AFM/5320/000/08**

Chief Justice Emeritus Dr Joseph Said Pullicino
Ombudsman
Office of the Ombudsman
11 St. Paul's Street
Valletta

23 March 2009

Dear Chief Justice Emeritus,

1. Thank you for sending me an advance copy of your Collective Report on the AFM Promotion Exercise 2006.

2. As you may be aware, a number of shortcomings which were identified throughout the course of my interviewing the complainants, or after your Office drew my attention, were addressed head on by me in time for the 2007 Promotion Exercise and I believe that further improvements have been made in the 2008 Exercise (it is hoped that the promotions will be promulgated soon).

3. Without expecting you to re-touch your Collective Report, I am just the same forwarding the following comments/clarifications on your Report:

a. **Paragraph 3.4**

Here one has to constantly keep in mind that, mostly, the allegations were grossly exaggerated and the majority were proven untrue, so much so that

following my reviewing of the individual cases as advised by you, few cases had their score adjusted upwards. One should also bear in mind that high qualifications do not automatically lead to promotion. It is true that higher qualifications are conducive to a more successful career, but the main reason why we insist with soldiers to achieve the minimum qualifications is to give such individuals the opportunity to be promoted. In fact, it is not unusual that a soldier with comparatively lower qualifications is preferred to another possessing higher qualifications. I feel that this is an important consideration for the purposes of promotions in the AFM because qualifications are just one of four pillars on which promotion assessments are based.

b. **Paragraph 3.5**

I interviewed approximately 250 soldiers who complained about the 2006 Promotions (of whom 162 referred their complaint to the Ombudsman). I have also interviewed about 130 soldiers in connection with the 2007 Promotions. The allegation mentioned in this paragraph, i.e. that points were awarded to soldiers who did not sit for the APFT was never made in my presence, or brought to my notice in any other way.

c. **Paragraph 3.7, second bullet**

I need not expound more on the huge effort that we have made in the last four years to improve the qualifications (technical and academic) of AFM personnel. As for the ACE, relying solely on the Education Department without digging into our pockets proved insufficient, especially as regards the number of classes, and hence the number of students allowed to attend the courses. In 2007, we reached an agreement with the Education Department to organise education classes specifically for the AFM, obviously after normal working hours. I am informed that most of those who did not avail themselves of such an opportunity did so out of choice, or for one excuse or another. To now allege that this was a ploy on the AFM's part is unbelievable. Incidentally, a good number of students successfully completed these courses. The ultimate aim of the AFM is to eventually reach a stage where Army qualifications are given due recognition in the civilian world as that would help mature soldiers to integrate themselves in other jobs should they decide to resign their post or on retirement.

d. **Paragraph 3.7, third bullet**

Here again, as far as I can vouch, the allegation that 'favoured' persons were given exemptions that eventually were not recorded is false. As your Investigating Officer can confirm, there were very few instances where deductions for medical exemptions had to be reviewed by me. Also, although 'consequential' exemptions (vide also paragraph 12) may be regarded as too harsh a measure, such an allegation has to be weighed in the context of an exemption, say excused the wearing of army boots, being sought for on the eve of a parade rehearsal or an actual guard of honour.

e. **Paragraph 4**

HQ AFM has made its case and the Administration has approved the recommendation to have promotion exercises on an annual basis. As your Office is aware, two promotion exercises have already been completed since 2006 and a third exercise is about to be concluded. With regard to the second part of paragraph 4.4, it is standard practice for the AFM to conduct promotion exercises on the basis of the AFM Organisation and the Personnel Establishment (PE) approved by OPM. In the three promotion exercises mentioned earlier, this practice was scrupulously followed and it was only in rare cases that the PE was not adhered to in all respects. When this departure from the PE occurred (I reiterate on rare occasions), it was done only in the interest of the Service and for no other reason. In regard to the last point raised by your goodself in paragraph 4.7, I fail to understand why it is being implied that the 2007 Exercise could be considered as a corrective one as a result of the reaction to the 2006 Exercise.

f. **Paragraph 5.2**

I would like to assure your goodself that every single man and woman in the Force know how much points would they lose for sick leave or medical exemptions, and how many marks are awarded for an ACE or 'O' level qualification.

g. **Paragraph 5.4**

With respect, and fully aware of the prerogatives that your Office may have in this regard, I do not agree that soldiers should be informed about the

number of vacancies in each rank. As I have already mentioned above, COs are made aware right from the initiation of a new exercise of how many vacancies are available in each rank in accordance with the above-mentioned Personnel Establishment. It is my opinion, however, that HQ AFM, in strict consultation with the respective CO, should retain the right to cascade vacancies from the higher to the lower ranks if it is considered that not enough potential exists amongst contenders in a particular rank. In effect, this measure means that if, say in the rank of Staff Sergeant, there are 'x' vacancies but, in the opinion of the CO there are not enough Sergeants currently with the right potential to fill all the vacancies, the Commander may approve a request from the CO to cascade some of the vacancies in that particular rank to a lower rank. That having been said, may I assure your goodself that the AFM does not resort to such cascading capriciously. Commander, AFM and the Administration Branch at HQ AFM go into all the details before acceding to a CO's request in this regard and that such a concession is granted with the utmost caution.

h. **Paragraphs 7.1 and 7.2**

In admitting that several Confidential Reports lacked certain details if not also depth of assessment, I would like to assure you that whenever complaints of this sort reached me, I considered every case with utmost seriousness. Obviously, in those cases where improper or insufficient assessment was confirmed, the only corrective action that I could take was to urge and warn Reporting Officers to be more conscious of what an inadequate report could lead to and, certainly, to address the matter in future reporting.

i. **Paragraph 8.2**

As in other areas of military operations, funding for courses is always limited and the AFM has to spend such funds judiciously. The primary objective is the interest of the Service and the channeling of soldiers in trades and specialised training which serve the AFM to execute the tasks assigned to it by Government. A scheme aimed at assisting AFM members in acquiring higher qualifications locally, especially if such qualifications were considered of benefit to the AFM, was introduced by me in 2005. Through such a scheme, a soldier may apply to be sponsored, either through paid absence from work (in the case of part time courses) or by partly funding a course fee. Although when introducing this scheme, I

set a limit to the amount of funds to be made available every year, there have been occasions where such amount was exceeded when it was considered that the course being attended by the individual was considered of direct relevance to AFM roles.

j. **Paragraph 9.1**

I find it difficult to believe the claim that instructions in regard to the registering of courses attended did not reach all the members of the AFM. Having said that, I am prepared to take up your recommendation in this respect. However, the requirement for personnel to ensure that all courses attended by them should be duly recorded with their Unit Records Office should remain. It is only through such a measure that the missing of such entries in Personal Records is eliminated.

k. **Paragraph 11**

Here it is pertinent to invite your attention to the fact that OPM has approved a promotion scheme based on length of service (time promotions). A Gunner with 14 years of service will be promoted to LBdr whilst a LBdr with 22 years of service will be promoted to Bdr. Naturally, the criteria of minimum qualifications (trade and education) and positive recommendation will still remain the basis of such a scheme.

l. **Paragraph 14**

Your recommendation in respect of APFTs should be considered on condition that an average mark of the APFTs conducted during the period under consideration is worked out. This effectively means that if during such a period three APFTs took place, the total score to be awarded to an individual should be the amount obtained by them in the three tests divided by three, regardless of whether the individual had sat for all the three tests or not. This measure is necessary in order not to abuse the system.

4. This Headquarters will continue to improve the promotion system and will take on board any recommendations, particularly those coming from the Ombudsman, which it believes would help to generate such an improvement. With promotion exercises now firmly being promulgated on an annual basis, an issue that is currently under consideration is whether the AFM should continue to compile two assessment reports, i.e. the

Confidential Report and the PAR. There is no doubt that the matter calls for careful analysis.

5. Finally, I would like to express my appreciation for all the work conducted by your Office in this complex exercise and for the efforts made by your goodself and the Investigating Officer to bring to light certain shortcomings and, therefore, to help improve the promotion system in the AFM.

**C Vassallo**
**Brigadier**
**Commander, AFM**

**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.**

| | |
|---|---|
| 1 (April 1996) | 14 (October 2002) |
| 2 (October 1996) | 15 (April 2003) |
| 3 (April 1997) | 16 (October 2003) |
| 4 (October 1997) | 17 (April 2004) |
| 5 (April 1998) | 18 (October 2004) |
| 6 (October 1998) | 19 (April 2005) |
| 7 (April 1999) | 20 (October 2005) |
| 8 (October 1999) | 21 (April 2006) |
| 9 (April 2000) | 22 (October 2006) |
| 10 (October 2000) | 23 (April 2007) |
| 11 (April 2001) | 24 (October 2007) |
| 12 (October 2001) | 25 (April 2008) |
| 13 (April 2002) | 26 (October 2008) |

## 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 |