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CASE NOTES

OFFICE OF THE **OMBUDSMAN** MALTA

Ombudsman

CASE NOTES

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Foreword

Every single administrative action or decision by government or by a public authority is bound to have an impact on citizens in various walks of life throughout the country. Some of these measures may merely affect individuals while others may have a wider reach and influence more directly scores – maybe hundreds, possibly even thousands at times – of people.

Experience shows that on the whole most of these actions and decisions are fair, correct and reasonable and that it is only a handful that are unfair and unacceptable and that give rise to dismay, frustration and a feeling of injustice.

As is widely known, the main purpose of the Office of the Ombudsman is to serve especially the second category of citizens – those who feel hard done by as a result of a decision by a public authority and feel the need to challenge this decision. This challenge need not be accompanied by all the trappings, the costs – as well as the delays – that are invariably associated with judicial action in a court of law; and indeed, not all such grievances may deserve to go the whole way to a court of law in view of their nature and substance. In these instances resort to the Ombudsman may represent a more viable alternative and contribute to restore a sense of administrative justice that ought to serve as the bedrock in the ongoing relationship between citizens and the public administration.

Guided by a keen sense of fair play, independence and the principles of equity, the thousands of grievances that have been tackled by my Office throughout its existence and their outcomes have served to enhance the right of citizens to good public administration and to accountable, transparent and efficient service provision.

Admittedly, most of these issues and the problems that reach my Office have no earth-shaking consequences and by no stretch of the imagination may they be considered as high-profile cases or border on drama. They may vary

from concerns about a widow's welfare payment that is denied or delayed; an employee's claims that she is being excluded from family-friendly measures to which she believes that she is entitled; charges of unfair treatment by hospital staff to an inmate; the withholding of a vehicle registration licence; refusal by the energy corporation to compensate for damage caused to household appliances by a power surge; and inaccurate billing for water consumption. These instances may be considered as humdrum and mundane and of significance or interest merely to persons who are directly involved.

There are, however, other instances that are brought to the attention of the Ombudsman that may have greater all-round relevance to the community at large – such as the wrongful or rigid application of a government policy or law; sheer discrimination; and decisions and practices that lack transparency and gnaw at the norms of good governance and at the commitment to fair decision-making that lie at the core of good public administration.

This publication gives coverage to several cases that are considered to deserve to go public; and regardless of whether they have a somewhat limited appeal or whether they have wider significance, each investigation that is conducted by my Office allows us the opportunity not only to be of service and assistance to citizens who may feel aggrieved but also the possibility to identify maladministration or an administrative process that is wrong and in turn submit recommendations to the authorities as to how these situations can and should be remedied. Left on their own clearly few individuals, if any, have the ability, the resolve and the strength to stand up to bureaucracy that is insensitive to the needs and aspirations of citizens and to convince a public authority to mend its ways if these are found to have caused distress to citizens.

At the end all my ombudsman endeavours point towards one direction – how to put a more human face on Maltese public administration and help improve the quality of life of citizens and make the country a better place where to live.

Joseph Said Pullicino
Ombudsman **April 2010**

Parliamentary Ombudsman

Case No H 634

MALTA PSYCHOLOGY PROFESSION BOARD

Desperately seeking the warrant of a Forensic Psychologist

The complaint

A graduate who obtained an MSc in Applied Forensic Psychology from a UK university in July 2002 lodged a complaint with the Office of the Ombudsman upon finding that his application for a warrant in Forensic Psychology in terms of article 19 of the Psychology Profession Act was rejected by the Malta Psychology Profession Board on the grounds that he did not possess adequate experience in the practice of the profession for a period of at least two years full-time as required by the Act.

Complainant claimed that although he furnished all the information that was needed to enable the Board to assess his eligibility for the award of a practitioner's warrant, his application was turned down and he was told by the Secretary to the Board that he would only be included in the warranting ceremony due to be held in December 2007.

Facts of the case

From his review of documents and copies of correspondence presented by complainant and by the Board regarding this grievance, the Ombudsman established that complainant filed his application with the Board on 15 December 2005 under article 19 of the Psychology Profession Act[1].

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[1] *"(1) Any person who on the coming into force of this Act is in possession of a professional qualification in psychology that makes him eligible for a warrant licence to practise in the country where the professional qualification was obtained, shall be deemed to have satisfied the provisions of article 3(3)(c);*

(2) For the purposes of article 3(3)(d), any training undertaken by any person who has obtained the qualification referred to in article 3(3)(c), between the date of such qualification and the coming into force

The Ombudsman found that for the purpose of processing this application the Board initially asked for documentation that would establish complainant's eligibility for a warrant licence to practise as a Forensic Psychologist in the country where he obtained his master's degree in terms of article 19 (1) of the Act or documentation to show that his professional qualification contained a professional training component as mentioned in article 19(3)(a). In his reply, however, complainant merely informed the Board that his master's degree "*is considered by the British Psychological Society as providing professional training in its entirety*."

The Malta Psychology Profession Board, however, was unimpressed by this information and took it upon itself to check whether complainant's degree would enable him to practise as a Forensic Psychologist in England. These enquiries led the Board to conclude that although the degree is accredited by the British Psychological Society, in order to practise in England complainant also required to practise for one year as a Forensic Psychologist supervised by a Chartered Forensic Psychologist. On this basis the Malta Psychology Profession Board concluded that complainant did not satisfy the criteria laid down in article 19(1).

Notwithstanding this decision, the Board went on to vet the application in terms of article 3(3) of the Act[2] but since it was still not satisfied with complainant's work experience, it wrote to him on 12 January 2007 to point out that he did not as yet satisfy paragraph (d) of this article.

In subsequent correspondence with the Board complainant insisted that he practised his profession since the time when he obtained his master's degree

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of this Act, shall be deemed to have been undertaken under the supervision of a registered psychologist." (article 19, Psychology Profession Act, chapter 471 of the Laws of Malta).

[2] *"3(3) A person shall not qualify for a warrant unless such person –*
(a) is a Maltese citizen, or is otherwise permitted to work in Malta under any law; and
(b) is of good conduct; and
(c) is in possession of the Masters Degree in Psychology conferred from the University of Malta or of another professional qualification as the Board may deem equivalent; and
(d) satisfies the Board that he has received adequate experience in the practice of the profession of psychology for an aggregate period of at least two years full-time or its equivalent in part-time following the completion of such degree or such other professional qualification under the supervision of a registered psychologist." (Psychology Profession Act).

in July 2002. He pointed out that in his view he qualified for a warrant under article 19 that provides that any training carried out between the time when an applicant obtained his qualification and the coming into force of the Act is to be deemed as having been carried out under the supervision of a registered psychologist. Complainant stated that between July 2002-February 2005 he was employed on a full-time basis with the Education Division, at the St Patrick's Boys' Craft Training Centre and with the Police Department while he also performed some private practice.

In order to back his claim complainant submitted a document dated 24 August 2007 and signed by the Principal of the St Patrick's Boys' Craft Training Centre which caters for students with challenging behaviour leading sometimes to criminal activity and stating that " … (complainant) *... helped me out during court procedures by supporting the student and his family, accompanying the student to court and also drawing up reports for the Criminal Court*. (Complainant) … *designed and participated in programmes for the students in the Centre helping them to deal with their behavioural problems*. *I also consulted with* (complainant) *about individual students and how best to deal with their problematic behaviour. Finally, I would like to say that I found* (complainant's) *experience as being of great support in my work while administering the Centre*."

Following a second evaluation of complainant's application, on 31 October 2007 the Board asked him to prove his experience between 2002 and 2006 and to indicate the number of hours given to forensic work as well as the role that he occupied while he carried out such work.

Complainant submitted a second document dated 1 November 2007 by the Principal of the Centre who explained that although complainant held the post of Instructor with the Education Division, after obtaining his master's degree he was relieved of his teaching duties to enable him to render service as a Forensic Psychologist at the Centre on a full-time basis. The Principal added that both during school days and during the holidays, complainant managed a programme intended for students at the Centre who demonstrated marked levels of challenging behaviour.

Again, however, the Board remained unimpressed by complainant's credentials and was still not convinced that his work at the Centre was

compatible with the roles and functions that he was required to undertake in order to be granted the warrant of a Forensic Psychologist. This led the Board to go a step further and to seek expert advice whether St Patrick's Boys' Craft Training Centre was acceptable as a forensic setting for the purpose of awarding a warrant.

The first expert contacted by the Board was the Executive Director of the American Association for Correctional and Forensic Psychology in California, US who stated that after having reviewed the Centre's website, he was of the opinion that the Centre did not have a correctional or a forensic environment and that the goals of the school are not correctional or forensic in nature. He added that students are not admitted to the Centre on court order and that no evaluations or assessments are done that are forensic in nature or that are submitted for review or action by courts or other legal authorities. The expert pointed out that the processes of education and training have no correctional nature in the same way as cognitive therapy groups designed to restructure criminal thinking.

The US expert added that applicant's *curriculum vitae* did not indicate that he had been engaged in work-related tasks that are typical of Forensic Psychologists or that whatever marginally related work he performed with children who might have a propensity for delinquent behaviour could be taken to constitute the two actual years of relevant experience designed to reflect a reasonable degree of expertise that must have been in the intention of the legislator. He concluded that from complainant's own application there was nothing to indicate that his tasks were forensic or that he spent the requisite time completing forensic tasks.

The second expert consulted by the Board, a former Chairman of the British Psychological Society and Course Leader of the MSc degree in Forensic Psychology at the University of Portsmouth, opined that on the basis of information submitted by complainant it was "*difficult to see how the candidate's work roles equate to what would be expected of a Forensic Psychologist*." In regard to the setting he stated that he "*would see the work context as having some relevance to forensic psychology, for which some credit might be given. However, I would be a little uncomfortable about conferring a title solely on the basis of work in this area, which seems to have more to do with education and social work than the sorts of applications of*

psychology that I would associate with criminal or civil justice."

On the basis of its previous opinion as sustained by these assertions, the Board concluded that complainant did not satisfy requirements laid down in article 3(3)(d) of the Act. In a letter on 30 November 2007 the Board informed complainant that in its view the St Patrick's Boys' Craft Training Centre did not constitute a forensic setting and that his work there could not be considered as relevant work experience and went on to tell him that although his work for the Police Department between July 2005-February 2006 could be considered, more details about his role and his work in this department had to be provided.

The letter by the Board concluded that applicant still had "*to fulfil the work experience required to make up the two years experience under supervision by a warranted Forensic Psychologist and in a forensic setting*" and that he had to provide evidence to this effect. The Board also required him to provide documentary evidence to confirm that he had covered the four key practice areas demanded of Forensic Psychologists.

During a meeting in January 2008 with the Ombudsman, complainant alleged that the Board treated him unfairly and misguided him by requiring different criteria, even with regard to the number of years of practice that he had to prove. He claimed that this occurred because the Board had not yet established the criteria to guide its work in the vetting of applications for a warrant at the time when applications were issued in November 2005 or by the time that he filled his application a month later. In view of this, he had no way of knowing whether an institution would be considered suitable or not by the Board for the purpose of providing appropriate experience. Complainant affirmed that the Board only established these criteria at a later stage without any discussion with unions representing psychologists and without any amendment to the Psychology Profession Act.

Complainant went on to point out that in its last letter the Board not only required him to prove one year and five months supervised practice with a forensic psychologist in a forensic setting but also requested him to furnish proof that he covered the four key practice areas demanded of Forensic Psychologists. According to complainant, however, the Psychology

Profession Act deals with psychology in general and makes no distinction between the various specialities. He also held that these competences were not mentioned before while it was only of late that these competences were included in the application for a warrant under the Act.

When the Office of the Ombudsman sought clarification about complainant's submissions from the Malta Psychology Profession Board, it was explained that the Board was set up on the same day when the Psychology Profession Act came into force on 1 February 2005. During its first year the Board dedicated most of its time to the classification of criteria for the award of warrants as stipulated in the legal framework under the Act.

The Board told the Ombudsman that several formats of application forms used in other countries for the award of warrants were examined before the Board drew up an application that was considered to be suitable locally. Both unions for professional psychologists in Malta contributed towards this process and suggestions that were considered relevant by the Board were incorporated in the local application form that was also formulated by reference to the core requisites specified in the Act.

The Ombudsman found that the first call for applications for a warrant lasted from 7 November 2005 to 13 February 2006 and that before the vetting of these applications got under way the Board discussed the rules of procedure to be used in this process. These rules sought to clarify in more detail the requisites set out in the Act and to establish criteria by which applications were to be examined to ensure a fair and just vetting process. Union representatives on the Board were asked to consult their unions to ensure that what was being done by the Board was acceptable and these criteria were discussed during January-March 2006 prior to the vetting of individual applications which started in early April 2006.

The first criteria to be identified concerned the major branches of psychology namely counselling psychology, clinical psychology, educational psychology and social psychology while other specialisations were dealt with at a later stage as the Board proceeded to vet the large number of applications that it received. The Board added that whenever doubts arose among members on the eligibility of applicants for warrants, it sought the advice of experts but insisted that members agreed that the criteria were to remain an internal

working document for use by the Board.

The Board went on to explain that applicants were allowed ample opportunity to clarify any doubts about their eligibility for a warrant in a particular branch of psychology and a meeting for all prospective applicants took place on 7 April 2006. Records showed that complainant attended this meeting but had not raised the issue of his eligibility for a warrant.

Considerations by the Ombudsman

The main aim of the Psychology Profession Act is to provide a framework for the regulation of the psychology profession. As from the date when this Act came into force, all those who intend to exercise this profession in Malta require a warrant that is conferred by the relevant ministry upon the recommendation of the Malta Psychology Profession Board in line with its main function to regulate the practice of the profession and ensure optimum standards in the service given by professional psychologists.

Since articles 3 and 19 of the Act establish the minimum requirements that are necessary for the granting of a warrant, the application form prepared by the Board requires candidates to state whether their application is to be considered under article 3 or article 19. However, although an applicant who satisfies the minimum requirements is granted a warrant, under article 3(2) this warrant does not automatically entitle the holder "*to exercise the profession of psychology in such areas of specialised psychology as may be prescribed by the Minister as requiring additional qualifications and, or, training, unless the warrant so specifies*". Article 6(6) provides that when considering an application for the practice of the profession in a specialisation of psychology, the Board has the discretion to direct that "*such person shall, in addition to the submission of such qualifications as may be prescribed, undertake and successfully complete such training or adaptation period as the Board may indicate*."

The Ombudsman stated that as a rule the decision of a board such as the Malta Psychology Profession Board on the merits of an application is not subject to his review. The Ombudsman should not usurp the functions of persons

appointed on a board by the Minister in view of their years of experience, expertise and knowledge in a particular field and should not criticise the manner in which a competent authority exercises its discretionary powers on the grounds that had he been the person taking such a decision he would have acted differently. In short the Ombudsman cannot substitute his own discretion to that of the Board.

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The Ombudsman explained that whenever a subjective decision of a competent authority is contested, he should only as a rule investigate whether procedures and criteria established by law were followed. This means that as long as no strong and convincing evidence emerges that the Board committed an irregularity or acted in bad faith and without regard to the actual merits of an applicant, there is no reason for the Ombudsman to intervene. In view of these considerations what the Ombudsman had to do in this case was to establish whether complainant satisfied the core requirements laid down in the Psychology Profession Act. If these were not satisfied, then applicant would not be eligible for a warrant.

The Ombudsman commented that from his review of correspondence and documents, it appeared that the Board handled and processed properly complainant's application. The Board initially examined this application in terms of article 19 of the Act as indicated by complainant himself but since article 19(3) was not applicable in this case, he was asked to prove that he was eligible for a warrant in the country from where he obtained his master's degree since this would automatically entitle him to a warrant under local legislation. The Ombudsman found, however, that complainant failed to supply this testimony and only stated that the British Psychological Society accredited the course that he had followed which included professional training.

Despite this failure by complainant to submit the required information, the Board did not turn down his application outright but carried out further investigations. The Board found, for instance, that according to the British Psychological Society, training criteria that are required in the UK for the

issue of a warrant of Forensic Psychologist for those who started their training prior to 2001 included the successful completion of a training course in forensic psychology accredited by the Society and a minimum one-year experience as a Forensic Psychologist under the supervision of a Chartered Forensic Psychologist.

In the light of this information the Ombudsman felt that there was nothing irregular in the demand made by the Board and that the Board was in order with regard to the years of experience that it demanded of complainant. It was in fact in terms of these criteria that the Board referred complainant to the requirement of a one-year experience and had not done so in connection with local legislation that expressly requires an experience that is phased over two years.

The Ombudsman pointed out that the fact that the Board committed no irregularity or unfairness was underlined by its decision not to reject complainant's application at that point but instead went further and sought to establish if he would be entitled to the warrant of Forensic Psychologist in terms of article 3.

It was at this stage that the Board noted that complainant satisfied the criteria laid down in article 3(3) paragraphs (a), (b) and (c) and that in terms of article 19(2) any training that he had undertaken between the date when he completed his master's degree and the date when the Act came into force would be deemed to satisfy the requirements of article 3(3) paragraph (d). It was then up to complainant to prove that he had practised *"the profession of psychology for an aggregate period of at least two years full-time or its equivalent in part-time*" as required by paragraph (d) of article 3(3). The Ombudsman noted that this is one of the core requirements set out by legislation and complainant was obliged to prove his practice in a forensic setting for this period of time to the satisfaction of the Board since he was applying for a warrant in forensic psychology.

Although complainant felt that he had proved that he had undertaken the required amount of practice and that the Board was not justified in concluding that his work at St Patrick's Boys' Craft Training Centre was not forensic in nature, the Ombudsman cannot substitute the judgement of the Board on this issue since his mandate expressly does not allow him to do so. Nonetheless

he noted that this judgement was not based only on the personal expertise of Board members but also on opinions of foreign experts in the field of forensic psychology whose views were purposely sought before the Board arrived at its final decision.

The Ombudsman referred to complainant's allegation that the Board misguided him because the criteria were not established before the issue of the call for applications. The Ombudsman noted that by this allegation complainant implied that the Board had not specified the institutions that it would consider acceptable and capable of providing to a prospective applicant the quality standard required and a reasonable degree of expertise that was sufficient for the Board to approve an application for the warrant of Forensic Psychologist.

The Ombudsman disagreed with this allegation of unfairness by complainant. The Act requires all applicants to prove the minimum requirements stipulated therein – including a two-year period of practice in the field that an applicant intends to practise in – so as to ensure that a warrant holder would have the necessary experience and expertise in this area. There was no doubt, according to the Ombudsman, that complainant was aware of this requirement and if he nourished any doubts about whether his work at the Centre would be considered appropriate and whether it would be regarded as having a forensic nature, he should have made the necessary enquiries with the Board at an early stage.

The Ombudsman noted, moreover, that article 6(6) of the Act allows the Board the discretion to require prospective applicants for a warrant in a specialisation of psychology to undertake and successfully complete such training and adaptation period that it deems necessary.

The Ombudsman pointed out that it is desirable that all details that could possibly affect the vetting of applications are made public even before the issue of applications. In this case, however, the Board itself admitted that it had found it difficult to establish criteria in respect of each specialisation and that after it established criteria applicable to the main branches of psychology, it proceeded to ask for external advice on areas where it felt that it lacked the necessary expertise.

The Board also explained that in the case of industrial and forensic psychologists it decided to use the guidelines of the British Psychological Society since most applicants in these areas obtained their degree from the UK and some even claimed that they practised their profession in that country. The adoption of criteria with which persons who studied in UK institutions ought to have been familiar was a further indication that the Board sought to be as impartial as possible in the vetting of applications.

Finally the Ombudsman referred to the allegation that in its letter on 30 November 2007 the Board not only told complainant to complete the experience required but he was additionally required to prove that he covered the four key practice areas required of Forensic Psychologists. The Board had countered by stating that core competences are not included in the application itself and insisted that it made no reference at all to any new requirements but merely specified the competences expected of a professional in the field.

The Ombudsman declared that in his opinion even this aspect of complainant's grievance was unfounded since no new criteria had ever been demanded of him and the core competencies mentioned were those required by the British Psychological Society for a graduate to be registered as a Chartered Forensic Psychologist in the UK and should have been covered in the course followed by complainant with his UK university.

Conclusion

Taking everything into account the Ombudsman found no justification in the allegations raised by complainant since there was evidence that procedures followed by the Board were fully in line with what was stipulated in the Psychology Profession Act that endows the Board with relatively wide discretionary powers.

Case No I 001

CENTRAL BANK OF MALTA

An unsustained case of discrimination with much wider implications

The complaint

A former employee of the Central Bank of Malta lodged a complaint with the Office of the Ombudsman where she expressed her aggravation that the management of the Bank repeatedly turned down her request for an extension of her period of work on reduced hours in order to be able to dedicate more time to her child. Complainant was exasperated by this attitude by the Bank since it was completely at odds with the announcement by the Government in January 2007 that its family-friendly measures would be extended to all public entities.

In turn the Central Bank explained that its refusal to introduce unconditionally all the family-friendly measures applicable in the public service stemmed from the fact that measures introduced by the Government did not apply to the Bank since it is not part of the public service but a public entity enjoying its own separate and distinct legal personality – a statement which complainant strongly challenged.

Subsequent to this refusal complainant requested early retirement under the Voluntary Severance Scheme for employees with over twenty-five years service but even this request was turned down by the Bank. At this stage the employee felt that she was left with no other option but to tender her resignation so that she would be able to continue to care for her child's needs.

Complainant, however, was determined not to give in and approached the Office of the Ombudsman with a view to a scrutiny of the Bank's decision that she labelled discriminatory especially since in other similar situations the Bank acted in a different manner. She recalled, for instance, that in March

2007 a new executive was appointed on a part-time basis of twenty hours per week when it was standard practice for all part-time staff at the Bank to work a minimum of twenty-five hours per week.

Complainant also disclosed another instance where another bank employee who too had young children to look after, was allowed a one-year extension to her period of work on reduced hours whereas a similar concession had not been extended to her.

By way of remedy complainant requested the Ombudsman to recommend her re-employment with the Central Bank either on reduced hours or as a part-time employee. Alternatively, she requested the Ombudsman to recommend that she be awarded a lump sum payment under the Bank's Voluntary Severance Scheme.

Facts of the case

The Bank's records showed that complainant joined the Central Bank of Malta in December 1981 as a Clerk and was promoted to the grade of Supervisor in 1991. Between end September 2001 and end December 2001 complainant was on maternity leave immediately followed by one year unpaid leave of absence to look after her child. In January 2003 complainant resumed her duties on reduced hours and was required to report for work for twenty-five hours per week.

In terms of clause 26 of the Collective Agreement that was applicable to her grade, complainant had to revert to full-time duties on 21 November 2005 when her son would be four years of age. However, in September 2005 she requested a one-year extension of her arrangements to work on reduced hours in terms of the side agreement between the Central Bank of Malta and unions representing its employees that the Bank would be prepared to consider an extension of arrangements with employees on reduced hours until a child would be six years old subject to the identification of a vacancy by the Bank. Complainant's request was, however, turned down on the grounds that no vacancy existed at that time.

The Ombudsman ascertained that one of the measures announced by the

Government in the Budget for 2007 consisted in the extension of family-friendly measures to all public entities. This encouraged complainant to resubmit her earlier request in February 2007 but these efforts were to no avail since the Bank again turned down this request.

In April 2007 complainant again approached the Bank with the same request but this time she made it known to the Bank that if her request would be rejected, she should be considered as having submitted her application for early termination of her employment under clause 43 (*Voluntary Severance Scheme*) of the Collective Agreement since she had been employed with the Bank for more than twenty-five years.

The reply from the Bank's Human Resources Office on 16 July 2007 was, however, no sweet music to complainant's ears as she found that her request for an extension of her work arrangements was turned down and that a similar fate awaited her request for voluntary severance of her employment with the Bank. Upon receiving these negative replies complainant submitted her resignation with effect from 19 July 2007 and in due course she raised the matter with the Office of the Ombudsman.

Findings by the Ombudsman

Upon consulting the section of the Bank's Collective Agreement applicable to complainant's grade, the Ombudsman found that clause 26 captioned *Reduced Working Hours* provides that employees with children up to four years of age can apply to work on a reduced weekly schedule of twenty-five hours. Although strictly speaking these hours of work are to be in accordance with the exigencies of the Bank, it had become the practice to allow staff to select working hours that best suited their needs with the result that all employees working on reduced hours more often than not opted for a morning timetable.

Subsequent negotiations on this Collective Agreement led the Bank to allow an extension to the condition regulating reduced hours of work under a separate agreement. The relative provision reads as follows:

"*The Bank will consider an extension of the reduced hours arrangements to continue until the child reaches 6 years of age on the specific condition that the Bank will determine the hours of work, which may be different from the current working hours, and subject to the identification of a vacancy by the Bank. This may mean a re-allocation of duties.*

The Bank agrees that employees on reduced working hours can apply to work a 30-hour week schedule. However, in these cases the Bank will select the hours of work according to its work exigencies which will depend upon the identification by the Bank of specific areas which demand a 30-hour week schedule."

In his investigation the Ombudsman found that despite two calls to fill clerical vacancies under these arrangements, there were no applications and the Bank accepted all requests from employees with children less than four years of age to extend their work schedule up to thirty hours per week.

The Ombudsman also found that clause 43 of the Collective Agreement 2005-2007 provided for a Voluntary Severance Scheme under which employees may opt for early termination of employment if they are over fifty-five years of age or if they have completed a minimum of twenty-five years service. In the latter case a lump sum payment equivalent to three times the employee's terminal annual salary would be payable provided that this payment does not exceed the aggregate salary payable till retirement age under the Social Security Act. In any case, however, the Bank retained the right to accept or to reject any application acting in its sole discretion.

The Ombudsman understood that it is the Bank's policy to allow employees to work on reduced hours during the first four years following childbirth. After these years, the Bank encourages staff with young children to further their career by providing financial assistance to help them defray part of the expense incurred in taking up childcare facilities.

The Collective Agreement also provided for the handling of disputes by a Grievance Board chaired by a person selected by the Bank from a list agreed upon with unions representing employees and including two officials, one selected by the Bank and the other by the unions. The procedure for dealing with grievances is laid down in clause 10 of the Agreement that provides that

"*both parties shall not commence any judicial proceedings, which for the purpose of this clause shall include recourse to the Office of the Ombudsman, prior to exhausting the remedies laid down hereunder*." However, although the steps that an aggrieved Bank employee had to follow to approach the Grievance Board were laid down in the Collective Agreement 2005-2007, complainant did not follow them because she stated that she was unaware that such as issue could be handled under the grievance procedure stipulated in this Agreement.

The Ombudsman confirmed that one of the budgetary measures for 2007 was that henceforth family-friendly measures applicable in the public service were also to become applicable in the public sector. This meant that if the Bank were to implement this policy, complainant would have been entitled to an extension of her period of reduced work hours.

Considerations and comments by the Ombudsman

The Ombudsman pointed out in the first place that when the Central Bank of Malta turned down complainant's request for an extension of her reduced hours of work in line with the government's new policy regarding family-friendly measures, complainant did not appeal against this decision under the relevant provision of the Collective Agreement. She had decided to resign and five months after her resignation she approached the Office of the Ombudsman.

The Ombudsman also noted that in the grievance that she lodged with his Office complainant did not claim that the Central Bank had acted in breach of provisions of the Collective Agreement that were applicable to her. Her complaint against the Bank was basically twofold: firstly, in analogous situations the Bank acted differently and therefore the Bank's refusal of her request for an extension of her period of reduced hours constituted a glaring example of discrimination; and secondly, her request for voluntary severance also in terms of the Collective Agreement had been arbitrarily turned down for no apparent reason.

Complainant went on to challenge the Bank's autonomy to deviate from declared government policy whereby as from 1 January 2007 family-friendly

measures applicable in the public service are also applicable to the public sector.

In defending itself from complainant's allegation of different treatment or discrimination, the Central Bank management stated that it was the Bank's policy to allow employees to work reduced hours during the four years following childbirth. The Bank also sought to justify its actions with regard to instances that were mentioned by complainant.

The Bank explained that the first case concerned efforts to recruit a new full-time Information System Auditor in the Internal Audit Office to fill a position that was vacant for a long time. When no applications were received to fill this post after an internal call, an external recruitment process was set in motion which, however, only managed to attract one eligible candidate; but since this candidate could only work part-time for twenty hours per week, the Bank had either to leave the position vacant or else to fill it temporarily on a part-time basis. Since the Bank was reluctant to leave the post unattended for a longer period, it was decided to choose the second option. Nonetheless the Bank management insisted with the Ombudsman that there was no comparison between the way in which this vacancy was filled and complainant's case.

The second instance concerned an application for an extension of arrangements for reduced hours that was given favourable consideration. In this case the Bank management explained that in July 2004 the Bank's Executive Management Committee had discussed the policy on reduced working hours and decided that extensions on the basis of a one-year contract could only be considered for vacancies arising in the Currency Examination Room or in the Cash Section where similar arrangements were workable and would not disrupt operations; and following the adoption of this policy, an application by a female clerk, a mother of two children, was accepted. The Bank management went on to explain, however, that since work in these two sections at the time of the Ombudsman's investigation demanded full-time employment, the Bank had no option but to deploy four part-time employees working on full time hours to meet the heavy workload.

The Bank management pointed out that this was the only instance where a request by an employee for an extension of arrangements for reduced hours

had been considered favourably and in fact nine other applications were all turned down. The Bank insisted that this showed that complainant had not been subject to any discrimination at all.

The Bank insisted that taking all these circumstances into account it would be unfair to state that the Bank had discriminated against complainant.

When the Ombudsman communicated this reaction by the Bank to her grievance and asked her to submit her views, complainant failed to do so.

Following a careful assessment of the way in which this situation had unfolded, the Ombudsman reached the conclusion that the clarification by the Central Bank management was sound and acceptable and there were no valid grounds to sustain complainant's allegation of discrimination.

At the same time with regard to complainant's other claim that the Bank's refusal to accept her request for voluntary severance of her employment in terms of the Collective Agreement and for a lump sum payment under the Voluntary Severance Scheme amounted to discrimination, the Ombudsman observed that clause 43 of the Agreement under which the Scheme was introduced clearly states that the Bank is free, acting on its sole discretion, to accept or to refuse an application under this Scheme. The Bank had justified its discretionary decision on the grounds that it only considered applications under this Scheme in areas where certain functions become redundant and explained that the only exception to this rule was for medical reasons.

under the Collective Agreement the Central Bank enjoys sole discretion to consider an application under the Voluntary Severance Scheme and once the Bank justified its discretionary decision, there was nothing else that the Ombudsman could add

On the other hand the Ombudsman noted that complainant did not challenge the discretion of the Bank or allege that the Bank exercised this discretion in an arbitrary manner. Complainant also failed to exercise her rights under the Collective Agreement to challenge the Bank's decision regarding her application and had instead decided to resign forthwith.

Conclusion

Having considered the merits of the case the Ombudsman found no evidence to conclude that the Central Bank of Malta was guilty of maladministration in the way in which complainant's application was handled. There was no evidence of improper discrimination either in respect of her request for an extension of the period to work reduced hours or in respect of her application under the Voluntary Severance Scheme.

The Ombudsman finally stated that since the decision taken by the Bank was in line with the Collective Agreement and since complainant opted to resign rather than appeal against the Bank's refusal of her request for an extension of her period of working reduced hours, there was nothing else that he could add to this case.

Note

In his Final Report on this grievance the Ombudsman pointed out that in his view this case raised important institutional issues regarding the relationship between the Central Bank of Malta and the Government and the extent of independence and autonomy that the Central Bank of Malta enjoys in determining its staff policies and the conditions of employment of its employees.

Subsequent to the issue of this Final Report, the Ombudsman launched an own-initiative investigation where he considered the issues mentioned above in the light of the status of the Central Bank of Malta as a National Central Bank within the European System of Central Banks and of the European Central Bank (ECB Statute). The Ombudsman also decided to extend the scope of his review by focusing on principles that should guide public authorities in their reactions to decisions by the national government on matters that regulate the public administration but do not impinge on their policies or on the exercise of their functions.

The report on this investigation entitled *Own-initiative report by the Parliamentary Ombudsman – Principles that should govern relations between the national government and public authorities and entities* was issued by the Office of the Ombudsman in January 2010.

Case No I 114

PILOTAGE AND MOORING BOARD

Wanting more than anything else to work as a Mooringman

The complaint

The Ombudsman received a complaint regarding the choice made by the Pilotage and Mooring Board to fill vacancies for Mooringmen in the Mooring Section of the Malta Maritime Authority.

Following a call for applications in the *Government Gazette* on 15 September 2006, complainant felt aggrieved by the selection of some persons who were to be appointed licensed Mooringmen when the results of this call were finally published in May 2008. He held that among the successful applicants there were some whose qualifications were inferior to those that he possessed while he alleged that others were successful on the strength of false certificates that had passed undetected.

Complainant further claimed that although he understood that he was originally placed seventh in the list of successful candidates, he had been highly surprised to find that in the final published result he had dropped to thirteenth position.

Complainant stated that he was aware that only three of the successful candidates possessed an Engine Driver's licence Grade 3 that was required of applicants while two of the selected applicants did not even possess the seafaring experience that had been asked for in the call for applications and never performed any work at sea. This led him to affirm that if these persons claimed to possess the certificate of an Engine Driver, their certificates must have been false and he urged the Ombudsman to ensure that certificates presented by applicants to the Authority were genuine. He also went on to allege that the selection of applicants was based on their political affiliations.

Complainant explained that he had worked at sea for several years on various vessels but despite this experience he was only given a low mark for his technical knowledge. He also implied that the marks that he was awarded under each selection criterion did not correspond to the marks that he had received in the first place and that at some point during the selection process some underhand manoeuvres must have taken place.

Facts and considerations

The Ombudsman found that the call for applications to fill vacancies for Mooringmen that appeared in the *Government Gazette* of 15 September 2006 had been issued by the Pilotage and Mooring Board in terms of the Malta Maritime Authority Act since one of the functions of this Board is to conduct examinations for Mooringmen and to assume responsibility for the whole selection process. The Authority in turn issues licences for Mooringmen once the Pilotage and Mooring Board submits its recommendations on the persons who are to be issued with a licence.

In order to be eligible under the call for applications for a Mooringman licence candidates needed to be in possession of an Engine Driver's licence Grade 3 or higher or a Boatmaster licence Grade 2 issued in accordance with the Commercial Vessels Regulations, 2002. Applicants were also required to provide evidence of good character including a police conduct certificate; be over eighteen years of age but not over fifty on the closing date of the call for applications; and be certified as physically fit and able to perform duties normally performed by Mooringmen by a medical board set up by the Minister responsible for ports.

The Ombudsman also found that the licences that candidates needed to submit with their applications are issued by the Malta Maritime Authority after applicants would have satisfied several criteria for eligibility including the required number of years of service on sea craft. Thus, in order to be given a licence for an Engine Driver Grade 3 an applicant needs to have provided appropriate service on vessels of not less than 75kW for at least six months while in order to be given a Boatmaster Grade 2 licence it is necessary to have provided appropriate service for at least twelve months and be in possession of a General Purpose Hand Certificate.

The Ombudsman observed that it is entirely the responsibility of the Malta Maritime Authority that awards these certificates to ensure and verify before the issue of a certificate that the period of service at sea claimed by an applicant has been really undertaken. This means that although it was the Pilotage and Mooring Board that issued the call for applications that gave rise to complainant's grievance, this Board was not responsible to carry out any verification that the certificates presented by applicants were genuine. The task of the Board was to ensure that each applicant would attach the licence that allowed him to be eligible together with his application and that any such licence had been issued by the relevant authority.

In order to ascertain whether an individual possesses the years of experience and the minimum qualifications required under the Training and Certification Guidance of the Commercial Vessels Regulations, 2002 for persons serving on commercial vessels operating within ports and inside Maltese waters, the Malta Maritime Authority demands a declaration that indicates an applicant's experience on seagoing vessels that needs to be signed by an authorised person in the organization where the applicant would have provided this service. The Authority does not carry out any checks on these statements and does not even ask for a certificate by the Employment and Training Corporation to verify whether an individual's claim to have been employed with the organization that is mentioned in the declaration is true or not. In other words, any such declaration is accepted at its face value and considered to be in *bona fide* without having been subjected to any scrutiny or check at all.

The Ombudsman pointed out that although verification would be useful in order to ascertain the truth of a declaration that is presented by an applicant, it had to be made clear that these procedures merely reflect those mentioned in the Training and Certification Guidance which provide as follows insofar as qualification criteria are concerned:

"*All required evidence of service must be presented in the form of testimonials. These must be provided by responsible persons preferably holding a deck or engine certificate of competency or a person holding a managerial position within the company served.*"

In addition to his doubts on the extent to which certificates that were

presented by some applicants were authentic, complainant protested about the result that he obtained in his interview. The Ombudsman noted that even before the process to interview candidates got under way, the selection board that was appointed by the Pilotage and Mooring Board had established the criteria that were to guide its task to award marks to candidates and that the maximum marks to be allocated under each criterion were as follows:

❑ qualifications	30 marks
❑ personality/character	5 marks
❑ experience	5 marks
❑ health and safety	5 marks
❑ practical knowledge	25 marks
❑ technical knowledge	25 marks
❑ ability to swim	5 marks

According to the result sheet that was compiled by the selection board and which was seen by the Ombudsman, complainant was awarded 79 marks out of 100 and was classified in thirteenth place. These results confirmed that complainant was completely off the mark when he claimed that he had been placed seventh.

The Ombudsman's investigation showed that when it was found that there were not enough vacant posts for all successful applicants, the four candidates who were placed jointly in fifth position, each with 87 marks, were again called for an interview in order to establish the final order. The verification of marks awarded to each candidate and carried out by the Ombudsman, however, confirmed that the final list that was published with each candidate's final placing was correct and faithfully portrayed the position due on the basis of marks awarded to each applicant.

Although the Ombudsman ascertained that complainant's marks under the criteria in the sequence listed above were respectively 30, 4, 4, 4, 20, 12 and 5, during a meeting with the Ombudsman complainant merely stuck to his allegation that these marks were not the ones that he was originally awarded by the selection board but failed to provide any evidence to back his allegation. Neither could he provide any information regarding the marks that he asserted that he was originally awarded or show that he had ever formally approached the selection board and asked to be given details about

the marks that he obtained under each of the seven criteria.

When the Ombudsman subsequently passed on to complainant a breakdown of the overall mark that he had been awarded, his only retort was that he failed to understand how he had only been given twelve marks for his technical knowledge when two members of the selection board had commented that he had performed well during his interview.

The Ombudsman made it clear in his Final Opinion on this case that in similar grievances he has to limit his scrutiny to a review of objective criteria adopted by the selection board which could be verified with a certain amount of accuracy. The Ombudsman does not subject to his scrutiny criteria used by members of a selection board in their evaluation of applicants that are dependent on the subjective assessment carried out by these members on the individual performance of each candidate during an interview. This position is understandable not least in view of the fact that neither the Ombudsman nor his representatives are at any time involved throughout the selection process or attend interviews. Moreover, members of a selection board are generally persons with several years of experience in their particular field which in certain instances, such as in the grievance in question, are of a technical nature.

The Ombudsman observed that taken together the two criteria – *Practical Knowledge* and *Technical Knowledge* – with a share of 50% of the total marks depend to a large extent on an individual's performance during the interview. From a verification carried out by the Office of the Ombudsman, it resulted that marks allocated under each of these two criteria by the selection board were determined on the basis of replies given by candidates during their interview to questions put to them by the board.

As has already been made clear the Ombudsman has no competence to involve himself in marks awarded to candidates for their performance or to recommend any variations in marks that are linked to the assessment given by members of the board to replies given by candidates during their interviews. Having said this, however, the Ombudsman could not but comment that on the whole complainant's performance during his interview, with 79 out of a maximum of 100 marks, seemed quite satisfactory.

Conclusion

On the strength of the evidence that he gathered the Ombudsman admitted that he found nothing untoward, unjust, wrong or illegal in this selection process.

utmost care should be given to the practice that is gaining ground whereby the relative importance of subjective criteria in a selection process is increasing at the expense of objective criteria that could be scrutinized by a review body or person

He pointed out, however, that he wished to take this opportunity to emphasize that utmost care should be given to the practice that seemed to be gaining ground in several selection processes whereby the relative strength and importance of subjective criteria to assess the performance of candidates were being increased at the expense of objective criteria that could more readily be scrutinized by an independent review body or person.

The Ombudsman observed that this emerging practice allows a greater element of freedom to selection boards in their evaluation of candidates who appear before them for an interview and substantially reduces the possibility of an independent, fair and just scrutiny of the whole selection process in the event that doubts are raised as to whether it was done faithfully after the selection board would complete its task.

The Ombudsman ended his Final Opinion by bringing to the fore his concern at this rather recent development where a substantial share of marks – in certain instances rising to even more than 50% – are allocated to purely subjective criteria since this reduces the element of transparency which ought to be an indispensable feature of any process to select or to recruit staff or even to promote staff to higher positions.

Case No I 139

FOUNDATION FOR SOCIAL WELFARE SERVICES

The employee who disliked working for *sapport* but found no support from the Ombudsman

The complaint

The Ombudsman received a complaint from a person who claimed to be an employee of *sedqa*, the national agency against drug and alcohol abuse that falls under the Foundation for Social Welfare Services, who reported that in May 2007 he was transferred to *sapport*, another agency within the Foundation that provides assistance to improve the quality of life of persons with a disability. Complainant felt aggrieved at this transfer because he believed that it had been engineered behind his back merely to accommodate another employee who was unwanted in this organization.

Complainant also expressed annoyance at the fact that attempts to seek an explanation about this transfer were unsuccessful because the Chief Executive Officer of the Foundation persistently refused to meet him. Equally unsuccessful were efforts by his union to intervene with the management of the Foundation.

Faced with this situation complainant asked the Office of the Ombudsman to intervene on his behalf because he felt that it was unfair on him to be sent to work elsewhere to make way for another employee when he had been working at *sedqa* for no less than thirteen years and always gave sterling service to this organization.

Facts of the case

During the Ombudsman's investigation complainant reported that as from May 2007 his workload was split and he spent two days per week in *sedqa*

and the remaining three days in *sapport*. Complainant explained that at first he had accepted these arrangements because he was led to believe that they were meant to be of a temporary nature and because he was aware that the person whom he was substituting at *sapport* had personal problems and he was willing to give a helping hand until such time as these problems were sorted out. Complainant told the Ombudsman that although he enlisted the support of his union to find out from *sedqa* when the situation would go back to normal so that he would revert to his former position, he remained without an answer.

Complainant stated that he had been employed at *sedqa* since 1996 as a Prevention Assistant Officer and performed mainly messengerial and driving duties. However, he felt that his transfer to *sapport* was unacceptable even though he knew that both *sedqa* and *sapport* formed part of the Foundation for Social Welfare Services but were two separate entities each led by a different director.

When the Office of the Ombudsman inquired about these allegations, the management of the Foundation replied that complainant's version did not faithfully reflect the way in which events unfolded. It was explained that complainant commenced his employment on 23 April 1996 with the Foundation for Medical Sciences and Services, as the Foundation was then known. Over the years this Foundation was restructured and transformed into the Foundation for Social Welfare Services and included under its wings three different agencies in the field of social solidarity – *appoġġ*, *sapport* and *sedqa*.

Management insisted that complainant was wrong to state that he was a *sedqa* employee since he was in fact an employee of the Foundation. This meant that like other employees in the Foundation's central administrative unit that services the three member institutions, he could be detailed to carry out any duties and tasks pertaining to his grade in any one of these agencies. These arrangements to service the three institutions by means of a central administrative set up located at the Foundation's head office at Santa Venera were confirmed by the fact that none of these agencies has among its employees a full-time messenger/driver since these tasks are allocated among employees in this grade by the Foundation's central administration.

The management of the Foundation insisted that complainant had carried out these duties together with other employees in the same grade since 2004 according to the exigencies of the Foundation. Consequently, complainant was at the service of every organization within the Foundation and at the time that he submitted his grievance to the Ombudsman his duties were shared between *sedqa* and *sapport*.

The management of the Foundation also observed that what could possibly have led complainant to approach the Office of the Ombudsman were the disciplinary steps taken against him some time earlier when he refused to deliver letters sent by *sapport* to Valletta and had also refused to carry out other duties assigned to him by the Foundation's Chief Executive Officer. Following this act of insubordination, other Foundation employees were required to perform the duties that complainant refused to undertake in order to tide over the situation.

The management of the Foundation insisted that complainant ought to have been fully aware of his duties. His contract of service dated 23 April 1996 with the Foundation for Medical Sciences and Services made reference to the full range of his main duties and responsibilities that were outlined in Appendix A of this contract and stated that these duties would be revised from time to time according to the exigencies of the Foundation. Besides, in September 2005 the Foundation's Senior Manager, Human Resources had given complainant a document that made reference to certain tasks that formed part of his duties even though he held that they did not form part of his responsibilities.

On his part the Foundation's Chief Executive Officer admitted that he was not aware that complainant had in the last few months ever asked to speak to him although as far as he could recall, whenever this employee in the past expressed his wish to meet him on issues that were related to his duties, he found no difficulty at all to do so.

In his reply to these statements complainant insisted that in the execution of his duties and responsibilities, his employment contract indicated that he was responsible to the National Coordinator of the Foundation's Drug and Alcohol Dependence Services or any other officer so delegated by the National Coordinator and not to the head of the (now defunct) Foundation

for Medical Sciences and Services or of the Foundation for Social Welfare Services that took over its responsibilities. He insisted that for the last thirteen years he was based at *sedqa* and it was only in the last year or so that he had been told that he was also expected to work for *sapport*.

Complainant went on to say that the Appendix that was supposed to be attached to his employment contract was never given to him despite his insistence for a copy and he used to be informed by word of mouth of the duties that were supposed to have been included in this job description. He stated that despite this lack of information about the exact range of his duties that inevitably brought about a certain amount of flexibility in his work, he never found any problem whatsoever to adopt a flexible approach towards his work and was prepared to show flexibility at all times. He maintained, however, that in the way in which he was transferred to *sapport* he had every reason to believe that he had been subjected to discrimination because another employee was detailed to carry out his former work at *sedqa* for no apparent reason whereas he was told to establish his work base at *sapport*. In his view this transfer constituted a discriminatory transfer under the Industrial and Employment Relations Act.

Complainant reiterated that he never refused to carry out work assigned to him or had been insubordinate but merely refused to perform additional duties because he felt that his workload had increased considerably and he was never offered any help to carry out these tasks even though on no less than four occasions he informed his superiors about the difficulties that he was facing to cope with this additional work.

The Chief Executive of the Foundation reacted to complainant's views by pointing out that the position of Prevention Assistant Officer had been abolished and referred to paragraph 2 *Responsibilities and Accountability* of complainant's employment contract that stated that his duties and responsibilities could change from time to time according to the exigencies of the Foundation. Moreover, since he first joined the Foundation complainant had always worked as a driver/messenger and received the remuneration that is linked to this position and to these duties.

The Chief Executive Officer went on to explain that as a result of the

restructuring of the three agencies that operate in the field of social welfare and their incorporation under the Foundation for Social Welfare Services, all their employees were transferred to the Foundation. Obviously this also happened in the case of complainant and was fully in line with his original employment contract with the Drug and Alcohol Dependence Services of the Foundation for Medical Sciences and Services which stated, amongst other things, that complainant agreed that " … … … *in the event that responsibility for administration of the statutory service against drug and alcohol abuse has been transferred to a separate entity other than the Foundation, provided that this is a separate, distinct and autonomous entity and not a government department* …..… (complainant) … *would terminate his employment with the Foundation and would accept his employment under this agreement with the new entity*." The Chief Executive Officer explained that since then both the Foundation for Medical Sciences and Services and the Drug and Alcohol Dependence Services had ceased to function and the Foundation for Social Welfare Services had taken over their operations.

The Chief Executive insisted that complainant formed part of the central administrative unit of the Foundation and dismissed his claim that any employee in this set up was permanently attached to any one single agency that is incorporated in the Foundation. He maintained that tasks that need to be done every day in terms of driving and messengerial services are distributed fairly among Foundation employees in this category.

It was also pointed out to the Ombudsman that it was simply untrue that complainant always obeyed all the instructions issued to him and he was in fact given two warnings for refusal to perform his duties.

Comments and considerations by the Ombudsman

In his Final Opinion the Ombudsman made it clear that he has always maintained that the allocation of duties and responsibilities to employees and the deployment of workers are a prerogative of management which is responsible for the day to day running of the

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institution or entity concerned and needs to ensure that service provision is at all times efficient.

The Ombudsman does not intervene in management decisions of this nature except when there is evidence that an employee has been transferred to another position in a vindictive manner or as a form of punishment or else there is proof that any new duties assigned to an employee are degrading or incompatible with the rank of the employee. The Ombudsman admitted that on the basis of the information that he gathered about this case, it did not appear that complainant's transfer could in any way be regarded as either vindictive or punitive.

The Ombudsman observed that complainant had not substantiated his allegation that another employee of the Foundation previously stationed at *sapport* had been transferred on a permanent basis to *sedqa* to perform the duties that he used to carry out. According to the Ombudsman, complainant seemed to harbour the view that once he had been performing these duties since *sedqa* was set up, he was entitled to continue to perform these tasks and that management had no right ever to ask him to perform his duties with another agency that falls under the Foundation regardless of the fact that he insisted that he never objected to a certain amount of flexibility in his work.

The Ombudsman also took into consideration the insistence by the management of the Foundation that complainant's claims were unfounded as well as the suspicion that he submitted his grievance in retaliation for disciplinary action against him by the management of the Foundation.

The Ombudsman observed that although complainant had been at *sedqa* as from his first day of work, this did not mean that management could not assign him other tasks in another agency that fell under the responsibility of the Foundation for Social Welfare Services. Indeed, complainant himself admitted that he knew well that both *sedqa* and *sapport* are entities that fall under the Foundation.

The Ombudsman was of the opinion that when everything was taken into account it was obvious that in 1996 complainant had not been recruited directly by *sedqa*, an agency that at that time formed part of the Foundation for Medical Sciences and Services – as the Foundation was then called – but

by the Foundation itself or, to be more precise, by the central administrative unit that was responsible at the time for the running and management of the Foundation. As a result, in the wake of the restructuring of the agencies and of the services that were being provided when the Foundation for Medical Sciences and Services was in due course replaced by the Foundation for Social Welfare Services, complainant remained an employee of this Foundation and not, as he wrongly claimed, of *sedqa*. This was also clear from his employment contract which stipulated that in the event that responsibility for the administration of the service against drug and alcohol abuse would be transferred to another government entity, its employees would be transferred to this new organization.

In the final analysis the Ombudsman recalled that this complaint was limited to a transfer that was alleged to have been discriminatory and not about complainant's duties and functions or about disciplinary procedures that were taken against him. The Ombudsman raised this point because from documentation made available to him during his investigation, it resulted that the two sides were unable to agree on complainant's duties even though they seemed to agree that, in line with what was laid down in his employment contract, complainant's duties were flexible and could be reviewed from time to time according to the exigencies of the Foundation.

The Ombudsman concluded that although this matter was of an industrial nature that strictly speaking did not fall under the mandate of his Office, he felt that a copy of the Appendix to which complainant's employment contract made reference and which, according to complainant, had not been provided to him, should be given to him at an early opportunity.

At the same time the Ombudsman recommended that in order to avoid any other possible future confrontation, the management of the Foundation should draw complainant's attention to his revised job description with particular emphasis on his obligations and his commitment to serve the Foundation as distinct from any agency that falls under the Foundation.

Conclusion

On the basis of the above considerations the Ombudsman stated that the

complaint was not justified.

The Ombudsman was pleased to note that a few days after the submission of his Final Opinion the management of the Foundation for Social Welfare Services complied with his recommendation and made available to complainant a new job description with full details on his responsibilities and duties.

Case No I 274

HEALTH DIVISION

A short-lived membership of the Specialist Accreditation Committee for the medical profession

The complaint

The Geriatric Medicine Society of Malta lodged a complaint with the Office of the Ombudsman in respect of representation on the Specialist Accreditation Committee (SAC) for medical practitioners. The Society felt aggrieved at the Government's decision to change legislation that meant it no longer qualified to be represented on this Specialist Accreditation Committee established under the Health Care Professions Act.

Background information

The Health Care Professions Act, amongst other provisions, establishes a Specialist Accreditation Committee for each of several professions such as medical practitioners, dental surgeons, pharmacists, nurses and midwives and other professions complementary to medicine.

The composition of each Committee is laid down in article 30 of the Act and includes under subarticle 2(d) "*one member, not being a member of the relevant Council, appointed by each of the relevant professional associations.*"[1] Subarticle 8 further defines "*relevant professional associations*" for the purpose of article 30 of the Act as associations "*listed in Part I of the Fourth Schedule*."

When the law was enacted in 2003 conditions listed in Part I of the Fourth Schedule to enable a health care professional association to be recognized

[1] Under the Health Care Professions Act *"the relevant Council"* in relation to medical practitioners refers to the Medical Council.

for the purpose of representation on a Specialist Accreditation Committee included, among others, that the association had to be regulated by a statute that was available to the public in general; a minimum of fifteen full members registered with the relevant Council; and participated actively in post-graduate education and continuing professional development.

It was an amendment regarding the requirement concerning membership that formed the merits of the complaint that was registered with the Ombudsman by the Geriatric Medicine Society of Malta in June 2008.

When the Health Care Professions Act came into force in 2004 the Geriatric Medicine Society of Malta was not included among associations listed in the Fourth Schedule to the Act and entitled to be represented on the Specialist Accreditation Committee for medical practitioners. This exclusion took place even though geriatrics appears among fifty medical specialities in the Fifth Schedule in respect of which the Specialist Accreditation Committee for medical practitioners could issue certificates of completion of specialist training.

Although this situation was corrected by Legal Notice No 147 of 2006 with the addition as from July 2006 of the Geriatric Medicine Society of Malta to the list of professional associations in the Fourth Schedule, however, subsequent to the introduction of Legal Notice No 27 of 2008, paragraph (d) of article 1 of Part I of the Fourth Schedule was amended to state that a professional association consisting wholly of health care professionals must have:

"…….. *a minimum of fifteen full members registered with the relevant Council:*
Provided that in respect of medical practitioners the fifteen full members have to be registered as specialists with the relevant Council."

Since the Geriatric Medicine Society was unable to meet this new requirement that full members had to be registered as specialists with the Medical Council, it ceased to be entitled to representation on the Specialist Accreditation Committee. This meant that its presence on the SAC for the medical profession barely lasted two years.

The Ombudsman's investigation

The Ombudsman found that when the Health Care Professions Act was drafted in 2002 and 2003 following extensive consultations between the Health Division and unions and professional associations, the composition of Specialist Accreditation Committees had featured prominently in these discussions. On this issue it was agreed to introduce a minimum threshold of fifteen members in each association since this seemed a reasonable level to enable fairly large organizations to be represented on their respective Committee and at the same time ensure that these Committees would not be unwieldy with many small associations cluttering their work.

It was also agreed between the parties involved in these meetings that members of specialist associations had to be registered specialists and that the Medical Association of Malta (MAM) would represent the interests of specialities that would not qualify for representation on the Specialist Accreditation Committee for medical practitioners.

The Health Division told the Ombudsman that since there were no Specialist Registers when the Act was passed in November 2003, it was agreed that in order to enable the first Specialist Accreditation Committees to be set up, the law was to request for a start that associations on a Committee needed to have fifteen members registered with the Medical Council. Agreement was also reached that this provision would be changed at a subsequent stage once Specialist Registers would be set up.

Early in 2008 the Medical Council published the Specialist Register and in line with what was agreed earlier, the necessary amendments to the law were made by means of Legal Notice No 27 of 2008. These changes affected three associations but whereas two of them enrolled further members as registered specialists, the Geriatric Medicine Society of Malta did not do so.

The Health Division insisted that it is reasonable to demand that specialist associations represented on a Specialist Accreditation Committee are to be made up of specialists in the field. It also pointed out that the Maltese health authorities recognized geriatrics as a health speciality and in fact the Fifth Schedule of the Act listed it as such.

At the same time the Division observed that other specialities listed in the Fifth Schedule but that are not represented on the SAC for medical practitioners have their interests represented by another association or by the Medical Association of Malta. Since these interests generally concern quality standards of training that are required for specialist accreditation, the Division saw nothing wrong that proposals by the Geriatric Medicine Society could be submitted to the SAC on its behalf by MAM or by the Association of Physicians.

The Geriatric Medicine Society of Malta rejected this suggestion and asserted that other associations could not adequately represent the needs of the speciality of geriatrics. It insisted that MAM is "*mainly ….. a union*" and that although common core ground exists with the Association of Physicians, the speciality of geriatrics has its own needs, especially in higher training, which can only be catered for by its own society.

The Society stated that although the Health Division classified it as "*small*" because its membership was below the arbitrary figure of fifteen recognized specialists, its membership included eight consultant geriatricians and fifteen other doctors actively working in the field of geriatrics of whom four were awaiting to be registered as specialists in geriatrics. The Society recalled that there were 1,350 geriatric beds in state hospitals while its members provide a day hospital/outpatient service and a medical input to government-run community homes as well as a consultation service to Mater Dei Hospital. Moreover the Department of Geriatrics had a medical staff of over thirty doctors and its own Clinical Director and Teaching Coordinator while it also provides teaching for undergraduates and teaching and training for postgraduates.

The Society explained that although geriatrics is recognized as a speciality, it was the only association that was penalized by the change in legislation and that was not allowed to represent the interests of the speciality in areas related to training and accreditation. The Society disagreed with the Health Division that the Committee would be unwieldy if there was no limitation to its membership and countered that when its representative attended SAC meetings from July 2006 to May 2008 there was no evidence that at that stage membership of the Committee was too large.

The Society added that the Health Division has the duty to safeguard the interests of all health specialities and not only fairly large ones to the detriment of smaller ones and that linking membership of a Specialist Accreditation Committee to a minimum of fifteen registered specialists was an arbitrary yardstick that did not give due recognition to the role and size of specialized departments in state hospitals where the brunt of teaching and training takes place. The Society pleaded that the Health Division should reverse this anomaly.

The Society insisted that although it was officially recognized by the Health Division and participated in SAC meetings for almost two years and fulfilled all its obligations, this recognition was abruptly withdrawn in May 2008. The Society held that this decision rendered geriatrics as a second-class speciality even though it has its own specific training needs and requires representation by its own society on committees such as the SAC.

When the Ombudsman delved into the files of the Health Division on the discussions that took place prior to the publication of the bill on the health care professions, he found that the Division had insisted that in order to be eligible for representation, a professional association should have at least fifteen members. This was meant to ensure that the number of associations on the SAC would be manageable.

At the same time the Ombudsman found no evidence on these papers of any written agreement between the Health Division and the Medical Association of Malta prior to the publication of the bill to the effect that members of a professional association recognized for the purpose of representation on the SAC were required to be specialists registered with the Medical Council in that particular speciality. The Public Health Regulation Division and the President of MAM, however, confirmed that during these discussions it was understood that members of an association seeking to be represented on the SAC needed to be specialists in their respective branch of medicine.

According to the Health Division at that stage it was not possible to insist on members of a professional association being specialists since no specialist was formally accredited as such in terms of the Act when the law was approved by Parliament in 2003. It was only after Specialist Registers were compiled

following approval of individual applications in 2008 that the authorities were able to identify specialists.

Considerations and comments

In his Final Opinion the Ombudsman clarified that this complaint concerned a regulation that has the effect of law. The administrative act following the publication of the regulations whereby the Geriatric Medicine Society of Malta lost its representation on the SAC can only be challenged and considered to qualify as maladministration if the decision did not fully respect the law. Failing this, the Ombudsman could at most reach the conclusion that the law was unjust and recommend a review of the legislation only if it would be considered prudent to do so. Any such situation would not, however, preclude him from investigating administrative decisions and recommendations made by the Health Division prior to the publication of the regulations.

The Ombudsman confirmed that following the publication of Legal Notice No 27 of 2008, the Geriatric Medicine Society no longer satisfied all the conditions for representation on the SAC under the Fourth Schedule to the Act since it did not have fifteen full members registered as specialists with the Medical Council.

When the Ombudsman looked at whether there was any administrative failure in the proposal for a change in the law, he found that during negotiations between the Health Division and interested sectors including the Medical Association of Malta as the representative of the Maltese medical profession, the number of fifteen members was agreed upon as otherwise, theoretically at least, there could be rival splinter groups each claiming to represent the same speciality.

The Ombudsman appreciated the explanation by the health authorities that during discussions with the MAM it was agreed that members of an association would eventually need to be specialists and that it was not possible, when the law was enacted in 2003, to include this condition since the Register of Specialists did not exist at that time and in terms of the Act could only be compiled when applicants were approved by the SAC and registered as such by the Medical Council. This meant that the requirement of a full member

of an association being a specialist could only be implemented as a second step since there was first the need of a functioning SAC that could accredit applicant practitioners as Specialists.

According to the Ombudsman the health authorities validly argued that leaving the situation as it was might have led to associations flooding their membership with non-specialists to secure representation on the SAC.

The Geriatric Medicine Society of Malta on its part held – according to the Ombudsman, validly – that as a result of the amendment in the legislation, the speciality is not represented when decisions are taken on matters that directly concern its interests. The Society, while stressing the importance of geriatrics and its recognition locally, maintained that the interests and special needs, including higher training in geriatrics, cannot be adequately represented by either the MAM or by the Association of Physicians as argued by the health authorities.

The Ombudsman shared this view but stated on the other hand that the insistence by the Society for treatment as that given to other associations meant that, as the Health Division argued, without any limitation on the number of specialist associations represented on the SAC by means of a membership threshold, there could be up to fifty members on the SAC since the Act recognizes this number of different medical specialities and, admittedly, this could render the situation unwieldy if not outright chaotic.

The Ombudsman appreciated the point made by the Society that even the European Union of Medical Specialists has a separate Geriatric Medicine Section with its own board and representation to recommend training in this field. He also understood its lament that it was embarrassing to be recognized by European bodies and to participate in executive board discussions and decisions on training in geriatrics and on accreditation needs in Europe and to be excluded from a local accreditation committee. He commented, however, that while local recognition of the Society or of the speciality of geriatric medicine was not under dispute and while the Fifth Schedule of the Health Care Professions Act expressly recognizes this speciality, the aspect of recognition and representation on the SAC are two separate issues.

Aware that geriatrics is an important speciality given the country's ageing

population and that the Government provides extensive services in this field, the Ombudsman agreed that it was important to give special attention to decisions regarding accreditation of specialists in geriatrics. However, regardless of the membership of the Society, the Ombudsman admitted that he saw merit in the introduction of a limit on the number of members on a committee and understood that there had to be a necessary even if arbitrary minimum number of members. In this case membership was limited to fifteen since it would not be practical to have the fifty recognized specialities represented on the Committee. This situation implied, however, that decisions could be taken in respect of a speciality without the input of persons who are more competent in that field of medicine; and in truth this situation could border on unfairness.

In the circumstances the Ombudsman admitted that it would be fairer if the law were to provide that where applications are due to be discussed and decided upon in respect of a speciality that is not represented on the SAC, the professional association with the greatest number of registered specialists in that field as its members would attend as an additional but full member for the period of the meeting when these applications are being discussed and decided. The Ombudsman observed that this proposal would go some way to address the issue and that there are precedents in local legislation, even health legislation, to this effect.

Another consideration raised by the Ombudsman was whether in similar instances resort to an arbitrary number represented the best solution. While undoubtedly this could be regarded as a valid yardstick, he could not reach the conclusion, however, that by adopting this approach in its recommendations on the proposed legislation the Health Division was guilty of maladministration.

The Ombudsman referred to the plea by the Geriatric Medicine Society that the Medical Association of Malta could not adequately represent the Society because as a union its main purpose is to regulate relations between members and their employers. Since the MAM statute refers, among other objectives, to initiatives meant "*to promote cultural, scientific and social activities and to study medico-moral problems including their theoretical and practical aspects*", the Ombudsman stated that although this differs

from what is stipulated in the law on participation by an association in postgraduate education and continuing professional education to be eligible for representation on the Specialist Accreditation Committee, it does not preclude the MAM from involvement in similar activities. In this regard the Ombudsman pointed out that once this issue had been raised, it was the duty of the Health Division to verify whether MAM and other associations listed in the Fifth Schedule of the Act meet this requirement to qualify for membership of the SAC since there was no evidence that any such verification took place.

The Ombudsman's investigation suggested further considerations that raised doubts about the correctness of the composition of the SAC when viewed in the light of its functions under the Health Care Professions Act. He observed that although it is not within his province to comment on legislation unless and insofar as this can be considered as grossly unfair or manifestly unjust, it is, however, within his function to suggest remedial action to rectify a perceived injustice and to suggest ways and means by which to avoid a situation that could provoke an act of maladministration.

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The Ombudsman stated that in his view this present instance qualified in a number of respects as a case in point and warranted closer examination not only in the context of the complaint raised by the Geriatric Medicine Society of Malta but also because of its implications for other specialist professional associations that do not qualify for representation on the SAC. Thus, for instance, the only yardstick to limit specialist representation on the Committee was that of quantity while the criterion of quality in terms of the relevance of any particular specialisation in medical and societal needs was ignored. This led the Ombudsman to comment that the choice of the criterion of quantity, while understandable insofar as it is an objective, even if arbitrary, benchmark that *prima facie* avoids improper discrimination, can give rise to undesirable if not unjust situations.

This occurs especially if one considers that the role of the SAC is related

essentially to qualitative standards; and since this means that decisions on the accreditation of specialists who are not represented by their peers on the Committee because the membership of their professional association is lesser than fifteen, are taken by members of the Committee who are less qualified in that particular specialization and who might also not have the best notion of the level of specialisation that is required for accreditation, the Ombudsman felt that this approach is not conducive to the attainment of reliable standards of accreditation.

Given that the main functions of the SAC concern matters related to the competence of an applicant seeking accreditation in his specialisation that can be judged best by specialists in that particular field, the Committee found itself in the position where, for instance, it has the function to issue certificates of completion of specialist training in the speciality of geriatric medicine upon the fulfilment of criteria recommended by professional associations listed in the Fourth Schedule from which the Geriatric Medicine Society had been excluded by regulation.

One other example: the SAC has the function to advise the Minister and the Medical Council "*on issues concerning specialist training and registration*" in geriatric medicine and to "*act as an advisory body for training*" in the specialist area of geriatric medicine as well as to accredit postgraduate training programmes when there is no member on the SAC with the recognized professional competence to tender such advice.

The Ombudsman commented that the notion that the interests of the Geriatric Medicine Society of Malta can be looked after by the Medical Association of Malta is faulty on at least two important counts. Firstly, the Association does not have any claim to competence in any specialisation except that of relations between members and their employers while secondly, the Specialist Accreditation Committee is not intended by law to serve as a forum to protect the interests of members of the various medical specialties but as an independent instrument to ensure the academic excellence of professionals before issuing them with a licence to exercise their speciality.

On these considerations the Ombudsman commented that it is clear that the presence of a specialist is essential when the Committee exercises its

functions in respect of accreditation and deliberates and decides on matters relevant to and pertaining to a specialty that is under review. He therefore ruled that in this respect and to this extent alone the grievance was justified and that the regulations ought to be revisited to ensure representation of any one of the listed specialities when the Committee deliberates and decides matters that are relevant to it.

The Ombudsman stated that one alternative for the composition of the SAC could be the setting up of a streamlined committee consisting of a small number of professionals elected by professional associations listed in the Fifth Schedule who would be appointed on their own merits and in their personal capacities rather than in representation of any particular group. A representative of the relevant professional association listed in the Fifth Schedule would then be co-opted with full membership and voting rights on every occasion that matters that concern the members of that association are discussed and decided on. This proposal would ensure a level playing field for all professional associations without at the same time creating a cumbersome mechanism due to excessive membership.

The Ombudsman reiterated that it is iniquitous to exclude professional associations from representation in a forum where decisions are taken that concern them directly while entrusting their representation to other SAC members who do not have the required competence in the relevant specialisation only adds insult to injury. In this respect the declaration by the Geriatric Medicine Society of Malta in its submissions to the Ombudsman that it "*cannot be and prefers not to be represented by other associations*" spoke volumes.

Conclusions and recommendations

In the light of these considerations the Ombudsman concluded that the cessation of representation of the Geriatric Medicine Society of Malta complied with the law and there was no maladministration in the process that led to the change in legislation.

He also held that there may indeed be an element of unfairness in the

requirements introduced by the amendment to the law since criteria in the Act for representation of professional associations do not allow for an association representing a particular speciality that lacks the minimum number of specialist members stipulated in the Act to be represented whenever a decision is made on whether a medical practitioner can be registered as a specialist in a particular speciality.

The Ombudsman observed finally that there was no evidence of any verification by the Health Division of the credentials of associations represented on the SAC to ensure that the requirements of the law in respect of participation in postgraduate education and continuing professional development were satisfied.

In the circumstances the Ombudsman recommended that the Health Division should review the legislation in respect of the above conclusions and particularly that the law ensures that the smaller yet equally important associations participate actively in discussions that take place by the SAC and that are of direct interest to their speciality.

Following the release of the Ombudsman's Final Opinion the Public Health Regulation Division embarked on a consultation process with a view to the submission of draft proposals for amendments to the relative sections of the Health Care Professions Act. At the same time the Health Division started another process to verify the credentials of associations represented on the Specialist Accreditation Committee for the medical profession.

The Ombudsman understands that both processes are still under way.

Case No I 430

MOSTA LOCAL COUNCIL

Mostly a matter of lack of communication in Mosta

The complaint

A Mosta resident lodged a complaint with the Office of the Ombudsman where he lamented that several government entities and public authorities tend to disregard citizens' concerns and fail to answer grievances that are directly addressed to them or give inadequate replies to issues raised with them. Complainant was particularly irked because the Mosta Local Council repeatedly ignored his complaints and on several occasions also failed to heed his requests for information.

Further information about the complaint

An instance which complainant referred to the Office of the Ombudsman where the Mosta Local Council ignored his interests occurred in September 2008 when without being given any prior information and, consequently, without his consent Council employees embedded a bracket with a *No Turn* traffic sign into the façade of his private residence. Complainant added that it was only after he lodged an official report with the Malta Transport Authority (ADT)[1] and after a site visit by an official of the Authority that the Council was instructed to remove this sign and attached it instead to a metal pole that was embedded in the pavement.

Complainant explained to the Ombudsman that he had not asked the Local Council to remove the sign from his façade but merely asked the Council to explain why it took this arbitrary action and transgressed on his property without having first sought his permission as the owner of the building. He

[1] As Transport Malta was known at that time.

further commented that in his view the traffic sign had still not been placed in an appropriate position and ought to have been placed further away since the sign referred to a one-way junction some twenty metres down the road.

According to complainant a second instance of flagrant disregard for citizens' concerns and lack of courteous treatment occurred following an email which he sent to the Mosta Local Council on 12 June 2008 to request information on publicity given by the Council regarding its Annual General Meeting on 9 June 2008. While commending the Council for its social responsibility, complainant remarked in his email that he felt that its good work had been undermined by its failure to communicate properly information about its Annual General Meeting to the very people that the Council is meant to serve.

Complainant pointed out that it was his understanding that only a small number of residents turned up for this Annual General Meeting and he attributed this low turnout to the fact that the only public notice to notify people about this meeting was a small notice affixed on the door of the lift of the Mosta Civic Centre. Complainant asked the Mayor to confirm whether there had been any other means of notification to draw the attention of the people of Mosta to this meeting and proposed that in future the Council should advise via email all those Mosta residents who were interested in the Council's proceedings about the date and time of any such meeting.

In his email to the Council complainant further charged that if this "*rather obscure and less than illuminating notice*" had been its only means to advise the people of Mosta of the Local Council's Annual General Meeting, this demonstrated that the Council had been "*manifestly remiss in accountable and transparent ethics*". He further upped his criticism of the Council when he concluded his email as follows: "*I await your response but you will excuse me if I do not hold my breath while waiting for one given my past experience*."

This demonstration of cynicism by complainant was not lost on the Mosta Local Council. Not taking kindly to these comments, the Mayor emailed back to him within twenty four hours and asserted that his email "*was nothing but a pack of lies*" and stated that "*when we start receiving decent emails from*

your good self you can expect a decent reply."

Complainant listed further grievances regarding the Mosta Local Council. He claimed that the *Contact Us* form on the Council's website had not been accessible for several months, probably because of some programming error, with the consequence that residents were unable to contact their Local Council. He also expressed his concern that the Council does not possess a response protocol to inform citizens of the time frame within which to expect a reply to issues raised with their Council and went on to lament that as in the case of most public entities, the website provides no information to indicate where a resident can resort to in order to obtain an equitable resolution of a grievance if in this person's view the matter was not addressed properly.

The Ombudsman's investigation

When the Ombudsman brought these issues to the attention of the Mosta Local Council, the Council explained as follows:

- **on traffic signage:** the Council pointed out that traffic signs are put in selected areas in a locality as a standard procedure to improve safety for pedestrians and motorists and not on the basis of applications made by individuals for their own convenience. In this instance the sign to which complainant referred was embedded on the façade of the dividing wall that separated his residence at first floor level from that of his neighbour at ground floor level and once complainant had gone so far as to involve the ADT in the matter, the Council had in turn followed the advice of Authority officials and removed the sign from the wall where it had been affixed and instead secured it to a pole in accordance with ADT regulations.

- **on publicity for the Council's Annual General Meeting:** the Local Council explained that contrary to complainant's lament, its Annual General Meeting was advertised on the *Government Gazette*, local newspapers and local radio stations as required by law. The Council submitted to the Ombudsman copies of adverts published in four daily newspapers between 2 and 5 June 2008 and provided copies of invoices to show that on these days the meeting was advertised as

well on four different local radio stations.

- **on the Council's website:** the Council admitted that complainant's assertion was correct but explained that it was allocating some of its limited financial resources to develop a new website for the locality.[2]

- **on the provision of information to dissatisfied citizens:** the Mosta Local Council pointed out that to the best of its knowledge no Council provides any information as to where citizens many seek resort if they remain dissatisfied with explanations given about decisions that affect them. The Local Council, however, assured the Ombudsman that it always tries to the best of its ability to be of service to residents of the locality with the resources that are made available and to address concerns and issues that directly affect residents in the best possible manner.

Comments and considerations by the Ombudsman

Before commenting on the merits of the complaint the Ombudsman clarified that once a complaint is lodged with his Office, the public authority that is involved is requested to comment and to provide relevant information to the Ombudsman on the issues that form the basis of the grievance. While the public authority is required to reply to his Office, it is not, however, obliged to provide to complainant a copy of its reply or replies to the Ombudsman. Moreover, copies of any documentation that is made available to the Ombudsman in the course of or for the purpose of an investigation are not given to the parties concerned.

The Ombudsman pointed out that it falls within the competence of a democratically elected Local Council to decide and to act in the general interest of the locality that it covers and of its residents. It is of course quite possible that decisions taken by a Local Council may not please all the

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[2] While the Ombudsman's investigation was in hand, on 5 January 2009 the Council informed the Office of the Ombudsman that a new website had been launched and that it was being used by residents on a regular basis. The Council also informed the Ombudsman that the forthcoming issue of its *Journal* would provide information to Mosta residents on this new website facility.

residents all the time but as long as the Council follows stipulated consultation procedures and acts according to law, its decisions are final and should be accepted by all and sundry.

The Ombudsman insisted that transparency and accountability are indispensable in local government operations and contribute towards increased collaboration from the residents of a locality in the Council's activities and programmes of works. At the same time a Local Council is obliged to provide information to citizens and answer *bona fide* enquiries especially since citizens entrust Council members to represent their views and interests regarding the locality for the duration of their tenure as members.

a Local Council is obliged to provide information to citizens and answer bona fide enquiries

The Ombudsman stated that a Local Council should not only acknowledge correspondence but should also as soon as reasonably possible give citizens a comprehensive and reasoned reply with regard to any issues or concerns raised with the Council. Reasons behind particular decisions ought to be explained clearly and fairly and citizens should be updated on any changes reached by the Council that are likely to affect them.

At the same time the Ombudsman went on to point out that having given adequate reasons for its decisions, a public authority is not required to engage in any active debate with interested parties in order to justify its actions. Any such debate should be viewed in the wider political context that ultimately judges the quality of any such decision at the bar of public opinion. This sphere is, however, clearly beyond the mandate of the Office of the Ombudsman.

At this stage the Ombudsman observed that it appeared that complainant's tussle with the Mosta Local Council was mainly the result of poor communication. In his opinion this clash could have been avoided if only the Council informed complainant that it intended to affix a traffic sign on the façade of his residence since this action was bound to encroach on his property and if the Council had bothered to answer his enquiries about the

other matters that he raised and that were in truth of general interest to any Mosta resident.

Since one of the functions of a Local Council is to provide and maintain road signs and markings in conformity with national standards and to establish and maintain pedestrian and parking areas, this meant that the Mosta Local Council was fully within its right to decide to introduce a sign to indicate to car drivers that a one way road was coming up. This was confirmed by the ADT official who was involved in the issue when complainant lodged a report with the Authority that the Local Council had affixed a bracket with a *No Turn* sign onto the façade of his residence without having previously sought and obtained his consent.

The Ombudsman, having confirmed that the sign in question had not been installed by the Traffic Management Unit of the ADT but by the Mosta Local Council, ascertained that even though no previous consent had been sought, the Authority found no objection to the installation of this sign since it was bound to improve safety for pedestrians and drivers alike while supporting the one-way system in the area. The ADT explained that it allows a measure of flexibility in the installation of similar road signage because if a permit were to be required from the Authority by every Local Council for the fixing of each and every traffic sign, this would give rise to a considerable increase in bureaucracy and substantially slow down works by Local Councils in their localities. However, it emerged that subsequent to complainant's protest, the ADT instructed the Mosta Local Council to remove the bracket from the façade of his residence and to affix the sign to a pole mounted on a public footpath as is standard practice elsewhere.

The Ombudsman was of the view that although within its right to introduce this sign, the Mosta Local Council failed to act in accordance with the basic principles of prudence and courtesy which ought at all times to guide its actions and its relations with residents of the locality. The Council's argument that complainant's consent was not necessary because his residence on the first floor of the building had not been affected since the sign was affixed to the dividing wall between two properties at ground floor level did not justify the Council's attitude towards complainant.

Principles of good governance require that public authorities deal with people

helpfully and in a sensitive manner and since the sign had been embedded in the façade of the block where complainant resided, the Council should have sought his opinion before fixing the bracket onto the wall. The Ombudsman expressed his conviction that if the matter had been approached sensibly, all the misunderstandings that arose would have been avoided. Indeed, complainant himself stated that it was likely that if he had been informed beforehand, he would have found no objection to the embedding of the bracket onto the façade of his residence.

The Ombudsman commented that while complainant is entitled to his opinion regarding an appropriate position for the pole mounted in the footpath to hold the traffic sign, the ultimate decision where to site this pole belongs to the Council and cannot be usurped by complainant.

The Ombudsman considered next the issue regarding the provision of information to citizens. He observed that public authorities should provide an efficient, effective and responsive service and handle enquiries and requests for information in an appropriate manner by providing clear, accurate and complete information promptly – and they should do so regardless of whether they approve or not of the style adopted by citizens in their communications with them or whether they are displeased by any caustic approach shown towards them.

The Ombudsman stated unhesitatingly that in his opinion the Council was at fault when it answered complainant's email dated 13 June 2008 in the way that it did and that the Mayor's reply failed to address complainant's enquiry about the publicity by the Mosta Local Council to its forthcoming Annual General Meeting. At the same time the Ombudsman stated that the tenor in the Mayor's reply was obviously prompted by the attitude shown by complainant in his email – and even here these comments ought to have been avoided in the first place since they served to set the relationship between the two sides immediately on the wrong foot.

The Ombudsman warned that on their part citizens seeking information or clarification from a public authority with regard to an action or decision taken by the authority or a service that is provided or a procedure that is adopted by the authority should refrain from passing any unnecessary sarcastic

remarks that are bound to raise the hackles of the officials involved and lead to unnecessary conflict and misunderstanding.

The Ombudsman also commented on the grievance raised by complainant regarding faults in the Council's website that were left unattended for a long time. While appreciating the Council's financial constraints as a result of which the Council took a rather long time to commission a new website, at the same time the Ombudsman expressed his satisfaction that the issue had by then been remedied. He understood that the new website was functioning properly and being regularly used by residents after their attention was drawn to it in the *Journal* that is issued by the Council.

The Ombudsman observed that modern technology is an important tool to establish a close link between citizens and public bodies. Public authorities should strive to use modern information and communication technology as a means of being more accessible to citizens. This will not only allow citizens the widest possible access to services provided by a public authority such as a Local Council but also serve to improve contacts with residents who may well put forward useful suggestions for the improvement of the locality or of the service being offered.

The Ombudsman also stated that Local Councils should actively seek and welcome any constructive feedback that may be offered, whether this compliments Councils for their work and initiatives or whether it is critical of their actions. Criticism, if constructive, can help Councils to review any policies that may be defective and modify any procedures that may have been adopted and that are found not to serve their purpose well.

Having said this, the Ombudsman suggested that the Mosta Local Council should seriously consider adopting complainant's suggestion that its website should provide information about possible alternatives that are available to an aggrieved citizen where an issue that has been raised cannot be resolved by the Council itself. Principles of good governance require that an internal review system is established whereby unsatisfied citizens can have any such decision reviewed by a third party that is not directly involved in the initial decision. It is imperative that all public entities (including Local Councils) provide details about alternative ways of dispute resolution including the

names and addresses of institutions or offices with whom a complaint or an appeal can be lodged.

Conclusion

In view of the fact that the grievances that featured in this complaint could have been avoided had the Local Council been more helpful and sensitive towards complainant and since the service rendered by the Council was not of a satisfactory level, the Ombudsman recommenced that the Mosta Local Council should tender an apology to complainant. In default complainant was invited to consider the Ombudsman's declaration that the Council had failed in its duty to correctly apply the rules of good governance in his regard as adequate justification.

Case No J 024

DIRECTORATE FOR EDUCATIONAL SERVICES

The candidate who wanted to build a fence around his application

The complaint

The Office of the Ombudsman was approached by a Head of Department in the Education Division who felt aggrieved at the outcome of a call for applications for the post of Education Officer (Physical Education) in the Directorate for Quality and Standards in Education that was issued by the Directorate for Educational Services.

Complainant had earlier submitted to the Directorate for Educational Services a petition in terms of the Public Service Management Code that was in turn referred to the Public Service Commission (PSC) but the Commission found no valid reasons to change the result of the selection process.

In his petition dated 22 April 2008 complainant wrote that since his experience went far beyond the minimum number of years stipulated in paragraph 13(c) in the call for applications – at least four years service in the relative grade together with at least four years teaching experience in the subject area being advertised in a licensed school – he considered himself clearly as the most eligible candidate. He went on to point out that also according to paragraph 13(c) candidates who did not satisfy this requirement could only become eligible for consideration by the selection board if other applicants who, like him, met this requirement would fail their interview.

In his petition complainant wrote that he took umbrage at the fact that he failed his interview by merely seven marks and expressed his reservations that his total mark was only five marks higher than the other eligible candidate when this person did not even possess any direct experience on matters associated with physical education administration at national level. He was mostly upset, however, and went on to query the difference of 97 marks,

which in his view was excessive, between his final score and that of the only successful candidate whose qualifications were similar to his own but who was by far his junior in terms of overall experience and length of service.

Complainant also questioned the marks that he was awarded during his interview under the selection board's approved criteria. This frustration arose mainly from his conviction that his track record spoke for itself. Not only had he been one of the three Subject Coordinators who ran the department in the years after the retirement of the previous post holder and was deeply involved in the introduction of various reforms in school syllabi but he also coordinated numerous in-service courses to PE teachers both at primary and secondary level.

Complainant pointed out that he had been very actively involved as well in the organization of special events including displays that were organized in connection with the millennium celebrations, the Education through Sport seminar by the Council of Europe in 2004 and the CHOGM meeting in Malta in 2005. He also claimed that he was involved in his personal capacity with the University SEC panel for Physical Education. Taking all this into account, he was adamant that in view of his overall experience, his mark under the assessment criterion *Track Record* (28 out of 50) was wrongful and that it had not been awarded on what transpired during his interview but on an incorrect evaluation of his overall work performance.

Complainant was also embittered by the marks that the selection board awarded him for *Leadership Qualities* and *Managerial Ability* – 25 and 26 respectively, out of 50 and argued that the board could not assess these criteria in any real depth during his interview even though he contended that he gave a good account of himself.

Complainant went on to express his dissatisfaction with his low marks under *Personal Attributes* despite his proven integrity and commitment and queried how it was possible for a person who served as Head of Department for more than ten years to demonstrate a poor knowledge of the post.

Finally complainant alleged that undue manoeuvres that took place in the Education Division prior to the selection process were intended to groom the candidate who was eventually selected for the position.

Facts and findings

The Ombudsman found that paragraph 13(c) in the call for applications for the posts of Education Officers in various areas of specialisation, including Physical Education, which appeared in the *Government Gazette* in October 2007 listed the requirements that candidates needed to satisfy in order to be eligible to apply. Applicants had to be Assistant Heads of School or Heads of Department[1] or School Counsellors in a licensed school. An important proviso to this requirement was that applicants had to have at least four years service in the relative grade with at least another four years teaching experience in the particular subject for which a candidate would submit an application. Paragraph 13(c) went on to state that: "*In the absence of applications from eligible officers according to the preceding paragraph, and/or in the absence of successful candidates, eligibility shall be extended to officers in the above mentioned posts who have less than the requisite number of years teaching experience*."

The call for applications made it abundantly clear, however, that in any event "*preference in selection shall always be given to applicants in the order of eligibility as provided above*."

Paragraph 14 stated that the selection process, in the form of an interview, would be conducted by a selection board that would be approved by the Public Service Commission.

In his investigation the Ombudsman found that of the three applications that were submitted for the posts of Education Officer in Physical Education, only two candidates satisfied the eligibility criteria whereas the third candidate did not possess the required years of teaching experience. This third application was, however, sanctioned by the rules of the call for applications.

The Ombudsman also found that when the final result was published, the two candidates who comprehensively satisfied the eligibility criteria had failed their interviews while the third applicant passed his interview with flying colours, with 230 out of a maximum of 250 marks, and was declared the only successful applicant. With the pass mark set at 150 as had been approved by

[1] Previously referred to as Subject Coordinators.

the Public Service Commission even before the selection process got under way, complainant found that his overall mark (143) meant that he lost this opportunity to advance in his career.

The Ombudsman's investigation also revealed that the selection process was based on five criteria, each of which carried a total of 50 marks – and complainant's marks under each of these criteria were as follows: *Track Record* (28); *Leadership Qualities* (25); *Managerial Ability* (26); *Personal Attributes* (36); and *Knowledge of and Suitability for the Position* (28).

In the course of his investigation the Ombudsman found that even before the Public Service Commission received complainant's petition and also prior to its approval of the result submitted by this selection board, the Commission had on its own initiative sought clarification as to why two applicants in a higher eligibility category were not considered suitable and failed their interview whereas a third applicant was successful even though his credentials in terms of years of teaching experience were less remarkable. This had occurred not only with regard to the area of Physical Education that was under scrutiny but in other areas of specialisation.

The reply by the selection board to the Public Service Commission was that throughout their interviews complainant as well as his colleague in the first category of eligible applicants were not particularly clear in their vision and in the priority areas that they would tackle and actions that they would take if they were to be appointed Education Officers in Physical Education. These two applicants had not convinced the board that they possessed the proper leadership qualities in this field which had been without an Education Officer for several years and which was sorely in need of two leaders who would provide inspiration and give life to this important aspect of school curriculum at a time when obesity and lack of physical education among schoolchildren are of concern.

The selection board assured the Public Service Commission that these characteristics were only evident in the candidate who was selected even though he featured in the second category of eligible applicants. This assessment led the board to recommend that the final choice should be restricted to this candidate even though the original intention of the Directorate

for Educational Services was to appoint two Education Officers in Physical Education.

When complainant's petition to the PSC was brought in turn to the attention of the selection board, the board dismissed this claim on several grounds. Despite his assertion that he was eminently suited to fill the position of Education Officer in Physical Education on the strength of his extensive experience as Subject Coordinator, the selection board countered by insisting that the selection of an applicant does not depend solely on a candidate's standing and status in terms of seniority.

According to the board complainant had on the whole fared rather badly in such important areas as vision for the future, the identification of priority areas that needed immediate attention as well as measures and actions to be taken in hand by the successful candidates. Members of the selection board were of the opinion that complainant was not at all successful in his efforts to convince them that he would prove to be an effective and determined leader in this field which urgently needed a sense of purpose and direction that it lacked for several years.

The board also rejected complainant's allegation that its choice was driven by ulterior motives and that all along its members meant to disregard his strong claim for this position. This was confirmed by the fact that the Directorate for Educational Services had agreed that two Education Officer posts were required for Physical Education and that the decision to select only one applicant was a source of concern since in this way the existing leadership problem in physical education was only partly solved.

With regard to the issues raised by complainant concerning his track record, the selection board pointed out that it had no quarrel with the tasks listed by complainant in his application form. The board, however, pointed out that this track record consisted to a fairly large extent in the coordination of activities that is in fact expected of a Head of Department/Subject Coordinator.

The board was also rather unimpressed by complainant's claim in respect of his experience as an examiner/marker with MATSEC. It explained that it was aware that like hundreds of other teachers in different subjects, complainant must have been approached directly by MATSEC for this work and he could

not possibly claim that this activity constituted a feather in his cap.

The board dismissed complainant's allegation that jockeying for position had taken place in the interviews that were held to fill the posts in Physical Education. It was explained that the persons selected to conduct interviews were appointed by the Directorate for Educational Services that had exerted no influence or pressure whatever on them. The Chairperson and members of the board denied the allegation that the successful candidate had been groomed for the position and insisted that the outcome of interviews for the posts of Education Officer in this area was fair and respected the merits of each candidate. The successful candidate, though admittedly coming from a reserve category of applicants, did exceptionally well during his interview and had an impressive portfolio which contributed towards his very high overall mark.

The Ombudsman also found that the PSC had even interviewed the Chairperson of the selection board in order to evaluate better the board's submissions on the selection process. The Commission was generally satisfied with the replies that were given and confirmed that there was no ground for a change in the overall results that had been registered.

The PSC was also satisfied that the selection process had been based on criteria that were set and approved before interviews took place and that these criteria were applied fairly, uniformly and consistently in the assessment of each candidate. Every effort was made by the selection board to make judgments on the merits of each applicant that were as far as possible objective and informed.

To give complainant a fair hearing the Ombudsman asked him to provide further details on his allegation that his failure was engineered behind the scenes in order to appoint the other candidate to his own exclusion. In his defence complainant argued that once paragraph 13(c) in the call for applications imposed a requirement of four years service in the grade of Assistant Head of School/Head of Department or Subject Coordinator/ School Counsellor in a licensed school, the board should not have proceeded to interview an applicant who did not satisfy this requirement. However, when his attention was drawn to paragraph 13(c) that extended the eligibility criteria to other candidates in the absence of applications from eligible

candidates and/or in the absence of successful candidates, complainant could only retort that in his opinion the selection board could not do this.

The Ombudsman, however, explained to complainant that in view of the way that the call for applications had been worded and structured, it could validly be argued that in the case of a vacancy still remaining unfilled, both complainant and the selected candidate could still have been appointed provided, however, that complainant had been successful in his interview.

The Ombudsman also considered complainant's allegation of unfair marking. Referring to his track record and to his proven activities in the field of physical education, complainant expressed his reservations as to how the selection board could assess and test his leadership abilities and qualities on the basis of an interview that lasted no more than half an hour. He insisted that during the time when the post was vacant he had worked with other Heads of Department to run the department and this confirmed that he was indeed able to work as a team player.

Complainant also raised doubts about the grounds on which the selection board awarded almost maximum marks to the successful candidate under all the criteria for which he was examined. He queried how the selection board could explain the superiority of this candidate under these criteria over other applicants especially when it was known that the relationship between this applicant and his colleagues was rather frosty.

Complainant continued to insist that the PSC failed to address in a proper manner his allegation that the selected applicant had been groomed for the post.

Considerations and comments by the Ombudsman

The Ombudsman pointed out in the first place that his Office can only investigate complaints involving the Public Service Commission if he is satisfied that a complainant had earlier sought redress directly from the Commission. In this case complainant had acted in this way and had already petitioned the PSC.

The Ombudsman also pointed out that his Office cannot recommend a change in a decision by the PSC if it is found that a petition was treated fairly and that the Commission gave due attention to all the issues covered by a petition. Similarly the Ombudsman cannot take any action if in its consideration of a petition the Commission properly evaluated all relevant information and the Ombudsman found that there was nothing in the Commission's deliberations on the petition that would lead him to conclude that any provision of article 22 of the Ombudsman Act was applicable.

This means that it is not the function of the Ombudsman to conclude that the result of an interview was unfair, mistaken or unjust when it results that the selection process was undertaken in a valid manner and was conducted fairly and in line with established criteria. The Ombudsman cannot substitute a subjective assessment or a decision taken by a selection board by his own and unless there are unmistakeable signs and clear proof that indicate an irregularity in the process or that an action or a decision taken by the selection board was manifestly wrong, there is no room whatsoever for a dissenting opinion from the Ombudsman.

The Ombudsman pointed out that in this case all the evidence pointed towards an assessment by the selection board of the three candidates in the running for the post that was in line with criteria established by the Commission before the process got under way, including a pass mark of 150 out of a total of 250. Of these criteria, *Leadership Qualities*, *Managerial Ability*, *Personal Attributes* and *Knowledge of and Suitability for the Position* are criteria that are interpreted subjectively by members of a selection board according to a candidate's performance throughout the interview.

The Ombudsman commented that the opinion of the selection board on complainant's performance during his interview was quite clear, emphatic and unmistakeable – he had given a clear indication that he did not reach the level that was desired for the position in question. While a candidate may have his own opinion regarding his performance throughout an interview, it is only the board's opinion which matters and which is decisive, regardless of the views of a candidate. This means that unless there is conclusive evidence of a mistake or bad intention in the actions or decisions of a selection board, no office of review – be it the Office of the Ombudsman or the Public Service Commission – can uphold a similar plea.

One of the main arguments put forward by complainant was that members of the selection board intentionally decided to fail him so as to have a clear path to appoint the other candidate who was supposedly at the back of their minds in view of what was stated in paragraph 13(c) of the call for applications.

The Ombudsman, however, explained that a valid interpretation of this paragraph suggested that complainant's view was unfounded and that all along there were two vacancies for the post and not just one. In the Ombudsman's opinion the only valid interpretation of paragraph 13(3) was that in the event that complainant was successful, he would have been appointed in terms of the original call for applications itself while any remaining unfilled vacancy could have been filled by the other selected candidate. The Ombudsman therefore ruled that there were absolutely no grounds to sustain the allegation of ill intent in this regard on the part of the selection board.

The Ombudsman also considered complainant's argument that it is not possible to adjudge an applicant's qualities, abilities and aptitude to fill a position of responsibility merely on the basis of an interview. While sharing to some extent this viewpoint the Ombudsman pointed out, however, that despite this inherent shortcoming a selection process based on an interview is still acknowledged as possibly the best system in a personnel selection process and no other system has been devised instead to choose employees from a pool of potential workers for any particular job. Besides, holding a face-to-face interview provides a very good – if not the best – opportunity to test at close quarters a candidate's vision on the responsibilities of a post applied for and the way in which a candidate would approach a new assignment.

while sharing the view that it is not possible to adjudge an applicant's aptitude merely by an interview, the Ombudsman acknowledged that an interview is still considered as possibly the best system in a selection process

With regard to another yardstick for selection based on his track record, complainant made several representations. Although in itself this would normally be a verifiable criterion, the Ombudsman found, however, that in this instance this yardstick had to a significant degree been interpreted in a subjective manner – namely, how a candidate's track record would stand him

in good stead if he were to be chosen to fill the vacancy.

The Ombudsman recognized that this subjective approach to the evaluation of a candidate's track record could possibly raise an eyebrow in the sense that it allows little if any scope for review and lessens the level of transparency of a selection process. On the other hand, however, he appreciated that in order to fill higher posts in a responsible and dependable manner, it is vital that the ones chosen to fill these positions demonstrate proper leadership qualities, a clear sense of vision and direction as well as a command of the situation. The Ombudsman commented that there can be no doubt that long years of service – even if themselves an objective criterion – constitute on their own no guarantee of a successful performance in a higher position where challenges are bound to be stronger.

In his submissions to the Ombudsman complainant also expressed the view that the PSC failed to address his allegation that the selected candidate had been groomed for the post – and the relevance of this charge was heightened when linked to complainant's other allegation that his failure was purposely engineered behind his back by the selection board so as to leave the way open for the appointment of the third applicant. The Ombudsman, however, after having ascertained that this claim had been duly examined by the PSC, observed that in his opinion this allegation lost most if not all of its significance since it did not in any way materially influence complainant's chances of being selected for the post once there was evidence that what held sway in the final decision of the selection board was its overall evaluation of complainant's performance during his interview and his suitability for the post.

The Ombudsman also referred in his Final Opinion to complainant's assertions regarding his merits and those of the successful candidate. Besides the fact that he cannot review issues that were not included in a petition that was forwarded to the Public Service Commission, the Ombudsman insisted that it remains the core function of a selection board to make its own evaluation of candidates on the strength of qualities that emerge during their interview. Clearly it is the members of a selection board who have to be satisfied with regard to the merits shown by a candidate and the claim to a higher position that a candidate may nourish.

Conclusion

On the basis of his deliberations, the Ombudsman reached the following conclusions:

a) there was no doubt that the Public Service Commission gave due consideration to the points raised by complainant in his petition; and this view was strengthened by the fact that even before it received this petition, the PSC on its own initiative and without any outside prodding subjected the selection process to a rigorous test and probed an important aspect of the board's decision that was subsequently raised by complainant in his petition – namely, that the two candidates (including complainant himself) who were fully eligible to submit their application had failed whereas another candidate who fell in the second category of eligible applicants was successful;

b) the allegation by complainant that he had been failed deliberately by the selection board to allow the preferred candidate to be appointed was unfounded. Complainant interpreted wrongly paragraph 13 (c) of the call for applications and the only valid interpretation of this condition was that while candidates in the first group of eligible applicants (such as complainant) would be selected if they were successful in their interview, other candidates in the second category but who would pass their interviews – such as the candidate who was eventually selected – could also be chosen if the two vacancies were not filled by the first method;

c) the final decision on candidates who should be appointed for the post was entrusted by the Public Service Commission to a selection board whose decision was essentially a subjective one and depended to a large extent on the performance of candidates during their interviews. Given the importance of this position in an area of education that has a long lasting effect on the attitude that is instilled among Maltese youths during their formative school years towards physical exercise and its impact on the health of future generations, the board had the responsibility to identify the two most suitable candidates for this task who held prospects that they would best meet the challenge – and the PSC, after reviewing the whole selection process, had no misgivings that the board had not carried out its task in a diligent and fair manner and concluded that there were no objective grounds to change the result.

The Commission took this decision in the exercise of its mandate in terms of the Constitution of Malta and the Ombudsman cannot conclude that this decision was mistaken, discriminatory or unjust. In the circumstances the Ombudsman was of the opinion that this complaint cannot be sustained.

Case No J 202

PARLIAMENTARY SECRETARIAT FOR PUBLIC DIALOGUE AND INFORMATION

The joint request for financial assistance that failed on all counts

The complaint

The Executive Secretary of the Marsaskala Local Council, also acting on behalf of the *Kumitat Kontra l-Impjant tar-Riċiklaġġ kif Propost*,[1] lodged a complaint with the Office of the Ombudsman on grounds of improper discrimination. It was claimed that whereas other localities benefited from the award of funds to finance technical studies on particular aspects of their locality, difficulties arose with regard to the allocation of funds for a technical survey on the locality whose interests the Marsaskala Local Council as well as the *Kumitat* strove to promote.

Facts of the case

In the course of his investigation the Ombudsman found that in the issue of the *Government Gazette* of 13 September 2005, the Marsaskala Local Council issued a call for tenders for the provision of consultancy services to investigate air quality in the locality. One of the conditions included in the tender document was that the Marsaskala Local Council would settle professional fees due in connection with these consultancy services. At the same time the Ombudsman noted that while six other Local Councils of localities near Marsaskala subscribed to this initiative, the tender documentation made no reference at all to the *Kumitat Kontra l-Impjant tar-Riċiklaġġ kif Propost*.

The Ombudsman also found that even before this call was issued, the

[1] Committee against the recycling project as proposed.

Marsaskala Local Council had requested the Government in July 2005 to provide financial assistance to underpin this study. However, since at that time the Government had not yet taken any policy decision on the provision of financial assistance in similar projects, the request was turned down.

In January 2009 the Marsaskala Local Council again approached the Government with a request for financial assistance in order to defray the costs that it incurred on expert consultancy services for this study. The Parliamentary Secretariat for Public Dialogue and Information that is also responsible for Local Councils, however, replied that this request could not be met since when the study was commissioned way back in 2005 the Government had not yet decided to offer financial assistance for similar projects and at that stage there were no policy guidelines on similar initiatives.

The Parliamentary Secretariat further stated that the Government had not been involved at all in the process undertaken by the Marsaskala Local Council to commission the study and was unaware of the way in which the consultants who carried out the study had been selected and if these consultants possessed the necessary qualifications. There were other aspects regarding the issue of this call for consultancy services of which the authorities were unaware since they were not brought into the picture when the call was issued.

In its reaction to this stand by the Parliamentary Secretariat, the Marsaskala Local Council referred to words said by the Parliamentary Secretary during his participation on the TV programme *Kliem u Fatti* on 15 October 2008 when one of the members of the panel raised this issue. The Council provided to the Ombudsman a recording of this programme where the Parliamentary Secretary was distinctly heard to say that at a certain time the Government decided that in instances where a Local Council is of the view that any proposed development is likely to have a negative impact on the area falling under its responsibility, the Council could request the Government to provide financial assistance in order to carry out studies to evaluate any possible unfavourable consequences on residents of the locality.

On television the Parliamentary Secretary stated as follows:

" .... *This ... (*initiative*) ... was launched when problems regarding the*

*Sant'Antnin (*wastes facility*) arose and the Local Councils were offered financial assistance to carry out this report but had turned down this offer. The Qala Local Council had submitted its request and was allocated these funds. The case relating to Qrendi happened earlier and took place before this policy was introduced. It would therefore be a great problem if all those Councils who commissioned reports at that time would now turn up and ask to be allocated funds to cover their expenses for these studies …..."*[2]

In a meeting with the Ombudsman the Parliamentary Secretary explained that by these words he wanted to convey the message that the policy decision that had been established by the Office of the Prime Minister took place at a later stage – towards the end of May 2008 – after the controversy on the building of the recycling project had arisen. The Ombudsman was assured that this policy established the procedures that were to be observed so that this package of financial assistance would be made available to applicants and was meant to ensure that public funds would be spent wisely and properly.

Among other things the policy laid down that Local Councils should submit a formal written application and undertake to observe the stipulated procedures and conditions in order to benefit from these funds. The rules also laid down that the Government was free to introduce any other conditions deemed necessary throughout the implementation of the scheme including the condition that contracts for the provision of consultancy services were to be awarded to competent experts and that an open call for tenders had to be issued before the award of any contract for consultancy services.

The Ombudsman noted that although these policy guidelines stipulated that a request for financial assistance under this scheme must be submitted by a Local Council, in this case the request had been presented by a group consisting of several Local Councils with responsibility for localities in the region together with the *Kumitat Kontra l-Impjant tar-Riċiklaġġ kif Propost* which was not eligible for assistance under this policy. In fact the Ombudsman observed that even the complaint lodged with his Office had

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[2] *"Din … bdiet titħaddem minn meta kien hemm il-kwistjoni tal-impjant ta' Sant'Antnin u l-Kunsilli Lokali ġew offruti l-flus biex jagħmlu dak ir-rapport u l-Kunsilli Lokali rrifjutawhom. Il-Kunsill Lokali tal-Qala għamel it-talba u ngħata l-flus. Il-każ tal-Qrendi jmur qabel daħlet dik il-policy. Il-problema hi li issa allaħares kull min għamel rapport f'dak iż-żmien issa jiġi għall-flus …."*

been submitted by the Marsaskala Local Council in its own name and on behalf of this *Kumitat*.

The Ombudsman took cognizance of the assertion by complainants that the Government adopted two weights two measures in the implementation of this policy in the sense that whereas the submission for financial assistance by the Qala Local Council had been accepted, complainants' application was arbitrarily turned down. The Ombudsman's investigation, however, revealed that although it was true that the Qala Council approached the Government for financial assistance and was even informed that assistance not exceeding €10,000 would be made available, no such assistance was in fact ever given since the Council failed to prove that it followed the established policy guidelines with regard to the consultancy services for which it sought this assistance.

Considerations by the Ombudsman

The Ombudsman noted that representations with Government regarding this issue were (correctly) made by the Marsaskala Local Council since in line with conditions that appeared in the tender document it was this Council that entered into the contract with the selected consultants. The Ombudsman stated that although the source from where funds were provided for payment of these consultancy services remained unknown, it was likely that this payment was made by the Marsaskala Local Council. It was therefore in order to expect this Local Council itself to submit a claim for a refund of these expenses and that the *Kumitat* would not be involved in this issue.

The Ombudsman, however, emphasized that the policy guidelines approved in May 2008 were meant "*to assist Local Councils to prepare reports on projects of a certain scale that are proposed to be implemented in their locality*." This underlined the fact that this assistance was not meant to reach an organization such as the *Kumitat Kontra l-Impjant tar-Riċiklaġġ kif Propost* on whose behalf too this grievance had been submitted. The Ombudsman was therefore of the opinion that he could only consider this complaint insofar as it had been lodged by the Marsaskala Local Council in its own name.

The Ombudsman observed that the policy guidelines established clearly the procedures to be followed by Local Councils that wished to participate and to benefit under this scheme. These procedures were meant to indicate the way that had to be followed to ensure that public funds were well spent and in an accountable manner.

The Ombudsman observed furthermore that the policy provides for "*an allocation that is made available annually by the central Government*." This means that financial assistance can only be sought and allocated if in the financial year in question funds for this purpose are specifically made available by the central Government in its annual budget. It is therefore obvious that no such assistance can be made available to Local Councils if for some reason or other no such funds are allocated in the central government budget in a particular year for this purpose.

At the same time the Ombudsman pointed out that this meant that a request for financial assistance could not be submitted with backdated effect by a Local Council to cover a technical study that would have been undertaken following the issue of an open call for tenders but that would have been adjudicated before the date on which funds are allocated by the central Government. Even less acceptable was the allocation of financial assistance out of funds that had not been allocated by the Government for this purpose because at the time when the Marsaskala study was commissioned this policy was not yet in force.

The Ombudsman commented that this complaint was based on two different issues – firstly, on allegations of improper discrimination; and, secondly, on charges of an incorrect and improper application of policy guidelines that were publicly announced by the Parliamentary Secretary responsible for Local Councils.

a) Improper discrimination

The Ombudsman noted that in its submissions the Marsaskala Local Council stated that costs incurred on a technical report in an identical case were reimbursed to the Qala Local Council in Gozo; and this led its members to believe that there ought to be no problem for funds to be allocated to their Council and to other neighbouring Councils.

The Ombudsman, however, found during his investigation that even if it were to be accepted that the Qala Local Council was at one point officially told that it would receive assistance for a technical study which it had undertaken, it was equally true to affirm that this Council had not in fact so far been awarded any such funds since it had not followed the procedures indicated in the policy announced by the Government.

The Ombudsman observed that if the claim by the Marsaskala Local Council regarding the Qala case was true – in other words, that this case had been dragging on since 2002 or one year before the issue concerning the Sant'Antnin recycling plant had arisen – and if it was also true that both cases were still pending while the request for financial assistance was submitted before the new policy guidelines were established, it was manifestly clear that in accordance with the basic principles of good administration neither the request by the Marsaskala Local Council nor the proposal by the Qala Local Council could be accepted.

The Ombudsman observed that this stand ought to be rigid and unmistakeable because it was definitely out of the question that these two requests could ever be in line with policy guidelines laid down on purpose to ensure that the whole process for the award of tenders for consultancy services would be above board and done in a transparent, proper and accountable manner. In this regard the Ombudsman noted that these policy guidelines served to show the way by means of well-defined procedures that were to be followed by all and sundry in the strictest manner during every stage of the process. Since these conditions also made it clear that the whole process could not be carried out *ex post facto* because otherwise no financial assistance could be authorised and awarded, the Ombudsman ruled that on this basis it would appear that the allegation that the process was mired in improper discrimination could not be sustained.

b) Incorrect application of policy

The Ombudsman pointed out that his observations with regard to the allegation of improper discrimination were equally applicable with regard to the part of the complaint that claimed that the Parliamentary Secretariat responsible for Local Councils was at fault by its incorrect application of policy.

The facts that emerged during the Ombudsman's investigation seemed to confirm that the only possible conclusion that he could reach was that this allegation was unfounded and there was no evidence of any incorrect application of policy. The Ombudsman had no hesitation to reach this conclusion given that no such policy guidelines were in existence at the time that this decision was taken.

According to the Ombudsman once it had been established that it was incorrect to state that the Qala Local Council received a reimbursement of expenses incurred in connection with the technical report that it commissioned, the main thrust of the argument by the Marsaskala Local Council and on which its complaint was built, crumbled like a sandcastle. In addition the Ombudsman commented that from information that he gathered, it appeared that it would be unlawful for the authorities to give any further consideration to the request by the Qala Local Council for the award of financial assistance.

The Ombudsman commented that these observations were directly addressed at the merits of complainants' grievance. There was, however, another issue that needed to be given consideration; and this concerned the declaration on the media by the Parliamentary Secretary responsible for Local Councils whose words on a television programme led the Marsaskala Local Council to draw the conclusion that this amounted to a commitment on behalf of the Government regarding the allocation of these funds.

The Ombudsman pointed out that it is not his function or his responsibility to interpret the words of participants during debates on local television stations since clearly it is the speakers themselves who are to assume responsibility for their own words and it is not his role to construe their meaning. The Ombudsman stated that whether declarations on the media conform to facts and to events that have taken place or that might take place is not something that he can judge and it is only the person who utters any such statements who can best explain their meaning and the context in which these words were pronounced. Clearly the Office of the Ombudsman has no say in these matters.

The Ombudsman explained that his role is to investigate if administrative action by public authorities is in line with the norms of good public administration

and with rules and procedures that bind the public service; whether it is in observance of government policies; and whether its application is done in a fair manner and consistently. He explained that in this instance it did not result to his Office that there was any shortcoming by the authorities that would fall under any category of administrative deficiency.

the Ombudsman's role is to investigate if administrative action by public authorities is in line with the norms of good public administration and with rules and procedures that bind the public service

Conclusion

Taking everything into account the Ombudsman was of the view that although it resulted that the Parliamentary Secretary had really spoken on television in the way that had been mentioned by complainants in their grievance, it was at the same time obvious that their decision to resubmit their application in 2009 for financial assistance for a technical report which they had commissioned several years earlier was turned down because this report was commissioned before the policy guidelines were established. Furthermore, this request by the Council was rejected because up to that time the Government had not yet allocated any funds for this purpose.

The Qala Local Council on the other hand submitted its application at a time when the authorities had already taken a policy decision to provide financial assistance to Local Councils and established broad policy guidelines to ensure accountability and transparency in the way that public funds provided for this purpose would be used. The Ombudsman commented that it was apparent that the decision to establish these policy guidelines was taken precisely following the controversy that arose on the Sant'Antnin recycling project.

Nevertheless the Ombudsman ruled that the Council's request for funds for the report that it commissioned could not be considered since this request was not covered by the policy guidelines for similar initiatives that were established by the Government several years after this report was prepared for the Council.

In view of these considerations the Ombudsman considered the complaint unjustified and turned it down.

Case No J 299

ENEMALTA CORPORATION

And then there were six disgruntled Specialist Engineers

The complaint

The Enemalta Professional Officers' Union presented a complaint to the Ombudsman on behalf of its members against Enemalta Corporation in connection with the aftermath of the issue of a call for applications to fill seven posts of Specialist Engineer. The Union protested that the position of Assistant Manager at the Delimara Power Station was filled by one of the newly appointed Specialist Engineers and expressed its reservations about this appointment since in its view this post should have been filled following the issue of a separate call for applications.

The Union claimed that the Corporation was guilty of maladministration with its manifest disregard of rules and procedures that it is bound to observe to fill internal vacancies while there was inconsistency and lack of transparency in the procedures that were used by Enemalta. The Union also accused Enemalta management of refusing to correct the situation and make amends for the injustice suffered by members.

The Union expressed its disapproval of the way Enemalta misled its members because despite assurances that all Specialist Engineers were assigned project work according to the job description annexed to the circular that accompanied the call for applications and were reporting to the Corporation's Projects Manager, things turned out differently. As a result, members of the Union felt that their career path at the Delimara Power Station had been blocked.

When referring to the way in which the Corporation filled the post of Assistant Manager at the Delimara Power Station, the Union alleged that instead of issuing a call for applications with a detailed job description as was always done in the past, this time the Corporation acted in a different manner that

was detrimental to the interests of Enemalta engineers involved in power station operations.

The Union disagreed that the filling of this post could be considered merely as the transfer of an employee and insisted that since it involved the filling of a vacancy, the usual procedures for the filling of vacancies ought to have been followed.

Facts of the case and explanations by both parties

Circular No 217/2006 issued on 30 October 2006 by Enemalta Corporation invited applications to fill seven vacancies in the new position of Specialist Engineer, established by agreement between the Union and the Corporation, in network planning (1), network projects (2) and power generation and distribution projects – electrical (2) and mechanical (2). Calls for applications for these posts were identical and stated that selected employees would be responsible for a proper management of projects in the Generation Section and report directly to Enemalta's Projects Manager.

With applications restricted to engineers in possession of at least five years experience in generation operations and maintenance and project work, engineers involved in power station operations and not in the Generation Section were ineligible. After an evaluation of the experience and the qualifications of applicants and interviews, the appointment of the seven successful candidates took place on 30 March 2007.

In the meantime the Assistant Manager at the Delimara Power Station who for several months was solely responsible for the operation and running of this facility was appointed Manager as from 28 March 2007. Following this appointment the post of Assistant Manager at the Delimara Power Station became vacant.

Since under the Collective Agreement 2006-2010 the Enemalta Professional Officers' Union represents professional employees in grades 9 to 5 and the newly appointed Specialist Engineers were placed in scale 4 of the Corporation's manpower structure, the Union could no longer represent them. However, following a request by these employees so that the Union

would continue to represent them, the Union's statute was amended in July 2007 although, according to Union officials, this decision incurred the displeasure of Enemalta management with the result that soon afterwards these Specialist Engineers received a written warning that disciplinary measures would be taken against them if they followed any Union directives. Furthermore, in a most arbitrary manner and without any prior notice, in May 2008 the Corporation abruptly changed the designation of Specialist Engineer to Assistant Manager with the consequence that these employees again could no longer be represented by the Union.

While these events were unfolding, in August 2007 the Corporation issued a call for applications for the post of Assistant Manager (Projects – Mechanical). Under the job description for this post, the successful candidate would fall under the responsibility of the Manager, Projects and perform duties similar to those of a Specialist Engineer.

It was at this stage that the Union started receiving complaints from its members that contrary to what appeared in the call for applications, one of the newly appointed Specialist Engineers was not deployed on project work in accordance with the job description of this post and was not even reporting to the Corporation's Projects Manager but was instead being assigned specific tasks directly by the Manager of the Delimara Power Station. In addition Specialist Engineers at the Delimara Power Station were informed by the Manager of this facility that henceforth they were to receive their work instructions directly from this employee.

This led the Union to query the original need to establish two posts of Specialist Electrical Engineers in the Generation Section and gave rise to suspicions that all along it was the intention of the Corporation that an employee appointed to this position would not be assigned any project work at all but would straightaway be given duties of Assistant Manager at the Delimara Power Station without having to go through the rigours of the issue of a call for applications for this post.

Between April and August 2008 representatives of the Union held several meetings with the Corporation's Human Resources Section and received assurances that not only was there no government approval for the post of Assistant Manager at the Delimara Power Station but that the Corporation

had no intention to issue a call for applications for this position since it did not feature in the management structure of this power station. At the same time the Corporation assured the Union that the Specialist Engineer at the centre of this controversy was being allocated project work that was appropriate and in line with his designation.

The issue, however, flared again soon afterwards when Union members at the Delimara Power Station reported that this Specialist Engineer was asked to perform their appraisal evaluation under the Corporation's Performance Management and Development Programme.

When the Union raised the matter during a meeting in March 2009, Enemalta's Chief Executive Officer insisted that although the post of Specialist Engineer was originally linked to project work, the Corporation was entitled to deploy these engineers, now designated as Assistant Managers, wherever it felt appropriate on the strength of their work contract. The Corporation confirmed this approach in a letter to the Union on 13 March 2009 stating that any similar move, where the conditions of work of employees are not affected, was the prerogative of management.[1]

When the intervention by the Director of Industrial and Employment Relations with the Corporation was to no avail, the two sides agreed on 22 May 2009 to refer the matter to the Ombudsman.

In a letter to the Ombudsman on 25 June 2009 Enemalta confirmed that soon after the appointment of the seven Specialist Engineers, in view of operational requirements it saw fit to change the designation of this post to Assistant Manager. Since this did not involve any change in the duties of these employees and salary scales of the two positions were at par, the Corporation considered this merely as a horizontal move for these employees and not as a promotion and felt no need to follow any of its normal promotion procedures. At the same time the Corporation took the opportunity to issue revised job descriptions for this new position and included, as an added

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[1] *"Fir-rigward ta' din il-kwistjoni nixtieq ninfurmak li ċaqlieq bħal dan, fejn ma ġewx affettwati l-kundizzjonijiet tax-xogħol tal-ħaddiema, huwa biss prerogattiva tal-management."* (letter dated 13 March 2009 by Chief Officer, Human Resources and Corporate Services, Enemalta Corporation to Secretary, Enemalta Professional Officers' Union).

responsibility, assistance to the incumbent Manager in the daily running of the Delimara Power Station.

The Corporation also pointed out that the work contract of Specialist Engineers included the following condition: *"The Employee is being assigned the position and the duties of Specialist Engineer within the Corporation but the Corporation reserves the right to change the position of the Employee to that of any analogous position according to the exigencies of the Corporation*."

The Corporation further maintained that since the Collective Agreement did not cover the post of Specialist Engineer, it was under no obligation to discuss any changes regarding this position with the Union; and on these grounds the Corporation dismissed the Union's allegations of lack of transparency.

Also in this letter the Corporation informed the Ombudsman that a few days earlier[2] it issued a call for applications for the position of Assistant Manager at the Delimara Power Station.

The reaction by the Union to the contents of this letter to the Ombudsman did not take long to come. The Union insisted that the statement by Enemalta that Specialist Engineers would be assigned specific project work was not borne out by events and expressed surprise that Specialist Engineers were reclassified as Assistant Managers (a position which the Union could not cover) only twelve months after their appointment. The Union expressed incredulity that merely four months after this appointment, the Corporation issued a call for applications for the post of Assistant Manager (Projects) with the same job description as a Specialist Engineer and with the successful applicant having to report to the same Manager as a Specialist Engineer.

The Union observed that these manoeuvres only led it to believe that Enemalta was not consistent in its policies to fill senior engineering posts. As an example, it pointed out that soon after the Corporation appointed two Specialist Electrical Engineers, it apparently backtracked on its decision and felt that one of these posts was not necessary with the result that one of these engineers was deployed to assist the incumbent Manger in the running of the Delimara Power Station.

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[2] On 9 June 2009.

The Union also stated that it would be interested to learn about the tasks assigned to the two Assistant Managers at the Delimara Power Station especially since the Corporation's organization chart showed only one post of Assistant Manager at this facility.

During meetings with the Ombudsman the Union explained that several of its members were denied the opportunity to apply for the post of Specialist Engineer because this call was limited to engineers on project work and there was no indication that selected applicants could be shifted from one section to another according to the needs of the Corporation. As a result engineers not involved in project work were led to believe that they were ineligible to apply and missed this chance for advancement.

The Union observed that despite the claim by Enemalta that all its engineers were at liberty to apply for the posts of Specialist Engineer since nothing in the call prevented them from doing so, this was incorrect because the call restricted applications to candidates with at least five years experience in generation operations and maintenance and projects.

The Union insisted that duties associated with the positions of Specialist Engineer/Assistant Manager, Projects and Assistant Manager at the Delimara Power Station were different in the sense that the first position was related to project work whereas the second position concerned operational and maintenance tasks. The Union also challenged the Corporation's claim that the duties of the Specialist Engineer deployed as Assistant Manager at the Delimara Power Station had not been changed because this person had never before been assigned tasks that featured in the job description in the June 2009 call for applications for this position and this confirmed that this was no mere transfer as Enemalta implied.

The Union explained to the Ombudsman that in view of its particular organization structure, Enemalta Corporation always issued specific job advertisements because otherwise management would be able to fill engineering vacancies that occur from time to time in a horizontal manner and block the career path of Enemalta engineers. This explained the Union's disapproval of Enemalta's new practice that it considered unacceptable whereby unlike previous applications, calls for applications to fill engineering

vacancies were too generic and gave no indication in which power station the selected employee would be deployed. The Union stated that the call for applications for Assistant Manager at Delimara in June 2009 was a case in point and added that Enemalta's policy for the filling of vacancies was characterized by a lack of transparency that was causing a lot of uncertainty and lack of motivation as well as loss of morale among its members.

To further substantiate its claims of inconsistency the Union referred to previous calls for applications for a particular position where candidates were required to be in possession of a university degree whereas in a recent call for the same position applicants needed a diploma on the understanding that the Corporation would then sponsor the selected candidate/s to acquire a first degree. Even the years of work experience considered necessary by Enemalta to enable candidates to apply for certain positions varied considerably; and whereas in August 2007 an applicant for an Assistant Manager post in the Generation Division required a minimum of five years experience in generation operations and maintenance and projects, in June 2009 an applicant for a similar Assistant Manager post was expected to possess at least ten years experience.

The Union concluded that these arbitrary changes in the number of years of work experience and qualifications that were required gave the distinct impression that the Corporation was issuing calls for applications that were tailor-made in a way that would accommodate certain individuals.

The Corporation rejected these charges and insisted that its recruitment policies were meant to allow the opportunity to the largest number of employees to apply for vacancies that arose from time to time. It explained that its recent calls for applications in engineering posts were non-specific and purposely designed with no reference to any particular project or power station to allow management the possibility to deploy employees on any project in its vast ongoing development programme for the generation and supply of electricity.

The Corporation continued to insist that there was nothing in the employment contract of its Assistant Managers (formerly Specialist Engineers) that prevented management from transferring them from one section to another in the light of work exigencies.

The Corporation, while admitting that its recent calls for applications were broad in scope, explained that in the past its engineers could submit an application in response to every call that was issued, regardless of whether they were posted at Delimara, Marsa or Gozo. The Corporation explained that with the Marsa Power Station due to be phased out, its calls for applications could not be specific and linked exclusively to any one power station so as to ensure that selected candidates could be deployed in any one of its power stations according to its exigencies.

Considerations by the Ombudsman

The Ombudsman noted that the Enemalta Professional Officers' Union was concerned that the career advancement of engineers who were its members was obstructed when the Corporation filled the post of Assistant Manager at the Delimara Power Station by a Specialist Engineer instead of issuing a call for applications. The Union held that this action was abusive on the grounds that even if not in a formal manner, in practice the Corporation filled this position without following procedures laid down in the Collective Agreement for the filling of engineering vacancies. The Union criticized the Corporation's failure to issue a call for applications and insisted that a proper selection process would have allowed engineers interested in this position the opportunity to apply.

The Ombudsman also noted that although the Corporation initially denied that the newly-appointed Specialist Engineer was performing duties as Assistant Manager at the Delimara Power Station, it subsequently changed tack and claimed that it was within its rights to transfer employees from one location to another according to its exigencies so long as their employment conditions were not changed. The Corporation stated that the possibility of transferring employees from one location to another appeared expressly in the work contracts of Specialist Engineers.

Referring to the job description in the original call for applications for Specialist Engineers, the Ombudsman noted that this document indicated that successful applicants would be assigned project management duties on Enemalta's major electrical generation projects and that, as the Union correctly pointed out, these candidates would fall under the direct line of

command of, and report to, the Corporation's Projects Manager and not the Manager, Delimara Power Station. Besides, this Circular gave no indication that selected candidates could be transferred to other sections of the Corporation.

The Ombudsman noted that this job description made it clear that in addition to being required to "*ensure proper management of projects within the Generation Section*", successful applicants were also expected, among other tasks, to:

"*… perform duties of coordinator or project manager as required by management on major electrical generation projects;*
*… carry out site work and supervision of electrical power generation, protection and control of projects; (*and*)*
… keep proper and timely records related to the projects falling under his responsibility."

With regard to the experience needed to enable Enemalta engineers to apply for the position of Specialist Engineer, the Ombudsman noted that the call for applications demanded a "*minimum of five years experience in generation operations and maintenance and projects*." This made it abundantly clear that to be eligible an applicant needed to have experience in project work and that engineers who were not involved in project work did not possess the necessary experience to apply.

On the other hand, however, since for the position of Assistant Manager at the Delimara Power Station no experience in project work was necessary, this meant that engineers experienced in generation operations and maintenance would have been eligible to apply if a call for applications had been issued for this position. This was confirmed by the call for applications issued in June 2009 to fill officially the position of Assistant Manager (Generation) where the experience that was required of applicants was limited to "*generation operations and maintenance*".

From a review of these developments as well as from an admission by Enemalta management, it resulted to the Ombudsman that an engineer who was appointed Specialist Engineer had in fact always served as Assistant

Manager at the Delimara Power Station even though for several months the Corporation denied that this person performed these duties.

The Ombudsman accepted that it is the prerogative of Enemalta management to transfer employees according to the exigencies of the Corporation in order to make the most efficient use of its manpower resources. He ruled, however, that there were clear indications that this case did not involve simply the movement of staff from one division to another and that the Corporation had filled a vacant position without following the correct procedures for the filling of vacancies. As a result engineers who might have been interested in submitting an application to fill this position were denied the opportunity to apply. Although Enemalta tried to remedy this situation in June 2009 when it issued a call for applications for the position of Assistant Manager (Generation), this decision did not alter the fact that previously the Corporation chose not to follow proper procedures for the filling of vacant positions and was guilty of maladministration.

The Ombudsman referred to Enemalta's view that it was entitled to deploy a Specialist Engineer as Assistant Manager at Delimara because this move did not affect the employment conditions or prospects of this employee. The Ombudsman, however, ruled that this only applied insofar as the newly appointed Specialist Engineers were concerned because their employment contract gave Enemalta the right to change their position "*to that of any analogous position according to the exigencies of the Corporation*."

The Ombudsman commented that the flexibility introduced in the employment contract of Specialist Engineers did not feature in the call for applications published earlier for these positions. This meant that it was possible that Enemalta engineers who possessed the right blend of experience referred to in the call for applications but not involved in project work, did not apply because they considered themselves ineligible.

In the light of conditions in the employment contract of Specialist Engineers and despite the Corporation's insistence that there was no official approval to fill the vacancy of Assistant Manager at the Delimara Power Station, the Ombudsman could not but reach the conclusion that when the Corporation issued the call for applications for Specialist Engineers in 2006 it already

intended to detail one of them to perform duty as Assistant Manager of the Delimara Power Station.

The Ombudsman went on to point out that his investigation revealed that even after the process launched in June 2009 to select an Assistant Manager for the Delimara Power Station came to an end and the successful applicant was appointed to this position, the Specialist Engineer who had been performing the duties of Assistant Manager at the Delimara Power Station continued to perform his duties there. This meant that while the Ombudsman's investigation was in hand there were two Assistant Managers at the Delimara Power Station who were carrying out tasks previously entrusted to one person.

The Ombudsman also felt that it was opportune to comment on the change in the designation of Specialist Engineers to Assistant Managers only one year after they were appointed to these positions. Having recalled that the Corporation did not deny that it adopted this new designation to counter the Union's decision to change its statute so that it would still be able to represent them, at the same time the Ombudsman took note of the explanation by Enemalta that this change in designation was attributable to operational requirements and also to the fact that their salary was at par with that of the Assistant Managers.

Taking everything into account, the Ombudsman was of the opinion that this explanation by the Corporation was justified, particularly in view of the fact that during a meeting between Enemalta management and representatives of the Union in July 2007 it was agreed that Specialist Engineers could still continue to be represented individually by the Enemalta Professional Officers' Union.

The Ombudsman observed that another issue raised by the Union concerned the Corporation's recent policy to issue calls for applications for engineering positions that in its view were too generic and failed to indicate the power station where the successful applicant would be deployed. According to the Union these open calls made it possible to select an applicant from one of Enemalta's power stations and deploy this successful candidate to a different facility and insisted that calls for applications should be linked to a specific power station because otherwise in the event of a vacancy the Corporation

would be free to move its engineers in a horizontal manner and deny them openings for promotion. The Union also complained that its members were being given the impression that the years of experience as well as qualifications that were requested in calls for applications were being changed arbitrarily in order to give an edge to certain employees.

On the other hand Enemalta management explained that changes in calls for applications reflected the Corporation's changing exigencies and that it could not agree that calls for applications should be linked to a particular power station especially at a time when the Marsa power station is due to be decommissioned.

In his Final Opinion the Ombudsman commented that every organization aims to make the best use of its manpower resources and it is understandable that recruitment procedures and employment conditions vary from time to time. It is also the duty of management to ensure that its workforce is not larger than is required. He went on to point out that although this issue was strictly speaking a management issue that concerned the field of industrial relations, he was of the view that there were no incorrect or unfair overtones in the Corporation's decision not to limit the call for applications to any particular power station. He therefore ruled that every Enemalta Corporation employee in possession of qualifications mentioned in a call for applications should be allowed to apply regardless of the power station where the employee is posted and where the vacancy exists.

The Ombudsman further opined that transfers of Managers from one of Enemalta's sections to another section are acceptable and cannot be considered as irregular as long as all employees in the grade who qualify for any such transfers are aware of these openings and allowed to submit their application for these posts.

The Ombudsman finally pointed out that his Office does not have the mandate to oversee requisites demanded by a public corporation to fill a vacancy that occurs amongst its workforce. Neither is he mandated to scrutinize criteria applied by a public authority in its call for applications as long

the Ombudsman does not have the mandate to oversee requisites demanded by a public corporation to fill a vacancy

as these criteria are made known and agreed upon before the selection process gets under way and applied in a uniform manner. Nonetheless the Ombudsman declared that the Union failed to prove its allegation that the selection process had been manipulated so as to favour certain employees and subject others to improper discrimination.

Conclusions

The Ombudsman concluded that on the basis of the evidence that he had found, he believed that the Union's main grievance that Enemalta Corporation acted in an abusive manner when it filled a vacancy without following the agreed procedures, had been substantiated. Having said this, however, given that while his investigation of this grievance was under way the Corporation issued a call for applications to fill the vacancy of Assistant Manager, the Ombudsman was of the opinion that it was not necessary to recommend a remedy.

However, in order to ensure a more transparent backdrop whenever the Corporation took similar decisions, the Ombudsman recommended that in future calls for applications Enemalta Corporation should make it clear that successful applicants can be asked to fill an analogous position according to the exigencies of the Corporation. He also recommended that calls for applications would consequently no longer be restricted to experience in any particular specialization.

University Ombudsman

Case No UJ 051

MALTA COLLEGE OF ARTS, SCIENCE AND TECHNOLOGY

The launch of a new degree programme that brought anguish to five students without the necessary entry requirements

The complaint

The University Ombudsman received a multiple complaint lodged jointly by five students at the Malta College of Arts, Science and Technology (MCAST) who had just successfully completed a two-year course leading to the Higher National Diploma (HND) in Business and Commerce in July 2009. These students alleged that they had been treated unfairly when they were denied admission to a degree course that was being launched in October 2009 by the College for students who had followed this HND course.

According to complainants MCAST failed to give them sufficient notice to prepare themselves for and to attain the required grades for entry to the new course leading to the degree of Bachelor of Arts (Honours) in Business Enterprise when this course was announced. In their view their predicament was exacerbated when the College turned down their request for a special concession to join this course with insufficient entry grades on the understanding that within an agreed period they make up for their lack of the required entry qualifications.

Facts and findings

The University Ombudsman found that when MCAST launched its 2008-2009 prospectus, it announced that the HND course could eventually lead successful students to proceed to a degree programme. In fact the course leading to Bachelor of Arts (Honours) in Business Enterprise commenced in October 2009 when students who in July 2009 had completed successfully

the HND in Business and Commerce with sufficiently high grades were eligible to proceed to this degree course as final year students. Whereas six HND students were able to proceed with their degree studies without delay, the five complainants were unable to do so because they lacked the necessary grades for entry to this course.

When these students drew the attention of MCAST to their dilemma, in order to assist them and to make it possible for them to join the degree course the College authorities agreed to introduce, as a one time concession, a "*grandfather clause*" whereby students could either repeat the final year of their HND course in order to bring their grades up to the level of the entry requirements for this degree course or, if they decided not to follow this option and preferred instead to take up employment, the College would recognize and credit them for up to four years relevant work experience under certain conditions.

The five students, however, rejected both options and argued that if they had known earlier of the entry requirements for the planned honours degree programme in business enterprise, they would have applied all their energy and concentrated on meeting these requirements. They also claimed that it was likely that as from October 2009 the grading regime in the HND course might have been rendered less demanding so as to make it easier for future students to qualify for entry to this degree course; and this implied that they had to face course standards that were higher than those set for subsequent years.

Observations and comments

The University Ombudsman observed unhesitatingly in his Final Report that the first line of complainants' argument was flawed. Students in all levels, and especially in tertiary level institutions, are expected to do their best and perform at the highest possible level in order to derive the maximum benefit from their endeavours and to achieve the best possible results. Students should aim for the best grades and seek to

students should aim for the best grades and seek to attain the highest intrinsic values from their efforts

attain the highest intrinsic values from their academic efforts regardless of whether courses which they attend lead them to a specific qualification or whether they would help to open for them the door leading to higher level courses and qualifications such as, in this case, a degree course.

The University Ombudsman pointed out that students are duty bound to apply their energy in all instances and to do their utmost to obtain the best possible results and grades regardless of whether upon their termination their courses hold prospects of leading to a degree programme or whether the requirements leading to entry to a degree course have already been announced or not. The University Ombudsman said that linking students' performance to expectations of what course options lay in store for them upon successful conclusion of their studies was unacceptable.

The University Ombudsman went on to point out that in this particular case it was clear that students ought to have been aware of the possibility of progressing to a degree course since this option had already been announced in mid-2008 and this meant that they had the whole of the 2008-2009 academic year in which to strive to get the best possible grades that would have allowed them direct access to the degree programme in Business Enterprise that was being promoted by MCAST. The University Ombudsman pointed out that this gave students more than ample opportunity to prepare themselves for this programme especially if they really meant to follow this course in the first place.

The University Ombudsman also found that the MCAST Principal vigorously refuted the implication by complainants that HND assessment procedures and standards would be lowered as from 2009. The Principal stated that on the contrary, the aim of the College is to improve HND standards even further precisely because it wants students at this level to enhance their chance of success when they progress to degree level work. He argued that it was indeed this concern that prompted the Council of Institutes of the College to reject complainants' request to join the course with insufficient entry grades since this was likely to lead to a lowering of course standards. It was in fact for this purpose that the College authorities decided to provide them with a one-time opportunity to improve their grades by repeating the final year of their HND course.

The University Ombudsman also noted that complainants faulted MCAST for not having applied a two-year notice before the launch of the degree course in question. He observed, however, that the two-year notice is a provision that is applicable to the University of Malta and not to MCAST. Furthermore the University applies this proviso when it is feared that the introduction of new regulations is likely to affect adversely *bona fide* students but not when new regulations are expected to act in students' favour.

The University Ombudsman explained that in this instance the decision by MCAST to launch this degree programme in 2009 was meant to be in the best interest of students by providing two sets of student cohorts – the October 2009 and October 2010 intakes – with the opportunity to proceed with their studies for a higher qualification. While complainants themselves too would have benefited from these arrangements had they been in possession of the entry requirements, at the same time it would have been manifestly unjust to deny other prospective students this opportunity had the College applied the proviso of a two-year notice period as complainants had proposed. In any event the University Ombudsman explained that since MCAST is not bound by any two-year notice regulation prior to the launching of a new course, the College had acted in full respect of its procedures and had not breached any of its own rules.

Complainants also argued that as an alternative MCAST ought to have announced the start of the degree course two years prior to its launch in October 2009. Although the University Ombudsman agreed that this would have been advisable, the College Principal assured him that the decision to launch the course was reached when the academic management of the College felt that the institution was properly equipped to handle this course and the academic course work had been developed. The launch only took place when the College had the necessary human and financial resources to run the programme properly.

According to the University Ombudsman, MCAST authorities had argued, correctly in his opinion, that it would have been academically irresponsible and administratively unacceptable for the College to offer the degree programme to students before the necessary preparations were complete and the institution was in a position to ensure that students enrolling for the course would be given a proper academic grounding in all subjects covered

by this degree course.

The University Ombudsman noted that in their reply to the proposal by MCAST that they should repeat the final year of their HND course to acquire a solid foundation for their degree programme, complainants requested instead that they be allowed to follow the final year of this course in two academic years instead of one. MCAST Principal, however, had turned down this suggestion on the grounds that College regulations do not allow for this concession.

The Principal of the College continued to maintain that it would be in the best interest of complainants if they were to proceed to the degree programme when they were already in possession of the required grades since this would allow them to stand a better chance of progressing through their course smoothly rather than face the risk of having to struggle through their studies because of weak academic foundations in the subjects covered by the programme. The University Ombudsman supported the Principal's position on this issue.

With regard to complainant's claim that they were treated in an unreasonable manner by the College authorities because they failed to put into effect transitory measures that would have made it possible for them to follow the degree programme, the University Ombudsman held that this claim was inaccurate. MCAST management had on purpose introduced the so-called "*grandfather clause*" which in effect was nothing else but a concession aimed solely at making it possible for complainants to proceed with their studies without lowering the course's academic standards or jeopardising recognition of the new degree programme. The University Ombudsman stated that once it was complainants themselves who freely decided not to benefit from this special concession, there was nothing else that he could do regarding this aspect of their grievance.

After having taken carefully into account the views expressed by complainants and by the College authorities, the University Ombudsman concluded that complainants' claim that MCAST treated them unfairly and showed discrimination towards them was untenable. There was no evidence to suggest that the College acted through flawed academic or administrative measures to exclude them from joining the degree programme of their choice

or in any way hindered them from pursuing further studies. Indeed, even though they did not possess the required passes of a sufficiently high grade, MCAST had offered them, through an extra year of study, an academically acceptable method to upgrade their credentials in order to be in a better position to pursue the degree course with profit.

The University Ombudsman also discarded the claim by complainants that the College had acted against its own rules or regulations.

Recommendations by the University Ombudsman

The University Ombudsman concluded his Final Opinion on this grievance by pointing out that in his two meetings with complainants he was most favourably impressed by their genuine interest and enthusiasm to proceed with their studies. In view of this, once their grievances were untenable, the University Ombudsman strongly advised them to reconsider MCAST's offer to repeat the final year of their HND course in order to improve their grades for entry in the degree course in October 2010 and enhance their prospects of a successful conclusion of their studies for a bachelor's degree in Business Enterprise. He advised them not to dismiss the additional year that was offered to them by MACST as a wasted year but to regard it as a necessary step that would improve their chances of success in their final academic year. This was a one-time opportunity that they should not allow to go to waste.

During a second meeting between the University Ombudsman and complainants at which the MCAST Principal was also present, the Principal agreed that even though the 2009/2010 academic year had already started, complainants who opted to repeat the final HND year would still be allowed to join the course as long as this offer would be taken without any further delay. He explained that he believed that complainants would not find it difficult to catch up even if they were to join at a stage when a couple of months had already gone by since to a large extent they had already done the studies that are associated with this year.

At this stage the University Ombudsman encouraged the College authorities to give utmost attention to these students throughout their repeat year should

they decide to take up the offer since this attitude should serve to improve complainants' morale which at that time seemed to be at a rather low ebb.

Case No UJ 069

MALTA COLLEGE OF ARTS, SCIENCE AND TECHNOLOGY

The ICT Lecturer who claimed automatic progression on the strength of her MBA from the Maastricht School of Management

The complaint

A Lecturer in Information and Communications Technology at the Malta College of Arts, Science and Technology (MCAST), on a part-time basis since 2002 and on a full-time basis since 2006, alleged that she was a victim of discrimination when MCAST management declined her request for automatic progression to a Senior Lecturer I post.

Claiming that the decision by the College not to acknowledge her Masters in Business Administration (MBA) for the purpose of career progression was unfair and meant that she was being deprived unjustly of a promotion with substantial financial loss, complainant was even more aggrieved when her appeal against this decision went unheeded.

Faced with this situation, complainant enlisted the support of the Malta Union of Teachers (MUT) to lodge a complaint with the Office of the University Ombudsman on her behalf. Besides presenting her case, the Union pointed out that the disregard shown by the College towards complainant's request for an appeal hearing ran counter to the Collective Agreement between the MUT and MCAST.

Facts and findings by the University Ombudsman

When the University Ombudsman delved deeper into complainant's academic credentials, he found that besides her B.Sc. (Business and Computing) and her Postgraduate Certificate of Education from the University of Malta,

complainant obtained in 1999 a Master's degree in Business Administration (MBA) with distinction from the Maastricht School of Management. In July 2009 the Maltese educational authorities declared an MBA awarded by this School as a recognized programme of post-graduate studies in management under Level 7 of the Malta Qualifications Framework of Lifelong Learning and the European Qualifications Framework. Complainant also had more than five years' full time experience as IT Systems Analyst with the Maltese government agency for information technology.

In November 2008 complainant applied for progression from Lecturer to Senior Lecturer I on the basis of section 6.3 of the Collective Agreement that states as follows:

"*6.3 (i) Minimum qualifications for appointment to the Senior Lecturer I grade shall be:*
(a) relevant first and masters degrees together with a professional teacher training qualification and at least five years full-time relevant and appropriate lecturing and/or industrial experience."

Section 6.8 of this Agreement also states that: "*It is the prerogative of the College to decide whether such qualifications are relevant to the duties pertaining the employee*."

The University Ombudsman found that in July 2009 MCAST Principal turned down complainant's application on the grounds that her MBA was "*first and foremost a management degree*" and was not therefore considered directly relevant to her ICT lecturing duties at the College. The Principal, however, went on to inform complainant that she would continue to benefit from the annual qualification allowance of €700 "*which is intended specifically to reward the efforts of those employees who choose to undertake further studies in fields which are not directly related to their duties at the College*." This award also reflected section 6.8 (j) of the Collective Agreement.

Notwithstanding the appeal in September 2009 by the Malta Union of Teachers on behalf of complainant against the Principal's decision, MCAST management failed to reply and this led the Union to approach the Office of the University Ombudsman.

Observations by the University Ombudsman

The University Ombudsman observed that he had already dealt with similar complaints regarding automatic progression from MCAST staff and pointed out that in these cases he always maintained the same position – namely, that it is not his remit to evaluate complainants' qualifications and decide whether a specific qualification is relevant to their lecturing duties. He noted that according to the Collective Agreement this task falls directly on the College authorities who in turn delegated it to the College Principal.

in complaints regarding MCAST staff it is not the remit of the University Ombudsman to decide whether specific qualifications are relevant to their lecturing duties

The University Ombudsman commented that in a similar complaint that he had considered earlier, he had pointed out that in his view it was not only unreasonable but also unrealistic to expect the Principal of the College to reach a decision on each similar case especially when the academic areas concerned may not fall within his area of competence. He recalled that he had proposed the setting up of a board composed of individuals with diverse academic competences and experiences to deal with similar requests.

The University Ombudsman pointed out that he had been informed that in November 2009 MCAST authorities had accepted this recommendation and had set up a Progression Board to deal specifically with requests that were similar to the one that was covered by this complaint.

Conclusion and recommendation

In view of the above the University Ombudsman concluded that complainant was entitled to an appeal hearing and he recommended that her appeal should be considered and determined by the newly established Progression Board. A few weeks after the submission of the Final Opinion by the University Ombudsman the Progression Board met to reconsider complainant's application for progression.

Guided by its view that "*for a degree to be deemed relevant, …. at least 60% of the programme content must be made up of modules that are exclusively and unequivocally related to the subject that the candidate was originally employed to teach*", the Progression Board reached the conclusion that since complainant's area of teaching was ICT while her MBA is a degree designed to enhance management skills, she was not eligible for progression to the grade of Senior Lecturer I.

Case No UK 002

UNIVERSITY OF MALTA

There is no such thing as a guaranteed pass in a university test

The complaint

A graduate with an honours degree in German from the University of London lodged a complaint with the University Ombudsman to protest against the decision by the University of Malta to refuse him entry to a course leading to a master's degree in Interpreting.

Complainant was taken aback by this decision. He had been working on a part-time basis on written translations for no less than five years and between January 2006 and January 2007 he had successfully completed a one-year course at the University of Malta that led to the award of a Certificate in Translation. In September 2006 he had also applied to join a two-year part-time evening course leading to a master's degree in Interpreting and after sitting for an aptitude test in which he was successful, he was due to join the course in October 2006.

It was at this stage, however, that complainant was faced with a dilemma since university regulations prohibit double registration and do not allow a student to enrol in two different courses simultaneously. Although some exceptions are allowed in day courses, this rule is applied rigorously in part-time evening courses since students are considered unable to cope well with the demands of full-time employment and the academic work of two concurrent courses. In view of this regulation, complainant opted to proceed with the Certificate in Translation course and relinquished his place in the master's course in Interpreting.

Subsequent to the University's decision to offer the master's course in Interpreting as a day course on a full-time basis, complainant re-applied to join this course in September 2008 and September 2009 but on both

occasions he failed the aptitude test. This led him to lodge a complaint against the university authorities where he claimed that the institution treated him unfairly when twice he was refused entry in this course.

Complainant also claimed that the student selection process that was based on an aptitude test was flawed and that the University failed to provide him with sufficient information about his performance in this test.

Findings by the University Ombudsman

Following a request by the University Ombudsman for an explanation about these grievances, the Pro-Rector for Students' and Institutional Affairs explained that an aptitude test for students who wish to join a course in Interpreting consists of two memory tests where examiners deliver two 3-minute speeches in English and Maltese which applicants have to reproduce without having been allowed to take any notes during their delivery. It was also explained that during an applicant's presentation the selection board considers such aspects as language competence, memory, communicative skills and personality and that at the end of their test candidates are judged on whether they had performed well enough to be considered eligible to join the course.

With regard to complainant's performance during his aptitude test the University Ombudsman found that according to the Chairman of the Aptitude Test Board complainant performed well in the Maltese section of the test but rather badly in the English section.

The University Ombudsman also found during his investigation on this complaint that it is the usual practice every year for the Head of Department of Translation and Interpreting Studies to chair the Aptitude Test Board accompanied by a staff member of the same department as well as external examiners from the Directorate General for Interpretation of the European Commission (SCIC) that partly finances this course. The University Ombudsman ascertained that members of this Board were unanimous in their conclusion that complainant did not show any communicative competence and aptitude and that since on the whole his performance was not of an acceptable standard, he should not be allowed to join the course.

University records showed that following the publication of the results of an aptitude test held in September 2009, complainant protested about the outcome and on 23 October 2009 he requested the University Registrar to provide him with details about his performance during this test. The Registrar passed on this information to him in an email on 11 January 2010.

Complainant was, however, unimpressed. Arguing that he had already been successful in a similar test in 2006, he cast doubts on the validity of the 2008 and 2009 tests and deplored the lack of an established protocol with procedures for the submission of appeals to a review or appeals board especially since he claimed, falsely as it later turned out, that these tests had been audio-taped.

Observations by the University Ombudsman

The University Ombudsman took note of complainant's conviction that the Aptitude Test Board refused him entry to the 2008 and 2009 intakes because he had earlier declined a place in the student intake for the course that started in October 2006. Although the university authorities rejected this accusation, the University Ombudsman was of the opinion that taking into account complainant's previous experience, it was not inconceivable that the assessors on the selection board nourished doubts on the degree of his commitment when he sat for these tests.

By contrast the University Ombudsman took a different view and argued that since complainant had applied for a third time, this could be taken to signify his sheer determination to follow this course. This perseverance by complainant was in fact acknowledged by the Board as a positive indication of his strong resolve to follow these studies.

The University Ombudsman also took due note of the fact that following complainant's failure in his second and third attempts, the Chairman of the Aptitude Test Board had shown a positive attitude towards him and confirmed the absence of any rancour or ill feeling on his part towards complainant by offering him advice and guidance as well as pedagogical material to help him perform better should he decide to sit for an aptitude test for a fourth time. Although in turn this led complainant to admit that this positive attitude was

in sharp contrast with his allegations that members of the Board had shown a hostile attitude towards him, however, he still continued to harbour the view that once he was already successful in an earlier aptitude test it was a foregone conclusion that he would again be successful in any other similar test in future.

The University Ombudsman commented that it is not his remit to judge the performance of a candidate during any form of examination or test since this task should best be left to the competent bodies who are appointed and mandated to do so by the University. He went on to state, however, that undoubtedly in this case the Aptitude Test Board was properly constituted and there was evidence to suggest that this Board had carried out the selection process according to set criteria.

it is not the remit of the University Ombudsman to judge the performance of a candidate during an examination since this task should best be left to the competent bodies appointed by the University

In this connection the University Ombudsman pointed out to complainant's admission that he was aware that while he performed well in the Maltese section of the aptitude test, he had not performed so well in the English section while complainant himself had also acknowledged that translation and interpreting require different skills and aptitudes. In this connection the fact that complainant had extensive experience in translation work, having been engaged in this activity for several years, gained added significance.

In view of these considerations the University Ombudsman ruled that he could find no evidence that complainant was treated unfairly or had been discriminated against. Consequently he ruled that his first complaint was not justified.

The University Ombudsman was also of the opinion that the aptitude tests as well as the selection process were both conducted within the norms of such exercises. The set tasks were standard for all candidates while evaluation criteria and procedures too were uniform. In addition the University Ombudsman found that all applicants were provided with written instructions on the conduct of the aptitude test prior to the sitting. This meant that

complainant's assertion that the selection process lacked accountability and transparency and that he had been the victim of discrimination had not been sustained in any way.

The University Ombudsman also found that although complainant verbally aired his misgivings about the selection process in various quarters, he had only done so in writing to the university authorities on 23 October 2009. The University Registrar answered on 11 January 2010 and dealt with all aspects of his grievance in a comprehensive manner including full details on the evaluation of his performance during the aptitude test.

The University Ombudsman, while admitting that the University took a rather long time to provide complainant with this information, nevertheless observed that the Registrar's answer was sufficiently detailed and to the point; and taking everything into account this led him to believe that there was no evidence that the university authorities had ever tried to hold back any information or failed to provide the requested details within a reasonable time considering in particular that the Christmas recess fell between the dates when complainant submitted his written grievance to the university authorities and their reply.

Conclusion

The University Ombudsman admitted that to some extent he understood and sympathized with complainant's expectation that once he was already selected to join the master's course in Interpreting in October 2006, any other aptitude test ought to have been plain sailing for him in subsequent years. This conclusion, however, does not necessarily follow and things ought not to be taken for granted in this manner.

The University Ombudsman pointed out that although the structure of the three aptitude tests was similar, the passages that complainant had to deal with in fact were very different. Each and every test has its own dynamics and candidates are known to act and to react to them differently – and this explains why their performance varies. In this instance the University Ombudsman also took into account an important factor – in his view it was

highly significant that all the assessors in complainant's test, including two external assessors, were unanimous in their judgement that complainant's performance was not up to standard in both the 2008 and 2009 tests.

The University Ombudsman also concluded that the University of Malta did not treat complainant badly or had shown any discrimination towards him in the least. There was likewise no evidence that the selection process for the course in question had been tainted in that it lacked accountability and transparency. There was also no evidence that the University failed to provide him with the information that he sought or that there was an excessive delay before it did so. Consequently complainant's allegations were rejected.

At the same time the University Ombudsman recommended to the university authorities that the selection process for this course should be rendered more robust. For this to happen the University should ensure that its assessment procedures would be structured in such a way that specific values are allocated to the different criteria so that candidates would then be assessed on every criterion, leading to an accumulated final mark. This system would serve to enhance further the credibility and transparency of the whole process and also ensure that a verifiable Fail/Pass list would be established together with a clear and final order of merit of all successful candidates.

Shortly afterwards the Department of Translation and Interpreting Studies took up the recommendations of the University Ombudsman and restructured the assessment criteria as well as the marking system in aptitude tests for the selection of applicants for admission to courses in this department.

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)*
Annual Report 2008	*Rapport Annwali 2008 (fil-qosor)*
Annual Report 2009	*Rapport Annwali 2009 (fil-qosor)*

Case Notes

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