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CASE NOTES

OFFICE OF THE **OMBUDSMAN** MALTA

Ombudsman

CASE NOTES

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Foreword

The Ombudsman's efforts to put right issues that might cause concern, hardship or injustice to citizens are the very essence of his work. Besides solving individual cases the Ombudsman's work should, however, be of wider benefit to the community as a whole and leave a stronger impact.

It is accepted that if recommendations and remedies proposed by the Ombudsman to correct injustice, discrimination or unfair treatment remain within the confines of his institution and of the public bodies that are involved, the demonstrative aspect of his work would be hugely displaced. This is the purpose behind this publication – to capture the Ombudsman's suggestions in favour of good governance and use these instances as a backdrop to promote and publicize the norms of good administration and guide the leaders of public administration along the path of accountable, transparent and fair practice.

This publication, the thirty-first issue in the long series of case summaries that is issued biannually by my Office, sets out several narratives which besides making interesting and often compelling reading, demonstrate at times good practice that deserves and earns the Ombudsman's approval and on other occasions administrative practice that, on the contrary, is less proper and deserves and earns the Ombudsman's criticism. Complaints in this latter category frequently serve to mirror attitudes, actions, decisions, and occasionally policies, by people holding public office that ought to be discarded, improved or remedied in the public interest.

The main aim of public service delivery remains an approach geared to a customer-friendly relationship that is efficient, receptive and open to the needs and demands of the community and constantly mindful of the fact that citizens and their welfare should lie at the core of the work of public officers in their daily duties.

This publication is meant to ensure that lessons that can be learned from this institution's casework are given recognition and put on record and brought to the notice of the community. This exercise is beneficial to the country at large, to citizens, to public authorities and, not least, to the institution itself.

Every edition of **Case Notes** is in fact a living testament to the Ombudsman's drive to support the national commitment towards good governance, to stamp out inefficiency and injustice and to nurture a customer-oriented mentality among providers of public service.

This Office is determined, with the full assistance of its stakeholders, to maintain the standards of its investigative work and respond to all complainants who seek its help, not only those with justified grievances but also those whose grievances are not found to provide any basis of administrative fault or service failure.

As in recent editions of **Case Notes**, this publication also contains the summaries of three complaints that were investigated by the University Ombudsman. Since it was housed in my Office, the Office of the University Ombudsman has proved itself as a perfect fit and has increased its accessibility in no small way. I am sure that with his valuable work Professor Charles Farrugia is contributing towards charting improvements in both policy and practice in the field of tertiary education in the country.

Joseph Said Pullicino
Ombudsman

April 2011

Note

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

Parliamentary Ombudsman

Case No H 194

HEALTH DIVISION

Obscure allegations of sexual harassment

The complaint

Jack Ferrini, an employee with overall responsibility for the running of a section in the Health Division, reported to the Office of the Ombudsman that after allegations of sexual harassment were levelled against him, he was subjected to a departmental investigation. However, even though upon its conclusion no disciplinary action was taken against him, he still lost the trust of his superiors and was transferred to another section. Ferrini felt that in this way he had been effectively punished because his prospects of career advancement that were relatively bright before this incident, were severely prejudiced.

Complainant maintained that the health authorities denied his right to a fair hearing because he was not given any information on the accusation that he was due to face reasonably in advance and was unable to prepare himself to deny these charges. Furthermore, throughout the hearing he was not warned about the seriousness of these allegations about his conduct and was not told of his right to seek legal assistance.

Complainant claimed that the government's policy on investigations on allegations of sexual harassment had not been followed. As a result his rights were trampled upon and he was not even given a copy of the final report by the board of inquiry when the investigation was concluded.

The Health Division maintained that the government's updated policy on sexual harassment was not applicable in this case because the allegations concerned an episode that happened before this policy took effect on 7 November 2006. Furthermore, since it was not the alleged victim who lodged the report of the incident as required by this policy and once the

person who raised the allegations withdrew the report a few days later, this case was not considered to fall under the government's policy on sexual harassment. Instead an internal administrative investigation took place where the provisions of this policy were not applicable.

The health authorities asserted that in line with procedures in administrative investigations, they were not prepared to release to the person at the centre of the allegations a copy of the letter that sparked off the whole issue although he was duly told of its contents. They also refused to hand him a copy of the final report on this case because they were adamant that he was not entitled to have access to this document.

The Health Division rejected Ferrini's claim that he was advised that he did not need legal assistance and stated that on the contrary he was warned that he was entitled to safeguard his own interest. The Division went on to explain that although in line with the recommendations of the board of inquiry complainant and the other employee involved in this incident were transferred from their former place of work, complainant's career advancement was not prejudiced and his promotion prospects had not been dented. In fact soon after this incident he was chosen to fill a higher position in the Division although he turned down this promotion for personal reasons.

Facts of the case

In the course of his investigation the Ombudsman found that on 25 October 2006 the Chairperson of an *ad hoc* board wrote to inform Ferrini that the Health Division had appointed him to lead an administrative inquiry to establish the facts regarding allegations raised against him by an employee who worked in his section. He was asked to attend the first meeting of this board of inquiry and explain how this incident arose.

From complainant's personal file the Ombudsman confirmed that before his appearance in front of this board of inquiry, Ferrini was not given any information about these allegations against his conduct. Neither was he aware of the identity of the person who made them or the identity of the alleged victim while he was also kept uninformed when the alleged abuse took place and other details that were meant to substantiate the charges

against him. It was only during the first meeting of the board that he was informed about allegations of sexual harassment and that he abused of his position to obtain sexual favours from a female subordinate. It was also at this stage that Ferrini became aware of the identity of the person whom he allegedly subjected to sexual abuse.

The Ombudsman noted that Policy Number: HRA/05/P0L2005, first issued in November 2005, defined the sexual harassment policy that applied to all employees in state hospitals and inverted the onus of proof in cases of alleged sexual harassment on the person alleged to have committed the abuse in the sense that it was this person who was required to prove his innocence. Moreover, under this policy a formal report on an alleged instance of sexual harassment had to be signed by the person who claimed to have experienced any such harassment.

On 7 November 2006 while the inquiry was under way, the Management and Personnel Office of the Office of the Prime Minister issued a document captioned ***The Public Service: Guidelines on what constitutes sexual harassment and on the procedures to be adopted in cases of sexual harassment*** that applies to all employees in the public service. Paragraph 11 of the document states that "*On the conclusion of the preliminary investigation, the Head of Department shall send under confidential cover to the complainant and to the alleged harasser a copy of the report showing the outcome of the investigation and indicating any further action being contemplated, if any*." The document also states that "*Both the complainant and the alleged harasser shall have the right to be accompanied at the preliminary investigation by a person of their choice*."

The Ombudsman found that on 20 March 2007 complainant had approched the Health Division to ask for information on developments regarding his case. A few weeks later he was told that a board of inquiry had been set up to investigate allegations of sexual harassment that reached the Health Division. This board had to examine if procedures in complainant's section were followed properly; identify administrative deficiencies; and recommend measures that were necessary to improve the situation. The Division explained that no employee was subjected to any investigation by this board of inquiry.

Considerations by the Ombudsman

In his consideration of this grievance the Ombudsman first examined complainant's claim that his right to a fair hearing had been prejudiced and he was unable to defend himself in a proper manner because he was unaware of the charges against him when he was summoned to appear before the board of inquiry. He also reflected on Ferrini's view that the government's policy on sexual harassment had not been followed because he was not given a copy of the final report of the investigation.

With regard to complainant's claim that he was not given a fair hearing, the Ombudsman noted that when Ferrini was asked to appear before the board he was merely told of an internal administrative inquiry to establish facts regarding allegations against him by an employee in his section. No other details were given in this letter and it was only during the inquiry that he was told that these allegations referred to sexual harassment and that he sought to take undue advantage of his position to obtain sexual favours from a female subordinate whose identity was only revealed at that stage.

The Health Division sought to justify its refusal to give a copy of the final report by the board of inquiry to complainant by stating that allegations of improper conduct by Ferrini referred to September 2006 whereas it was bound to follow the government's policy on sexual harassment that became applicable in November 2006. The Division explained that since it was not the alleged victim but a third party who sent the report and who in any event withdrew this report a week later, the episode was not considered to constitute a case of sexual harassment and instead an internal administrative inquiry had taken place.

*The Ombudsman referred to the fundamental principle that a person who is facing or likely to face an accusation on some misdemeanour should, in a reasonable time before being asked to give evidence, be given details of the allegations of which he stands accused ….. (*and*) ….. be allowed the opportunity to be assisted by a person of trust of his own choice.*

The Ombudsman referred to the fundamental principle that a person who is facing or likely to face an accusation on some misdemeanour should, in a reasonable time before being asked to give evidence, be

given details of the allegations of which he stands accused. Furthermore, a person in this position should be allowed the opportunity to be assisted by a person of trust of his own choice. These rights are laid down in the government policy on cases of sexual harassment.

The Ombudsman commented that although the Health Division denied that Ferrini was advised that he did not need to seek legal assistance, it would certainly have been in the interest of all the persons involved if in its report the board of inquiry specifically indicated that complainant was allowed the opportunity not to answer questions that could have led him to face charges of improper behaviour. The Ombudsman noted that it seemed that complainant had not insisted, as was his right, to have any assistance during the hearing although he denied vigorously the allegations against him and was eventually freed.

The Ombudsman took note of the stand by the Health Division that since this was not an investigation into allegations of sexual harassment but an internal administrative investigation, the official policy on sexual harassment was not applicable. He referred to the views of the Division that since the inquiry was already under way before the policy update in November 2006 that allowed complainant the right to ask for a copy of the report, it was not bound to provide him with this document. The Ombudsman considered these arguments invalid since the updated policy came into effect before the board of inquiry issued its final report on 26 November 2006 while this policy did not exclude investigations that took place earlier.

The Ombudsman also took note of the explanation by the Health Division that it did not consider this case as an investigation into allegations of sexual harassment because it was not the alleged victim who made these allegations. In order to defend its position the Division explained that under its terms of reference the board of inquiry was required to "*assess and investigate the allegations*" in the letter of 19 September 2006 where these accusations first appeared and to "*identify any administrative deficiencies/omissions as a result of your findings*."

According to the Ombudsman, however, the allegations by the third party were explicit and based on an episode of sexual harassment and constituted an essential part of the investigation by the board of inquiry. This led him to

state that on the basis of the board's final report that was made available to his Office, he had no doubt that the board considered the main charge against complainant to be one of sexual harassment.

The Ombudsman observed that from his interpretation of the final report he was inclined to believe that members of the board were unable to reach a definite conclusion that there was any sexual harassment. As a result, while he understood Ferrini's request for a copy of the final report, he appreciated that given the circumstances surrounding this case he could not state that the internal inquiry by the Division and the report by the board fell under the government policy on sexual harassment which states that a copy of the report ought to be given to the alleged harasser.

The Ombudsman referred to Ferrini's lament that he was punished in a way that harmed his prospects of career advancement. The Division did not deny that plans before this incident to allocate higher duties to complainant were shelved subsequent to this episode. Nonetheless, the health authorities denied that his career prospects were wrecked as a result of these events and in fact soon afterwards he was offered a higher position in the Division that he decided to turn down.

The Ombudsman pointed out that an employee has the prerogative to decide whether to accept an opportunity of career advancement and whether a new position is likely to serve him in good stead or not. He went on to comment that from his understanding of the situation he had reason to believe that complainant held high prospects of advancement in his career but these prospects were effectively blocked after allegations arose about him and after the board of inquiry recommended that he should be transferred to another section. This placed him at a disadvantage and his advancement prospects in relation to his other colleagues were dampened.

On Ferrini's plea that an explanation was due to him by the Health Division of the reasons that led to sanctions against him, the Ombudsman stated that he could not blame the Division when it dropped plans to give complainant higher duties and decided not to deploy him any longer in the same workplace as the female employee who was allegedly subjected to his attention while transferring immediately both employees to work elsewhere. In his view the authorities were not only entitled but also obliged to take all the preventive

measures that were necessary since after having given due regard to the circumstances of the case and to the report by the board, he was convinced that the action taken by the Division was justified. However, despite this view and although allegations against complainant were not substantiated and subsequently dropped, the Ombudsman observed that the authorities were still bound to give Ferrini a proper explanation for decisions taken in his regard, in particular negative ones, that prejudiced his career prospects. This is a basic right of all citizens and an integral principle of sound administrative practice.

Recalling that the board of inquiry also had to identify any administrative or procedural shortcomings in the section under complainant's charge that came to light as a result of its work, the Ombudsman pointed out that no evidence was brought forward to back allegations that the work environment in complainant's section reflected serious breaches of professional ethics. As a result, the board was unable to declare unequivocally that there was a lack of proper administration in this section although judging from their recommendations, members might have felt that improvements in operational and management practices were warranted. This led the Ombudsman to state that the health authorities should have asked the board to investigate in greater depth the administrative arrangements and procedures in complainant's section in order to establish precisely whether there were any serious shortcomings.

Further observations by the Ombudsman

At this stage the Ombudsman felt that it would be useful to put forward a few observations on the rules of conduct that are to be applied in delicate situations such as the one that emerged from this complaint.

Safeguarding personal and interpersonal relationships

In principle, personal and interpersonal relationships between individuals and their behaviour towards each other in the emotional and sexual spheres are safeguarded under the mantle of a person's fundamental human right for privacy which is protected by the Constitution of Malta and by article 8 of the

European Convention on Human Rights.[1] It is only in exceptional cases that a public authority can interfere in the exercise of this right or pass judgement on, and subject to its scrutiny, the conduct and behaviour of individuals in these spheres of life.

…… personal and interpersonal relationships between individuals …… are safeguarded under the mantle of a person's fundamental human right for privacy which is protected by the Constitution of Malta and by article 8 of the European Convention on Human Rights. It is only in exceptional cases that a public authority can interfere in the exercise of this right or pass judgement on, and subject to its scrutiny, the conduct and behaviour of individuals in these spheres of life.

Ensuring that citizens are protected from third parties in the exercise of their right to privacy

It follows as a result of this right to privacy that national laws should protect individuals from the actions of third parties who try to intervene, without any authority to do so, in the way that other persons exercise this right. Recent legislative provisions concerning sexual harassment and the government's policy in this field are meant to ensure that individuals are protected properly in the exercise of this fundamental human right.

Eliminating interference by national authorities in the private lives of citizens

A third guiding principle is that there should be the least amount of interference by the public administration in the private lives of citizens and that any such involvement should be the exception rather than the rule, allowable only in situations when it is absolutely necessary to curb abuse or conduct that qualifies as an act of sexual harassment. Any such illegal acts should

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[1] *Article 8 – Right to respect for private and family life of the European Convention on Human Rights* states as follows*:*
"1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

not be allowed or ignored in any circumstances, least of all in a work environment, and the authorities should take decisive action to quell any such unlawful action forthwith. On the other hand, whenever a person's conduct does not qualify as sexual harassment, it is not acceptable for a public authority to intervene since this would amount to a clampdown on behaviour that is not illegal.

…… there should be the least amount of interference by the public administration in the private lives of citizens and … any such involvement should be the exception rather than the rule, allowable only in situations when it is absolutely necessary to curb abuse or conduct that qualifies as an act of sexual harassment.

Furthermore, conduct that does not qualify as sexual harassment but amounts to administrative abuse should be kept in check by the authorities although any such intervention ought to be limited to the administrative shortcoming and not delve into personal relationships of the individual or individuals concerned.

Safeguarding the dignity of employees from sexual harassment

The government's policy on sexual harassment is designed to safeguard the dignity of employees by ensuring that illegal action that would qualify as sexual harassment is not tolerated in any workplace. In order to ensure that investigation of such behaviour is done with the maximum amount of prudence and does not invade the right to privacy of the individuals concerned, this policy lays down in a detailed manner the way in which complaints are to be submitted and procedures to be followed by public authorities in their preliminary investigation of these reports and in any disciplinary action considered necessary on the conclusion of an inquiry.

The next steps in the Ombudsman's investigation

The Ombudsman observed that although the government's policy on sexual harassment was updated a few days after the alleged instance of sexual harassment happened, the public authority involved had the duty nonetheless to establish whether there were any elements of illegal or improper action

before an investigation on allegations of sexual harassment could proceed. In this case the health authorities failed to follow these procedures; and since it was not the alleged victim who made the allegations and at a subsequent stage withdrew them, the whole episode lacked an essential element of sexual harassment that essentially requires a victim who feels harassed to react to such a situation.

According to the Ombudsman, given this background the Health Division should immediately have stopped the investigation of the alleged sexual harassment and informed the person who submitted the report that all his allegations were baseless and that he had no right at all to intervene in the emotional relationship that might have developed between two employees in Ferrini's section who might have been after all consenting adults.

The Ombudsman also declared that although the health authorities asserted that they carried out an internal administrative investigation, he had reason to believe that the terms of reference led members of the board to focus mainly on the alleged instance of sexual harassment rather than on the alleged administrative abuse – administrative abuse that, due to the fact that accusations against complainant included improper conduct during working hours, wrong use of facilities in a public office for personal motives and behaviour and conduct unbecoming in a public place, was, if proven, of a very serious nature.

In the view of the Ombudsman, therefore, while the health authorities acted correctly when they took action against complainant, they were wrong not to consider the episode as one of serious misconduct by complainant and his female colleague. In any event, regardless of the way in which the Health Division tackled the issue, once Ferrini was accused of improper conduct, he should have been told of all the accusations levelled against him to enable him to defend himself and nothing should have been allowed to jeopardize his right to a proper defence of his position or stand in the way to establish the truth.

The Ombudsman declared that strong indications emerged during his investigation that this incident should not have been considered in the first place as a case of sexual harassment. Before an investigation gets under way to establish the credibility of allegations of sexual harassment, a preliminary

investigation should first be carried out to determine if *prima facie* there are grounds to indicate that an illegality was committed. In this case, therefore, it would have been proper if once a preliminary investigation had run its course, the report of this investigation had been given to complainant as the person who allegedly committed the act of harassment so that his fundamental right to a fair hearing and the basic elements of natural justice would have been respected. Justice, even at the administrative level, should not be done behind closed doors but openly so that a person who stands accused of a misdemeanour will be allowed every opportunity to defend himself and subsequently to be aware of the motivations behind a decision declaring his guilt or innocence.

Justice, even at the administrative level, should not be done behind closed doors but openly so that a person who stands accused of a misdemeanour will be allowed every opportunity to defend himself and subsequently to be aware of the motivations behind a decision declaring his guilt or innocence.

The Ombudsman remarked that in his view if the terms of reference of the board of inquiry had been, as indeed they should have been, limited to administrative abuse and to shortcomings by employees at their place of work, the results could have been different. The investigation would have allowed more witnesses to be heard and this might possibly have shed more light on the alleged misdemeanours that might have taken place in this case and, possibly, earlier in other instances.

According to the Ombudsman the Health Division was wrong to maintain that its "*internal administrative investigation*" could not be considered as a preliminary inquiry in a case of sexual harassment. The investigation took place primarily as a result of allegations of sexual harassment and was conducted according to established policy on alleged instances of sexual harassment and it was not acceptable for the Division not to follow this policy by claiming that this was an administrative investigation. If the allegation that gave rise to the investigation was based – even if wrongly – on sexual harassment, the Health Division should have adopted procedures that are laid down in official policy for similar instances since if this policy had been followed, the report that caused this furore would have been rejected forthwith once it was not submitted and signed by the presumed victim.

The Ombudsman recognized, however, that since the allegations were of a serious nature, he saw nothing wrong that they gave rise to a departmental inquiry to establish whether the alleged facts really happened so that proper disciplinary measures would be taken against the employees involved. In this regard the Ombudsman remarked that it was unfortunate that from the very start the investigation did not take its proper course since the rights of the person at the centre of the allegations were not adequately safeguarded although there was evidence to suggest that in substance he was aware of the precise nature of the charges against him and was allowed every opportunity to defend himself.

On the other hand once the internal inquiry by the Health Division was not carried out in accordance with sexual harassment policies in the public service, complainant had no right to a copy of the report as laid down in this policy. In this scenario, given that his grievance had been considered in the context of an administrative investigation concerning unacceptable behaviour at a workplace, Ferrini's right to a copy of the report of the preliminary internal departmental inquiry does not appear to be an automatic right as he made it out to be.

Conclusions by the Ombudsman

After having examined the merits of the issues related to this complaint, the Ombudsman concluded that in an administrative investigation regarding improper conduct that might lead to some form of censure, the accused party has the right to be given full details before the investigation gets under way and to be told of his prerogative not to reply to questions that could prejudice his position. It was not clear whether this happened in the investigation in which Ferrini was involved although once he was not found guilty of allegations based on sexual harassment, at least on this score he could not claim that his interest had been prejudiced.

The Ombudsman concluded that even though the inquiry investigated allegations of sexual harassment, it could not be argued that this inquiry ought to have been conducted in the context of the government policy on sexual harassment since an essential element – namely, the report by the alleged victim – was missing. This meant that Ferrini had no automatic

right to a copy of the report by the board on the grounds laid down in the government's policy on sexual harassment. The internal inquiry was held because the Health Division could not allow charges of improper conduct in complainant's workplace to pass by unnoticed even though these allegations were later withdrawn. Once the red light had flashed, the Division had to take all possible steps to ensure that there was no abuse in Ferrini's section and that any allegations of improper behaviour would be nipped in the bud.

The Ombudsman went on to remark that clearly complainant's career advancement had been jeopardized since upon the conclusion of the inquiry, earlier promises given to him on his future deployment in the Health Division were withdrawn. According to the principles of good administration that include the right of citizens to an explanation for administrative decisions that affect them in a negative manner, Ferrini was entitled to be informed of the reasons that led to the withdrawal of his proposed new deployment inside the Division.

A public authority is entitled to preserve a wholesome work environment …..… and ensure that appropriate decisions are taken to curb any allegations of abuse or indiscipline that may arise at a workplace …..…

On the other hand it is fully in order and lawful for – and even incumbent upon – a public authority in the exercise of its functions to deploy its workforce in its best interest to ensure effective, transparent and well-organized service provision to clients. A public authority is entitled to preserve a wholesome work environment for its employees and ensure that appropriate decisions are taken to curb any allegations of abuse or indiscipline that may arise at a workplace and that are brought to its attention. Any decisions taken in this context need not be considered as disciplinary measures even though they might prejudice the interest of employees who are directly involved.

The Ombudsman concluded that in homage to the principles of good administration, the Health Division ought to have asked the board of inquiry to delve deeper in its investigation into alleged happenings at complainant's workplace. Such an investigation could have taken the form of an inquiry that would not result in any charges being raised against any employee and

could have been an internal exercise that need not lead to a report to which any employee has the right of access. It is after all the responsibility of the national health authorities to ensure that the running of the section that used to fall under the charge of complainant, like all other sections that form part of the Health Division, is managed in a trustworthy and dependable manner.

Case No H 198

HEALTH DIVISION

Arrangements for extended unpaid study leave

The complaint

A Principal Scientific Officer, appointed to this post in the Health Division in 1998, lodged a complaint with the Ombudsman where he alleged that the health authorities prevented him from concluding his PhD studies in a foreign university when they unfairly refused a further extension of his study leave abroad. Since his studies were relevant to the health services provided by the government, he argued that this refusal ran counter to government policy on scholarships aimed at assisting students to pursue academic research at postgraduate level and contribute towards research in identified areas of national priority.

Complainant held that this decision was arbitrary and discriminatory and forced him either to terminate his studies abroad or his employment in Malta to the detriment of the quality of health services and patient care in the country. He claimed that he was even more upset by this decision since he needed only one more year to finish his PhD studies.

Facts and findings by the Ombudsman

Complainant applied for one year unpaid leave as from 7 May 2001 in order to take up the post of Consultant in the Caribbean with the Pan American Health Organization (PAHO) of the World Health Organization (WHO). The request was approved on grounds of public policy.

When this assignment was extended by another year, complainant asked for an extension of his arrangements with the Health Division for unpaid leave till the end of April 2003. Following internal consultations, the Division

in May 2002 turned down this request due to the exigencies of the service since the hospital service at that time was in dire need of the services of an expert in his field and was unable to do without complainant's services unless a suitable replacement would be made available on a full-time basis. Complainant was also warned that disciplinary action would be taken against him unless he resumed his duties in Malta forthwith.

At this stage matters took an unexpected twist when instead of returning to Malta, complainant informed the Health Division in May 2002 that he had been accepted to pursue a course of studies leading to the award of a PhD by a university in the Caribbean. Although the service in his speciality in state hospitals was known to be experiencing difficulties at that time as a result of complainant's absence from Malta and despite the earlier warning about disciplinary action if he failed to resume his duty, his request for unpaid study leave in order to pursue his studies was accepted. In subsequent years complainant submitted several requests for a one-year extension of his unpaid study leave and each time his request was approved. The last of these extensions saw him through up to May 2007.

In March 2007, two months before the expiry of the last approval of his extended study leave, complainant sought yet another extension of his long-standing arrangements for unpaid study leave by another year. This would have meant a sixth year of unpaid leave for his PhD studies in addition to the year of unpaid leave granted earlier for his WHO assignment in 2001. Although there was no written policy to provide guidance on the way similar requests should be handled, the practice in the Health Division at that time was not to grant more than five years of unpaid study leave to employees reading for a PhD; and on this basis the application was turned down.

During his investigation the Ombudsman found that in this request for yet another extension, complainant made no mention that this would be his final year. He also found that throughout all these years complainant had never revealed to the Health Division that his PhD studies were on a part-time basis and that the Division reacted to this development by claiming that this information threw his several requests for unpaid study leave during the previous years in a different light. According to the Health Division in these circumstances complainant was only eligible for part-time study release and would have been expected to report for duty with the Division when he was

not otherwise occupied with his studies given that attempts to shore up the service of his specialization in government hospitals on a temporary basis had not materialised.

When asked for his views, complainant replied that since 1998 the Division repeatedly said that it sorely needed the service of experts in his field and scoffed at the fact that since then no action was ever taken on his repeated requests to train and recruit other specialists especially when according to international health standards the Mater Dei Hospital needed a complement of twenty experts apart from needs in other state hospitals. Complainant rued the lack of planning foresight by the Maltese health authorities and was critical of failure by the Institute of Health Care to take up his proposal to organize a local course in his line of specialization even though he drew up a curriculum for this course.

Complainant also challenged the statement that the Health Division does not allow more than five years of unpaid leave to employees reading for a PhD. Referring to a reply to a Parliamentary Question given by the Prime Minister that there were 39 public officers on unpaid leave and 7 on study leave for over five years, complainant remarked that the policy by the Health Division on long-term arrangements for unpaid leave amounted to discrimination when compared to other sectors in the public service. He again maintained that the refusal by the Health Division to extend by another year his unpaid study leave was at odds with official policy on human resource development in the government health sector.

Complainant rebutted the statement by the Health Division that he failed to indicate that he was in the final year of his studies. He referred to a declaration by his Supervisor at his Caribbean university to support his request for an extension of his study leave which stated that he was at an advanced stage of his studies and was due to present "*his upgrade seminar*" during the current academic year – and, according to complainant, in the parlance of Commonwealth universities this term refers to the final step before the award of a PhD. Complainant stated that he assumed, wrongly as it turned out to be, that the local authorities would understand that this term indicated that he was in his final year.

Complainant criticized the Health Division whose management never

bothered to ask about his progress or show any interest in his studies during all the years that he was away. He also rejected the claim that the Health Division was unaware that his studies were on a part-time basis and that he ought to have spent the rest of his time working for the Division. According to complainant, most university students following clinical PhDs, although registered with their university as part-time, actually require a full-time commitment in research and this was especially so in his case where he was doing research in five different Commonwealth small states – and this amounted to more than a full-time commitment. He also stated that it was unreasonable for the Health Division to expect him to divide his time travelling back and forth to work with the Division in Malta and to carry out his research in the Caribbean region.

The Ombudsman observed that the Public Service Management Code regulates special unpaid study leave for public service employees in line with the Manual for Staff Development issued by the Staff Development Organization of the Office of the Prime Minister. Approval of any such leave is invariably subject to the exigencies of the service and is only allowed "*provided that the employing departments are able to release the officers without needing a replacement*."

The Ombudsman ascertained during his investigation that research degrees such as the PhD awarded by complainant's Caribbean university involve a taught element to provide students with research techniques as well as independent study assisted by a Supervisor and the production of a thesis that is judged to be the result of original work followed by the defence of this thesis at a public oral examination.

Considerations and comments by the Ombudsman

The Ombudsman commented that the main issue in this case was whether the Health Division abused its powers by refusing to grant complainant yet another extension of his unpaid study leave overseas on the grounds that his services were needed in Malta.

On his part complainant countered the stand taken by the health authorities in response to his latest request for unpaid leave, namely that his services

were needed in Malta, by pointing out that throughout all the years since he joined the Health Division the authorities failed to develop a nucleus of Maltese specialists in his area of specialization whose services were vital for the efficient delivery of quality care and ought to be a national priority in the state hospital sector.

Taking his cue from complainant's insistence that the local health service lacked a human resource capacity in his own special line of work, the Ombudsman stated that in his view complainant should be the last person to challenge the statement that his services were badly needed in the country, especially with the opening of the Mater Dei Hospital.

The Ombudsman also observed that complainant had encountered no difficulty to secure an approval from the Health Division way back in 2001 for a one-year study leave to work abroad. However, when this assignment was renewed for another year and his request for an extension was turned down because of the exigencies of the service, he still managed to find a way out of this impasse by enrolling for a PhD course in a Caribbean university. Again the health authorities did not put any obstacles in his path and despite the problems that his absence continued to create, his unpaid study leave was renewed on an annual basis, with the last extension valid up to April 2007. Complainant was therefore on leave of absence since 2001, five years of which were in connection with his PhD studies.

The Ombudsman went on to comment that complainant was correct to assert that the authorities failed to inquire about his progress or when he was expected to finish his studies. At the same time, however, complainant himself failed to give a definite date when he would complete his studies. Given this situation, it was clear that the Health Division decided to detach itself from complainant's experience and simply sought refuge in its policy of granting up to five years unpaid study leave while refusing to sanction any further extensions when the fifth year was over.

Viewed in this perspective, the Ombudsman felt that he could not detect any failure on the part of the Health Division or consider that its decision to recall complainant was wrong. This decision had also to be seen against the backdrop of the opening of the Mater Dei Hospital that placed further strains

on the country's health service.

The Ombudsman recalled that complainant challenged the policy of the Health Division not to grant more than five yeas of unpaid leave to employees reading for a PhD by reference to the reply to a Parliamentary Question that seven public officers were released on study leave for over five years. While acknowledging that needs might vary from one department to another and even from one discipline to another, the Ombudsman observed that complainant was unable to mention any official in the Division – apart from himself – who was on unpaid study leave for so long. This led him to consider this argument as untenable especially in view of the oft-repeated recommendations by complainant himself to have more specialists in his own line of study in state hospitals.

The Ombudsman also took into account complainant's explanation that his request for a further extension of his study leave for the final year of his PhD studies was supported by his Supervisor who wrote in terms that are, according to complainant, in standard usage in Commonwealth universities to show that a student is in his final academic year. Without going into the merits of this controversy, he commented that this statement implied that complainant had reached an advanced stage of his studies and that the data collection process related to his research was completed and that it was also likely his thesis only required the final touches which could presumably be done in Malta. Furthermore, if necessary complainant could still make arrangements to travel back to his university in the Caribbean for the oral defence of his thesis.

Taking everything into account the Ombudsman stated in his Final Opinion that the impression that he formed from his scrutiny of this grievance was that complainant succeeded in finding a way how to wriggle around and to remain abroad on work/study assignments even though his services were badly required in Malta. The arrangements in force between him and the Health Division for several years seemed to suit him well and enabled him to continue his studies for a PhD far away in the Caribbean while possibly also giving him the opportunity to work there given that his name still featured on the list of contributors to the Pan American Health Organization.

In this regard in order to establish whether complainant was still on contract

with PAHO, the Office of the Ombudsman established direct contact with this organization which replied that it is not its policy to give any information on its staff, past or present, without the approval of the employee concerned. It undertook, however, to inform complainant about this inquiry so that he would either provide this information directly himself to the Ombudsman in Malta or else authorize its release.

The Ombudsman noted that while his investigation of this grievance was in progress and exactly on the day that the ultimatum by the Health Division to complainant was due to expire, by means of an email dated 15 November 2007 he sent his resignation from his post in the Health Division with backdated effect from 6 May 2007.

At this stage the Ombudsman commented that although there was nothing wrong for complainant to continue working with PAHO as long as the Health Division gave its approval, it was obvious that giving service to the local health service must take priority over complainant's personal interests particularly if he wanted to retain his post of Principal Scientific Officer in the Maltese public service.

The Ombudsman finished his Final Opinion by stating that it was incumbent on him to comment on the way in which the Health Division handled complainant's requests for extensions of his unpaid leave since 2002. In his view the Division should have realized that it was likely that complainant was following a part-time PhD course since he had already informed the Division that his contract with PAHO had been extended by another year.

The Ombudsman commented that despite the exigencies of the service including the urgent need to develop a core of experts in complainant's specialization in Malta, for five whole years the Health Division had not bothered to ask complainant for any details of the course that he was following even though he had been released on unpaid study leave. Nor did the Division consider it necessary to inquire about the duration of his course and how long he needed to be away from Malta. It was obvious, according to the Ombudsman, that the Division merely approved year in, year out the extension of complainant's unpaid leave as a matter of routine and never felt it necessary to inquire from his university to what extent his presence was necessary to enable him to pursue his studies for a PhD in that region.

The Ombudsman pointed out that the Health Division should have considered these issues at the appropriate moment. Having failed to do so, it could not now reasonably expect to argue that complainant never gave any information about the course that he was following. He also criticized the Division for never bothering to check whether complainant was still providing a service to PAHO. These failures by the Health Division to safeguard its own interest drew the Ombudsman's censure.

Conclusion and recommendation

The Ombudsman concluded his Final Opinion by stating that after giving due consideration to the merits of this grievance, he believed that the Health Division was more than justified to refuse complainant a further extension after having been away from his place of work for no less than six years. Especially in view of complainant's insistence on the urgent need to develop a core of specialists in his field of work as part of the national health system, the Ombudsman concluded that his complaint was unfounded.

The Ombudsman was, however, critical of the way in which the Health Division handled complainant's requests for extensions of his arrangements for unpaid study leave without bothering to check whether his continued stay in the Caribbean was necessary and whether he was still on contract with PAHO. This utter disregard for issues that could have shed light on his insistence to stay away from Malta for so long at a time when his presence in the country was sorely needed, according to the Ombudsman, amounted to maladministration.

The Ombudsman was …… critical of the way in which the Health Division handled complainant's requests for extensions of his … unpaid study leave without bothering to check whether his continued stay … (abroad) *… was necessary …… This utter disregard for issues that could have shed light on his insistence to stay away from Malta … … amounted to maladministration.*

Case No H 289

DEPARTMENT OF CIVIL PROTECTION

Allegations concerning a selection process

The complaint

An Assistance and Rescue Officer in the Department of Civil Protection lodged a complaint with the Office of the Ombudsman because he felt perturbed by the outcome of a call for applications issued by his department to fill the posts of Leading Assistance and Rescue Officer. After submitting a petition according to the Public Service Regulations that was turned down by the Public Service Commission (PSC) on the grounds that there was no reason that could lead the Commission to believe that the final result of interviews held to fill these posts should be changed, complainant submitted his grievance to the Office of the Ombudsman in line with the relative provisions of the Ombudsman Act, 1995.

Facts of the case

The Ombudsman's investigation centred on the issue of a call for applications for the post of Leading Assistance and Rescue Officer. This call was open to Assistance and Rescue Officers with a minimum of five years' experience and to officers who could provide testimonials that they possessed experience in fire fighting and/or rescue operations or in any related area for at least three years.

Complainant had responded to this call and after interviews were held, he was placed in twenty-second position out of fifty-five candidates in the final order of merit with 57 marks. This meant that his total mark was three less than the points awarded to the last candidate on the list of candidates who were promoted to the post of Leading Assistance and Rescue Officer. This performance led him to submit a petition in terms of section 1.1.10 of the

Public Service Management Code that was in turn presented to the PSC.

In his petition complainant rued that in the call for applications candidates were not required to present certificates attesting to their merit, ability or professional and technical competence with the result that although he had no less than fifteen certificates to prove his merit, he was placed in the same position as other officers with no qualifications and no certificates that would attest to their experience in rescue operations or fire fighting. Complainant claimed that this was disconcerting since even in order to be selected as a member of the Hazmat squad in the same department, the call for applications would require candidates to possess an Ordinary level pass in Maths or Physics and a certificate in engineering.

Complainant also pointed out in his petition that during his interview the selection board had not asked any questions about his leadership skills, qualifications and his experience in fire fighting and rescue operations – and he was confident that if he had been asked questions on these subjects, his replies would have demonstrated his merit and his competence. He also alleged that some questions that were put to him were meant to throw him off guard and show him in a bad light while insisting that instead he ought to have been asked questions that tested his leadership qualities and his skills to solve problems that are related to his duties.

Complainant's final point in his petition was based on an objection to one of the members of the selection board whose presence, in his view, served to give a psychological advantage to officers who formed part of the Marine Unit of the Department of Civil Protection. He observed that his fears in this respect were vindicated since all the members in this Unit who were interviewed during the selection process had been ranked before him in the final order of merit. He alleged that some of these members had a low level of education or had made use of an inordinately high amount of sick leave.

The Ombudsman found that in its deliberations on this petition the PSC considered all these issues and had even asked members of the selection board to provide additional information on the reasons that led them to reach their final decision and to clarify other aspects of the petition. The Ombudsman also found that the selection process was based on several criteria that were established and approved before interviews took place and that the PSC

ascertained that these criteria were applied consistently by the board while all the candidates were subjected to the same method for the evaluation of their merits. The PSC had been fully satisfied that the selection board carried out its task in a diligent manner and objectively and that its deliberations were just and based on a well-informed assessment of each applicant.

The PSC also felt that it was not proper to focus attention merely on the merits of any single applicant in the way that complainant had done in his petition when he referred only to the applicant who was ranked just above him. It was the responsibility of the board to assess the merits of all the candidates who were summoned for an interview in relation to each other in a selection process where the most suitable applicants had to be chosen from a pool of eligible applicants and where the merits of each candidate had to be viewed in the wider frame of the respective merits of all the other candidates rather than in isolation.

The PSC also concluded after its review of the way in which the selection board performed its task that the fact that complainant was placed in twenty second position out of fifty-five candidates could not be considered as a mark that reflected badly on his abilities and aptitude or that he did not perform his duties as an Assistant Rescue Officer in a proper manner.

The PSC furthermore considered the method used by the selection board to allocate the fifteen marks for testimonials presented by applicants under the *Qualifications* criterion. Given that several applicants presented certificates that were of direct relevance to their work as well as other testimonials that were less directly connected to their duties, the selection board allocated maximum points for the different categories of certificates in accordance with the following scale:

- 10 marks for certificates directly linked to applicants' work environment and duties;
- 3 marks for certificates related to educational subjects; and
- 2 marks for other certificates.

Complainant presented five certificates that were relevant to his position and was awarded four marks for these qualifications after the selection board considered a certificate in Rescue and Fire Fighting issued to him in

2000 to have superseded another certificate in Basic Fire Fighting that he achieved in 1998; and a similar procedure was used in the evaluation of certificates that were presented by other candidates. In addition complainant submitted ten other certificates on educational subjects for which he was awarded the maximum number of marks while since he had not presented any other certificates, he was not awarded any other marks. Complainant's total number of marks for his qualifications was therefore seven.

To questions that were put by the PSC the selection board explained that the purpose of the interview was not to ask normal run of the mill questions that candidates probably expected to be asked. Instead the questions were largely meant to test the reactions of candidates to matters that were related to their workplace but which were to a fairly large extent unexpected and meant to make them think outside the box.

The PSC also gave due consideration to complainant's manifest displeasure with the presence of a particular member on the selection board but promptly overruled this objection because this person was a most senior official of the department and was perfectly entitled to sit on the selection board by virtue of his seniority and experience. The Commission believed that if this person had been left out of the selection board, no other high ranking official of the department ought to have been involved in this process because invariably applicants who fell under the responsibility of these officials would have benefited and taken undue advantage from this connection. Moreover, the chairman of the selection board assured the Public Service Commission that all its members enjoyed his full trust and confidence and he had no doubt whatsoever as to their loyalty, seriousness and honesty.

The PSC also ascertained that members of the Marine Unit who placed higher than complainant in the final order of merit were all Assistance and Rescue Officers who were eligible to apply. All these employees were qualified as Masters for the mv *Garibaldi* that is operated by the Unit and on several occasions they showed that they were able to lead crews on board the vessel as well as to assume responsibility for the operation and running of this vessel.

With regard to complainant's allegation that some officers claimed to have known the outcome of the selection process even before the results were

published, the chairman of the board admitted that he was not in a position to comment on this rumour.

During his investigation the Ombudsman found that in addition to the 15 marks that were available for qualifications that applicants had in their possession, the selection board adopted four other criteria to guide it in its work and awarded marks to applicants on the strength of their *Related Experience/Performance, Related Knowledge, Leadership* and *Personal Qualities*. Under each of these criteria complainant was awarded respectively the following marks: 10 out of a maximum of 25; 17/25; 17/25; and 6/10.

Considerations and comments by the Ombudsman

The Ombudsman's role in instances when he is required to review decisions taken by the Public Service Commission is to check whether in its deliberations the PSC gave proper consideration to issues raised in petitions that are presented to the Commission by employees who subsequently decide to approach the Office of the Ombudsman for a further airing of their concerns. The main objective of this review by the Ombudsman is to ascertain whether there was anything in the assessment of the petition by the PSC that was contrary to law, mistaken, improperly discriminatory or in any other way unjust.

The Ombudsman emphasized that in any such review of the PSC's action his task is invariably limited to an appraisal of objective elements in the Commission's work. No person or authority – whether it is the Public Service Commission or the Office of the Ombudsman – that seeks to review any decision taken by a duly appointed and properly constituted government authority has any right to alter a decision that is based on the subjective judgement that is made by a selection board with regard to the way in which a candidate

No person or authority – whether it is the Public Service Commission or the Office of the Ombudsman – that seeks to review any decision taken by a duly appointed and properly constituted government authority has any right to alter a decision that is based on the subjective judgement that is made by a selection board …..

reacts to questions put to him by an interviewing board or with regard to a candidate's performance during an interview. Subjective opinions reflect the personal views of members of a selection panel in the light of their evaluation of the merits of the person being interviewed and on the assumption that any such evaluation is fair, honest and not motivated by prejudice, this opinion is to stand and cannot be replaced by the opinion of a third party who has no role whatsoever to play in any similar situation.

The Ombudsman observed in his Final Opinion that his investigation revealed that the Commission examined fairly, fully and in depth all the points that complainant raised in his petition. The PSC asked for further clarification from the selection board on several issues and its replies were acceptable, credible and fair. The Commission had also, subsequent to a request by the Ombudsman, approached the selection board to throw more light on the way in which marks were awarded to candidates for their qualifications and the information that was made available served to establish even more strongly that the whole selection process was conducted in a regular and transparent manner.

The Ombudsman observed that out of the criteria that were established to guide the selection process, marks awarded under four of these criteria – namely, *Related Experience/Performance, Related Knowledge, Leadership* and *Personal Qualities* – were dependent on the subjective judgement of members of the selection board and, consequently, he refrained from passing any comment on these assessments.

With regard to the qualifications of applicants who were interviewed by the selection panel: the Office of the Ombudsman took it upon itself to check the certificates of the successful candidates as well as complainant's testimonials. This check confirmed that marks given to all these applicants had been awarded correctly and reflected fully the sub-criteria for the award of marks that were established by the selection board before the process got under way.

In this connection the Ombudsman made it clear that it is not his function to intervene or to pass any comments on the way that these sub-criteria were chosen by the selection board or on the marks allocated to each of these sub-criteria. This is the function of the selection board and nobody is allowed

to interfere in its work. In these circumstances the duty of the Ombudsman consists only in ensuring that parameters for the award of marks under each yardstick are applied fairly and consistently with each and every candidate. In this regard the Ombudsman stated categorically that he was fully convinced that in this instance the award of marks to all the candidates whose marks were subjected to his scrutiny was done in a fair manner.

In this context the Ombudsman wished to comment on the issue that was raised by complainant with the PSC that in the call for applications by the Department of Civil Protection that gave rise to this complaint, applicants were not required to submit any educational certificates whereas in earlier calls for applications for similar positions candidates were expected to possess Ordinary Level passes in Maths or Physics or an engineering certificate. Besides pointing out that complainant raised this objection only after the results of the call for applications were issued, the Ombudsman felt that it was opportune to observe that this call concerned promotions from the position of Assistance and Rescue Officer to Leading Assistance and Rescue Officer and that is was proper and fitting that this call should be open to officers in this grade. Indeed, his scrutiny of the qualifications of the successful applicants confirmed that all these officers had qualifications in fire fighting and/or rescue operations or related areas.

Complainant had also pleaded that despite the fifteen certificates in his possession, he was placed on the same footing as other applicants who did not possess any qualifications related to rescue or fire fighting operations. The Ombudsman pointed out that his investigation found that this claim was unsubstantiated and in fact it transpired that in comparison to the qualifications of successful officers, complainant was amongst those who were least qualified since most of his qualifications were not related to the position that he applied for. In this regard the Ombudsman commented that while it was true that there were successful applicants who were on the whole less qualified than complainant, at the same time it was important to recall that the overall mark for qualifications amounted to only 15% of the total number of marks on which the final selection was based. The Ombudsman's scrutiny of marks awarded to complainant's colleagues for their qualifications confirmed that these marks had been awarded objectively and were just and applicants who were less qualified than complainant were in fact awarded fewer marks than he was given.

Complainant also objected to the type of questions put to him throughout his interview. The Ombudsman explained that it is not his function to involve himself in the type or nature of questions that are put to candidates during their interview by a selection panel unless there is evidence of abuse although on the other hand he appreciated that it is difficult to bring forward conclusive evidence to back up any such allegation.

Complainant had finally raised an objection on the composition of the selection board. While pointing out that any decision regarding the choice of members to constitute a selection panel is the prerogative of the Commission, as long as these persons are known to possess integrity and to inspire full confidence in their uprightness, the Ombudsman felt that there was no reason whatsoever to cast any doubts on their reliability and seriousness. But even on this score complainant only voiced his doubts after the selection process had been completed and the final result had been published; and the misgivings that he expressed on these individuals had also to be viewed against this background.

Conclusion

Having examined the merits of this case, the Ombudsman concluded that the PSC had given adequate consideration to all the points raised by complainant in his petition and no evidence had arisen to indicate that the final decision by the PSC on complainant's petition was wrong, discriminatory or unjust.

On this basis the Ombudsman stated that in his opinion the complaint was unjustified.

Case No H 582

MALTA ENVIRONMENT AND PLANNING AUTHORITY[1]

When a proposed 30m road gave way to a 2.5m pedestrian passageway

The complaint

A developer who owned a plot of land in Triq il-Kurkanta, Żebbuġ approached the Office of the Ombudsman for a second time when he continued to face difficulties in his efforts to develop this property even though the Authority had already approved the planning permission for this development way back in 1992. The proposed development was based on plans that envisaged that Triq il-Kurkanta would be extended to join Main Street in Żebbuġ with the same width originally laid out in the Temporary Provisions Scheme for the area that had been approved by the House of Representatives in 1998.

These plans, however, met heavy weather in the face of strong opposition from another owner of property that abutted on Main Street and with frontage onto Triq il-Kurkanta. Although a part of this property was expropriated for the formation of a road that would access the final stretch of Triq il-Kurkanta to Main Street and provide direct passage to passers-by as set out in the Temporary Provisions Scheme, this second developer waged a sustained onslaught against this link. Even though he lost his court case against the Land Department over the expropriation proceedings as well as the appeal, he continued to insist that Triq il-Kurkanta should not be extended through his property. He also insisted that the width of the road should be reduced so that the expropriated land would be returned back to allow him to develop this site.

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[1] The Planning Authority, which was set up in 1992, merged with the Environment Protection Department on 1 March 2002 and the new organization became known as the Malta Environment and Planning Authority (Mepa). Since this complaint straddles a period that covers both organizations, for ease of reference this case summary makes mention throughout of *"the Authority"* without making any distinction whether the action was taken by the Planning Authority or by Mepa.

Background information

Before proceeding to tackle this grievance the Ombudsman noted that this complaint was already considered by his predecessor who, in his Final Opinion on 18 May 2001, wrote that the Authority "…… *for a number of years considered that this part of the Temporary Provisions Scheme runs counter to Structure Plan Policy UCO 14. This policy states that within Urban Conservation Areas there should be a general presumption against the opening of new access roads unless this is absolutely necessary for planning reasons or to ensure a sanitary environment. The Authority considered that it would be dangerous from traffic aspects for Kurkanta Street to open directly into Main Street which was narrower. On the other hand it realized that there were drainage and rainwater run-off problems in Kurkanta Street*."

The Ombudsman had then concluded his Final Opinion as follows:

"…… it results that the Planning Directorate acted within its mandate in requesting a change in the scheme because this conflicted with the Structure Plan. Moreover, the proposal of the Planning Directorate[2] *would solve existing sanitary problems and does not create any real hardship. Therefore there are no sufficient grounds to justify the allegation that the Planning Authority is improperly assisting the previous owner in stalling the project."*

This was not, however, the end of the story. Soon after the issue of this Final Opinion the Roads Department of the Ministry for Transport and Communications refused to accept the former Ombudsman's recommendation and on 6 June 2001 wrote as follows:

*"…… many attempts were made to unblock the situation in the past. One of these instances was in late 1998 when the proposal to construct a passageway was first put forward. In that instance no objections to the proposed approach were raised by the department in the hope that the issue would be resolved. A decision was subsequently taken by (*the*) Planning Authority against this proposal to reduce the width of the link between Triq il-Kurkanta and Main*

[2] The proposal by the Planning Directorate sought to reduce the width of the projected road to a pedestrian passageway, 2.5m wide.

Street, on the basis of which your Office informed complainant that the project was to continue …..…

At this stage, therefore, once PA had rejected several requests by a private architectural studio to modify the existing scheme alignments and reduce the width of this part of the road, it would be inadvisable for PA to now tender an application to seek approval for the implementation of modifications to the approved building scheme, which itself had recently rejected.

It is the department's view that once consensus between the various property and landowners has not been reached the PA application should be withdrawn and alternative methods of traffic management adopted to regulate flow of traffic in the locality."

The Ombudsman noted that subsequent to this reaction, the situation remained deadlocked and that although all the authorities involved in this issue seemed to agree that the road should be opened up as originally authorised by Parliament, no effective action was ever taken. In the meantime a lot of development was allowed to take place in Main Street which, in the words of complainant in his letter to the Ombudsman that gave rise to this case anew, served to "*negative the original objection against opening a wide road into the village core*."

Complainant submitted that this deadlock was causing him substantial prejudice since he was unable to develop his property according to the planning permission that was granted to him earlier and requested the Ombudsman to reconsider his grievance afresh in the light of the impasse that prevailed in the last few years. This situation meant that the land that was subject to expropriation proceedings to provide access for run-off water and drainage in line with the local development plan remained in the possession of its owner.

Considerations by the Ombudsman

Before proceeding to evaluate this complaint the Ombudsman declared that his review of this case would have the conclusions reached by his predecessor in May 2001 as its starting point. He stated that he would not revisit these

findings unless and insofar as they could be affected by new material facts or by considerations of substance that could significantly affect his own conclusions.

Two basic issues

The Ombudsman pointed out that his consideration of this grievance would hinge on two basic but not indifferent issues:

- firstly, whether the Authority could override a resolution of the House of Representatives that Triq il-Kurkanta had to be extended to Main Street with the same width as originally planned to provide full access for vehicles and whether the way in which the Authority reversed that decision in the Temporary Provisions Scheme could be justified; and

- secondly, complainant's submission that building development that was allowed in the relevant part of Main Street, even after approval by Parliament of the Scheme, prejudiced the nature of the site as an urban conservation area coupled with his other concern whether the present state of development in the area in question justified a derogation from the presumption that no new access roads should be opened in urban conservation areas unless absolutely necessary for planning purposes or to ensure a sanitary environment.

The first issue

The Ombudsman pointed out that the first issue was raised in paragraph 8 of the Final Opinion of his predecessor in 2001 that asked whether it was proper for the Authority *"to stall action and obstruct implementation of a scheme approved by Parliament in 1998."* Although this Final Opinion ultimately justified the Authority's final decision, one could possibly argue that it failed to address the core merits of this question and to answer it adequately.

The Ombudsman observed that it could be argued that the issue that needed to

be addressed was not whether the Authority was empowered by Legal Notice 76 of 1997[3] to make changes in the Temporary Provisions Scheme when it considers it expedient to do so in the public interest but instead what were the limits of such powers. He declared that in his view the issue concerned the extent to which the Authority could, of its own motion, through powers given by this Legal Notice or other ministerial directives, overrule Parliament.

The Ombudsman appreciated that the Development Planning Act gave the Authority the power to revise Temporary Provisions Schemes that were approved by Parliament by resolution while even the term "*temporary*" denotes that these Schemes were not meant to be cast in stone. At the same time, it should be understood that any amendments to these Schemes by the Authority should not be made arbitrarily or capriciously. Any decision by the Authority to review, change, amend or rescind a Temporary Provisions Scheme had to be well motivated, taken solely with the public interest in mind and in the knowledge that the Scheme represented the will of the House of Representatives on how an area in the Scheme should be developed. Furthermore, the starting point leading to a change in a Scheme had to be that any such development should be made on lines decreed by the people's representatives and that any change should only be authorised exceptionally and for sound reasons.

On these grounds the Ombudsman declared that he would not contest the opinion of his predecessor that the Authority, in an attempt to unlock the deadlock, in this case had the *vires* to raise a Planning Control Application in terms of paragraph 8 of Legal Notice 76 of 1997 so that it could alter the approved schemes for the area. In his view, since that procedure was technically correct and the powers exercised by the Authority were within the meaning and the scope of the Legal Notice, he would abide by his predecessor's conclusion that the procedure adopted by the Authority was a legitimate one even though it was in contrast with its previous negative decisions on the same merits. This procedure was sanctioned by the letter of the law as laid down in Legal Notice 76 of 1997 even though, according to the Ombudsman, it did not reflect its spirit.

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[3] *Scheme Amendments and Changes in Alignment Order, 1997.*

The Ombudsman referred to planning regulations in force at that time, and indeed even at the time that he submitted his own Final Opinion in 2011, that were relevant to the situation that arose in this case. Sub article 28(3) of the Development Planning Act states as follows:

"(3) Minor modifications not affecting the substance of the plan may be carried out by the Authority either on its own motion when it considers to do so in the interests of proper planning of the area or following a minor modifications application submitted to it by any person. Modifications shall not be considered to be minor when they would alter the general thrust of the plan or affect a Temporary Provisions Scheme boundary or a development boundary indicated in a local plan."

Clearly then a modification that would alter the general thrust of the plan should not be considered as a minor variation.

The Ombudsman commented that the Authority, when deciding on its own motion to modify the Temporary Provisions Scheme, seemed to have assumed that the construction of the passageway that was proposed by the Planning Directorate was a minor amendment. He expressed his serious reservation on this position since he considered this modification to involve a substantial change in the nature of Triq il-Kurkanta, converting it from a main through road for vehicular traffic into a virtual *cul de sac* and at the same time changing traffic management and accessibility in the whole area, intended to be served by the road as originally planned under the Temporary Provisions Scheme.

The Ombudsman went on to observe that although the Authority seemed to consider that the proposed modification merely involved a change in the alignment of the road and buildings in Triq il-Kurkanta and that this would qualify as a minor amendment, he held a different view. Modifications in the alignment of a road should not be meant to change its character or deform it. The emphasis in regulation on the fact that only minor modifications as specified can be made by the Authority underscores the legislator's intention that the will of Parliament, as expressed in the Schemes, has to be substantially respected.

The Ombudsman stated that in his opinion paragraph 8 of Legal Notice

76 of 1997 gave the Authority exceptional power that had to be exercised judiciously and sparingly. It is a power that impinges on the supremacy of Parliament and that invades its authority. Parliament delegated these powers to the Authority to allow corrective measures to be taken in cases where obvious and manifest mistakes would lead to planning anomalies and/or injustice if a development boundary or the alignment of a road or building in a Temporary Provisions Scheme as approved would be implemented. It is not a power that the Authority could or should exercise to contrast or to neutralize a planning decision taken by Parliament when it approved the Scheme.

The Ombudsman observed that he was of the view that the Authority could only exercise these powers for valid reasons such as, for instance, when consideration had to be given to facts that were not available to Parliament when it approved the Schemes or which supervened their approval. In these circumstances the Authority needed to be cautious not to substitute its will to that of Parliament and to be aware that in the exercise of its powers under paragraph 8 of Legal Notice 76 of 1997 the starting point had to be the implementation of the Temporary Provisions Schemes as approved. The Authority's appreciation of submissions for changes proposed in the Schemes had to be based solely on this fundamental principle.

The Ombudsman stated that as a rule the Authority is not therefore justified to exercise its power to amend a Temporary Provisions Scheme solely in an attempt to resolve a deadlock between two developers or to reconcile their conflicting interests as had happened in this case.

The Ombudsman observed that it had been established that:

- the Temporary Provisions Scheme approved by the House of Representatives determined that Triq il-Kurkanta should have access into Main Street and should also retain the same width and alignment as planned throughout its whole length;

- Triq il-Kurkanta was formed and developed in accordance with the Temporary Provisions Scheme except for the last few meters which comprised the section under dispute;

- the land on both sides of the road was acquired and developed by several persons in the expectation that the alignment as planned under the Temporary Provisions Scheme would be realized in a way that would allow free vehicular access onto Main Street – and complainant was one of the persons who purchased property in this area and acquired permits to develop this property on plans that envisaged frontage onto a widened Triq il-Kurkanta accessing into Main Street as planned.

The Ombudsman also observed that when the Temporary Provisions Schemes were approved by Parliament, the concept of an Urban Conservation Area to protect a village core from undue development had already been recognized. It had to be presumed that when Parliament approved these Schemes it duly took account of the fact that, as planned, Triq il-Kurkanta would provide new vehicular access into Main Street at a point that was within the identified urban development zone. Parliament must also have been aware that unless Triq il-Kurkanta retained the planned width at the point of access with Triq il-Kbira, this would lead to the creation of a *cul de sac* and in the process would also generate traffic management problems, among other issues.

The Ombudsman stated that in the circumstances one had to conclude that Parliament was in favour, in the public interest, of having traffic accessing directly from Triq il-Kurkanta into Main Street as indicated in the Scheme. His investigation, however, found that when the Authority reversed its previous decision to reject applications to change the Temporary Provisions Scheme and approved that the width of access from Triq il-Kurkanta into Main Street be reduced in a way that would only allow a pedestrian passageway, it was not motivated by any new facts or considerations of which Parliament was not aware when approving the Scheme.

The Ombudsman remarked that although he would not contest his predecessor's conclusion that the decision by the Authority could be justified on technical grounds to protect the village core, he admitted to having serious reservations that the amendment was approved to resolve strong lobbying by interested parties, namely complainant and other resident owners of property in Triq il-Kurkanta on the one hand and the former owner of the expropriated land on the other. In his view it remained a moot point whether the overriding

consideration that led to the reversal of policy by the Authority on this issue was solely inspired by the public interest.

The second issue

The Ombudsman explained that the second issue concerned complainant's claim that building development that took place in the end part of Main Street into which Triq il-Kurkanta was planned to access, prejudiced its nature as an urban conservation area. Complainant's architect certified on 11 December 2007 that:

"…… It seems that MEPA approved this change requested by the owner of a very small plot of land on the basis that Main Street has 'urban conservation area' characteristics. It is my considered opinion that this is absolutely not the case as could be attested by a cursory site inspection which indicates that the stretch of Triq il-Kbira, far removed from the parish church, is actually a wide road with newly constructed buildings all along the stretch and on both sides of the road – so much so that both the streets on either side of Triq il-Kurkanta lead into Triq il-Kbira."

In order to verify this statement, the Ombudsman in the presence of officials from the public authorities involved and other interested parties made an on-site inspection at the very tail end of Main Street in the periphery of the designated village core area. His observations during this visit led him to conclude that the amount of urban reconstruction involving demolition of old buildings and their substitution by modern multi-storey buildings undoubtedly radically changed the nature of this stretch of road. Indeed, it was obvious even to a layman that the Authority found little to conserve or preserve in this area and that this particular stretch had been redeveloped into an ordinary, commonplace habitat without any vernacular architecture features worthy of preserving.

Taking everything into account the Ombudsman declared that in his view if ever the area in question could have qualified as a conservation area, it had certainly lost any such characteristics through development authorised by the Authority even after the approval of the Temporary Provisions Scheme and the Structure Plan.

The Ombudsman noted that the proposal by the Planning Directorate to reduce the width of the projected road within the village core to a pedestrian passage of 2.5m in the application for planning control received by the Authority was motivated *inter alia* by the consideration that the passageway would enhance the environment as this would be a village core characteristic. The application of Structure Plan Policy of the Urban Conservation Order 14 protecting the visual amenity of historic cores was also considered relevant in this case.

The Ombudsman stated, however, that undoubtedly all these considerations would not withstand a reality on-site check in the light of development that took place in the area throughout the years. In the circumstances he could not but conclude that the construction of the proposed passageway would actually be out of place and would not serve to enhance the environment.

The Ombudsman found no hesitation to admit that his assessment of the present state of physical development in the area was that of an outside observer who was not technically competent to give an authoritative opinion. The final word in any such instance, therefore, rested with the Authority that is by law vested with the power to determine technical planning issues in the light of existing rules and regulations.

The Ombudsman went on to admit that given his mandate he can only highlight what in his view are elements that should be taken into account in the application of planning rules and regulations in the interest of the community rather than in the interest of individual owners who wished to develop their property in the contested area. These elements essentially regard public communal services including public roads, facility of access to the hub of the village, drainage and water seepage facilities and telephone services. Good administration requires that these public services and utilities should be made available within the context of preserving the area's historical and cultural environment and heritage.

Technical issues to be addressed by the Authority

The Ombudsman stated that in this respect there were certain technical issues that the Authority needed to review.

When the Authority rejected the application for the closure of access to Main Street and the creation of a *cul de sac* which would reduce the width of the projected road at the end of Triq il-Kurkanta to a pedestrian passage of 2.5m that would be inaccessible to vehicles, this was done also because it was deemed necessary to allow passage for the flow of storm water and to provide for main sewer connections. In this regard it was understood that a storm water project at Żebbuġ, commissioned by the Water Services Corporation, required the formation of a canal with a width of at least 3 metres for the drainage of rainwater in the land that had been expropriated for the purpose of road formation. This project envisaged that rainwater collected from Triq il-Kurkanta and several other streets in the neighbourhood would be received in this canal and channelled to flow into a neighbouring valley. The Ombudsman pointed out that unless these works would be implemented, it would be difficult to understand how drainage of rainwater could be adequately provided for through a canal in a pedestrian passageway that was only, at most, 2.5m wide.

The Ombudsman noted, moreover, that in this passageway provision had also to be made for the flow of a main sewer from Triq il-Kurkanta into Main Street and that even Triq il-Kurkanta had been built with a gradient that would provide for this flow. Several property owners in Triq il-Kurkanta had objected – and continued to object – to the decision by the Authority not to open the road as planned because they maintained that they were suffering grave inconvenience as a result of sewage problems that would only be solved if the road would be opened to its original planned width.

The Ombudsman submitted that although the decision by the Authority to open a 2.5m passageway was meant to solve these rainwater and drainage issues, complainant and other property owners in Triq il-Kurkanta continued to insist that this solution would not resolve these problems at all. In the circumstances he stated that it would appear that before a final decision could be taken, these issues needed to be examined in depth and a permanent and efficient solution had to be found urgently.

Conclusions by the Ombudsman

The Ombudsman reiterated in his Final Opinion that it is not his function to

delve into the technical details of this saga and the contrasting opinions and decisions of the authorities involved in favour or against the opening of Triq il-Kurkanta that led the Authority in 2001 to adopt the compromise solution to reduce access to a 2.5m pedestrian passageway. He commented that it was significant that after several years the situation remained unresolved and that the works, as approved in 2001, were not yet finalized. The land expropriated by the Government for road formation works that were originally planned was still subject to the President's declaration and no part of it had been released to its former owner to be utilized for development according to the permit that was given to him. It was obvious that the authorities were reluctant to do so because once any construction would take place, it would then be impossible for the road to be realized according to original plans. The Ombudsman observed that the Authority should address this state of affairs and take a definite decision forthwith in the public interest.

The Ombudsman referred to the unsuccessful attempt by the Authority to resolve the situation by considering an application for planning control (PC 12/2001) to eliminate the road connection as originally shown in the Temporary Provisions Scheme approved by Parliament and to reduce the width of the projected road and to build instead a pedestrian passageway, 2.5m wide, to link the two roads. This continued stalemate was due on the one hand to the conviction of the Roads Department that it was not in the public interest to permanently block the possibility of having the road constructed in the future with its original planned width and on the other hand to the wish by the Authority to reconcile the conflicting interests of private developers who owned property in the area.

The Ombudsman opined that in the circumstances a thorough revision of the proposal should be undertaken that would take into account the existing situation including the state of physical development in the area. Considerations of public interest should be paramount and the final decision should have as a starting point the original plan approved by Parliament in the Temporary Provisions Scheme that envisaged that it was in the public interest that the end part of Triq il-Kurkanta should be widened to serve as an access road for traffic into Main Street.

The Ombudsman stated that this decision should be examined in the light of the general presumption against the opening of new access roads and the

widening of existing streets and valleys laid down in Structure Plan Policy UCO 14 – a planning principle that was also recognized at the time that Parliament approved the Schemes. However, according to the Ombudsman, these issues would become relevant only after the Authority would establish that the area under review could still qualify as part of the village core as an Urban Conservation Area.

This re-examination should also make an in-depth assessment of the safety and sanitary environment requirements of residents in this road and establish whether at this stage it was still essential for Triq il-Kurkanta to be constructed as originally planned. One had to keep in mind that a few months before the decision by the Authority to reverse its repeated refusal to amend the Temporary Provisions Scheme, the Authority itself had declared that "*the proposal to eliminate* (the) *connecting road at Triq il-Kurkanta, Żebbuġ, Malta was refused on grounds that (*the*) proposal affects land which has been already expropriated by Government for a public purpose, the storm water run off and main sewer connection."*[4]

Recommendations by the Ombudsman

The Ombudsman recommended that in the light of these considerations the Authority should re-examine its decision to reduce the planned width of Triq il-Kurkanta as set out in the Temporary Provisions Scheme to a mere 2.5m passageway. He also recommended that a final decision, while allowing further development by complainant and any other developer, should define long term traffic management and other essential municipal services including rainwater seepage and sewage drainage.

The Ombudsman went on to suggest that in this review consideration should be given not only to the interests of complainant and other interested developers and owners of land and property in the contested area but also and above all to those

A decision on road formation, an essential public utility, should be taken mainly if not exclusively in the public interest and should reflect …..… the will of Parliament.

[4] Letter by the Planning Authority to the Director, Roads Department on 28 January 2000.

of the general public. A decision on road formation, an essential public utility, should be taken mainly if not exclusively in the public interest and should reflect, within the context of the Ombudsman's recommendations, the will of Parliament.

The Ombudsman concluded by insisting that any decision by the Authority should conform to existing planning regulations and legislation. Its implementation has to be realized within the parameters of applicable policies and procedures as laid down by law.

Outcome

In its reaction to the Ombudsman's Final Opinion the Authority clarified that the Temporary Provisions Scheme of the area in question that was approved by Parliament in 1989 included the proposed vehicular link between Triq il-Kurkanta and Main Street together with surrounding buildings within the village core boundary. However, when the Structure Plan that too was approved by Parliament came into force in 1992, Structure Plan Policy UCO 14 that was meant to address the control of vehicular traffic and the creation of a safer and more congenial environment for pedestrians within Urban Conservation Areas, was found to be in conflict with the projected road link indicated on the Scheme.

The Authority explained that in view of this conflict it was considered expedient in the public interest to make changes in the Temporary Provisions Scheme in terms of Legal Notice 76 of 1997 that was then applicable.[5] The subsequent PC application (PC 12/01) was processed and approved within this legal framework since it was feared that the proposed vehicular road would create a traffic hazard. At the same time it was felt that there was ample vehicular access to the new developed housing area on the periphery

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[5] Article 8(1) of Legal Notice 76 of 1997 which was applicable in 2001 (before being replaced by Legal Notice 27 of 2002) stated as follows:

"The Authority may, where it considers it expedient to do so in the public interest and having regard to the Temporary Provisions Schemes or Subsidiary Plans, the Structure Plan and other material considerations, and in accordance with article 3 of this Order, make changes in the Temporary Provisions Schemes or Subsidiary Plans."

of the village core through other connections with Main Street while the introduction of a pedestrian passageway would allow for the surface water run off and sewer connections to be adequately catered for.

The Authority maintained that it did not envisage that any action could be taken on the Ombudsman's recommendations as the decision by the Authority on PC 12/01 in September 2001 was taken in the general public interest in line with Structure Plan policy approved by Parliament.

Following this reaction, the Ombudsman informed complainant that after the reconsideration of the case by the Authority in the light of his recommendations and although he did not necessarily agree with the Authority's position on the issue, he deemed that this grievance was closed insofar as his Office was concerned.

Case No I 486

BUILDING INDUSTRY CONSULTATIVE COUNCIL

On fixed term work contracts and positions of trust

The complaint

An employee who served for several years as Secretary of the Building Industry Consultative Council (BICC) was aggrieved and reported the matter to the Office of the Ombudsman when his claim to a indefinite contract of service in this post in terms of Legal Notice 51 of 2007 was, in his view, unfairly turned down by the Management and Personnel Office (MPO) of the Office of the Prime Minister.

Facts and findings

On 9 December 2003 by means of an internal circular (WD Pers 43/2003) addressed to all its employees, the Works Division invited applications for the post of Secretary to head the administration of the Building Industry Consultative Council within the Ministry for Resources and Infrastructure.

Complainant's application was successful and on 26 March 2004 he was assigned to the Council to perform the duties of Secretary for a trial period of three months. In this letter complainant was told that subject to satisfactory performance during these months, the assignment could be extended on a year-to-year basis and that throughout his assignment he would retain his substantive grade of Supervisor in scale 14 in the public service while upon its termination he would revert to his substantive grade. By way of compensation for carrying out duties in the Council that were beyond his substantive grade in the public service, complainant was entitled to an additional monthly remuneration as well as a monthly allowance for the use of his private car on BICC matters.

The Ombudsman noted that although complainant's duties were originally termed an "*assignment*", when the Director, Corporate Services of the Ministry for Resources and Infrastructure wrote on 18 May 2004 to the MPO to report about the outcome of circular WD Pers 43/2003 he stated that complainant had been "*appointed*" Secretary to the BICC on a trial basis for three months.

Upon successful conclusion of his trial period complainant was formally appointed Secretary to the BICC for a period of three years as from 16 November 2004 by the Minister for Resources and Infrastructure.[1] In subsequent years complainant's services with the Council were extended by means of the issue of a letter of renewal that stated that he was being reappointed to this position on a year-to-year basis.[2] However, after the second extension complainant's appointment was first prolonged by three months up to 30 October 2008 and then abruptly terminated on 1 November 2008 by a letter to complainant from the Permanent Secretary of the Ministry for Resources and Rural Affairs which at that time was responsible for the Council.

Upon being asked by the Ombudsman for an explanation of the reasons for the termination of complainant's appointment, the Ministry replied that in September 2008 it had already intimated to complainant that any further renewals should not be considered as a routine process. In fact subsequent to this statement complainant's next renewal only covered four months. The Ministry also pointed out that in the light of several earlier attempts by complainant to convert his fixed term work contract into an indefinite contract, he had been told that since his position was considered as a position of trust, this prevented his appointment from being amended into employment of indefinite duration.

In this regard the Ombudsman noted that Legal Notice 51 of 2007 – *Contracts*

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[1] *"I am appointing you Secretary to the Building Industry Consultative Council for a period of three years as from the 16th November 2004 ….."* – letter by the Minister for Resources and Infrastructure to complainant dated 30 December 2004.

[2] The Maltese words that were used in these letters of reappointment by the Minister for Resources and Infrastructure in 2006 and 2007 were *"Għandi l-pjaċir nerġa' naħtrek bħala Segretarju tal-Building Industry Consultative Council ……" (*translated as *"I am pleased to reappoint you Secretary to the Building Industry Consultative Council ……..").*

of Service for a Fixed Term Regulations, 2007 under the Employment and Industrial Relations Act (Cap 452) provides that employees on a contract of service for a fixed term but who have held such a position without interruption in excess of four years are entitled to an indefinite contract. However, sub-regulation 3(2) provides that these regulations shall not apply to:

"(a) persons appointed to serve on any Board of any statutory or public Authority, Commission, Committee, Corporation or the Board of any body corporate established by law …..…
(b) assignments for the performance of a task of a specific nature or a specific task to be performed in a specified period of time given by the employer to an employee who is already employed with the employer on an indefinite contract of service;
…..…
(d) a contract of service in the Public Service or the Public Sector not made in accordance with the applicable laws of Malta and in particular, the provisions of the Constitution."

The Ombudsman observed that complainant did not fall in a category of persons appointed to serve on the board of a public authority or other body corporate while his assignment at the BICC could not be considered as a contract of service that was made in accordance with the provisions of the Constitution of Malta since it was not made on the advice of the Public Service Commission (PSC) or through the Employment and Training Corporation or through a public examination.

At the same time regulation 7 of Legal Notice 51 of 2007 that is without prejudice to sub-regulation 3(2) provides that an employer may not retain an employee on a fixed term contract of service if he cannot provide objective reasons for doing so. However, sub-regulation 7(4e) qualifies as an objective reason a situation where the employee:

"…..… is a person employed as a person of trust in the office of a publicly elected body or of a holder of a publicly elected office, or is employed by a person referred to in paragraph (a) of sub-regulation (2) of regulation 3 to serve as a member of the private staff, or is employed to serve as advisor or consultant or in any other capacity in the Public Service or public or private sector as a person of trust."

The Ombudsman confirmed that after the publication of Legal Notice 51 of 2007, complainant made representations to the authorities to convert his definite contract into an indefinite one by virtue of the fact that he had already at that time exceeded four years without interruption on a fixed term contract. These requests were, however, turned down on the grounds that there was an objective reason why his contract should remain on a definite basis, namely that he occupied a position of trust.

The Ombudsman next sought information from the Management and Personnel Office as to whether a definition of "*a position of trust*" existed at law or whether there were official policy criteria whereby a position would be considered as a position of trust. This query was not, however, addressed in the reply that was sent to the Ombudsman by the MPO.

Considerations and comments by the Ombudsman

The Ombudsman stated that complainant's lament arose as a result of the fact that although during his tenure as Secretary to the Council he was continuously led to believe that his appointment would be regulated by a specific contract including a salary that would reflect the responsibilities of the position, this contract never materialised and he felt that he had been sorely let down by the Ministry.

Complainant challenged the reasons given by the authorities to justify their refusal to convert his fixed term contract into an employment contract of indefinite duration and their reference to a provision in the *Contracts of Service for a Fixed Term Regulations, 2007* that excludes holders of fixed term contracts in a position of trust from being able to qualify for an indefinite contract after four years of uninterrupted service. Complainant disagreed that he was occupying a position of trust since his appointment followed a call for applications open to all employees in the Works Division and that never indicated that the position was one of trust.

Although the Ombudsman requested the MPO as the office that is responsible for human resource management in the public administration to state the grounds on which a position in the public service can be regarded as a position of trust, either on the basis of an existing policy or at law, this query

remained unanswered.

This led the Ombudsman to state that he tended to agree with complainant that once the position of Secretary to the Council was not declared formally as a position of trust and since there is no definition at law of such a position, it could not possibly be argued that this position, filled after a call for applications open to scores of employees in the Works Division, could be regarded as a position of trust. In the absence of a clear policy followed by government authorities on positions of trust, it could reasonably be claimed that every office in the public service is essentially one of trust since the Criminal Code binds all public officers to respect confidentiality. In the opinion of the Ombudsman, however, this is not what was intended by the regulations published under Legal Notice 51 of 2007 or by the relative EU Directive on which these regulations were based.

The Ombudsman observed that although the MPO viewed the position of Secretary to the BICC as one of trust since complainant was "*handpicked after an internal expression of interest* …… (that was) … *not a normal call*", he did not agree with this interpretation. Whilst agreeing that circular WD Pers 43/2003 was not a public or service-wide call, it was to all intents and purposes a regular internal call, open to hundreds of employees in the Works Division where, like many other internal calls in the public service, the issue of a position of trust did not feature at all. The Ombudsman went on to argue that once the choice of complainant was made following "*an internal expression of interest*" – if the authorities so wished to label the call for applications – one cannot then state that there was any handpicking which enabled complainant to be the successful applicant. In any event, the Ombudsman stated that any such consideration was irrelevant to the issue as to whether the position of Secretary to the Council is a position of trust or otherwise.

The Ombudsman also observed that one could not validly argue, as was done by the Ministry for Resources and Rural Affairs, that it was the Minister himself who appointed complainant or that complainant himself considered his position as one of trust because he offered to resign following the general elections of March 2008.

Besides, according to the Ombudsman, there was a further aspect that needed

to be considered regarding the insistence by the MPO that complainant's position was one of trust, namely, that there seemed to be no definition of positions that would qualify for this description. There is no such definition in Legal Notice 51 of 2007 or in any employment related law while the MPO failed to venture a definition when asked to do so by his Office. In the opinion of the Ombudsman, this uncertainty was unacceptable since the right of an employee to have his definite employment contract converted into an indefinite one and the right of an employer to terminate the definite contract of an employee were at stake.

…… it is a basic principle that laws should be clear and certain. Ambiguity in legislation and regulation has to be avoided and terms used should be capable of univocal definition …… All legal terms should have an objective meaning and should not be capable of being interpreted according to the subjective meaning that may be given to them by an interested party.

The Ombudsman explained that it is a basic principle that laws should be clear and certain. Ambiguity in legislation and regulation has to be avoided and terms used should be capable of univocal definition to ensure their compliance. All legal terms should have an objective meaning and should not be capable of being interpreted according to the subjective meaning that may be given to them by an interested party.

The Ombudsman declared that his investigation showed that it was not at all clear what the Management and Personnel Office meant by the term "*position of trust*" and whether the meaning given by the MPO could stand the test of objective scrutiny. The definition by the MPO could easily mean that all public employees occupy a position of trust in terms of Legal Notice 51 of 2007 since all public officers are enjoined to perform their duties, whatever they are, in a trustworthy manner; and indeed they would not have been employed if their employer did not trust them to do the duties entrusted to them. It is therefore obvious that the quality of "*trust*" is not inherent and intrinsic to the position itself but to the personal relationship between the employer and the employee that the said position is meant to satisfy.

The Ombudsman pointed out that the EU Directive that limits the nature and

extent of definite contracts of employment is applicable across the whole spectrum of employment in any EU Member State and is not limited to the public service. This means that any definition of a term has to be generally applicable to all employment contracts indiscriminately.

The Ombudsman also noted that in his opinion the attempt by the MPO to introduce the element of trust and give it a loose and consequently wide interpretation, if generally applied, could risk neutralising the Directive to a large extent. He expressed his view that as a consequence it was doubtful whether such an approach would be acceptable in EU fora.

In the circumstances the Ombudsman recommended that if the government chose to insist on the limitation of the Directive and to exclude "*positions of trust*" from its application, it should clearly define what this term means within the context and objectives of the Directive. It should define to what extent the degree of fiduciary relationship between employer and employee would justify an exception to this Directive and whether this would fall within its declared limitations.

The Ombudsman went on to state that the term "*position of trust*" is capable of different interpretations when referring to various aspects of human activity. Relationships between a tutor and his ward, a banker and his client, a doctor and his patient all give rise to varying degrees of "*trust*" and the violation of any such trust could give rise to serious consequences and is recognized as an element of increased responsibility and liability in Criminal Codes. The Ombudsman declared that it is obvious, however, that none of these recognized definitions of "*trust*" could be applied automatically to justify an exemption from the EU Directive regulating definite contracts of employment of these and other professionals.

The Ombudsman commented that it is in this context that the final part of sub-regulation 7(4e) requires fine-tuning. The generic phrase *"or in any other capacity in the Public Service or public or private sector as a person of trust"* needs to be more clearly defined not only to ensure its compliance with the Directive but also, and more importantly, not to allow avoidance of its word and spirit.

The Ombudsman observed that without prejudice to his findings, the

government would possibly have been correct in invoking sub-regulation 3(2d) of Legal Notice 51 of 2007 once the appointment of complainant as Secretary to the Council was not made in accordance with applicable laws whereby an appointment in the public service is, as a matter of procedure, made on the advice of the Public Service Commission under the provisions of the Constitution of Malta. In this instance where the designation of complainant as Secretary to the BICC was originally declared an "*assignment*" that in later correspondence came to be referred to as an "*appointment*", there were indications that the whole selection process might not have been made in accordance with the applicable laws of Malta since the PSC was not involved and the appointment did not follow a public examination that was advertised in the *Government Gazette*. Nor was the appointment made after consultation with the Employment and Training Corporation.

The Ombudsman stated that on this ground alone complainant may not qualify for conversion of his fixed term contract into an indefinite one in terms of Legal Notice 51 of 2007 since these regulations do not cover appointments that do not satisfy the Constitution of Malta. In this context the Ombudsman deemed it relevant to point out that the authorities never declared that Legal Notice 51 did not apply to complainant's appointment but instead repeatedly quoted the provision under this Notice relating to what they considered as complainant's "*position of trust*".

In its defence the MPO contended that the Building Industry Consultative Council was set up with specific terms of reference under Parliamentary Resolution No 74 as approved on 3 November 1997 for a period of three years, renewable unless the government would give notice that the Council's appointment would not be renewed. The same resolution also established that during the period of appointment, the administrative and clerical members of the Council should be provided by the government from amongst public service employees. To this effect, according to the MPO, the Ministry for Resources and Infrastructure under whose onus the Council fell at that time, issued "*an internal expression of interest*" amongst employees of the Works Division – as opposed to a public or service-wide call for applications – so that public officers in the Division, already on an indefinite contract, may express their interest in performing the duties of Secretary to the Council for as long as required. In fact no specific fixed term period was envisaged in this "*expression of interest*", with the incumbent continuing to receive the

salary of his substantive grade. The MPO also stressed the temporary nature of BICC and of its staff and that its duties were time-bound.

Parliamentary Resolution No 74 of 3 November 1997 indicated clearly the temporary nature of the BICC that was not set up by law as a permanent body while the Resolution itself specified that the government could refuse to renew its existence. There is therefore merit in the argument by the MPO that as a result of this background one could not reasonably expect a Council that is itself not established on an indefinite basis to be served by a Secretary who is on an indefinite contract. Additionally, since under this Resolution the administrative and clerical duties of the Council were to be performed by public officers provided by the government, this left the government with full discretion to deploy and rotate public officers to carry out the Council's administrative tasks.

In this regard the Ombudsman referred to sub-regulation 3(2b) which provides that Legal Notice 51 of 2007 does not apply to "*assignments for the performance of a task of a specific nature or a specific task to be performed in a specified period of time given by the employer to an employee who is already employed with the employer on an indefinite contract of service*." Recalling that complainant was already employed as a public officer on an indefinite contract of service in salary scale 14 and, in line with Parliamentary Resolution 74, was given an assignment, renewed annually, to perform specific duties as Secretary to the BICC, in terms of this paragraph the provision of Legal Notice 51 of 2007 – converting a fixed term contract into an indefinite contract – did not apply to complainant.

According to the Ombudsman this is the reason that the authorities should have given to justify their action rather than equate the position of Secretary to the Council to a position of trust. The facts of the complaint fit precisely with sub-regulation 3(2b) of Legal Notice No 51 of 2007 and it was for this reason alone that the authorities should have refused complainant's request for an indefinite contract for the tasks that he was performing.

At this stage the Ombudsman went on to refer to a further aspect that arose in the course of his investigation when complainant presented a document dated 8 November 2007 signed by the Minister for Resources and Infrastructure stating that *"I am pleased to reappoint you Secretary to the Building Industry*

Consultative Council from 26 June 2007 for a period of one year."[3]

The Ombudsman noted that this official renewal of complainant's term for a further period of one year up to 25 June 2008 was made subsequent to the coming into force of Legal Notice 51 of 2007 on 15 June 2007.[4] The Ombudsman also found that on 30 September 2008 the Permanent Secretary of the Ministry for Resources and Infrastructure wrote to inform complainant that he was again being appointed Secretary to the BICC for the period 27 June 2008 to 30 October 2008. This meant that complainant held this position continuously from 26 March 2004 to 30 October 2008 – in other words, for a period of over four years.

Sub-regulation 7(6) of the *Contracts of Service for a Fixed Term Regulations, 2007* further provides as follows:

"(iii) In the case of an employee on a fixed term contract whose period of continuous employment has not exceeded four years on the date of entry into force of this sub-paragraph, the employer shall, either before the expiry of the current contract or within a period of six months from the date of entry into force of these regulations, whichever is earlier, furnish the employee in writing with:

(a) the objective reasons, if any, why the contract which had been entered into should not be converted into one of indefinite duration if the employee is employed on one or more successive contracts for a continuous period exceeding four years, or

(b) the actual wages and other conditions of employment attached to the contract once this automatically becomes indefinite in the absence of objective reasons."

The Ombudsman stated that under this provision any renewal of complainant's appointment after the entry into force of these regulations should have

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[3] *"Għandi l-pjaċir nerġa' naħtrek bħala Segretarju tal-Building Industry Consultative Council mis-26 ta' Ġunju 2007 għal perjodu ta' sena."*

[4] By virtue of Legal Notice 156 of 2007 the Minister of Education, Youth and Employment established 15 June 2007 as the date when the *Contracts of Service for a Fixed Term Regulations, 2007* came into force.

included the declaration that the position to which he was being re-appointed was one of trust. This implication is based on two important considerations, namely, that the authorities never argued that the provisions of Legal Notice 51 of 2007 did not apply in complainant's case and, secondly, on the grounds that the official reason that was given to justify the failure to convert complainant's contract into a definite one was that he was occupying a position of trust – an objective reason, acceptable under the terms of Legal Notice 51 of 2007. On this basis any renewal of complainant's appointment after the Regulations came into force implied a failure by the authorities to observe the provisions of these Regulations that were applicable to his particular case.

The Ombudsman commented that if at that stage the authorities believed that complainant's position was one of trust and that this constituted an objective reason not to convert his contract into one of indefinite duration, they were in duty bound to inform him so on the first occasion when his appointment was extended yet again after Legal Notice 51 of 2007 came into force; and this should therefore have taken place in the letter dated 8 November 2007. Once they failed to do so, the authorities ought then to have informed complainant of the actual wages and other conditions of employment attached to the contract for the period of renewal. Again the authorities failed to do anything of the sort.

Finally the Ombudsman made reference to an overriding consideration, namely, the nature of the call for applications in December 2003 and the type of contractual relationship that the circular set out for the post of Secretary of the Council. He recalled that the offer was restricted to employees of the Works Division and that since the posting did not attach to a salary grade, the selected applicant could only expect to receive a monthly allowance in addition to the salary attached to his substantive post in the service.

The Ombudsman pointed out that clearly complainant must have become increasingly upset that although after he was selected to the post in 2004 he was led to believe that his position would be regulated by a contract that would include a salary compatible with his duties, he was left instead with his basic salary in grade 14 plus monthly allowances for higher responsibilities that were not linked to any higher salary scale. His additional remuneration could not therefore be considered as a deputizing allowance in terms of the

Public Service Management Code. Admittedly the call for applications did not specify a higher salary scale or refer to any specific remuneration while complainant belonged to a grade in the public service from which he was not eligible to apply directly for a grade in a higher salary scale.

The Ombudsman observed that the fact that complainant's duties in the BICC were previously done by an officer in a higher salary scale was not a valid argument in favour of his view that he deserved a higher scale. It could, however, be relevant to an issue – not raised by complainant – as to whether he was appropriately remunerated for the formally recognized higher responsibilities even though at the same time it must be admitted that he always accepted the remuneration offered to him subsequent to his selection as Secretary to the BICC and never claimed underpayment.

The Ombudsman said that it was unfortunate that these expectations were further fuelled by the incorrect weighting given to the term "*naħtrek*" – (*I appoint you* …") used in the letters of reappointment issued by the Ministry for Resources and Infrastructure which led complainant to compare it, at least in his mind, to a renewal of a contract of service which it definitely was not. Complainant was never an employee on the books of the Council since he was still – and had always been – employed with the Ministry on an indefinite contract.

The Ombudsman stated that the undeniable fact that the posting instilled in complainant expectations of being awarded a higher salary that would be commensurate with his higher responsibilities, while perhaps justified, was rather irrelevant to the point at issue.

Conclusions by the Ombudsman

At the end of his investigation the Ombudsman concluded that the authorities never pleaded that the *Contracts of Service for a Fixed Term Regulations, 2007* did not apply to complainant. On the contrary, they made reference to a specific provision in these regulations, namely, that complainant occupied a position of trust and argued that this constituted an objective reason whereby another provision in the regulations that after four continuous years of employment a fixed term contract is converted into a permanent one, was not

applicable in this particular case.

The Ombudsman stated that once the authorities considered complainant to occupy a position of trust, in terms of regulation 7 of Legal Notice 51 of 2007 they were obliged to inform him accordingly on the first occasion after these regulations came into force when his contract was next renewed for one year up to 15 June 2008. The Ministry, however, failed to do so.

The Ombudsman pointed out that there was no mention in the internal call for applications for employees in the Works Division that the advertised position was a position of trust; and once complainant was selected subsequent to this call, the authorities could not argue that he had been handpicked for this position.

It was also important to recall that when requested by the Ombudsman to indicate the legal basis or publicized policy as to which positions are to be considered as *"positions of trust"* the MPO, as the authority responsible for the management of the public service, failed to address this query.

Taking everything into account the Ombudsman upheld complainant's argument that the reason given by the authorities to reject his request for a permanent contract as Secretary to the Council was wrong. The authorities could possibly have invoked sub-regulation 3(2d) of Legal Notice 51 of 2007 that these regulations do not apply to a contract of service in the public service that was not made in accordance with the applicable laws of Malta and, in particular, the provisions of the Constitution. Once the Public Service Commission was not involved in the award of a fixed term contract for complainant that was repeatedly renewed, one had to query whether the regulations that he invoked could apply in his case. The Ombudsman ruled that this was a matter that would need to be decided by a court of law.

The Ombudsman concluded, however, that once complainant was already employed with the public service on an indefinite contract and was given a specific assignment with the government, in this instance sub-regulation 3(2b) of Legal Notice 51 was applicable; and this should have been the reason that complainant ought to have been given to explain why his definite contract could not be converted into an indefinite one.

The Ombudsman stated that the authorities were wrong to renew complainant's tenure up to 15 June 2008 – the first renewal after the regulations came into force – without informing him that they considered his position as one of trust when they believed it to be so in terms of Legal Notice 51 of 2007. This attracted criticism from the Ombudsman.

The Ombudsman concluded his Final Opinion by stating that while he understood complainant's predicament when he lost a substantial monthly allowance to which he had been accustomed for over four years, he was at the same time unable to assist him any further since according to his contract as Secretary to the Council his salary was to be that of his substantive grade in scale 14 plus a monthly allowance and there was no evidence of any commitment to upgrade his salary scale.

The Ombudsman recommended that the MPO should draft an interpretation of a *"position of trust"* for submission to the Attorney General for the purpose of amending Legal Notice 51 of 2007 to establish a clear and transparent interpretation of this term and avoid any possible future uncertainty.

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Outcome

Subsequent to the issue of the Final Opinion by the Ombudsman the MPO reaffirmed its stand that the temporary nature of the Building Industry Consultative Council and of staff assigned to the BICC was manifestly clear in the Agreement attached to Parliamentary Resolution No 74 setting up the Council.[5] Consequently complainant must have been aware of the temporary nature of his own position within the Council and that his continued

[5] The Agreement states, among other things, that the Council was initially being appointed for a period of three years *"renewable thereafter for further periods of three years each unless the Government gives notice in writing to the other parties at least one month prior to the then current term of its intention not to renew the agreement"*. The Agreement also states that *"… the Council shall continue to function for as long as the Government and one of the other parties remain party to this agreement."*

engagement as Secretary was destined to last for as long as he continued to enjoy the trust of the Council. The MPO went on to point out that Legal Notice 239 of 2008 had amplified the definition of a "*position of trust*".

In his reply the Ombudsman reiterated his view that the consideration that a position of employment with the Board is one of trust cannot be linked to the temporary nature of the Council itself. He also stated that notwithstanding the amplification that was referred to by the MPO, in his opinion this definition required further clarification although a decision regarding this clarification ultimately rested with the government.

Case No J 290

CUSTOMS DIVISION

Longing for telework

The complaint

In a complaint lodged with the Office of the Ombudsman a female employee in the Customs Division alleged that while her repeated requests to her superiors to be allowed telework were consistently ignored for a long time and subsequently rejected, a colleague was allowed to work remotely through telework arrangements even though she never applied to work in this way.

Complainant was also upset that her proposals to the management of the Customs Division regarding the type and nature of assignments that she could usefully carry out by telework were repeatedly turned down. She expressed her indignation at the fact that when only a few months later the employee who had been allowed telework went out on maternity leave, she was told to take over her tasks but was not allowed to do these same duties in the same way.

Findings by the Ombudsman

To establish the proper sequence of events, the Ombudsman gained access to the files of the Customs Division on the matter. This enabled him to ascertain that despite complainant's claim, her colleague submitted her first request for telework a fortnight before she sent her own application. The Ombudsman also found that the application by complainant's colleague had been processed regularly and that after her request was approved by the Permanent Secretary of the Ministry for Finance, the Economy and Investment, a date was set when these telework arrangements would commence.

In the course of his investigation the Ombudsman found that despite

complainant's misgivings, the date when an employee first submits an application for telework does not constitute the sole yardstick on which to process these requests. From documents that were brought to his attention the Ombudsman found that complainant's application was not turned down because her colleague applied earlier but on the grounds that there was not enough work in the section of the Customs Division where the two employees were deployed to justify that both workers be allowed to work remotely. The Ombudsman also found that complainant's other proposals regarding alternative telework that she could be assigned were in fact given due consideration by management but found unacceptable. The Ombudsman recalled at this stage that acceptance of proposals for telework should always remain a prerogative of management.

…… acceptance of proposals for telework should always remain a prerogative of management.

With regard to complainant's claim that her colleague could switch without any difficulty from telework to maternity leave, the Ombudsman observed that all female employees could avail themselves of maternity leave as of right. He also pointed out that whenever an employee is on maternity leave, the workload of this person has as a rule to be distributed among other employees.

While recognizing that complainant must have been irked to be assigned work previously done by telework while she had to be physically present on the job to perform these duties at the same time that she had a pending application to work remotely, the Ombudsman observed that in his view these arrangements were inevitable since in any event the work of the Customs Division could not be left pending to await the return from maternity leave of this employee. In the circumstances the Ombudsman accepted the assurance by the management of the Division that it would not have been sensible to ask complainant to telework from home throughout the maternity leave of her colleague.

The Ombudsman commented in his Final Opinion that after having examined documents presented by the Customs Division in connection with this issue and after having heard explanations given by management, he was able to confirm that there were not enough opportunities for telework in this Division

to accommodate the large number of telework requests from employees who wished to work from home. The Ombudsman also found that contrary to complainant's belief that her request had been merely shelved, her application was given serious consideration by the Head of the Division and was also discussed with representatives of her trade union but even despite this intervention it was still not possible to allocate any telework to her.

The Ombudsman also examined complainant's grievance that long after she sent her application, she still remained without a reply. On this aspect of the complaint the management of the Division informed the Ombudsman that all the applications for telework by employees of the Division that could not be accepted due to a dearth of telework opportunities were left on hold so that in the event that any such opportunities would arise in future, these requests would be considered afresh. The Division claimed that it acted in this manner since if instead it issued a straight refusal, this would have closed the door to all these applicants.

Notwithstanding this explanation the Ombudsman stated, however, that in his opinion the Division would have handled the matter more properly and would have been better advised if instead of doing so, it had written to complainant and to other applicants who were in the same position to explain the situation and inform them that at that stage there were no tasks that could be done under telework arrangements. The Ombudsman was also of the opinion that even at that stage the Division ought to have informed applicants that it would only consider their requests in the event that new opportunities for telework arose that were not available at that point in time.

The Ombudsman's discussions with the Customs Division regarding this complaint confirmed that despite all its good intentions, management was still unable to provide any amount of telework to the relatively large number of employees who wished to work under these arrangements. Clearly management was not to blame for this situation since if it was felt that the work by employees of the Division had best be done under traditional arrangements, this was the end of the story and the Division could not conjure up new tasks merely for the sake of meeting the wishes of employees to work remotely. These several requests obviously placed management with its back to the wall and there seemed to be no immediate solution to this problem.

The Ombudsman observed that it appeared that when the government first announced a scheme for the strategic use of telework, this announcement gave rise to a lot of expectations among employees. As a result, it soon became obvious that the strong interest generated by this scheme was much greater than the government ever anticipated and that in turn this gave rise to widespread disappointment among employees whose applications for telework could not be accepted since there were not enough opportunities to go around.

The Ombudsman also commented that there were strong indications that when the scheme was launched, there had been inadequate planning about the way in which it would be implemented. It was obvious that no exercise had been done to establish the type and kind of work that could be assigned to employees of the Customs Division under the proposed new arrangements before the scheme was launched while there was also no indication of the workload that could be assigned to employees who wished to work under these arrangements.

Conclusion

These findings led the Ombudsman to conclude that although complainant's request to be assigned telework was turned down while her colleague's application had been accepted, this did not constitute improper discrimination or amount to injustice.

The Ombudsman observed that no worker could claim a right to be assigned telework since any such arrangements are the result of an agreement freely entered into between management and an employee. This is in fact how the Customs Division acted subsequent to the launching of this scheme by the government since in areas where it was felt that applications for telework could be accommodated and there was work that could be done under these arrangements without causing any disruption to its day-to-day operations,

…… no worker could claim a right to be assigned telework since any such arrangements are the result of an agreement freely entered into between management and an employee.

the Division did not hesitate to implement the government's new policy.

Put bluntly, if complainant happened to be assigned duties in a particular section of the Customs Division where telework arrangements were not considered suitable or were hard to come by, the Division could certainly not be faulted for turning down her application.

Case No J 436

NAXXAR LOCAL COUNCIL

The Local Council that cared for the upkeep of its roads

The complaint

A resident of Naxxar lodged a complaint with the Ombudsman to protest against the Local Council of this locality which in his view unjustly withheld the sum of €23.30 from a deposit of €1 16.47 that he paid to be given permission by the Council to place machinery in front of his residence where structural alterations were being carried out.

Facts and findings

Upon learning that he needed a permit from the Naxxar Local Council to station machinery such as a crane or lifting equipment outside his house or to erect scaffolding on the pavement in connection with works in his residence, complainant applied for this permit against the payment of a deposit of €1 16.47. Conditions for the issue of this permit included that the contractor undertaking the works would at all times place protective plastic sheeting under his machinery to safeguard the tarmacked surface of the road from damage in the case of oil spills from the machinery; payment of an automatic penalty of €23.20 if any oil spills would damage the surface of the road; and the right by the Council to claim from the permit holder all the expenses incurred to repair any damage that might be caused to the road during the works.

Complainant signed the form with these conditions that also contained a declaration at the end that he had read and understood these terms and would abide by them. However, since works on his residence were not completed by the time that this permit expired, complainant applied for an extension by a few weeks and the Council duly accepted this request.

When works were eventually completed and complainant told the Naxxar Local Council that the permit could be withdrawn, in line with normal practice on similar occasions the Council sent a Works Officer to inspect the site and establish the condition of the area of the street where the machinery had been stationed. A report on this inspection was given on an *ad hoc* Council form captioned *Inspection of Machinery or Materials.*[1] It later transpired that this was the second inspection outside complainant's residence since the Local Council issued the permit although complainant expressed doubts as to whether these inspections had really taken place on the grounds that nobody ever informed him about them.

The Ombudsman found that following the declaration by the inspector who visited the site, the Naxxar Local Council withheld €23.30 from complainant's deposit as a penalty and refunded the sum of €93.18. Complainant, however, did not take this action lying down and steadfastly refused to accept the cheque issued by the Council with the reduced amount while insisting on a full refund.

To defend its action the Naxxar Local Council sent various emails to complainant with photos of the damage allegedly caused to the surface of the road in front of his residence by oil spills from the machinery that was stationed there for several months but complainant insisted that he never received these emails. Another inspection that took place some weeks later showed that lumps of concrete found earlier in front of complainant's property had in the meantime been removed but the oil spills were still visible. Complainant insisted with the Council that these oil stains were not from machinery used for works on his property and attributed them instead to a neighbouring contractor who often parked his heavy machinery in front of his house. Despite these protests, the Council stuck to its decision.

Faced with this impasse, the Ombudsman requested the Naxxar Local Council to submit a copy of the report by the Works Officer that led the Council to withhold part of complainant's deposit. From this document it appeared that in a report on the condition of the road before works got under way, the inspector confirmed that the pavement was in good condition while

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[1] *"Spezzjoni ta' Makkinarju jew Materjal".*

the tarmac surface of the road too was in good shape. The report went on to state that even at that time the middle section of the road was stained by an oil spill that must have been deposited by machinery.[2]

In comments on the state of the road after the works were completed, the inspector referred to some concrete patches on the pavement although he admitted that it was likely that these patches had been there for quite some time.[3] The Ombudsman noted that this report, issued a few days after works were completed, made no mention of any oil spills although these had been mentioned in the earlier report on the condition of the street in front of complainant's residence before works got under way.

Considerations and comments by the Ombudsman

The Ombudsman noted that complainant challenged the penalty by the Naxxar Local Council for an alleged oil spill from machinery used for works on his residence. While vigorously denying that the spill was caused by this machinery, he asked the Council to turn its attention elsewhere and verify whether this damage was caused instead by the heavy machinery belonging to a building contractor who regularly left it parked in the neighbourhood. To counter complainant's insistence that he had not received any warnings from the Council with a deadline to carry out remedial works on the road, the Council on its part declared that the penalty had been inflicted on complainant not because he failed to carry out the remedial works on time but for what it considered as something that had undoubtedly occurred, namely the oil spill. According to the Council, all indications pointed that it was complainant who was responsible for this situation.

The Ombudsman pointed out that his Office would have been unable to investigate the matter if the Council did not have in its possession the reports on which it had based its decision to penalize complainant and that had also been made available to him. The report on the first inspection indicated clearly that an oil spill existed in the middle of the road near complainant's

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[2] *"Il-bankina tinsab tajba u t-tarmac ukoll. Hemm roqgħa żejt ta' xi makkinarju fin-nofs tat-triq …."*

[3] *"Fil-bankina hemm xi qatriet tal-konkos però jidher li ilu hemm. Fit-tarmac ukoll hemm xi ftit konkos. Dan ukoll jidher li ilu hemm."*

residence before the works had even started while the second report that was prepared after the works were completed made no mention of oil marks on the road and merely referred to old drops of concrete.

In his Final Opinion on this case the Ombudsman stated that it was reasonable to expect that if there were any oil spills in the road after works were finished, the inspector sent to check the condition of the road would have made reference to these spills in his report. The absence of any such comments could not therefore but be interpreted in favour of complainant and strengthen his credibility since in his first report before works got under way the inspector indicated that there was evidence of an oil spill on the surface of the road.

Considering the existence of conflicting evidence that gave rise to at least a reasonable doubt in favour of complainant's position and once there was no reference at all to any oil spill in the second report, the Ombudsman upheld complainant's version and was inclined to believe his denial that he was in any way involved in this spillage. Even though there was evidence of oil spills in subsequent photos of the section of the road in front of complainant's residence, this was not, however, enough to vindicate the stand by the Council that complainant was the one who was directly responsible for them or that he had caused them. At the same time the Ombudsman expressed his view that both reports confirmed that, contrary to what complainant maintained in his grievance, these inspections had indeed been carried out even though he might not have been aware of them.

Complainant also alleged that the Naxxar Local Council misled him into signing a permit with conditions for the positioning of heavy machinery in a public thoroughfare. He maintained that once these conditions imposed a duty on the contractor and not on the property owner to place protective sheeting under the machinery as a preventive measure, it was the contractor who ought to have been required to sign this permit. The Ombudsman, however, rejected this claim since complainant himself affirmed in his declaration that he read, understood and accepted the implications of these conditions that, amongst others, held him personally liable for any damages. In the circumstances it could safely be concluded that complainant signed these conditions freely and it was unacceptable for him to complain several months after he had done so that he had been misled into signing these papers.

Conclusions and recommendations

The Ombudsman concluded his investigation by stating that complainant's allegation that the Naxxar Local Council misguided him into signing a document to signify his acceptance of conditions for the long-term positioning of machinery in a public road was not sustained since he freely signed this document and his signature confirmed that he read, understood and agreed with these conditions. Equally unjustified in the Ombudsman's view was the allegation regarding inspections that were done on behalf of the Council since there was evidence that confirmed that these inspections really took place and in fact the Ombudsman was provided with a copy of the reports of these site visits.

The Ombudsman finally upheld complainant's claim that the Naxxar Local Council unfairly refused to grant him a full refund of his deposit. The report of the inspection that was done before works were taken in hand indicated the presence of an oil spill while the follow-up report made no mention of any such spill. The absence of any reference to an oil spill in the second report soon after the completion of these works especially when the first report had referred to these stains in the road before works got under way was, according to the Ombudsman, vital in order to determine whether the Naxxar Local Council was correct to penalize complainant for the oil spill and to withhold payment of the refund in full. The Ombudsman felt that there was no sound evidence to support the Council's action, irrespective of any photos of these stains that the Council claimed to have in its possession.

The Ombudsman therefore recommended that the Naxxar Local Council should refund in full the deposit of €1 16.47 that was made by complainant before works on his residence were taken in hand.

A few weeks after the release of the Ombudsman's Final Opinion the Executive Secretary of the Naxxar Local Council wrote to inform the Ombudsman that the full amount of complainant's guarantee had been released.

Case No J 506

EUROPEAN UNION PROGRAMMES AGENCY

Fiona and her friend Francesca and their trip to Finland

The complaint

In a joint complaint lodged with the Office of the Ombudsman against the European Union Programmes Agency (EUPA),[1] Fiona and her friend Francesca, two primary school teachers, alleged that the Agency failed to honour its undertaking to refund expenses amounting to €1400 which they each incurred in respect of a course that they followed in Finland in 2008.

Facts and findings

In March 2007 Fiona and Francesca submitted an application through their Head of School to be sponsored under the Comenius Lifelong Training Programme to attend an in-service training activity in the UK from 27 August to 6 September 2007 for staff involved in school education. The course was intended to increase their skills in the English language so as to facilitate the teaching of English to their students and to promote the teaching of English as a foreign language.

However, although an independent reviewer made a favourable assessment of their applications well ahead of the commencement of this course, it was only by a letter dated 28 August 2007 that the Agency informed them of this positive outcome. Since by that time the course was already under way and the letter made it clear that any expenditure would not be considered eligible

[1] The European Union Programmes Agency (EUPA) was set up in 2000 as a Unit within the Ministry of Education, Youth and Employment and was established as a legal autonomous agency on 4 May 2007. The aim of EUPA is to support Maltese individuals and entities in availing themselves of funding under the various educational programmes provided by the European Commission.

under the Comenius grant allocation unless a contract was already in place between the Agency and the legally-authorised person of the benefiting party – in this case the Head of the School through whom both teachers sent their applications – the delay meant that they were unable to participate in this programme.

The August 2007 letter further pointed out that it was only meant to notify them of the result of the selection process and not to be taken as a formal commitment of funding by the Agency. It went on to explain that, in line with rules of the Agency and EC procedures that contracts are signed with institutions and not with individuals, funds are only formally committed with participants in the Comenius programme *"through a contractual agreement presented by the EUPA once funds for your activity have been made available by the EC."* The letter concluded by informing them that they would be contacted by the National Agency at a later date to initiate procedures for the signing of the contract.

In order to make up for the delay for which it was responsible and which caused their failure to benefit from the Comenius programme, EUPA offered Fiona and Francesca the opportunity to identify another course in which they could participate; and it was on this score that a divergence of opinion arose between the Agency and complainants. Whereas EUPA maintained that the two teachers were instructed to identify a course similar to the one in the UK that they missed, on their part Fiona and Francesca insisted that an official of the Agency merely told them that they could simply choose another course and make arrangements to attend this activity.

Taking up this offer, complainants identified an in-service training activity for educational staff due to take place in Finland from 28 April to 04 May 2008 under the Comenius programme and meant to provide *"sensitization training about migration, racism, discrimination, culture and diversity."* According to complainants this course would enable them to provide better instruction to children coming from different cultures and instil values of diversity and tolerance amongst students from different nationalities who attended their school. However, upon being made aware of the content of this course the Agency in March 2008 informed complainants that this course could not be considered as a replacement of the approved UK course since the content of the two courses was clearly different. Besides the application presented by

complainants was found by the Agency to be rather weak and also to have failed to give a proper indication of the project's expected benefits.

Despite this setback complainants continued to insist that when they informed an official of the Agency about the course that they had selected, their proposal was accepted straightaway and that they were even advised to send their application to participate in this course. According to Fiona and Francesca, they were given to understand that they had a right to go on a training programme of their own choice to honour the commitment given earlier to them by the Agency and that their applications were considered merely a formality to compensate for the problems that arose about the course in the UK.

On his part the employee in question denied that he ever gave them the go ahead for the course in Finland and pointed out that Fiona and Francesca were already informed in writing and should have been aware that funds would not be made available unless a contract had already been signed. He stated that he always insisted with complainants that the course to replace the approved UK programme needed to be similar in content.

While Fiona and Francesca continued their efforts to identify an alternative course under the Comenius programme, they inquired with the Agency whether the unutilised grant that was approved for their UK course could be transferred to cover their visit to Finland. EUPA, however, explained that the transfer of these funds was not possible and that the only way for complainants to participate in the Comenius programme would be through their selection of a course whose content and course description would be "*as close as possible*" to the UK course approved earlier.

When in mid-March 2008 Fiona and Francesca were informed that the Finland course had not been approved, this news did not seem to deter them or to dampen their spirits. Regardless of the fact that at that stage their participation under the Comenius programme was in the balance, they still travelled to Finland since they felt that otherwise they would miss this course. Indeed, complainants had booked their flights to Finland way back in October 2007 even though they had no authorization from the Agency by then to purchase these tickets.

Feeling upset at their failure to recover from EUPA expenses incurred on travel and subsistence for their participation in the Finland activity, complainants alleged that funds earmarked for their visit to the UK under the Comenius programme were allocated instead to their school to finance training programmes overseas for other staff. This claim was denied by the Agency which explained that the financial allocation in 2007 for participation in the Comenius programme by Maltese individuals was not completely utilized; and this was confirmed by the Agency's Financial Statements for 2007 which showed that unutilised funds during the year exceeded the amounts claimed by complainants and that more than enough funds were available to cover Fiona and Francesca's participation in the Finland programme if their attendance at this course had been sanctioned.

Considerations and comments

In his Final Opinion the Ombudsman stated that his investigation established beyond any doubt that the European Union Programmes Agency was responsible for the delay to process complainants' applications for the UK course. This inefficiency was underlined by the fact that although the deadline for the submission of applications was 30 March 2007 and the course was due to commence on 27 August 2007, it was only on 28 August 2007 that Fiona and Francesca were told that their applications had been accepted even though they could not travel to the UK unless a contract had already been signed between the Agency and the Head of School who submitted the application on their behalf.

The Ombudsman explained that EUPA management admitted that in 2007 the Agency was passing through a stage of transition and that the delay was attributable to this situation. Agency officials acknowledged the situation in which Fiona and Francesca found themselves and tried to make amends by allowing them the opportunity to identify another course. The Ombudsman stated that there were conflicting versions by the two sides regarding what happened at this stage. While Fiona and Francesca insisted that they were given a blanket approval by the Agency to go ahead, EUPA categorically denied that it had ever done so and stated that it had been made clear to complainants all along that it would only be possible for them to attend a course overseas under the Comenius programme by selecting a course that

would be "*as close as possible*" to the one originally approved.

The Ombudsman found in his investigation that Fiona and Francesca reacted to this situation by requesting an extension of the deadline within which they had to find an alternative course that could be sponsored under Comenius arrangements and by seeking clarification as to what the Agency meant by a course that would match as much as possible the UK programme. The Ombudsman commented that the request by complainants that funds approved earlier be moved to cover the Finland event and their efforts to seek information about the type of training that would qualify under the Comenius programme seemed to contradict their statement that they were told that they could follow any other course and that applications for the Finland event were merely a formality.

The Ombudsman stated that it appeared that Fiona and Francesca pleaded that once they had already paid for their flights to Finland, they considered themselves free to travel and attend the course even though their participation had not been sanctioned by EUPA by the time of their departure. He observed, however, that from the Agency letter dated 28 August 2007 complainants ought to have understood that any expenditure in connection with their participation under the Comenius programme would not be eligible for reimbursement under EC grant allocations before the conclusion of a formal contract between the Agency and their legally-authorized representative. Since this condition was not withdrawn and no such contract, a prerequisite for any funding, was ever signed, complainants should have realized that they would not be eligible for the reimbursement of expenses. The Ombudsman observed that this condition was brought to their attention in writing in August 2007 or two months before complainants booked their flights; and if they chose to ignore this requirement, this was surely their responsibility and nobody else's.

In his Final Opinion the Ombudsman remarked that although the courses in the UK and Finland were in-service training programmes, it was obvious that the topics as well as the content of these courses were by no means similar. The UK event was a two-week course on teaching methodology for teachers of English to young learners while the Finland course was a ten-day course on sensitization training about migration, racism, discrimination, culture and diversity. These are vastly dissimilar topics and areas of study and in no way

related.

Complainants made several statements to the Ombudsman on what they were allegedly told by an Agency official including words to the effect that they could choose any course that covered a topic that was of interest to them and make arrangements to attend this event. The Ombudsman noted, however, that this official firmly denied this claim and insisted that he repeatedly warned complainants that no expenses would be refunded unless a formal agreement was in place prior to their departure.

The Ombudsman pointed out that correspondence between complainants and EUPA tended to support the version given by the Agency. These documents showed that although Fiona and Francesca, while awaiting the outcome of their applications for the Finland activity, received a written refusal for their request for the transfer of funds from the UK course to the course in Finland, they never bothered to raise the point with the Agency that one of its officials had earlier advised them that they could follow any other course and also verbally agreed to the new course that they identified. Indeed, it was only during the Ombudsman's investigation that these reactions by EUPA surfaced and were mentioned for the first time by complainants. Besides, there was evidence to show that even though they were fully aware of the repercussions of going abroad in the absence of a signed contract between the Agency and the Head of School to cover the funding of their attendance at this activity under the Comenius programme, complainants still went ahead and travelled to Finland.

These findings led the Ombudsman to state that he was not in a position to substantiate the claim by Fiona and Francesca that they were allowed a free hand to choose any course that was to their liking. He remarked that complainants ought to have exercised due prudence and diligence to identify a course whose content would be similar to the course content of the UK activity but since the content of the two courses bore no relationship to each other, complainants should not have booked the flight, at least not without written permission of the Agency.

The Ombudsman pointed out that even if his Office were to accept that an official from EUPA gave complainants an assurance on their eventual reimbursement – something that did not result from his investigation – Fiona

and Francesca should never have relied only on a verbal assurance. Although both understood that the matter fell under the jurisdiction of EUPA as the National Agency, they still proceeded to Finland on their own steam in the face of a clear warning from the Agency in August 2007 that no funds would be made available unless an agreement had already been signed. According to the Ombudsman, this made complainants entirely responsible for their decision to travel to Finland and they could not expect to blame EUPA for the adverse consequences that they suffered as a result of their decision.

The Ombudsman also referred to the approval given to complainants by the Education Division to their request for study leave to enable them to travel to Finland. Although they interpreted this approval as an official authorization to attend this activity, this approval did not in any way authorize them to proceed abroad on funds administrated by EUPA since it is obvious that the Education Division has no control or mandate on the administration of these monies.

In his Final Opinion the Ombudsman referred to the insistence by complainants that he should hear evidence regarding their grievance on oath to establish the whole truth and pointed out that it is his prerogative to decide whether or not to hear evidence on oath. Insisting that any such decision is not to be taken lightly, the Ombudsman stated that this would only be done if circumstances were deemed to warrant this approach and such evidence would be considered relevant to the outcome of the case.

> ….. *(*it is the Ombudsman's*) … prerogative to decide whether or not to hear evidence on oath …..* *(*and*) ….. this would only be done if circumstances were deemed to warrant this approach and such evidence would be considered relevant to the outcome of the case.*

The Ombudsman concluded his Final Opinion by referring to the petition that complainants addressed to the Petitions Committee of the European Parliament on 17 April 2008 that contained allegations against the official of the Agency who supposedly told them to go ahead with their arrangements to travel to Finland. Complainants had not at any time in the course of his investigation referred to this petition, let alone its outcome.

The Office was aware, however, that the Petitions Committee considered explanations given by EUPA as "*entirely satisfactory*." The Ombudsman considered this statement as relevant to the issue under scrutiny especially since the Petitions Committee had gone on to state that the Agency's official who was all along subjected to complainants' criticism had "*gone out of his way to assist the persons concerned and provide them with every opportunity available within the reasonable limits of the rules and procedures governing such matters*." Clearly the EU has its own rules and procedures that regulate the administration of its funds and the Agency has to abide by them.

Conclusions

In the light of his investigation the Ombudsman concluded that the complaint could not be sustained for the following reasons:

- firstly, even if he verified complainants' statement that they paid their trip on the alleged free hand extended to them and the subsequent verbal approval by the Agency for the course in Finland, this situation did not entitle them to follow this activity with funds administered by EUPA given that before the start of this course they were unequivocally informed by the Agency that it was considered unacceptable to replace the UK event. Although they were aware that funds would not be made available before a contract covering this visit had been signed, they chose to ignore this warning and were therefore responsible for all the consequences that arose as a result of their actions;
- secondly, since EUPA is the only authority mandated to approve courses chosen by complainants, once they travelled to Finland on what they considered as assurances – that were in any event not confirmed by the Ombudsman – from others who were not mandated to do so, this was complainants' responsibility and the Agency did not have to answer for anything in this respect;
- thirdly, the allegation of a free hand in the choice of a course as an alternative to the UK course and the alleged subsequent approval of the Finland activity was not, in the opinion of the Ombudsman, sustained. Apart from conflicting statements on this point, Fiona and Francesca only mentioned the position adopted by the Agency during the Ombudsman's investigation of their complaint and

never gave these explanations to EUPA during their contacts with the Agency to justify their action. Above all the Ombudsman gave strong weight to the fact that complainants themselves had admitted that they had no prior approval to buy their tickets to Finland and had not entered into an agreement that was mandatory before any claim for reimbursement could be made;

- fourthly, the accusation that funds originally allocated to complainants were used for other purposes was dismissed by the Ombudsman since in 2007 the Agency had unutilised funds which were more than enough to meet complainants' participation in the course in Finland had this course been deemed acceptable to EUPA in line with EC policies that it is bound to apply.

At the same time the Ombudsman held that there was an administrative failure on the part of EUPA when it failed to process the March 2007 applications in time before the deadline and this failure led to complainants' grievance since by the time that they were informed of the favourable assessment of their application, the course in the UK for which they applied was already under way. Although the Ombudsman took note of the plea that this happened at a time when EUPA was still finding its feet this did not, however, exculpate the Agency.

The Ombudsman observed that he was satisfied that the Agency offered complainants a fair remedy which, if properly applied, would have resulted in a fair solution. It was complainants themselves who ignored instructions issued to them on various occasions and if they acted in this way regardless of the consequences of their action, they were fully responsible for the repercussions. In the circumstances the Ombudsman ruled that no compensation was due and closed the file.

Case No K 479

MALTA INFORMATION TECHNOLOGY AGENCY

The successful (though ineligible) candidate

The complaint

A young employee seeking to improve his career prospects in the IT sector alleged in a complaint to the Office of the Ombudsman that the Malta Information Technology Agency (MITA) unjustly refused to engage him as a Systems Engineer even though he was recommended to fill this position after an interview by a selection board that was set up by the agency. He claimed not only that he was highly qualified and had experience in the duties of a Systems Engineer but also that the agency had other employees in positions that were higher than that of a Systems Engineer with even lesser qualifications.

Facts and findings by the Ombudsman

During his investigation the Ombudsman found that after having secured the authorisation of the Management and Personnel Office (MPO) and the Employment and Training Corporation (ETC) in line with government policy and current employment legislation, MITA issued a call for applications from suitably qualified individuals to fill the post of Systems Engineer. Under engagement criteria that were approved by both organizations for this post, applicants needed to possess *"a first degree level of education in IT"*; certification in operating software products; and *"at least six years of experience in a relevant area."*

In his application to fill the vacancy complainant presented evidence of his experience together with copies of his qualifications from the City and Guilds of London Institute including a Certificate for Communication in Technology (1987); Part II Certificate in Microcomputer Technology (1988);

and Modular Part III Certificate in Microcomputer Technology (1990). He also presented a copy of his ITIL Foundation Certification in IT Service Management (2001).

In its reaction to the Ombudsman's prodding during his investigation on this case, the selection board confirmed that although it was aware that complainant lacked the academic degree required for the post, it nonetheless gave due consideration to his earlier experience with the agency before he resigned to join private industry. The board defended its action by referring to its interview report which stated that as an ex-MITA employee, complainant not only understood the business and most of the agency's key clients but was *"also in possession of a lot of institutional knowledge that takes years for an employee to accumulate."* Complainant was also considered to have *"an excellent understanding of the technologies used by MITA"* as well as *"both the theoretical knowledge and the hands-on experience"* required for this position.

This led the board to conclude that he was the best candidate among all the applicants, placing him first in the final order of merit with an overall score of 94% and recommending him to fill the advertised position since his overall experience in different IT sectors and his competencies were judged suitable for the advertised position. In line with MITA policy on the recruitment of new employees this recommendation, however, needed the endorsement of the agency's senior management before the position could be offered to him.

It was at this stage that the selection process ran aground. In an internal memorandum seen by the Ombudsman, the Chief Executive Officer (CEO) of the agency maintained that since the recommended candidate did not possess the qualifications listed as mandatory in the call for applications, MITA should not offer the position of Systems Engineer to him. Following this decision complainant was told that MITA was unable to consider his application any further.

Perturbed at this turn of events, complainant requested information regarding the selection process to which he was entitled under the Data Protection Act, including a copy of the interview report by the selection panel. The agency management lost no time to provide these documents although certain

information was obliterated to protect third party interests as required under the Act. Access to these reports, however, enabled complainant to learn that he had been highly recommended for the position of Systems Engineer by the selection board having been considered as *"an effective team player from day one"* and as *"the ideal candidate"*. All this in turn led him to ask for the reasons why his application had been turned down.

During a meeting in which the agency's CEO confirmed to complainant that his selection was dropped because he lacked the required academic qualifications, complainant asked whether MITA had an appeals procedure to which he could resort in order to contest this decision. This issue, however, remained unaddressed and a few days after the meeting complainant was merely informed that the call to fill the position of Systems Engineer had been closed and the post had not been filled.

When the Ombudsman asked MITA to throw light on this complaint the agency replied that as a government entity it is bound by established legal provisions as well as by other conditions laid down by the Employment and Training Corporation on staff recruitment in the public sector. It went on to explain that in this case after it was granted clearance by the MPO and by the ETC to issue a call for applications for the recruitment of a Systems Engineer, it had no option but to abide by the qualifications that appeared in the position description in this call.

The agency also explained that the ETC permit included a standard condition that made it mandatory for all candidates interviewed and for any successful applicant who might be offered employment to possess all the educational requisites that featured in the agency's request to the Corporation and that if MITA filed to observe this provision, the permit would lapse. Yet another condition by the ETC was that the engagement of any employee recruited under the terms of this permit would not be valid until copies of the report by the selection board and of the qualifications of the selected candidate would be received and vetted by the Corporation.

MITA senior management confirmed that when it was found that the selection board recommended that complainant be chosen even though he lacked the necessary qualifications and since this requirement could obviously not be waived at the board's discretion given the insistence by the ETC that any

successful applicant had to possess these qualifications without fail, the recommendation of the panel was rejected. Complainant was duly told that his application had been turned down.

The Ombudsman also found that during a meeting between the CEO of the agency and complainant, the latter had even been assured that MITA would reconsider its position in the event that he presented evidence of the equivalence of his qualifications with the requirements that appeared in the position description of Systems Engineer in the call for applications. However, complainant failed to take up this suggestion.

Considerations and comments by the Ombudsman

The Ombudsman explained that irrespective of complainant's other claims, the main issue in this grievance was whether MITA acted correctly in refusing to employ him after he was subjected to a rigorous interview by its selection board and was considered as an ideal candidate, scoring as much as 94% during his interview.

The Ombudsman recalled that an essential requirement in the call for applications was a first degree level of education in IT, a condition that was endorsed by the Management and Personnel Office which, in terms of government policy, determines whether a government agency can proceed to recruit new employees. At the same time the permit issued by the ETC, as required by law, to authorize the issue of an external call for applications obliged the agency to ensure that the selected candidate would possess the stipulated tertiary education level, failing which any eventual appointment would be considered invalid.

The Ombudsman noted, however, that although the representative of the Human Resource Section of the agency who was a member on the selection panel was aware of these mandatory requirements and even though even a perfunctory assessment of complainant's qualifications would have shown that he was not eligible, the board for some reason still went ahead and interviewed complainant. Following this interview the selection board declared him as the best candidate for the position of Systems Engineer although it was abundantly clear beforehand that any appointment that would

be given to this individual would be invalid.

The Ombudsman noted in his Final Opinion that in line with MITA policy, the agency's Chief Executive Officer is obliged to endorse every recommendation of a selection board for the purpose of personnel recruitment. In this case, upon receiving the panel's report the reaction by the CEO was that once complainant did not possess the stipulated academic qualifications, he was unable to endorse the recommendations of the board since the employment of this candidate would clearly be in breach of the law.

The Ombudsman referred to one of complainant's submissions that his qualifications indicated that he had a tertiary level of education. Correspondence exchanged in this regard between the agency, the Management and Personnel Office and the Employment and Training Corporation and seen by the Ombudsman showed that a mandatory requirement for this position was a tertiary level of education in IT that was qualified as a degree level or equivalent. The Ombudsman's consultations with the Malta Qualifications Recognition Information Centre (MQRIC),[1] however, confirmed that complainant's highest qualification was his Modular Part III Certificate in Microcomputer Technology that was considered as a Level 4 qualification under the National Qualifications Framework. His other qualifications were at a lower level while his ITIL Foundation Certificate was considered as an entry level certificate. The Ombudsman also ascertained through MQRIC that a tertiary level of education entails at least a recognised qualification at Level 5 or diploma level from a recognized institution which complainant did not possess; that a diploma from the University of Malta is considered at Level 5; while a degree is pegged at Level 6.

The Ombudsman, while noting that the word "*equivalent*" is possibly not the best term to use when signifying a level of attainment, stated that it would at the same time be reasonable to consider that in line with the National Qualifications Framework, a Level 6 qualification would have satisfied such requisite. If only a tertiary education level was instead stipulated, a Level 5 qualification would reasonably have satisfied the requirement of both the

[1] The Malta Qualifications Recognition Information Centre (MQRIC), which falls under the Malta Qualifications Council, is the national official body for the recognition and comparability of both academic and vocational qualifications.

MPO and the ETC.

This led the Ombudsman to point out that it seemed that MITA itself equated a tertiary qualification/level of education with a degree level which, according to advice given to him, is not the same since a Level 5 qualification under the National Qualifications Framework such as a diploma from a recognised University is at tertiary level. None of complainant's qualifications was at any of these levels and as a result in either case he did not satisfy the requirements laid down in this call. According to the Ombudsman these considerations were enough to uphold MITA's decision not to recruit complainant despite the recommendation by the selection board although, without any prejudice to this statement, he considered other arguments raised by complainant.

The Ombudsman pointed out, for instance, that in order to justify his level of education complainant had wrongly equated higher education with tertiary education. Complainant had resorted to article 63 of the Education Act[2] which, however, taken in its entirety from the Act rather than partially, as complainant had done, states as follows:

"'higher education' includes activities and programmes of teaching, training and research at tertiary level, and in terms of teaching includes the Diploma, Bachelors, Masters and Doctorate levels, and also comprises education provided by universities, institutions, colleges and franchises of higher education providing courses at and above ISCED level 5, or at and above NQF level 6; and 'higher education sector' shall be construed accordingly."[3]

The Ombudsman noted that for reasons of his own complainant quoted this definition only in part and omitted any reference to ISCED Level 5 or to NQF Level 6 specified in the Act for the purpose of qualifying institutions, colleges and franchises that are recognized as providing higher education. ISCED Level 5 is equivalent to NQF Level 6 or degree level that is higher than diploma level. When this full definition is taken into account, it becomes evident that complainant's academic attainment did not satisfy any level of education that is specified in this definition.

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[2] Article 63 of the Education Act defines higher education for the purpose of the establishment and functions of the National Commission for Higher Education set up under the Act.

[3] ISCED (International Standard Classification of Education) is a UNESCO classification.

The Ombudsman passed on to examine complainant's assertion that once he was called for an interview, this meant that the selection board must have accepted that he had enough qualifications and that he satisfied the eligibility criteria applied by the board to be considered as a potential candidate since otherwise his application would have been rejected. The Ombudsman argued, however, that this panel did not have the final say and had to submit its recommendations to the CEO of the agency whose hands were tied down by conditions made by the MPO and by the ETC in respect of qualifications and educational level that the successful applicant needed to possess.

Faced with this situation the Ombudsman decreed that complainant's qualifications did not meet the conditions set in this call for applications and that the selection panel would have been well advised to consult MITA's senior management before it interviewed complainant when he manifestly failed to satisfy the requisites of the call in terms of educational level.

Complainant also stated that since he was awarded full marks for his level of education even though he did not possess a degree, this led him to believe that the board deemed this level to satisfy the educational requirements that appeared in the call for applications. The Ombudsman explained, however, that this issue was objective and verifiable – facts are facts and cannot be subject to interpretation. Complainant did not possess a tertiary level of education and despite his arguments, this fact cannot be disputed.

*….. (*the agency's*) ….. failure to address complainant's queries whether he had a right to appeal against its decision … was unacceptable since under the norms of good administration, every public body is obliged to give a clear reply to legitimate queries from citizens …*

The Ombudsman referred to MITA's failure to address complainant's queries whether he had a right to appeal against its decision. This attitude was unacceptable since under the norms of good administration, every public body is obliged to give a clear reply to legitimate queries from citizens and the agency's attitude in this respect attracted the Ombudsman's criticism.

Complainant had also referred to the level of qualifications of MITA

employees in the grade of Systems Engineer and other higher grades who were either in possession of the same qualifications that he had or were even less qualified. In this regard the Ombudsman stated that an agency has the right to promote the improvement of the educational level of its workforce by enforcing higher academic levels for new recruits without at the same time blocking career prospects of employees already in post. He stated that had complainant remained with MITA instead of resigning to join private industry, he could possibly have benefited from its policy in respect of serving staff that can best be viewed in the context of enhancing the bond of loyalty between management and employees.

Complainant also queried MITA's decision not to employ him by casting doubts on documents that were made available to him by the agency in response to his request under the Data Protection Act and by alleging that the agency tried to keep relevant information from him when it blanked out certain sections in these documents. The Ombudsman, however, ruled that this observation by complainant was out of order since he had no right to information regarding other applicants and MITA was within its right to cancel from any documents given to him any third party data to which he was not entitled.

*….… complainant ….… had no right to information regarding other applicants and … (*the agency*) … was within its right to cancel from any documents given to him any third party data to which he was not entitled.*

Conclusion

The Ombudsman concluded that apart from its failure to address a query from complainant on the possibility of appeal from the decision to reject his application, the agency was justified not to employ complainant despite a favourable report by the selection board. MITA could not have acted otherwise since if it went ahead with the employment of complainant as Systems Engineer when he did not possess a tertiary level of education as requested in the call, any such recruitment would have been invalid and in breach of the ETC permit in terms of the law.

The Ombudsman decided not to uphold the grievance and closed the file.

University Ombudsman

Case No UK 060

UNIVERSITY OF MALTA

The student who badly wanted a Pass with Distinction in her Masters degree

The complaint

A university student sent a complaint against the University of Malta to the University Ombudsman where she alleged that in her programme of studies for a Masters of Science, she was compelled to research a topic other than her first choice. She also claimed that the Principal Supervisor of her new dissertation topic not only failed to provide her with appropriate tutorial support but that she was subjected to discrimination when she did not receive any proper guidance in her efforts to identify a suitable methodology for her dissertation write-up whereas fellow students in her course were treated differently and given preferential treatment.

Complainant went on to allege that her External Examiner, who was also a member on the Board of Examiners, was not fully conversant with the research area of her dissertation and that the Board as a whole undervalued her work while her dissertation was under-marked. As a result she was not awarded a Masters degree with Distinction that she believed she fully deserved.

Findings by the University Ombudsman

In October 2009 complainant joined a one-year full-time course leading to a Master of Science at the University of Malta in conjunction with James Madison University of the USA. However, although the first choice for her dissertation topic was landscape ecology, the Director of the Institute judged her to lack sufficient academic grounding in this area. When the Supervisor of her undergraduate dissertation confirmed this evaluation,

she chose instead the formulation of landscape quality objectives for a specific area of the Maltese Islands.

A year later, in the summer of 2010 complainant presented her dissertation and underwent a *viva voce* defence of her work before a Board of Examiners that included the Director of the Institute, the External Examiner, the Principal Supervisor of her dissertation and an academic representative from James Madison University who participated via teleconferencing. The Board was unanimous that complainant deserved a 70% mark (Grade B) for her dissertation which, taken with her coursework average mark of 77.8%, resulted in a 75.2% weighted average which fell short of the 80% mark that is required for a final classification of Pass with Distinction. Feeling upset with this outcome, in December 2010 she lodged a grievance with the University claiming that there were "*very serious*" shortcomings in the supervision of her dissertation research. The Rector of the University in turn appointed a board of investigation consisting of the Pro-Rector for Academic Affairs and the Registrar to look into the matter.

During this inquiry complainant's Principal Supervisor and Co-Supervisor handed to the board a very exhaustive Memorandum that rebutted complainant's allegations on a point-by-point basis in a most comprehensive and convincing manner. The board of investigation also received a draft of sections of complainant's dissertation with several track changes that showed that in fact she was given comprehensive advice about her dissertation work. Also in the light of discussions with other academics who were involved in complainant's programme of studies and guided by the unanimous decision by the Board of Examiners on the mark to be awarded for complainant's dissertation, the board of investigation concluded that any objective review of this dissertation was unlikely to bring about any change in the final result. The board decided that complainant's claims were unjustified and declined her request for a review of her dissertation result.

Complainant rejected these findings and at this stage sought the intervention of the University Ombudsman on her behalf.

Observations by the University Ombudsman

The University Ombudsman pointed out straightaway that it is not his remit

The University Ombudsman pointed out …… that it is not his remit to investigate issues of an academic nature and that he would not judge whether complainant possessed sufficient grounding in landscape ecology to pursue the subject as a dissertation topic as was her original intention.

to investigate issues of an academic nature and that he would not judge whether complainant possessed sufficient grounding in the area of research to pursue the subject as a dissertation topic as was her original intention. It sufficed for his purpose that the Director of the Institute of Earth Systems advised complainant to seek another research topic after having ascertained with the Supervisor of her undergraduate dissertation that she lacked the necessary academic background to proceed with her first choice. The University Ombudsman also observed that it seemed to him that the advice given to complainant to change the area of her research was a responsible and sound decision that was taken in her own best interest. He went on to observe, however, that when complainant was told to choose a different topic for her dissertation, she eventually accepted this advice and agreed to conduct her research on the new topic without any further difficulty.

For similar reasons the University Ombudsman decided not to pronounce himself on the competence of the External Examiner to carry out her duties but noted that members of the Board of Examiners were nominated by the Institute of Earth Systems and approved according to the relevant university regulations by Senate which is the highest academic body of the institution. He stated that clearly both bodies are more competent than complainant herself to decide on the academic capabilities of members chosen to constitute the Board of Examiners.

The University Ombudsman referred to paragraph 51 *Supervision of Masters' Dissertations* of the *General Regulations for University Postgraduate Awards, 2008* of the University of Malta and in particular subparagraphs 51(6) and (7) regarding the duties of Principal Supervisors and Co-Supervisors which state as follows:

"(6) Principal Supervisors shall meet students regularly to review progress. Meetings may be substituted by other means of communication.

(7) Principal Supervisors and Co-Supervisors are not responsible for proof-reading dissertations. Neither is it their responsibility to ensure that dissertations do not contain plagiarised parts."

These regulations make it abundantly clear that the task of Principal Supervisors and Co-Supervisors is to guide students to develop the theoretical framework of their dissertation; steer them through the literature; and guard against unethical or unscholarly practices. They are not expected to correct linguistic, grammatical and idiomatic mistakes although they often tend to point them out.

In his investigation on this case the University Ombudsman also found that samples of complainant's work together with the many detailed changes and corrections on the script confirmed that the Principal Supervisor carried out her duties scrupulously and that it was complainant who had not always followed her advice. Indeed at one point the report by the Board of Examiners stated that complainant's work included *"several instances of careless referencing ... … including errors with regard to citations in text and missing details in the reference list"* as well as *"use of writing styles inappropriate for academic work, notably a tendency to make sweeping statements without adequate supporting evidence"* while complainant *"had repeatedly shown resistance to making changes as suggested."* The report concluded that *"At the end of the discussion, there was agreement amongst all four Examiners that ... (*complainant*) ... merited a mark in the high 60s or low 70s.... (*and*) ... after some discussion it was unanimously agreed that ... (*complainant*) ... be given a mark of 70% with grade of B."*

The University Ombudsman understood that complainant was distraught with her failure to achieve a Pass with Distinction because she had worked hard to reach this aim. He stated, however, that his impression was that complainant seemed to want to transform her anguish into accusations of inadequate tutorial support. This led her to refer to several alleged instances of negative discrimination although she failed to substantiate in any way her claims that staff at the Institute of Earth Systems treated her differently from the way that they dealt with her peers.

The University Ombudsman also pointed out that these complaints of unfair treatment were in sharp contrast with a section of complainant's dissertation

where she wrote that *"... I owe the greatest acknowledgment and appreciation to my Supervisor Dr. ..... for her support, advice and guidance. Throughout the compilation of this work, her constant assistance has proved to be of inestimable help to me in overcoming difficult situations and completing this dissertation. I am also thankful to Dr ..... who, as my Co-Supervisor, commented on my views and proposed useful suggestions."*

At this stage the University Ombudsman recalled that one of the reasons given by the board of investigation set up by the University for its rejection of complainant's request for a review of her dissertation mark was that she failed to submit her request within the stipulated time in line with the *University Assessment Regulations, 2009*.[1]

The University Ombudsman commented that in his view the board interpreted this regulation too literally. While it was true that complainant initially presented her complaint to him within the stipulated time from the publication of the results – an approach that is not allowed by the terms of his remit since his Office is only to be sought as a last resort – and although complainant wrote to the Rector in mid-December 2010, the fact remained that the university authorities knew of her complaint earlier.

With this slight exception, the University Ombudsman made it clear, however, that he fully concurred with the board's conclusion that complainant's request for a review of her dissertation was unjustified.

Conclusions by the University Ombudsman

In view of his findings the University Ombudsman concluded that:

- it is not his remit to challenge an academic decision taken by the

[1] Regulation 48 *Revision of Assessment Results of the University Assessment Regulations, 2009* as approved by Senate of 16 December 2010 states as follows in its sub-regulation (1): *"Subject to the provisions of any relevant regulations or to any procedural guidelines, including the payment of fees, made by the appropriate University authority, a student may, not later than two weeks from the publication of the result of the Assessment, request that an examination paper or any other work submitted for Assessment be reviewed for the purpose of ascertaining that no error was made in the award of marks. Students may additionally request that the decision of the revision be elaborated in a detailed report."*

Director of the Institute of Earth Systems to lead complainant towards a research topic that was different from her first choice since it was fully within his power to do so;

- the Principal Supervisor for complainant's dissertation carried out her duties in accordance with conventional academic practice for research work at Masters level and there was no evidence that she did not provide complainant with proper tutorial support or ignored her request for assistance whenever she sought it; on the contrary there was evidence that this Principal Supervisor did her work conscientiously and complainant duly acknowledged this help and expressed her appreciation of the support that she received;
- the Board of Examiners for complainant's dissertation, including the External Examiner, was appointed by the University Senate according to university regulations and complainant offered no evidence to show that any member on this board was incompetent or unsuitable for this assignment;
- there was evidence that all these members carried out their evaluation with thoroughness and their report did not include any irrational remarks or demands that could not reasonably be met by a postgraduate student;
- complainant failed to present any tangible evidence to prove her claim that she was discriminated against by the university authorities or that she was mistreated in any way.

These conclusions led the University Ombudsman to state that complainant's grievance was not sustained and to close the file.

Case No UL 001

INSTITUTE OF TOURISM STUDIES

A blatantly discriminatory requirement in a call for applications

The complaint

The University Ombudsman received a complaint against the management of the Institute of Tourism Studies (ITS) which claimed that a call for applications for lecturing staff on a definite service contract at the Institute's branch in Gozo set conditions that discriminated against persons with no previous lecturing experience at the ITS.

Complainant remarked that this call for applications was couched in such a way that if he were to apply, his submission would be discarded straightaway even though his qualifications were superior to those of some Lecturers who were employed at the Institute since he had never taught at the ITS. According to complainant this condition had not featured in earlier applications for ITS staff and its inclusion was meant to put Casual Lecturers who were already providing their service to the Institute in an advantageous position to the detriment of other applicants with no prior experience at the ITS.

Findings by the University Ombudsman

The University Ombudsman found that the Institute of Tourism Studies published an advert in several local newspapers on 10 January 2011 inviting applications for lecturing staff on a definite contract to lecture in the second semester of the 2011-2012 academic year in various areas of specialisation. The call advised applicants that previous lecturing experience at the ITS was essential.

The initial reaction by the University Ombudsman to this requirement that previous lecturing experience at the Institute was a *sine qua non* was that he

could not understand what prompted the ITS management in the first place to include this condition that had drawn complainant's ire since it was blatantly discriminatory. He declared that it was absurd of the ITS management to include this requirement since it rendered ineligible highly qualified candidates who might have lectured in other prestigious overseas institutions for tourism-related studies but, for some reason or other, had not taught at the ITS. The University Ombudsman had no hesitation to state that this condition was restrictive with regard to complainant and to other potential applicants who were in the same situation and in this respect the grievance was fully justified.

When the University Ombudsman drew the attention of the ITS management to the inadmissibility of this condition, officials agreed that reference to previous teaching experience at the Institute as an essential requirement was ill-advised and inopportune. They went on to explain, however, that the call for applications was issued by the Ministry for Gozo which is responsible for the administration of the ITS branch in Gozo.

Following this intervention by the University Ombudsman and his advice to the Ministry for Gozo that this requirement was blatantly discriminatory, the call for applications was withdrawn and a new one was published shortly afterwards. The new call stated that "*applicants with previous teaching experience will be given preference*" while the closing date was extended to a later date.

The University Ombudsman commented that following this development there was nothing in the amended call for applications to support complainant's assertion that if he were to apply for one of the lecturing posts originally advertised, the selection board would not consider his qualifications in its evaluation of his application. He went on to state that it was difficult to believe such an assertion and visualize a situation where a competent selection board of a national institution such as the ITS would, as complainant implied,

…… qualifications and experience are not necessarily the only criteria on which a selection process is based since selection criteria are normally established before the process gets under way so as to guide members of the board on the way in which the evaluation of applicants is to be conducted ……

ignore relevant qualifications and experience of candidates in order to consciously discriminate against an applicant or other.

The University Ombudsman recalled that qualifications and experience are not necessarily the only criteria on which a selection process is based since selection criteria are normally established before the process gets under way so as to guide members of the board on the way in which the evaluation of applicants is to be conducted. He also pointed out that before reaching a decision on a candidate's merit, members of a selection board are bound to consider other attributes including the personal qualities of candidates as well as their shortcomings. The University Ombudsman concluded that at this stage he considered complainant's claims in this regard as mere conjecture and not admissible for investigation.

…… before reaching a decision on a candidate's merit, members of a selection board are bound to consider other attributes including the personal qualities of candidates as well as their shortcomings.

He therefore rejected this second aspect of the grievance and once the first issue raised by complainant had already been solved, he closed the file.

Recommendations by the University Ombudsman

Despite this decision, however, the University Ombudsman declared that he still felt that it was appropriate to draw the attention of the ITS management to the contents of his Final Opinion on an earlier complaint that he investigated and that concerned the selection and employment of lecturing staff on a definite contract.

In this earlier grievance he had suggested that the ITS management should revisit the practice of allocating a subject that requires a not inconsiderable amount of 390 hours tuition per semester – or 780 tuition hours per year – to just one part-time Lecturer and expressed his view that for academic and administrative reasons the employment of a full-time Lecturer would be more appropriate. The University Ombudsman had recommended that the Institute should consider sharing this heavy lecturing load between two or more part-

time Lecturers if the employment of a full-time Lecturer could be expected to give rise to administrative, organizational or financial problems.

The University Ombudsman had also stated that aware of the dire shortage of personnel in this area, the ITS management should consider the engagement of candidates who may possess appropriate academic qualifications but lack teaching or practical experience. With appropriate guidance and supervision from their more experienced colleagues, the Institute would stand to gain from the introduction of new blood amongst its lecturing staff.

….. guidelines for the selection ….. of lecturing staff at the ITS on a contract basis should be clearly defined and publicized so that members of selection boards as well as candidates will be aware of the selection criteria and the procedures involved ….. (while) *… selection boards for academic posts should contain a majority of academics.*

The University Ombudsman had suggested that guidelines for the selection and recruitment of lecturing staff at the ITS on a contract basis should be clearly defined and publicized so that members of selection boards as well as candidates will be aware of the selection criteria and the procedures involved. He had also reiterated his earlier proposal that the composition of selection boards for academic posts should contain a majority of academics.

The University Ombudsman wound up his Final Opinion by observing that these recommendations were still valid. He therefore urged the ITS management both in Malta and Gozo to take them into account when conducting a recruitment process for vacant teaching posts in a bid to ensure that the two institutions will benefit from lecturing staff who may provide the best possible instruction and guidance to students entrusted to their charge.

Outcome

Following meetings initially with the new Chairperson of the Institute and at a later stage with the new ITS management, the University Ombudsman was informed that his recommendations were being taken on board. In this

connection the setting up of this new management team at the Institute of Tourism Studies was also in line with an earlier recommendation by the University Ombudsman for a more robust academic, administrative and management structure to support the work of the institution to provide professionally trained personnel in the hospitality industry.

Case No UL 008

UNIVERSITY OF MALTA

Divergence in the assessment of a student's Final Teaching Practice

The complaint

In February 2011 the University Ombudsman received a complaint from a student in protest against the *Fail* mark awarded to her by the Faculty of Education of the University of Malta for her Final Teaching Practice in November/December 2010. She felt that this mark was unjust and would not only prevent her from graduating with her year cohort in November 2011 but also from commencing her teaching career in the scholastic year 2011-2012.

Complainant pointed out that although the appraisal template, completed by the Examiners who assessed her classroom performance during her Final Teaching Practice, confirmed that she did her teaching duties in a diligent manner, she still failed her Final Teaching Practice. Dismayed by this apparent conflict in her overall result, she asked the university authorities to alter her *Fail* grade to a *Pass* so that she would graduate at the end of her final academic year with her colleagues and also be eligible to apply for a teaching post in the Directorate for Educational Services as from the 2011-2012 scholastic year. When her request was rejected, she approached the University Ombudsman.

Findings by the University Ombudsman

Complainant joined the four-year Bachelor of Education (Honours) course run by the Faculty of Education in October 2007 and opted to specialize in the teaching of Maltese and German in secondary schools. In the practical sectors of the course she completed successfully the School Experience programme in her first year and was also successful in her First and Second

Teaching Practice sessions that formed part of the second and third year respectively of the course. Complainant then undertook the fourth year Final Teaching Practice in an educational college for a period of six weeks in November/December 2010 where she taught both Maltese and German.

University records on complainant's performance showed that for the purpose of her Final Teaching Practice evaluation two Examiners visited her class four times to assess her teaching performance in Maltese and five times in German while an additional Examiner visited her on a tenth occasion after the regular Examiners expressed misgivings about her ability to teach German. At the end of her Final Teaching Practice the Board of Examiners concluded that she was successful in the teaching of Maltese but failed in the teaching of German.

The University Ombudsman noted that in the *Bye-Laws of 2006 in terms of the General Regulations for University Undergraduate Awards, 2004 for the degree of Bachelor of Education (Honours)* the section captioned *Special Provision for Field Placement* states as follows under paragraphs 13(3) and 13(4):

"(3) Students shall be required to pass all the Field Placements. Students can only do one Field Placement in any year of the Course and shall be allowed to repeat only one failed Field Placement during the following year, so that the final Field Placement is held during an additional year of studies, if allowed in terms of the Principal Regulations.

(4) Students whose Field Placement includes the teaching of two teaching areas and who fail to satisfy the examiners in the teaching of one of the teaching areas shall be considered to have failed the Field Placement. Such students shall be required to repeat the Field Placement in terms of paragraph (3) of this bye-law and as provided for in the Principal Regulations. Students may be allowed to repeat the Field Placement in the teaching of the failed teaching area only under those conditions established by the Board."

The University Ombudsman observed that given her result, complainant had to repeat the Field Placement during the following year. This meant that in order to obtain a Teacher's Warrant and graduate with her 2007-2011

student cohort in November 2011, complainant had to be successful in her supplementary Teaching Practice in October/November 2011. It also meant, however, that she would be unable to apply for a teaching post in state schools since the Directorate for Educational Services was expected to roll out the recruitment process for new teachers in the summer of 2011 in readiness for the scholastic year commencing in September 2011.

The University Ombudsman noted that as with other students in the Faculty of Education, the assessment of complainant's Teaching Practice consisted of two types of records, namely standard appraisal templates and open-text observations. Whereas the accumulated appraisal templates recorded merely seven unsatisfactory judgements out of 206 assessment criteria with respect to complainant's ability to teach German, the open-text observations contained several positive comments as well as a considerably higher number of criticisms. The University Ombudsman, however, stated that before he would draw his conclusions from the criteria that featured in complainant's score sheet, a few observations on his part would be in order. These observations would be limited to assessments by Examiners who visited complainant's classroom and to information that emerged in his discussions with complainant and with members of the Faculty of Education and other academic authorities.

Observations by the University Ombudsman

The University Ombudsman observed that in the assessment of Teaching Practice, student teachers are tested on the extent to which they transform educational theory into pedagogical practice. It also serves to examine candidates on their pedagogical competences in lesson preparation, classroom management, motivational techniques, effective communication skills and correct subject content.

In their Final Teaching Practice student teachers should be competent to adopt innovative teaching and to master basic teaching skills. Their Examiners not only act as tutors and advisors but also examine their ability to master teaching skills that are required in today's schools so that on the basis of their Final Teaching Practice assessments of student teachers, they can certify as fit to serve in schools only candidates with the required level of competence.

In discussions with the Faculty of Education the University Ombudsman found that to reduce some of the subjectivity inherent in Teaching Practice where some Examiners might have higher expectations than others, the Faculty constructed standard appraisal templates containing 39 criteria that cover pedagogical activities entailed in an average lesson and that are meant to provide an unambiguous evaluation of student teachers' efforts and abilities. Each criterion is assessed on a three-point scale where marks 1 and 2 – which constitute a *Pass* – denote respectively a *Satisfactory Performance* and a *Marginal Performance* while mark 3 denotes an *Unsatisfactory Performance* and signifies a *Fail*.

At the same time it is appreciated that appraisal templates alone cannot reflect adequately the quality of student teachers' work in the dynamics of a classroom. Examiners often therefore provide student teachers with open-text comments, observations and criticisms to explain these criteria on their appraisal templates.

The University Ombudsman took note of complainant's observation that since the vast majority of some four hundred criteria in the appraisal templates for her Maltese and German lessons fell in category 1 or 2 with only two *Fail* entries in Maltese and seven in German, on the strength of these results she deserved an overall *Pass*. On the other hand he noted the view of the Faculty of Education that a successful lesson does not depend merely on the highest number of 1 or 2 entries under the template criteria and that a decision whether students are successful or not in their Teaching Practice also takes into account their overall achievement throughout the full six weeks of this practice session.

The University Ombudsman also understood that a *Fail* in vital benchmarks for the assessment of Teaching Practice such as faulty subject content, weak class management or careless lesson preparation outweighs passes scored in other template criteria. Similarly, a consistent *Fail* mark in several lessons in a crucial skill prevails over other *Pass* entries. In such cases Examiners overcome the limitations of the three-point template system by providing students with open-text comments on their abilities and weaknesses as well as suggestions for further development and specific subject issues.

The University Ombudsman pointed out that it is important that students

appreciate the relationship between entries on appraisal templates and the open-text evaluations and that they are aware that since these assessments are meant to reinforce each other, they should not highlight one evaluation at the expense of the others. It is equally important to ensure that template ratings that contrast markedly with open-text comments and that might overshadow evaluations given by Examiners do not give rise to confusion among students about the merits and accuracy of the entire Teaching Practice evaluation.

The University Ombudsman observed that such discrepancies were noticeable in complainant's case where negative open-text observations for her lessons in German did not match the entries or ratings in her appraisal templates. From a table that he reconstructed from appraisal templates of visits by six Examiners for German and that recorded only unsatisfactory performance ratings,[1] it was possible to draw several conclusions that illustrate this point with regard to complainant's overall performance and her respective assessments during these visits. This analysis revealed that:

- on the selected criteria complainant obtained seven unsatisfactory grades out of 206 entries during these six visits, indicating that her performance was occasionally but not consistently unsatisfactory;
- since category 3 *Fail* appraisals were only recorded in the first three visits and the three subsequent visits showed no other unsatisfactory entries, this performance denoted progress and that complainant improved her performance as her Teaching Practice progressed; and
- in his visit the third opinion Examiner did not find complainant's

[1]

Reconstruction by University Ombudsman
from appraisal templates of six visits to complainant's class for German

Visits / Criteria	First visit	Second visit	Third visit	Fourth visit	Fifth visit	Sixth visit
Class profile	3	3	-	-	2	2
Student profile	-	3	-	-	2	2
Use of space	1	3	1	1	1	2
Lesson sequence	-	2	3	1	1	2
Teaching/learning strategies	1	2	3	1	1	2
Use of resources	1	2	3	2	2	2

Note
Ratings: 1 = Satisfactory performance; 2 = Marginally satisfactory performance; 3 = Unsatisfactory performance

performance unsatisfactory under any appraisal criteria listed in the template.

The University Ombudsman also noted other discrepancies between entries on the appraisal templates and the Final Report by Examiners. He found, for instance, that during their visits none of the Examiners evaluated complainant's performance as unsatisfactory under the German language related criteria and indicated instead that she demonstrated sound subject knowledge and competence in language instructions while she communicated her ideas effectively. Despite these comments, however, Examiners reported in their Final Report that they found several faults with complainant's competence in German and that the standard of her spoken German needed to improve.

The University Ombudsman also found that in their Final Report the Examiners criticized complainant's teaching methods and concluded that insofar as lesson methodology was concerned, her major shortcoming during most of their visits was her traditional teaching approach. Without implying that traditional approaches are wrong, Examiners made it clear that being as traditional as complainant during this formative phase of her teaching activity was unacceptable. Moreover, whenever complainant resorted to the use of technology in her teaching, she did not do so in a logical manner while there was evidence that she prepared too much material for delivery in one lesson and that her lessons were not structured properly.

At this stage the University Ombudsman observed that although these criticisms reflected those in the open-text comments, they featured only once as unsatisfactory in the appraisal templates under methodology related criteria such as lesson sequence, teaching and learning strategies and use of resources. Besides, these unsatisfactory ratings under these criteria appeared in one single lesson with apparent improvements in the subsequent three.

The University Ombudsman understood that Examiners justify inconsistencies between ratings on appraisal templates and critical observations in the open-text by their wish to boost students' self-confidence. However, although these intentions are generally laudable, the University Ombudsman felt that this practice could be dysfunctional. Unwarranted high entries can lead students to nourish a false sense of security and to lay greater store on positive ratings in their appraisal templates and at the same time, subconsciously or

conveniently, ignore negative evaluations in open-text comments. According to the University Ombudsman, even more damaging from an educational and from an administrative point of view is the fact that in such cases these two modes of assessment are in conflict when they should generally underscore each other.

Conclusions by the University Ombudsman

The University Ombudsman stressed that given his role, he was not in a position to judge complainant's teaching abilities and his intervention was limited to examine whether there were any procedures that were biased or manifestly erroneous or gave rise to unfair treatment or were grounded on mismanagement or misinterpretation of regulations. He emphasized that where none of these deficiencies emerge, he has to respect conclusions and to rely on opinions expressed by Examiners who are appointed by the university authorities on the basis of their academic and professional expertise.

The University Ombudsman commented that complainant's Final Teaching Practice assessment records showed that Examiners went out of their way to obtain an accurate representation of her pedagogical skills by visiting her class on ten different occasions – four for Maltese and six for German – which is double the number of visits normally conducted in Teaching Practice. In addition, these regular Examiners sought the opinion of a third Examiner when they sensed the possibility that complainant could fail in German. The three Examiners in the presence of a leading academic in the Faculty of Education and the Teaching Practice Coordinator, after considering complainant's overall performance and on the basis of paragraph 13 *Special Provision for Field Placement* in the *Bye-Laws of 2006 in terms of the General Regulations for University Undergraduate Awards, 2004 for the degree of Bachelor of Education (Honours)*,[2] concluded that she satisfied the Teaching Practice requirements in Maltese but failed to do so in German.

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[2] Paragraph 13(7) states as follows: *"The Board shall assign at least two additional examiners to each student. The main additional examiner is requested to present the assessment reports for the consideration of the Field Placement Board of Examiners. The Board of Examiners shall, in terms of the University Examinations Regulations, determine the procedure to be adopted for the conduct of the Field Placement assessment and may themselves conduct assessment visits to particular students as they deem fit."*

The University Ombudsman recalled that in its Final Report, the Board of Examiners was unanimous in its conclusion that complainant failed to reach the standard to pass the 2010-2011 session of the Teaching Practice even though despite the limited amount of scheduled lessons that she was required to teach, she still received the maximum amount of six visits in all. He also pointed out that although allowed every possible opportunity for improvement, complainant failed to reach the required level though the Board was confident that she would show a marked improvement if she would concentrate her efforts on the remaining study-units and follow the advice given to her by the Examiners.

The University Ombudsman declared that it was not for him to judge this purely academic conclusion, reached unanimously by the Examiners, that complainant did not reach the required standard to teach German. At the same time he stated that in spite of regulation 13(7),[3] from an administrative viewpoint he was still at a loss to reconcile entries on complainant's Teaching Practice appraisal templates with a *Fail* grade since Examiners did not indicate in their Final Report the procedures used for the conduct of complainant's assessment. His opinion in this regard was strengthened by a third-opinion Examiner who was brought in to adjudicate between a *Pass* and a *Fail* result and who, while not finding any unsatisfactory criteria in the appraisal templates, still made critical comments in her open-text observations and then went on to sign the *Fail* Final Report. Given this apparent inconsistency, the University Ombudsman stated that he supported complainant's plea that her ratings on the standard templates did not warrant a *Fail* result and that she did not deserve this classification.

The University Ombudsman reiterated that it was not within his remit to pronounce himself on complainant's other claim that the University should alter her *Fail* grade to a *Pass* since this was a purely academic judgement. Such a decision should be left in the hands of the appropriate academic authorities even though he admitted that it was difficult in this case to

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[3] Regulation 13(7) of the Bye-Laws of 2006 that have been referred to earlier states that the Field Placement Board of Examiners *" … shall determine the procedure to be adopted for the conduct of the Field Placement assessment and may themselves conduct assessment visits to particular students as they deem fit."*

> *….. it was not within … (*the remit of the University Ombudsman*) … to pronounce himself on complainant's other claim that the University should alter her Fail grade to a Pass since this was a purely academic judgement. Such a decision should be left in the hands of the appropriate academic authorities …..*

establish who these authorities should be and the procedures to be followed since, unlike forms of written examination including dissertations and assignments where a revision of texts submitted by students is possible, regulations governing Teaching Practice do not envisage a review or an appeals board while it is not possible to assess a candidate's performance during Teaching Practice once lessons during the six-week practice session would already have been delivered.

In the light of his findings regarding the discrepancy between the contents of the standard appraisal templates and complainant's *Fail* Teaching Practice result, the University Ombudsman recommended that the University should set up an appeals board to review complainant's performance in her Final Teaching Practice and decide whether she should pass or fail on the basis of the ratings recorded on the appraisal templates in relation to the open-text comments.

The University Ombudsman concluded his Final Opinion by stating that if the University agreed to implement his recommendation, the appeals board should reach its conclusions sufficiently in time to allow complainant's final result to be published with those of the 2007-2001 B. Ed. (Hons) student cohort of which she formed part during her years as a student in the Faculty of Education.

Outcome

A few weeks after the submission of the Final Opinion, the university authorities set up an appeals board for the purpose that had been recommended by the University Ombudsman. After considering all the assessments by the three Examiners and other records concerning complainant's performance in her Final Teaching Practice, the board concluded that the areas of weakness

that were identified in these reports did not constitute sufficient grounds to award her a *Fail* grade and that this grade should be changed to a *Pass*; and the Office of the Registrar of the University lost no time to amend complainant's result accordingly.

From the Ombudsman’s Caseload

Case 14 (November 2010)

Reflections by the Ombudsman on the sad, untimely death of Ms AB's young child

Background information

The Ombudsman investigated the sad case of the sudden death of Ms AB's sixteen-month old child who was rushed to Mater Dei Hospital by his parents where he received treatment at the Emergency Department and was sent back home only to succumb to his condition three days later.

Ms AB sought the Ombudsman's intervention and expressed her deep distress at the attitude of the hospital authorities and their refusal for a long time to give her a proper account of her son's medical condition and an explanation of the reasons that led to his untimely death on the grounds that this was the subject of a magisterial inquiry. Ms AB was perturbed by the fact that her attempts to secure a copy of her son's medical records from the hospital management drew a blank and expressed concern that ten months after her child passed away, his death certificate was still incomplete and had not yet been registered.

Complainant was further aggrieved at the contents of the report of the magisterial inquiry that she finally managed to obtain and raised doubts about some aspects of this report that in her view were incorrect.

Facts of the case

On 24 December 2008 complainant and her partner took their sixteen-month old son to Mater Dei Hospital where he was examined and diagnosed with croup and after receiving advice on the treatment that the child needed, the boy was discharged. For the next three days the parents administered the medication that was prescribed for their son but early in the morning of

27 December before Ms AB's partner left for work, he discovered to his great shock the child's lifeless body in his cot. Attempts at resuscitation at Mater Dei Hospital where the child was taken urgently by ambulance were unsuccessful.

Following a request by the hospital authorities, an autopsy was carried out on 29 December 2008 and the death certificate ascribed the cause of death to pneumonia. However, since only three days earlier their son was healthy and showed no signs of any sickness, the couple considered this diagnosis as too vague and demanded an explanation from the Mater Dei management.

To their surprise, however, the hospital management gave no answer but pleaded that the case was the subject of a magisterial inquiry that was conducted by the Court. To further increase the couple's distress, they never received any offer of counselling or any explanation whatsoever – in their own words, *"nothing at all"* – and were even refused a copy of their son's medical records. A letter by their lawyer to the hospital authorities in mid-February 2009 requesting information on the child's death too remained unanswered.

In reply to questions submitted by a local newspaper correspondent on 29 May 2009 the Parliamentary Secretary for Health replied as follows:

"At the time of the sad demise of …….. senior staff members of the Department of Paediatrics had spent time with the family trying to explain to them the facts as they were known at the time of death. However, as happens in cases of sudden unexplained death, the death of ….. is the subject of a magisterial inquiry. The Health Division can confirm that the magisterial inquiry is not yet concluded.

It is not the normal practice to hold internal inquiries in the presence of a magisterial inquiry. The Health Division will be in a position to discuss the case further with the family once the magisterial inquiry is concluded and the report is available."

The magisterial inquiry was completed on 5 August 2009 and concluded, after considering the evidence and the report of a forensic expert, that there was no mismanagement by medical staff at Mater Dei Hospital. However,

when on 24 September 2009 the child's parents finally obtained a copy of the report from Attorney General's Office, they were distressed to find that in their view the inquiry contained incorrect information. At this stage the couple felt that further investigation was warranted and approached the Ombudsman.

The Ombudsman's investigation

The investigation by the Ombudsman confirmed that the death of the child was the subject of a magisterial inquiry that was prompted by the Mater Dei management and that it was almost two months after this inquiry was concluded that the hospital authorities were informed of its outcome. However, since a magisterial inquiry is a function of the Courts, in terms of the Ombudsman Act the Ombudsman has no jurisdiction over the conduct of an inquiry and its conclusions.

The Ombudsman found that in the light of his initial intervention where he urged the Health Division to heed complainant's concerns on the other issues that appeared in her grievance, on 2 December 2009 the Director General, Health Care Services of the Health Division wrote to Ms AB. After expressing his regret at the apparent lack of communication from the Division he informed her that the Mater Dei management, the Department of Paediatrics at the hospital and the Health Division itself were the subject of a magisterial inquiry following the death of her child and for legal reasons they were not in a position to discuss any details regarding this case prior to the completion of this magisterial process. The Director General appreciated that this reply was likely to cause even greater distress but at the same time he showed his willingness to meet the couple to discuss health issues related to the case.

When this meeting took place in mid-December 2009, together with the Chairman of the Department of Paediatrics at Mater Dei Hospital the Director General explained the signs and symptoms presented by the child and the treatment administered at the Emergency Department as well as the contents of the post-mortem report. With regards to the details that appeared on the death certificate, it was explained that at the time that the post-mortem took place two days after the child's death only things that were visible to

the naked eye could be reported and that laboratory test results as to the microbiological cause of the pneumonia that was claimed to have afflicted the child were only available at a later stage.

Following a meeting at the Office of the Ombudsman during which Ms AB aired her concerns including the fact that the hospital management still failed to give her a copy of her son's medical records, this Office was able to get hold of these documents and presented them to her. These records showed that Ms AB's son was already dead on arrival at Mater Dei Hospital and that when attempts at resuscitation failed, the hospital authorities informed the Police for the purpose of holding a magisterial inquiry. This is standard procedure in cases of sudden unexplained deaths.

From a report by the Chairman of the Department of Paediatrics the Ombudsman found that following the arrival at Mater Dei Hospital in the morning of 27 December 2008 of a child showing no signs of life, he was immediately called in and kept the child's parents informed of the resuscitation measures that were being applied to try and save their son's life. When life support measures were discontinued, he informed them of their child's death and discussed further with them the probable sequence of events that led to the death of their son.

Considerations and comments

A wrong, uncaring and insensitive attitude

The Ombudsman's investigation revealed that after requesting a post-mortem and a magisterial inquiry in line with standard procedures in circumstances where the cause of death is unknown, the Health Division withdrew from any further involvement in this case on the grounds that the matter was *sub judice* and fell under the jurisdiction of the Courts. This meant that in a moment of anguish the much-needed support for the parents was not forthcoming and their need for clear answers and explanations, and above all counselling, was not met. With the exception of the Chairman of the Department of Paediatrics on the day of the child's demise, hospital staff and the top rungs of the Health Division kept aloof and avoided every opportunity to be involved on the grounds that the matter was in the hands of the Courts.

It is the opinion of the Ombudsman that this attitude towards complainant and failure to provide any support to the parents on the grounds of an ongoing magisterial inquiry was wrong, uncaring and insensitive. It is also the Ombudsman's opinion that it would have been in the interest of the health authorities themselves to set up an internal inquiry alongside the magisterial inquiry especially when only three days before his death the child had received treatment at the Mater Dei Emergency Department. According to the Ombudsman it would also have been appropriate to hold such an investigation to establish the facts should civil court action be instituted for alleged negligence or for any other failure in the treatment and for which the hospital could have been held responsible.

A magisterial inquiry does not preclude an internal departmental inquiry

The Ombudsman stated that he shared the views of a former Chief Justice who was consulted by the health authorities regarding this case that a magisterial inquiry is not meant to replace a departmental or other inquiry on the same issue under the Inquiries Act. This former Chief Justice held that the Health Division should not plead that a case is *sub judice* and use this as a pretext to refrain from providing information to patients or their relatives.

The condition regarding confidentiality arising from the *sub judice* status of matters covered by a magisterial inquiry binds only the Magistrate and court staff and experts taking part in the inquiry and no other person is bound by any such condition unless expressly enjoined by the Magistrate not to communicate any specific type of information. In this case, therefore, it remained the function of the health authorities to provide support despite any ongoing judicial intervention.

The right of citizens to have access to their medical records

In the next step of his investigation the Ombudsman sought to establish whether there is in place a system that enables citizens to verify what happens in state hospitals to patients who are close to them. The Ombudsman felt that it is necessary for means to be provided that allow citizens the right to obtain answers to their concerns on standards of patient treatment and to any complaints that might arise and he enquired whether there are any fixed rules or guidelines on how similar issues should be handled by the health

authorities.

While assuring the Ombudsman that action was in hand to establish a protocol with a set of standards and procedures to be used by Customer Care Officers when handling complaints related to patients in state hospitals, the health authorities acknowledged, however, that at times it is difficult to define the extent of the information that could be given to persons who present these requests, also in view of any litigation that could possibly arise from the details that are being released.

Drawing from the lessons that emerged from this case, the Ombudsman added that it appeared to him that in similar circumstances a major problem was the lack of communication between hospital authorities and patients or persons who are related to them about the state of the health and welfare of inmates. When faced with this observation, the health authorities expressed doubts about the wisdom of discussing details on hospital treatment with inmates and their relatives lest any information would be misinterpreted and possibly even used against them in any litigation that might arise.

In the aftermath of the infant's death

With regard to the magisterial inquiry on the death of Ms AB's child, the Ombudsman found that in this case the health authorities were kept in the dark since the inquiry took several months to be completed and that after the report was concluded in early August 2009, it was only by accident that two months later they became aware of its outcome.

Delving deeper, the Ombudsman took note of the explanation by the hospital authorities that the doctor who examined the child at the Emergency Department seemed to have made the right diagnosis. He noted that when the Chairman of the Department of Paediatrics spoke to the parents soon after their child's death, he could not at that stage provide any further information in view of the pending postmortem although he shared their concern to find out what went so tragically wrong especially when a few days earlier the child was full of life.

According to the Ombudsman, however, the subsequent attitude of health care staff, fearful of saying anything which could in their (mistaken) opinion

be in breach of the Court's orders coupled with fears lest anything they said could be used as evidence against them in a potential civil court case, led to a situation where the parents faced an impenetrable wall in their efforts to shed light on this tragic event.

This situation was further aggravated when the Mater Dei management turned down the parents' request for a copy of the child's medical records. The Ombudsman considered this as another wrong decision since it is universally recognised that patients are entitled to have access to their medical records – a right that is even sanctioned by the *Patients' Charter of Rights and Responsibilities* issued by the Hospital Management Committee of St Luke's Hospital in 2001. In this case where the patient was a sixteen-month old child, it was obviously the parents who enjoyed this right even if it was wrongly denied to them and this situation was only corrected when they received a copy of their son's medical records following the Ombudsman's intervention and the health authorities raised no further objection to their release. The Ombudsman insisted that fears of a possible claim for damages could not override a patient's basic right and that neither is this right affected even if civil court action for damages is instituted.

The Ombudsman also examined Ms AB's grievance that the original death certificate was incomplete. Since it is established practice for a death certificate to be issued immediately after a postmortem to enable the Inquiring Magistrate to decide whether to permit the burial to go ahead, in similar instances a death certificate is drawn up on the basis of the pathologist's initial observation without the benefit of results of laboratory investigations on samples taken during the postmortem. In this case it was only after the Ombudsman alerted the health authorities to complainant's concerns about an incomplete death certificate that the Health Division asked the pathologist to issue an updated certificate with the details that resulted from the laboratory investigations and presented this document to the child's parents.

The Ombudsman commented about another issue that emerged from this case. Referring to unexpected incidents at hospitals such as sudden deaths, he stated that in his view any such incident should immediately set off an internal inquiry, regardless of the fact that a magisterial inquiry would be in place. Although the child's unexpected death occurred at his parents' home, the fact that three days earlier the child received treatment at the Emergency

Department constituted enough grounds to consider this as a case which needed to be subjected to a formal internal inquiry. Carried out in time, this inquiry would have been in the interest of all concerned, not least the parents and the health authorities themselves, even though the case was reviewed by the senior paediatrician at Mater Dei Hospital on the day of the child's demise and his report formed part of the medical records about Ms AB's son.

The Ombudsman was also deeply appalled that for several months the parents received no bereavement counselling at a time of deep pain caused by their child's death and when they most needed support to cope with their ordeal. This failure had its roots in the mistaken approach in cases where a magisterial inquiry is in place although it was at least partly remedied when the health authorities agreed to discuss the circumstances surrounding this tragic event with the child's parents.

Complainant finally enquired whether there was any further action that she could do in order to have her son's death investigated properly in view of her allegation that the magisterial inquiry was incorrect and at odds with hospital records which showed that the child was suffering from pneumonia when she first took him to the Emergency Department at the Mater Dei Hospital.

In his reply the Ombudsman stated that although he cannot investigate the conduct of a magisterial inquiry or its outcome, on the basis of information made available to his Office, including the child's medical records, there was nothing to substantiate Ms AB's belief that her child had pneumonia when she first took him to the Emergency Department. In the Ombudsman's view this belief was the result of poor communication between the parties involved in this painful experience and although he felt that a departmental inquiry should have taken place soon after the death of the child, he expressed his reservation regarding the value of an internal investigation at that late stage.

Conclusions

In the light of circumstances surrounding the child's sudden loss and the implications of this incident on the way in which hospital authorities should deal with traumatic situations, the conclusions reached by the Ombudsman appear below.

Ms AB's misgivings about the report of the magisterial inquiry

Since allegations in respect of the magisterial report are not subject to investigation by this Office, Ms AB could seek legal advice on how best to move forward if she wanted to probe this matter further.

the role of a magisterial inquiry in the context of other forms of scrutiny

Although the health authorities and the hospital management were under the mistaken impression that once a magisterial inquiry was in place, they could not, or should not, divulge any information or offer any counselling to the bereaved parents and failed to set up an internal inquiry to investigate the child's death, the Ombudsman observed that a magisterial inquiry does not preclude the authorities from carrying out an internal inquiry and from releasing information to which patients and/or relatives are entitled unless the Inquiring Magistrate issues a specific prohibition.

In this respect the Ombudsman made it clear that this statement did not cast any shadow on the quality of the treatment given to the child at Mater Dei and that there was no evidence of any lack of reasonable medical and nursing care although there was clearly in this instance a glaring failure in communication between the hospital management and the child's parents to ensure pain relief intervention at the appropriate moment. The hospital administration failed to address adequately Ms AB's concerns in respect of the circumstances that surrounded the death of her son and this failure only served to increase her distress.

The Ombudsman explained that information given promptly and at the appropriate time by a service provider goes a long way to alleviate anxiety and remove suspicions of failure. In this case after the initial expression of support by the Chairman of the Department of Paediatrics, the parents faced a blank wall that made their grief and numbness even more overwhelming.

the issue of a protocol for the guidance of hospital staff and of the health authorities

Since it emerged that no clear instructions and guidelines exist on how to

handle such situations, hospital staff are generally at a loss whenever advice and counselling are needed for relatives suffering from a state of deep emotional hurt; and the Ombudsman recommended the issue of a protocol to guide staff on how to tackle painful situations.

patients' rights to have access to their medical records

The hospital authorities were at fault when they turned down Ms AB's request for a copy of her son's medical records although this is a patient's right that has been recognized by the Maltese health authorities for several years. This failure was attributable to fear of possible litigation in court and based on a mistaken impression regarding action that is to be taken by the hospital management whenever a magisterial inquiry is in place.

In the Ombudsman's view, patients – and in certain instances, their immediate relatives – have right of access to all the facts, both clinical and administrative, that surround and record their treatment and stay in hospital, including details regarding the circumstances and cause of death should this happen. Patients have the right to be fully informed both as to the material facts regarding their medical condition and their diagnosis as well as the circumstances before, during and after any medical treatment or surgical intervention. At the same time the hospital management does not have a right to withhold any such information on the pretext that a magisterial or other inquiry is in progress or that its disclosure could embarrass or prejudice the hospital administration or the health professionals who are involved.

The Ombudsman stated that he was convinced that as a result of a generally defensive approach by management which in truth reflects a mentality that is common in the Maltese public administration, Ms AB and her partner were caused undue suffering and distress by the way in which their situation was handled.

The provision of psychological, psychiatric and social support by qualified professionals should be standard practice in similar situations in accordance with well-established procedures and should be published in the form of a protocol and brought to the attention of all staff who are likely to be in contact with similar situations.

The Ombudsman referred to the support set-up that assists patients and relatives in cases where severe trauma or death occurs. He appealed strongly that this intervention should not be withheld whenever circumstances arise that might lead to an investigation or inquiry into the conduct of the hospital administration or the quality of professional services provided since any such defensive wall of silence weighs down heavily on those who are entitled to receive correct and timely information and deserve support, sympathy and advice that would set their mind at rest and alleviate distress.

Recommendations

In the interest of a transparent and accountable hospital administration and in order to promote a correct relationship with patients, relatives and legal guardians, the Ombudsman submitted the following proposals:

i) health authorities should in future ensure that unless debarred by an Inquiring Magistrate, they should set up an internal inquiry whenever circumstances warrant that this be done in the interest of patients or of their relatives or even of the hospital involved;

ii) public hospitals should have in place a programme for implementing essence of care communication guidelines aimed at addressing situations that cause or are likely to cause distress to patients and their relatives, especially in situations that require explanations on the clinical and administrative *iter* of treatment given to patients besides ensuring appropriate professional counselling of relatives as may be necessary. Existing complaints policy and procedures together with any other supporting documentation should be reviewed and upgraded, with emphasis on support facilities for staff members to handle difficult situations or complaints and also to allay unjustified fears and unfounded suspicions;

iii) a protocol, based on a recognition of the established right of patients to see their medical records, should be issued as a matter of urgency with clear written instructions to hospital staff on how to deal with requests for the medical records of patients either by patients themselves or by authorized persons; and

iv) while the sterling work by voluntary organisations dedicated to palliative care, such as Volserv at Mater Dei Hospital and the Hospice Movement, is greatly appreciated, these NGOs should be roped in to provide ancillary service to professional support structures meant to assist both patients and relatives in difficult moments.

Other Reports

The minor repairs that ADT and Transport Malta undertook to carry out but remained at a standstill for double the amount of time needed for the City Gate project

The Ombudsman has decided to make public a complaint lodged with his Office back in 2007 against the Awtorità dwar it-Trasport ta' Malta (ADT) as it was then known, now Transport Malta, as an example of how public authorities ought not to treat citizens

Background information

For several years a resident in Qawra complained, first with ADT and later with Transport Malta, about bad workmanship of road alignment works done in his street by a contractor on behalf of the ADT. As a result considerable amount of surface runoff found its way and flooded his garage after every downpour causing substantial damage to his property.

During the Ombudsman's investigation the key facts behind this grievance were never contested by ADT or by Transport Malta. There was no doubt that complainant suffered this nuisance for years on end, at least since 2004, and ADT accepted responsibility for the bad workmanship that was responsible for water runoff that flooded his property and undertook to carry out remedial works. However, some time later ADT came up with the pretext that it had no funds and at a subsequent stage told complainant that it would issue a call for tenders for these works. Unfortunately, however, this turned out to be an empty promise.

Complainant was deeply upset. Not only was he unable to make use of the garage since the electronic instruments of vehicles parked inside ran the risk of becoming defective because of high humidity levels but the situation continued to deteriorate as the years went by. Despite various assurances by ADT and by Transport Malta management, nothing ever took place to

remove this inconvenience.

This indifference was in evidence too in the way that ADT, and later Transport Malta, reacted to the Ombudsman's intervention. In January 2008 the ADT sought to justify its lack of action by stating to the Ombudsman that the Director of its own Network Infrastructure Directorate (NID) consistently failed to reply to internal memoranda urging him to treat the matter with urgency. To the Ombudsman this admission was a clear indication that ADT had no control over its own employees and was unable to implement in an effective and timely manner works that the Authority itself undertook to carry out.

As the months passed by and the Ombudsman continued to insist upon the ADT management to carry out these repairs as had been promised to complainant, the works remained pending. In the meantime complainant's garage continued to be flooded every year during the rainy season.

After persistent prodding by this Office, during an onsite meeting in October 2008 ADT officials agreed to issue a call for tenders for works to adjust the lower part of the culvert and create an outlet for surface water runoff collected in this section. However, despite a promise by the NID Director to complete works by the end of 2008, all round lethargy continued to prevail and again nothing happened. Although some time later the appointment of a new Director for the Network Infrastructure Directorate held prospects of a breakthrough, this never materialised.

This situation led the Ombudsman in mid-August 2009 to seek the intervention of the Permanent Secretary at the Ministry for Infrastructure, Transport and Communications and to protest strongly at the way in which his Office was being treated by Transport Malta. This approach too failed to produce any tangible results and the explanation that was proffered this time was that a technical report was awaited before works could be taken in hand although no explanation was ever forthcoming what this report entailed. Several months again passed by and works remained outstanding.

When responsibility for road maintenance works passed from ADT's Network Infrastructure Directorate to the Roads and Infrastructure Directorate of Transport Malta, the Ombudsman immediately demanded an investigation

to establish why this complaint was persistently ignored. However, even this direct approach to the new management of Transport Malta faced a brick wall.

September 2009: enter the engineer responsible for the Roads and Infrastructure Directorate who confirmed to the Ombudsman that works to release complainant from his predicament would get under way soon. However, by mid-2010 these works remained pending while at this stage the Authority even started to ignore in a systematic manner communications sent by this Office on the matter.

Feeling that the whole situation had reached the point of no return, in the last week of August 2010 the Ombudsman warned Transport Malta management that unless this case would be resolved by mid-September 2010, he would issue his Final Opinion. Even this letter was ignored and the only reaction by Transport Malta was a computer-generated acknowledgement.

Considerations by the Ombudsman

This detailed chronology of events can only lead to one conclusion: this was an instance of sheer arrogance at its very worst and an example of how a public authority should not treat citizens. Here was a certificate of inefficiency, incompetence and arrogance by a national authority; here was a glaring example of the insensitive and undignified way in which an authority treated a citizen who sought justice and respect for his rights.

This situation is even more appalling since for a long time an innocent citizen had to suffer the consequences of slipshod works done on behalf of a public authority that in turn failed to show any concern for damage caused by these works to the private property of an upright resident. This attitude is unacceptable and censurable. Equally reprehensible was the attitude shown by this authority towards the Office of the Ombudsman while its investigation on this grievance was under way.

On several occasions public authorities that enjoy a measure of autonomy fail to appreciate the role of the Ombudsman to safeguard citizens and their rights. This failure to cooperate on their part reflects a lack of awareness of

the work done by this Office in its role as a mediator when things go wrong between citizens and the public administration. Although public bodies form an integral part of the public administration and are obliged to serve citizens fairly, at times these authorities convey the impression that in their view the work done by this Office undermines their autonomous status and that since the recommendations of the Ombudsman have no executive force, the ombudsman institution can be taken lightly.

At times this attitude leads officials in these authorities not to cooperate with the Ombudsman; not to reply to requests for information from his Investigating Officers; and even to ignore efforts by his Office to establish contact. These officials seem unwilling to appreciate that the function of the Ombudsman is not only to support an aggrieved citizen but also to contribute towards improved standards of public administration. They seem unaware that citizens should be at the centre of their service provision and that at all times they are bound to provide efficient service to the country at large.

This situation has repeatedly led the Ombudsman to insist that every autonomous public authority should be accountable not only towards citizens but also towards the country. Citizens have every right to demand that officials entrusted with the reins of public administration are bound by rules and standards that apply in the public service which safeguard the fundamental right of citizens to good administration. The Ombudsman recalled that the Public Administration Act, recently approved by Parliament, extends a measure of protection to citizens even in their relationships with autonomous institutions set up by law.

The Ombudsman pointed out that up to the date of his Final Opinion, no action was taken to repair a water culvert and a pavement in a public street during a period that was equivalent to double the amount of time that is required to complete the City Gate project in Valletta. This inertia was in sharp contrast with the stand by the authorities who unreservedly agreed that complainant's grievance was justified and even undertook to remedy the defective works for which they were ultimately responsible.

The Ombudsman insisted that there can be no justification whatsoever for this attitude by public corporations. Citizens are not concerned – and rightly so – with bureaucratic complications that at times abound in public bodies.

Citizens are only concerned – and again, rightly so – that whenever those in office accept responsibility for any defects for which they are liable, they should make amends as soon as possible.

According to the Ombudsman, this was an instance where a citizen could have taken legal action against the public body concerned for this undignified treatment, with the odds of a successful outcome heavily stacked in his favour.

In the Ombudsman's words, this grievance was justified and complainant's stand was vindicated while the incompetence shown by the authorities was deplorable.

Conclusion and recommendations by the Ombudsman

The Ombudsman concluded that in ordinary circumstances he would not have hesitated to limit his conclusion to a declaration that Transport Malta should assume full responsibility for the slipshod works that caused so much distress to complainant and undertake repairs in the shortest possible time. He pointed out, however, that circumstances surrounding this case had far-reaching implications and it was his duty to go beyond such a simple declaration.

According to the Ombudsman this episode was more serious given that the public authority responsible for this appalling situation, despite its repeated promise to carry out the necessary repairs, had persistently ignored not only the Ombudsman's investigation but also, and perhaps more importantly, the justified claims of an aggrieved citizen. This attitude by a public authority needed to be remedied by an apology and by the award of compensation.

The Ombudsman therefore recommended that Transport Malta should issue an apology to complainant for the way in which for several years both its predecessor and itself had trampled on his rights and that repairs should be carried out forthwith under the direction of competent technical personnel. He also recommended that Transport Malta should award complainant a once-only nominal payment of €500 to cover moral damages suffered as a result of his abysmal experience.

The Ombudsman stated in his Final Opinion that he had no alternative but to bring these issues to the attention of the political authorities responsible for Transport Malta since he was convinced that as a result of an intervention at the political level, public bodies will in future seek to honour their obligations towards citizens in a more caring and responsible manner. For this reason the Ombudsman submitted his Final Opinion to the Prime Minister and to the Minister for Infrastructure, Transport and Communications to draw their attention to his recommendations on this complaint for any action that they would consider appropriate.

Developments following the Ombudsman's Final Opinion

Following the submission of the Ombudsman's Final Opinion the Minister for Infrastructure, Transport and Communications was quick to react.

In a letter to the Chairman of Transport Malta the Minister commented that he was alarmed to note that while the organization accepted responsibility for defects in road works that gave rise to this grievance, for several years it failed to solve the problem. He also showed his concern that in January 2008 the ADT, as the precursor to Transport Malta, merely blamed its own Network Infrastructure Directorate instead of directly assuming responsibility for the situation and that despite assurances to the Ombudsman that the problem would be solved by the end of 2008, nothing had happened. The Minister was also perturbed that TM management failed to reply to the Ombudsman's letter in August 2010.

The Minister wrote that: "*The Ombudsman's Office is not to be treated in this manner and I believe that the authority should make a formal apology to the Ombudsman*." He instructed TM management to identify the employees responsible for this situation and to consider whether disciplinary action was called for and at the same time to take the necessary repair immediately in hand.

On his part the Ombudsman too was quick to appreciate the Minister's directive to Transport Malta to take appropriate measures and pointed out that to his knowledge the issue of instructions by a Minister to a public authority to issue an apology was "*a welcome first*".

TM management followed the cue and apologized to the Ombudsman for its lack of response that it attributed to weak follow-up procedures that had already been addressed rather than to any lack of respect for his Office. Management also submitted a technical status update on the matter. It denied that it ever accepted responsibility for run-off water that entered complainant's property and insisted that in 2008 as a sign of goodwill it sealed the service culvert in the footpath adjacent to this property and carried out rendering and cleaning works to prevent further water seepage even though in its view the water that found its way to complainant's basement could not be attributed to this culvert.

According to TM management the problem was due to the basement walls below street level that were not double wall construction while the gap between these walls and the rock face was filled with construction waste and there was no membrane in place to prevent water seepage. Recalling that complainant knew of these defective works and had taken the builder to court, TM insisted that it was his responsibility to seal his property against water ingress.

Nonetheless, TM management stated that since complainant continued to insist that the service duct was the source of the problem, its engineering staff had prepared an estimate of the cost for an extension of this culvert to drain surface water runoff to a reservoir on the opposite side of the road. The quotations that were submitted, however, were higher than its estimate and the call for tenders had to be issued again.

In his reaction the Ombudsman accepted the apology by Transport Malta and stated that he would pass this apology to complainant to whom it was also, if not primarily, due. He wrote that he was pleased to note that finally there were indications that TM meant to implement the necessary repairs and warned that his Office intended to monitor progress.

The Ombudsman also wrote that he had never suggested or hinted that ADT or Transport Malta be held accountable for damage that was not caused by works carried out on their behalf or for damage for which they were not responsible. He added that he was quite surprised that it was only now that TM management was putting forward all these explanations that were

never even remotely suggested or referred to during all the years that his investigation was under way.

For correctness' sake and to establish the commitment by both ADT and by TM to execute repairs that would solve the problem, the Ombudsman referred to the several occasions that his Office was told that these works would be completed by the end of 2008. Even in September 2009 TM informed his Office that internal preparations had reached their final stages and that works would be taken in hand by the end of the month while in January 2010 the NID again informed the Ombudsman that works were due to start soon.

The Ombudsman concluded that once TM management had given several commitments that works beyond the mere rendering and sealing of a water culvert would be carried out, he could not but conclude that both ADT and TM seriously failed to meet their obligations towards complainant and for several years chose to ignore their responsibility for damage caused to his property. The Ombudsman pointed out that he would seek to ensure that following his intervention the case would be resolved as soon as possible.

January 2011

Final Opinion by the Ombudsman on a complaint regarding exemptions from eco-contributions and developments subsequent to the issue of the Final Opinion

1. Background information

1.1 The case can be summarised as follows: members of an approved scheme run by Green Dot Malta Limited submitted that they were actually worse off having joined the approved scheme because apart from paying an eco-contribution as per the Eco-Contribution Act (Cap. 473 of the Laws of Malta), they contributed towards the operation of the said scheme. They were making double payments on their waste since the exemptions from eco-contributions that were promised by the Government to those who participate in an approved scheme, never materialised. To make matters worse, according to complainants, the Government by means of Legal Notice 84 of 2010 retracted from its commitments under Legal Notice 74 of 2008. Complainants also accused the Government of employing delaying tactics and intentionally shuffling its feet in the implementation of exemptions from eco-contributions as well as in refunding past dues.

1.2 On its part the Government confirmed its intention to develop such a scheme but insisted that the law only provides that the competent Minister may exempt a producer from the payment of eco-contributions or grant a credit from the same (Cap. 473 art. 12). It does not bind it to do so. The Government added that it is in fact working towards the creation and implementation of such a scheme but the system required time to develop and implement correctly. The Government furthermore stated that it "*never committed itself to any timeframes for the implementation of the mechanism*".

2. The issues

2.1 The issues brought for the Ombudsman's consideration are twofold.

(a) is it correct for the Government to state that it was never obliged to issue exemptions and/or credits from eco-contributions?

(b) furthermore, can it truly be said that the Government never committed itself to any timeframes for the implementation of the envisaged scheme?

I shall proceed to deal with these two issues in turn.

3. The existence or otherwise of an obligation on the Government's part to issue exemptions and/or credits from eco-contributions

3.1 The Government seems to be relying on the Eco-Contribution Act that on the one hand imposes eco-contributions (art. 3) and on the other hand opens up the possibility for the granting of credits:

> *"3. (1) There shall be charged and levied by the competent authority… an eco-contribution…*
> *(---)*
> *5. In cases of recovery of waste from products on which eco-contribution is paid in terms of this Act, the producers of these products may, in accordance with regulations made under articles 12 and 13, be granted a credit of the contribution paid thereon, or part thereof, against eco-contributions which may fall due in future."*
> *(---)*
> *"12. (1) The Minister may, with the concurrence of the Minister responsible for finance and in accordance with regulations made under the provisions of article 13 –*
>
> *(a) exempt any producer from the payment of the eco-contribution, in whole or in part, which would otherwise have been payable on products produced by him; or*
>
> *(b) grant any producer a credit of the contribution paid on such products, in whole or in part, against eco-contributions which may fall due in future,*
>
> *if the producer provides or participates in a scheme, approved as*

provided in the regulations, for the recovery of waste from these products …"

3.2 The Ministry for Resources and Rural Affairs is resting its case on the use of the term '*may*' in the above-quoted articles of law. It argues that eco-contributions are imposed by law. However, if producers provide or participate in an approved scheme – thus suggesting that producers are not legally obliged to provide or participate in an approved scheme – the authorities will consider granting exemptions or credits against future eco-contributions. Such a strict interpretation could lead one to conclude that even if producers join an approved scheme, their refunds/eco-tax credits are not guaranteed to materialise. Such an interpretation would make it possible for Government to refuse to grant the refunds/eco-contribution credits at any stage, to any producer.

3.3 Clearly such a strict interpretation verges on the arbitrary and could give rise to abuse. I find this line of reasoning unacceptable. At law, the term *'may'* as opposed to *'shall'* should not be regarded as a green light giving Government an absolute discretion. A correct interpretation of the above legal provisions is that, all conditions being equal, producers will either set up or join an approved scheme as they were being encouraged to do. Once this is done, provided they fulfil their obligations in terms of recovery of waste, etc., they would be entitled to receive the tax credit or refund.

3.4 Similarly in the phrase *"eco-contributions which may fall due in future"* (art. 12(1)(b) of the same Act) the term '*may*' is obviously to be understood as *'shall'*. In fact eco-contributions being compulsory, they will fall due for as long as the law is not amended or repealed, provided a producer continues to operate in his present line of business and produce items on which eco-contributions are due. All factors being equal the eco-contribution will be due and the *'may'* is in fact a *'shall'*; similarly credits/exemptions from eco-contributions will fall due if all the conditions of the law are met and abided with by the producer.

3.5 The *raison d'être* behind the system is to encourage the producer to collect his own waste. In default the Government will collect money through which it would finance such recovery operations. Waste recovery, recycling, etc. cost money and have to be financed. The State is not encouraged to

take on this role but is to share the burden with producers, if not shed it completely – vide Council Directive 94/62/EC which, *inter alia*, favours a *"spirit of shared responsibility"* (preamble) in the reduction, recycling, etc. of waste and the "*participation of economic operators*" (art. 7).

3.6 If producers pay eco-contributions, they expect the State to fulfil the task of waste recovery. On the other hand, if they participate in an approved scheme and fulfil their legal obligations, they correctly expect the mechanisms laid down in articles 5 and 12 of Cap. 473 to kick in. They cannot be expected to enter an approved scheme, pay their dues towards the approved scheme and then pay eco-contributions. This would be unreasonable and unfair on the producer and ultimately on the consumer who in the end always foots the bill by purchasing marked-up products. The consumer cannot be expected to pay twice for waste recovery. This is unfair and, it may further be argued, implies that somebody is making an unjustified enrichment. Either the approved scheme is not functioning, and therefore should not be financed by the producer who participates in it, or the operator/s of the scheme are doing their job and eco-contribution is being collected unjustly because the Government is not recovering the waste. The eco-contribution is not, and should not be turned into, another source of income for the Government.

4. Meetings at Ombudsman's Office

4.1 During meetings at the Ombudsman's Office, officials from the Ministry for Resources and Rural Affairs explained that eco-contribution was introduced because industry was reluctant to clean up. The eco-contribution serves *inter alia* to finance waste recovery when this is not being carried out by the producer. It also conveys a message to consumers that waste does not vanish when the refuse disposal truck collects it but has to be processed, recycled and disposed of. These processes cost money and have to be paid for.

4.2 Consumers are encouraged to consume less, or at least consume with more care, if for no other reason to avoid ultimately having to pay this contribution. Therefore, once the system of waste recovery through an approved scheme is up and running correctly, the Government is ultimately obliged to issue credits or exemptions. In other words, the '*may*' element in the above quoted provisions of law is an obligation on the Government's

part, conditional to the producers recovering their waste through an approved scheme.

5. Legal Notice 74 of 2008

5.1 Other questions arise in this regard. These include the extent to which credits or refunds are due and whether they are due on all products on which eco-contributions are levied and whether a 100% refund is due. These issues were catered for in Legal Notice 74 of 2008 which categorically (and in my opinion fairly) states as follows:

> *"3(1) A producer who participates in an approved waste recovery scheme for products on which an eco-contribution is due, shall be exempt, in accordance with these regulations, from payment of the eco-contribution on products the producer indicates that the waste resulting therefrom will be recovered through the approved scheme."*

5.2 The above quoted regulation confirms the Government's obligation to issue credits or exemptions to producers who participate in approved schemes. If confirmation that the issuing of credits or exemptions was required (in my opinion, this already emerges from the Eco-Contributions Act itself), this Legal Notice provides it. Not only is the Government committed in this regard but one could also argue that the Government committed itself specifically to issue exemptions (as opposed to credits) by means of L.N. 74 of 2008.

5.3 One notes how the above-quoted regulation 3 also states that the exemption is due "*in accordance with these regulations*". The regulations clearly refer to themselves, as opposed to a statement on the lines of "*in accordance with these and any other regulations that the Minister may publish under article 13 of the Act*" which would have left the matter to his discretion.

5.4 In other words, contrary to the Ministry's statement that these regulations are indicative, they in actual fact contain a strong element of finality. The Legal Notice expressly states that the regulations it sets out provide "*measures, procedures and guidance to the Act for the granting of exemptions in respect of eco-contribution due by producers who participate*

in the recovery of waste through approved schemes". Nowhere in L.N. 74 of 2008 is there a limitation to the extent of exemptions or a limitation to the number of products on which exemptions will be due.

5.5 The message of the legislator is clear: if a producer participates in an approved scheme and meets all the formalities laid down in the law, that producer will be entitled to exemption from eco-contribution. This is the same message conveyed in the Eco-Contributions Act itself: that contributions will be reduced (whether through credits or exemptions) once the producer participates in an approved scheme and fulfils all his obligations under the Act.

6. Ministry's position

6.1 The Ministry for Resources and Rural Affairs has contended that this Legal Notice was not intended as an end in itself but *"defined the Government's intention to develop an eco-contribution exemptions scheme with the intention that this would be further defined and operationalised in subsequent legislation. This was always made clear to stakeholders during meetings as well as in any correspondence."* The Ombudsman is not in any way refuting the need for further legislation and other measures to not only put the system into practice but also install the necessary auditing mechanism and prevent abuse.

6.2 In other words, the legislation amounts to a re-affirmation of the Government's obligation to issue contributions. The Government undertook to issue exemptions from eco-contributions on <u>all</u> products on which eco-contribution is due, that producers recover through approved schemes, from the time when actual and proven recovery of products, through an approved scheme, commenced. Short of amending the Eco-Contributions Act any further regulations, definitions, etc., have to be along the lines laid down through Cap. 473 and L.N. 74 of 2008.

6.3 Legal Notice 84 of 2010 has to be considered in the light of the above. This Legal Notice regulates exemptions to be paid on the products listed in Schedule One for recovery occuring between 1 July 2009 and 31 December 2010. Complainants have claimed that this Legal Notice is unfair because the approved scheme started operating before 1 July 2009 and because Schedule

One does not include all products on which eco-contributions are due and which are being recovered.

6.4 In my opinion, this Legal Notice is not as unfair as the complainants are submitting. This Legal Notice may be interpreted as a step closer to finally issuing exemptions on some of the products on which eco-contributions are paid between 1 July 2009 and 31 December 2010. It does not renege in any way from the Government's undertaking under the parent act to exempt from eco-contributions all products on which the contribution is otherwise due as from the date established by law and which is being recovered through an approved scheme. The Government owes a refund of eco-contribution on all those products which were recovered through an approved scheme whether before or after 1 July 2009 even though not listed in Schedule One of L.N. 84 of 2010.

7. Were timeframes established for the implementation of the exemption/credit scheme?

7.1 For the above-stated reasons it can be argued that exemptions are due in connection with all products recovered through an approved scheme, from when the scheme was approved and the producer joined it. It is fair and reasonable to maintain that refunds are due from that point, provided the producers and operators of the scheme can prove that the products were actually recovered, and that in general abided with the law.

7.2 The Government is saying that it *"never committed itself to any timeframes for the implementation of the mechanism".* This would have been correct had the Government never published Legal Notice 74 of 2008. It is my considered opinion that the Government should have first drafted all the necessary legislation and prepared all the mechanism required to implement such schemes and then published same all at once or within a very short time. This would have avoided the problem of refunds. A problem that can only get worse if arrears are due on goods on which double payments are still being made (eco-contribution and payments towards the approved scheme). It may even become more difficult to collect the necessary evidence on recovery and to work out how much is due by way of refund in such cases.

7.3 As things stand, the fact that Legal Notice 74 of 2008 as issued does

not set out timeframes for the implementation of the mechanism attracts criticism. Good practice requires that processes should be implemented in pre-determined timeframes. The more complex the issues are, the greater the possibility of disagreement. It is therefore important not to leave matters open-ended. This situation gave rise to accusations of delaying tactics, etc. that could have been avoided by enacting the relevant legislation and setting up all the necessary mechanism before publishing the first Legal Notice.

8. Conclusions

8.1 For the above-stated reasons:

(a) I am denying the Ministry's claim that it was never legally bound to issue exemptions and/or credits from eco-contributions. This obligation emerges from the Eco-Contributions Act itself and was re-affirmed by Legal Notice 74 of 2008.
(b) As regards the temporal element, the Government should have drafted the legislation and put the necessary mechanism in place before publishing the very first Legal Notice.
(c) When Legal Notice 74 of 2008 was published, the Government allowed approved schemes to be born. Operators of these schemes competed between themselves for membership and found themselves under pressure from producers who did not want to pay the eco-contribution once they had joined the approved scheme since this meant they were being unfairly subjected to double payment of dues.

8.2 Once the schemes were set up, the Government was obliged to issue exemptions and/or credits. There was no need for a commitment to a timeframe: as soon as approved schemes were allowed to be set up, registered and started to operate, the Government's obligation to issue credits and exemptions became immediate. The fact that it is already several years behind its obligations only serves to exacerbate the situation.

9. Recommendation

9.1 Developments during the course of this investigation indicate that the parties involved have been and are working towards an amicable situation of outstanding issues. I recommend that these efforts be brought to a fruitful

conclusion as speedily as possible in the light of the considerations made in this final opinion.

10. Developments subsequent to the issue of the Final Opinion

10.1 In its reactions to the Final Opinion on this complaint that was issued by the Ombudsman on 13 January 2011, the Ministry for Resources and Rural Affairs stated that it shared the Ombudsman's view that it was important to ensure that claims for refunds or exemptions under the eco-contribution system are duly audited so as to establish that all recovered waste for which refunds or exemptions are claimed has been effectively delivered to approved waste recovery facilities.

10.2 The Ministry also expressed its concern that the eco-contribution charged to producers over the past years had been "*transferred*" onto consumers through increases in the price of their goods and were not borne as a cost by these producers themselves. The Ministry therefore felt that it was unfair to refund any such eco-contribution to producers when it was evident that these costs had already been recovered from the consumer at large.

10.3 The Ministry explained that new legislation on refunds due to be published in accordance with article 12 (1)(b) and article 13 of the Eco-Contribution Act would ensure that only producers who participate in approved schemes shall be entitled to a refund. This refund would cover expenses incurred in the recovery of waste or the paid eco-contribution itself, whichever is the lower. This would be in line with the stand adopted all along by the Government that it supports the formation of, and participation by producers in, approved schemes and its intention to grant exemptions to producers who participate in such schemes.

10.4 The Ministry also pointed out that in line with its interpretation of regulation 3 of Legal Notice 74 of 2008, only producers who participate in an approved scheme might be eligible for exemptions. This means that such schemes must have been approved in terms of the legislation for the duration of the period for which such exemptions are being granted and producers participating in schemes that were not approved at such time are not to be considered eligible. The Ministry went on to explain that new legislation

on refunds from eco-contributions that is due to be published shortly should also reflect this position.

10.5 The Ministry stated that according to its interpretation, only schemes having signed up members should fall under the scope of this legislation. It was explained that there are currently schemes for packaging waste and for waste from electrical and electronic equipment; and while the former schemes are registered and up and running, the latter schemes are registered but not operational since they do not yet have any members.

10.6 Finally the Ministry admitted that owing to the complexity of the various issues at stake as well as the fact that different factions within the industry had divergent views on certain crucial aspects under discussion, there was a delay in the publication of the new legislation. The Ministry assured the Ombudsman, however, that the Government was committed to ensuring that these discussions would lead to a mechanism based on a sound legal structure that would operate in a fair and equitable manner and contribute towards the credibility and authenticity of the waste recovery sector in Malta.

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Office open to the public as follows

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