NUMBER 30
OCTOBER 2010

CASE NOTES

OFFICE OF THE **OMBUDSMAN** MALTA

Ombudsman

CASE NOTES

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Printed at the Government Press

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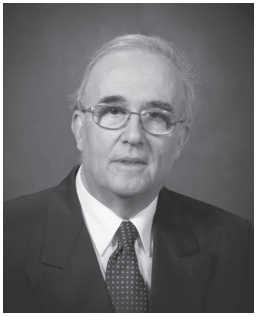
Foreword



The Ombudsman's efforts to solve individual complaints and provide suitable remedies in sustained cases should be viewed in the context of the aim of the ombudsman institution to promote the improved delivery of public services to the country at large. On various occasions the Ombudsman's recommendations at the end of an investigation in a justified complaint can have a marked influence on the person concerned and at the same time contribute towards wider improvements in aspects of public administration that directly affect the experiences of other citizens.

Improvements can take various forms. At times a mere acknowledgement of distress caused to an individual by the shortcoming of an employee in public office may in itself be considered as an appropriate measure; an offer of an apology can help to mend fences; while a commitment to do things differently and restore an aggrieved citizen to the position in which he would have found himself if the act of maladministration had not been committed at all can make a profound difference to the person involved. On other occasions deeper and more significant changes may be required to address systemic weakness that are identified in the course of an Ombudsman's investigation.

This is one of the strengths of the ombudsman service. In its defence of the right to good public administration the Office of the Ombudsman applies the principles of good governance to complaints that are pursued to the investigation stage, ranging from the review of a puny fine for a traffic infringement that is considered unfair by a motorist to the scrutiny of legislation that might impair the pension entitlement of retired workers.

This sustained search for justice by the ombudsman institution ensures that both those responsible for the delivery of public services as well as citizens who make regular use of these services will benefit from a strict adherence to the principles of good governance that should form the bedrock of every public administration in the 21st century.

Joseph Said Pullicino
Ombudsman
October 2010

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 192

MANAGEMENT AND PERSONNEL OFFICE

Denis Moreno's quandary – fit to be detailed as Head in a public entity but not eligible to apply for headship positions in the public service

The complaint

In October 2004 Denis Moreno, a public officer holding the substantive grade of Public Relations Officer in scale 7 of the government salary scale, was detailed for duty with Heritage Malta under article 18 of the Cultural Heritage Act, 2002. A year later, following the issue of a call for applications, Moreno was appointed to a headship position by Heritage Malta on a performance contact for a three-year period ending in September 2008 with a basic salary that was equivalent to between salary scale 3 and 4 in the public service.

In 2005 and 2006 Moreno responded to several calls for applications that were issued for the post of Director in the public service since he contended that he was suitably qualified for this position under the eligibility criteria that guide the selection process for headship positions published in 2005. In his attempts to compete for headship positions, however, Moreno found himself at a disadvantage due to his career stream in a departmental grade related to the field of information and public relations because other public officers in scale 7 of the general service stream were given preference over officers in a similar scale but in another stream. Furthermore, after his third application Moreno was told that in any future responses to calls for applications for similar positions he need not submit a formal application but should merely send an expression of interest together with his *curriculum vitae* since he was only eligible for the category of reserve applicants.

Since in each case his application was turned down and he was not even called for a single interview, Moreno became exasperated by this situation. In February 2006 he submitted a petition to the Prime Minister on his various

unsuccessful applications but at the end of March he was informed that the Public Service Commission (PSC), after having duly examined his case, had reached the decision that he had not been treated unjustly.

On 16 July 2006 Moreno approached the Management and Personnel Office (MPO) of the Office of the Prime Minister. He referred once more to his unsuccessful applications and affirmed that the public service reform programme of the first half of the 90s had brought his career advancement to a halt since although under this programme employees in the grade of Public Relations Officer were promised that the career stream to directorship positions would be open to them, the Government failed to honour this promise.

Moreno also drew attention to the incongruity that whereas in Heritage Malta he was assigned responsibilities that corresponded to those allocated to a Director in the public service, at the same time all his applications for directorship positions in the service were persistently ignored. He felt that it was odd that while Heritage Malta found no difficulty to entrust him with duties pertaining to the post of Director and to remunerate him accordingly, at the same time whenever he submitted an application or expressed his interest in the position of Director in the public service he always faced a brick wall. This not only meant a financial loss in terms of possible appointments to higher positions that he had foregone but also the loss of a future pension linked to these posts.

Complainant's submissions to the Ombudsman

When Moreno found that his submissions against this situation led him nowhere, he lodged a complaint with the Office of the Ombudsman and alleged that on various occasions the Management and Personnel Office subjected him to unfair treatment.

By way of sustaining this allegation complainant explained that his career in the public service had been repeatedly blocked. He claimed that during discussions on civil service reform that led to the agreement entitled *Classification and Regrading of the Information Class* in December 1995 Public Relations Officers were promised that they would be placed in salary

scale 7 of the government salary structure and subsequently, in line with the progression of the analogous grade of Principal in the general service stream, proceed to scale 5 to be eligible to apply for the post of Director. At a later stage, however, the MPO changed its position and PROs were deprived of this right to move to scale 5. According to Moreno, as a result of this shift in the MPO's stand that effectively blocked his access to scale 5, whenever in subsequent years he applied for a headship position he was considered ineligible.

Complainant also explained to the Ombudsman that some time after he requested the MPO and the Public Service Commission in November 2006 to be placed in scale 5, his request was allowed to fall by the wayside since shortly afterwards it was decided that even officers in grade 7 (such as complainant) would be eligible as of right to apply for headship positions.

Moreno affirmed that as a result of the rejection of every application that he submitted for the post of Director, his future pension rights in terms of Article 8E of the Pensions Ordinance were prejudiced. He held that as a public officer detailed to perform duties in a public entity, this article of the Pensions Ordinance was applicable to him on the grounds that he was carrying out duties as a Head under a performance agreement for a definite period as established by this article. In view of these circumstances complainant felt that he was entitled to a pension that would reflect his position as Head with a public entity.

The Pensions Ordinance: considerations by the Ombudsman

The Ombudsman observed that in the Pensions Ordinance there is no definition of "*Headship positions under a performance agreement*" or of a "*head of a department of government*" for the purpose of Article 8 although sub-article 4 of Article 92 of the Constitution of Malta in chapter VII captioned *The Executive* contains a reference to "*Heads of departments of government*."

With regard to Moreno's request for a right to a pension based on scale 5 in the public service salary structure, the Ombudsman found that the MPO held that to benefit from this pension complainant had to be employed on a permanent basis with Heritage Malta in accordance with Article 8B of the

Pensions Ordinance. This would enable his pension to be calculated on a grade analogous to his headship position in Heritage Malta but at the same time implied that complainant had to resign from the public service.

Complainant, however, objected to this proposal. He maintained that if his definite contract with Heritage Malta would not be renewed or if his detailing would be revoked, he would revert to grade 7 in the public service whereas if he were to resign his employment with Government, this would bring his career in the public service to an end. Moreno stated that he was unable to convert his employment with Heritage Malta on a permanent basis since no employee under similar contractual arrangements had as yet been accepted to join the agency in this way.

The MPO continued to maintain that the Pensions Ordinance regulates the award of pensions and cannot be adjusted at will to accommodate particular circumstances in which a public officer might find himself. As long as Moreno was a public officer, his pension would be based on his substantive grade whereas if he resigned and joined Heritage Malta on a permanent basis, his pension would be calculated on a grade in the service analogous to his grade in Heritage Malta as long as this was not higher than scale 3. Complainant rejected this interpretation and argued that since he held a headship position, Article 8E of the Pensions Ordinance[1] was applicable to him in the same

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[1] Article 8E of the Pensions Ordinance states as follows:

"8E. (1) Notwithstanding anything to the contrary under this Ordinance, where a public officer retires from the offices referred to in subarticle (2) after having served for at least twelve months in such an office or retires from the public service after having served for a term of three years in such an office, the pensionable emoluments of such officer on retirement shall be, when such officer accomplishes a creditable performance, those attached to the salary scale, at the date of the officer's retirement, of the highest or higher of the offices referred to in subarticle (2) held by such officer as aforesaid at any time before his retirement:

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

(2) The offices referred to in subarticle (1) are the following:

(a) Cabinet Secretary;

(b) Permanent Secretary;

(c) Headship positions under a performance agreement;

(d) Ambassador, High Commissioner or other principal representative of Malta in any other country, when appointed from the public service in terms of the proviso to article 111(1) of the Constitution of Malta and provided that, prior to such appointment, the holder of any of the said offices was eligible for appointment as a head of a department of Government in terms of article 92(4) of the Constitution of Malta."

way as in the case of other public officers, irrespective of their posting, since otherwise it would constitute a great injustice and this provision of the law would be unreasonable and improperly discriminatory.

On its part, however, the MPO continued to shoot down Moreno's interpretation of Article 8E and insisted that reference to a Head of a government department in this article can only be to officers appointed by the Public Service Commission to fill the post of Director or Director General under sub-article 92(4) or Article 110 of the Constitution of Malta. The MPO also held that since complainant's appointment with Heritage Malta was not sanctioned by the PSC in accordance with these provisions, he could not be considered as filling the post of Head and consequently could not benefit from Article 8E of the Ordinance. According to the MPO, only Article 8B of the Ordinance was applicable in Moreno's case[2].

Complainant again challenged this interpretation and queried why Ambassadors and the Cabinet Secretary, who are not selected and appointed by the Public Service Commission, are entitled to benefit under Article 8E.

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[2] Article 8B of the Pensions Ordinance states as follows:

"8B. (1). Where an officer's service with the Government has been terminated to take up permanent employment with a company or entity as provided in article 8A, or in accordance with the provisions of any other law which provides or provided that in respect of an officer, detailed for duty with the corporation or entity referred to in the relevant law, and who accepts permanent employment with such corporation or entity, service with the said corporation or entity shall, for the purposes of the Ordinance in so far as applicable to him, be deemed to be service with the Government, the pensionable emoluments of such officer on retirement shall be deemed to be the pensionable emoluments established in accordance with the following subarticles:
Provided that nothing in this article shall be deemed to detract from any rights granted to any officer in virtue of article 8C.

(2) The pensionable emoluments of an officer to whom subarticle (1) apply shall be deemed to be the pensionable emoluments payable to an officer in Government service in a grade and at the incremental level corresponding to the post and incremental level at which the officer retires from the company, corporation or entity as the case may be.

(3) For the purposes of subarticle (2), posts and salary grades with the respective company, corporation or entity shall be classified in the most nearly corresponding grades and incremental level under the Government of Malta by reference to job description, skills, responsibilities and other analogous factors.
……..
(6) No post shall be classified in a grade higher than Grade 3 in the service of the Government or such other grade that the Minister responsible for finance may, from time to time, by notice in the Gazette determine."

The MPO, however, turned down this observation because under Article 111 of the Constitution of Malta the appointment of an Ambassador is made by the Prime Minister following consultations with the Public Service Commission whereas in the choice of a Secretary to Cabinet the Commission is not even consulted and neither is its advice sought.

Interpretation of Article 8E of the Pensions Ordinance

In his evaluation of the controversy on complainant's pension entitlement, the Ombudsman first pointed out that Moreno was effectively asking for an interpretation of Article 8E of the Pensions Ordinance and specifically for an interpretation of the words "*headship positions*."

Although in his view a proper platform for a final interpretation of a legal provision falls on a court of law, the Ombudsman nevertheless stated that Article 8E, like Articles 8A, 8B, 8C and 8D of the Ordinance, refers to different situations that arise when public officers provide service to a corporation or entity. Article 8E, however, makes no such reference and merely lists officers in the public administration such as Cabinet Secretary, Permanent Secretary, Head of Department under a performance agreement and Ambassadors, High Commissioners or other principal representatives of Malta overseas whenever these persons are appointed from the public service in terms of the proviso to sub-article 111(1) of the Constitution of Malta. On these grounds the Ombudsman concluded that the MPO's viewpoint that the approval of the PSC is required to establish whether a Head is eligible to qualify for a pension, was not necessarily valid.

The Ombudsman also noted that the four articles in the Pensions Ordinance that refer to public officers, including Heads on performance contracts, who take up duty in a public agency allow these officers to do so on the understanding that they terminate their employment in the public service and take up permanent employment with the entity. In this context one might consider that when Article 8E, which is separate from the preceding article, refers to employees in headship positions under a performance agreement, the legislator has in mind a Head in the public service. This led the Ombudsman to state that he could not share Moreno's view that the MPO's interpretation in this sense was necessarily wrong.

Mindful of complainant's request that in case the Ombudsman subscribed to the interpretation given by the MPO, his Office should declare Article 8E unreasonable, unjust and improperly discriminatory, the Ombudsman explained that before he can declare a law as unjust, there has to be strong evidence that this law denies citizens a right that clearly and in all justice belongs to them.

According to the Ombudsman Article 8E of the Pensions Ordinance deals specifically with situations analogous to those where a public officer who is assigned headship duties on a performance contract performs these duties in an entity at a level and at a rate of remuneration higher than his substantive grade in the public service. On this issue the MPO held the view that Moreno had means whereby he could secure a pension higher than that of his substantive grade and that this could be done under Article 8E of the Ordinance.

The Ombudsman, however, did not agree. He pointed out that this assertion was only correct up to a certain extent since for Article 8E to be applicable in this case, Moreno needed to be permanently employed with Heritage Malta and at a grade higher than his substantive position in the public service – and this would entail his resignation from the public service.

The Ombudsman commented that he shared complainant's concern that the MPO's suggestion meant for him a step in the dark. Moreno was detailed by the Prime Minister to give service in Heritage Malta under article 18 of the Cultural Heritage Act[3] although it was recognized that when he was detailed for these duties, he was not deprived of any right legally due to him under the law that regulates his assignment at Heritage Malta. He was offered a definite work contract with the agency and was free upon its expiry to go back to scale 7, his substantive grade in the public service.

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[3] Article 18 of the Cultural Heritage Act, among other things, states as follows:

"18. (1) The Prime Minister may, at the request of an Entity, from time to time direct that any public officer shall be detailed for duty with the entity in such capacity and with effect from such date as may be specified in the direction.

……

(3) Where any officer is detailed for duty with any Entity in accordance with this article, such officer shall during the time in which such direction has effect in relation to him, be under the administrative

Taking these considerations into account the Ombudsman stated that it seemed that whenever a Head in the public service on a performance contract retires after three years in this position, this officer would be entitled to a higher pension based on his salary as Head. On the other hand it appeared that if the same public officer is detailed to serve in a public entity for three years, and possibly even longer, in a headship position on a performance contract, these years would not serve for the purpose of a "*higher*" pension and upon reaching retirement age this employee would receive a pension based on his lower substantive grade in the public service even though the time spent with the entity would be considered as service for pension purposes.

The Ombudsman observed that complainant's performance contract was not done with the approval of the PSC as in the case of a Head in the public service. Nonetheless, in his view this distinction was not sufficiently strong as to eliminate the vestige of discrimination that he considered to exist between the performance contracts of a Head in the public service and of a public officer serving as Head in a public entity. The Ombudsman commented that clearly unless the employee concerned – such as complainant in this case – is not offered permanent employment in the entity in which he is detailed, it would be unwise for the employee to resign from the service as the MPO had recommended that Moreno should do.

The Ombudsman pointed out that while he appreciated that the pensions legislation might discriminate against persons in Moreno's position, at the same time the law that refers to the detailing of public officers for duty with public sector entities does not prevent them from submitting applications for a higher position even though admittedly prospects of any such opportunity were remote, if not inexistent. This situation, however, changed as a result of the decision taken in 2007 whereby officers in any substantive grade within salary scale 7 became eligible to apply for headship positions.

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authority and control of the Entity but shall for other intents and purposes remain and be considered and treated as a public officer.

(4) Without prejudice to the generality of the foregoing, a public officer detailed for duty as aforesaid -

(a) shall not during the time while such officer is so detailed -

(i) be precluded from applying for a transfer to a department of the Government in accordance with the terms and conditions of service attached to the appointment under the Government held by that public officer at a date on which he was detailed for duty; ……

(b) shall be entitled to have the service with the Entity considered as service with the Government for the purpose of any pension, gratuity or benefit under the Pensions Ordinance ……"

Eligibility criteria for applications to a headship position by a public officer

The Ombudsman recalled that under criteria established by the PSC in 2005, vacancies in headship positions in the public service were open to officers in grade 7 in the Senior Principal grade in the general service stream. This meant that public officers in a departmental grade like Moreno were not eligible even though they were in grade 7 and would form part of a reserve list of applicants whereas officers in the same scale as Senior Principal in the general service stream were eligible as of right to apply and as such had a distinct advantage. In 2007, however, when the Public Service Commission removed this preferential treatment Moreno could henceforth compete on a level playing field with employees in grade 7 of the public service salary scale.

When referring to discussions concluded on 20 December 2005 with the signing of the agreement entitled *Classification and Regrading of the Information Class*, complainant pointed out to what he considered as the Government's failure to keep the promise given during these negotiations that PROs in the public service could compete for and take up directorships in the service by being allowed to advance to grade 5. Upon scrutinizing this Agreement the Ombudsman found, however, that it did not stand up to Moreno's assertion. This was confirmed by the Ombudsman's approach to two ex-MPO officers who represented the Government in these discussions. Although signatories to this Agreement, both gentlemen could not recollect that there was ever an undertaking to this effect by the Government.

The Ombudsman also examined the file at the Management and Personnel Office captioned *Public Service Reform – Information Grade* containing documentation that recorded the discussions that led to the signing of the December 2005 Agreement. However, he did not find in this file any reference to, or mention of, Moreno's claim of a promise by the Government to the effect that PROs could at a subsequent stage apply for positions of Director.

The Ombudsman approached other officers who were involved in negotiations with the Government on the civil service reform programme and who explained that one of the aims of this reform was to enable employees

such as complainant to have ample openings to further their careers. The Ombudsman ascertained, however, that at a subsequent stage the eligibility of these employees to apply for headship positions under a performance agreement was restricted and, consequently, Moreno and other employees in his grade were no longer eligible to apply.

The Ombudsman, while observing that he found no evidence that trade unions representing these employees raised any objection to this restriction, pointed out that he could appreciate complainant's rancour that he was adversely influenced by circumstances but commented that in all fairness it could not be said that these circumstances arose due to an administrative shortcoming.

Unjust treatment

The Ombudsman passed on to consider Moreno's complaint that he was treated unjustly when all his applications for a headship position were turned down. Moreno pleaded that it was unfair that he was given the responsibilities of a Head in a public agency but at the same time the Government did not consider him suitable to assume similar responsibilities in the public service.

On this issue the Ombudsman pointed out that several aspects of the complaint were prescribed under the Ombudsman Act, 1995 since more than six months elapsed since complainant first had knowledge of these issues. Moreover, the law does not allow him to investigate procedures that fall under the competence of the PSC if complainant would not have earlier raised the issue directly with the Commission itself. In all fairness, however, Moreno had not requested the Ombudsman to investigate any decision taken by the Commission.

At this stage the Ombudsman confirmed that until changes in criteria concerning eligibility to directorships and to headship positions were made, complainant was not eligible to submit a direct application but was only eligible to express his interest in these positions and his application could only be considered if among those eligible to apply, no one was found suitable to fill the post in question. However, the situation changed after complainant submitted his grievance to the Ombudsman and all employees in scale 7

(including complainant) became eligible to apply for the post of Director.

The Ombudsman observed that although Moreno felt aggrieved because the change did not place earlier and as a result had missed several opportunities for career advancement, his Office could not delve into the merits of this aspect of his grievance. The guidelines sanctioned by the PSC that excluded complainant from submitting an application to a headship post were applicable not only for him but also for all those who were in the same situation.

Conclusion

In his Final Opinion the Ombudsman commented that from his investigation it resulted that complainant was wrong to claim that he was subjected to discrimination by the MPO because he was never interviewed for headship positions. Although Moreno claimed that in the run-up to the Agreement the authorities promised that the route to these positions would also be open to Public Relations Officers, the Ombudsman found no evidence to back this allegation. This was confirmed by two ex-MPO officers who took part in negotiations on the reform programme for employees in the information category and who could not recollect that any such undertaking was ever given. Neither did any indication of any such promise emerge from documentation in the MPO file on the reform programme for employees in the information grades.

The Ombudsman also rejected Moreno's allegation that the selection process to fill these positions was marked by a lack of transparency and was not credible.

With regard to Moreno's claim that the MPO refused to recognize that he would qualify for a higher pension upon his retirement in line with Article 8E of the Pensions Ordinance on the grounds that his position as Head resulted from his performance contract with a public entity and was not sanctioned by the PSC, the Ombudsman was of the opinion that a definite interpretation of a point of law can only be delivered by a court of law. He pointed out, however, that when Article 8E is viewed in the context of other provisions of the Ordinance he could not conclude that the interpretation by the MPO was necessarily wrong.

Nonetheless, also according to the Ombudsman, the law as it now stands might give rise to discrimination with regard to public officers (such as complainant) who, though not necessarily of their own choice, were detailed by the Prime Minister for duty with a public entity and subsequently given a headship position under a performance contract. Since any such appointment was considered outside the framework of the public service, these employees could not benefit from a higher rate of pension associated with analogous grades in the service.

At this stage the Ombudsman recalled that complainant did not contest the validity of the provision that appeared in the law as approved by Parliament. Neither did he allege that the provision that was the subject of his grievance was discriminatory because it was done *ad hominem* but because it affected him and other persons in the same situation in a negative manner. It was this consideration that led him to regard it as basically unjust.

The Ombudsman declared that he should act with caution whenever he has to consider whether a legal provision brought to his scrutiny is "*unjust, oppressive or improperly discriminatory*" under the Ombudsman Act, 1995.

not every law that adversely hits the interest of a citizen or of a group of citizens should be considered as unjust, oppressive or improperly discriminatory

Not every law that adversely hits the interest of a citizen or of a group of citizens should be considered as unjust, oppressive or improperly discriminatory. Of their very nature laws are meant to regulate the interests of both individuals and society and need to make choices that more often than not favour a particular section or sections of society but not others. However, as long as laws are enacted in an objectively correct spirit and applied in a manner that is not improperly discriminatory, they should be accepted, respected and observed by all.

The Ombudsman observed that he has no mandate to intervene in changes to legislation since this should be brought about by activity at the political level or by the pressure of public opinion. In this case the Ombudsman concluded that he did not detect any element that could enable him to accept Moreno's claim that the law is in itself objectively unjust, oppressive or improperly discriminatory.

At the same time the Ombudsman pointed out that occasions can at times arise when after its enactment, a law that is not objectively unjust, oppressive or improperly discriminatory can be more properly evaluated and at this stage found to give rise to injustice or subjective discrimination that were not envisaged earlier. In any such event these adverse effects would need to be addressed. Only in this context can the Ombudsman identify the possibility of an element of improper discrimination that would need to be seriously scrutinized and, if found to be real, in turn addressed and remedied.

The Ombudsman observed that the law as it stands today and as interpreted by the MPO, unduly placed Moreno and others in his position at a disadvantage when compared with public officers in the same grade who continue to perform duty in the public service. He pointed out that it had to be recalled that complainant had not been the one to ask to be assigned these duties but was detailed by the Prime Minister to perform duties in a public authority and that this episode unduly influenced his career prospects and his opportunities for advancement. At the same time it was recognized that Moreno was performing duties that were compatible with the position as Head in Heritage Malta in line with his performance contract with the agency.

According to the Ombudsman this legal provision can be considered logical in instances where a public officer performs duties for a relatively short period with a public authority following a directive by the Prime Minister but can be regarded as unjust and improperly discriminatory when this period goes beyond a second extension of a performance contract between a public officer and a public entity.

The Ombudsman recommended that it would be useful if the authorities were to review this situation in the light of his considerations and the remedial measures that he had recommended.

Outcome

Almost a year after the submission of the Ombudsman's Final Opinion, complainant received a letter of appointment from the Management and Personnel Office as Officer in scale 4 of the civil service structure. By virtue of this appointment he became eligible to apply for vacant directorships that arise in the public service while the appointment also served to enhance his pension entitlement.

Case No H 626

HEALTH DIVISION/PUBLIC SERVICE COMMISSION

The radiographer who more than met his match

The complaint

A medical technician employed at the Gozo General Hospital in the substantive grade of Senior Radiographer was aggrieved that he failed in his bid to be chosen for the post of Assistant Principal Radiographer in the Department of Customer Services in this hospital. In his complaint with the Office of the Ombudsman he alleged that the way in which the selection process for this post was conducted seemed destined from the very start to be designed to offer a distinct advantage to a third person.

In his grievance complainant alleged that criteria chosen to guide this selection process were in flagrant violation of Regulation 12 of the Public Service Commission Regulations[1] since under these criteria applicants' educational qualifications were allowed at most merely 15 marks whereas experience and previous performance were allocated a maximum of 25 marks. He also stated that although it was widely known that there was really a vacancy at the Gozo General Hospital for a Principal Radiographer and not for an Assistant Principal Radiographer, nonetheless the call for applications was for the recruitment of an Assistant Principal Radiographer with a view to the promotion of the selected applicant to the post of Principal Radiographer in next to no time.

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[1] Regulation 12 of the Public Service Commission Regulations states as follows:

"12. In making recommendations for the appointment or promotion of officers in the public service, the Commission shall have regard to the maintenance of the high standard of efficiency necessary in the public service and shall –

(a) give due consideration to qualified officers serving in the public service;
(b) in the case of officers in the public service, take into account qualifications, experience and merit before seniority in the service …..."

Another objection regarding this selection process was that shortly before the issue of this call for applications one of the Senior Radiographers at the Gozo General Hospital was chosen as a member of a board that was responsible to oversee the refurbishment of the Radiology Department and a new Radiology Section in the Gozo General Hospital – and according to complainant it was no mere coincidence that this person was subsequently chosen to fill the post that had been advertised.

Facts of the case

The Ombudsman found that before submitting his grievance to his Office, complainant sent a petition to the Prime Minister in August 2007 in line with the Public Service Management Code where, among other things, he claimed that the Public Service Commission (PSC) turned down his request for a breakdown of the marks that were shown against the names of all the applicants on the list with the final order of merit that was published earlier in the month. In his view this refusal greatly hampered his efforts to have better access to facts that might have served to strengthen his hand to show that the whole selection process was not conducted in a fair manner.

In his petition complainant stated that under the criterion *Related Technical Knowledge* he was awarded 26 out of a maximum of 30 marks and maintained that he deserved a higher mark because none of the other applicants could claim to possess the wide range of technical knowledge that he had or was responsible for the operation of several specialized instruments that fell under his charge.

Complainant also expressed his resentment that under *Relevant Experience* he was awarded only 12 out of a maximum of 25 points. In his view this was a travesty of justice since he had studied and worked for several months in an EU member state and worked for four years in a private hospital as Principal Radiographer while he also presented documents and certificates to prove his experience in the operation of specialized radiological instruments at St Luke's Hospital and at the Gozo General Hospital which no other applicant could boast of.

Complainant went on to claim that he always performed his duties in an

impeccable manner and that no disciplinary proceedings were ever levelled against him.

The award of 18 marks out of a maximum of 20 for *Supervisory abilities required in the post* also upset complainant who strongly believed that he deserved full marks on this score.

Complainant finally submitted that the criterion *Qualifications* ought to have been given a higher weighting since at a mere 15% of the overall mark, this was very low. He recalled that he had always shown a keen interest to pursue his studies and had been awarded a B.Sc. as well as a master's degree in Health Care Administration in addition to several other certificates and he was sure that no other applicant could match his qualifications.

In December 2007 the Management and Personnel Office of the Office of the Prime Minister informed complainant that after the Prime Minister had referred his petition to the PSC and after having scrutinized closely the selection process in question and considered his representations, the Commission concluded that there was no valid reason why the result of the selection process for the post of Assistant Principal Radiographer at the Gozo General Hospital should be changed. The PSC had established that this process was based on criteria that were agreed upon and approved before interviews got under way and also found that these criteria were applied in a uniform and trustworthy manner with regard to each candidate and no effort had been spared so that this process would be objective, well documented and just.

The PSC observed that while it was the responsibility of the selection panel to assess the respective merits of each applicant and to determine the final order of merit, it had verified that in the selection process under review members of the board had taken due account of the qualifications of all the applicants. There was also evidence that they had correctly evaluated complainant's merits on the basis of the information given in his application in a trustworthy and responsible manner according to criteria established earlier and complainant's placement in the final list of candidates reflected his strengths and merits in relation to all the other applicants on this list. In a process that was both qualifying and selective, complainant's merits were not only assessed reliably against established criteria but were ranked against

the merits of the other candidates as well.

Despite this explanation complainant was still dissatisfied and restless and in January 2008 he requested the Office of the Ombudsman to delve deeper into the case because he asserted that although he asked the PSC to give him the grounds on which it reached these conclusions, this information was still kept away from him.

From records of deliberations by the PSC on this case that were made available for the Ombudsman's oversight, it was found that the Commission had considered complainant's petition in depth and besides seeking the comments of the chairman of the selection board, it had also made its own examination of the individual merits of all the applicants. It resulted to the Commission that complainant was awarded the highest mark (26 out of 30) under *Related Technical Knowledge* and that marks allocated to applicants under this area were awarded in the light of their replies to a set of technical questions put to them by members of the board during their interview.

It also emerged that under *Relevant Experience* the selection panel gave due weight to the number of years in employment of each candidate as well as the practical experience of each applicant in different areas of radiography including experience in hospitals and clinics. Out of a maximum of 25 marks available under this yardstick, 22 marks were to be allocated according to the actual number of years that a candidate had been employed in radiography service while the remaining 3 marks were to be allocated on the basis of a candidate's other experiences or practice outside a hospital environment and directly related to radiography. Following its review of the way in which the selection board acted with complainant and other applicants in this category, the Commission felt that adequate consideration and weighting was in fact given to complainant's years of service in radiography.

Under *Supervisory abilities required in the post* the selection board gave due importance to such aspects as sensitivity, organizational ability in the provision of radiography services and the way in which candidates had generally reacted during their interview to questions on these issues. While these aspects were allocated 12 out of 20 marks, of the remaining 8 points 5 were given to an applicant's ability to supervise staff in the department and promote their personal development and the 3 other points were awarded for

a candidate's technical competence, IT skills, the ability to work without any supervision as well as part of a team and interpersonal communication skills. In this category complainant received the highest marks (18).

Complainant was awarded maximum marks (15) under *Qualifications*. In this connection, however, mindful of complainant's conviction that he was the best qualified of all the four applicants who were found eligible for the interview and since a review of these qualifications was the best means for an objective assessment of the way in which candidates' educational background had been judged, the Ombudsman verified the way in which the Commission evaluated the merits of the qualifications of each applicant. At the end of this exercise the Ombudsman was fully in agreement with the assessment by the PSC that the judgment by the selection board was fair and just. There was not the slightest doubt that complainant's allegation was off the mark since there was in fact another candidate in possession of his qualifications.

The PSC, after having examined the issues raised by complainant, had expressed its conviction that there were no grounds to revise the final order of merit as issued by the selection board.

Considerations and comments by the Ombudsman

The Public Service Commission is set up under the Constitution and the merits of its decisions cannot, except in certain well-defined circumstances, be contested in a court of law. Nonetheless, the Ombudsman can investigate whether the Commission in its considerations gave due weight to points raised in a petition and whether in a process conducted by the Commission there was some aspect that was against the law, mistaken in fact or according to law, improperly discriminatory and unjust in any other way.

With regard to complainant's first lament that he was not given a breakdown of marks awarded to other candidates, the PSC declared that it is not its policy to provide information about third parties. On its part the Office of the Ombudsman fully understood and subscribed to this policy especially in view of issues related to data privacy and protection and on these grounds it agreed that there had been no shortcoming by the PSC.

Marks awarded by the selection board under three of the five criteria on which the selection process was based – namely, *Related Technical Knowledge, Supervisory abilities required in the post* and *Personal Qualities* – depend more than anything else on the subjective judgement of members of the selection panel and on the performance of applicants during their interview. It is surely not the function of the Ombudsman to look into this subjective judgement of board members and propose that this judgement be reviewed or to provide his opinion regarding marks awarded to applicants under these criteria. The Ombudsman, however, felt that he should point out in this connection that complainant was awarded 26 marks out of a maximum of 30 for *Related Technical Knowledge* – and this was the highest mark awarded to any candidate – while even under *Supervisory abilities required in the post* complainant scored the highest number of marks. Under both criteria, however, complainant expected even higher marks although on the other hand he seemed satisfied with his marks under *Personal Qualities*.

it is surely not the function of the Ombudsman to look into ... (the) ... subjective judgement of board members and propose that this judgement be reviewed

By contrast marks awarded to candidates under *Qualifications* in any selection process are verifiable and not subject to any subjective interpretation since obviously they cannot but reflect candidates' actual educational level and qualifications. Although under this category complainant received maximum marks, he stated that he was in possession of the highest academic and educational qualifications but this claim turned out to be unfounded since when the Commission and the Office of the Ombudsman examined the qualifications of all applicants, it was established that even the chosen person was in possession of these qualifications as well. The Ombudsman pointed out that if complainant maintained that information regarding the educational qualifications of the successful applicant was false and he could sustain this charge, he had to substantiate his claim in the first instance with the Commission.

It resulted to the Ombudsman that in the final analysis it was the criterion *Relevant Experience* – where only 12 out of a maximum of 25 marks were allocated to complainant for the years that he had been employed in radiography

– that swayed the balance against him and was the determining factor to tilt the choice away from his reach. From a schedule that was prepared by the selection board and submitted to the PSC, the Ombudsman verified that complainant was the applicant with the least number of years of service since he was appointed Radiographer in 1999 and Senior Radiographer four years later in 2003 whereas the selected candidate was appointed Radiographer way back in 1983 and Senior Radiographer in 1988 – in other words no less than fifteen years before complainant reached this grade.

The Ombudsman reiterated that he does not interfere and has no say in criteria chosen by a selection board to establish the final order of merit of candidates. In similar circumstances his only expectation is that these criteria are established and determined before the selection process gets under way for the sake of equity and transparency. He also expects these criteria to be applied consistently and without any improper discrimination – and following its scrutiny of the whole case the PSC confirmed that indeed this had been the case.

The Ombudsman commented that with the benefit of hindsight he could not but observe that the method used to evaluate each candidate's track record under *Relevant Experience* seemed to put complainant at a disadvantage in relation to the chosen candidate. Despite the experience that he accumulated over several years – though, admittedly, over a much shorter period than this applicant – he was awarded even less than half the marks available under this category. This did not, however, undermine the validity of the whole process or overturn the marks awarded by the selection panel both to complainant and to the successful candidate and the PSC could not in the circumstances reach a different conclusion.

The Ombudsman noted at this stage that the difference in points awarded to the successful candidate and to complainant was 12. Even if complainant received the same marks as this candidate who already had several years' experience in radiography before complainant took this grade, he would still have been unable to get enough marks to be placed first at the expense of this applicant.

The Ombudsman referred to the statement by complainant that the call for applications should not have been for the post of Assistant Principal

Radiographer but for the post of Principal Radiographer since it was this post which was vacant and that the call had purposely been engineered in a way that the person selected to fill the post of Assistant Principal Radiographer would in a short while advance to Principal Radiographer. On this issue the Ombudsman shared the view of the PSC that it is the administration's prerogative to decide where vacancies exist and what posts or positions should be filled through calls for applications. Complainant's argument that the issue of this call was intended to favour the selected candidate to enable him to be appointed Principal Radiographer within a short period was rightly considered untenable.

The Ombudsman also referred in his Final Opinion to complainant's concern on the validity of the criterion used to assess qualifications on the strength of regulation 12(b) of the Commission's own regulations. Here too the Ombudsman shared the comment by the PSC that "*the matter of what percentage mark should have been given to a particular criterion is purely the Commission's prerogative (the setting of criteria and their relative weighting are invariably set beforehand by the Commission) and was, obviously, definitely not something to be decided by a particular candidate for the post* ……" The PSC went on to consider complainant's objection that only 15% of the total marks were allocated for *Qualifications* as well as his statement that the Commission had gone against the provisions of regulation 12(b) of the Public Service Commission Regulations as verging on the frivolous.

Taking everything into account the Ombudsman commented that although he firmly believes that citizens have the right to ask for and to be given information regarding decisions by public authorities that directly affect them, he considered that this explanation by the PSC was satisfactory and saw no need for any further intervention by his Office.

Conclusion

The Ombudsman, feeling satisfied that all the merits of the points raised by complainant in his petition were dealt with in a suitable manner by the Public Service Commission, concluded that it did not result to him that there was any element or any aspect in the process conducted by the PSC that

was wrong at fact, not according to law, discriminatory or unjust. In the circumstances he concluded that the complaint was not justified.

Case No H 659

HEALTH DIVISION

The precautionary measures that were considered undignified by the family of a hospital patient who passed away

The complaint

The Ombudsman received a complaint from a person who expressed indignation at the treatment given to his late father at Zammit Clapp Hospital. Complainant was aggrieved that when his father passed away at this hospital, death was wrongly attributed to tuberculosis and this prevented his family from giving him a normal burial.

Complainant narrated that four days before he died, his father was put in an isolation room in the hospital and that within a few hours of his death his corpse was wrapped and sealed in a plastic body bag. He recounted how a few days later together with other close relatives of the dead man, he was requested to undergo preliminary tuberculosis tests at a government chest clinic and how after a few weeks all those who went through these tests were told that the deceased person never had tuberculosis after all. The dead man's family was in fact perplexed upon being told that it was likely that there had been a mix up at the hospital and that the blood test of the deceased relative was inadvertently mixed with that of an asylum seeker who at that time was undergoing tests in the hospital.

Complainant and his relatives admitted that they were greatly upset upon receiving this information. Not only had the deceased person not received a decent burial but they all had to go through an ordeal of medical tests that later turned out to have been quite unnecessary. Furthermore, the death certificate continued to attribute the wrong cause that led to the death of complainant's late father.

Complainant told the Ombudsman that he believed that a formal apology

from the Health Division was in order to make up for this painful situation while he also insisted that the authorities should issue a corrected death certificate that would supersede the original one and show the true cause that led to his father's death.

Facts of the case

After complainant and the other relatives duly gave their consent to the Office of the Ombudsman to access medical data and other information about the deceased person, the Ombudsman was in a position to launch his investigation on this unusual case.

His first step was to approach the management of Zammit Clapp Hospital and to seek the views of the Department of Geriatrics in this hospital. The hospital authorities explained that complainant's father was an inpatient at Zammit Clapp Hospital for almost two months and that throughout his stay he was under the care of a Consultant Geriatrician. The patient was admitted mainly because of a chest infection that required treatment with intravenous antibiotics and upon his admission the Consultant issued instructions on the various tests and analyses that needed to be carried out.

Since it was found that the chest infection was not resolving adequately and the patient's chest X-ray remained abnormal, a CT scan of the thorax was requested. This took place three weeks after his admission and in the light of the results of this scan and of other tests and following consultations with a Consultant Respiratory Physician, the patient was referred to the Oncology Department where he was given one shot of palliative radiotherapy.

In the sixth week there were indications that the patient was stable enough to return home with the support of his relatives although consideration was also given as to whether arrangements should be made for him to be transferred to St Vincent de Paule Hospital. Unfortunately, however, before a decision was reached the patient's clinical condition started to deteriorate.

It was around this time that following a report from the Bacteriology Department on tests performed earlier on the patient and following contacts with a Consultant Microbiologist and a Consultant Physician (Infectious

Diseases), it was decided to keep complainant's father in a single room and to start antituberculosis treatment. This regime was confirmed by the Senior Registrar in the Department of Geriatrics who also coordinated the TB Chest Clinic.

Also at this stage discussions took place on whether to transfer the patient to a Negative Pressure Room at St Luke's Hospital but since no beds were available and it was considered unlikely that the patient was highly infective, it was agreed to keep him at Zammit Clapp Hospital with instructions for additional tests to ascertain further the patient's condition. Despite the commencement of antituberculosis medication, the patient's clinical condition, however, contained to deteriorate and he passed away some time later.

The death certificate issued by Zammit Clapp Hospital listed lung cancer as the disease or condition that led directly to death with pulmonary tuberculosis as another significant condition contributing to death but not related to the disease or condition causing it.

The investigation by the Ombudsman confirmed that soon after he passed away, complainant's father was wrapped up in a body bag although it was ascertained that this is normal procedure at Zammit Clapp Hospital in keeping with international recommendations in the case of known or suspected infectious diseases including pulmonary tuberculosis. Furthermore, since at that stage the patient had only just started the course of treatment whilst arrangements were being made for further smear tests, it was still debatable at the time of his death whether the patient was a high-risk case as regards the spread of infection. In view of this uncertainty, the hospital authorities believed that caution had to be exercised and that this attitude was understandable.

The Department of Geriatrics at Zammit Clapp Hospital explained to the Ombudsman that this information was elicited from the patient's clinical file and from discussions on this case with the Consultant Geriatrician and the Matron at Zammit Clapp Hospital. It was also explained that at the time of his death the patient was being treated as a case of tuberculosis as had been indicated by the Microbiology Laboratory although confirmation was still awaited whether he was infective or not.

With regard to complainant's allegation that there was a mix-up of samples the Ombudsman's investigation revealed that none of the professional and nursing staff at Zammit Clapp Hospital who were involved in the treatment and care of complainant's relative were ever informed about this change in the patient's diagnosis. It was therefore not possible to obtain any comments on this claim from the hospital management and in the circumstances further clarification was sought from the Chest Clinic and the Microbiology Laboratory.

According to the Department of Geriatrics at Zammit Clapp Hospital the patient's clinical file documented in a proper and orderly manner the course of management and treatment followed during his stay at the hospital as an inpatient based on results and diagnosis that were available at that time. While appreciating that procedures that hospitals need to follow in certain circumstances could lead to further distress in bereaving patients – and this was understandable in the case of complainant's family which had to deal with a diagnosis of several ailments finally culminating with tuberculosis – however, it is obvious that these procedures need to be followed whenever the hospital management feels that they are warranted and whenever it is recommended that these procedures are followed.

At the same time the management at Zammit Clapp Hospital was not insensitive to complainant's request for an amended death certificate for his late father and indicated that in the event that the diagnosis of tuberculosis turned out to be incorrect, doctors who were involved in this case were willing to issue an amended death certificate.

To get a better picture of developments in this case, the Ombudsman also discussed the complaint with the Senior Registrar at Zammit Clapp Hospital responsible for coordination in the TB Chest Clinic. From this meeting it emerged that in mid-June 2007 the coordinator of the Clinic was approached by medical staff to review complainant's relative who at that time was an in-patient in the hospital. After his examination of the patient on 18 June 2007 when he was in a very poor state of health, he wrote in the patient's file that it appeared to him at that time that the patient had evidence that was compatible with the scars of old tuberculosis and that there was a good possibility that reactivation had occurred. In view of his condition the patient was started on an antituberculosis treatment although a few days later unfortunately he

passed away.

The coordinator of the Chest Clinic went on to point out that he subsequently started the usual screening of relatives and staff who had been in close contact with the deceased patient. He also requested arrangements to be made for DNA fingerprinting as the number of positive TB cultures was unusually high and the results from the Mycobacterium Reference Unit and Regional Centre for Mycobacteriology of the Health Protection Agency in London which were available some six weeks after the death of the patient indicated that complainant's relatives as well as two other patients whom the Unit had also specifically been requested to analyse and compare using DNA fingerprinting, showed the same pattern. These findings indicated either that there had been contact between all three patients, a triple coincidence, or some form of lab cross contamination. As regards the two other patients who were involved it was confirmed that one of them had in fact developed tuberculosis.

The coordinator of the Chest Clinic went on to state that once it became clear that complainant's relatives probably did not have tuberculosis, he immediately passed on this news to them. By this time, however, several days had passed since complainant's burial. He explained that although the relatives of the deceased person were relieved upon being given this information, they still raised questions about how this was possible once a positive culture had been obtained. He had assured them, however, that the most likely explanation for this situation was that some form of error had occurred since it was thought that the other reasons mentioned earlier were unlikely.

The coordinator of the Chest Clinic also distinctly recalled that complainant had asked whether this error took place at Zammit Clapp Hospital but he had denied this in a most empathic manner since the two other patients, including the asylum seeker, had never undergone any treatment at Zammit Clapp Hospital. He also insisted that at no time had he ever implicated any department or the hospital in these events but merely admitted that it was difficult to pinpoint where the error had occurred and left it at that. He pointed out that once at that stage the relatives of the deceased had not pressed the issue any further, they might have assumed that he was implicating that Zammit Clapp Hospital was responsible although he resolutely stated that

he had never, either directly or indirectly, implicated the hospital at any time during his conversations with complainant.

He also expressed his final opinion that there was a probability of some 95% that this case was not one of active tuberculosis.

The opinion of other experts that was sought by the Ombudsman served to confirm that cross contamination is not an uncommon experience in various laboratories around the world.

In a bid to obtain deeper professional guidance and advice the Office of the Ombudsman also consulted top officers responsible for infection control in government hospitals. All these persons were, however, unanimous in their opinion that there is no valid scientific reason to treat the body of a person whose death is attributed to pulmonary tuberculosis in the way that the body of complainant's father had been treated since the corpse could not transmit any infection. This meant that complainant and other relatives of the deceased person were justified in feeling aggrieved at the way that the corpse had been treated. The way in which this corpse had been handled was degrading even though it was done in good faith.

Conclusion

The Ombudsman concluded his investigation by stating that taking everything into account his opinion was that both the deceased person and his relatives were victims of circumstances. In the view of the Ombudsman, however, certain circumstances, such as the way in which the corpse of complainant's father had been handled, were surely avoidable and he recommended that to make up for this shortcoming the hospital authorities ought to apologize to the relatives of the deceased person in an unequivocal manner.

… to make up for this shortcoming the hospital authorities ought to apologize to the relatives of the deceased person in an unequivocal manner

On the other hand the Ombudsman stated that he found no evidence of

any culpable fault by the hospital authorities in respect of the diagnosis of pulmonary tuberculosis that up to the time of death, and for several weeks after, was based on laboratory (microbiological) evidence. The Ombudsman agreed that the health authorities could not but submit the relatives of the patient to the necessary health precautions and checks that, in the circumstances and at that point in time, were indicated and seemed proper and appropriate.

The Ombudsman explained in his Final Opinion that his Office believed that the fact that a false positive result for tuberculosis had been recorded could not be regarded as having been an avoidable event. The Ombudsman felt that in the circumstances the explanations given by the hospital authorities were credible and his Office was fully satisfied with these clarifications.

The Ombudsman went on to state that the death certificate was issued in the light of information available at the time that it was being drawn up and consequently there was no administrative failure. As regard the death certificate itself, it resulted that although the health authorities were prepared to issue a second death certificate, the matter was, however, somewhat more complex since the details that appeared in the first certificate and the cause of death listed therein had already been recorded at the Public Registry and as a result a second death certificate would still reproduce "*incorrect*" information. For these details to be changed, it was necessary for complainant to seek recourse to the court.

Taking everything into account the Ombudsman stated that it would not be amiss if the health authorities were to send a letter of sympathy to the relatives of the deceased person to express their regret at what had happened even if no fault could be attributed to them.

Outcome

Upon receiving the Final Opinion complainant expressed the hope that the Ombudsman's recommendations would be taken up by the authorities. In particular he referred to the statement that in order to change the mistaken details that appeared on his father's death certificate it was necessary to resort to the court and requested that any legal expenses that would be incurred to

redress the situation should be borne by the Health Division.

In its reply the Health Care Services Division of the Health Division stated, however, that while it was not possible for its legal advisor to offer legal support to third parties, this advisor would be available to support complainant and his family in their efforts to change the registered cause of death although it had to be the family to take the leading role in this action.

Upon further insistence by the Ombudsman that complainant and his family should be offered full assistance by the Health Division both in terms of legal aid as well as payment of expenses involved in the correction of the death certificate as "*no fault compensation*", the Division replied by stating that in the event that complainant and his family would file an application in the Civil Court asking for an amendment to the death certificate, the Division would be ready to support financially the payment of the legal expenses involved, if any, in accordance with chapter 12 of the Code of Organization and Civil Procedure. The Division, however, ruled out that it would offer legal aid involved in the correction of the death certificate.

Case No I 129

WATER SERVICES CORPORATION

The applicant who was out of touch with project management techniques and failed his interview

The complaint

In a complaint lodged with the Office of the Ombudsman an employee in the Water Services Corporation (WSC) claimed that he had been subjected to discrimination when he failed an interview that was held following the issue of a call for applications in October 2007 by means of WSC Circular No 16/2007 to fill posts of Operations Manager in the Network Infrastructure Development and Renewals Unit in the Corporation.

Complainant, a Team Leader in one of the Corporation's regional offices, insisted that he possessed the level of education and the experience that were required in this call for applications. He claimed that he answered correctly all the questions put to him during his interview by members of the selection board when he was also given the opportunity to explain to them in some detail his experience stretching over fifteen years in the type of duties that featured in the call for applications since he was already doing most of this work on a day-to-day basis.

Complainant admitted that he was highly astonished when he found that he failed his interview and that the successful candidate not only did not possess his qualifications but also lacked the vast years of experience that he had in work related to the development of the Corporation's network infrastructure. He lamented that the selected applicant had only been deployed on these duties for five years and that on innumerable occasions this person sought his assistance and guidance with regard to the supervisory nature of his duties since complainant performed these duties for a much longer period and was also authorised by the WSC management by virtue of his position to deal directly with various contractors and to supervise their work.

Facts of the case

During the Ombudsman's investigation on this case, complainant set great store by the fact that the call for applications issued by the Corporation referred to "*posts*" rather than "*post*" and also recalled that during his interview the selection board made it clear that there were two vacancies that needed to be filled. Complainant felt sure that if he had been awarded the points that he felt that his performance throughout his interview deserved, he would have been selected as well and would have been placed at most in second position. Complainant also told the Ombudsman that he felt extremely dismayed by the marks that he was awarded by the selection board for his experience and suitability for the post.

The Ombudsman found that before he approached his Office to lodge his grievance, complainant wrote a letter of protest on 20 January 2008 to the Chief Executive of the Water Services Corporation. However, in his reply dated 26 February 2008 the Chief Executive of the Corporation informed complainant that the result issued by the selection board was "*just and equitable*" and went on to give him details about the marks that he had been allocated under the three main selection criteria that were adopted by the board. These were as follows:

Qualifications:	30 marks out of maximum of 30 on account of his Diploma in Water Operations Management by the University of Malta;
Suitability:	5 marks out of 40; and
Experience:	10 marks out of 30.

The average marks that were awarded to the other applicants under these criteria were, respectively, 30, 11 and 10. This indicated beyond any doubt that it was the *Suitability* criterion that had been complainant's main undoing.

Comments by the Ombudsman

Complainant's main concern arose about marks that he was awarded under

Suitability and *Experience* for the duties that he performed at the WSC in relation to the responsibilities that were attached to the post of Operations Manager that was advertised by the Corporation. In complainant's view the marks that he was awarded for *Suitability* (5) and for *Experience* (10) were unjust and he alleged that the award of these low marks was a deliberate move to ensure that even though he was placed second, he would get only 45% of the overall mark and this would in turn pave the way for the selection of only one applicant. Complainant was adamant that he deserved better for the sterling service that he had always given to the WSC.

The Office of the Ombudsman contacted the management of the Water Services Corporation and sought its views and comments about points raised in this grievance and about the allegations that it contained. The Ombudsman also asked to review all the documentary evidence available at the Corporation regarding the selection process to which complainant had referred. However, although these documents were duly passed on to him, the Corporation refrained from adding its views on complainant's allegations and instead merely sent a copy of the interview report prepared by the selection board.

This report showed that although thirteen applications were received, only eight candidates were interviewed because the five other candidates were ineligible. It was also confirmed that out of the three criteria set for the evaluation of candidates, the selection panel agreed to give the highest weighting to suitability for the position in question because it was aware of the Corporation's intention to give overall responsibility to the selected candidate to ensure that network development projects to be executed under his supervision would be implemented properly and in accordance with rigorous criteria with regard to such crucial areas as standards of quality, budgetary control and the duration of the works.

As in other similar situations the Ombudsman made it clear in his Final Opinion that his scrutiny of this grievance was again guided by one overriding consideration – namely, that marks awarded by members of a selection board under the various criteria established to guide their evaluation of candidates' performance throughout their interview and that depend on the subjective judgement of board members cannot as a rule be altered, questioned or turned down by the Ombudsman. The Office of the Ombudsman is not an appeals

board against decisions taken by a selection board.

In addition the Ombudsman argued that members on selection boards are normally selected from among persons with vast experience in the particular sector that is under consideration and it is definitely not his function to alter or revise a subjective assessment reached by members of a selection board and to provide instead his own version and his opinion on the marks that could have been allocated to applicants under these criteria.

The Ombudsman confirmed that in the case under consideration the criteria of *Suitability* and *Experience* were both judged on the basis of the subjective opinions of the members of the selection board.

With regard to *Suitability*: the board wrote in its report that this had been assessed primarily "*on the applicants' personal characteristics namely, personality and integrity, persistence to attain objectives, initiative, flexibility and assertiveness*." The board had decided to assess the suitability of each candidate under these headings because the position that was under consideration was considered highly technical and involved an ongoing relationship with several government entities and contractors on behalf of the Corporation. In fact it was for this purpose that during their interviews applicants were asked to state "*their strengths, achievements and their skills in handling projects, issue detailed reports and IT presentation with regards to project management software*".

In his Final Opinion the Ombudsman reiterated his oft-pronounced stand that he has no power whatsoever to change marks awarded by a selection board even in an instance such as this one where complainant was awarded a very low mark – 5 out a maximum of 40. The performance of a candidate during an interview should satisfy and serve to convince members of the selection board themselves and no one else. Regardless of the confidence that a candidate might harbour on his performance during an interview, in the final analysis what matters is the overall evaluation in the eyes of the members of the selection panel of his potential to fill a post that is under consideration. Although an applicant may be free to retain the impression that he performed exceptionally well throughout an interview – as in fact complainant had done in this case according to his reports to the Ombudsman – it is obvious that this impression bears no influence whatsoever on the final

outcome of the interview. Clearly the only determining factor in similar situations is the assessment that is made by the members of the board of the candidate's responses and reactions to issues raised throughout the interview. It is this assessment that is the only thing that counts and that really matters.

With regard to the *Experience* yardstick: the Ombudsman pointed out that in the past this criterion was judged solely by reference to the number of years that an applicant would have performed duties in a similar or in a relevant position since this would generally enable members of the selection board to reach an objective decision on the strength of a candidate's real experience. In recent years, however, a growing number of institutions are known to have moved away from this method of assessment and have increasingly resorted to an evaluation of an individual's experience by means of systems that indicate the extent to which an applicant's work experience and background can effectively contribute to enhance and support the candidate's potential for a particular position.

Although admittedly this method has its advantages, at the same time it is undermined by one great disadvantage in that it substantially reduces the level of transparency that is indispensable in any manpower selection process. Although this new system allows members of a selection board a greater measure of freedom in their choice, at the same time it can serve to weaken in no small way the usefulness of an impartial and fair review of a selection process when controversy and doubts arise about the final choice of the successful candidate or candidates.

The Ombudsman established that in this particular case the assessment of the work experience and background of each applicant for the purpose of allocating a mark under the *Experience* yardstick was not done by the selection board with reference to the number of years that the employee had performed similar duties in the Corporation. Any such assessment would have been based on an objective evaluation of the applicant's actual contribution in a work situation or environment identical to the one due to be allocated to the successful candidate.

Instead the board reiterated that since the position that needed to be filled was of a highly technical nature, it had established a set of questions associated with this position that would enable an evaluation of each candidate with

regard to "*management skills, knowledge of the relative position objectives and expertise towards a comprehensive management of projects particularly in the areas of*:

- *quality information available at the pre-planning stages;*

- *control of projects particularly from quality, financial and progress point of view;*

- *quality of management information (contract document and specifications) which is produced and is available to monitor all aspects of project performance ……..;*

- *post-project follow up and/or evaluation of major or sensitive projects.*"

The Ombudsman found that the set of eight standard questions prepared prior to the interviews by the selection board to be put to applicants ranged from information on what urged candidates to apply for the post and why they felt that they should be selected to fill the position; an indication of five position objectives of an Operations Manager in the Network Infrastructure Development and Renewals Unit; and an indication of what accountability meant to candidates.

Other issues that were raised by members of the selection panel included the responsibilities of an Operations Manager and the chain of accountability to which an employee in this position has to respond; and methods how to control the output of employees and subordinates and to ensure the attainment of overall work objectives in the context of available resources. Candidates were also required to give details on initiatives that need to be taken to meet planned objectives as well as to explain the experience which they possessed in the use of project management software, in the preparation of reports regarding project implementation and in the evaluation of information and statistical details resulting from these reports and which an Operations Manager in the Network Infrastructure Development and Renewals Unit in the Water Services Corporation is expected to use on a regular basis.

From records made available to the Ombudsman by the WSC management it was found that complainant was awarded a mere 10 marks out of a maximum of 30 whereas the highest mark that was awarded in this field was 20.

Conclusions by the Ombudsman

The Ombudsman commented that he felt it was incumbent on him to point out that in this case there was evidence to suggest that the method used to assess candidates could well have worked against complainant. Having been employed with the Corporation for twenty-three years, he was possibly out of touch with modern project management techniques – and it was therefore quite likely that this basic lack of awareness and understanding of these techniques and inexperience were his undoing and must have contributed towards his low marks in this area.

the Ombudsman has no mandate to review criteria established by the selection board as long as these criteria were applied in a uniform manner and without any vestige of improper discrimination

At the same time the Ombudsman observed that he has no mandate to review criteria established by the selection board for this particular call for applications as long as these criteria were applied in a uniform manner and without any vestige of improper discrimination. The Ombudsman stated that from evidence that he had gathered, there was no doubt that established procedures had been observed to the full and were applied equitably across the board.

Taking everything into account the Ombudsman was of the view that he was not in a position to sustain this complaint and closed the file.

Case No I 136

EMPLOYMENT AND TRAINING CORPORATION

The ETC Inspector who was prepared to close an eye to a breach of employment regulations

The complaint

An Inspector with the Employment and Training Corporation (ETC), charged in 2002 of a string of offences and suspended from his duties on half pay while his case was in court, felt aggrieved and approached the Office of the Ombudsman. He explained that although he had been acquitted, the Corporation refused to refund him in terms of the Collective Agreement the half salary that he forfeited during his period of suspension and that even though he raised the matter with the ETC management, his request was turned down.

Facts of the case

From the Ombudsman's investigation it emerged that in October 2002 complainant was charged by the ETC of having failed to report that he had been offered a sum of money not to perform properly his duties as an Inspector; of having accepted the bribe; of having failed to carry out his duties in a proper manner; and of having committed a breach of confidentiality. Criminal proceedings were instituted by the Police against complainant who was in turn suspended from work on half pay as from 25 September 2002. One month later he resigned from the ETC.

In judgement given on 26 October 2007 the Court declared that it was clear that complainant had requested money by way of recompense for failing to carry out his duties properly. The Court, however, went on to acquit complainant because at the time that he committed this misdemeanour, the offence was not considered as a crime punishable under article 15 of the

Criminal Code.

Given that the Magistrates Court found clear evidence that complainant demanded money from a person who was in breach of ETC employment regulations on the understanding that he would close an eye and take no measure against this transgression, the Corporation was adamant that even though no money changed hands, this did not render any less significant the fact that it was the Inspector himself who was the one to ask for money from the wrongdoer. The ETC management considered complainant's behaviour a serious breach of the ethics, duties and responsibilities of an Inspector and on these grounds decided not to refund the half salary that had been withheld.

Clause 5.3 of the Collective Agreement for 2001-2003 between the Employment and Training Corporation and the *Union Ħaddiema Magħqudin* allows for the suspension of a worker in the course of investigations or disciplinary or criminal proceedings if in the opinion of the ETC the retention of the employee is in conflict with the employee's duties and responsibilities. However, whereas under this Agreement an employee who is under suspension would be on half pay, no pay is due to an employee who is suspended in connection with a criminal offence. In this case, however, although criminal proceedings were instituted against complainant, the Corporation continued to pay him half his salary during his period of suspension.

Sub-clause 5.3(c) of the Collective Agreement states as follows:

"(c) If after … investigations by the Corporation no action is taken against the employee, or if such action is taken and the employee is found not guilty of what he was suspended for, he will be fully … reinstated in his former post and refunded the pay withheld."

Complainant rested his claim on this provision.

Considerations and comments

In his grievance complainant requested the Ombudsman to declare that the ETC breached the Collective Agreement when it refused to refund him the half salary that was withheld from him from 25 September 2002 to 24

October 2002. Records seen by the Ombudsman confirmed that complainant resigned on 25 October 2002, three days after being charged with a series of offences.

It is the view of the Office of the Ombudsman that an alleged breach of a Collective Agreement pertains to the field of industrial relations and that disputes in this field are best resolved directly between management and representatives of an employee who might be involved in any alleged infringement or non-observance of any provision of the Collective Agreement. This Office holds that in similar instances its role is to establish whether the stand taken by management was admissible in terms of good administrative practice including whether this position was based on a decision that was mistaken in fact or at law or was manifestly unjust and/or unfair.

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The Ombudsman noted that in this case the ETC not only initiated disciplinary proceedings in terms of the Collective Agreement but referred the matter to the Police as well. He also noted that for reasons of his own complainant opted not to allow proceedings – including internal disciplinary ones – to continue since he resigned within three days of the start of these proceedings.

According to the Ombudsman sub-clause 5.3(c) of the Collective Agreement referred to by complainant specifies the action to be taken by the ETC in instances where in the event that an employee is suspended, no further action is taken against the employee or if, following any action taken, the employee is found not guilty. In such cases the Agreement lays down that the employee is to be reinstated in his former position and is to be refunded the salary withheld.

The Ombudsman also observed that since sub-clause 5.3(c) is related to discipline, it is reasonable to argue that a decision to refund is mandatory when the internal disciplinary action is concluded and the employee is found

not guilty of the charge.

The Ombudsman went on to state that in his opinion it could be validly argued that complainant did not satisfy sub-clause 5.3(c) since internal disciplinary action which the ETC was entitled to take against complainant – and which in fact it had already initiated – was aborted when complainant resigned from his employment with the Corporation when faced with disciplinary proceedings and court action. Indeed, it could be claimed that complainant had never been acquitted from disciplinary proceedings as contemplated in sub-clause 5.3(c) of the Collective Agreement for the simple reason that he had not faced any internal disciplinary action subsequent to his voluntary resignation from the Corporation.

The Ombudsman observed that in the circumstances he could not but take a look at the picture in its wider perspective. This meant that he could not lose sight of the fact that the court ruling that resulted in complainant's acquittal had also unequivocally stated that there was evidence that complainant requested money from the wrongdoer in exchange for withholding measures against him and accepting not to perform his duties as an ETC Inspector as he was bound to do.

The Ombudsman pointed out that in the opinion of the ETC management this was an action that clearly amounted to a serious breach of discipline which could have led complainant to be found guilty in internal disciplinary proceedings and which in turn would have disqualified him from a refund of the half pay that was preventively withheld by the Corporation.

Conclusion

Having examined the merits of the complaint, the Ombudsman concluded that there were no grounds to consider that action taken by the ETC to withhold the refund of complainant's half salary from September to October 2002 constituted an act of maladministration since through complainant's resignation, internal disciplinary proceedings against him were stalled and the Corporation was unable to push forward proceedings against him since he no longer formed part of its workforce. As a result complainant could not claim that the action initiated against him by the ETC which included internal

disciplinary proceedings in terms of clause 5.3 of the Collective Agreement that were discontinued, had in fact exculpated him of the charges.

The Ombudsman also concluded that on the contrary the Court, while acquitting complainant of the criminal charges that he was facing, had found unmistakeable evidence that in the course of his duties he requested money that was not due in order to close an eye to abusive and illegal behaviour. Such action entailed disciplinary sanctions and it was only as a result of his resignation that this process was brought to a halt.

In view of these considerations the Ombudsman turned down the complaint and closed the file.

Case No I 219

DIRECTORATE FOR EDUCATIONAL SERVICES

The employees who were wary of an external evaluation of their work processes and activity

The complaint

Several trained social workers employed in the School Social Work Service in the Directorate for Educational Services told the Ombudsman that they were *"annoyed and stressed …* (at) *… the strange demands*" being put upon them by an employee of the Directorate who was appointed to carry out an evaluation of the support and guidance being given by the Service to students in their education and personal growth.

These employees expressed with the Ombudsman their disapproval of this assignment because they understood that in the light of the results of the evaluation of their operations, the work of the Service would be decentralized with each social worker being assigned to one College. Employees were in complete disagreement with this suggestion and were doubly resentful of this proposed move because they were never consulted about it.

Facts of the case

The Ombudsman found that the problem started to brew when the person assigned to assess the effectiveness of the School Social Work Service asked employees to submit to him completed Case Referral Forms sent to the Service by Heads of Schools which refer to students who, for some reason or other, do not benefit fully from education. Employees, however, refused to do so on the grounds that these Forms contain personal and sensitive data of students referred to the Service by Heads of Schools and that they would be in breach of their professional Code of Ethics and of the law if they were to comply with this directive.

Another bone of contention was that this official managed to lay his hands on copies of medical certificates of staff in this Service. Insisting that the information in these documents on the health condition of staff was not relevant to the evaluation exercise that this official was asked to carry out, employees sought the intervention of the Commissioner for Data Protection and of the Ombudsman.

In the course of his investigation the Ombudsman found that during contacts between these employees and the Office of the Commissioner for Data Protection several issues related to the work of the Service were discussed including the sensitivity of information contained in files used in the Service and that it was agreed that information contained in Referral Forms can only be used for social intervention work. The Commissioner for Data Protection also advised employees of the Service that Case Referral Forms should only be accessible to qualified social workers or to persons under their supervision and to no third party and that details on these documents that could be released had to be used strictly in connection with the compilation of statistical data. In addition the Commissioner explained that employees were entitled to keep their own professional records apart from official ones and that they should inform his Office of any new procedures for the processing of data gathered by the Service.

When the Ombudsman sought information about issues raised in this complaint, the Directorate for Educational Services explained that the tension that arose among employees in the School Social Work Service was attributed to the launching of an exercise to evaluate the work being done by the Service so that its operations would be streamlined and decentralized. It was pointed out that unless the Directorate was given access to data and information regarding social work intervention by the Service, it would be difficult to evaluate the quality of its social work support and intervention and assess its efficiency levels and accountability.

The Ombudsman learnt that the person detailed to carry out this evaluation sought access to Case Referral Forms because an analysis of these documents would enable him to establish a database including information on the caseload at the Service on an annual basis; follow up action that needs to be taken on these cases; the number of school or house visits conducted by the Service per month; and the nature and extent of feedback given to schools

by the Service. The Ombudsman found that information submitted by the School Social Work Service to the official responsible for the evaluation process was considered inadequate and did not allow a proper evaluation of its work and operations.

The Directorate for Educational Services insisted with the Ombudsman, however, that employees of the Service were at no time ever requested to hand over or to grant access to any confidential information available at the Service regarding their clients.

The Ombudsman found during a meeting with the official conducting the appraisal that for the purpose of his exercise, he initially tried to gather information from the annual reports of the Service but data in these reports was of a general nature and provided no details about follow up of cases and follow up visits by employees. Other efforts to gather information on the day-to-day running of the Service from logbooks of drivers with the Service were equally to no avail. The official stated that he tried to gather information that he required for the preparation of his review from the temporary absences sheets of employees (that were, however, inexistent) as well as weekly work forecasts and that in the circumstances he resorted to medical certificates available at the Service although he insisted that he had done so merely for the purpose of data gathering.

The Ombudsman understood that this exercise was spurred by complaints reaching the Directorate about the level of the work being done by the Service and that the whole purpose of the exercise was to establish how the Service was functioning so as to propose improvements in the way that its support and guidance to students was being conducted.

Considerations by the Ombudsman

On the strength of the evidence that he collected regarding this case the Ombudsman commented that it was clear that a solution to this situation was dependent on finding a correct balance between the privacy rights of clients of the Service and the obligation to privacy that social workers employed in this Service have to respect *vis-à-vis* their clients and the right of the employer, in this case represented by the official detailed to perform the evaluation, to

obtain all the data considered relevant and necessary to carry out a proper assessment of the work being done by the Service.

The Ombudsman stressed that he had no misgiving to state that the Directorate was fully entitled to carry out such an audit and to appoint a person it deemed capable of performing this function. Any such evaluation exercise should not be looked upon as a criticism – as employees in the Service apparently chose to believe – but should instead be viewed as a necessary exercise in the context of the national drive to improve the range and level of services provided to specific sectors of the community by public entities.

The Office of the Ombudsman also discussed the issue of the protection of privacy of clients of the Service with the Office of the Commissioner for Data Protection and both institutions agreed that sensitive personal information about clients of this Service should not be disclosed to persons not performing social work in the Service or to a third party. Notwithstanding this, the Ombudsman made it clear that the evaluation exercise in question could not be properly and effectively conducted – and, consequently, would not yield the desired result – unless adequate and detailed information was made available about the work done by the social workers of the Service, the frequency of calls made upon the Service, its response pattern and other relevant information. Such details of their very nature include documentation relating to employees of the Service themselves – but after all every employer has a right to these details.

Conclusions by the Ombudsman

In view of the above the Ombudsman recommended in his Final Opinion that the person detailed by the Directorate to evaluate the work performed by the Service should be supplied with information appearing in Case Referral Forms although any indication of names, addresses and classes of students referred to the Service should be strictly avoided. The Ombudsman

the Ombudsman recommended that the provision of … information appearing in Case Referral Forms … should be done with the prior approval of the Commissioner for Data Protection

recommended that the provision of any such information to the representative of the Directorate should be done with the prior approval of the Commissioner for Data Protection.

Finally the Ombudsman pointed out in his Final Opinion that he could not recommend to the Directorate to accept an internal evaluation of the intervention work done by the School Social Work Service that employees performing duty in this Service offered to carry out on their own initiative since the Directorate enjoys full discretion to appoint itself whoever it deems competent to carry out any such assessment, including an external evaluator.

Outcome

Subsequent to the presentation of his Final Opinion, the Ombudsman was informed that the Directorate for Educational Services would find no objection if the School Social Work Service were to hide the identity of students whose names appear on Case Referral Forms that are submitted by Heads of Schools as long as these forms are made available for the purpose of the evaluation of the work done by the School Social Work Service.

At this stage the Ombudsman closed the file.

Case No J 596

UNIVERSITY OF MALTA

A recommendation by the University Ombudsman that was considered unacceptable by the university authorities

The complaint: background information

A student of the Institute of Health Care lodged a complaint against the University of Malta with the University Ombudsman where she claimed that her academic and practical work had been unfairly assessed and as a result she was awarded a lower classification than that required by university regulations to allow her to proceed to a Masters degree.

Having examined her objection the University Ombudsman concluded that although complainant had her own shortcomings, her first practicum and practicum examination were poorly managed and in fact she performed much better when she was properly mentored and monitored. As a remedy to her first complaint regarding unfair assessment of her work, the University Ombudsman suggested that the Institute of Heath Care should consider the second practicum not as a re-sit session but as a continuation of the first. This would mean that complainant's final practicum result would be an amalgamation of the result of the first practicum examination (29%) with that obtained following the re-sit (86%) in order to reach an average mark of 57%.

Note

The University Ombudsman carries out his duties in full independence and autonomy. He does not report to the governing bodies of the institutions that fall under his jurisdiction and has no association with their day-to-day operations and activities. Complainants who are not satisfied with the outcome of the investigation of their grievance by the University Ombudsman can, however, exercise the ultimate right of recourse to the Parliamentary Ombudsman. This complaint is a case in point.

For the purpose of this case study the Ombudsman is at times referred to as the Parliamentary Ombudsman so as to establish a clear distinction between him and the University Ombudsman.

The University Ombudsman also observed that if this suggestion would prove acceptable to the university authorities, complainant's degree classification would be adjusted as well so long as her modified overall result would warrant this adjustment.

The University Ombudsman proceeded to turn down the two other aspects of the complaint about the grade/mark that complainant was awarded for her dissertation and about the outcome of her *viva voce* since he felt that both grievances were not justified.

After giving due consideration to the recommendation by the University Ombudsman, the university authorities informed complainant on 24 November 2009 that this recommendation could not be implemented. Feeling aggrieved, complainant requested the Parliamentary Ombudsman to investigate her case further.

Considerations by the Ombudsman

(a) Procedures to be followed

The Education Act assigns the University Ombudsman a specific jurisdiction to investigate complaints alleging maladministration by the University of Malta. At the same time the Parliamentary Ombudsman must recognize and respect the autonomy of the University Ombudsman in the exercise of his functions as a sectoral Ombudsman who is entrusted by law to oversee a specialised area of the public administration in which he is competent.

Recourse to the Parliamentary Ombudsman by a complainant who is not satisfied with proceedings before a sectoral Ombudsman should not be considered as an appeal from the sectoral Ombudsman's Final Opinion or anything that is consequential to it. Instead it should be considered as an effective means of review of proceedings primarily aimed at establishing that rules of due process were observed and in this way contributed towards a fair hearing. Any such review has to be considered as an exceptional procedure in that the Parliamentary Ombudsman only intervenes when and if he establishes that a decision by a sectoral Ombudsman that gives rise to dissent was against the principles of natural justice and equity; based on a

mistaken material element of fact; or based on a substantial and determining misreading and error of law.

In this regard the Ombudsman drew a comparison with the exceptional procedure that the Code of Organisation and Civil Procedure lays down for a retrial to be allowed within a set of established parameters. The Code states that under this procedure a judge should not delve into the merits of a case unless in a preliminary hearing he has determined that from available records a valid reason exists at law to turn down the contested judgement and justify a re-trial.

The Ombudsman stated that in his opinion by adopting a similar parallel approach he could establish a procedure that would fully respect the autonomy of sectoral Ombudsmen and their authority in specialised areas of public administration within their functions while at the same time guaranteeing that citizens get a fair deal.

(b) The nature of the complaint

The Ombudsman pointed out that in the application of these principles to the case under review, it was important first to establish the precise nature of the complaint.

Complainant did not feel aggrieved by the Final Opinion of the University Ombudsman or by his remedy to redress the act of maladministration that he identified during his investigation. To a large extent the complaint was upheld and the remedy recommended by the University Ombudsman would, if implemented by the university authorities, completely address complainant's concerns. However, complainant had asked the Parliamentary Ombudsman to intervene because the University of Malta contested the Final Opinion of the University Ombudsman and steadfastly refused to implement his recommendation.

According to the Parliamentary Ombudsman the University Ombudsman exhausted his functions when he issued his Final Opinion since the Education Act does not provide any further remedy to a complainant in a case where the university management refuses to accept a Final Opinion by the University Ombudsman or to implement his recommendations in whole or in part.

Complainant was therefore correct to refer her case to the Ombudsman, regarding the Office of the Ombudsman as an office of last resort and acquiring in this process the same extent of protection given to other citizens who seek redress from him against acts of maladministration under the Ombudsman Act. This protection could potentially include the ultimate remedy of having complainant's case referred by the Parliamentary Ombudsman to the Prime Minister and eventually to the House of Representatives.

Complainant's approach to the Ombudsman envisaged an inquiry on his part to determine whether the decision of the University of Malta to turn down the Final Opinion of the University Ombudsman that her complaint was essentially justified and to refuse to implement his recommendation, in itself constituted an act of maladministration. Complainant did not contest the opinion of the University Ombudsman with which she was in full agreement; and her reference to the Ombudsman did not concern the merits of her original complaint but the refusal by the University of Malta to implement the recommendation of the University Ombudsman and a review of the whole situation to establish whether when she addressed her concerns to him, this approach was justified.

This refusal, consequential to the University Ombudsman's Final Opinion, forms an integral part of the process that is subject to review by the Ombudsman within the parameters stated above.

Reasons for refusal by the University of Malta to accept the recommendation by the University Ombudsman

On 24 November 2009 the Director of the Institute of Health Care of the University of Malta informed complainant of the decision by the Board of the Institute not to accept the recommendation of the University Ombudsman. He wrote:

"The Board noted that the Ombudsman is suggesting that the student is awarded the average mark for the first sitting and re-sit of the Management of Care in a Mental Health Setting (NUR4221) examinations.

The Board was informed that the Ombudsman's suggestion was carefully

considered by the Board of Studies for …… Mental Health Nursing. The Board noted also that the student received an adequate and extensive amount of support.

Following consideration the Board accepted the recommendation of the Board of Studies that no change is made to the student's grade. Furthermore, the Board pointed out that the student's Second Class Lower classification does not preclude her from applying for the Masters degree course."

In February 2010 when the University informed the Parliamentary Ombudsman that the recommendation by the University Ombudsman that the second practicum be considered as a continuation of the first practicum and that the two marks obtained during the first sit and the re-sit be amalgamated, giving a final cumulative result of 57%, was considered unacceptable, the Rector of the University wrote as follows:

"This recommendation was discussed at length by the Board of Studies for the course, by the Board of the Institute of Health Care and by the Pro Rector for Student and Institutional Affairs with the University Ombudsman. It was agreed that his recommendation could not be accepted and/or implemented since there is no University regulation which provides for the amalgamation of the first sit and re-sit marks, and taking such action in this case would create an undesirable precedent, besides being contrary to law and in contravention with general customary practice."

Preliminary inquiry

Before accepting complainant's request to review the decision of the University Ombudsman and the consequent refusal by the University of Malta to implement his recommendation and applying the procedural guidelines outlined earlier, the task of the Parliamentary Ombudsman was to establish, by means of a preliminary inquiry, whether the circumstances of the case warranted that its merits be considered anew by him. In this task the Ombudsman had to establish whether the investigation by the University Ombudsman was lacking *prima facie* in one or more of the elements mentioned above that would justify his intervention in proceedings that were conducted by the University Ombudsman to ensure that the complaint was

fairly and correctly investigated.

This preliminary inquiry based on the records of the investigation by the University Ombudsman led the Parliamentary Ombudsman to reach the following conclusions on each of the grounds that could warrant review of the case:

(i) Rules of due process

There was no allegation that these rules were not correctly applied or that the principles of natural justice were violated and neither did complainant feel aggrieved that proceedings before the University Ombudsman were unfair or unjust.

(ii) Error of material fact

There was no issue as to the facts that gave rise to the complaint since these facts resulted from evidence produced by the parties involved in the case. While it was true that there was contestation on the degree of supervision that complainant received during the last months of her practicum, however, the appreciation of the facts, as they resulted, by the University Ombudsman did not ignore or mistake any material element. The Ombudsman therefore decided that he should not and would not interfere in conclusions drawn by the University Ombudsman from these facts even if the university authorities continued to contest these conclusions.

This led the Ombudsman to reach the opinion that the conclusion by the University Ombudsman on issues of fact and their appreciation had to be accepted and respected. These conclusions pertained to the specialised field of investigation competent to a sectoral Ombudsman and any opinion reached by him in this respect should not, without good and valid reason, be disturbed.

These conclusions led the Parliamentary Ombudsman to decide that taking into account that the rules of due process had been observed and that there was no evidence of any error of material fact, there were no reasons that would justify a review of procedures before the University Ombudsman based on these grounds.

(iii) Error of law

In their rejection of the recommendation by the University Ombudsman, the university authorities submitted that although this proposal aimed to rectify a perceived injustice suffered by complainant, it was essentially based on an error of law that was considered substantial and determining. The university management submitted that if it were to implement this recommendation not only would it create an undesirable precedent but it would also be acting contrary to law and in contravention of general customary practice.

Review warranted

At a first stage the Parliamentary Ombudsman considered the submission by the University of Malta that "*there is no University regulation which provides for the amalgamation of the first sit and re-sit marks*."

Having established as a fact that there is no regulation that authorises the University to implement the recommendation by the University Ombudsman in his Final Opinion, the Parliamentary Ombudsman held that this fact alone *prima facie* warranted a review on his part to establish the extent to which this recommendation was correct and valid and also to establish whether it could be said to be based on a substantial and determining error of law.

Review of the merits

In his review of the merits of the recommendation by the University Ombudsman, the Parliamentary Ombudsman noted that administrators of public affairs must act within the parameters of the legislative instrument that empowers them to take decisions and to act within its defining limits. Public officials have the *vires* to interpret laws and regulations when applying them, subject to the overall superior and authoritative pronouncements by courts of law with regard to their legality. At the same time public officials are allowed to "*create*" precedents only if their decisions are empowered by laws and regulations or if their decisions fall within the limits of administrative discretion that is statutorily given.

The Ombudsman pointed out that creating a precedent in itself should not automatically exclude the validity of a recommendation if it effectively

provides an adequate remedy. Indeed, circumstances may at times warrant or indeed require resort to a precedent to rectify an injustice. Precedents can, however, only validly be made and entertained if they are sanctioned by existing legal instruments – and this principle applies to a public administrator as well as to the Ombudsman.

In the same way like an administrator, the Ombudsman cannot and should not act beyond the law and its limits and his opinions and recommendations have to be done *intra legem* and based on an extensive or restrictive interpretation of an existing law and regulation. They cannot, however, be based on a non-existent one and precedents can only be justified where the law accords the administrator or the Ombudsman a discretion empowering him to do so or when the law is, in regard to the facts of a case that is under review, unclear or incomplete.

The Ombudsman stated that in the present case there was no doubt that the recommendation by the University Ombudsman would create a precedent in the sense that the remedy proposed had never before been adopted in situations that were similar to those in which complainant found herself but which could also be a source of complaint to other students who would find themselves in analogous circumstances in future. According to the Ombudsman, the remedy proposed by the University Ombudsman would provide an adequate solution but the question remained whether it could be said to be empowered by an existing law or regulation or whether it could be considered to fall within the limits of administrative discretion that the University could lawfully exercise.

The Ombudsman observed that it had been established that there is no law or regulation that authorises the University of Malta to provide a remedy on the lines recommended by the University Ombudsman. Nor is there any law or regulation giving the University discretionary powers that allow for a sufficiently wide interpretation or to encompass and justify the creation of such a precedent. Indeed, if anything, university regulations categorically provide that a candidate who is successful in a re-sit would have his/her pass mark reduced to the minimum.

The Parliamentary Ombudsman recalled that regulation 51 of the General

Regulations for University Undergraduate Awards[1] expressly states that "*in any supplementary assessment, the maximum mark/grade that may be awarded shall be 45, Grade D*." On these grounds there was no doubt that acceptance by the University of the recommendation by the University Ombudsman would be in sharp contrast with this Legal Notice – put bluntly, it would be in conflict with a statutory provision. The Ombudsman ruled that to this extent the recommendation by the University Ombudsman could be qualified as being based on a substantial and determining error of law.

Equity

Having established that it is not proper in the particular circumstances of this case to create a precedent, the Ombudsman passed on to consider whether the ruling by the University Ombudsman could be justified on the grounds of equity. In this context he argued that undoubtedly the ombudsman institution partakes of the nature of a court of equity. It is within the nature of its functions to recommend justice, applying the rules of natural justice and supplementing the law to restore fairness and redress injustice. Supplementing the law does not, however, mean creating, amending or substituting it. Still less does it allow avoiding it.

The Parliamentary Ombudsman stressed that, like an administrator, he is not a legislator. All systems require that the exercise of equity should not be arbitrary but used exceptionally with reference to situations not envisaged by the legislator. Equity is intended to obviate a manifest injustice and cannot be introduced if the remedy proposed is not provided for in the law or regulation but is not contrary to it as it is in this case.

Certainty of results

The Ombudsman stated that regulations that govern the conduct of examinations create rights and obligations and should be applied transparently

[1] The General Regulations for University Undergraduate Awards, 2004 were brought into effect by Legal Notice 127 of 2004.

and uniformly across the board. Care should be taken not to introduce areas that are influenced by discretionary measures through the creation of precedents or the exercise of equity where regulations do not allow it. Discretion in this area should only be exercised in very exceptional cases and the limits of such discretionary powers should be well defined.

The Ombudsman commented that procedures should favour certainty of results and the authority of examining boards should not be unduly weakened or else results issued by these boards will be put in doubt without any good reason. Moreover, once established procedures for the revision of results are exhausted, no further representations challenging them should be entertained.

The Parliamentary Ombudsman remarked that is within his function to investigate administrative practices that affect relations between tutors and students and how these impact on students' academic progress. He observed further that he is free to reach his own conclusions on whether a student was treated fairly and was allowed the opportunity and necessary guidance to follow his studies effectively. The Ombudsman can also pass on to recommend measures to redress perceived injustice within the context of existing regulations meant to ensure the certainty of results and the authority of examining boards.

The Ombudsman observed that it is proper that students who feel aggrieved at the level of tutorship that is provided to them are expected to make representations in real time as their course progresses and not after the publication of results. Care should also be taken to distinguish between a student's academic programme that could be negatively affected by failings of tutors or other reasons and the conduct of statutory examinations that should ensure that results correctly reflect the performance of students sitting for these examinations.

Conclusion and recommendation

In the circumstances the Parliamentary Ombudsman concluded that the refusal by the University of Malta to implement the University

Ombudsman's recommendation could not be qualified as an act of maladministration. In his opinion this decision was well grounded and well motivated and cannot be considered to have been capricious or arbitrary. It was taken after due deliberation; was within the administrative competence of the academic authorities; and was also in conformity with university regulations. It had therefore to be respected. The complaint, in the circumstances, could not be upheld.

the Parliamentary Ombudsman concluded that the refusal by the University of Malta to implement the University Ombudsman's recommendation could not be qualified as an act of maladministration …… this decision was well grounded and well motivated and cannot be considered to have been capricious or arbitrary

The Parliamentary Ombudsman concluded his Final Opinion by recalling that in her original complaint to the University Ombudsman complainant submitted that she was unable to proceed with her studies for a Masters degree due to her second lower honours degree because to proceed to a Masters degree a student needs to have at least a second upper honours degree.

Mindful of the fact that in a letter to complainant the Institute of Health Care contradicted this statement[2] and having established that, contrary to what complainant submitted, her placing did not appear to preclude her from applying for a Masters degree, an issue could arise whether that placing might negatively affect an eventual application made by her to follow such a course. In this eventuality, the Parliamentary Ombudsman recommended that on the basis of equity in the appreciation by the competent board of the application by complainant, account should be taken of the conclusion by the University Ombudsman to uphold the first of her three complaints.

The Ombudsman stated that this recommendation was intended to provide a remedy in equity to redress the injustice identified by the University Ombudsman. This is an area that does not invade the conduct of the

[2] In a letter to complainant dated 24 November 2009 the Institute of Health Care confirmed that according to the Board of Studies for Mental Health Nursing *"…. the student's second class lower classification does not preclude her from applying for the Masters degree course."*

examination process and is within the discretionary power of the Institute of Health Care and the University of Malta.

Outcome

In its reaction to the Ombudsman's recommendation in his Final Opinion the University of Malta pointed out that after discussions with the Institute of Health Care it was agreed that in the event that complainant would apply for one of the Institute's Masters courses, she would be considered with other applicants with a second class upper division bachelor's degree. It was also agreed to evaluate any application by complainant with the applications of these candidates on the basis of her experience in the area of the proposed study and in the light of her performance during an interview. The university authorities felt that this would represent a fair way to address the recommendation by the Parliamentary Ombudsman.

Case No K 042

ENEMALTA CORPORATION

In the aftermath of utility bills left unpaid by a prison inmate

The complaint

Claire Vargas, owner of a garage in Paola, referred to the Ombudsman a grievance concerning water and electricity bills that remained unpaid by the tenant to whom she rented these premises since in her view the Water Services Corporation (WSC) unjustly made her bear the brunt of her tenant's failure to settle his dues to the Corporation.

Facts of the case

The Ombudsman found in the course of his investigation that the premises in question were leased by complainant to a person who ended up having to serve time at the Corradino Correctional Facility and whose pending bills with the Water Services Corporation and Enemalta Corporation in respect of consumption and service charges amounted to €800.

When faced with this situation Ms Vargas asked that the water and electricity accounts of the garage be transferred to her name, at first the WSC mailed to her a form for a change in the name of the consumer. This form requires the tenant's signature and also makes it clear that any pending arrears on all water and electricity bills are to be settled at the same time that the form is presented to the Corporation. However, when complainant tried to obtain the signature of the tenant even by means of a registered letter sent to him at the Corradino Correctional Facility, she had no reply.

Complainant told the Ombudsman that upon explaining the predicament in which she found herself, she was advised by the WSC that in the circumstances she could submit an application for the installation of a new

water and electricity service in her garage together with a payment of €650 that is the fee for the installation of a new service.

Ms Vargas, however, regarded this proposal as unjust and insisted that she was not responsible for bills that the tenant failed to settle and which had been issued under his name as the person making use of her garage. She pointed out that when the water and electricity supply to the premises was suspended, she was not informed of this decision and recalled that when the account in the garage was changed to his name, the tenant had paid a deposit of around €116.

The investigation by the Ombudsman

When the Ombudsman sought the comments of Enemalta Corporation on whose behalf the WSC was also acting, he was told that since the invoice was issued in the name of a tenant who was still resident in Malta even though serving time at the Corradino Correctional Facility, an application needed to be submitted for a change in the name of the consumer. This form had to be accompanied by settlement of outstanding invoices on this account and payment of a reconnection fee amounting to €140 in respect of each service (a total of €280) since both services had been suspended.

This meant in effect that on its part Enemalta Corporation continued to insist on the transfer of the account (including settlement of all pending invoices) with the approval of the tenant. It also meant that in the event that Ms Vargas was unable to obtain the written consent of the tenant to this transfer, she had no other option but to resort to a court of law or to the Rent Regulation Board to regularize the situation.

Considerations by the Ombudsman

The Ombudsman observed that the function of his Office is to investigate whether the facts that complainant mentioned in her grievance constituted an act of maladministration. He commented that in his investigation the Ombudsman should first and foremost be guided by the principle that the public administration is at all times obliged to apply properly and in a correct

manner applicable laws and regulations that are in place in furtherance of these laws. In the event that the Ombudsman finds that the public administration has acted with a sense of justice, reasonableness and equity, he cannot conclude that it is guilty of maladministration.

The Ombudsman passed on to consider the extent to which the ramifications of this situation affected Enemalta Corporation although these principles applied equally well to the WSC. In this regard it was felt that what had to be established first was the manner in which a public utility such as Enemalta Corporation should apply regulations that determine when it has the right to suspend the water and electricity supply to consumers in the case of unpaid bills. It was also important to establish procedures that should be followed to reactivate the provision of water and electricity services in premises where these services have been suspended.

The Ombudsman stated that from this investigation as well as from similar investigations that he carried out in recent years, he formed the impression that in its interpretation of these regulations the Enemalta management still seemed at a loss even though in other earlier cases where consultations were held with his Office, the decisions that were reached were fair and equitable and in truth reflected the substance of these regulations.

In similar complaints brought to his attention the Ombudsman had always insisted that the point of departure should be the juridical relationship that arises whenever a person submits an application for the supply of water and electricity and both corporations agree to provide their respective service against the payment of established tariffs. At this stage meters are installed to keep a record of the relative consumption and are registered in the name of the applicant – in this case in non-residential premises – regardless of the title to the premises in question of the person on whose name the meters are registered. It is clearly of no consequence to both corporations if an applicant who is duly recognized as the consumer is the owner or the tenant of the premises or whether the premises are on a temporary long lease or leased in perpetuity or even held on any other title whether onerous or gratuitous.

Enemalta's *Electricity Supply Regulations* refer to a consumer as a person to whom the Corporation agrees to supply electricity or a person on whose account the Corporation provides an electricity service. It is only with this

person and with nobody else that the Corporation enters into a contractual relationship and any other person, in the eyes of Enemalta, is only to be regarded as a third party who is not in any way involved in the contract for the provision of this service by the Corporation. Obviously this does not exclude a consumer from having, as indeed often happens and as in fact happened in this case, a contractual relationship and obligations with third parties such as, for instance, the owner of premises that a consumer occupies by way of some kind of title.

Regulation 67 of the *Electricity Supply Regulations* establishes the relationship between Enemalta Corporation and consumers. It lays down that if an invoice sent to a consumer is not settled within a determined time, Enemalta can suspend the provision of electricity to the defaulter. This suspension can take place upon the expiry of the period allowed by law as from the date when a bill is issued.

It is also on the strength of this regulation that Enemalta is not bound to issue a notice regarding suspension of the electricity supply or regarding bills that need to be settled to a person who is not a registered consumer. It is also clear from this regulation that service can be suspended only to a defaulting consumer since the electricity supply is only provided to a registered consumer and to nobody else.

Regulation 71 of the *Electricity Supply Regulations* in turn lays down that a consumer whose electricity supply is suspended should pay in advance a reconnection fee that covers all expenses incurred by the Corporation to provide the service anew. Even here this regulation speaks clearly. It is only a registered consumer who has the right to ask for resumption of a service that has been suspended to premises that are registered under this consumer's name as long as the consumer settles the reconnection fee. Any other person who is not a registered consumer has no right to make a similar application even though the invoice may be issued in his name.

These considerations led the Ombudsman to point out that in similar circumstances different scenarios might arise and that a distinction needs to be made between these situations. In a first scenario the electricity supply is suspended as a result of failure by a consumer to settle amounts that are due and agreement is reached to transfer the invoice to the name of the owner

of the premises whereas under a second instance there is an agreement to transfer an invoice to the owner of the premises.

According to the Ombudsman in both these instances the Corporation is within its right to maintain that this would amount to the transfer of an invoice. Enemalta is therefore correct to insist that arrears due for past invoices are to be settled by the new consumer who would be stepping into the shoes of the old consumer and that this new consumer should also pay the fee to reconnect the service, should this be the case. The Corporation is right to insist that in similar cases any such transfer ought to be done with the consent of the previous consumer who was obliged to settle these invoices as the person who was entitled to receive this service. These arrangements would reflect the contractual and juridical relationship created at the time that the service was installed in the premises as well as the new juridical relationship created as a result of the agreement between the owner and the registered consumer.

The Ombudsman referred to a third scenario when a property owner asks to be recognized as the consumer to the exclusion of the occupier of the premises who might have failed to settle an invoice or for any other reason. In this instance the Corporation does not allow the transfer of an account to the name of a person who is not the registered consumer. A person who claims that he is entitled to make use of the water and electricity supply in premises in the absence of the express wish of the consumer registered with the Corporation, can only do so upon the submission of a new application for a service in the premises on which this person would hold a title.

The situation in the case under scrutiny was, however, completely different. It is obvious that an applicant for a new service should not be held responsible to pay for consumption registered by another person under a contract with the Corporation to which the applicant was not even a party.

The Ombudsman observed that on several occasions he maintained – and on this score there was full agreement with Enemalta's legal advisers – that it is the responsibility of the Corporation to take all necessary measures to ensure that amounts due are settled directly by persons who would have entered into a supply contract with the Corporation. Supply regulations in fact do not allow the Corporation to attempt to recover monies that are due

by resorting to persons with whom it has no juridical relationship and who have not themselves made use of the Corporation's service.

On the other hand a person who submits an application for a new service – and the request by Ms Vargas surely fell in this category – must inevitably pay the tariff established by the Corporation for the provision of a new service. In this regard the Ombudsman stated that the amount demanded by the Corporation is not relevant because it is applicable to all those who apply for the installation of a new water and electricity service. Equally irrelevant is the fact that this amount could be even higher than arrears due for registered consumption.

On the strength of these principles as applied to the facts of this case, the Ombudsman declared that in his view the original stand by the WSC to consider favourably an application by Ms Vargas for a new service by means of a transfer of the account but against the payment of the tariff due for the supply of a new service as established by the *Electricity Supply Regulations* was fair and acceptable. This solution reflected considerations made by the Ombudsman regarding the interpretation of the applicable regulations.

The Ombudsman commented that there were indications that complainant suffered prejudice on the part of Enemalta Corporation as a result of incorrect behaviour by the tenant who was making use of her property and who was the registered consumer on the books of the Corporation. However, if as a result of this behaviour by her tenant Ms Vargas suffered damages including the payment of a fee for the provision of this service, she had no other option, at least theoretically, but to take the tenant to court although clearly any such move was of no interest to the Corporation since it merely concerns a relationship between the owner of the premises and her tenant.

At this stage the Ombudsman noted that in this case Enemalta Corporation introduced an important new element that never featured before in previous similar cases. In this case the tenant's permission for a transfer of the account was pending and circumstances were such that although still in Malta, the tenant held back from signing the form for the transfer of the account and even though Ms Vargas claimed to have found the keys of the garage in her letterbox, the question arose as to whether this was enough to prove that the tenant was unwilling to continue to make use of the garage upon his release

from the Corradino Correctional Facility.

This also led to the question whether the Corporation should accept that the account be changed onto complainant's name without the express written consent of the tenant. The question could also arise as to whether in this case this transfer could possibly lead to abuse in the sense that the owner of the property could bring pressure to bear upon the tenant to vacate the garage because once the account would be under the name of Ms Vargas, this would enable her to suspend the water and electricity supply to the property at will and at her bidding.

According to the Ombudsman an answer to all these issues should be found in the light of his considerations above on the interpretation of the applicable regulations. In his view Enemalta ought not to get involved in efforts to establish the relationship between the occupier of the premises who was duly registered as the consumer on its books and the owner of the garage since this relationship is of no concern to the Corporation. The Ombudsman stated that the refusal by the registered consumer to honour his contractual obligation entitled Enemalta to rescind the contract and to suspend its service provision to him as in fact the Corporation had done.

In these circumstances the Corporation should also take appropriate steps to safeguard its interests as a public corporation that is responsible for the administration and management of public assets in full respect of the right of citizens to good administration. The Corporation should also, according to the Ombudsman, make an evaluation of the factors surrounding this case and consider the prospects of ever being able to recover the amount due from the consumer. In the event that this review will give a negative outcome, the Corporation should proceed to conclude an agreement with a third party to the exclusion of the registered consumer.

The Ombudsman stated that at this stage there was every indication that the consumer had no intention or was not in a position to settle his outstanding bills and by his attitude he was in practice renouncing his right to the continued lease of the garage. The Ombudsman was of the opinion that the decision by the Corporation to enter into a new contract for the supply of water and electricity services in premises that were abandoned by the registered consumer was not prejudicial to its interests once it was established

that this consumer failed to honour his obligations towards Enemalta. Even here the relationship between the owner of the premises and the tenant was of no concern to the Corporation and needed to be determined by a court of law should this be the case.

The Ombudsman reiterated that these principles were applicable in respect of both the WSC and Enemalta Corporation.

Conclusions and recommendations

Having examined the merits of the case the Ombudsman concluded that a public corporation that provides a service to consumers has no legal basis to support the view that any outstanding payment by a registered account holder can pass on to a third party with whom the corporation has no legal relationship unless the account would have been transferred with the consent of the account holder who is recognised by the service provider as the consumer. It is after all the responsibility of a creditor to run after monies that are due to him.

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The Ombudsman also concluded that it was established beyond any doubt that the registered consumer failed to honour his obligation under his supply contract with the two corporations who were therefore perfectly in order to suspend service provision and to refuse to supply water and electricity under the supply regulations and in this way effectively cancel the contract with this consumer.

The Ombudsman ruled that the circumstances of the case were such that both corporations were justified to accept the request by Ms Vargas for the supply of water and electricity services to the property in question and to demand payment of the tariff due for the supply of a new service instead of asking for a reconnection fee.

The Ombudsman went on to comment that the WSC was mistaken in its original demand that a transfer had to be done and that arrears in respect of water and electricity consumption with the approval of the previous account holder had to be settled in full before this transfer could take place. Furthermore, the deposit that was paid had to be taken into account to determine the amount due but responsibility for the payment of this outstanding amount had to remain, as it has always been up to now, incumbent on the consumer tenant.

The Ombudsman finally recommended that the water and electricity supply should again be provided to complainant who should, however, be asked to pay the tariff that is due for a new application.

Outcome

Subsequent to the issue of the Ombudsman's Final Opinion, Enemalta Corporation reported to the Ombudsman that although Mr Vargas had been approached to submit an application for the provision of a new water and electricity service to the property in question and to pay the applicable fee, she had refused to do so.

In the circumstances the Ombudsman drew complainant's attention to the fact that although she should not be held responsible by the Corporation to settle outstanding bills that were left unpaid by her erstwhile tenant, at the same time she should not expect the Corporation to assume responsibility for the actions of this person and foot the expenses that would be incurred in order to have the water and electricity supply restored to her garage.

At this stage the Ombudsman closed the file since the decision not to pay this fee pertained exclusively to Ms Vargas.

Case No K 219

MINISTRY OF FOREIGN AFFAIRS

To be or not to be appointed to act as Ambassador

The complaint

An officer in the Ministry of Foreign Affairs holding the substantive grade of Counsellor in scale 7 of the salary structure of the Maltese civil service lodged a complaint with the Office of the Ombudsman where he alleged that he was treated unfairly by the Ministry. He claimed that after he had been detailed to act as Chargé d'affaires in the Malta Embassy in a European capital, his request to be appointed Acting Ambassador was turned down.

Complainant argued that once conditions of service for officers posted overseas provide for the appointment of Acting Ambassadors, he should have been given this appointment as well as an acting allowance instead of a deputizing allowance.

Background information

Complainant, a Counsellor posted at the Maltese Embassy in a European capital, was detailed as Chargé d'affaires from 29 August 2008 when the Maltese Ambassador to this country retired. According to complainant, in this position he was required to perform all the day-to-day duties that an Ambassador normally performs until his term of duty ended on 31 January 2010 and another officer was detailed as Chargé d'affaires in his stead.

Soon after he took up the duties of Chargé d'affaires complainant started to enquire with the Ministry about his entitlement to an acting allowance. However, it was only in November 2009 that he was informed by the Ministry that he was not entitled to an acting allowance but to a deputizing allowance. This decision was taken after discussions in which the Office of the Attorney

General as well as the Public Administration HR Office of the Office of the Prime Minister had been roped in.

The award of an acting allowance to a public officer is regulated by paragraph 2.4.5.1 of the Public Service Management Code and applies to acting Heads of Department. In this case the award of an acting allowance to complainant would have amounted to half the initial salary of an Ambassador (salary scale 3) plus half the initial salary of the officer's substantive grade besides increments and allowances provided that in all the officer involved would not exceed the minimum emoluments of an Ambassador. On the other hand a deputizing allowance (regulated by paragraph 2.4.5.8 of the Code) entailed the payment of the difference between complainant's salary at the time of his posting overseas and the minimum of the next higher scale (in this case scale 5) with a provision for increments every twelve months. This meant that with his request for an acting appointment complainant wanted his allowance to be pegged at the amount applicable under scale 3 – that of Ambassador – instead of scale 5.

Complainant contested the Ministry's decision and referred to section 3.11.3 of the *Conditions of service for officers serving overseas* which states as follows:

"3.11.3 There may be special situations where the extended absence of an Ambassador or High Commissioner creates the need for an acting appointment. In such cases the necessary constitutional formalities will be initiated by the Permanent Secretary and once these formalities are completed, an acting allowance will be paid for the period of the acting appointment."

He argued that in terms of this section he was entitled to an acting allowance since circumstances at the Maltese Embassy where he was posted amounted to a special situation which occurs upon "*the extended absence*" of an Ambassador – as indeed had happened in this case.

He also pointed out that in terms of paragraph 9.13.1.1 of the Public Service Management Code the *Conditions of service for officers serving overseas* form an integral part of this Code.

Facts and findings by the Ombudsman

In his investigation the Ombudsman found that procedures for the constitutional formalities laid down in section 3.11.3 of the *Conditions of service for officers serving overseas* had not been initiated since, according to the Ministry, following the retirement of the Ambassador in August 2008 the Government's initial intention was to close down the Maltese Embassy where complainant was serving although this decision was subsequently revisited and it was decided instead to scale down Malta's representation in this country to Chargé d'affaires level. This decision was only conveyed to complainant by an email dated 20 January 2010, a mere ten days before his term of office at this Embassy was due to expire.

In this email the Ministry of Foreign Affairs, while admitting that Article 111 of the Constitution of Malta allows for the appointment of an Acting Ambassador or Acting High Commissioner, went on to inform complainant that this article must however be understood in the sense that a person appointed to this position would really be in a position to fulfil all the functions of an Ambassador or High Commissioner.

The Ministry also drew complainant's attention to the fact that as Chargé d'affaires he was not accredited to the Head of State of the receiving State but represented Malta at government level and in this situation he could not fulfil all the functions of an Ambassador. The Ministry concluded that the appointment of an Acting Ambassador does not exist in any diplomatic rank or in diplomatic parlance.

Article 111 of the Constitution of Malta provides as follows:

"111. (1) Power to appoint persons to hold or act in the offices to which this article applies ..... shall vest in the President, acting in accordance with the advice of the Prime Minister …
(2) The offices to which this article applies are the offices of any Ambassador, High Commissioner or other principal representative of Malta in any other country."

Complainant challenged the Ministry's refusal of his request for an appointment as Acting Ambassador and argued that an acting appointment

cannot refer to a fully-fledged Ambassador but to a Chargé d'affaires. He contended that if there is no such grade or rank as that of Acting Ambassador, the acting appointment would apply to a Chargé d'affaires and further argued that a Chargé d'affaires serving over a long period of time would in fact amount to a Head of Mission. Complainant went on to contest the Ministry's statement that he could not fulfil all the functions of an Ambassador since he was doing just that throughout his assignment and argued that the fact that he was not accredited to the country's Head of State was an irrelevant consideration.

Upon being brought into the picture by the Office of the Ombudsman by virtue of its earlier involvement in the issue and in the original decision to grant a deputizing allowance to complainant instead of an acting allowance, the Public Administration HR Office explained that in conjunction with the Ministry of Foreign Affairs it had sought the advice of the Attorney General. The advice that was given was that an acting appointment could be issued only if the incumbent were to be given the full role and power of Ambassador.

The Public Administration HR Office also referred to section 3.11.3 of the *Conditions of service for officers serving overseas* which states that the necessary constitutional formalities for an acting appointment have to be initiated by the Permanent Secretary and explained that on the strength of this provision it was only possible to pay an acting allowance once these formalities had been completed. The Public Administration HR Office referred to the explanation by the Ministry of Foreign Affairs that a Chargé d'affaires does not fulfil all the functions of an Ambassador or High Commissioner and also referred to the Ministry's statement that there was never any intention in 2008 to substitute the outgoing Maltese Ambassador in the country where complainant was serving and that in fact a decision had already been taken at this stage to manage the Maltese Embassy in this country at Chargé d'affaires level.

The Public Administration HR Office went on to explain that since it recognized the higher duties and responsibilities that were being carried out by complainant in his role as Maltese Chargé d'affaires in the Embassy, it was agreed to award a deputizing allowance to complainant as per sub-section 2.4.5 of the Public Service Management Code. The Public Administration HR Office also pointed out that besides complainant there were three other

officers who were operating under similar circumstances and who were likewise being paid a deputizing allowance since they could not be appointed Acting Ambassadors and could not therefore be granted remuneration based on an acting position in this grade.

In the course of further discussions between the Ministry of Foreign Affairs and the Office of the Ombudsman it was clarified that a Chargé d'affaires performs a role instead of filling a position or post. The Ministry went on to justify its stand by referring to the government's annual *Estimates* which features the post of Ambassador but does not include the position of Chargé d'affaires. It was also clarified that in effect a Chargé d'affaires only performs the day-to-day duties of an Ambassador in the absence of an Ambassador.

The Ministry of Foreign Affairs confirmed that although originally it had been decided to close down the Maltese Embassy upon the retirement of the former Maltese Ambassador to this country, it was subsequently decided to keep it at Chargé d'affaires level. However, although a Posting Order had been issued, this failed to specify that the status of the Embassy was to be kept at a lower level and as a result complainant was only made aware of this decision on 20 January 2010.

The Ombudsman observed that there are several formalities that need to be observed before a person can qualify as an Ambassador including the issue of a formal appointment and the presentation of credentials to a receiving country's Head of State. In this case none of these formalities had been followed – and this was a sure indication that the Maltese Government did not intend to have a representative at ambassadorial level in this country.

The Ministry of Foreign Affairs was adamant that the assumption of duties as Chargé d'affaires does not give rise to a claim by the person holding this position for an allowance for an Acting Ambassador position unless the Permanent Secretary of the Ministry formally informs this person that he is being appointed Acting Ambassador.

Upon being asked by the Ombudsman to elaborate further on the difference in the role and functions of a Chargé d'affaires and of an Ambassador, the Ministry of Foreign Affairs referred to the Vienna Convention on Diplomatic Relations of 1961 and in particular to articles 19(1) and 19(2) which state as

follows:

"If the post of head of mission is vacant, or if the head of mission is unable to perform his functions, a Chargé d'affaires ad interim shall act provisionally as head of mission. The name of the Chargé d'affaires ad interim shall be notified, either by the head of mission or, in case he is unable to do so, by the Ministry of Foreign Affairs of the sending State to the Ministry of Foreign Affairs of the receiving State or such other Ministry as may be agreed." – Article 19(1).

"In cases where no member of the diplomatic staff of the mission is present in the receiving State, a member of the administrative and technical staff may, with the consent of the receiving State, be designated by the sending State to be in charge of the current administrative affairs of the mission." – Article 19(2).

In addition the Ministry of Foreign Affairs explained that whenever an Embassy or Mission is left under the responsibility of a Chargé d'affaires *ad interim*, this person is unable to carry out all the duties of an Ambassador. By way of example the Ministry pointed out that while an Ambassador who is appointed by the Head of State of the sending State can ask and call upon the Prime Minister and Ministers of the receiving State, a Chargé d'affaires is not given this opportunity by the receiving State. This approach is common in international relations, the purpose being mainly that of enabling a receiving State in this way to exert pressure on the sending State to appoint and be represented by an Ambassador.

The Ministry of Foreign Affairs went on to explain that a Chargé d'affaires is usually accredited to the Foreign Ministry of the receiving country in which the Chargé d'affaires operates and not to the Head of State and acts in the absence of a Head of Mission.

The Ministry of Foreign Affairs concluded that on the strength of these various considerations it could safely be argued that although a Chargé d'affaires carries out some of the duties within an Embassy, a Chargé d'affaires cannot exercise the rights of representation at the highest office which an Ambassador or Head of Mission is entitled to do by virtue of his appointment by the country's Head of State.

The Ombudsman also noted that the section captioned *Appointment of Chargé d'affaires or Acting High Commissioner* in the *Administrative Instructions of the Ministry of Foreign Affairs* states as follows:

"If the Head of Post is to be absent from the country of duty, he should appoint a Chargé d'affaires" – Article 26;

"On the departure of the Head of Post from the country of duty, he should inform the Ministry of Foreign Affairs of that country of the date of his departure, at the same time giving the name of the person who will replace him as Chargé d'affaires an interim. If the Head of Mission is a High Commissioner, the person left in charge of the Mission upon his departure bears the title of Acting High Commissioner instead of Chargé d'affaires" – Article 27.

Considerations and comments

The Ombudsman commented that the issue in this case was whether complainant was entitled to an appointment of Acting Ambassador and, consequently, to an acting allowance based on salary scale 3 instead of a deputizing allowance at salary scale 5 which he had been awarded. Complainant based his claim on section 3.11.3 of the *Conditions of service for officers serving overseas* which provides for the possibility of an acting appointment in the event of an "*extended absence of an Ambassador or High Commissioner*" and maintained that Article 111 of the Constitution of Malta makes it possible to appoint an Acting Ambassador. This led complainant to state that since he carried out all the duties of an Ambassador over a long period and once the post of Acting Ambassador does not exist as a rank, the reference to an Acting Ambassador can only be to a Chargé d'affaires.

Complainant also held the view that the fact that he had not been accredited to the Head of State during his stay in this country was irrelevant to the issue at stake.

On its part the Ministry of Foreign Affairs explained that in the light of the decision by the Government to put down the level of representation of the Maltese Embassy in the country in question to the level of Chargé d'affaires

instead of closing down this Embassy, the Ministry had not initiated the necessary constitutional formalities for an acting appointment that would have involved the accreditation of the person nominated for this position to the country's Head of State.

The Ministry had also insisted that a Chargé d'affaires has the role of performing the day-to-day duties of an Ambassador in the latter's absence but does not have the full functions of an Ambassador who is accredited to the host country's Head of State. A Chargé d'affaires is usually accredited to the Foreign Ministry of the receiving country and is unable to exercise the rights that a representative at the highest office – that of Ambassador appointed by the Head of State – is entitled to.

The Ombudsman confirmed during his investigation that paragraph 2.4.5.2 of the Public Service Management Code provides that for an acting allowance to be approved, a person must be duly appointed to act as a Head of Department and must have been so for an uninterrupted period that exceeds six months. While it was accepted that complainant had exceeded this period, the Ministry, however, argued that he had never been appointed Acting Head (or Acting Ambassador in this case) as this required an appointment by the President of the Republic – and this was something which had not been done. Complainant had merely been detailed to serve as a Chargé d'affaires with duties that did not include all the functions and powers of an Ambassador.

Taking these considerations into account the Ombudsman stated in his Final Opinion than he did not consider as sufficiently valid the argument submitted by complainant that in the absence of the rank of Acting Ambassador, the acting appointment mentioned by the Constitution of Malta and in the *Conditions of service for officers serving overseas* must necessarily refer to a Chargé d'affaires. Apart from (and consequential to) the fact complainant had not been appointed by the Head of State as Chargé d'affaires, complainant could not assume all the functions and powers of an Ambassador.

The Ombudsman also commented that the Ministry of Foreign Affairs, even if belatedly, had informed complainant that following the retirement of the former Ambassador it was not the intention of the Government to appoint another resident Ambassador to the country where he was posted but instead to keep the Maltese Embassy in this country at Chargé d'affaires level. The

Ombudsman noted in this connection that even complainant's successor had been assigned the role of Chargé d'affaires.

The Ombudsman noted finally that irrespective of these considerations it is not the function of his Office to pass any judgement or to comment on the level of diplomatic representation that the Maltese Government may establish in any particular country since any such decision pertains exclusively to the Ministry of Foreign Affairs. The Ombudsman has only to determine in these circumstances whether this ministry had acted fairly in the way that it treated this case.

Conclusions

Having reviewed the merits of the grievance the Ombudsman concluded that there were no sufficient grounds to sustain the complaint of unfair treatment. He stated that following the retirement of the Maltese Ambassador in 2008 the Government had decided to reduce the level of Maltese representation in this particular country and to have the Embassy led by a Chargé d'affaires and this level of representation was maintained even after the term of office of complainant expired and he was recalled to the Ministry in Valletta. Regardless of these developments, it is obviously not the function of the Office of the Ombudsman to comment on the level of Malta's representation in foreign countries since this decision pertains exclusively to the Government.

it is obviously not the function of the Office of the Ombudsman to comment on the level of Malta's representation in foreign countries since this decision pertains exclusively to the Government

The Ombudsman went on to comment that even if the *Conditions of service for officers serving overseas* as well as the Constitution of Malta both provide for the possibility of the appointment of an Acting Ambassador, once the decision was taken to reduce the level of representation of Malta in this country and upon being detailed to serve as Chargé d'affaires, this meant that even if complainant was performing the day-to-day duties of an Ambassador, he was not, however, in a position to carry out all the functions

pertaining to this post. Since complainant was not appointed by the President of the Republic, as a result he was not accredited to the Head of State of the country where he was posted. The appointment of an Ambassador in an acting capacity can only be formalised through proper accreditation with the Head of State of the receiving country and since this was not the case, this effectively served to limit complainant's range of intervention in the receiving State on behalf of Malta.

The Ombudsman concluded that complainant's higher duties during the period that he had served as Malta's Chargé d'affaires were, in the circumstances, appropriately rewarded through the approval and payment of a deputizing allowance.

University Ombudsman

Case No UK 015

UNIVERSITY OF MALTA

On students who perform generally well in their study programmes but fail in the final hurdle

The complaint

An ex-student of the Medical School complained with the University Ombudsman against failure by the University of Malta to award him appropriate certification to reflect his academic achievement as well as the duration and level of his studies in the course in Medicine and Surgery (M.D.). He asked the University Ombudsman to recommend that other than an academic transcript, the University should issue a document that would certify the extent of his academic endeavours.

Facts of the case

Complainant joined the five-year course in Medicine and Surgery at the University of Malta in October 2004. After having successfully completed the two-year Intermediate Course, he proceeded to the three-year Final Course but failed in the second year of this Course and duly repeated this year. In this repeat year, however, complainant unfortunately failed his paper in Surgery (including Orthopaedics) and failed again in his supplementary examination in this subject. Following a revision of this paper where his fail result was confirmed, in October 2009 the University Senate agreed that complainant had exhausted all possible attempts to pass the failed subject and should withdraw from the course.

Complainant's first approach to the University Ombudsman to ask the University to allow him another opportunity to proceed with his studies was turned down since it was not considered justified.

Reluctantly accepting these decisions by the University Senate and by the University Ombudsman, this ex-student of the Medical School then asked the University to issue a certificate that would testify the four years of study that he had almost completed successfully. The University, however, turned down this request since it could not apply regulation 74 of the General Regulations for University Undergraduate Awards, 2004[1] once the M.D. course was not structured on the study unit/credit system and bye-laws of this course did not provide for the granting of an interim award.

The University Ombudsman also found that when complainant sought the advice of the Malta Qualifications Council on whether he was entitled to a qualification or certification from the University, the Council replied that the issue fell outside its remit and that it was a matter for the university authorities to decide in the first instance.

Regulation 5 of the M.D. Degree Course Regulations, 1998 applicable to courses starting in October 1997 or later stated as follows:

"5. (1) The Course shall extend over a period of five years and shall be divided into two parts: the Intermediate Course of two years' duration and the Final Course of three years' duration.

(2) Except with the permission of the Board, students must follow the Course from admission to the Intermediate Course up to the Final Examination without interruption or repetition. Permission to interrupt or to repeat a year shall normally not be given more than once, except by permission of Senate granted for special reasons."

Regulation 6 of these Degree Course Regulations lists subjects that are to be followed in each of the two years of the Intermediate Course while

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[1] Regulation 74 of the General Regulations for University Undergraduate Awards, 2004 states as follows:

"When a student withdraws from a degree course either by choice or because ineligible to proceed further in terms of these regulations, and unless the bye-laws for the course provide for the granting of an interim award the student shall:

(a) if at least 60 credits have been obtained, be granted the Certificate of Higher Education (Cert. H.E.);

(b) if at least 120 credits have been obtained, be granted the Diploma of Higher Education (Dip. H.E.),

in both instances without reference to any Area of Study in the title of the award."

Regulation 7 shows the subjects in the three years of the Final Course. The University Ombudsman noted that in this case after his Intermediate Course, complainant completed successfully all the subjects in the first and second year of the Final Course with the exception of Surgery (including Orthopaedics) in the second year.

Observations by the University Ombudsman

During his contacts with the University Ombudsman complainant acknowledged that he failed the M.D. course but argued that he satisfied the full requirements in respect of nine subjects in the Intermediate Course and eighteen out of nineteen subjects in the first two years of the Final Course. This led him to claim that his accumulated tertiary education study units amounted to more than the 180 credits required for an undergraduate degree under the Bologna Agreement – and the University Ombudsman confirmed that this claim was correct. Equally valid was complainant's claim that his studies exceeded by far the 60 and 120 credits required for the University's Certificate of Higher Education and Diploma of Higher Education respectively.

The University Ombudsman recalled that in a similar case in the nursing area that was brought to his attention, the University of Malta awarded the Certificate of Higher Education to a student who completed successfully the first of a two-year diploma course. In his opinion, however, even a cursory analysis demonstrated straightaway that complainant's studies were more intensive and at a more advanced level than those of this nursing student.

On the other hand the University Ombudsman noted that the University's jurisdiction in this matter is restricted by limitations in M.D. course regulations which do not allow students in complainant's predicament to be awarded appropriate certification that would reflect the duration and the level of their studies as in the case in other courses where bye-laws provide for the granting of an interim award. The University Ombudsman, while not excluding that there may be valid reasons for this difference such as, for instance, the possibility that the award of a Bachelor of Medicine could create misunderstandings and controversy, observed that this situation went against the international trend to certify academic achievement at all levels.

He also referred to another aspect to this case that deserved to be given due consideration. Since complainant successfully completed the Intermediate Course, on the basis of equity he was entitled to certification that would reflect his accomplishment. M.D. course regulations distinguish clearly between the Intermediate Course and the Final Course to the extent of listing their syllabi separately. On the other hand, however, even though M.D. course bye-laws do not provide for the granting of an interim award, they do not debar the University of Malta from issuing a certificate to reflect the successful completion of the Intermediate Course. Such action in the opinion of the University Ombudsman would result in a more just solution.

The University Ombudsman stated that one could also argue that the nature, extent and depth of studies reached by students and the level of their educational attainment are reflected in academic transcripts that students can present to their prospective employers. However, students who for some reason or other do not complete their course successfully are known to be reluctant to submit transcripts that record both "*failed*" and "*passed*" study-units. Moreover, the reality of the situation is such that employers are more familiar with and give greater credence to certificates than they do to transcripts.

One could also argue against a comparison of university courses since what applies to one course does not necessarily pertain to another. Although this is a valid point it is still possible that some university students are unintentionally short-changed in contrast to fellow students in other courses although it is recognized that the university authorities mitigated this shortcoming by the introduction of a Certificate and a Diploma of Higher Education.

In the view of the University Ombudsman, however, this measure does not go far enough in the case of the M.D. course and other undergraduate courses and he felt that the University should introduce changes on the lines that he proposed while also taking precautions to ensure that any such certification would not lead to undeserved professional status or to the granting of any related warrant.

The University Ombudsman made it clear that he was aware that the M.D. course by the University of Malta enjoys wide international prestige and he did not wish to put forward proposals that might in any way lessen its repute

and standing. He expressed his confidence as well as his conviction, however, that the issue of certification for successful completion of the Intermediate Course with the appropriate nomenclature for students who complete that part of the M.D. course but not the entire M.D. course, would not jeopardize its standing.

Conclusions and recommendations by the University Ombudsman

Taking into account his findings and observations based on the fact that regulations of the M.D. course make distinct reference to an Intermediate Course as well as a Final Course with their respective duration and course programmes and that complainant satisfied the requirements of the Intermediate Course while also mindful that M.D. course regulations do not prohibit the issue of an interim certification, the University Ombudsman recommended that the University should provide complainant with an appropriate certificate that would attest and reflect his achievement.

The University Ombudsman stated that on these grounds he found complainant's grievance justified and expressed his opinion that once M.D. course bye-laws neither provide for, nor prohibit, an interim qualification, he would recommend that the University of Malta should consider options that would, through appropriate regulations or bye-laws, make the situation less discriminatory in respect of medical students while safeguarding the integrity of the University's M.D. degree.

The University Ombudsman pointed out that this recommendation could possibly be extended to other courses lasting four or five years where, under current regulations or bye-laws, students who perform well through the greater part of their study programme but fail in the final hurdle have little to show in terms of certification for their efforts and endeavours.

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Outcome

Subsequent to the presentation of his Final Opinion the University Ombudsman was given to understand that faculties at the University of Malta that offer professional degree courses were asked to submit their recommendations regarding alternative certification that would give adequate value to ECTS credits awarded to students who fail in the latter part of their study programmes. To date, however, no changes have been made.

Case No UK 018

UNIVERSITY OF MALTA

The student from South Africa who claimed he got a raw deal

The complaint

A former student of the University of Malta hailing from South Africa lodged a complaint with the University Ombudsman where he claimed that after having been encouraged by the contents of a course prospectus issued in June 2009 to join an academic programme that was offered by the Edward de Bono Institute for the Design and Development of Thinking at the University of Malta for mid-career professionals, he was deeply disappointed upon commencing this programme to find that the promised tuition was not being delivered.

Complainant accused the University of Malta of misrepresentative marketing since although the prospectus referred to a flexible and well-functioning distance learning programme, in his view programme content was not delivered in an integrated manner but as a set of disparate modules that were presented in isolation and without consideration for other modules.

Complainant pointed out that one of the professors whose name appeared in the course prospectus had in the meantime passed away while Professor Edward de Bono failed to deliver the lectures as advertised in the course programme. He was also dismayed by the fact that some of the partner institutions that planned to participate in the course had pulled out of the consortium and that although the Course Director had promised to rectify the situation, there had been no improvement.

In his grievance complainant also referred to the late delivery by one of the participating institutions of one of its study modules; problems with the virtual learning environment; and lack of communication about course

material and books.

Complainant claimed that these developments as well as the lack of integration of course contents and the poor overall administration of the programme led him to withdraw from the course and to demand a full refund of the tuition fees and the expenses that he incurred during the study week that he had spent in Malta. In addition he was highly critical of the university management whom he accused of unacceptable delays in dealing with his grievance while he was adamant in expecting an apology from the Director of the Institute.

Findings by the University Ombudsman

The University Ombudsman found that early in 2009 the University of Malta advertised the launching of a new course leading to a Master of Science (M.Sc.) in Strategic Innovation and Future Creation by the Edward de Bono Institute for the Design and Development of Thinking at the University of Malta in connection with the University of Potsdam, the University of Teesside and the Turku School of Economics. The course, supported and partly funded by the European Commission's Erasmus Curriculum Development Project, was advertised as being based on a "*blended*" approach and consisting of an e-learning mode together with face-to-face tuition and seminars. Students were also expected to participate in a six-day intensive seminar at each of the four participating institutions during the two-year course.

The University Ombudsman also found that after complainant, a resident in Pretoria in South Africa, applied to join the course on 15 September 2009 and was accepted on 18 September 2009 as an extra late applicant, he had also agreed to pay the tuition fee of €4,000. Complainant commenced the course with face-to face lectures in Malta on 5 October 2009 but feeling dissatisfied with the way that the course was being run and with the quality of the course in general, he resigned on 24 November 2009 when he was already in the eighth week of the first semester.

In his investigation on this complaint the University Ombudsman found that in the initial stages of the course one of the lecturers who was scheduled to participate had unexpectedly passed away and his colleagues from the

University of Potsdam took over his lecturing duties. During the same period Professor de Bono had to postpone his participation due to circumstances beyond his control.

When complainant showed his initial misgivings about these developments, the university authorities explained to him that since there were still more than two semesters to go up to the end of the course, there was ample time for participants to have the opportunity to benefit from Professor de Bono's lectures.

The University Ombudsman also considered complainant's claim that although this programme was marketed as culminating with a joint degree, it was in fact merely a degree awarded by the University of Malta. With regard to joint certification to participants, the University of Malta admitted that while the course was jointly run and developed by the four institutions mentioned earlier, however, "*due to problems that cropped up with the award of a joint degree by all partners, the four institutions decided that they would collaborate in the teaching and assessment of students registered on the course but the degree would be awarded jointly by the University of Malta and the University of Potsdam*."

The University Ombudsman reviewed the material that advertised the course and saw that it had been promoted as an "*International Joint Master of Science*" and as a "*unique new interdisciplinary postgraduate programme delivered by four European universities*." Despite complainant's claim, however, the publicity material about the course made no reference at all to a joint degree issued by the four participating universities.

The University Ombudsman found from records that were made available to him by the university authorities that complainant met the Course Coordinator in the first week of October 2009 where he raised his concerns about what, even at that early stage of the course, he already considered as serious shortcomings. Although after this meeting he decided to continue to participate in the course, nevertheless on 24 November 2009 complainant resigned from the course since he remained dissatisfied with its contents and with the way in which it was being organized.

The university management informed the University Ombudsman that although it is the policy of the institution not to refund tuition fees to students who resign later than two weeks from the commencement of a course in which they would be registered, in this case as a sign of goodwill but without any prejudice, it had been decided to refund complainant the sum of €3,883 out of the tuition fee of €4,000 that he paid before he joined the course. The University, however, declined to refund his travel costs to Malta and the expenses that he incurred on accommodation as well as living expenses throughout his stay in Malta. The University also staunchly refused to apologise for the alleged claim of mismanagement.

Observations by the University Ombudsman

The University Ombudsman noted that it is not uncommon in the launching of a brand new academic course, not only at the University of Malta but also possibly elsewhere, to experience teething problems. Indeed, even this course with its innovative concept based on a "*blended*" mode was not free from this risk.

The University Ombudsman also remarked that the decision by the four participating institutions from four different countries, each with its own distinctive national tertiary level education legislation, to collaborate in a new experimental academic programme not surprisingly brought in its wake several difficulties related to the award of a degree to successful students and to its recognition. In the circumstances it was not at all surprising that the four institutions found it difficult to reach an agreement to issue a joint degree.

In view of this the University Ombudsman admitted that he felt that it was quite an achievement for the University of Malta and the University of Potsdam to provide a joint degree based on collaboration between the two institutions and that also included tuition and assessment from two other institutions. Nonetheless, even if the course was never specifically advertised as a four-way joint degree, the University Ombudsman felt strongly that the issue of whether upon conclusion of the course the degree would be awarded jointly to successful students by two, three or four institutions ought to have

been made clear to participants even before they enrolled for the course.

The University Ombudsman considered other concerns raised by complainant regarding academic inputs that were promised by the course organizers but that failed to materialise. Whereas the University of Malta obviously could not be blamed for the unexpected demise in Potsdam of one of the course organizers, the University Ombudsman appreciated, however, that in the circumstances the university authorities had done the next best thing and replaced this academic by other equally eminent lecturing staff in his subject area.

At the same time the university authorities, while admitting that the academic involvement of Professor de Bono in the course had been postponed due to *force majeure*, undertook to ensure that barring other unforeseen obstacles Professor de Bono would deliver his academic inputs to course participants at a later stage and pointed out that there was more than ample time to make up for this unexpected omission.

The University Ombudsman also considered the refusal by the university management to refund the full amount of complainant's tuition fees and to make up for his international travel costs as well as his accommodation and living expenses during his brief stay in Malta. It was argued that not only had complainant submitted a very late application to join the course that meant that the University had to incur extra administrative work to process his application, but he had in fact also participated in, and benefited from, half a semester of tuition. Furthermore, he had decided to resign from the course of his own free will and, according to the university authorities, without any just cause or reason.

In the circumstances the university management felt that although fees are not normally refunded to students who resign from an academic course more than two weeks after the start of the course, in this case the Finance Department acted in a fair manner when as a sign of goodwill and without in any way accepting or admitting any responsibility for any wrongdoing or for any academic mismanagement, it refunded complainant a very substantial share of the course fees that he had paid to register for this course with the exception

of the administrative costs related to his extra late registration. Indeed, this line of action by the Finance Department tallied with complainant's own initial wish when in an email to the Course Coordinator he wrote that he expected "*to get most of the fees I have paid to date returned to me minus reasonable expenses*."

The University Ombudsman pointed out that it had taken the university authorities around two months to resolve this issue. He considered this amount of time as not unreasonable especially since it was noted that complainant himself had complicated matters by requesting that his resignation from the course be backdated to a date that was within two weeks from the commencement of the course in order to be eligible for a refund of the full amount of the course fee when this was manifestly not so.

The University Ombudsman also ascertained that the refusal by the University to offer any sort of apology to complainant for the alleged shortcoming in the academic organization of the course or for alleged maladministration arose from the fact that according to the Pro Rector of the University of Malta for Student and Institutional Affairs, a perusal of complainant's file at the University confirmed beyond any doubt that his emails as well as his complaints to the university authorities had never been ignored despite his claim that his correspondence was consistently disregarded. It was established that all the replies to complainant by staff at the Edward de Bono Institute for the Design and Development in Thinking had always been issued in the space of not more than three days while it was also found that these replies were always clear, to the point and polite despite the often rude and arrogant tone of complainant's communications.

Conclusion

Taking everything into account the University Ombudsman reached the opinion that complainant's grievance was not justified. It was evident that complainant was not satisfied with some aspects of the course and without allowing the university authorities time to address the issues that were within their control and that could be remedied, he decided to resign voluntarily from the course half way through the first semester even though he was

aware that the full academic programme consisted of three semesters.

The University Ombudsman concluded that complainant could not hold the University of Malta responsible for all the shortcomings that he perceived especially since the University in fact did its utmost to remedy the genuine ones and that were within its power to address. According to the University Ombudsman complainant had no grounds to interpret the University's willingness to refund some 97% of the course fee that he had paid as an admission of guilt due to false publicity material and misrepresentation and to demand an apology. The University had gone a long way to meet his claims and he was not justified to ask for more.

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Case No UJ 079

INSTITUTE OF TOURISM STUDIES

A selection process which was not blemished by any form of discrimination but lacked transparency and was not well documented

The complaint

A full-time Lecturer at the Institute of Tourism Studies (ITS) lodged a complaint with the Office of the University Ombudsman claiming that he had been treated unfairly by the ITS management when his application for the post of Subject Coordinator at the Institute was turned down even though he had all the requisites to fill this position. Complainant sought an explanation why he was not selected and why the appointment of the incumbent was extended by three months.

Facts of the case

The University Ombudsman found that in September 2009 the Institute of Tourism Studies issued a call for applications for the post of Subject Coordinator in five subjects. Complainant applied for the post in Food and Beverage Service (FBS) since he had taught the subject at the Institute for twenty years and felt that he was fully qualified to fill this position.

The Collective Agreement of 2 May 2009 between the ITS and the Malta Union of Teachers stipulates that Subject Coordinators require at least five years teaching experience at the Institute and to have served for two years in the grade of Lecturer. The Agreement further states that the post of Subject Coordinator is not a promotional one but entitles the holder to a reduced teaching load and an annual performance bonus of €1165. As a result, to a large extent academic staff at the Institute regard the post of Subject Coordinator as an official recognition of their expertise and their

work commitment to the Institute.

Early in October 2009 complainant was asked to attend an interview before a selection board consisting of the Deputy Director of the ITS as Chairman and two members of the Institute's Board of Governors. According to complainant, the Chairman of the selection committee told him that the interview was a preliminary one and that a second interview was planned to be held at a later stage – and in this connection the University Ombudsman recalled that a similar claim was put forward by another complainant in an analogous case.

When the appointment of Subject Coordinators was announced in mid-December 2009 complainant was taken aback when he found that he did not feature on this list and that the appointment of the incumbent of the post of Subject Coordinator in Food and Beverage Service was extended until January 2010. Complainant also found that the Board of Governors of the Institute decided to issue a fresh call for applications for this post when this extension would expire.

Observations by the University Ombudsman

When the University Ombudsman approached the Chairman of the ITS for the official reaction of the Institute to issues that complainant raised in his grievance, the University Ombudsman found little cooperation despite several written and verbal reminders. Notwithstanding his insistence for a detailed reply, the ITS Chairman merely wrote as follows:

"*The Collective Agreement states clearly that it is the management's prerogative to assign the duties of Team Coordinators whenever it feels opportune. This is a post of responsibility and not a promotion.*

The only requirement specified in the Agreement is that there would be a call for applications. Management therefore can regulate its own procedures.

In the past years, management had decided that applicants would be interviewed by a panel composed of two members of the Board of Governors and the Deputy Director. This committee would, after discussing with

management, make recommendations to the Board of Governors.

In this particular case it was decided that, for different reasons, applicants did not satisfy … management's requirements and accordingly proposed that the person occupying this position with extremely good results should retain his post until a fresh call is published."

The University Ombudsman considered this answer unacceptable. He made it clear that it was fully in his power to insist on a full explanation to his efforts to unravel the way in which the selection process had taken place and to verify if the process had been flawed or not. He further argued that if the ITS management held that it was free to regulate its own procedures, it was important for him to know what these procedures were and to be given an assurance that they were followed scrupulously. Despite repeated requests by the University Ombudsman, the Chairman of the ITS continued to hold back this information, making it difficult for the University Ombudsman to probe the way in which the Institute handled this selection process.

Subsequent to the appointment of a new Chairperson for the ITS, arrangements were made for the University Ombudsman to meet the incoming Chairperson and the Head of Administration of the Institute in order to unblock this impasse. During this meeting the Head of Administration admitted that as far as he was aware no records existed with regard to the selection process for the posts of Course Coordinators advertised in September 2009. He subsequently confirmed in writing to the University Ombudsman that the only documentation that could be traced regarding this selection process consisted in the minutes of the meeting of the Institute's Board of Governors held on 29 October 2009 which stated as follows:

"(The ITS Chairman) *... explained that Mr XX was recommended by the subcommittee as Coordinator for FBS. However, a problem has arisen in the meantime as Mr XX is taking ITS to court in connection with a claim for the refund of expenses …..… Considering these circumstances, the Board of Governors decided to withhold the FBS recommendation and a fresh call for applications is to be issued in January 2010. Meanwhile, it was agreed that Mr YY* (the incumbent)*, who together with …* (complainant) *has applied for this post, is to be temporarily appointed as FBS Coordinator till January 2010."*

Guided by the terms of his remit the University Ombudsman had no reason to agree or disagree with this decision by the Board of Governors or to question why the selection committee chose Mr YY instead of complainant.

At the same time, however, guided also by the rules of fair play and transparency the University Ombudsman was of the opinion that complainant was fully entitled to know the reason why his application for the post was turned down while the selection board should have explained to the two candidates who were eligible for the post why it was felt necessary to issue a fresh call for applications in January 2010.

The University Ombudsman also expressed consternation at the fact that nobody from the ITS management could provide a plausible reason why the follow-up interview promised to complainant had not taken place.

Conclusion

The University Ombudsman stated in his Final Opinion that in his view the absence of a detailed report about the selection process for Subject Coordinators and the way in which it had been conducted was a clear case of non-transparency. Furthermore, the failure by the ITS management to submit adequate answers to questions that he had raised on various aspects of this process was equally disturbing. This situation led the University Ombudsman to deplore the manner in which the records of the selection process were handled since it gave the distinct impression that the process was not transparent and properly documented.

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Notwithstanding this reprimand, however, the University Ombudsman declared that he could not detect any evidence of wrongdoing or that the procedures were unfair or that the process was tainted in any way by any form of discrimination against complainant. The selection committee was constituted in a way that was in conformity with previous decisions by the management of the Institute; interviews were held according to

established practice; and the Board of Governors of the Institute endorsed the recommendations of the selection committee. Indeed, complainant himself admitted to the University Ombudsman that he considered the procedures followed during his interview as "*very fair*."

On the strength of these considerations the University Ombudsman observed that he was unable to support complainant's claim of unfair or discriminatory treatment although at the same time he insisted that complainant was entitled to an explanation why he had not been selected for the post and why there were no follow-up interviews. The University Ombudsman felt that on both these scores the laments raised by complainant were fully justified.

The University Ombudsman was also critical in his Final Opinion of the extraordinary and unjustified length of time that it took the ITS to deal with this complaint which was by all accounts straightforward and uncomplicated. Failure to provide clear answers and explanations on issues that arose during his investigation was inexcusable and unjustifiable and caused a lot of unnecessary anxiety to complainant.

The University Ombudsman stated that the need to provide information such as criteria adopted by the selection board as well as clear indicators of the performance of each candidate under each of the various selection criteria goes beyond the requirement to satisfy the natural urge of each applicant to know how his/her performance had been rated by members of the panel. An unambiguous justification of decisions reached by an employee selection board encourages good administrative practice and serves to demonstrate and to reinforce a sense of fairness, transparency and accountability in an experience that is of its very nature complex and that could give rise to controversy and divergent opinions.

The University Ombudsman pointed out that whenever a selection board provides this information, supported by a well documented selection process, the reputation of an organization or an establishment as an impartial and just employer is duly enhanced.

The University Ombudsman remarked that the open and transparent attitude adopted by the Institute's incoming Chairperson augured that future employee selection processes in the Institute would reflect the basic guidelines regarding

transparency and good administrative practice.

Recommendations by the University Ombudsman

Taking everything into account the University Ombudsman proposed that the ITS management should issue complainant a letter of apology to express its regret at the time taken to provide him with the reasons why he was not selected and at the failure to conclude his case within a reasonable time.

He also suggested that future processes for the selection of candidates as well as promotion exercises should follow guidelines handed down to the ITS management by his Office since in this way the Institute will act, and be seen to act, in an equitable, transparent and accountable manner. In addition a full record of the various stages of every selection process should be prepared by the selection board and submitted to the Institute's Board of Governors for its endorsement.

The University Ombudsman concluded his Final Opinion by pointing out that from this case as well as from other cases regarding the ITS he formed the impression that while the Institute had an efficient administrative structure, it was somewhat short on academic leadership. In this regard he stated that the Institute has not had an official Academic Director and a Registrar for some time while it also lost the services of its Deputy Director upon reaching retirement age. The University Ombudsman was of the view that these absences had a negative impact on the Institute's academic structure and on staff relations and he took this opportunity to recommend that the Board of Governors should take measures to fill these posts forthwith.

Outcome

Following the issue of his Final Opinion the University Ombudsman was pleased to note that selection processes conducted by the Institute of Tourism Studies were conducted in a most transparent manner on the lines of his recommendations and did not give rise to any further complaints or difficulties.

The Chairperson of the ITS confirmed to the University Ombudsman that the Institute had sent a letter of apology to complainant on the inordinate time that it had taken to conclude his case and also informed him that calls for applications for the recruitment of the two senior positions mentioned in his report had been issued and both posts were expected to be filled shortly.

From the Ombudsman's Caseload

Case 13 (August 2010)

On the payment of compensation by Enemalta Corporation for damages caused by power surges

The complaint

Complainant is claiming compensation from Enemalta for damages he suffered as a direct result of a power outage last June that seriously damaged the electrical installation in his residence. Enemalta is disclaiming any responsibility for the incident and payment of consequential damages.

The facts

1. This is one of a number of cases received by this Office claiming compensation from Enemalta for damages sustained as a result of power cuts, mostly to household electrical appliances and electronic equipment. In this case, when power was restored following the second power blackout in June, the surge was so overpowering that it melted half of the circuit cable of complainant's residence welding it to the piping system. Repairing the damage involved considerable expense because immediate action entailed breaking up the tile works or bypassing to install a new cable. When complainant requested some form of compensation for this damage, he was informed by Enemalta that the Corporation was unable to accept liability for any damage because "*that power cut on that date was totally beyond our control*". Enemalta maintains that it is disclaiming any liability "*in accordance with Enemalta's Act Section 14*".

2. This Office received a number of complaints against Enemalta claiming reimbursement of damages in similar, even if not analogous, circumstances. These cases include .....

Enemalta's reaction

3. Enemalta's defence in these cases is standard. It is summarised in its

letter of 1 March 2010, sent by Mr Gotthard Tabone, Manager Policy and Industrial Relations, which is being fully reproduced hereunder since it sets out the Corporation's position. It follows my request to Enemalta to determine its policy in the light of the stand the European Union is taking for consumer protection in this area and measures being taken by competent authorities in other countries. The Corporation submitted as follows:

"Reference is made to your letter dated 23rd February 2010, whereby the Ombudsman proposed the following action in order for Enemalta to deal more efficiently with damages caused by power surges:

'The Ombudsman has proposed the setting up of an independent board to examine cases where damages are incurred by power surges. It has also been suggested that the Corporation finds out what stand the European Union is taking and what measures are being adopted by the competent authorities in other countries in dealing with such cases.'

In the light of the above recommendation, Enemalta has carried out the following research.

Within the general framework of consumer complaints, in the EU there is currently a move to adopt a harmonised methodology of collecting complaints. The Commission has in fact launched a public consultation on the matter through **COM (2009) 346 – Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a harmonised methodology for classifying and reporting consumer complaints and enquiries**. *The deadline for comments is 05/10/2009. After collecting and analysing feedback from the consultation, the Commission will recommend the final version of the methodology.*

Then, within this framework, the Commission requested the European Regulators' Group for Electricity and Gas (ERGEG) to develop recommendations on customer complaint collection, handling and reporting in the electricity and gas sectors. Furthermore, the 3rd Internal Energy Market Package, adopted by European Union on 13 July 2009, includes new provisions regarding customer protection, and in particular regarding customer complaint handling. As a result, the ERGEG has issued a **Draft**

Advice on Customer Complaint Handling, Reporting and Classification [Ref: E09-CEM-26-03, 17 September 2009]. *In this Advice, the ERGEG examined the procedures in nine countries and subsequently developed 15 draft recommendations on consumer complaint handling. The focus of these recommendations is on complaints regarding household customers. The nine case studies and the draft recommendations are attached to this Report.*

One of the main provisions quoted in the Advice is Article 3 paragraph 13 of EC Directive 2009/72/EC concerning **Common Rules for the Internal Market in Electricity**. *This states as follows:*

'Member States shall ensure that an independent mechanism such as an energy ombudsman or a consumer body is in place for an efficient treatment of complaints and out-of-court dispute settlements.'

As a result, the **Electricity Regulations** *(Subsidiary Legislation 423.33) provide the following '***Measures on consumer protection for household customers***' in Schedule III:*

'Without prejudice to any other law on consumer protection:

(a) customers have a right to a contract with their electricity service provider that specifies:

(i) the identity and address of the supplier;

(ii) the services provided, the service quality levels offered, as well as the time for the initial connection;

(iii) if offered, the types of maintenance service offered;

(iv) the means by which up-to-date information on all applicable tariffs and maintenance charges may be obtained;

(v) the duration of the contract, the conditions for renewal and termination of services and of the contract, the existence of any right of withdrawal;

(vi) any compensation and the refund arrangements which apply if contracted service quality levels are not met; and

(vii) the method of initiating procedures for settlement of disputes.

In any case, this information should be provided prior to the conclusion or confirmation of the contract. Where contracts are concluded through

intermediaries, the above information shall also be provided prior to the conclusion of the contract.'

Under Article 15(11) and Clause 1.3 of the Fourth Schedule of the Arbitration Act, all disputes arising from the supply of electricity, electrical meter rent or any other service provided by Enemalta Corporation are subject to mandatory arbitration. Furthermore, the Arbitration Tribunal enjoys exclusive jurisdiction in "all disputes arising from the supply of electricity, electrical meter rent or any other service provided by Enemalta Corporation."

Before the introduction of this system of mandatory arbitration by means of L.N. 165 of 2006, matters relating to damages caused by the provisions of an electricity supply were dealt with in various fora, for instance local courts and the consumer tribunal. Therefore, if this system is to be removed, it would once again lead to a situation of forum shopping which had existed prior to mandatory arbitration, and consequently, matters would actually take longer to be decided.

Therefore, the obligations stated under the Electricity Directive quoted above are satisfied through the system currently in force. Hence, it is not recommended that further remedies to the existing ones be introduced, particularly since the present remedy (mandatory arbitration) is being challenged in the Constitutional Court on the basis of breach of the right to fair hearing, and any amendments at this stage would send a signal that the Government/Corporation is conceding the said fact."

The investigation

4. The Ombudsman has focussed his investigation on the principles involved, the measure of protection that consumers should be afforded and the mechanisms available to claim for redress when they have claims for damages against Enemalta in the circumstances under review. The Ombudsman considered that the merits of such claims against Enemalta are often bound to be of a technical nature that requires appreciation and determination by qualified, technical, competent professionals. It was for this reason that as a general comment the Ombudsman had preliminarily suggested to Enemalta that it should consider the setting up of an independent board to determine requests for payment of damages incurred as a result of power surges.

5. That proposal was made during meetings that the Ombudsman had with the Corporation and which were followed by a meeting with the Malta Resources Authority. Enemalta rejected the Ombudsman's suggestion in its letter dated 1 March 2010 reproduced above. Enemalta's submissions in that letter will form the basis of this Final Opinion that will not finally determine the merits of this and other similar cases. It will however establish what procedures should be put in place to adequately protect consumers who feel aggrieved by acts of maladministration by Enemalta.

Considerations

Section 14 subsection (2) paragraphs (a), (b), (c) of the Enemalta Act

6. Enemalta is explicitly disclaiming any responsibility in this and similar cases on the strength of Section 14(2) paragraphs (a), (b), (c) of the Enemalta Act. There have been cases in the past when Enemalta took a different approach, more favourable to consumers. There were cases where compensation was deemed to be due and paid. In recent months however, there seems to have been a hardening of Enemalta's position, seeking protection and immunity on the strength of this Article to exculpate itself *a priori* from any responsibility. This Section lays down:

"(2) With respect to the supply of electrical energy by Enemalta, the following provisions shall have effect:

(a) Enemalta may reduce as it thinks fit the quantity of energy supplied to any consumer, if, by reason of any unforeseen circumstances beyond the control of the Corporation, it appears that the supply of electrical energy generated is insufficient to enable the full quantity to be conveniently supplied;

(b) where the quantity of energy supplied has been reduced as aforesaid no liability shall be incurred by Enemalta in respect of any loss or damage caused by such reduction;

(c) Enemalta shall not be liable for any damage to person or property or for any cessation of the supply of energy which may be due to unavoidable accident, fair wear and tear or overloading due to unauthorised connection of apparatus, or to the reasonable requirements of the electrical system, or to

the defects in any electrical installation not provided by the Corporation."

Analysis of Section 14 (2) of the Enemalta Act

7. It should be noted –

a) This Section is an integral part of the Enemalta Act. It expresses the will of the legislator that Enemalta's responsibility for loss or damage caused in the provision or supply of energy shall be determined within the stated parameters. Though the Ombudsman has the jurisdiction to declare that a provision of law is unjust or unreasonable, he should only do so with great circumspection and in cases where such unreasonableness or unjustness is univocal and manifest. A careful reading of the Article does not lead the Ombudsman to this conclusion.

b) However, blanket disclaimer regulations are not looked upon favourably by the Courts. It is established case law that such clauses in no way derogate from the general principle of law that every person should be held responsible for damages that result from his negligent action or inaction. Clauses purporting to exclude *a priori* responsibility for damage whatsoever the reason that causes it, like the oft quoted "*you travel at your own risk*", have been judicially declared to be ineffective and non-binding on contracting parties. This, especially when the party disclaiming responsibility is a dominant public authority, enjoying a monopoly and providing an essential service to the citizen who must necessarily acquire that service from it.

c) Clauses that attempt to limit rights enjoyed under general principles of law, whether through legislation or regulation, have to be interpreted restrictively. In applying such clauses it is the interpretation that is the less burdensome on the party whose rights are being limited that has to be favoured.

d) As stated, Enemalta maintains that in accordance with Section 14 subsection (2) of the Enemalta Act, it cannot be held liable for damages sustained by complainant. It maintains that the power cut on that day was beyond its control and therefore it cannot accept liability for any damage. Complainant submits that his "*claim is not for compensation due to non supply of energy but for damages caused as a direct result of Enemalta's*

negligence/incompetence when restoring power". He submits that Section 14 is therefore irrelevant and inapplicable to his case. This submission could be applicable to a number of other complaints referred to above and considered by the Ombudsman.

8. A careful reading of Section 14 (2) shows that complainant is absolutely right in his interpretation of the Section. This does not necessarily mean that his complaint is justified. This remains to be seen when the merits of the case, including its technical aspects, are examined.

Interpreting Section 14 subsection 2

9. An analysis of Section 14 shows that it is intended to authorise Enemalta to reduce, as it thinks fit, the quantity of energy supplied to any consumer. This it cannot do capriciously. It can only do so if this is "*by reason of any unforeseen circumstances*" beyond its control, that shows that the supply of electrical energy generated was insufficient to enable the full quantity to be conveniently supplied. The law provides that, if and when such a situation arises and Enemalta reduces the quantity of energy supplied, it would incur no liability in respect of any loss or damage caused by such reduction. Clearly, Enemalta would not be so liable if it can prove that there were unforeseen circumstances beyond its control that affected the generation of electrical energy. Such an exemption from liability was also extended to Enemalta in the case of any cessation on the supply of energy, which can be due to a number of determined circumstances. These are:

a) unavoidable accident;
b) fair wear and tear;
c) overloading due to -
   i) unauthorised connection of apparatus;
   ii) the reasonable requirements of the electrical system; or
   iii) the defects in any electrical installation not provided by the Corporation.

10. It is clear that the provision is intended to limit liability to the case of a reduction of energy supply or its cessation. It is also clear that the avoidance of liability is strictly related to the circumstances that are identified as being provoked either by circumstances beyond the supplier or by the actions of

third parties, that is, the unauthorised connection of apparatus or defects in any electrical installation not provided by the Corporation. Nothing in this Section exempts the Corporation from liability in the case of damages that occur as a result of electricity being supplied to a consumer. It is presumed that the Corporation has full control on the manner in which the supply of electricity is restored and that its transmission mechanisms and cables are properly maintained and capable of ensuring a smooth and stable supply of electric current. In this respect the legislator did not consider it appropriate to interfere in the general provisions of law that regulate other contracts of service.

11. The restrictive interpretation that should be given to Section 14 does not allow that it be extended to apply to cases like those of complainant and others presently under review. These cases cannot therefore be summarily dismissed by Enemalta. One has to examine the merits of the case to establish whether there was any responsibility on Enemalta's part for the marked upsurge in the supply of electricity current when restored and the consequent damage, which is not apparently contested by the Corporation. It would be up to the Corporation to prove that there are circumstances that would exonerate it at law from responsibility under the ordinary rules governing contracts. Once the damage is proven and its cause established, it would be incumbent on the Corporation to prove that it was not negligent, that it properly maintained the system supplying the electricity power and that due care and diligence was taken during the process when power was being restored. It would be up to the Corporation to prove satisfactorily these and other technical data needed to justify its actions. The appreciation of this data and other facts relevant to arrive at a just appraisal of whether Enemalta should be held liable for damages suffered, will be at the centre of any process determining a claim for damages by a consumer. It would also be central to any proceedings of alternative dispute resolution at whatever level of effectiveness, including a Final Opinion of the Ombudsman.

EU Directive 2009/72/EC

12. In the course of the investigation carried out, the Ombudsman has proposed the setting up of an independent board to examine cases where damages are incurred as a result of power surges. At that time, he was not aware of developments taking place in this same area within the European

Union. He had actually suggested that the Corporation finds out what stand the Union was taking and what measures were being adopted by competent authorities in other countries when dealing with such cases. Subsequent investigation threw much light on this important area as is evidenced by the facts stated in Enemalta's letter of the 1 March 2010 reproduced above. The attention of the Ombudsman was focussed on Article 3 paragraph 13 of EC Directive 2009/72/EC concerning common rules for the internal market in electricity which states as follows –

"Member States shall ensure that an independent mechanism, such as an Energy Ombudsman or a Consumer Body, is in place for an efficient treatment of complaints and out of court dispute settlements".

13. When quoting this Article the Corporation rightly highlighted the words '*independent mechanism*' and '*an Energy Ombudsman or a Consumer Body*'. There is not as yet a harmonised methodology for reporting and classifying consumer complaints on a cross-sectoral basis around the European Union. Enemalta Corporation is fully aware that developments are taking place within the Union in this respect to fine tune recommendations on complaint handling as well as proposals for complaints classification.

14. This is a technical field in which the Ombudsman will tread very carefully. He limits himself to referring to the public consultation on the **Draft advice on Customer Complaint Handling, Reporting and Classification** prepared by the European Regulators Group for Electricity and Gas (ERGEG), (Ref: EO9/CEM/26/03 dated 17 September 2009) to which reference was made by Enemalta –

"The 3rd Internal Energy Market Package, adopted by European Union on 13 July 2009, includes new provisions on customer protection, and in particular regarding customer complaint handling. Member States are invited to set up new protections for household customers among which:

- *single points of contact to provide information on their rights;*
- *information on bills about the means of dispute settlement;*
- **creation of independent mechanisms for the treatment of complaints … and disputes;** [my bold]
- *financial compensation for customers;*
- *complaint monitoring."*

ERGEG's draft advice … aims to provide Member States and national regulators with an input on how to translate these new legal provisions into operational modalities".

15. Among the main recommendations made in this authoritative report there are the following:

"- customers should be able to choose between various channels to submit a complaint;
- alternative dispute settlement should be made available for all household customers, preferably without charge or as inexpensively as possible, irrespective of the financial amount of the dispute;
- statutory complaint handling standards for the energy sector should be in place including:

- *written complaint handling procedures (within supplier and third parties) should be available to all customers;*
- *information on the alternative dispute settlement body should be provided with the first acknowledgment of a complaint;*
- *the use of a common complaint classification would permit national regulatory authorities (NRAs) that wish to do so, to make comparison between suppliers' quality of service performances;*
- *final answer from a service provider should be issued as soon as possible and preferably within two months.*

- redress schemes should be in place to allow for compensation in defined cases; …."

No uniform means of redress

16. The study on which the ERGEG report is based shows clearly that there is no uniformity in the systems chosen by different countries to provide out of court settlement of claims by consumers on the level of service provided by suppliers, both regarding billing and also in regards to claims for damages resulting from faulty service. Each country has chosen its own path. There is however one common factor. Procedures always provide for out of court consideration of claims that is intended to culminate either in an amicable settlement of the claim or its determination, generally leaving recourse to Court action as a final option of last resort open to the parties. This information is very revealing in so far as it shows how other members of

the European Union have reacted to the implementation of the EC Directive and also how this compares to its implementation by Enemalta through the **Electricity Regulations** (Subsidiary Legislation 423.33) reproduced in the Corporation's letter of 1 March 2010.

Appendix 1 attached to this report summarises the systems of customer protection mechanisms in nine countries chosen by ERGEG. This background information is being provided to illustrate how customer protection in Europe is developing and the positive change of mentality towards an effective system of alternative dispute resolution of claims to encourage out of court settlement. The full text of the document can be accessed at *http://www.energy-regulators.eu/portal/*.

Enemalta's position is unsatisfactory

17. It is my opinion that if the **Electricity Regulations** (Subsidiary Legislation 423.33) are meant to satisfy the requirements of EU Directive 2009/72/EC concerning common rules for the internal market in electricity, the Corporation's stand is wholly unsatisfactory. While the regulations provide that consumers have a right to a contract that specifies "*any compensation and the refund arrangements which apply if contracted service quality levels are not met*", it only specifies that consumers were to be informed of "*the method of initiating procedures for settlement of disputes*". Nowhere do the regulations state that this method has to be provided through an independent mechanism, such as an Energy Ombudsman or a consumer body, that is in place for an efficient treatment of complaints and out of court dispute settlements. The letter and spirit of the Directive explicitly require that Member States should ensure that –

a) a mechanism **independent of the energy service provider** has to be permanently in place;

b) such a mechanism has to be **extraneous to the Court**;

c) it should be capable of **effectively treating** complaints and **settling disputes;** and

d) it should have the **characteristics** of an Energy Ombudsman or consumer body or the like.

The EU Directive therefore requires that Member States should put in place independent mechanisms that can quickly, cheaply and efficiently investigate complaints and recommend redress. The service provider will be expected to implement recommendations made to rectify injustices and provide redress also in the form of compensation or refund if it results that the contractual service quality levels are not met. The essential element to be ensured when setting up such mechanisms is that they should not be judicial in nature. The Directive specifically provides that disputes have to be settled out of court.

Compulsory arbitration

18. Enemalta maintains that the independent mechanism required by the Directive is satisfied through the provision of Section 15(11) and Clause 1.3 of the Fourth Schedule of the Arbitration Act which requires that all disputes arising from the supply of electricity, electrical meter rent or any other service provided by Enemalta Corporation are subject to mandatory arbitration. It submits that the Arbitration Tribunal enjoys exclusive jurisdiction in "*all disputes arising from the supply of electricity, electrical meter rent or any other service provided by Enemalta Corporation*". By implication it is insisting that all claims by consumers, including those for damages resulting from power surges, can only be determined by the Arbitration Tribunal. Management is insisting that it need not, and indeed should not justify the Corporation's actions in defence of the claims made, since this could prejudice their case before the Arbitration Tribunal. There have been occasions where Enemalta explicitly took this line of defence, substantially claiming that the Ombudsman had no jurisdiction to investigate claims since this could only be determined by the Arbitration Tribunal. A position which is, in my view, completely untenable.

Mandatory arbitration

19. I will not enter into the merits of the issue whether mandatory arbitration as a means of determining civil rights and obligations, is constitutionally correct or not. This matter is being challenged before the Constitutional Court on the grounds that it violates Article 6 of the European Convention of Human Rights that guarantees the right to a fair hearing. This issue is not directly relevant to the merits of this opinion. It is my view, however, that mandatory arbitration is by definition a judicial process since both Enemalta

and the consumer are bound by law to submit themselves to the jurisdiction of the Tribunal and they are bound to abide by its award that has the force at law of an executive title, like any other judgement of the Courts. The decision of the Tribunal is final and it can only be appealed, in certain specified cases, before the Court of Appeal.

Mandatory arbitration is costly, time consuming, confrontational and adversarial. It is an exercise to determine rights and obligations. It is a judicial process and it certainly is not a process before an independent body to attempt to reach an out of court settlement. Mandatory arbitration is certainly not meant to identify administrative failings that the Corporation should be prepared to readily acknowledge and promptly remedy, irrespectively of whether it was legally bound to do so. Enemalta seems to be missing the main thrust of the EU Directive that aims at ensuring that customers are treated fairly and with respect, that they are given their due when they suffer damage as a result of administrative failings and that such redress should be given readily and without undue delay or unnecessary cost.

Alternative dispute resolution

20. Methods of alternative dispute resolution are today acknowledged tools to ensure an efficient and transparent public administration. Corporations providing a service should be accountable for their actions. They should be prepared to reimburse customers for damages suffered through negligent actions or inaction, undue delay or outright inefficiency. In short, public authorities should be prepared to submit themselves to an independent enquiry into the way their service is provided, to abide by the findings of such enquiry, to apologise for failings or discomfort caused and to provide adequate and prompt compensation when this is required, irrespective of the cost. It is about time that public authorities and corporations in Malta recognise this new culture that has thankfully taken root in the European Union and that is finding its way in the public administration and sanctioned by the case law of our Courts.

The ombudsman institution is a positive manifestation of this culture. Other regulatory bodies, on a national basis, serve the same purpose and propagate the same salutary administrative law principles.

EC Directive not satisfied

21. These considerations lead the Ombudsman to the conviction that the stand taken by the Corporation that statutory referral to mandatory arbitration satisfies the requirements of the obligations imposed by the Electricity Directive, is not correct. Nor could it be validly argued that customers have the possibility of referring their claim to a Consumer Tribunal, because the Arbitration Act gives the Arbitration Tribunal exclusive jurisdiction on disputes arising on the supply of electricity, electrical meter rent or any other service provided by Enemalta Corporation. Any claim filed before a Consumer Tribunal would automatically be thrown out because of this jurisdiction clause.

The Malta Resources Authority

22. It would appear that the same objection could presumably be raised in the case of a consumer who refers his complaint to the Malta Resources Authority. Technically speaking the exclusive jurisdiction clause in the Arbitration Act could be pleaded in an attempt to divest the Malta Resources Authority from its function to protect consumers in this area. The clause in the Arbitration Act was enacted after the Malta Resources Authority Act came into force as Act XXV of the year 2000 (Chapter 423 of the laws of Malta). It is a special provision that superseded and has precedence over the general provisions of the Malta Resources Authority Act. There is however one basic essential difference that distinguishes this Authority from judicial or quasi-judicial bodies. It is not a tribunal established by law.

The functions of the Malta Resources Authority

23. This Office is aware that the Malta Resources Authority has in the past considered and decided claims by consumers against Enemalta Corporation on various aspects of its administration, including damages resulting from power surges.

It is informed that the Malta Resources Authority has the technical competence and structures to investigate power cut accidents, to establish their cause and identify responsibility. Malta Resources Authority actually investigates every power cut within the normal course of its operations. While it is

acknowledged that the Malta Resources Authority has a very wide remit of regulatory functions regarding resources relating to water, energy and mineral resources and that its functions include the duty to regulate, monitor and keep under review all practices, operations and activities relating to these areas of economic activity, it is clear from a careful reading of the Act that consumer protection has to be one of the main objectives of the Authority. There are a number of provisions in the Act that refer to consumer protection. It is enough for the purpose of this opinion to highlight paragraphs (p) and (q) of Section 4(1) of the Act that outlines the functions of the Authority. These provide that it shall be the function of the Authority:

"p) to promote the interests of consumers and other users in Malta, particularly vulnerable consumers, especially in respect of the prices charged for, and the quality and variety of the services and, or products regulated by or under this Act;

q) to determine disputes in relation to matters regulated by or under this Act."

24. Apart from its general regulatory and advisory functions on the wider plane of general policy and price control, the Authority is therefore also charged with the specific duty of protecting consumers and determining disputes between consumers and service providers. The Act also provides for mechanisms of review of decisions taken by the Malta Resources Authority. An appeal from them lies in certain cases to the Resources Appeals Board, when it is alleged that there was a material error as to fact or law or that the rules of due process were not correctly observed or when there was some material illegality, including unreasonableness or lack of proportionality.

25. The Act further provides that any person who feels aggrieved by the decision of the Appeals Board or the Authority itself, may appeal to the Court of Appeal on a question of law. It is not immediately clear to what extent the service provider, in this case Enemalta Corporation, is obliged by the Act to comply with the decisions of the Malta Resources Authority on individual complaints or whether it can, even in this forum, contest the claim and insist on referral to mandatory arbitration. It would also appear that the procedure to be followed before the Appeals Board still has to be fine-tuned and regulations have to be made regarding the form in which an appeal is to

be lodged and the time limits to be observed.

These considerations lead the Ombudsman to the conviction that the complaints procedure established under the Malta Resources Authority Act would satisfy the requirements of EU Directive 2009/72/EC. It is an independent mechanism that is in place for an efficient treatment of complaints and out of court dispute settlement.

It is a mechanism that is operated by an Authority that has the technical know-how, that is in a position to establish facts relevant to the determination of the complaint and that, given adequate human resources, should provide a speedy, efficient, fair, equitable and out of court resolution of complaints at minimal costs. If it is well managed, the system should be acceptable to Enemalta Corporation in that it would provide adequate protection to its consumers.

Conclusion

26. Leaving aside the thorny issue of mandatory arbitration and the judicial determination of claims of consumers against Enemalta, it is the Ombudsman's opinion that the surest and safest way in which to satisfy the requirements of EU Directive 2009/72/EC is to strengthen the structures of the Malta Resources Authority in its important role as an effective tool in consumer protection in this vital area.

27. Having established that mandatory arbitration can only be equiparated to court proceedings and cannot be considered to be a mechanism for an efficient treatment of complaints and out of court dispute settlement, the solution rests with utilising existing structures within the Malta Resources Authority rather than with the creation of yet another Consumer Body or Energy Ombudsman. As stated, the MRA has the technical know-how and competence to identify whether Enemalta Corporation has to assume liability for damages claimed by the consumer. It is incumbent on the Corporation to declare its readiness to accept, as a matter of principle, the reasoned decision of the Malta Resources Authority on whether a consumer's claim that the service provider was responsible for the damages he suffered is justified.

If, following that decision, the consumer and Enemalta fail to reach

agreement on the quantum of damages due, that matter could be referred to **voluntary** arbitration to which both Enemalta and the consumer would have preventively subscribed.

Recommendations

28. In the light of these considerations the Ombudsman recommends that:

i) The Malta Resources Authority and Enemalta Corporation should within the limits of their respective competences, revisit the provisions of EU Directive 2009/72/EC with a view to ensuring that the review of the complaints mechanism of the Authority is strengthened and rendered more effective for out of court settlement of disputes. This review should also undertake a fine tuning of the regulations necessary to render the process undertaken by the Malta Resources Authority effective through all stages, including procedures before the Appeals Board;

ii) Both the consumer who opts to have recourse to the Malta Resources Authority and Enemalta bind themselves to abide by the decision of the Authority on whether Enemalta is to be held responsible for the damages claimed by the consumer. They should also undertake that, if no agreement is subsequently reached on the quantum of damages, that matter should be referred to voluntary arbitration. The liquidation of damages often entails complex legal issues that would be outside the remit of the Authority and that, in case of disagreement, should best be left to a competent arbitral tribunal specifically chosen for the purpose;

iii) It is recommended that a protocol or agreement setting out the procedures to be followed when considering consumer claims, be entered into between the Malta Resources Authority and Enemalta Corporation; and

iv) Complaints arising from the supply of electricity, electrical meter rent or any other service provided by Enemalta Corporation received by the Parliamentary Ombudsman should in the first place be referred to the Malta Resources Authority for investigation and determination.

Meanwhile, it has been agreed with the Malta Resources Authority that

this and other complaints of a similar nature presently pending before the Parliamentary Ombudsman are to be referred to it for investigation, on a trial basis, in anticipation of a favourable response by the competent authorities to the recommendations made in this Final Opinion.

Finally, the attention is drawn to all complainants that they should take appropriate steps to ensure that their rights of action to have their claims judicially determined are properly safeguarded against the running of prescriptive periods.

J Said Pullicino
Ombudsman **11 August 2010**

APPENDIX 1

Customer complaints are considered a top-level indicator which can contribute to monitoring markets from a customer perspective and identifying market malfunctioning.

As part of the European Union's initiative to monitor the performance of markets from a customer perspective and identifying market malfunctioning in the electricity and gas sector, the European Commission requested the European Regulators' Group for Electricity and Gas (ERGEG) to develop recommendations on customer complaint collection, handling and reporting in the sector. This is so because customer complaints are one of the top-level indicators for screening markets, regarding economic or social outcomes for customers and identifying where intervention may be needed.

To design these draft recommendations aiming at providing a set of best practices, nine (9) energy regulators, with relevant experience on how to handle customer complaints, shared their experiences and good practices and developed a case study which was then attached to ERGEG's report. These regulators came from the following countries – Austria, France, Italy, Poland, Romania, Spain, Sweden, the Netherlands and the United Kingdom.

ERGEG then issued a **Draft Advice on Customer Complaint Handling, Reporting and Classification**[1].

The following is a summary of the examination of the systems adopted in the nine countries chosen by ERGEG.

1. Austria

E-Control has a legal mandate to implement an Alternative Dispute Resolution Board (ADR) and has also established an *Energy Hotline* where customers may receive information and advice.

[1] E09-CEM-26-03 – 17/09/2009

Although about 80% of complaints and inquiries are solved at the *Energy Hotline*, the other cases are transferred to the ADR Board which negotiates with the customer and the supplier to reach a mutually agreed solution for both parties involved. If this is not sorted then an official ADR procedure can be initiated.

The solutions of the ADR are only suggestions to both parties and are not binding and either party may go to Court if it is not satisfied with the outcome of the ADR procedure.

2. France

The breakdown of responsibilities for customer complaints/inquiries on electricity is the following –

- The General Directorate for Competition Policy, Consumer Affairs and Fraud Control (DGCCRF – Ministry for the Economy) takes care of infringements of legal obligations before contracting;
- The Energy Ombudsman is responsible if the complaint is related to contractual obligations;
- NRA has jurisdiction if the complaint is related to access to the grid.

The outcome of the Ombudsman's complaint handling is a non-binding written recommendation to the parties (the supplier and/or DSO and the customer). Each part may go to court if dissatisfied with the recommendation and even before the end of the dispute settlement.

3. Italy

The Italian regulatory authority for Electricity and Gas, AEEG is entrusted with the function of evaluating complaints, appeals and reports from users or consumers, individually or as a body, related to quality standards and tariffs by energy operators.

The complaint settlement procedure is divided in two parts –
- Initially the authority can request information and relevant documents from the supplier;
- If the case is not settled, proceedings could follow where the authority can

even impose fines on the supplier when it is not abiding with regulations.

The Regulator, however, cannot prescribe compensation for damages – these can only be ordered by a Court.

The major suppliers are developing ADR procedures in agreement with consumer associations.

4. The Netherlands

In terms of Dutch energy law, suppliers and operators are responsible for having an internal dispute resolution procedure – but legislation does not define what the dispute resolution procedure should look like, nor is there an obligation to use a mandatory uniform definition. Consequently, the company can determine when a complaint is a complaint and in what way it is to be dealt with. However, once the institution has given a decision with which a customer disagrees, a complaint can be filed with an independent dispute settlement body which, in almost all cases, is the *Stichting Geschillen Commissie*. Alternatively consumers can go to Court. In both cases the decision is binding.

5. Poland

Polish energy consumers can address their complaints to the energy sector supplier or operator they have a contractual relationship with and if they are unsatisfied they can present a case to a third party body.

Where a customer is not satisfied with a company's procedure of handling a complaint – e.g. if a discount or compensation is not granted to the customer – a court of law is the body competent to resolve the dispute.

Since there is no clear division of responsibilities for customer inquiries/ complaints, customers may refer to the Regulator or a local Consumer Ombudsman or consumer organisations (governmental or NGO's).

The Energy Consumers' Ombudsman deals with the majority of complaints/ inquiries and its opinions are not legally binding.

The Regulator's decision finalising a dispute is final, but each party has a right to appeal to a court.

There is no Alternative Dispute Resolution board dedicated to energy consumers.

6. Romania

The treatment of petitions is regulated by a variety of laws, government decrees and subsidiary legislation, and petitions regarding electricity supply services can be addressed to one of various institutions –

- The Romanian Government
- The Ministry of Economy
- The Agency for Consumer Protection Rights
- The national Energy Regulatory Authority (ANRE)
- The state local authorities (Municipalities)
- The Ombudsman
- The Competition Council
- The National Customer Protection Authority
- The electricity or gas companies that provide the service
- The customers' non governmental associations.

The breakdown of responsibilities amongst these bodies is not easy to define.

The service provider is required to have an internal complaint handling procedure and pre-contractual dispute solving procedure.

There is no alternative settlement body.

7. Spain

Here, the Autonomous Communities (Energy and Consumption Directorates) are responsible for customer complaints or inquiries related to electricity supplies, such as quality servicing, invoicing, inspections, charges, etc. Nevertheless the National Energy Commission (CNE) watches over Spanish

energy consumers.

The CNE collects and sends complaints and inquiries to the Autonomous Communities if they are responsible for the subjects concerned and informs the consumer on the applicable legislation and that it has forwarded his complaint to the region where the point of supply is located. CNE has the responsibility to resolve disputes related to third party access.

Each Autonomous Community is independent and has its own dispute resolution procedure. The parties have to adopt the solution proposed - but have the right to go to Court.

A voluntary procedure (arbitration) exists to resolve conflicts between consumers and suppliers but no supplier has as yet decided to join the procedure.

8. Sweden

In Sweden there are several third party bodies that can be involved in customer complaints/inquiries depending on the issue:

- The National Body for Consumer Complaints is a public authority that functions roughly like a court. Its main task is to impartially try disputes between consumers and companies, provided these have not already been dealt with in Court. Petitions are filed by the consumer. Its decisions are not binding but the majority of the companies nonetheless follow them. Companies that do not follow the board's recommendations get blacklisted.

- The Energy Markets Inspectorate (EI) provides information and handles some disputes (e.g. metering and electricity quality, network connection).

The larger energy companies also have a complaint handling mechanism called the Energy Ombudsman and customers who are unhappy with an issue can turn to the Ombudsman within the company to have the issue dealt with again. If the customer still remains unsatisfied, he can turn to the National Body for Consumer Complaints.

It is not compulsory for a customer who wishes to complain to any third

party body, to first refer his complaint to his supplier or operator, although this is always suggested to the customer.

9. UK (England, Scotland and Wales)

As of October 2008 a new complaint handling procedure was set up in terms of the Consumer, Estate Agents and Redress Act of 2007 for the energy sector.

This process involves the following third party bodies with specific responsibilities –

- Consumer Direct – a helpline giving advice on consumer rights and signposting how and where to make a complaint. It can also refer complainants directly to the companies;

- Consumer Focus – a referral body for vulnerable customer complaints and disconnection cases;

- Energy Ombudsman – a backstop for unresolved complaints whose ruling is binding on the energy company but not on the customer who may seek further redress through the courts. However, before this office deals with the complaint, it is necessary that it had been submitted to the company, except in the case of vulnerable customers or when the complaint is regarding disconnection, in which case Consumer Focus may deal directly with the energy company on behalf of the customer.

Energy supply companies and network operators are required to be a member of the statutory redress scheme (the Ombudsman), which can award compensation up to £5000 payable by the energy company. This institution is also funded by the energy industry through the payment of a membership fee and fees per case.

Other Reports

The Somali national who tried to reunite his family in Malta

Background information

Abukar, a Somali national who arrived in Malta in 2005 and was at first granted humanitarian protection and later subsidiary protection, asked the Maltese authorities for permission to bring his family from his country to live on the island. However, although he worked in Malta for four years with a regular employment permit and paid local taxes while his Certificate of Conduct testified that he was a person of good conduct, the Central Visa Unit of the Ministry of Foreign Affairs that is responsible to grant permission for entry into Malta of third country nationals, turned down his request.

At this stage Abukar asked the Office of the Ombudsman in Malta to review his situation. He pleaded that under Maltese law concerning the status of long-term residents and regulations on third country nationals, he was allowed to reunite his family in Malta. International law too entitled him to be reunited with his family on the grounds that he was an asylum seeker who received humanitarian protection from the Maltese authorities.

The Ombudsman's evaluation of the situation

After having carefully considered the explanation that he received from the Maltese immigration authorities, the Ombudsman concluded that Abukar was incorrect to claim that the position of the Maltese Government was unfair and illegal and went against national and international law. He found that the Maltese legislation that Abukar referred to did not apply to his case and regulation 3(2b) of Subsidiary Legislation 217.05 specifically excluded persons who were in complainant's situation.

The Ombudsman informed complainant that according to European Union law (Council Directive 2003/86/EC), family reunification is allowed to refugees but not to persons enjoying subsidiary protection. He also informed Abukar that this Directive is in line with the United Nations 1951 Convention

relating to the Status of Refugees that only upholds family reunification to refugees and extends the rights of refugees to members of their family.

The Ombudsman pointed out that complainant himself admitted that the Maltese authorities allowed him to take up legitimate employment and to pay local taxes and social contributions while he was entitled to benefits under the country's social security system and health care in accordance with national law that is based on the applicable EU Directives and international obligations.

The Ombudsman concluded that on this basis Malta was fulfilling its legal obligations towards complainant and the refusal by the Maltese authorities to accept Abukar's request to bring his family to the island did not amount to bad administration as defined in the Ombudsman Act, 1995.

Considerations by the Ombudsman

The Ombudsman appreciated Abukar's desire to be reunited with his family. The UN Convention states that the family is a natural and fundamental group unit of society while Article 8 of the European Convention on Human Rights and Fundamental Freedoms proclaims that everyone has the right to respect for his private and family life, his home and correspondence. Council Directive 2003/86/EC refers to the "*obligation to protect the family and respect family life*" but limits this right to refugees, a limitation that is questioned by various EU institutions.

The European Convention does not protect human rights and fundamental freedoms in an absolute manner but subjects each basic right to various exclusions, exceptions or limitations. Article 8 explicitly subjects the exercise of this right to restrictions in accordance with law that are "*necessary in a democratic society*."

The Ombudsman recalled that the Maltese Government transposed the EU Directive that excludes irregular refugees who are granted subsidiary protection from the opportunity to be reunited with their immediate families that is given to refugees with asylum status. The Maltese Government argues, not without justification, that it has to accept limits imposed in a EU

Directive that upon accession to the European Union became binding law in Malta.

The Ombudsman went on to consider whether this part of the Directive is just and reasonable since it is his function to consider this issue from this perspective. He stated that it is clear that in principle persons awarded subsidiary protection are not to be equated with refugees who are granted asylum. The latter hail from different, far worse and more unfortunate circumstances and are granted full protection in the country that accords them asylum. They are victims of extreme circumstances in their country of origin and deserve the right to be unconditionally received by the receiving country with the possibility of full integration in the country of their choice. Their situation is considered to be a permanent though not necessarily an irreversible one.

On the other hand persons enjoying subsidiary humanitarian protection are considered to require only temporary protection. They are allowed refuge within the countries that receive them on the understanding that they would be repatriated as soon as conditions in their country of origin allow them to return safely.

It is therefore fair to argue that in principle in similar circumstances family reunification is not an essential requirement. Irregular immigrants who are granted subsidiary humanitarian protection are only temporarily separated from their families and seen in this light, the EU Directive as transposed into Maltese law is reasonable.

The situation, however, becomes more complex when for some reason or other, persons enjoying subsidiary protection remain in the receiving country for years on end. In this case separation from one's family could be equivalent to inhuman treatment and could represent a violation of the fundamental right of respect for a person's private and family life and home. Constitutionally and conventionally, these rights have to be secured by the state to all persons within its jurisdiction.

The question arises here whether a democratic society is justified to refuse immigrants with subsidiary humanitarian protection an opportunity to be reunited with their immediate family long after their arrival in a host country

and with no reasonable prospect in the foreseeable future of repatriation to their country of origin. The question arises whether protection of the family and respect for family life should be afforded also to such persons whose stay, though initially expected to be of a temporary nature, eventually appears likely to last for years in the country that received them.

It is known that various international bodies support an extension of the right to family reunification to immigrants beyond those enjoying refugee status. The European Council on Refugees and Exiles has proposed, for instance, that the right to family reunification should not be limited to persons who are recognised as refugees under the Refugee Convention of 1951 but should cover persons who are granted protection on other grounds.

The Ombudsman recognizes that this is a complex matter with consequences on the social and economic fabric of the receiving state. It also leads to pressure to have persons enjoying subsidiary protection and their families integrate in the society of the receiving state when the final aim should be repatriation of these persons and not their integration.

The Ombudsman acknowledged that with the passage of time the distinction between refugees granted asylum and persons enjoining subsidiary status becomes blurred since family unity and values are fundamental to both groups. It is natural that persons with subsidiary protection will form a family if they do not already have one or yearn to be reunited with the family they left behind. These are human needs that can be denied for a time but that in the long run have to be respected.

The Ombudsman observed that the Maltese Government has to face realities and do what is proper, reasonable and just in the interest of society fully aware that, within the stated limitations, fundamental rights are to be enjoyed by all persons within the state's territory.

Conclusion

The Ombudsman concluded that as things stand today he could not uphold the complaint by Abukar since the Maltese Government was not guilty of maladministration when it correctly applied the EU Directive as transposed

in Maltese legislation.

The Ombudsman recommended that the Maltese Government should monitor the situation to determine, at the proper moment, when limitations in the EU Directive that exclude persons enjoying subsidiary protection from the right to be reunited with their immediate family, become no longer reasonable in a democratic society. This decision would achieve a balance between the needs of society and the inhuman effects that persons suffer from this restriction.

The Ombudsman concluded that in any such event the Maltese Government may need to define the extent of family for the purpose of family reunification and to determine circumstances under which persons with subsidiary humanitarian protection can prove that persons whom they claim as members of their family are really such.

The Ombudsman also recommended the inclusion of other conditions such as, for instance, that a person with subsidiary humanitarian protection cannot make a claim for family reunification before a defined period has passed and that any such reunification would not extend beyond the rights of the person enjoying subsidiary protection or of his family beyond those that the person had prior to reunification.

The Ombudsman finally proposed that any further concessions in this area would be made solely on humanitarian grounds and that no other rights would be acquired by the irregular immigrant or his family as a result of these concessions. While guidelines have to be laid down, decisions would be taken on a case-by-case and person-to-person basis in the light of prevailing circumstances.

June 2010

Lack of enforcement of regulations that prohibit smoking on public transport by Transport Malta

1. The complaint

1.1 In a grievance lodged with the Ombudsman, a complainant alleged that the authorities failed to take adequate action to protect citizens from abuse by public transport bus drivers. Over the years he had time after time reported to Malta Transport Authority (ADT) and, more recently to Transport Malta, details of abuse by drivers who illegally smoke while driving their bus. However, although the authorities acknowledged the problem and indicated that they were taking the necessary action, the situation remained the same. Complainant claimed that this reflected lack of enforcement in respect of a public health hazard to commuters even though the law has been in force for around thirty years.

2. Facts and considerations

2.1 Complainant explained to the Ombudsman that during 2009 he reported to the authorities responsible for public transport at least thirty instances of bus drivers who failed to observe the law regarding smoking on public transport while he reported another nineteen cases between January and May 2010. Complainant had furnished full details of these cases and provided sufficient information for a proper investigation by the authorities. He also submitted to the Ombudsman correspondence he had with Transport Malta where he insisted that the situation had reached alarming proportions that warranted the authority's urgent intervention.

2.2 Complainant stated that he was upset that the authority responsible for public transport had not taken legal action on any of these cases even if it issued warnings to the culprits. At the same time the Ombudsman found no indication that complainant was ever requested to give evidence in Court on his grievances even if he appeared reluctant to be summoned every time he reports a case since in his view it is the duty of the Enforcement Unit within

Transport Malta to enforce the law.

2.3 Upon being asked by the Ombudsman about this situation, Transport Malta – which is responsible for enforcement of anti-smoking laws on public transport – stated that whenever a bus driver is caught smoking by one of its Enforcement Officers or is reported by a commuter who is prepared to give evidence under oath, legal action is taken against the offender. However, in the case of bus drivers reported by commuters who are not ready to testify under oath, Transport Malta resorts to the issue of warnings. Transport Malta went on to explain that it has thirty Enforcement Officers on its books and that since 2008, fifty-three bus drivers were taken to Court following reports by these Officers.

2.4 The Ombudsman commented that the statistics given to him by Transport Malta raised more than an eyebrow. In over thirty months, 30 Enforcement Officers managed between them much less than 2 anti-smoking enforcements per month. Assuming that all these cases refer to abusive smoking by drivers – since they might also refer to other misdemeanours – this works out at a maximum of 53 abuses in 900 man-months or 0.59 enforcements per man-month. In contrast, a single commuter who obviously must have covered only a few routes of the local transport network had reported on his own no less than 49 cases of abuse over 17 months or 2.9 abuses per man-month.

2.5 The Ombudsman was quick to point out that these figures do not speak highly of the efficiency of the enforcement system practised by the transport authorities at least over the last 17 months. Considering that the authority responsible for public transport is obliged to enforce legislation that concerns a serious health hazard, it appears that this organisation is not really doing much to protect commuters from abuse by drivers. Clearly enforcement procedures are not functioning as they should and urgent action is needed on the part of the authority.

2.6 Transport Malta was set up by Act XV of 2009 that was enacted on 31 July 2009; and while it cannot be held responsible for any omissions by the Malta Transport Authority as its predecessor, enough time has now passed since it assumed responsibility to improve its enforcement system.

2.7 This Office is of course fully aware that upon seeing an Enforcement Officer in uniform waiting to board his bus, a bus driver can easily get rid of his cigarette and "*hide*" the abuse although this difficulty could be overcome by resort to methods that would make it less easy for a driver to know in advance that an Enforcement Officer is about to board his bus. Reported abusers could also be put under a more watchful system through more frequent inspections, possibly by different Enforcement Officers. Consideration could also be given to an SMS reporting system similar to that used for exhaust fumes so as to identify abusers and subject them to more rigid supervision.

2.8 Smoking on public transport vehicles is prohibited as per subsidiary legislation 332.13 Passenger Transport Services Regulations section 60(1) which provides that "*No passenger and/or driver may smoke while he is in a passenger transport vehicle*." This obviously means that the non-smoking ban is not limited to the time when a public transport vehicle is in service or even in motion but comes into effect the moment any person, be it a driver or a passenger, steps inside a public transport vehicle. It is the duty of the regulator to ensure strict adherence to regulations and to have in place proper administrative structures and an effective control system to enable it to curb abuses. This investigation showed that the authorities are seriously failing in their duty and in their responsibility towards commuters.

2.9 The Ombudsman pointed out that the upcoming public transport reform that is due to be in place by the end of the year is expected to bring in its wake a radical improvement in standards of discipline and efficiency and will not be limited to cosmetic change. Among other things, public expectations are rightly centred on the hope that change would impact positively on the general behaviour, appearance and demeanour of personnel running the service. Care should also be taken to ensure that in this reform programme every effort is made to put in place adequate and efficient enforcement systems to ensure that rules and regulations are rigorously observed. Commuters who make use of the public transport system have a right to be well protected by a serious inspectorate service that is capable of gaining their respect as well as instilling discipline in a minority whose actions bring the local transport system into disrepute. Sanctions for offenders have to be proportionate but rigorous and applied strictly and uniformly. The declared intention to have properly trained staff is a positive step to be encouraged in every way.

3. Conclusions and recommendations

3.1 The Ombudsman concluded that although smoking on public transport is a recognised health hazard through passive smoking affecting commuters and legislation banning such smoking has been in force for decades, there is evidence that abuse is still relatively frequent and goes unpunished. The record of contraventions reported by 30 Enforcement Officers during a period of more that two and a half years clearly indicates that the enforcement system that is in place is not efficient and not working well especially when one considers that complainant alone over a period of seventeen months reported practically the same number of abuses as the 30 Transport Malta Officers put together over nearly twice this period of time.

3.2 The Ombudsman concluded by strongly urging Transport Malta to take immediate steps to improve its enforcement of anti-smoking legislation on public transport so as to better protect the health of commuters.

August 2010

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