3. CASE STUDIES

Office of the Parliamentary Ombudsman

The open secret of the airline employee

The complaint

An Air Malta employee lodged a complaint with the Office of the Ombudsman that he was subjected to discrimination on grounds of sexual orientation when he was not selected for *ab initio* pilot training. He referred to article 4 of the Constitution of Malta that prohibits discrimination on grounds of sex and to the Equal Treatment in Employment Regulations that prohibit discrimination in the field of employment on grounds of sexual orientation.

Complainant was aggrieved by this decision because besides his qualifications in engineering, he had been employed in the national airline's engineering department for several years and was in possession of a private pilot licence.

Having always nourished an ambition to become a pilot with the national airline, complainant saw in an internal call for applications for *ab initio* pilot training that was issued by Air Malta in June 2006 an opportunity to fulfil a lifelong dream. His hopes were, however, dashed to the ground in January 2007 when his application was turned down and other applicants were chosen even though he claimed to be the most qualified candidate. Complainant stated that when he sought an explanation, he found that he was turned down by the selection board for two reasons, namely that he was *"improperly dressed"* and that he was *"over confident and nonchalant"* during his interview.

Facts of the case

When the Ombudsman asked for information about the selection process, the national airline explained that all applicants were interviewed by a panel consisting of three management pilots who asked the same set of technical and general questions about Air Malta and also asked them to explain why they believed that they should be chosen for the course.

The Ombudsman was told that during his interview complainant had projected an image of himself to the board as being nonchalant and in an overtly relaxed manner that contrasted sharply with the business-like approach of the other applicants. Members of the panel were emphatic that it was complainant's behaviour and attitude during his interview that led them unanimously to reject his application and insisted that they had not done so for any other motive.

They all expressed utter surprise at complainant's claim of discrimination on grounds of sexual orientation and ruled out that their decision was based on discriminatory reasons as he alleged. They insisted that they were unaware of his sexual orientation before they found that this accusation was levelled against them with the Ombudsman.

Complainant continued to plead that he was the most qualified candidate and ought to have been selected. He had responded diligently to all the issues raised during his interview and the board did not challenge his replies or contest his qualifications. Complainant resented the claim that he presented himself as a nonchalant person or that he was improperly dressed and explained that he went straight to the interview from his place of work in the company's official uniform.

Complainant reiterated his belief that his exclusion was attributable to discrimination based on sexual orientation and challenged the statement of the members of the board that they were unaware of it. He admitted that he made no secret of his sexual orientation and never tried to conceal it and his colleagues at work and his supervisors were well aware of it.

The Ombudsman found that while the interviews were taking place, each member of the board completed an individual score sheet in respect of each applicant and at the end of the interviews, they had compared their assessment of each candidate. The board also gave ample reasons for its acceptance or its rejection of each candidate. In its report on complainant the board reported that he projected an image of an over-confident person that at times verged on the arrogant and demonstrated a casual attitude in his replies to questions put to him while he had answered in a *"nonchalant"* manner. Moreover, he was inappropriately dressed for the interview and his body language too left much to be desired.

Considerations and comments

The Ombudsman pointed out that to uphold the claim by complainant that his exclusion arose as a result of his sexual orientation, there had to be strong evidence that led to a reasonable degree of certainty that his exclusion was in fact motivated by this reason. In support of his contention that he had all the necessary qualifications and coupled with his view that he answered correctly questions by the selection panel since Air Malta never pleaded that he gave inadequate or incorrect answers, complainant dismissed the other reasons given by the board regarding his appearance that contributed to his failure. He contended that in default of any other valid reason, his failure was by exclusion necessarily due to his sexual orientation.

The Ombudsman examined complainant's allegation that the selection board penalised him for his sexual orientation because members were aware of his disposition. While complainant argued that his sexual orientation was well known among the company's workforce and he made no effort to hide this personality trait, Air Malta management pleaded that the company employed 1,400 workers and it was impossible for members of the board to know each and every employee.

Members of the selection panel had declared unequivocally that they did not know complainant before the interview and were unaware of his sexual orientation when they turned down his application. They also vouched that no such consideration ever featured in their evaluation of his merits. These members confirmed that it was only after they saw complainant's letter to the Ombudsman that they became aware of his sexual orientation since during the interview there was no need for complainant to manifest externally his inclination.

The Ombudsman took note of the board's assertion that any such sexual orientation would not in itself have served as a bar to the selection of complainant to undergo training. Air Malta's employment and training policies are not homophobic and it is not the company's policy to debar any such persons from attendance at training programmes.

The Ombudsman then considered the claim by the selection board that during his interview complainant adopted an overtly nonchalant attitude that manifestly irritated all the members of the panel. His reaction to questions by the board was considered to verge on the insolent and members were negatively impressed by his attitude during his interview while his body language reinforced this overall impression. They also commented that complainant took no pains to show a dress code that is normally expected of candidates in an interview who are all out to give a good account of themselves. Board members declared that they individually reached the conclusion that complainant was unsuitable for selection before they proceeded to consider his performance in the interview and to allocate an overall mark.

On his part complainant continued to maintain that there was nothing untoward or inappropriate in the way that he was dressed for his interview. While admitting that he might have exuded confidence during his interview because he is by nature a self-confident person, he rejected the accusation that he was nonchalant and pleaded that he answered diligently all the questions that were put to him.

Complainant challenged the statement that members of the selection panel had no knowledge of his sexual orientation when the interview took place. He had worked as cabin crew for several years and had once even flown on a six-day

mission for the airline with one of the members of the board. Complainant insisted that he never tried to hide his sexual orientation and was sure that this trait was well known among Air Malta's workforce.

In his Final Opinion the Ombudsman noted that discrimination on grounds of sexual orientation in a selection process is not justified and, if proven, has to be censured unequivocally. However, for any such allegation to be sustained there must be enough grounds that lead to the conclusion that beyond any reasonable doubt any such discrimination actually took place. Admittedly this is difficult to prove but in order to do so the balance of probability has to be such as to convince the arbiter that discrimination in fact occurred. The Ombudsman stated that according to complainant, once he performed well during his interview the only reason to explain his failure must have been sheer bias against him on the evidence of his sexual orientation.

While complainant challenged the assertion that board members were unaware of his sexual orientation, at the same time the Ombudsman was faced with a statement by these persons who categorically insisted that they did not know of this orientation. Faced with this situation the Ombudsman admitted that he was not in a position to accept or to reject these contrasting positions.

The Ombudsman went on to point out that judgement on complainant's attitude throughout his interview depended on the interpretation given by members of the board at the time of the interview and it is not his function to contest this judgement or to substitute their opinion. The evaluation of complainant's performance was not something that could be objectively verified and an impression sketched on the mind of board members by a candidate's performance cannot be removed or replaced by the Ombudsman. In the end it boiled down to complainant's word against that of the board and since it was impossible to be sure of what actually took place, the Ombudsman could not determine whether complainant's attitude was within acceptable limits or such that would reasonably lead the board to consider that he was not fit to be chosen for the training programme.

The Ombudsman pointed out that even though complainant admitted that his sexual orientation was *"a public secret"*, this did not necessarily mean that all his colleagues and the management of such a large company were aware of it. This was merely a presumption by complainant and even if members of the selection board were aware of this fact, it did not automatically follow that his sexual orientation was the reason behind his failure. Board members unequivocally stated that complainant had not been selected because of the sheer bad impression that he left during his interview through what they considered as over-confidence that had not gone down well with them. In these

circumstances it is clear that the Ombudsman cannot substitute any such interpretation by the selection board of complainant's attitude by his own.

The Ombudsman observed in his Final Opinion that an analysis of the facts resulting from his investigation had also to be evaluated in the light of principles enunciated by Council Directive 97/80/EC of 15 December 1997 that was recast in Directive 2006/54/EC. This Directive, applicable to all EU member states and forming part of Malta's domestic law following the country's accession to the Union, deems it necessary to adopt Union-wide rules on the burden of proof to be applied in sex discrimination cases brought under national laws implementing the 1976 Equal Treatment Directive. These rules were introduced following a case in which the European Court of Justice held that *"the rules on the burden of proof must be adapted when there is a prima facie case of discrimination and that, for the principle of equal treatment to be applied effectively, the burden of proof must shift back to the respondent when evidence of such discrimination is brought."*

The Council states in its Directive 97/80/EC that "*plaintiffs* (in this case complainant) *could be deprived of any effective means of enforcing the principle of equal treatment before the national courts if the effect of introducing evidence of an apparent discrimination were not to impose upon the respondent* (in this case Air Malta) *the burden of proving that his practice is not in fact discriminatory*." The aim of this Directive, which states that its requirements apply to civil and administrative procedures, is to enable more persons who consider themselves wronged because the principle of equal treatment has not been applied to them, to have their rights ascertained by judicial process after possible recourse to other competent bodies such as the Ombudsman. It is with this aim in mind that the Directive imposes on member states certain safeguards on the compilation of evidence and the onus of proof.

Article 2 of the Directive lays down that under the principle of equal treatment there shall be no discrimination whatsoever based on sex, either directly or indirectly. In the latter instance problems often arise in cases of discriminatory conduct because of perceived or assumed sexual orientation. Sexual orientation is very often an invisible characteristic that can either elude an observer or lead to a wrong perception.

Subsection 2 of Article 2 of the Directive lays down that for purposes of the principle of equal treatment "*indirect discrimination shall exist where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of one sex unless that provision, criterion or practice is appropriate and necessary and can be justified by objective factors unrelated to sex*." This principle of equal treatment as set out in this provision

does not apply to discriminatory acts between one sex and another but also, as is the present case, in respect of a person with a different sexual orientation.

However, before complainant can claim that he was a victim of indirect discrimination, he has in the first place to prove conclusively that the facts that he complains of constitute a *prima facie* case of discrimination. As stated above, that proof is objectively and definitely not forthcoming even though complainant might subjectively harbour suspicions that his failure can only be attributed to his sexual orientation.

The Ombudsman concluded that he found no conclusive evidence to back complainant's allegation while the board gave plausible, coherent and reasonable explanations for its motivation when reaching its unanimous decision. This explanation not only excluded the sex factor of which the members of the board maintain that they were unaware and which would have in any case been considered irrelevant to the selection process but also, and more importantly, refers to negative aspects of complainant's attitude and behaviour that in their opinion rendered him unsuitable for selection. Since complainant had not proved a *prima facie* case of improper discrimination on the grounds of his sexual orientation, the board was not required to justify its decision in the light of complainant's allegation and the principles in Council Directive 97/80/EC do not apply.

The Ombudsman pointed out that allegations of discrimination on grounds of sexual orientation present particular problems when the orientation is not manifest. In this case, however, the situation was different since complainant made no secret of his sexual orientation and had no difficulty in declaring and manifesting it publicly to the extent that he insisted that members of the board knew about it although on the other hand it was established that the board never took this factor into account since its members were not aware of it.

The Ombudsman, however, ruled that in his view this crucial point was not proven to the extent that the burden of proof that the principle of equal treatment had been scrupulously observed had to be shifted on to Air Malta.

Conclusion

Taking everything into account the Ombudsman concluded that there was no clear evidence to sustain complainant's allegation that the sole reason for his exclusion from the training course was discrimination on the basis of his sexual orientation as a gay person. Neither did the Ombudsman find any evidence or reason to doubt the declaration by members of the board that they were unaware of complainant's orientation at the time of the interview. He therefore turned down the complaint.

The Physics Teacher who had librarianship at heart

The complaint

A full-time Physics Teacher in the Education Division complained with the Ombudsman that following her transfer to a Higher Secondary School at the start of the 2007/2008 scholastic year, she was not assigned duties of Teacher-Librarian even though she passed an interview for this post. She held that she was entitled to this position because before the school year got under way but admittedly after her interview, she completed her Diploma in Library and Information Studies at the University of Malta.

Complainant based her grievance on the grounds that other Teachers who were not in possession of the Diploma in Library and Information Studies were allowed to fill vacancies for Librarians at the Higher Secondary School where she had been transferred. She disagreed with the explanation given by the education authorities that it is standard practice that upon being transferred to a new school a Teacher is not given a post of responsibility – in this case that of Librarian – to the detriment of another Teacher who already holds a similar position at that school.

Complainant also felt that she was treated unfairly because after she verified the results of the interviews, she found that although she fared better than a colleague at her new school, this candidate had nonetheless been assigned the post of School Librarian.

Facts and findings

In March 2007 complainant applied to be transferred from the Junior Lyceum where she had taught for around ten years. Her request was subsequently approved and in September she was assigned to teach Physics in a Higher Secondary School.

In April 2007 complainant had also applied for the post of Teacher-Librarian following the issue by the Department of Student Services and International Relations of the Education Division of a call for applications from Teachers already employed in state schools. Complainant, who never before held the post of School Librarian, indicated in her application that she had already applied for a transfer to a Higher Secondary School where vacancies existed and stated that at that time she was in the second year of her course for a Diploma in Library and Information Studies and would acquire this qualification later on during the year. Complainant was successful in her interview held in June 2007 while in August 2007 she completed her Diploma in Library and Information Studies.

Buoyed by her diploma and aware that she fared better in her interview than the incumbents, soon after the school year started in September 2007 complainant approached the Education Division for an explanation why she was not chosen for the post of Teacher-Librarian and why instead of being given a full library load to which she believed that she was entitled, she was given merely two library sessions per week as a volunteer. In its reply to complainant the Division recalled her recent transfer to a Higher Secondary School and went on to point out that "*it is standard practice that a teacher who is transferred to a school will not be given a post of responsibility (in this case that of Librarian) to the detriment of another teacher already in post in that school.*"

The Ombudsman found that the call for applications for the posts of Teacher-Librarian stated that members of staff already holding these posts should apply for renewal and that in the assignment of these posts consideration would be given to a specialised qualification in librarianship. The call went on to state that "*in the case of more than one teacher in the same school holding such qualifications, the most senior teacher will be assigned such duties. Other teacher/s will be given the opportunity of moving to another school where a vacancy in such a post exists. All applicants, who are not in possession of qualifications ... ... will be required to sit for an interview.*"

The Ombudsman also found that when the call for applications was issued, the applicable provisions of the Collective Agreement then in force between the Government and the Malta Union of Teachers (MUT) stated as follows:

"*4.3.2 ... ... posts of special responsibility will be assigned to teachers for a period of at least two years through an internal call for applications issued by the Education Division ....*

4.3.3 In assigning ... (librarian duties) *... consideration shall be given to specialised qualifications in the particular field. In the case of more than one teacher in the same school holding such qualifications the most senior teacher will be assigned such duties in that particular school. Others will, however, be given the opportunity to move to another school on seniority basis.*"

In the new Collective Agreement signed in July 2007 the relevant provision was amended slightly to read as follows:

"*(4) In assigning ...* (librarian duties) *... consideration shall be given to holders of specialised qualifications ... ... In the case of more than one teacher in the same school holding such qualifications the most senior teacher will be assigned such duties in that particular school. Others will however be given the opportunity to move to another school on seniority basis.*"

In an exchange of correspondence with the Office of the Ombudsman on this complaint the Education Division wrote that upon being transferred to another school a Teacher does not gain immediate seniority over other staff members and is only integrated in the seniority list after spending at least one scholastic year in the new school. According to the Division this was standard practice that was also accepted by the Malta Union of Teachers.

The Education Division also pointed out that after complainant's request to be transferred to a Higher Secondary School was accepted early in September 2007 and she was deployed to teach Physics, a short while later she sent a letter of protest at the Division's failure to allocate to her a full library load at her new school. According to the Division, however, for the 2007/2008 school year complainant's new school had a complement of five Librarians; of these, four were reconfirmed in their post while the fifth position was filled by another Librarian who was transferred to this school as his previous school was closed down. The Division clarified that a redundancy always takes precedence in staff placement decisions.

The Education Division also referred to the Teacher mentioned in complainant's letter and explained that this person, although not in possession of a Diploma in Library and Information Studies, had applied for a renewal of her position at complainant's new school where she had already been teaching for several years. By contrast complainant submitted her first application for library duties while she was still a Physics Teacher at her former Junior Lyceum.

In her defence complainant referred to the point raised by the Division that it is standard practice, accepted by the Malta Union of Teachers, that teachers who are transferred to another school do not gain any seniority over other staff members and only get integrated in the seniority list after at least one year in their new school. According to complainant, however, the MUT confirmed that, on the contrary, whenever an employee is transferred to fill a permanent vacancy in a school, the employee would form part of the seniority list of the new school with immediate effect.

Complainant also observed that the agreement signed in July 2007 between the MUT and the Government makes no reference to any "*standard practice*" about seniority positions as stated by the Education Division and that seniority in the public service is determined by the Public Service Management Code.

Considerations and comments

In the course of his investigation the Ombudsman found that following her application for the post of Teacher-Librarian, complainant was interviewed

together with others whose two-year term in this post at her new school was due to expire since incumbents were also required to apply in order to be considered for selection. These incumbents, like complainant, were not – at least until the date of their interview – in possession of the specialised qualification that was referred to in the call for applications; and in line with the Collective Agreement, none of them enjoyed any precedence over the others.

In this respect the Ombudsman pointed out that complainant's argument that she later attained a Diploma in Library and Information Studies that entitled her to preference over others, carried no weight at all. This argument would have merited consideration only if she obtained the qualification before the closing date of the call for applications.

The Ombudsman observed that the Education Division had not denied that the order of merit showed that complainant obtained a better placing than an incumbent Teacher-Librarian. According to the Division, however, this person was preferred to complainant on the grounds of its policy that a Teacher who is transferred to another school does not gain any seniority over other members of staff at least until this teacher spends one scholastic year in the new school.

The Ombudsman found, however, that despite the assertion by the Division that this was standard practice that was also accepted by the Malta Union of Teachers, the Union denied that this was so. It maintained that when a staff member is transferred to fill a permanent vacancy in a school, this person becomes part of the seniority list of the new school with immediate effect. He also noted that the MUT stood by its claim – in his opinion, correctly – that there was no such reference to seniority in the July 2007 Agreement.

In his Final Opinion the Ombudsman went one step further and stated that no such reference existed prior to the issue of the call in July 2007. Neither was any reference made to any such provision in the call for applications. The only preference that seniority conveys occurs in instances where more than one applicant possesses the preferred qualification but seniority does not apply in the case of applicants who do not possess the preferred qualification.

The Ombudsman also referred to complainant's claim that a Teacher without the preferred qualification was brought from another school and to the explanation by the education authorities that this person had been transferred to the school where complainant had been posted because his former school was closed down and he became redundant. The Ombudsman understood, however, that a redundancy always takes precedence while complainant had not even challenged this procedure.

Conclusions and recommendation

Taking everything into account the Ombudsman concluded that complainant's claim of precedence by virtue of her Diploma in Library and Information Studies was not sustained because she obtained this qualification after the closing date of the call for applications.

On the other hand he upheld the claim that she should have been given preference over any other applicant whom she preceded in the final order of merit since after all this is what a competitive interview is for. Nowhere in the Collective Agreement or in the call for applications itself was there any reference that incumbents who apply for a renewal of their term take precedence over newcomers who apply for the same post/s in the same school.

The Ombudsman therefore recommended that complainant deserved to be given the post of Teacher-Librarian and reiterated an earlier recommendation made in a similar case that representatives of the Education Division and the Malta Union of Teachers should meet to clarify issues related to the July 2007 Agreement and agree on an interpretation that would remove any doubts for the filling of similar posts in future.

The Team Manager who would be Unit Manager

The complaint

The Ombudsman received a complaint from a Team Manager in the Environment Protection Directorate (EPD) of the Malta Environment and Planning Authority (Mepa) who complained of discrimination when the Board of the Authority upheld the recommendation to appoint five Acting Unit Managers in this directorate from its complement of six Team Managers as from 1 January 2008 and he was the only Team Manager to be left out despite his professional and academic background and wide experience. He claimed that persons appointed to these posts had served as Team Managers only for a few years and that it would have been more equitable to tailor the Directorate's new structure in a way that all its Team Managers would have been upgraded.

Complainant expressed surprise at the stand by Mepa management that the acting appointments ensured continuity and a smooth handover since Acting Unit Managers were given a workload unrelated to their previous work. While admitting that management has the prerogative under the Collective Agreement to assign acting staff grades, he felt that these appointments were not really a temporary measure since the replacement of employees in an acting capacity hardly ever occurred in the years that the Authority had been in existence.

The Authority replied that complainant's claims were unwarranted since the Collective Agreement allows management to appoint officers in an acting capacity provided a call for the filling of vacancies is issued within three months from the issue of acting appointments. The Acting Unit Managers were appointed following acceptance by the Mepa Board of a proposal submitted by the Director of Environment in 2007 to set up five units in the Environment Protection Directorate to strengthen middle and line management and restructure the Directorate on functional rather than thematic lines and also took account of Malta's obligations arising out of accession to the EU, particularly the environmental *acquis*.

The Authority explained that the restructuring process that was called into doubt by complainant was meant to achieve a more flexible allocation of manpower in the Directorate and that thematic issues were covered by Teams housed within each Unit. The Authority maintained that the creation of further Units of a thematic nature would weaken flexibility and create a precedent since other thematic sections could demand a similar upgrading that would increase the demand for administrative and support staff and push up recurrent costs.

Mepa management went on to explain that the new structure was approved in August 2007 following consultations with unions and staff and the new structure was planned to come into effect on 1 January 2008. In the meantime interim measures were taken to ensure a smooth transition while key functions were identified and allocated within the Units in the new structure.

The Authority denied that Acting Unit Managers were allocated a workload that was unrelated to their original duties and gave details about their old and new responsibilities. It insisted that the acting appointments were without prejudice to the official call for applications issued in mid-November 2007 and open up to the end of the month and assured the Ombudsman that no advantage had been reaped by these employees since the selection board was instructed not to take account of applicants' track record beyond the end of November 2007. Mepa management also insisted that in senior management positions, academic qualifications and experience in a thematic area are not the only considerations and that it laid store on a broad knowledge of environmental and related issues, management skills and a general aptitude for the role.

Mepa justified its action to set up five Units by explaining that the Team headed by complainant is the only EPD team without any direct obligations arising out of Malta's EU membership. Furthermore, the role of complainant's Team in the Authority diminished with the setting up of the Malta Resources Authority that assumed responsibility for complainant's area of operation.

Mepa management clarified that complainant's proposal to create six instead of five Units was not based on good management and improved efficiency. The basis of any manpower reorganization plan should be higher levels of efficiency and not the wish to address the situation of any particular employee.

In turn complainant stated that the Board consistently ignored his proposal to upgrade his Team to a fully functional Unit together with the five other Units that were recommended by the Director of Environment. He alleged that the fragmentation of functions covered by his Team and the allocation of these tasks to other Units were merely intended to weaken its potential to become a Unit.

Complainant argued that contrary to what was stated by the Authority, his area of operations was a fully-fledged functional discipline with several obligations arising from EU legislation and showed surprise that his Team's functions were not considered to warrant the treatment given to other Units in the new EPD structure. He expressed concern at the assertion that his Team was the only one with minimal obligations arising out of EU membership and asserted that its activities fell within the remit of Malta's EU obligations under the environmental *acquis*.

Complainant rejected the reference to the Malta Resources Authority Act since his Team derived its responsibilities from the Development Planning Act and the Environment Protection Act. At the same time the Memorandum of Understanding between Mepa and the Malta Resources Authority did not envisage that Mepa would diminish its involvement in the regulation of the sector covered by complainant's Team and in fact the MRA had asked Mepa to provide it with inspectorate services in this area.

Complainant reiterated that the Authority's claim that the workload allocated to Acting Unit Managers was related to their original duties was only partly true and in any case could also have applied in his respect. Appointees retained all or part of their workload and were given additional duties that were not always related to their previous tasks.

Complainant added that he had a faint suspicion that since the selected persons were all some twenty years his junior, his age could have been the reason why he was not appointed Acting Unit Manager.

On its part the Authority held firmly that it acted in terms of the Collective Agreement and had the prerogative to identify the Units that were required after giving due consideration to the needs and priorities of the organization, its workload and the level of decision-making in its various sectors. The Authority

explained that complainant's proposal to raise his Team to Unit status was hard to justify in the context of a newly-restructured Environment Protection Directorate since the work of his Team under the Environment Protection Act constitutes a very small part of the functions of the Directorate which is heavily driven by the *acquis* in the area of the environment.

The Authority went on to explain that an overriding consideration in the choice of Acting Unit Managers was the need to ensure the least disruption in the take up of work on the existing Directives and ongoing EC legislative proposals with the entry into effect of the new structure in 2008. Acting Unit Managers already carried out a substantial amount of work under the Environment Protection Act while complainant's Team performed principally functions under the Development Planning Act and only had limited work under the former Act.

Mepa management was emphatic that the age of complainant and of the selected applicants had nothing to do with the acting appointments and the fact that Acting Unit Managers were young was hardly surprising since most of the Authority's employees are young or middle aged.

The Authority turned down the claim that Acting Unit Managers had an advantage in the selection process because the interval between their appointment and interviews for Unit Managers was so short that they could hardly claim any additional experience or the achievement of any objectives during this time. The Authority assured the Ombudsman that candidates for the post of Unit Managers were judged on the *curriculum vitae* provided in their applications while the board for the selection of Unit Managers was advised by independent consultants who reported on the aptitude and characteristics of each applicant following tests based on internationally accepted methodologies.

Comments and considerations

The Ombudsman observed that complainant's grievance centred around two main arguments:

- firstly, the structure proposed for approval by the Board of the Authority could easily have been tailored in a way to absorb all the Teams currently in operation so that all Team Managers in the Environment Protection Directorate would have been upgraded to Unit Managers; and
- secondly, although the Collective Agreement allows Mepa management a free hand to appoint employees in an acting capacity as long as a call for applications is issued within three months, the acting appointments made by management brought about an injustice in regard to complainant since he was as qualified, if not better qualified, and even possessed more experience than others who were appointed Acting Unit Managers.

The Ombudsman commented that complainant never questioned the need of having five Units in the Environment Protection Directorate but proposed that his Team, the only one that was left out of the new structure, should have been given the status of a Unit as well given its considerable workload. Complainant was upset that as a result of the reorganization of the Directorate, the functions performed by his Team would be fragmented and assigned to the new Units.

The Ombudsman noted that it is not his function to change a decision taken by the Board on the organizational structure to be adopted by the Authority. In this case the identification of the Units necessary for the proper functioning of the Authority is a prerogative of the Board and his Office cannot substitute a decision taken on this issue unless there is proof that the decision was not justified or was unfair. No such evidence had emerged in this case.

The Ombudsman shared the observation by the Authority that a reorganization exercise should increase efficiency and not address the situation of particular individuals. Any such process should be driven by the needs and priorities of the body concerned and its workload and his Office is not competent or authorised to make any such considerations on behalf of a public body.

The Ombudsman took note that the Mepa Board restructured the EPD along functional rather than thematic lines, taking particular account of the obligations arising out of Malta's accession to the EU and especially the environmental *acquis*. This restructuring was meant to make the Directorate more flexible and cost effective and the point had been made that if complainant's Team were granted Unit status in its own right, this would result in additional costs and demands for more administrative and support staff.

Mepa management did not consider any such increase justified because the work of complainant's Team under the Environment Protection Act constitutes a very small part of the functions of the Environmental Protection Directorate. The Authority further substantiated its stand by insisting that complainant's Team was the only Team in the EPD with few direct obligations stemming from Malta's membership of the Union.

The second issue raised by complainant was that he had been discriminated against when, unlike other Team Managers, he was not appointed Acting Unit Manager pending the completion of the process to select Unit Managers on a permanent basis even though in his view his professional and academic background was superior to that of the selected persons. He held that it was difficult for Mepa to justify these appointments on the grounds that these persons were selected to ensure continuity because several Acting Unit Managers were given a workload that was unrelated to their previous work. Complainant also

believed that since those who were appointed were some twenty years younger, his age could have been the reason why he was left out and felt that Acting Unit Managers could have gained an unfair advantage since they occupied these positions for several months and during this period acquired practical experience and enhanced their managerial skills.

On its part the Authority insisted that it was entitled under the Collective Agreement to appoint in an acting capacity whoever it deemed fit and that these appointments were without prejudice to the official call for applications. It was confirmed that to ensure a fair process the selection board was instructed to take into account each applicant's *curriculum vitae* up to the date of the submission of applications while external consultants were asked to report on the aptitudes of each applicant.

Mepa management insisted that the age factor was not taken into consideration at all while an important criterion in the selection process was the need to ensure minimum disruption in the take up of work on existing EU Directives and ongoing EC legislative proposals with the launching of the new EPD structure.

The Ombudsman admitted that he understood complainant's state of mind following the appointment of five Acting Unit Managers while he was the only who was left out. He appreciated that complainant must have been upset that Acting Unit Managers were younger and held their previous appointments for a lesser number of years – and the Authority had not contradicted these facts. He commented, however, that an employee who is younger in age is not necessarily less competent than an older worker. As rightly pointed out by the Authority, experience and qualifications are not the only criteria in applications for senior management positions and factors such as management skills, a general aptitude for the job and, in this particular case, a broad knowledge of environmental issues and related matters are fundamental.

The Ombudsman observed that Mepa management never implied that complainant was not competent or that he did not perform his work in a diligent manner but the choice was based on other considerations that were connected with the main aims of the restructuring of the Authority and management vehemently denied any discrimination in the selection process.

The Ombudsman felt, however, that complainant's concerns with regard to the advantage gained by Acting Unit Mangers were justified. His contention that generally persons in acting positions are subsequently chosen to fill vacancies on a permanent basis was not challenged by Mepa and although the Authority was correct to state that once complainant held a management position for several years, he should already possess experience and management skills,

Acting Unit Mangers were clearly in a position to acquire first hand experience in directing Units forming part of Mepa's new structure and this experience was likely to give them a head start in the selection process even though it was not meant to be considered in the evaluation of their *curriculum vitae*. The Ombudsman rejected Mepa's view that the interval between the appointment of Acting Unit Managers and their interview was too short to enable them to claim any additional experience.

In such a situation the Ombudsman stated that it would have been better for the sake of equity and transparency if the structure approved by the Board had been implemented straightaway upon the conclusion of the selection process for the filling of the vacancies rather than resort to acting appointments.

The Ombudsman concluded that there was no evidence that led him to believe that the acting appointments were made with the express intention to discriminate against complainant. Mepa was credible in its explanation that the EPD would be more effective if it was reorganized on functional rather than on thematic lines and that thematic issues could best be dealt with by teams created within each Unit.

At the same time the Ombudsman commented that it appeared that the previous work of Acting Unit Managers was mostly related to EU Directives and that his review of the workload allocated to Acting Unit Managers confirmed that this work was related to their previous duties. He therefore accepted Mepa's position and agreed that the Authority's approach was plausible on the grounds that Malta's obligations under the *acquis* could not have been ignored for any length of time as a result of the disruption that the reorganization could have created. It was also understandable that since it was planned that the new structure would come into effect in January 2008, interim measures – such as the appointment of Acting Unit Managers and the allocation of key tasks to them – had to be taken to ensure a smooth transition.

The Ombudsman also observed that it is to be expected that when restructuring occurs, responsibilities need to be adjusted and a reallocation of some of the duties of employees is often necessary. In the case of complainant, however, his appointment as Acting Unit Manager was not considered justified because his Team was the one with the least direct obligations arising in connection with Malta's EU membership.

Conclusion

The Ombudsman concluded that there were no grounds for him to believe that Mepa improperly discriminated against complainant and he found no evidence

of maladministration. He deemed it necessary, however, to point out that this incident could have been avoided and justice would have been seen to be done if no applicant was given an undue advantage in the selection process in view of the experience that a candidate holding an acting position invariably acquires.

Mindful of the proposal that the Team headed by complainant be moved under the Planning Directorate, the Ombudsman went on to recommend that complainant's contribution, his expertise and years of experience be given due recognition even in the light of the fact that these qualities were never put in question by the Authority.

The making of a Qualified Expert in medical radiation physics

The complaint

In a complaint with the Office of the Ombudsman, an employee in the Health Division maintained that there should be only one Qualified Expert on radiation protection in Malta and that this position should be occupied by a qualified medical radiation physicist so that in this way Malta's criteria for the appointment, selection and approval of a Qualified Expert would fall in line with those found in other EU countries. As a result persons not in possession of appropriate qualifications would no longer be considered as Qualified Experts in this field but as Radiation Protection Officers.

Facts of the case

In 2004 complainant resigned from his post as Diagnostic Radiographer at St Luke's Hospital and signed a contract with the Health Division to read for a master's degree in Medical Radiation Physics and train in Medical Physics on a two-year course in London. Complainant qualified in 2005 and spent a further year undergoing training throughout 2006.

Upon coming back to Malta and he was about to start his duties as a Medical Physicist with responsibilities in radiation protection and quality assurance in diagnostic radiology, complainant found from the website of the Occupational Health and Safety Authority (OHSA) that the Radiation Protection Board (RPB) had already recognized other persons to act as Qualified Experts (QEs) in his own sphere of activity. Complainant was particularly surprised to discover that these recognized QEs were none other than some of his ex-colleagues at the Health Division who were all diagnostic radiographers.

Complainant explained that when he raised the matter with OHSA he was told that the Authority was aware of this situation and that the Authority was afraid

that his return to Malta happened somewhat late in the sense that criteria for the selection of Qualified Experts had already been established prior to his return to Malta. Complainant went on to state that before the OHSA established these posts, the Health Division used to employ expatriate medical physicists with experience in radiation protection to perform these duties and that at that time these foreign employees used to be called Radiation Protection Advisers.

Complainant added that while he was undergoing his course of studies and training in the UK, these ex-employees of the Health Division happened to be his supervisors. According to complainant these persons agreed that recognized Qualified Experts in Malta did not have sufficient expertise for the tasks involved in this position and to give advice on all aspects of radiation protection to employers in the medical field and in the industrial sector. This was confirmed in documents that were written and signed by these individuals and that were presented by complainant to the Ombudsman.

Complainant also referred to a document captioned *Radiation Protection – The status of the radiation protection expert in the EU Member States and applicant countries* (Issue No 133) that was prepared by the European Commission in 2003 which recommended that "*in Malta medical physicists specially trained in radiation protection shall be considered as QEs*". However, according to complainant, since the Occupational Health and Safety Authority had not followed the Commission's recommendation, this led to a situation where the Authority had several recognized Qualified Experts instead of having a number of local officers who would fall under the direct line of command of only one Qualified Expert.

The Ombudsman sought clarification on complainant's assertions from the Radiation Protection Board that is responsible for these issues and operates in an autonomous manner from the Authority from whom it only receives administrative support. The Board provided the Ombudsman with a detailed account on a point-by-point basis where it refuted complainant's allegations.

With regard to the claim that it had set inappropriately low criteria for Qualified Experts without any proper consultation, the Board submitted that these criteria were established in accordance with recommendations of the European Union with the help of an independent technical adviser who was recommended to the Board by the International Atomic Energy Agency (IAEA). The Board went on to explain that it is bound to follow these recommendations but assured the Ombudsman that if the EU established new guidelines on the appointment and selection of Qualified Experts, it would not hesitate to review its criteria to ensure that it would be in line with the latest EU provisions.

Regarding complainant's claim that he was subjected to discrimination and was not contacted or even considered to become a Qualified Expert, the Board pointed out that it did not need to approach or to seek any person's permission or approval to appoint a Qualified Expert. It was explained that when complainant approached the Board on this issue, it gave him full and complete answers to his questions and he had not raised the issue again.

On complainant's assertion that there should be only one Qualified Expert for Malta, the Board replied that this was simply not a practical proposal since ionising radiation is used in many different applications and it is highly unlikely that a single person would meet all the criteria for all the different aspects of medical and industrial applications.

Despite these explanations complainant continued to contest the position taken by the Radiation Protection Board. He referred to international documentation, including IAEA documents, which in his view prove that it is recommended that a Qualified Expert in Medical Physics should be a medical physicist – which was in fact his own profession – and submitted that the personnel who were approved and designated by the Board as Qualified Experts should instead be redefined as Radiation Protection Officers. Further exchanges of correspondence during the Ombudsman's investigation provided interesting details on the functions of Qualified Experts and Medical Physics Experts (MPEs) in terms of the relevant EU Directives and Maltese legislation which, according to the Board, are not only different but should not be confused.

Considerations

The Ombudsman commented that the debate between complainant and the RPB centred largely on the qualifications that Qualified Experts should possess and whether QEs appointed in Malta following calls for applications are required to satisfy criteria that are inferior when compared to radiotherapy. Since there was no allegation of discrimination or unjust treatment, the Ombudsman limited his scrutiny to an investigation into alleged acts of maladministration of which complainant maintained that he was a victim.

According to the Ombudsman, crucial to the determination of this complaint was the fact that Legal Notice No 44 of 2003[1] (that provides for adequate protection of people against the harmful effects of radiation and for the safety of radiation sources and for the role of Qualified Experts in these fields) and Legal Notice No 472 of 2004[2] (that deals with medical exposure and concerns the

1 Nuclear Safety and Radiation Protection Regulations, 2003.
2 Ionising Radiation Medical Exposure Regulations, 2004.

duties of Medical Physics Experts) both transpose distinct EU Directives under the Euratom Treaty. In particular Article 33 of this Treaty states: "*Each Member State shall lay down the appropriate provisions, whether by legislation, regulation or administrative action, to ensure compliance with the basic standards which have been established and shall take the necessary measures with regard to teaching, education and vocational training.*"

The Ombudsman was of the opinion that the Radiation Protection Board was correct to submit that this Article clearly leaves it up to the Maltese authorities to set up a system that would comply with the basic EU provisions; and having examined Maltese regulations, the European Commission came to the conclusion that Maltese legislation provides an adequate definition of both a Qualified Expert and of a Medical Physics Expert.

The Ombudsman also observed that the Radiation Protection Board is by law the competent authority entrusted with the determination of policy in this field. It has the function to determine the criteria, qualifications and competence that officials that fall under its jurisdiction are required to possess.

The Ombudsman commented that at the same time complainant may be justified in contesting the policies that this Board establishes or the criteria that it adopts even though these were set up using the knowledge and experience of an advisor recommended by the International Atomic Energy Agency with reference to communication 91/C 103/03 from the European Commission. Complainant also has every right to challenge the Board's decision and to query its competence. Ultimately, however, its decisions on matters of policy are not subject to the scrutiny of the Ombudsman unless they appear to be manifestly unfounded, grossly incompetent, unjust or improperly discriminatory; but no evidence at all emerged that this was the case.

What emerged quite clearly in this grievance, according to the Ombudsman, was the fact that the issue arose because complainant was overqualified for a position according to criteria set by the Radiation Protection Board that allowed other less qualified persons to be also eligible for the post. Complainant firmly believed that criteria used by the Radiation Protection Board were unfair and discriminatory in the sense that persons without a master's degree in Medical Radiation Physics could meet these criteria and be approved as Qualified Experts.

On the other hand the Board maintained that its criteria were in line with the current requirements of the European Commission and that it has sufficient knowledge and experience in both medical and industrial applications to set criteria that meet Commission guidelines. The Board also held that in addition

to advice from its technical advisor, it has the ability as the Maltese regulatory authority to seek advice from overseas contacts that it had built up over the years as well as international bodies such as the IAEA.

Taking these considerations into account the Ombudsman turned down complainant's submission that the Board acted in an incompetent manner and that it failed to make proper assessments. He expressed his conviction that if the Board failed to live up to the expectations of the European Commission, appropriate measures would have been taken by the authorities to rectify this situation. In addition the Ombudsman was of the view that it was likely that on this issue complainant could seek redress from the relevant EU institution if he was confident that his interpretation of the Legal Notices transposing the relevant EU Directives was correct.

The Ombudsman concluded that even if this were so, this would merely amount to a misunderstanding that could not be considered as equivalent to an act of maladministration; and on these grounds the complaint could not be sustained.

Contrasting assessments of the degree of disability of an injured employee

The complaint

An employee with a local construction company who suffered severe multiple injuries when he fell three stories while carrying out finishing works on a commercial block in December 2003, lodged a complaint with the Ombudsman where he explained that on the advice of a specially appointed medical board, the Director of Social Security declared him to suffer from a 35% disability and awarded him a disablement pension based on this degree of disability.

When complainant appealed against this decision to the Umpire and claimed that the degree of his disability as appraised by this board was significantly lower than that acknowledged by his own private specialists, the Umpire sent the matter back to the Director of Social Security for reconsideration because in his view this was not a proper basis on which to lodge an appeal. However, when after several months this formal reconsideration by the Director did not take place, complainant decided to raise his concerns with the Ombudsman.

Facts of the case

The Ombudsman found that complainant filed a report with the Department of Social Security a few days after the accident occurred and that he remained unfit

for work all through 2004 while he continued to undergo treatment for his injuries. Although complainant was eventually declared fit to resume work in mid-December 2004, he continued to complain of several ailments related to the injuries that he sustained.

Early in 2005 an *ad hoc* medical board consisting of two family medical practitioners and an orthopaedic surgeon was set up by the Department of Social Security to assess the extent of complainant's disability. Complainant made available to this board the reports that were prepared in 2004 by three specialists about his condition and the extent of his injuries as well as their assessment of the degree of his disability.

In February 2005 complainant was diagnosed by the department's medical board to be suffering from a 35% permanent disability and informed of the rate of his weekly disability pension on the basis of this diagnosis. The department also informed him of his right of appeal to the Umpire "*on any question of law or principle of importance*" within thirty days from the date of this letter.

Complainant duly exercised this right of appeal. He submitted that the extent of his disability at 35% as too low when compared to the disability of 57% that had been certified by his private consultants. However, a few days later the Umpire informed him that the decision by the Director of Social Security, based on the medical board's position, was not subject to appeal according to law and that the case had been referred back for revision to the Director. Feeling dismayed upon being told during a telephone conversation with department officials that nothing could be done to help him in his situation, complainant broached the matter with the Ombudsman who in turn approached the Director of Social Security to be informed of the action that the department planned to take in the light of the Umpire's request for reconsideration.

In his reply the Director said that he felt there was no need of any reappraisal or reconsideration on his part since "*there were no new elements or circumstances to reconsider.*" He affirmed that there was also no need to consider the whole issue anew because the views of complainant's private consultants amounted merely to "*only another opinion*" by different consultants.

The Director pointed out that if a general medical practitioner had investigated this case on behalf of his department, he would willingly have referred it for further reconsideration. However, feeling that it would be "*unethical to challenge the opinion of a medical specialist*" and especially since in this particular case there were contrasting opinions from different consultants, he stood by the decision taken by the medical panel appointed by his department.

The Ombudsman noted that the Social Security Act states that where an accident or industrial disease results in the permanent loss of physical or mental faculty, the person concerned shall be entitled to an injury grant or an injury pension. Article 106 of the Act states that every claim for a benefit, pension, allowance or assistance shall be considered by the Director who may decide to allow or disallow any such claim provided that

"*(a) if the claim is for injury grant, injury pension, medical assistance or social assistance ..... the Director shall, before giving his decision, ... consult on the medical aspects of the claim one or more persons holding the warrant to practise the medical profession drawn from a panel of persons appointed by the Minister for the purpose of advising on such cases, as the nature of the claim may require;*
(b) if the claim is for injury benefit and the resultant period of incapacity for work exceeds ten benefit days the provisions of paragraph (a) of this proviso shall apply ... ...
..... (e) if the claim is for a pension in respect of invalidity, the Director shall, before giving his decision ..... consult on the medical aspects of the claim, one or more persons holding the warrant to practise the medical profession appointed by the Minister for the purpose of advising on such cases..."

Sub-article 108(1) of the Social Security Act states that an appeal arising on a claim for an injury grant against any decision by the Director of Social Security should be launched with the Umpire "*on any question of law or principle of importance ... ... unless the claim has been rejected by the Director following consultation by the said Director on the medical aspects of the claim ... ... in which case the Director may revise his decision... ...*"

Section 110 of the Act states that "*The Director or the Umpire, having given a decision on any claim or question, may review that decision if he is satisfied that* -
(a) it was given in ignorance of or was based on a mistake as to some material fact; or
(b) *since the date of the decision there has been a relevant change of circumstances,*
and may give a revised decision to have effect from such date as he may determine."

Considerations and comments

The Ombudsman made it clear that it is not up to his Office to determine whether the disability verdict reached on complainant's injury was correct or not although at the same time he underlined that citizens are entitled to have their affairs

handled in accordance with the law, properly and with all due care. This meant that his role in this instance was limited to an inquiry into steps taken by the Director of Social Security to handle this case after the Umpire referred it back to the department for reconsideration.

The Ombudsman pointed out that there were two aspects to this case: firstly, a scrutiny whether the relevant provisions of the Social Security Act were observed; and, secondly, if the principles of good administration were applied properly and if the Department of Social Security behaved equitably and in an administratively correct manner.

With regard to the application of the Social Security Act, the Ombudsman pointed out that the law leaves no place for any ambiguity. A decision on whether to award an injury pension has to be taken by the Director of Social Security after consultation with the medical panel as laid down in Article 106 of the Act. In the absence of a rejection of an application in accordance with Article 108 of the Act an applicant can only appeal to the Umpire "*on any question of law or principle of importance.*"

The Ombudsman noted, however, that complainant had not appealed on these grounds but appealed instead on the merits of the board's decision and the Umpire, not surprisingly, turned down his appeal. Nonetheless, in this instance the Umpire did not stop there but went on to ask the Director to reconsider the case. Under Article 110 of the Social Security Act it is within the Director's discretion to decide that there was no basis for any such reconsideration.

What, however, caught the Ombudsman's attention in the handling of complainant's application was the composition of the medical board appointed by the Director in terms of the law. Equally important in the Ombudsman's view was the manner in which the Director exercised his discretion in respect of the need to reconsider the case as suggested by the Umpire.

While stressing that the composition of the medical panel respected the letter of the law and was valid, the Ombudsman felt, however, that this gave rise to some queries. The Director himself admitted that whereas if a general practitioner had investigated the case he would willingly have referred it back for reconsideration, on the other hand he argued that "*it would be unethical to challenge the opinion of a medical specialist*" and more so in a case that was marked by different opinions from different consultants.

The Ombudsman observed in his Final Opinion that complainant had submitted certificates by specialists in three different specialities namely orthopaedics, neurology and ophthalmology while the medical board appointed by the

Department of Social Security to deal with this case included only a specialist in orthopaedics. While expressing full confidence and respect on the professional competence and integrity of the three board members, the Ombudsman, however, had difficulty in accepting the implication in the refusal by the Director of Social Security to reconsider the case as had been recommended by the Umpire that he had matched skill with skill.

The Ombudsman observed that one does not need to be an expert in the field of medicine to realize that expertise in orthopaedics does not extend to expertise in the field of ophthalmology even if certain neurological aspects could possibly come within the remit of an orthopaedic surgeon. This led him to conclude that on the basis of equity and in line with the Director's reasoning behind his refusal to reconsider complainant's request, the Director of Social Security should have taken due account of the fact that he had appointed an orthopaedic specialist and two general practitioners to decide on certificates submitted by an orthopaedic surgeon, a neurologist and an ophthalmologist, each of whom gave the degree of disability in his respective specialised field.

The Ombudsman stated that transparency requires that in this case all three certificates that registered a fact that was material to the determination of complainant's rights needed to be assessed by persons holding equivalent competences or qualifications.

Conclusion and recommendations

On this reasoning the Ombudsman concluded that while the Director's original decision was in accordance with the strict letter of the law, it was nonetheless based on an argument that was not according to its spirit. Nor was this decision sustainable on the basis of equity.

The Ombudsman said that the Director of Social Security would have been more prudent if he had at least sought clarification as to how members of the medical board reached their conclusions on the neurological and ophthalmologic claims made by complainant and supported by specialists in these fields. He stated that it would undoubtedly have been better had the Director ensured that the medical board included specialists who were competent to assess the certificates on complainant's disabilities that were presented by consultants who were specialists in their respective fields.

In the circumstances the Ombudsman upheld the complaint only in respect of the reconsideration suggested by the Umpire and recommended that the Director of Social Security should reconsider his decision and take appropriate steps to ensure that complainant's claims in respect of his neurological and ophthalmologic

problems are addressed in an equitable manner after having consulted with specialists in these fields.

In the course of follow-up action by the Ombudsman on this case the Director of Social Security explained that the discrepancy in the assessment of the extent of complainant's disability between the department's medical board and his private consultants arose in view of the different criteria for the evaluation of disability in compensable injuries that were used by the two sides. The Director also informed the Ombudsman that members of the department's medical board who examined complainant's case had assured him that they had given due consideration to the medical reports that had been presented to them by complainant's consultants in their evaluation of the degree of his disability.

In the circumstances the Ombudsman agreed that since the Director of Social Security was not in a position to substitute the professional decision reached by the members of the medical panel and had no grounds to do so while he too could not interfere with a decision of this nature, there was no basis for him to uphold complainant's plea that he had been treated unfairly.

A particularly unjust situation that was allowed to persist for years on end

The complaint

An ex-government employee who joined Malta International Airport plc (MIA) in 1992 requested the intervention of the Ombudsman in connection with the amount of pension paid to him by the Treasury Department.

He explained that on 3 March 2005 the Tribunal for the Investigation of Injustices[3] concluded that an injustice had been committed against him when he was not promoted to the post of Executive. The Tribunal recommended that by way of compulsory remedy he should be appointed Executive with backdated effect to 1 January 1992; placed in the seniority list as if he had been promoted to this position on that date; and paid the difference in salary that he had foregone as a result of this injustice. However, although the Prime Minister endorsed the

3 The Tribunal for the Investigation of Injustices, established by Act VIII of 1997, has *"the power to hear and determine any written complaint made by any person who claims to have sustained injustice in consequence of any undue distinction, exclusion or preference which has been made or given to his prejudice, or of any disability or restriction to which he has been subjected, by any action taken by any person to whom this Act applies in respect of any of the following:*
(a) appointments, promotions or transfers of public officers;
(b) appointments, promotions or transfers of members, officers or employees of any body established by law ....."

Tribunal's decision on 29 September 2005 in terms of the Tribunal for the Investigation of Injustices Act[4] and instructed MIA to implement these decisions, the company refused to comply since it held that it was not legally bound or obliged to implement the Tribunal's recommendations.

Complainant's predicament was further compounded by the fact that as the date of his retirement in November 2007 approached, his request to the Management and Personnel Office (MPO) of the Office of the Prime Minister to find a solution for his situation faced another brick wall. The proposal to award him an *ex gratia* Treasury pension based on the salary paid to employees in an executive grade fell by the wayside in the face of objections by the Treasury Department and as a result, upon reaching retirement age complainant found that the amount of his pension was linked to the post that he actually occupied at the time of his retirement and to the last salary that he received from MIA. This meant that his pension was lower than the amount due to him in the light of the Tribunal's decision.

Initial considerations

When approached by the Ombudsman, the MPO pointed out that the award of a service pension is regulated by article 8C of the Pensions Ordinance and since at the time of his retirement complainant held the post of Administrator, the proposal to award him an *ex gratia* Treasury pension on the basis of a position of Executive that he never occupied and on the strength of emoluments that he never received would constitute a breach of the Pensions Ordinance. On these grounds the MPO concluded that complainant had no option but to start court proceedings against MIA to oblige it to implement the decision of the Tribunal.

The Ombudsman's initial reaction was to consider the law regarding the payment of a Treasury pension that is applicable in the case of an officer whose service with the Government has been terminated to take up permanent employment with a company that is designated by an Order of the President of Malta for the purposes of the relevant section of the Pensions Ordinance. The Ordinance expressly provides that upon the retirement of an officer who took permanent employment or was detailed with a company, corporation or entity referred to in subarticle (2) of article 8C before 1 April 2002, "*the pensionable emoluments of such officer on retirement shall ..... be the emoluments actually paid to such officer at the time of his retirement.*" Malta International Airport plc features in the list of companies, corporations and entities to which this provision applies.

4 *"It shall be the duty of the Prime Minister to implement the recommendations of the Tribunal by setting up such procedures and giving such directives as are necessary for the implementation of the said recommendations."*

The Ombudsman next referred to the Memorandum of Understanding between the Government, Malta International Airport Limited and trade unions on 27 November 1991 on employees of the Air Terminal Department who were given the opportunity to take up full time employment with Malta International Airport Limited. Under paragraph (f) of this Memorandum, employees who, like complainant, joined the Civil Service before 15 January 1979 retained their right to a pension under the Pensions Ordinance.[5] This meant that for the purpose of his Treasury pension complainant retained his contractual relationship with the Government and an entitlement to a service pension by virtue of his employment in government service before 15 January 1979. This also meant that since his relationship was exclusively with the Government, complainant could only enforce his right to a service pension against the Government, independently of any agreement that existed between the Government and MIA, and that the Government was bound to pay complainant his service pension in terms of the Pensions Ordinance. Furthermore, complainant's claim against the Government on the pensions issue was independent of any other claims that he rightly had as a result of the Tribunal's decision in March 2005.

The Ombudsman was of the view that regardless of the MIA's decision to observe or to ignore the Tribunal's recommendation, it was the Government's duty to pay complainant a service pension calculated on the salary that he would have received had the Tribunal's decision been implemented. He noted that once the Tribunal's decision that complainant suffered an injustice and should be appointed Executive was endorsed by the Prime Minister, the Government assumed the obligation to implement this recommendation and complainant's corresponding right was in this way created.

Other considerations by the Ombudsman

With regard to the grievance that complainant's Treasury pension was based on his salary upon his retirement in 2007 and was lower than the pension that he would have received had MIA honoured the Tribunal's recommendation that he should be appointed Executive as from 1992, the Ombudsman held that a central issue in this aspect of the case was the Prime Minister's approval of the Tribunal's findings and his directive to MIA to implement its recommendations. Once this directive binds the company in regard to that part of the decision concerning

5 Paragraph (f) of this Memorandum states that: *"For the purpose of those employees who, by virtue of their having joined the Government service prior to 15 January 1979, currently enjoy any pension and/or gratuity rights under the Pensions Ordinance, their full time employment with Malta International Airport Ltd ..... shall be considered as government employment for the purpose of the Pensions Ordinance only and their service with Malta International Airport Limited will be deemed service with Government for this purpose only."*

complainant's employment, it also binds the Government in respect of issues that may arise as a consequence of that decision such as the payment of a pension that depends only on government action.

The Ombudsman observed that once the Tribunal concluded that complainant suffered an injustice and recommended remedial action and since the Prime Minister endorsed the Tribunal's decision, to all intents and purposes complainant should have been considered as if he had been appointed to an executive post as of 1992. As a result, given that the amount of Treasury pension payable is dependent on an employee's appointment, the Ombudsman failed to understand why in this case the Treasury Department continued to insist that complainant did not occupy the position of Executive to which he was legally entitled since 1992.

Neither could the Ombudsman comprehend why complainant's right to a service pension calculated on the salary payable to an Executive, a pension which is due from the public administration, had been prejudiced by the position that was adopted all along by MIA. He observed that in this instance it was the state's obligation to remedy the judicially declared injustice in the shortest possible time – at least insofar as that part of the sentence that is dependent on the Government is concerned such as the determination of the amount and the payment of the pension owed to complainant.

The Ombudsman found it was incomprehensible how despite the Prime Minister's endorsement of the Tribunal's findings which bound the Government with regard to the amount of pension payable and to its actual payment, the Management and Personnel Office merely shrugged off the government's responsibility towards an injured party by suggesting that before the case could be considered any further, complainant "*should first pursue all possible avenues of redress ..... including taking MIA plc to court .....*" In his view this assertion was unacceptable since the pension to which complainant was entitled was dependent solely on the Government. Particularly in the light of the Prime Minister's endorsement of the Tribunal's decision, the department was bound to pay the pension in the correct amount regardless of whether complainant had proceeded against his employer judicially and independently of the outcome of any such proceedings.

The Ombudsman noted that the Treasury Department turned down the proposal to pay an *ex gratia* payment on the grounds that it doubted whether the Government was obliged to enter into the merits of the injustice suffered by complainant since he was already employed by MIA when the injustice occurred. The department also expressed doubts on the award of a Treasury pension, even on an *ex gratia* basis, in respect of an office which complainant never occupied and in respect of emoluments that he had never received.

The Ombudsman admitted that he found this situation particularly intriguing. In his view doubts expressed by the Treasury Department whether the Government was obliged to enter into the merits of an injustice suffered by complainant amounted to a contestation of a decision by the Prime Minister who was exercising functions entrusted to him by law when he directed that the Tribunal's recommendations were to be implemented by MIA and consequently by the administration. The Ombudsman expressed reservation whether the department could validly raise such doubts.

The Ombudsman considered the point made by the Treasury Department that on the basis of subarticle 8C(1) of the Pensions Ordinance it was open to question whether even an *ex gratia* Treasury pension may be awarded in respect of an office which complainant never occupied and emoluments that he had not received. The Ombudsman, however, was of the opinion that on this issue the reasoning of the Treasury Department was incorrect, not in line with the spirit of the Pensions Ordinance and did not interpret properly article 8C of this Ordinance.

On other occasions the Ombudsman expressed his disapproval of a restrictive interpretation of the Pensions Ordinance that would result in an unjust denial of a pension that a former public officer would be entitled to. In these instances he made it clear that in his view legislation regulating the rights of citizens for social benefits, particularly those that are contributory such as pensions under the Pensions Ordinance, should be interpreted in a way that would favour rather than deny the award of benefits to citizens. According to the Ombudsman a literal interpretation of the law often leads to a conclusion that is far from the intention of the legislator and that might even result in injustice.

The Ombudsman observed that in this instance where the administration was obliged to implement a decision by the Tribunal for the Investigation of Injustices, a literal interpretation of article 8C of the Pensions Ordinance had only led to the exacerbation of an injustice. He explained that in his view when the Ordinance speaks of "*emoluments actually paid to such officer at the time of his retirement*" these words do not mean that the amount payable by way of pension should be based on the amount actually received by way of salary by the employee at the time of retirement. Although this is so in most instances, exceptional situations could arise where an employee entitled to a pension that is pegged to a higher salary might not yet have received this salary for reasons beyond the employee's control.

The Ombudsman ruled that a just interpretation of the words "*emoluments actually paid to such officer*" can only refer to the amount to which the officer would be entitled by way of salary at the time of retirement. For the purpose of the computation of a service pension it is irrelevant whether the officer materially

received the salary once he is entitled to that emolument because the payment refers to the position held on termination of the officer's employment.

According to the Ombudsman it is neither logical nor legally correct to withhold a pension to which an officer would be entitled upon retirement when it is established that the employee was effectively awarded the appointment to which the salary is pegged, simply because the officer had not materially received this salary for whatever reason. Clearly the legislator cannot provide for all the eventualities that may arise when drafting the legislative provisions to be included under any law.

In the opinion of the Ombudsman complainant should be considered as having occupied the position of Executive since 1992 despite MIA's refusal to accept the Tribunal's recommendation. He ruled that even if a court of law were to declare that the company is not obliged to honour the decision of the Tribunal, the administration would still be bound to observe the recommendation of the Tribunal to rectify an injustice for which the public administration was held accountable insofar as the service pension is concerned once this was even endorsed by the Prime Minister.

Conclusion

The Ombudsman concluded that in his view the original proposal to grant complainant an *ex gratia* pension calculated on the basis of the salary that he would have received had he been appointed Executive, was correct. He was therefore of the opinion that the MPO and the Treasury Department should jointly resolve this impasse by the payment to complainant of a pension that would be calculated on the basis of the salary paid to an Executive together with arrears due as a result of lower pension payments made by the Treasury Department as from the date when complainant reached retirement age. The Ombudsman also recommended that complainant be paid the difference that was due to him if he had received a lump sum on his retirement.

The Ombudsman finally stated that other rights, if any, competent to complainant and arising out of the implementation of the decision by the Tribunal for the Investigation of Injustices both against the Government and MIA were to remain unprejudiced.

Despite several attempts by the Ombudsman urging the Government to accept his findings, the Government continued to refrain from implementing these recommendations since it was felt that any such action could prejudice a case that was filed in Court by a colleague of complainant against the Government and that was broadly on the same lines as complainant's own case.

The tenant who was adamant on his right to the airspace overlying his property

The complaint

A shop owner asked the Ombudsman to investigate his claim that the Housing Authority ignored a court ruling in respect of the airspace overlying his shop which the Authority continued to rent to a neighbour when this airspace, as confirmed by the court judgement, was his legitimate property. Complainant said that despite this ruling, the Authority turned a blind eye to the continued violation and use of his airspace by a third party.

Facts and findings

The Ombudsman ascertained that in 2007 complainant entered into a promise of sale agreement with the Housing Authority to acquire by way of purchase a shop and even paid the full price of this property when the promise of sale was signed although through no fault of his own, the final deed of sale was not concluded. The airspace above this shop was not excluded – but then neither was it mentioned – in the promise of sale document but since he held the tenancy of the premises as shown in this agreement, complainant objected to the unauthorised use of his property by a neighbour. The matter was eventually resolved by means of a court case in which the Authority was not a party.

In a judgement delivered on 30 April 2009 the First Hall of the Civil Court ruled that complainant was in possession of the airspace under dispute and ordered the third party to close the doorway that she had opened without complainant's consent and that led from her premises onto his airspace. The court also ordered the neighbour to cease to occupy this area and to remove the low dividing wall that she had built as well as her clothesline. However, although this third party complied with the court's rulings, complainant reported that she still kept a gas cylinder as well as electricity and water service installations on his property.

In order to get rid of this inconvenience and since he had acquired the premises in the first place from the Housing Authority, complainant requested the Authority to take action against his neighbour and to enable him to regain full possession of his airspace as soon as possible without any further hassle.

Considerations and comments

The Ombudsman noted that although according to complainant under the court judgement his neighbour was ordered to evict the roof, the court had in fact ruled that she was to stop accessing the airspace since it was satisfied that

complainant was in possession of this space. The Ombudsman also found that the court had not specifically ruled that complainant had proved that he was in possession of the airspace in terms of his agreement with the Authority and made no reference at all in its judgement to the promise of sale between the two sides. The Ombudsman noted that the Authority had not objected to the court order that complainant's neighbour should comply with its judgement.

When approached by the Ombudsman the Authority admitted that it had rented the airspace to the neighbour since it was under the impression that this roof was its property. The Authority added that once it understood that the neighbour to whom it unwittingly rented the airspace complied with these rulings, the case was settled and there was nothing else for it to do.

On the other hand complainant argued that the court judgment was not fully observed because although the door leading to the roof had been blocked, the neighbour was still making use of his property. While admitting that the gas facility and the water and electricity supply installations that belonged to his neighbour and that were kept on his roof had not featured in the court case, he argued that since the court directed his neighbour to cease to occupy the airspace, her action was in flagrant violation of this order.

Complainant expressed concern that the Housing Authority continued to receive the payment of rent from his neighbour even though the court upheld his plea that he enjoyed a right over the airspace. On this issue, however, the Ombudsman was presented with documentary evidence showing that after the court judgement and even before his Office launched its investigation on this complaint, the Authority in September 2009 told complainant's neighbour that the permit to use the airspace was being withdrawn with immediate effect and directed her to comply fully with the court ruling straightaway.

Conclusions and recommendations

In the light of his findings the Ombudsman concluded that the court judgement in the civil case instituted by complainant implied that the Housing Authority was not correct to rent to a third party airspace belonging to complainant when he was in lawful possession of that space. However, since the Authority acted immediately to correct this situation and informed complainant's neighbour in writing that the permit to use the airspace was being withdrawn with immediate effect, he ruled that any pending issues in respect of continued abuse by complainant's neighbour would be for complainant to pursue in court. As plaintiff in the civil court case which he instituted, it was up to complainant to have recourse to the courts again and plead that his neighbour failed to abide by its ruling.

The Ombudsman explained, however that the Housing Authority was not completely exempt from its obligation to safeguard complainant's right to the airspace. In the first instance it was its unlawful action, even if possibly a genuine mistake, in renting the airspace above complainant's property to a third party that led to litigation between complainant and his neighbour. The Authority's obligation, more so after the court judgement, was to stop the tenancy of the airspace and inform the tenant accordingly.

The Ombudsman also recommended that since the final deed of sale of the premises to complainant was still pending and since the court concluded that complainant was in possession of the airspace once this space had not been excluded in the lease agreement, the issue of the right to the airspace, even though not mentioned in the promise of sale document, be clarified in the final deed of sale and prior to its publication.

According to the Ombudsman it appeared that complainant had every right to insist that the property be transferred to him by title of sale free and unencumbered and including its airspace that would not be subject to any rights of third parties.

An unfair exchange rate formula for foreign service pensions based on an unjust application of the law

The complaint

The Ombudsman received a complaint from a pensioner regarding the exchange rate applied by the Department of Social Security in its calculation of the equivalent in local currency of his UK service pension for the purpose of computing his local social security retirement pension. Complainant felt that the department was applying an unreasonable rate of exchange for sterling and since his foreign service pension meant a deduction in his local pension, this resulted in a pension that was lower than the amount due to him.

Facts and findings

Complainant retired from the Royal Air Force in the UK in 1988 and was granted an annual service pension of £stg3780. Since during the years that he served abroad complainant also paid social security contributions in Malta, upon reaching the age of 61 years in April 2002 he became entitled to a Maltese pension under the Social Security Act. This Act provides for a deduction from a contributory retirement pension in cases where a pensioner receives a service pension such as a pension from abroad; and when complainant's local pension was first determined in 2002, the Department of Social Security applied the £stg/Lm exchange rate applicable at that time to put his UK pension at Lm2192

and, as from January 2008, at €5105. This amount was deducted from his local social security pension ever since.

Complainant was upset that the value of his UK service pension in terms of the local currency and based on this formula continued to be deducted by the department despite the very unfavourable £stg/€ rate of exchange that prevailed in 2009 when he presented his complaint. This meant that at that time the euro equivalent of his UK pension was €1144 less than what was considered by the Department of Social Security for deduction purposes from his local pension.

The Social Security Act allows for a deduction from the local retirement pension in the case of a pensioner who is also in receipt of a service pension which, as from 1 April 1978, is defined under this Act as:

"(i) ... ... a pension or other allowance awarded to a person at any time before or after the aforesaid date that is payable by or on behalf of his employer in respect of past services in Malta or abroad and shall in each and every case be considered on an uncommuted basis, and
... ...
(iii) with effect from January 6, 1996 net of increases in the amount payable of such Service Pension by way of cost of living increases awarded after January 7, 1995 and
(iv) with effect from October 4, 1997 a pension or other allowance ..... net of increases in the amount payable of such Service Pension by way of cost of living increases awarded after the initial award of such Service Pension; and
(v) with effect from the 5th January 2008, for the purposes of calculating the rate of a pension under this Act, a Service Pension net of four hundred and sixty-six euro (€466);
(vi) with effect from the 3rd January 2009, for the purposes of calculating the rate of a pension under this Act, a Service Pension net of another €200;"

When complainant sought redress, he found that the Department of Social Security was guided by its decision that for the assessment of a social security pension as from 4 October 1997 a service pension was to be considered at its original rate on the date of initial award and net of any cost of living increase after this award. Complainant also learnt that as a result of this decision, in order to determine the value of a service pension in a currency other than the currency in use in Malta, this pension is converted at the rate applicable on the date of its award and thereafter the rate remains unchanged even though the amount would increase by cost of living adjustments. The department explained that since it is the original rate of service pension and not the current rate that is taken into consideration, the rate of exchange should be that applicable in the year of the original award and in subsequent years the same amount should continue to be taken into account.

Not satisfied with the department's reply that there were no grounds to review its position, complainant approached the Ombudsman who in turn sought an explanation from the Department of Social Security with special reference to the legal and policy aspects of the exchange rate applied in these instances.

In his reply the Director of Social Security referred to article 2(1) of the Social Security Act which states that in an assessment where the claimant is also in receipt of a service pension, it is the original rate of service pension on the date of its initial award that is taken into consideration. According to the Director the original amount of the service pension does not change and increases that claimant might have benefited from throughout the years are ignored for re-assessment purposes. The Director observed that this policy applied even when sterling was stronger and complainant must have earned a higher service pension than the amount originally awarded to him.

Considerations and comments

In his investigation of this grievance the Ombudsman's initial consideration was whether the Department of Social Security was fair to continue to deduct from complainant's local retirement pension a portion of his service pension when the deducted sum was no longer real or actually received.

The Ombudsman recognized that the Social Security Act provides that from the local social security pension to which complainant became entitled in 2002 there should be deducted his UK service pension. The Act also includes an amendment, effective in 1997, that a service pension is to be considered without taking account of any cost of living increases.

By way of policy, though not specifically laid down by law, for the purpose of deduction from complainant's retirement pension the Department of Social Security interprets the law as empowering it to consider the 2002 equivalent to the currency used in Malta of complainant's service pension as a fixed sum to be used as the starting point for deduction, regardless of more favourable or less favourable rates of exchange of sterling. The department bases its argument on the 1997 amendment (i.e. subparagraph (iv) of the definition of service pension) in the sense that once the amount of service pension is considered net of increases due to the cost of living, it is the original sum in Maltese currency that should be considered, irrespective of exchange rate changes.

The Ombudsman, however, argued that the law does not say so and does not refer to any "*original rate of service pension*" even though the department uses these words in its arguments. The original rate of complainant's UK pension cannot, in the context of the definition of "*Service Pension*" in the Act, be

automatically interpreted as the 2002 sum or the exchange rate at that time and he concluded that the department has no sound legal grounds for its policy based on this interpretation of the law.

The Ombudsman raised other considerations. In his view Maltese recipients of any foreign pension can rightfully complain of double jeopardy. In the first place they are penalised by the 1979 legislative amendment, later incorporated in the Social Security Act, which was considered by them, not without reason, to be unjust and penalises all recipients of a service pension, whatever its origin, including a Maltese service pension. They are further aggravated by the department's interpretation of amendments to the Act whereby the amount in any foreign currency (except the euro) that they receive in service pension is not deducted from their social security pension, to which they are by law entitled, at the exchange rate at the time when they actually receive it but at the rate obtaining at the time when they first became entitled to it.

The relevant part of the 1979 amendment to the National Insurance Act brought to the fore by complainant's contestation states as follows:

"Abatement of pension due to service pension
92.(1) When a person is entitled to a service pension of which no part has been commuted, any pension arrived at in accordance with the provisions of article 91 of this Act shall be abated by the amount of such service pension"

The Ombudsman commented that this amendment was meant to level pension entitlement across the board and to ensure a 2⁄3 maximum national insurance pension to all. To achieve this, it was decreed that recipients of a service pension should not benefit from that pension to which they had contributed unless their service pension was less than the maximum national insurance pension, in which case they would only receive the difference. This amendment meant that no person who receives an uncommuted service pension could, from that date onwards, receive more that the maximum pension under the national insurance scheme. If a pensioner's service pension was less, the pension would be topped up to reach the two-thirds level while in the case of a service pension equivalent to or more than the maximum under the national insurance or social security scheme, the pensioner would receive no benefit.

The Ombudsman recalled that when enacted, this amendment was considered unjust and discriminatory by those adversely hit. He also recalled that after 1987 subsequent administrations introduced amendments whereby the two-thirds level was considered the minimum rate of pension to which a national insurance subscriber would be entitled and not the ceiling beyond which pensions might not rise.

The Ombudsman pointed out that it was clear that by the 1979 amendment the legislator wanted, when determining the amount that a pensioner had the right to receive from the national insurance or social security pension, to deduct from it any amount of pension that the pensioner was receiving at the same time from any other source. In those years most persons enjoying foreign service pensions received a British service pension and the exchange rate issue was irrelevant because sterling and the Lm were practically at par.

The Ombudsman stated that clearly it was never the intention of the legislator to create a situation where a person receiving a service pension would end up with a reduced two-thirds social security pension or with no pension at all simply because the value of the original pension would have been eroded through a deterioration of the exchange rate. The principle that a pensioner has to receive in real terms the maximum two-thirds social security pension in all cases where a pensioner is eligible for this amount cannot be put in doubt.

However, since the interpretation by the Department of Social Security could negatively affect pension rights under the social security contributory scheme, the Ombudsman felt that this policy could be qualified as potentially contrary to law, unjust, oppressive and improperly discriminatory. While recognizing that the 1979 amendment was an expression of the legislative will of Parliament, he stated that a law could not be qualified as unjust because it adversely affects or positively favours a section of the population and not another. It is of the essence of governance to reconcile the interests and needs of different sections of the community in furtherance of the common good.

The Ombudsman noted that in this case complainant did not contest the validity of the 1979 law or its subsequent amendments but objected to the department's interpretation that negatively affected the amount of his social security pension. Mindful of his function to determine whether this policy can be qualified as contrary to law, unreasonable, unjust, oppressive or improperly discriminatory, the Ombudsman declared that in his view the policy that developed and seemed to have been accepted over the years did not appear to be in conformity with the law. Once the exchange rate for sterling, the currency prevalent in such cases, reached a stage when its negative effect was, significantly in some cases, eroding service pensions paid in this currency, it was natural that pensioners would object to this situation.

The Government sought to justify its policy on the grounds that it already introduced amendments to meet in part its commitment to pensioners and since 1997 the service pension to be considered for the assessment of a social security pension was the original service pension on the date of initial award, net of any cost of living increase after the initial award. However, while amendments that

took place over the years offset the negative effects of the 1979 amendment, it was likely that more recent amendments were partly motivated by drastic exchange rate changes that brought significant reductions in the social security pensions of those with a foreign service pension even though it was unclear to what extent these amendments provide adequate relief against a drop in the effective value of foreign pensions. According to the Ombudsman, the main fault in the government's policy seemed to be its equiparating cost of living increases given in the UK with the loss of the value of sterling in relation to the Maltese lira and, in recent years, the euro although in his view the two concepts, though to some extent connected, are not interchangeable.

The Ombudsman went on to observe that it is an established principle at law that the rate of exchange has to be calculated at the rate prevailing on the date of maturity of a debt. This principle, enshrined in constant case law, supports the view that when the Department of Social Security issues social security pensions due to pensioners, it has to take into account the amount in service pension that a pensioner receives from any other source, calculated at the rate of exchange on the date when the pensioner actually receives it. Any exception to this rule can only be made either by agreement or by law.

The Ombudsman stated that the crux of the issue remained the interpretation of the 1979 amendment. It was obvious that the legislator intended at that time to ensure that a person entitled to a service pension would have the amount actually received in real terms deducted from his national security pension and that it was never the intention that a service pension for the purposes of this amendment should remain unchanged indefinitely, regardless of changes in currency values throughout the years. The 1979 amendment does not allow for a different interpretation and if the legislator wished to implement what the government policy is today, it would have been so decreed.

The Ombudsman commented that it was likely that over the years complainant made marginal gains or losses from fluctuations in the exchange rate of sterling but never complained about the system applied by the department. This seemed to indicate that the system was accepted even if there was no strong evidence that it was based on law and it was only when the exchange rate for sterling made a deep inroad into his social security pension that complainant was moved to present his objection.

The Ombudsman admitted that while administratively it may be acceptable to apply a uniform rate of exchange when fluctuations are minimal, when the exchange rate varies widely with negative effects on pensioners, the situation cannot be ignored; and this was what happened in recent years when sterling took a plunge. At a time when the persistent low exchange rate of the £stg

negatively affected complainant and others in his position, the department insisted on withholding a part of their pension without a clear legal basis for doing so. According to the Ombudsman, however, when more than one interpretation of the law is possible, it is the less detrimental version that should be applied. Furthermore, in this particular instance, no withholding in whole or in part of a pension was acceptable unless specifically sanctioned by law.

The Ombudsman referred to the argument by the Department of Social Security that pensioners in receipt of a service pension benefit from the fact that for the purpose of the deduction from their social security retirement pension only the "*original*" service pension net of any cost of living increases is taken into account; and this explains why the sum to be deducted is determined on the date of the original award of a service pension and thereafter remains a fixed one. The Ombudsman, however, ruled that this argument was not valid because the law makes no reference to the exchange rate that should be considered in the case of a pension payable in a foreign currency or state that the original rate of exchange is to apply. Neither does the law provide that the sum as originally determined is to continue to apply; and once the law has not so specified, it is incorrect for the department to argue in the way that it does.

The Ombudsman stated that whenever a significant variation occurs in the exchange rate, the service pension due to a pensioner varies correspondingly and it is unfair to deduct from the local contributory retirement pension an amount that is not actually received unless the law unequivocally says so. This applies also when there is a significantly favourable exchange rate and the department would pay a pension that would be higher than that to which a pensioner would be entitled.

Conclusions

In the light of these considerations, the Ombudsman concluded that the government's policy in the assessment of the amount of social security pension to which recipients of a service pension are entitled, in his opinion, does not conform to law.

The policy of the Department of Social Security to consider the value of a foreign service pension as equivalent to its value in terms of the Maltese currency at the time when it is first awarded and thereafter to continue to apply a fixed exchange rate irrespective of fluctuations has been followed for several years even though it is not based on any unequivocal provision of the law. However, although this policy has never been challenged, its application should nonetheless be subject to the principles of good administration including that of giving citizens a fair deal. While it may be administratively correct to apply a constant

rate of exchange for a foreign currency which experiences marginal fluctuations either way over the years, this policy ought to be kept under regular review in the case of marked exchange rate fluctuations that significantly erode pensioners' entitlement under the law.

The Ombudsman also concluded that the policy adopted by the Department of Social Security in certain circumstances can be qualified as unjust, oppressive and improperly discriminatory. However, since over the years the Government introduced several amendments to alleviate the negative effects of its own policy in varying degrees, the Ombudsman was of the view that complainant and other pensioners in his position were not entitled to a review of the amount of social security pension paid to them in the past.

Taking everything into account the Ombudsman finally recommended that the Government should urgently ensure that its policy is strictly in conformity with existing legal provisions and that the letter and spirit of the 1979 amendment and the Social Security Act are fully respected when assessing the rate of social security pension due to recipients of a foreign service pension.

Aware that on the one hand his recommendations had policy and financial implications and that, on the other, the issue in question affects a potentially vulnerable sector of society, in the months following the issue of his Final Opinion the Ombudsman urged the Department of Social Security on several occasions to report on the action which it planned to take. On its part the department explained that preliminary results of an exercise to assess individual cases of pensioners in the same situation as complainant revealed that whilst a number of them would enjoy an increase in their pension on the basis of the Ombudsman's guidelines, others would suffer a reduction although this would only be in theory since the law protects existing pensions.

The Ombudsman, while satisfied that this complex issue was now under active scrutiny by the government authorities, at the same time appreciated that a final decision must necessarily take time to mature and agreed to await the outcome of the department's deliberations.

The laptop from the US

The complaint

A parent who bought a laptop for his son applied for a grant of 16% on its cost under a scheme announced by the Government in February 2008 to encourage the purchase of computing equipment for domestic use. He was greatly upset shortly after the submission of this application to find that it was turned down

since the laptop was not purchased in Malta. Feeling aggrieved at this turn of events, he lodged a complaint with the Ombudsman because he insisted that his application was eligible and that he qualified for payment of the grant.

Facts of the case

Complainant explained that when early in 2008 his son, a full-time student at MCAST, needed to upgrade his computer, he took advantage of a scheme that was launched by the Ministry of Finance to promote the use of computers in Maltese households. However, since the computer that his son needed was not available locally, he ordered this model from the US through the internet.

Complainant stated that before he made arrangements to purchase this laptop directly from the US, he first contacted the Information Society Secretariat (ISS) of the Ministry for Investment, Industry and Information Technology, which was at that time responsible for the management of the scheme. On the phone a customer care official of the Secretariat referred him to regulations for eligibility for the grant that appeared in application forms obtainable from any Maltapost branch and assured him that in order to qualify for the grant it made no difference whether the computer was bought locally or from a non-EU Member State since as long as he paid VAT at 18% on the equipment he would be able to benefit from this offer.

Complainant was therefore highly surprised when after the laptop arrived from the US and he submitted his application form for a refund to the ISS, he found that it was turned down since the receipt indicated that the computer was not purchased locally while the rebate was limited to equipment purchased in Malta. He claimed to have been misled by the Secretariat when he was told to refer to the conditions of the scheme that appeared on application forms instead of being advised to pay attention in particular to the conditions that appeared in the *Government Gazette*.

Findings by the Ombudsman

The scheme *Grant on the purchase of computing equipment* launched in the *Government Gazette* on 29 February 2008 to encourage the purchase of computing equipment for domestic use, applied to expenditure incurred between 18 February and 30 May 2008 and provided that applications and supporting documents had to be submitted by 13 June 2008. The notice in the *Gazette* stated that application forms had to be collected from Maltapost branches and submitted by buyers following full payment, accompanied by the original fiscal receipt and the original invoice for the purchase of the equipment. The grant was capped to a refund of 16% of the total purchase price of the equipment up

to a maximum of €186.40 while the notice in the *Gazette* clearly limited the award of a grant to computer equipment "*purchased in Malta.*"

Documentation made available to the Ombudsman confirmed that the laptop was bought from the US and that the equipment, as evidenced by the customs declaration, was despatched on 6 June 2008 and arrived in Malta a few days later. Other documentation presented to the Ombudsman showed that complainant paid VAT charges on the laptop on 13 June 2008 and also paid customs clearance and other charges on 16 June 2008. Complainant insisted that although applications forms and documents had to be presented by 13 June 2008, his application was still on time because the department extended the term of the validity of the scheme.

According to the Malta Communications Authority that assumed the functions of the Information Society Secretariat in July 2008, the condition that the equipment had to be purchased in Malta was in fact among a set of conditions to determine whether an applicant was eligible or not under the scheme. Also according to the Authority, the decision to reject complainant's application was taken by the Ministry of Finance in accordance with regulations published in the *Government Gazette* since the ISS was not involved in the choice of eligible applicants.

The Ombudsman noted that the Malta Communications Authority understood that complainant's application was not eligible for the grant and was turned down because the receipt submitted with the application indicated that the equipment was not purchased in Malta – a fact which complainant did not contest. However, when the Ombudsman requested the VAT Department that was responsible for the issue of refunds under the scheme to forward documentation in its possession on this particular case, it was found that this department never received complainant's application.

Among papers made available to his Office by the VAT Department, however, the inquisitive eye of the Ombudsman found an email dated 19 June 2008 where an official from the Ministry for Infrastructure, Transport and Communications wrote to the Refunds Section of the VAT Department as follows: "*I've just been informed that only purchases made in Malta will be considered for a refund. Purchases made from EU and non-EU countries are not eligible. By any chance have you issued cheques for purchases made outside of Malta so far?*" The Refunds Section replied in turn that only purchases made in Malta were covered.

Since it was unlikely that this email concerned complainant's case given that his application was dated 7 August 2008, this note led the Ombudsman to believe

that at some point there must have been some doubts in circulation regarding the origin of purchases that were in fact eligible for a refund.

Considerations by the Ombudsman

The Ombudsman pointed out that the first aspect of this grievance concerned incorrect information given to complainant by the customer care section of the Information Society Secretariat and centred mainly around his claim that an employee of the Secretariat had assured him that it made no difference if the computer was bought locally or from a non-EU Member State and that as long as he paid 18% VAT he would benefit from the subsidy.

The second aspect of the grievance concerned the leaflet that was distributed to local households together with the application form to enable members of the public to participate in the scheme. Whereas the leaflet made no reference at all to the notice that appeared in the *Government Gazette*, the terms and conditions for eligibility in the scheme that were given in the application form did not include the requirement that the equipment had to be bought locally. Complainant raised the point that the department could not expect citizens to read every edition of the *Gazette*.

Following consideration of all the facts that emerged from his investigation the Ombudsman was of the opinion that complainant failed to provide any evidence that he was given incorrect information by an employee at the Information Society Secretariat who was authorised to provide details on the scheme. Complainant was unable to identify the person who allegedly misled him but admitted that the information given to him was relayed verbally by a person who answered his phone call to the Secretariat. As a result the Ombudsman was not in a position to confirm complainant's allegations although he commented that the email sent to the VAT Department on 19 June 2008 seemed to convey the impression that the authorities were possibly themselves unaware of this limitation.

On the other hand complainant was correct to state that leaflets made available to the public with the application form failed to refer to or to mention the notice published in the *Government Gazette*. Under the caption **What are the terms and conditions for eligibility of this scheme?** the leaflet listed six criteria but completely omitted the requirement that the equipment had to be purchased locally to allow purchasers to benefit from the subsidy.

When questioned by the Ombudsman, the Malta Communications Authority admitted it was unable to confirm whether the website *www.thesmartisland.gov.mt* referred to in application forms distributed to the public contained any reference

to the notice that appeared in the *Government Gazette* since the content management system of this website did not allow for archiving and the Authority was unable to check the matter.

The Authority also explained that leaflets that promoted the scheme as well as application forms were distributed after the publication of the notice in the *Government Gazette* and the leaflets were provided, among others, to all those persons who collected an application form.

The Ombudsman commented that this situation should never have arisen. Officials responsible for this scheme were obliged to ensure that the public was given every opportunity to be aware of all the criteria that needed to be met so that applicants would be eligible and benefit from its advantages. He added that these officials could not seek to exonerate themselves from their obligations by arguing that these details appeared in the *Government Gazette* since this publication is not one which an ordinary citizen buys on a regular basis as would have been the case had this information been published on local daily newspapers.

Taking everything into account the Ombudsman stated that once the public had been directed to collect application forms from Maltapost branches, the authorities should have taken the necessary steps to ensure that this information would also be clearly included in the leaflet accompanying application forms without expecting citizens to look up information from other sources.

This having been said, the Ombudsman went on to state that one had to assess whether this omission sufficed to justify complainant's grievance especially since from a mere review of the application it should have been evident to every level-headed person that the equipment covered by the scheme had to be purchased locally. All applicants were required to fill various mandatory fields in connection with the equipment purchased and besides a technical description of the equipment they had to provide such details as the total cost inclusive of VAT; fiscal receipt number; date of purchase of the equipment; and name, address and VAT registration number of the retailer. Moreover, as is always the case in similar schemes, both the invoice and the original fiscal receipt had to be attached to the application so that the department would process these papers.

The Ombudsman pointed out that it had been made clear that the 16% subsidy was to be granted on the total amount paid by each eligible applicant – which obviously varied from one applicant to the other – and was not a refund of VAT paid by each purchaser. This meant that complainant was wrong to argue that once he paid VAT he would be entitled to the refund. As is generally the case with government schemes based on cash grants, the main aims of this scheme

were to encourage households to purchase computers for domestic use and stimulate the local business sector and it was difficult to envisage the launching of a scheme by the Government that would cover purchases made abroad.

The Ombudsman commented that since complainant purchased his laptop from the US, he was unable to attach the original fiscal receipt for this purchase as laid down in the conditions of this scheme. Complainant was only given an invoice from the seller and the fiscal receipt in his possession was limited to the amount of VAT paid locally to the VAT Department. In fact he was unable to indicate the VAT registration number of the retailer and though he alleged that he was told by an official of the Secretariat to write the words *Not Applicable*, he was unable even here to indicate the person who advised him to do so.

Conclusion

In view of these considerations the Ombudsman felt that complainant failed to prove that he had been misled. On the other hand the Ombudsman held that although complainant was correct to state that the information that the computer had to be purchased locally was not included in leaflets and in application forms that were available over the counter, he should have used his judgement to realize that the documentation that had to be submitted to the authorities responsible for the scheme referred to local retailers.

The Ombudsman concluded by stating that to avoid the recurrence of similar situations he would strongly recommend that in future the department should ensure that all relevant information – including, for instance, details regarding eligibility – is made easily accessible to the general public either on the application form itself or on the department's website.

Office of the University Ombudsman

The MCAST Lecturer who bit off more than he could chew

The complaint

The University Ombudsman received two complaints from a member of staff at the Malta College of Arts, Science and Technology (MCAST). In the first case complainant claimed that he was asked to teach syllabi and to correct students' work that went beyond his professional competence while in the second case he alleged that the College was terminating his services without justification and that as a result of this decision he had to revert to his previous post in the Education Division with a consequent loss of income.

Facts of the case

After working for several years in a trade school as an Instructor in Automobile Engineering, complainant joined MCAST on secondment in September 2003 when the school's Automobile Engineering Unit was incorporated in MCAST's Institute of Mechanical Engineering (IME). His qualifications consisted of a certificate that he obtained following his apprenticeship with the Royal Air Force many years earlier and a Diploma in Vocational Teacher Training following an MCAST in-house pedagogical course.

In December 2008 complainant reiterated earlier protests with the Institute's management that he was assigned to teach syllabi that were beyond his competence and that lack of resources deprived him from carrying out his teaching duties properly. Following these protests, the IME management assigned him more basic teaching duties including instruction on the repair of farm machinery to students in the Institute of Agribusiness.

On a number of occasions the academic management of the IME informed MCAST Principal that complainant's teaching output was poor in delivery and inadequate in content while College authorities received several complaints from students and parents alike with regard to complainant's teaching ability. The IME was also concerned that complainant was often absent from work on medical grounds and that in view of a reduced teaching load upon resumption of duties, his work had to be distributed among his colleagues.

When in December 2008 complainant returned to the College after a long spell of sick leave, he adamantly refused to carry out his teaching duties and only relented when he was issued with a formal warning. All this led the IME Director to write to MCAST Principal that complainant *"struggled to keep up with the assigned workload"* and that he "*found difficulties in ... ... meeting the required quality assurance measures.*" This situation came to an end in June 2009 when MCAST Principal decided that the only way out was to tell complainant that his services at the College were no longer required and that he would revert to his previous post with the Education Division as from September 2009. This meant that complainant lost an annual allowance of €5255 for teaching at the College.

Upon receiving this notice complainant maintained that once his services at the Institute of Agribusiness were no longer needed, he was not competent enough to give any more lessons and to correct students' work. However, although the management of the Institute insisted that he was still expected to complete his teaching and correcting commitments up to the end of the 2008/2009 academic year, complainant steadfastly refused to carry out these duties.

In June 2009 MCAST turned to the Employment and Training Corporation to recruit a Lecturer/Assistant Lecturer in Motor Vehicle Engineering. Candidates were required to possess a first degree in engineering at Honours level with Mechanics as an area of specialization or an Advanced Technician Diploma with a minimum of five years relevant industrial or commercial experience.

Observations by the University Ombudsman

Although complainant insisted that the termination of his duties at MACST was a direct outcome of his protests with the management of the Institute of Mechanical Engineering and of the Institute of Agribusiness, the University Ombudsman found that he had to look in a different direction in order to establish the truth.

From meetings with complainant and with MCAST Principal the University Ombudsman confirmed that complainant found it extremely hard to cope with the more advanced teaching duties at the IME where students have far better qualifications that his former trade school students and course content is of a much higher level than complainant was used to deal with. In fact complainant himself had no qualms to admit that he was asked to teach syllabi that he was not "*competent and experienced*" enough to tackle. These difficulties were confirmed by the College Principal who admitted that MCAST management received several complaints from students at all levels within the automobile sector about complainant's performance.

MCAST Principal turned down complainant's efforts to attribute his poor quality teaching to lack of facilities and proper equipment at the College and pointed out that MCAST's admittedly limited resources had not hindered other IME staff from carrying out their duties to the full when they took over courses that used to belong to complainant. The Principal emphasized that most courses at the IME were monitored by City and Guilds external examiners who year after year were satisfied with the work being done by the Institute and even sanctioned it as a C&G overseas teaching centre.

The University Ombudsman held that he is not mandated to judge complainant's mastery of the content of his subject or his pedagogical skills since this task belongs exclusively to MCAST management. It was immediately apparent, however, that complainant had reached a point in his career where his knowledge and experience fell far short of the teaching and academic abilities that were needed to deal with the topics covered by the Institute of Mechanical Engineering at the College and that were far more advanced than the subjects that he taught during his several years at the trade school sector.

The University Ombudsman was also of the view that there was no evidence to suggest that the teaching abilities that were expected of complainant by the MCAST authorities were exceptional or unreasonable. These duties were in fact similar in nature to those demanded from any full-time College Lecturer.

According to the University Ombudsman decisions regarding complainant were based on academic and pedagogical grounds and in the best interests of MCAST students. Complainant was asked to relinquish his post at the College and revert to the Education Division not because he refused to teach subjects that were beyond his competence but because his teaching ability was inferior to the required level; and in the circumstances MCAST management had the responsibility to replace complainant by another lecturer with better academic credentials and with the ability to master his subject in a better way than complainant. The University Ombudsman stated that the College authorities appeared to be taking all the necessary precautions to ensure that complainant's successor would possess the qualities to teach at MCAST without letting students down and their enquiries with the ETC were a step in this direction.

The University Ombudsman added that although complainant couched his grievances with expressions of professional concern, closer scrutiny revealed that he was mainly upset by the loss of his allowance upon having to revert to the Education Division. Although he understood complainant's dilemma, the University Ombudsman was of the view, however, that complainant had not acted in a way that enhanced his claim as a dedicated teacher when upon being told of the decision to terminate his duties at the end of the academic year, he arbitrarily decided not to conclude his teaching assignment or to correct his students' work. By acting in this way complainant ignored the educational maxim that students should not be allowed to suffer as a result of staff disputes.

Conclusion

The University Ombudsman concluded that there was no evidence that complainant's superiors treated him unfairly or discriminated against him when they asked him to teach syllabi in Automobile Engineering since he was employed for this purpose and his failure to fulfil his teaching responsibilities was solely a shortcoming on his part and could not be attributed to MCAST management. The University Ombudsman declared that complainant's plea that he was treated in an unjust manner was not substantiated.

Similarly the University Ombudsman found no evidence to sustain complainant's claim that his employment at MACST was terminated unjustly. By complainant's own admission that was confirmed in writing by MCAST management, his

service to the College did not satisfy the institution's needs and once his posting at the College was not on a permanent basis but on secondment, his services could be terminated at any time as long as this action was justified.

The University Ombudsman was convinced that MCAST management had legitimate reasons to ask complainant to revert to the Education Division and acted in accordance with the terms of his secondment to the College. There was no doubt that the College acted responsibly and only meant to safeguard its reputation and the institution's academic standards when it sent complainant back to his former post at the Education Division and his grievance based on unfair termination of his employment was therefore completely unjustified.

Seniority and experience are not always trump cards in a selection process

The complaint

The University Ombudsman received a complaint against the University of Malta by a consultant at a department at the *Mater Dei* Hospital who alleged unfair treatment in the process to fill a post at the Medical School that was given instead to a junior medical colleague. Complainant claimed that although he asked the university authorities for a clarification on three separate occasions, the University still failed to give him a satisfactory explanation.

Facts of the case

The investigation by the University Ombudsman revealed that complainant applied for a post at T2 level at the University of Malta and was interviewed in June 2008. In due time he found, however, that his application was unsuccessful and that the selected candidate was the Registrar in another department at *Mater Dei* Hospital while the second placed candidate in the final order of merit was a junior trainee in his own department.

Feeling that he was overlooked by the selection board, complainant argued that his qualifications as well as his teaching and clinical experience exceeded considerably the experience of the first two candidates. He also pointed out that he found it particularly difficult to understand how a colleague whom he had himself trained some years earlier was placed on the waiting list of selected candidates whereas he had been left out in the cold.

Feeling aggrieved, complainant wrote to the Rector of the University of Malta in August and November 2008 and again in April 2009 and asked for an investigation of the selection process and for a scrutiny of the results. However, since he felt

that the replies as well as communications by email from the Director of Human Resources were inadequate and his concerns were not properly addressed, complainant sought the intervention of the University Ombudsman in July 2009 to review the quality of the response by the University.

In the University's reaction to the issues raised by complainant, it was explained that the selection board consisted of one of the University's Pro-Rectors, a senior medial professor and a member of the University Council. This board met on 6 June 2008 and conducted its selection process on a range of criteria including academic qualifications; teaching experience; suitability and communication skills; and performance during the interview. It was reported that at the end of its work the board was unanimous in its decision regarding the final order of merit.

In its reply the university management went on to explain that "*regarding the seniority of candidates in another institution ..... one has to point out that* (for) *the University ...* (holding) *... a senior position within another institution does not automatically make a candidate the most appropriate to fill a lecturing post.*"

The University rejected the accusation that it did not provide complainant with the information that he requested and explained that although admittedly it had not sent an official reply to his request, nevertheless its Director of Human Resources had been in regular touch with him by means of a lengthy exchange of emails. The University added that despite an offer by the Director of Human Resources to meet complainant and provide him with an explanation, complainant had not taken up this opportunity.

Observations and conclusions

The University Ombudsman observed that this grievance concerned two issues: the correctness or otherwise of the selection process; and openness, transparency and the right to know.

In his investigation the University Ombudsman confirmed that the selection board was properly constituted and carried out its task in accordance with established procedures and criteria that were determined before the selection process got under way. The first two candidates in the final order of merit were chosen unanimously as the most suitable for the post while the University Council approved the appointment of the first placed candidate. The University Ombudsman also confirmed that the selection board took due notice of complainant's qualifications, teaching and clinical experience in comparison to the academic and other credentials of the other candidates in its review of the merits of all eligible applicants.

The University Ombudsman observed that it is not within his remit to evaluate the attributes of candidates for an academic post since this task falls directly upon the shoulders of the members of a selection board who are expressly entrusted with the responsibility to do so. Nor is it within his remit to question the recommendations and conclusions on academic matters of a staff selection board. The function of the University Ombudsman is to ensure that the selection process was not flawed by an unjust decision or by a discriminatory action against one of the applicants.

In his Final Opinion the University Ombudsman observed that after a careful evaluation of all the evidence that had been presented and the information that he gathered, there was not the least indication that the selection board had not carried out its work correctly and fairly. While commenting that on the one hand he understood complainant's disappointment that two candidates who are his junior in the government health service were placed first and second in the final order of merit, on the other hand he accepted the statement by the University that seniority and experience were not the only criteria on which the selection board based its choice.

On these grounds the University Ombudsman was of the opinion that not the least shred of evidence emerged that the university authorities had discriminated against complainant and consequently his allegation that he was treated unfairly in the selection process was unsubstantiated.

The University Ombudsman, however, commented that complainant's second grievance, namely that he received insufficient information from the University about his concerns regarding the selection process, was another matter. Complainant sent no less than three letters to the University Rector that remained unanswered while the email exchanges and the offer by the Director of Human Resources to meet him in person did not go far enough to allay his misgivings about the way in which the process was conducted. Complainant had in fact asked for a written explanation but remained without it.

The University Ombudsman noted that in the same way as the Parliamentary Ombudsman, he had on several occasions noted an apparent reticence by the University to provide sufficient information to individuals whose academic destiny is influenced by its decisions. This complaint was another such case.

The University Ombudsman observed that people have a right to have access to information about decisions which directly affect their destiny and this right has to be respected at all times. One could not expect people in complainant's situation to be satisfied merely by a brief rejection note by the University about an issue that is crucial to their academic involvement and deserve to be told why

their application was unsuccessful. They are also entitled to information about their overall performance and to be told where they scored highly on the acceptance criteria and where they fell short of expectations.

The University Ombudsman commented that he was aware that this approach would entail extra work to the University and that occasions might even arise when making this information available could possibly lead to further queries and stronger aggravation. In the long run, however, once a selection process is conducted in a correct, equitable and fair manner the University itself is bound to benefit since it will foster the feeling that the institution is, and appears to be, transparent and fully accountable for its actions. It is also likely that this open approach might not satisfy all unsuccessful applicants but it should still go a long way towards lessening the aura of mystery and the accusation of secrecy shrouding academic decisions that the University is often accused of unjustly.

In view of the above the University Ombudsman considered complainant's second grievance justified and appealed to the university management to provide him with the information that he sought as long as these details do not impinge on the privacy rights of other candidates.

The shortcomings of a system that placed too much on the shoulders of MCAST Principal

The complaint

An Assistant Lecturer at the Malta College of Arts, Science and Technology (MCAST) lodged a complaint with the University Ombudsman against the Board of Directors of the College and claimed that the College administration refused to acknowledge his master's degree for the purpose of career progression to a Lecturer post. Complainant felt that this decision ran counter to the Collective Agreement between MCAST and the Malta Union of Teachers for 2007-2010 and that he was unjustly deprived of a promotion that would in turn have meant a higher salary.

Complainant further alleged that his appeal against the decision by MCAST Principal was not handled properly since it was the Principal himself who considered the issue and who had ruled against his appeal.

Facts of the case

The University Ombudsman found that after working for some years on quality management systems with the Malta Standards Authority, complainant joined MCAST as an Assistant Lecturer in November 2006 and taught several subjects

in various different courses. His *curriculum vitae* showed that he obtained a bachelor's degree from the University of Malta in 2003 and a master's degree in 2008 with specialization in Environmental Studies and International Relations.

Just before he obtained his master's degree, complainant applied for automatic progression from Assistant Lecturer to Lecturer under subsection 6.2(i) of the Collective Agreement that states that the minimum qualifications for appointment to Lecturer status are:

"(a) a relevant first degree together with a professional teacher training qualification and at least three years full-time relevant and appropriate lecturing and/or industrial experience; or
(b) a relevant first degree and master's degree and at least three years full-time relevant and appropriate industrial and/or lecturing experience."

Complainant's application was, however, turned down in a letter dated 28 November 2008 by the College Principal where he told him that he did not satisfy any of the options under the Agreement "*as you neither have a teacher training qualification nor is your master's degree relevant to the area/s which you teach.*" The Principal added that in line with the Collective Agreement the College would pay complainant an annual allowance of €700 as from his graduation on 24 November 2008. Complainant appealed against this decision and maintained that his master's degree was relevant to his lecturing duties but a month later the Principal rejected this appeal as well.

Following this, complainant sought a meeting with MCAST Principal to discuss both his original request and his appeal. This meeting was held early in April 2009 and was attended by two other academic members of staff of the College and a few days later MCAST Principal wrote to complainant to confirm that his post-graduate degree was not considered directly relevant to his areas of teaching and that his application for progression could not be favourably considered.

Faced with this outcome complainant approached the University Ombudsman.

Considerations by the University Ombudsman

After having looked at the requirements in subsection 6.2(i)(b) of the Collective Agreement regarding career progression, the University Ombudsman held that complainant satisfied the requirement related to a first degree and that he would satisfy the other requirement concerning relevant teaching experience on 20 November 2009 when he would have been lecturing for three years on a full-time basis. The University Ombudsman also found that MCAST authorities did not consider his previous work experience as relevant to his lecturing duties

since it did not involve any pedagogical experience. This left unresolved the issue related to the third criterion in the Agreement linked to a Lecturer post, namely, whether complainant's degree was "*relevant*" to his lecturing duties.

The University Ombudsman found that section 6.8 of the Collective Agreement stipulates that "*It is the prerogative of the College to decide whether such qualifications are relevant to the duties pertaining the employee*" and that this task had been delegated to MCAST Principal.

The University Ombudsman recalled that in a similar and recent complaint against MCAST he expressed the view that the mandate whereby the College Principal was delegated to carry out this task seemed to make unreasonable demands on him. The University Ombudsman stated that he continued to hold this view and that he also felt that this mandate could be detrimental to staff applying for promotion.

He therefore referred to his earlier recommendation for the removal of these decisions from the hands of the Principal so that the onus would be a collective responsibility borne by members of an *ad hoc* board with varied competences, qualifications and experiences. In this way any suspicion of personal bias in a staff selection process would become less likely and decisions would not give rise to allegations of discrimination. In the opinion of the University Ombudsman this board would be autonomous and be allowed a free hand to make nominations for staff promotions to MCAST management.

The University Ombudsman also recommended the setting up of a Promotions Board at MCAST to deal with academic promotions and related issues in a truly dependent and autonomous manner as well as the setting up of an Appeals Board to deal with appeals arising against decisions by the Promotions Board. He insisted that members of the two boards would be different and preferably with different specializations.

The University Ombudsman had also strongly recommended that the interpretation of the word "*relevant*" in subsection 6.2(i) of the Collective Agreement be tightened by the introduction of unambiguous criteria to define and establish clearly how degrees and academic qualifications are to be assessed in terms of their relevance to academic staff duties. He was of the opinion that the way that this requirement was being applied in staff promotion processes was far too open and subject to different interpretations.

At this stage, however, the University Ombudsman appreciated that he had submitted recommendations in this sense to MCAST Principal on a similar complaint only a few months earlier and in truth not enough time had passed to

find whether these proposals were implemented although he was confident that these proposals were being followed up since MCAST Principal had informed him that steps were in hand to implement his recommendations. In any event complainant's grievance had arisen a few months before the University Ombudsman had even made these recommendations and so it was not possible for his request to be considered by the proposed new set up at MCAST for staff assessment and evaluation for the purpose of his promotion to Lecturer.

With regard to the area of study in question the University Ombudsman pointed out that since Environmental Studies is a nebulous term with rather wide interpretations, it was possible that complainant did not present a case that was sufficiently strong to convince the persons who were involved in the selection process that his master's degree was relevant to the topics that he taught at the College. Furthermore, since MCAST lacked specific criteria to define the "*relevance*" of qualifications to an academic post, this rendered the evaluation of the academic merits of applicants in a staff promotion process an even more arduous task.

The University Ombudsman concluded his investigation by pointing out that in any event from complainant's *curriculum vitae* it was clear that before 20 November 2009 he would not have had the teaching experience of three years that would have enabled him to be eligible for promotion to Lecturer as laid down in the Collective Agreement. The complaint that he was not promoted following his application in November 2008 was not therefore upheld.

The University Ombudsman went on to rule that it was not within his competence to judge whether complainant's master's degree was related to the subjects that he was assigned to teach and whether it satisfied the yardstick of relevance of a master's degree to his subjects to be eligible for promotion. His role is primarily to ensure that procedures that lead to administrative and management decisions are fair and correct and that adequate reasons are given to justify the actions of a public body. As things stand, the decision whether complainant's post graduate degree was *"relevant"* to his teaching duties fell fairly and squarely on the Principal and the same applied to the decision whether complainant's appeal against the Principal's decision was to be accepted or rejected.

The University Ombudsman commented that when MCAST Principal reached his decisions on these issues, he was acting within the terms of the Collective Agreement. Nevertheless, according to him the system whereby the Principal is the sole arbiter of the eligibility and relevance of academic qualifications of staff in their applications for positions at the College has serious shortcomings since the Principal may not always be the most appropriate person to decide the extent to which studies undertaken by staff are relevant to their teaching duties even though he is free to seek advice from competent consultants.

Referring to the practice whereby MCAST Principal serves as judge and as appeals adjudicator in the same case as a downright anomaly that should be discontinued forthwith, the University Ombudsman did not have the slightest hesitation to uphold complainant's second grievance.

Notwithstanding these conclusions the University Ombudsman felt that it was his duty to stress that throughout his investigation all the evidence pointed to the fact that the Principal had at all times acted in good faith and merely followed established procedures which he inherited from his predecessor. At no time had the Principal acted unjustly or discriminated against complainant and on the contrary he did his best to ensure that complainant was given a fair treatment despite the constraints within which he had to operate in similar circumstances.

Recommendations

The University Ombudsman recommended that his proposal for the setting up of a Promotions Board to remove decisions on promotions from the hands of the Principal should be implemented forthwith. Equally urgent was his proposal for the establishment by MCAST of clear guidelines to evaluate the direct relevance of qualifications to duties assigned to College teaching staff. In this connection the University Ombudsman expressed his comfort at the fact that he was aware that MCAST Principal had already in principle accepted both proposals.

The University Ombudsman also proposed that as soon as MCAST adopts these recommendations, complainant should be allowed to prove to the new board that his master's programme was relevant to his teaching duties and that if his qualifications are deemed relevant under the College's criteria for promotion, this promotion should become effective as from the date when complainant would in fact become eligible – in other words, from 20 November 2009.

MCAST Board of Directors reacted in a positive manner to these proposals and set up a Promotions/Progressions Board that in a short time had processed more than thirty applications by academic staff in accordance with the provisions of the College's Collective Agreement.