The Gibraltar Public Services Ombudsman

ANNEXE ANNUAL REPORT 2008

'Sometimes we feel that what we do is just a drop in the sea, but the sea would be less without this drop'

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BUILDINGS AND WORKS DEPARTMENT

CASE SUSTAINED

CS/787

COMPLAINT AGAINST BUILDINGS AND WORKS FOR THE DELAY IN REPAIRING HER ROOF FROM WATER INGRESS

Complaint

The complainant was aggrieved at the delay in repairing her roof which was allowing rainwater to penetrate into her flat.

The complainant explained that Building and Works (B&W) had made temporary repairs to her roof by covering it with a tarpaulin in 2001, which had been leaking for twenty years, more recently in November 2006, they had erected scaffolding and painted the roof's asbestos sheets; this was explained to the complainant as a more permanent repair that should last five years.

In January the following year (two months later) there was serious water ingress from recent rainfall which the complainant reported to the emergency service. The complainant was informed, by workmen that came to inspect the roof, that some asbestos sheets had been broken by the workmen when they painted the roof in November 2006, however no one returned to make repairs. In July 2007 the complainant explained that she had visited B&W offices and explained that work she had reported six months ago had not been started. She was promised that someone would look into the outstanding work and get back to her, a week later no one had contacted her, and she brought her complaint to the Ombudsman.

In response to enquiries from the Ombudsman B&W explained that temporary repairs had been made to the complainant's property in 2001 because it was in a derelict state and staff at B&W had erroneously assumed that because no allocations were made to the flats when they became vacant, only minimum maintenance should be undertaken. They further explained that no one at the Ministry for Housing recalled giving such an instruction and advice was being sought on their policy of future use of the building and the repair and maintenance policy.

B&W also explained that there were three job numbers assigned to this repair, all of which had been "stopped" because the leading tradesman undertaking the work had been off sick for a long period and no incentive bonus remained on the job, removing the motivation for anyone else to take on the job. It was explained to the Ombudsman that the problem lay with the way the incentive bonus scheme was operated and there had recently been a review of this situation because of its unacceptable nature. Subsequent to this complaint B&W had re-started the work and were looking at a solution to the problem of assigning the work to other tradesmen. This would resolve the complainant's immediate complaint, however B&W added that they were seeking guidance from the Ministry for Housing for an expenditure of approximately £152,000.00 to refurbish these flats and replace the roof, in order to resolve the water ingress permanently.

The complainant informed the Ombudsman in October 2007 that she had been to B&W offices four times since August seeking an update as to when the work would start. The work finally started in mid October 2007.

The complainant confirmed that the latest temporary repair had been successful and there had not been any water ingress during the subsequent rainy season.

Conclusion

The Ombudsman had little doubt that if he had not highlighted this job directly to the senior management of B&W the issues causing the delay would not have been addressed for quite some time, if at all. Unfortunately this was an all too familiar example of the problems regarding the management of the backlog of work in B&W, see previous report CS750 published in the 2007 annual report.

The reason why the complainant had to wait for 10 months for the water ingress problem to be resolved was that the jobs raised to do the work had been "stopped" due to the status of the incentive bonus. This had happened on three separate occasions with no consideration to the effect on the complainant. The Ombudsman was also concerned that it appeared that junior staff within B&W had been able to act on an erroneous assumption that minimum repairs were to be made because the Housing Department had not allocated any further tenants, for these reasons the Ombudsman sustained the complaint.

The Ombudsman was informed in early 2008 that B&W had introduced, on a trial basis, a dedicated team to address complaints and queries from tenants. It was anticipated that issues of the sort raised during this investigation would be identified earlier and resolved without the need for the Ombudsman's intervention.

CASE SUSTAINED

CS/806

COMPLAINT AGAINST THE BUILDINGS AND WORKS DEPARTMENT FOR NOT HAVING RESOLVED A LEAKING SOIL PIPE PROBLEM WHICH HAD BEEN CONSISTENTLY REPORTED TO THEM SINCE THE YEAR 2003

Complaint

The Complainant was aggrieved because the Buildings and Works Department ("B&W") had not resolved a leaking soil pipe problem which had been consistently reported to them since the year 2003.

Nuisance

The Complainant informed the Ombudsman that the leaking soil pipe was located in a cupboard in her corridor; the pipe emanated from her neighbour's flat above her. The leaks increased during the weekend and peaked just after breakfast, then after lunch and again at supper time. This indicated to the Complainant that it was the waste pipe from her neighbour's flat that was pouring into her corridor.

Events leading to the Complaint

The Complainant explained that she began reporting the problem back in 2003 to B&W, again in 2004 and in 2006. In 2007 she not only reported it to B&W but also to the Department of the Environment who took samples of the leaking water. On the 2 May 2007 she again reported the leak

to City Hall, yet still nothing appeared to have been done.

She further explained that on 29 December 2007, subsequent to reporting the leak to the emergency service, a plumber attended her flat and told her that it would be 'a major job' and that she should report it in the New Year.

On the 8 January 2008 she was told by staff at B&W to return in a fortnight's time if nothing was done, the Complainant explained that they seemed surprised when she returned on the 22 January 2008 to tell them that nothing had been done.

B&W attended at the Complainant's flat on 29 January 2008 but there was nobody there; arrangements were subsequently made for a return visit and B&W visited the Complainant's flat on 1 February 2008 advising that a plumber would be visiting the Complainant to make repairs. By the 12 February the promised plumber had still not arrived and the Complainant returned to B&W seeking an explanation. Much to her surprise she was told that no such report appeared on their records. She returned to B&W again on 29 February as the plumber had still not arrived and was told to go to the Reporting Office at the City Hall. At the Reporting Office she was advised that the job to repair the leaking soil pipe had been cancelled due to "no response from tenant". She immediately returned to B&W with a photocopy of the cancelled job and was told it had been a mistake.

The Complainant explained that she returned to B&W at Town Range fortnightly until on the 5 April 2008 she called the emergency service as the leak was pouring into her corridor. Again on 6 April 2008 she called the emergency service and was told to call the Reporting Office at City Hall on Monday 7 April 2008. B&W returned to the flat for a second time and arranged for two plumbers to attend but they were unable to gain access to the neighbour's flat. The Complainant was subsequently informed by her neighbour that the plumbers returned on 9 April 2008 and "patched up the fault" hoping that it would work.

As of 10 April 2008, when the Complainant brought this complaint to the Ombudsman's attention, the pipe was still leaking.

Buildings and Works Response

B&W checked their electronic records and the earliest report available for a leaking waste pipe was Job No. 86746 which was raised on the 2nd May 2007. The After Hour Emergency Service not having been able to undertake the work on 1st May 2007 (emergency call-outs were not logged in the Work Services Program)

B&W also had in their records a report raised by the Environmental Agency under Job No. 86759 also on the 2nd May 2007 for the same defect. There was also a recent report that referred to water ingress from the flat above (Job No 95170 dated 7th April 2008) which referred to the same job.

The work that had just been completed was done in two phases. In the first instance, work was done on the waste pipe and on the date of writing their reply to the Ombudsman (17 April 2008) they had broken between floors to resolve the problem as the first attempt was not totally successful.

B&W were unable to comment on the sequence of events as described by the Complainant from 29th December 2007 to date because they had no way of confirming it. They could however confirm that the Complainant did visit their office to complain to their Help Desk about the outstanding works on

6th February 2008, 28th March and 10th April respectively. It was through these complaints and the "*hasten*" action taken by the Help Desk that the job was taken on by one of B&W Depots and completed before the Ombudsman's letter dated 14th April 2008. B&W failed to mention the telephone calls made by the Ombudsman prior to putting the complaint in writing.

When the Director of B&W investigated this matter the complaint had been addressed and had also received a telephone call from the Complainant thanking them for having completed the work.

Comments and Conclusions

The Ombudsman wished to highlight the considerable efforts and delay encountered by the Complainant in her quest to have the leaking soil pipe repaired. It had taken at the very least from 2 May 2007 to April 2008 to repair the soil-pipe. This was not an external soil pipe, the was direct waste water ingress into the Complainant's flat from the flat above, yet little or no consideration had been given to the Complainant's plight.

This was an obvious case of maladministration on the grounds of delay and especially due to the lack of service given to the Complainant.

Many comments and recommendations have been made by the Ombudsman in the past in relation to matters of delay and service by B&W. There is no doubt that vast improvements have been made, but cases such as this one belittles their good work.

Update

The Ombudsman received a "thank you" letter from the Complainant where she thanked the Ombudsman and his team for having solved her 5-year problem in less than a week.

CASE SUSTAINED

CS/808

COMPLAINT AGAINST BUILDINGS AND WORKS FOR DELAY IN REPAIRING THE LEAK FROM HER ROOF

Complaint

The complainant, a 78 year old woman, was aggrieved because her roof had been leaking since 2005 and despite reports to Buildings and Works ("B&W") no repair had been made.

The complainant explained that every time it rained, rain water would pour through her roof into the corridor of her home to such an extent that she had to place buckets to catch the water. On one occasion, in her attempts to control the damage from the rain, she had slipped on the water that had inevitably missed the buckets.

Investigation

In March 2007 the complainant brought her complaint to the Ombudsman. Subsequent to his

inquiries the Ombudsman was informed by B&W that due to the backlog of work created by industrial action this job was still outstanding. In April 2007 the Ombudsman was informed that scaffolding had been requested from the contractor in order to access the roof, however, it would not be erected for at least three months because the contactor was not able to supply enough scaffolding for B&W needs and there were other jobs that had taken a higher priority.

The scaffolding was eventually erected in September 2007 and although the repair was made the roof continued to leak. The complainant believed this to be the same leak and reported again it to B&W as such. However, the Estimator mistakenly assessed the job as "plumbing repair" which caused confusion and delay at the Depot. The repair was reassessed as a roof repair on the other side of the building and in November 2007 the scaffolding was moved to the other end of the building. B&W did not return until April 2008 when they advised the complainant that if the second leak could not be repaired it maybe necessary to replace the roof as the existing tiles were no longer available. The Ombudsman had been informed that the second repair would be attempted as soon as other higher priority work had been completed. Meanwhile the scaffolding remained in situ. No definite date could be given to the complainant of when repair would be made.

Comments

B&W had given two reasons for the cause of the delay:

1. Backlog of work created by industrial action
2. Scaffolding contractors not being able to meet the demands of volume of work.

In reference to 1) the Ombudsman selected this case as one of four that were part of a more in depth investigation into B&W management of their backlog, an issue he had highlighted in previous reports and his 2006 Annual Report. The results showed an average completion rate in 2007 of just 62% per month of reported jobs, indicating that the backlog was increasing, even after the industrial action.

In reference to 2) the reasons given by B&W for the delay between April 2007 and September 2007 was that the delay had been caused by the scaffolding contractors not being able to meet the demands of B&W. However, the Ombudsman had to highlight that since the repair in September 2007 the scaffolding had been moved to the other side of the property in order to make repairs to the second leak and at the time of writing this report it had remained there for seven months while waiting for the workmen to return The Ombudsman questioned whether this was the best use of limited resources and who else might be waiting for B&W to start works but were being delayed because of the non availability of scaffolding?

The Ombudsman noted the difficulty the complainant had experienced in obtaining information during the three years she had been waiting for the first repair to be made, once again it appeared to have taken the intervention of the Ombudsman for the complainant to be updated. The Ombudsman was aware of a new Help Desk introduced earlier this year by B&W as a trial and hoped that this would improve this department's service to its tenants

Conclusions

Three years is a long time to wait for the repair of a leaking roof, especially by a 78 year old woman. The delay had been caused by a combination of industrial action and the management of limited scaffolding resources. This combined with the poor productivity of just 62% completion of

outstanding work during 2007 and the difficulty experienced by the complainant in obtaining any information on the outstanding work (without the assistance of the Ombudsman) had left the tenant with a service falling far short of satisfactory**.** For these reasons the Ombudsman sustained this complaint and assured the complainant that he would seek updates as to when these outstanding works would be done until they were completed. If there were persistent delays he would then consider laying a special report in Parliament.

CIVIL STATUS AND REGISTRATION OFFICE

CASE NOT SUSTAINED

CS/761

COMPLAINT AGAINST THE CIVIL STATUS AND REGISTRATION OFFICE FOR THEIR REFUSAL TO ACCEPT THE COMPLAINANT'S APPLICATION FORM AND SUPPORTING DOCUMENTS FOR EXEMPTION FROM THE REQUIREMENTS OF SECTION 12(1) OF THE IMMIGRATION CONTROL ACT

Complaint

The Complainant complained that on Thursday 20 September 2007 she went to the Civil Status and Registration Office (the Department) where she handed in an application form and supporting documents ("the Application") for exemption from the requirements of section 12(1) of the Immigration Control Act. The staff at the counter however refused to accept them on the basis that she was not in employment.

The Complainant informed the Ombudsman that the Application consisted of the following:

1. The application form for exemption from the requirements of section 12(1) of the Immigration Control Act.
2. The Complainant's Gibraltar birth certificate.
3. The Complainant's Gibraltar civilian registration card.
4. The Complainant's Medical Department Gibraltar Child Health Clinic Infant Weight Record Booklet.
5. The Complainant's Government of Gibraltar Medical & Health Department Vaccination and Immunization Record Booklet.
6. A letter from her former Headteacher dated 22 May 2006 in relation to the Complainant's attendance at Sacred Heart Middle School.
7. A certificate from Westside School dated 28 June 2006 in relation to the Complainant's attendance at Westside School.
8. A letter from the Principal, Gibraltar College of Further Education, dated 4 May 2006 in relation to the Complainant's attendance at the College.
9. The Complainant's certificate of no convictions issued by the Royal Gibraltar Police on 13 September 2007.
10. The Complainant's Gibraltar residence permit certificate dated 13 September 2007 issued by the Royal Gibraltar Police Immigration Department.

Comment

This was not the first time that the Ombudsman had been informed of such incidents at the Department. However, as a result of previous investigations/enquiries there had been assurances from the Department that instructions had been issued for the counter staff to accept applications forms that had been completed and were accompanied by the pertinent documents. Therefore, the Ombudsman decided to seek the Department's comments on this particular incident.

Investigation

Consequent to the Ombudsman's inquiry the Department provided information stating that their enquiries had revealed that the Complainant's application for British nationality presented two circumstances which the Department had not come across before. In the context of exemption for sub-

sequent naturalisation, it was the first time that an applicant who had apparently resided in Gibraltar all her life was applying whilst still a student in Gibraltar. Secondly, given that she had been born in Gibraltar the possibility existed that she could be considered for registration under the entitlement provisions of Section 15(4) of the British Nationality Act, (birth in an Overseas Territory and residence in the Territory during the first ten years of the applicant's life). In such a case, it was the first time that an application under this section was encountered where the applicant was over 18 and no longer a minor (applications are usually made once the child reaches the age of 10). As regards exemption, applicants who have resided in Gibraltar from an early age, who complete their studies and settle in employment were, as a matter of policy, fast-tracked and were not required to wait their turn in the queue. However, applications from persons who were pursuing further studies outside Gibraltar were deferred and not considered until they completed their studies, returned to Gibraltar and settled. On the question of possible registration under Section 15(4) there was a need to confirm whether, given her age, the Complainant could apply and if so, to determine which was the appropriate application form.

The Officer who attended to the Complainant at the counter had not worked in the relevant Section of the Department for long and was still relatively inexperienced in nationality matters of this kind. It would appear that she sought directions from a Senior Officer but the complications that the case presented gave rise to a misunderstanding between them which in turn resulted in erroneous advice being given to the Complainant, in spite of standing instructions requiring nationality applications which were correctly filled in and accompanied by the required supporting documentation, to be accepted at the counter and examined in detail later.

The Department further explained that it would appear that the Complainant's application could more appropriately be considered under the entitlement provisions of Section 15(4) than under the discretionary provisions for exemption and subsequent naturalisation. However, this would be subject to the residence requirements being satisfied. These were, continuous residence in Gibraltar for ten years since birth with absences not exceeding 90 days in each of those ten years. If the Complainant considered that she met these requirements she could apply using the appropriate form (which the Department attached to their letter to the Ombudsman). If her absences had exceeded the 90 days, it could still be possible to consider her under the discretionary provisions of Section 15(7) provided the absences were not extensive.

The Department asked the Ombudsman to convey their sincerest apologies to the Complainant for the erroneous advice she was given and for the inconvenience she had been caused. The Head of the Department stated that if the Complainant encountered any further difficulty she should not hesitate to contact him directly; he would be more than happy to assist her in any way he could.

Conclusion

The Ombudsman carefully considered the Department's reply and formed the opinion that, whilst keeping in mind that they had caused the Complainant to feel aggrieved, they had acted in a positive and proactive manner when informed of the grievance.

The Head of the Department had provided a substantial and satisfactory account of the events that led to the complaint and offered his apologies. Also, he offered his personal assistance should the Complainant meet any further difficulties. However, the Ombudsman had to highlight the anxiety of the young applicant when her application form was refused. This should not have happened and, if the counter staff was relatively new in the relevant section and inexperienced in nationality matters, perhaps the Senior Officer (who should have been aware of this fact) should have attended to the

Complainant at the counter when confronted with an unusual situation.

The Ombudsman was of the opinion that the Department's response to this complaint was a good example of how to react when a member of the public feels aggrieved. Undoubtedly the Department's action constituted good administration and would be used by the Ombudsman as an example to follow by those entities under his jurisdiction.

In the circumstances, and because of the misunderstanding alluded to by the Head of Department, the complaint was not sustained.

CASE SUSTAINED
RECOMMENDATION MADE

CS/772

COMPLAINT AGAINST THE CIVIL STATUS AND REGISTRATION OFFICE ("THE DEPARTMENT") IN RELATION TO THE TIME HIS APPLICATION FOR EXEMPTION UNDER SECTION 12(2) OF THE IMMIGRATION CONTROL ACT WAS TAKING TO BE PROCESSED.

Complaint

Complaint against the Civil Status and Registration Office ("the Department") in relation to the time his application for exemption under section 12(2) of the Immigration Control Act was taking to be processed.

Background

The Complainant a Moroccan national submitted his application for exemption under section 12(2) of the Immigration Control Act on 29 November 2005. On 5 November 2007 the Complainant wrote to the Department asking for an update in relation to his application and was informed by them by way of letter dated 6 November 2007 that the Department's records showed that he had handed in his application for exemption on 29 November 2005. The Department went on to state in their letter that the Complainant would be considered when his turn arose and that he would be asked formally to attend an interview. The Department's letter ended by informing the Complainant that there were a large number of applications which were outstanding and that the Department was doing its utmost to process them as quickly as possible.

The Complainant was extremely unhappy and upset at the time his application was taking to be processed and came to see the Ombudsman with his Complaint.

Investigation

As a result of the Complaint the Ombudsman corresponded with the Department to inform them of the Complaint and to ascertain their comments.

It took two chaser letters to elicit a reply from the Department which was received over two months from the date of the Ombudsman's letter informing the Department of the Complaint. (This is over the time scale considered appropriate by the Ombudsman for a substantive reply. The Ombudsman

expects substantive replies no later than 2 to 3 weeks from the date of his letter).

[**Ombudsman's General Note for Departmental Guidance.**

The Ombudsman expects an acknowledgment of receipt of the complaint to be sent within 4 days of receipt of the complaint at the very latest.

With regard to an Initial Reply letter, the Ombudsman expects this to issue within 7 days of receipt of the complaint at the very latest.

A substantive reply to the Ombudsman's letter informing the Department of the Complaint, is expected from the Department by no later than 2 to 3 weeks from the date of his letter.

Should the Department for any reason be unable to provide a substantive reply within 3 weeks, a suitable holding letter should issue from the Department to the Office of the Ombudsman explaining why the 3 week time frame cannot be adhered to and confirming when the Department will be in a position to forward a substantive reply.]

The Head of the Department in his letter apologised for the delay in replying and enclosed a copy of their above mentioned letter to the Complainant dated 6 November 2007.

The letter went on to explain that the Complainant's application would be included in a further batch of applications for exemption which the Department was currently processing and that the Complainant had been asked to attend an interview at the Department's offices on 20 February 2008.

The Complainant received a letter from the Department dated 4 February 2008 in which they referred to the Complainant's application for exemption dated 14 July 2005 which still had to be determined and asked him to attend the Department on 20 February 2008 so that they could update his application and test his knowledge of English.

Conclusions and Comments

From the above information the Ombudsman concluded that there had been maladministration arising from what he considered was the inordinate time the Complainant's application was taking to be processed.

In the Complainant's case the Department had confirmed that the Complainant had handed in his application on 29 November 2005. The next step in the application procedure, which was administratively completely in the hands of the Department, was the attendance by the Complainant to test his knowledge of English. This had been scheduled to take place on 20 February 2008 two years and three months after the application was lodged.

The Ombudsman considered that the cold facts of the matter were that over two years after the Complainant had submitted his application, there was still no end in sight in relation to its outcome.

This was not in the best interests of either the Complainant or the Department.

From the Complainant's point of view there was, in addition to the ever present realistic fact that the application might not meet with success, the grinding and ever present uncertainty of a completely open ended wait potentially running into years, for a final outcome.

From the Department's point of view, the Ombudsman believed that the Department as a provider of services to members of the public, could not possibly be satisfied with a level of service which resulted potentially in the passage of an uncertain number of years from time of application to decision/outcome. This was certainly a very poor level of service.

Recommendation(s)

The Ombudsman therefore made the following recommendations:

1. That the Department within the next 3 months carry out an internal audit to ascertain average time taken in processing the different nationality related applications it deals with. (This recommendation is made as a result of the Ombudsman's concerns that it appears that applications are taking far longer to be processed than is administratively reasonable).

2. That consequent on that audit, the Department implement appropriate time brackets for the processing of applications generally and particularly in relation to the various procedural administrative steps undertaken by the Department leading to the application's final determination.

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CASE PARTLY SUSTAINED

CS/780

COMPLAINT AGAINST THE CIVIL STATUS AND REGISTRATION OFFICE (CSRO) FOR THE DELAY IN ISSUING A VISA FOR THE COMPLAINANT'S WIFE TO ENTER GIBRALTAR AND THE DISRESPECTFUL ATTITUDE WHICH THE CSRO HAD DISPLAYED WITH HIM

Complaint

The complainant (a soldier in the Gibraltar Regiment) lodged a complaint against the Civil Status and Registration Office ("CSRO") with the Ombudsman in November 2007 for the delay in issuing a visa for his wife to enter Gibraltar and the disrespectful attitude which the CSRO had displayed with him.

The complainant explained that he first applied to the CSRO in September 2007 by letter. The letter included details of the complainant's relationship with his wife four years prior to the marriage and his employment and housing arrangements. The letter also included copies of documents certifying his marriage in August 2007, his conversion to Islam in June 2007 and validation certificate of the British Consulate in Tangiers. It also included a copy of his wife's passport and ID.

In their letter of reply dated 12 September 2007 the CSRO explained the procedure for resident Gibraltar belongers (a category used by CSRO to loosely describe persons who have the entitlement to a Gibraltar Identity Card) to bring their non EU visa-requiring spouses to Gibraltar. A visa application must be made to the CSRO before the spouse enters Gibraltar. The application is assessed by establishing the validity of the marriage and that the relationship is not one of convenience, also the accommodation which the couple are to occupy and relatives who may have to live

with them, and the ability of the resident to maintain their spouse without recourse to public funds.

The CSRO also explained in the letter that once representations are approved and the issue of the necessary visa is authorised, the spouse may then enter Gibraltar, whereupon the issuing of the residence permit and registration under the Civilian Registration Act follows.

In conclusion they also explained that, in order to proceed with his request, he should supply them with a copy of his birth certificate, proof that his wife had been included on the tenancy of his home, and a letter from his employer confirming his annual income and entitlement to married quarter.

On the 27 September 2007 the complainant's mother submitted in person the remaining documentation on behalf of the complainant and the CSRO asked that the complainant make arrangements to visit their offices.

The complainant explained that he was confused as to why the CSRO required him to attend their office when he had already supplied them with all the documentation they had requested. He attended the counter but was asked to return on 1 October 2007 for a private interview. At the interview the CSRO explained that there was insufficient background information as regards his relationship prior to the marriage and that this was particularly important in his case given that his wife's mother and sister, who were visiting Gibraltar with his wife at the time that he struck the relationship, had remained in Gibraltar illegally and had not left.

The complainant explained that he became very agitated at the meeting as he did not see how he could provide any further proof than that already provided that his marriage was not one of convenience but based on a genuine relationship that had started four years ago when he met his wife through his father in law. She had not remained in Gibraltar illegally (as did her mother and sister) and he had travelled to Morocco on a regular basis over the four year period to visit her; this had become fortnightly in the months prior to the marriage. They decided to settle and raise a family and so, married in August 2007. This was subsequent to the complainant's conversion to Islam in June 2007. All this information had already been supplied to CSRO in his original letter.

The complainant explained that he felt that the Officer from CSRO was aggressive and angry in her attitude towards him during the interview, treating him in a disrespectful manner in that she referred to him as 'Chiquillo' and smoked throughout the interview. In frustration the complainant left the meeting promising to contact his superior from the Gibraltar Regiment, who had offered his assistance if required.

On the 2 October 2007 the complainant's employer submitted a letter to the CSRO explaining the background of the complainant's relationship with his wife. The Ombudsman noted that no additional information was provided in this letter beyond the information already supplied by the complainant in his original letter.

Investigation

In response to the Ombudsman's inquiries the CSRO explained that although the complainant had provided them with all the information they had requested, in cases of this nature, they considered it their duty to provide Government with as much information as possible. In order that when the Government considers such requests it should do so with the benefit of all the relevant facts and circumstances as are known.

They further explained that given that the complainant's spouse's family had remained and continued to remain in Gibraltar illegally they had been persuaded to undertake a more detailed enquiry than normal. This involved, amongst other things, formally seeking information from a Consultant Physician at the Gibraltar Health Authority regarding the complainant's mother in law's medical condition. Had they not deemed it necessary to pursue such an investigation the CSRO assured the Ombudsman that the complainant's case would have been processed quicker than it had taken on this particular instance.

On the 15 November 2006 the CSRO completed their investigation and submitted to Government the complainant's request for his wife to be issued a visa (nine weeks after the original request had been made). The complainant was sent a letter by CSRO eight weeks later confirming that permission had been granted (seventeen weeks after the original request had been made). Relevant documents were also sent to the British Consulate in Tangier and the complainant's wife arrived in Gibraltar soon after.

Comments

The visa application had taken seventeen weeks for the CSRO to process. The CSRO had explained that the process would have been quicker had they not deemed it necessary to expand their enquiries to the status of the complainant's mother in law. The Ombudsman acknowledged CSRO's discretion in conducting checks and gathering of information when submitting applications for Government approval. The Ombudsman restricted his investigation to the administrative process by which this discretion is exercised and whether in this case the process had been unnecessarily prolonged thus causing the complainant undue delay in being re-united with his wife.

There were three main stages of the consideration of the application which the Ombudsman had to highlight.

Initial letter sent by CSRO on 12 September 2008

The letter sent in reply to the complainant's application by CSRO (12 September 2008) was incomplete. (This was confirmed by the CSRO in his letter to the Ombudsman dated 31 January 2008) The letter did not include the need for further information into the background to the relationship in order to allay any concerns of a possible "marriage of convenience".

Interview

When the complaint was first referred to the CSRO, reference was made to the complainant's allegations that the treatment received at the interview was disrespectful and that the CSRO member of staff was smoking. The CSRO chose not to reply to this allegation; therefore the Ombudsman was of the opinion that he could make inferences in respect of the allegations. The complainant felt undermined and belittled by the attitude of the CSRO, i.e. the interviewer was smoking and referred to him as 'Chiquillo'. This conduct by the CSRO is unacceptable and the Head of Department should produce guidelines for interviews in respect of the deportment of his staff. Especially offending is the reported smoking whilst carrying out an interview without first seeking the permission of the interviewee.

Decision to extend the investigation to include the mother in law

The CSRO had extended the investigation to include the complainant's mother-in-law, yet there did not appear to be any evidence to suggest the complainant's wife had lived in Gibraltar for the past four years, as her mother and sister had done. In any event, the authorities were well aware of their presence in Gibraltar but had no record of the complainant's wife.

Conclusion

The complainant's application for his wife's visa had taken seventeen weeks from application to conclusion. Immigration matters must be dealt with diligently coupled with high degree of duty of care to applicants since the outcome of decisions very often affects the very fabric of the person's life. However, one must hasten to state that those processing immigration applications also owe a duty of care to the community at large and must ensure that the proper procedures and guidelines are complied with; unfortunately this may sometimes cause delay.

When a Government officer is conducting an interview with a member of the public that officer, quite apart from the fact that he is representing the Government of Gibraltar, must ensure a high level of service and duty of care at all times towards the person being interviewed. Regrettably, in this instance these norms of behaviour did not appear to have been adhered to with the consequent result of a complaint being lodged with the Ombudsman.

The Ombudsman did not sustain the complaint of delay. He did sustain the complaint of the CSRO's conduct during the interview and recommended that the Head of that Department should issue guidelines for the conduct of interviews, if these did not already exist.

MINISTRY OF EMPLOYMENT

CASE SUSTAINED

CS/801

COMPLAINT AGAINST THE MINISTRY FOR EMPLOYMENT ("THE MINISTRY") WITH REGARD TO THE MANNER SHE WAS TREATED BY THE LABOUR INSPECTORS ("THE INSPECTORS"). THE COMPLAINANT WAS ALSO AGGRIEVED BECAUSE OF THE MINISTRY'S DECISION TO ACCEPT A BACKDATED DISMISSAL NOTICE.

Complaint

Complaint against the Ministry with regard to the manner she was treated by the Inspectors. The Complainant was also aggrieved because of the Ministry's decision to accept a backdated dismissal notice.

Background

The Complainant explained that she had worked for a company ("the Company") for over four years as a part-time permanent lunch lady. Sometime in April 2006 however, even though she was on sick leave, she was called by one of the Directors of the Company who explained to her that the Head Teacher of the school where she had been working no longer wanted her working there and that she therefore had to leave. The Company allegedly told her that they did not know what to do, and had nowhere to place her, to which the Complainant then added that she would then seek Union advice.

After explaining her case to a Union Representative, the Complainant was referred to a lawyer who acted on the Union's behalf. Unfortunately, the Complainant explained, a year passed and not a lot was done by the lawyers appointed by the Union. As a result the Complainant felt she had no option but to refer the matter to another advisor. He listened to her case and after allegedly advising her that he felt she had a case she was referred to the Inspectors at the Ministry.

The Complainant explained that she was very pleased with the quick response she got from the Inspectors. They immediately got in contact with the Company and begun to get her file in order. The Complainant claimed that the Inspectors verbally informed her that she had a genuine case.

The Inspectors continued to investigate her case and gave her regular updates. However by November 2006, after not hearing from the Inspectors for some time the Complainant phoned to ask for an update. The Complainant claimed that it was then that she was referred to the Senior Labour Inspector. She felt that it was at this point when her case started to collapse and she was told she did not have a case. She was further informed that the Company had sent a dismissal form which had been received by the Ministry on 9th November 2007, but back dated to May 2006. The Complainant held a meeting with the Senior Labour Inspector and complained that she felt this was illegal and fraudulent.

She pointed out that she had never received a dismissal form and had simply been told to leave, as a result of which she had gone to her Union and later to the Inspectors. She was told that the dismissal was on the grounds that she had failed to go to work, and again she explained that it was the Company that had told her she had to leave. The Complainant then allegedly pointed out that she had never applied for unemployment benefit purely because she did not think she was unemployed, and also highlighted that she had received full pay for May 2006 as well as a payment of £563.16 in November 2006 (£395.48 printed on a pay slip yet £563.16 credited to her bank account). The Complainant stated that the Senior Labour Inspector simply informed her that this must have been an ex-gratia pay-

ment. The Complainant insisted that she was not happy and asked for an appointment with the Director of Employment ("the Director").

After pressing for an appointment with the Director the Complainant was finally able to meet with him and the Senior Labour Inspector. At this meeting the Complainant was informed that the payment of £395.48 (or £563.16) had not been accepted by the Ministry as an ex-gratia payment since it was on a normal payslip, but that her dismissal had still been accepted. Allegedly, the Director nevertheless added that he could arrange for the dismissal to be backdated to November 2007 which would enable her to apply for unemployment benefit.

The Complainant was not happy with the way she has been treated by the Ministry and felt that their decision to accept the backdated dismissal was wrong. She had hoped that the Inspectors would put things in order with respect to her employment and advise her on her employment rights, but instead they seemed to have simply sided with the Company. The Complainant complained that this may be as a direct result of the Company working for Government and thus Government siding with their Agent.

The Ombudsman's Preliminary Enquiries

Before deciding whether to initiate a formal investigation warranting a report, the Ombudsman contacted the Director and requested an update of the Complainant's case. The Ombudsman was informed that during the meeting that the Complainant and held with the Director of Employment on 5th February 2008 the Complainant was informed that the Director was disputing the Termination Date and that his office was trying to establish the actual date of termination. Further, the Ombudsman was informed that they would be contacting the Complainant upon receiving the requested information from the Company.

The Ombudsman informed the Complainant of the above (by letter) and also that the Ministry had been asked to keep the Ombudsman updated on this matter; the Ombudsman also asked the Complainant to do likewise.

The Complainant was informed that in the meantime, her file would be kept in abeyance and advised that if she had not had any news from Ministry in ten working days, then she should contact the Ombudsman.

A short time after, the Complainant informed the Ombudsman that she had received a reply from the Ministry and was not pleased with it and would like the Ombudsman to consider her original complaint.

Investigation

The Ombudsman's investigation centred on the duties of the Inspectors and the circumstances that led them to conclude that there was indeed no breach of the employment legislation.

The Ombudsman wrote to the Ministry setting out the complaint and, as per usual procedure when commencing an investigation, requested their comments.

The Ministry explained that this particular case was reported to the Inspectors by the Complainant on 2 October 2007. It appeared that she had stopped working, in the most practical sense, for the Company sometime in May 2006, whereupon she firstly sought Union advice, subsequently legal

advice and then referred the matter elsewhere and was advised to take her case to the Inspectors. By her own admission, a year passed with not a lot being done before the matter was referred to the Inspectors. It was therefore, well over a year from the Complainant's initial 'complaint' to the Union that she brought her case to the Inspectors.

The Ministry explained that, again, by her own admission, the Labour Inspectors promptly took up her case and gave her regular updates, and it would appear that the Complainant was well satisfied with the way she was being 'treated by the Ministry'. However, the Ministry further explained, the Complainant was not happy with the outcome of the Inspectors' investigation. She was evidently not satisfied with the associated explanation and decided to bring a complaint to the Ombudsman.

As Head of Department and responsible for the Labour Inspectorate, the Director explained that he most immediately affirmed that he was satisfied with the response of the Inspectors to the case that the Complainant had referred to them for any due investigation and with the explanation offered to her as outcome to the investigation undertaken.

The Ministry provided the Ombudsman with a copy of the 'Record of Possible Breaches of the Ordinance' (evidently, the form had not been updated as it should now read 'Act' instead of 'Ordinance'). The form showed that the Complainant had made her complaint on 2nd October 2007. The 'Nature of Complaint' read as follows:

> *Individual has not been paid since November '06*
> *Owed: November '06 to date.*
> *Balance of A/L* [Annual Leave]

Under the heading 'Action Taken' the following had been entered:

This referred to a separate 'Record of Possible Breaches of the Ordinance' form dated 23rd August 2007, which stated:

> *Spoke to* [the Company] *who states that* [the lawyer] *was representing the Complainant. She also states that the Complainant has been issued alternative employment which the Complainant has refused. On 27/9/07 instructions to pay individuals.*

On the 2nd October 2007 'Record of Possible Breaches of the Ordinance' form, an entry dated 3rd October 2007 stated:

> *Spoke to* [the Company's lawyer], *confirms a letter was sent on 12/12/06 to* [the Complainant's lawyer] *offering new placements and detailing the reasons why she was to be transferred however,* [the Complainant] *was with same wages but not same post.*
>
> *Informed Complainant Department* [the Ministry] *will not take case up as offered alternative employment and can take case up with Industrial Tribunal. P.S. Company instructed to submit terminations I.R.O. employee. On 4/1/08 spoke to* [the Company] *in relation to submitted termination to change termination date to December '06.* [The Company] *stated they would be contacting their lawyer to submit them. On 9/1/08 spoke to* [the Company's lawyer] *in relation to termination he said he would be looking at Company records and be submitting them to Department.*

> *On 23/1/08 met with* [the Company who] *states that payment showing in Nov.o6 is an (ex-gratia) payment and as their system does not cater for that, payslips were issued.* [The Company] *also stated that the figures did not balance with payments made.*

The Ministry explained that upon initial investigations, given that the Complainant had produced payslips for November 2006, it appeared that the Company, as her employer, had employed her at least until such a date. The Company had however, submitted for due registration with the Ministry, a Notice of Termination of employment stating the end of the Complainant's employment to be 11th May 2006. This Termination was received by the Ministry on 9th November 2007.

The date of the apparently final payslip and date of termination of employment did not match and caused the Inspectors to seek explanations to the effect from the Company.

The Company explained that the Complainant did not work beyond the date of termination as set out in the Notice of Termination and that the payment made (November 2006 payslip) was an ex-gratia payment made out of goodwill and not to be construed as payments by way of wages for work done. The Company had further explained that they had made deductions [income tax and social security] as they considered that they had a duty to do so and for no other reason.

The Ministry also provided the Ombudsman with copies of all relevant correspondence and minutes of the meeting held with the Complainant on 5th February 2008.

The Ministry also provided information as to the remit of the Inspectors and explained that they are appointed under section 16 of the Employment Act for the purposes of this Act. In essence, the Inspectors 'police' and seek to enforce the Act in the manner that the Act prescribes (the relevant extract from the Employment Act was also attached). By way of random inspections and of reported possible breaches of the Act, the Inspectors undertake investigative work to establish whether there has indeed been a possible breach of the Act. The Inspectors do not take sides but consider the pertinent issues in relation to statutory provisions (i.e. employment legislation) and will seek to establish whether a possible breach arises. Upon any possible breach being detected the matter will be brought to the attention of the party concerned by way of seeking to have the possible breach put right. Where the matter is not 'amicably' put right, it is referred to Attorney General Chambers for advice on how to best proceed.

In the Complainant's particular case, upon having undertaken the due investigation, the Inspectors were not able to establish that in the given circumstances a relevant breach had been committed. In consequence the Complainant was informed that the Inspectors could not take her case any further.

The Ministry then took issue with some of the statements that the Complainant had chosen to make in putting her case to the Ombudsman.

The Ministry most vehemently refuted the Complainant's statement to the effect that the Inspectors seem to have simply sided with the Company and that this may be as a direct result of the Company working for Government and thus Government siding with their Agent. They reiterated that the Inspectors do not take sides but consider the pertinent issues in relation to statutory provisions (i.e. employment legislation).

The Ministry also took issue with the Complainant's statement to the effect that the Director had said that he could arrange for the dismissal to be backdated to November 2007 which would enable

the Complainant to apply for unemployment benefit. They contended that his was not true. The Director has no powers and it is not his business to arrange for any dismissal to be backdated; and further, entitlement to unemployment benefit is not determined by the Director.

After carefully perusing the Ministry's letter, on the 23rd April 2008, the Ombudsman wrote to the Ministry seeking clarification on some specific points.
Whether the Inspectors considered within their investigation the effects of the Company not submitting the termination document within the 7 days required by law and why they came to the conclusion the submission of the Notice of Termination of Employment nearly eighteen months after the event was not a breach of employment law.

Whether the Inspectors considered within their investigation the fact that if the Complainant's last day of work was the 11 May 2006 how then could it be said that her employment was terminated on that date because she "failed to attend work" (as stated on the "Termination of Employment" form submitted by the Company).

It would appear that the alleged ex-gratia payment did not comply with the Income Tax legislation in that permission had not been sought from the Income Tax Commissioner and that under the criteria for ex-gratia payments it was unclear how it would be given that status based on the facts available, especially since income tax and social insurance was deducted from the payment.

The Ministry replied that the Inspectors did consider within their investigation the fact that the Company had not submitted the termination document within the 7 days required by s 13 and concluded that the employer had not wilfully withheld the submission of such a document because as explained in letter dated 7th November 2007 from the Company's lawyers to the Senior Labour Inspector, the Company had been awaiting developments as to possible continuation of employment by the Complainant. Upon no advancement in this connection the Notice of Termination was then submitted for the Complainant.

The Ministry stated that it was a fact that the Complainant '*failed to attend work*' after what turned out to be her last day of work i.e. 11th May 2006.

As regards the Ombudsman's statement that the alleged ex-gratia payment did not appear to comply with the income tax legislation, the Ministry arranged for all necessary information to be passed on to the Commissioner of Income Tax for whatever investigation and action he considered appropriate.

Comments and Considerations

The Ombudsman had to consider the actions of the parties involved in this complaint, i.e. the Complainant and the Ministry.

The Complainant

The Complainant, upon being faced with an employment situation which she was not pleased with, decided to seek her Union's assistance; this occurred 11th May 2006 or soon thereafter. The Union instructed lawyers to assist the Complainant but given that one year later the Complainant's situation had not resolved, she decided to seek the assistance of the Inspectors.

On inspection of the Inspectors' file in respect of this complaint, the 'Complaint Form' showed that the complaint lodged had been in respect of the non-payment of wages from November 2006 to the

date of lodging the complaint, i.e. 2nd October 2007, plus a balance in respect of leave.

The Complainant had brought the matter to the Inspectors some fifteen months after the event.

The Inspectors

The Inspectors' handling of this complaint raised serious administrative concerns. From the information available to the Ombudsman, it appeared that the Inspectors had misdirected themselves in dealing with the complaint.

The complaint received had been in respect of the non-payment of wages for the period November 2006 to the date of the complaint, i.e. 2 October 2007 plus the balance of her annual leave.

The Ministry's own record showed that despite the fact that the Inspectors had been advised that there were lawyers involved and that there had been alternative offers of employment and refused, on the 27th September 2007 the Inspectors issued instructions to the Company to pay the Complainant. There was no record in the Ministry's files as to how this decision had been arrived at, yet to the best of the Ombudsman's knowledge the instruction had not been met and no further payment had been made to the Complainant.

On 3rd October 2007, six days after the instructions to pay was issued, the Inspectors, after speaking to the Company's lawyers inform the Complainant that they will not take her case as she had been offered alternative employment and she could take the case up with the Industrial Tribunal.

A post script note shows that the Inspectors then instructed the Company to submit terminations in respect of the Complainant.

The termination form was delivered to the Inspectors on 9th November 2007 which showed the termination date as 11th May 2006. On 4th January 2008, about two months later, the Inspectors spoke to the Company in relation to the submitted terminations to change the termination date to December 2006. Again there is no information on file, so far as the Ombudsman could determine, as to what issues were considered and how this decision was taken.

Subsequent to the various episodes contained at points 1-5 above, during the meeting that the Complainant held with the Director of Employment on 5th February 2008 the Complainant was informed that the Director was disputing the Termination Date and that his office was trying to establish the actual date of termination. In the end the Company informed the Director that they would not change the termination date as the Complainant did not work beyond the date already submitted.

Whether the Company was correct in submitting the Notice of Termination with the 11th May 2006 as termination date is not within the scope of this investigation and no comment will be made about it. However, what is certain is that the Ministry did not appear (at different stages) to be prepared to accept the termination date as provided by the Company.

Conclusion

It was the Ombudsman's opinion that this case had brought to light flaws of an administrative nature within the Inspectors' investigation procedures and made the following recommendations:

1. The heading of their complaint form should simply be headed 'Complaint Form' and not as

at present 'Record of Possible Breaches of the Ordinance' (in any event it should read 'Act' and not 'Ordinance')

2. The Complaint Form should be precisely that, a complaint form, detailing the complaint as presented to the Inspectors. No other information as to any action taken should be con tained in that form.

3. The Complaint should be signed by the Complainant.

4. There should be a clear record of the Inspectors' actions and the reasons for such actions.

CASE SUSTAINED

CS/802

COMPLAINT AGAINST THE MINISTRY FOR EMPLOYMENT ("THE MINISTRY") WITH REGARD TO THE MANNER SHE WAS TREATED BY THE LABOUR INSPECTORS ("THE INSPECTORS"). THE COMPLAINANT WAS ALSO AGGRIEVED BECAUSE OF THE MINISTRY'S DECISION TO ACCEPT A BACKDATED DISMISSAL NOTICE.

Complaint

Complaint against the Ministry with regard to the manner she was treated by the Labour Inspectors. The Complainant was also aggrieved because of the Ministry's decision to accept a backdated dismissal notice.

Background

The Complainant explained that she had worked for a company ("the Company") for over five years; firstly as a lunch lady as of 7th January 2002, and then as of 25th May 2005 as a Head Supervisor. She had never had any problem with her employers and this was reflected in the fact that she got a wage increase and bonus on 12th September 2003 and was later promoted to Head Supervisor with 16 women under her supervision.

Sometime in April 2006, as Head Supervisor, she felt she had no option but to write to the Head Master of the School where she had been assigned to, complaining that six lunch ladies were not properly adhering to their job requirements. She copied this letter to the Company as protocol stipulated. As a direct result of this incident she was called in to the Company's office and told that the Head Master (of the school where she was assigned to), no longer wanted her working at the school, and that she therefore had to leave. The Company allegedly told her that they did not know what to do, and had nowhere to place her, to which the Complainant then added that she would then seek Union advice.

After explaining her case to a Union Representative, the Complainant was referred to a lawyer who acted on the Union's behalf. Unfortunately, the Complainant explained, a year passed and not a lot was done by the lawyers appointed by the Union. As a result the Complainant felt she had no option but to refer the matter to another advisor. He listened to her case and after allegedly advising her that he felt she had a case she was referred to the Inspectors at the Ministry.

The Complainant explained that she was very pleased with the quick response she got from the Inspectors. They immediately got in contact with the Company and begun to get her file in order. The Complainant claimed that the Inspectors verbally informed her that she had a genuine case.

The Inspectors continued to investigate her case and gave her regular updates. However by November 2006, after not hearing from the Inspectors for some time the Complainant phoned to ask for an update. The Complainant claimed that it was then that she was referred to the Senior Labour Inspector. She felt that it was at this point when her case started to collapse and she was told she did not have a case. She was further informed that the Company had sent a dismissal form which had been received by the Ministry on 9th November 2007, but back dated to May 2006. The Complainant held a meeting with the Senior Labour Inspector and complained that she felt this was illegal and fraudulent.

She pointed out that she had never received a dismissal form and had simply been told to leave, as a result of which she had gone to her Union and later to the Inspectors. She was told that the dismissal was on the grounds that she had failed to go to work, and again she explained that it was the Company that had told her she had to leave. The Complainant then allegedly pointed out that she had never applied for unemployment benefit purely because she did not think she was unemployed, and also highlighted that she had received full pay for May 2006 as well as a payment of £701.73 in November 2006 (£501.83 printed on a pay slip yet £701.73 credited to her bank account). The Complainant stated that the Senior Labour Inspector simply informed her that this must have been an ex-gratia payment. The Complainant insisted that she was not happy and asked for an appointment with the Director of Employment ("the Director").

After pressing for an appointment with the Director the Complainant was finally able to meet with him. The Complainant's husband accompanied her and the Senior Labour Inspector was also present. At this meeting the Complainant was informed that the payment of £501.83 (or £701.73) had not been accepted by the Ministry as an ex-gratia payment since it was on a normal payslip, but that her dismissal had still been accepted. Allegedly, the Director nevertheless added that he could arrange for the dismissal to be backdated to November 2007 which would enable her to apply for unemployment benefit.

The Complainant was not happy with the way she has been treated by the Ministry and felt that their decision to accept the backdated dismissal was wrong. She had hoped that the Inspectors would put things in order with respect to her employment and advise her on her employment rights, but instead they seemed to have simply sided with the Company. The Complainant complained that this may be as a direct result of the Company working for Government and thus Government siding with their Agent.

The Ombudsman's Preliminary Enquiries

Before deciding whether to initiate a formal investigation warranting a report, the Ombudsman contacted the Director and requested an update of the Complainant's case.

The Ombudsman was informed that during the meeting that the Complainant and her husband held with the Director of Employment on 5th February 2008 the Complainant was informed that the Director was disputing the Termination Date and that his office was trying to establish the actual date of termination. Further, the Ombudsman was informed that they would be contacting the Complainant upon receiving the requested information from the Company.

The Ombudsman informed the Complainant of the above (by letter) and also that the Ministry had been asked to keep the Ombudsman updated on this matter; the Ombudsman also asked the Complainant to do likewise.

The Complainant was informed that in the meantime, her file would be kept in abeyance and advised that if she had not had any news from Ministry in ten working days, then she should contact the Ombudsman.

A short time after, the Complainant informed the Ombudsman that she had received a reply from the Ministry and was not pleased with it and would like the Ombudsman to consider her original complaint.

Investigation

The Ombudsman's investigation centred on the duties of the Inspectors and the circumstances that led them to conclude that there was indeed no breach of the employment legislation.

The Ombudsman wrote to the Ministry setting out the complaint and, as per usual procedure when commencing an investigation, requested their comments.

The Ministry explained that this particular case was reported to the Inspectors by the Complainant on 23rd August 2007. It appeared that she had stopped working, in the most practical sense, for the Company sometime in May 2006, whereupon she firstly sought Union advice, subsequently legal advice and then referred the matter elsewhere and was advised to take her case to the Inspectors. By her own admission, a year passed with not a lot being done before the matter was referred to the Inspectors. It was therefore, well over a year from the Complainant's initial 'complaint' to the Union that she brought her case to the Inspectors.

The Ministry explained that, again, by her own admission, the Labour Inspectors promptly took up her case and gave her regular updates, and it would appear that the Complainant was well satisfied with the way she was being 'treated by the Ministry'. However, the Ministry further explained, the Complainant was not happy with the outcome of the Inspectors' investigation. She was evidently not satisfied with the associated explanation and decided to bring a complaint to the Ombudsman.

As Head of Department and responsible for the Labour Inspectorate, the Director explained that he most immediately affirmed that he was satisfied with the response of the Inspectors to the case that the Complainant had referred to them for any due investigation and with the explanation offered to her as outcome to the investigation undertaken.

The Ministry provided the Ombudsman with a copy of the 'Record of Possible Breaches of the Ordinance' (evidently, the form had not been updated as it should now read 'Act' instead of 'Ordinance'). The form showed that the Complainant had made her complaint on 23rd August 2007. The 'Nature of Complaint' read as follows:

Person has not been paid since November '06, has had dealings with Opposition in order to recover monies due.
Owed: November '06 to date.
Balance of A/L [Annual Leave]

Under the heading 'Action Taken' the following had been entered:

Spoke to [the Company] *who states that* [a lawyer] *was representing the Complainant. She also states that the Complainant has been issued alternative employment which the Complainant has refused. On 27/9/07 instructions to pay individuals.*

In a separate 'Record of Possible Breaches of the Ordinance' form, an entry dated 3rd October 2007 states:

Spoke to [the Company's lawyer]*, confirms a letter was sent on 12/12/06 to* [Complainant's lawyer] *offering new placements and detailing the reasons why she was to be transferred however,* [the Complainant] *was with same wages but not same post.*

Informed Complainant Department [the Ministry] *will not take case up as offered alternative employment and can take case up with Industrial Tribunal. P.S. Company instructed to submit terminations I.R.O. employee. On 4/1/08 spoke to [Company] in relation to submitted termination to change termination date to December '06.* [The Company] *stated they would be contacting their lawyer to submit them. On 9/1/08 spoke to* [Company's lawyer] *in relation to termination he said he would be looking at Company records and be submitting them to Department.*

On 23/1/08 met with [Company who] *states that payment showing in Nov.o6 is an (ex-gratia) payment and as their system does not cater for that, payslips were issued.* [The Company] *also stated that the figures did not balance with payments made.*

The Ministry explained that upon initial investigations, given that the Complainant had produced payslips for November 2006, it appeared that the Company, as her employer, had employed her at least until such a date. The Company had however, submitted for due registration with the Ministry, a Notice of Termination of employment stating the end of the Complainant's employment to be 11th May 2006. This Termination was received by the Ministry on 9th November 2007.

The date of the apparently final payslip and date of termination of employment did not match and caused the Inspectors to seek explanations to the effect from the Company.

The Company explained that the Complainant did not work beyond the date of termination as set out in the Notice of Termination and that the payment made (November 2006 payslip) was an ex-gratia payment made out of goodwill and not to be construed as payments by way of wages for work done. The Company had further explained that they had made deductions [income tax and social security] as they considered that they had a duty to do so and for no other reason.

The Ministry also provided the Ombudsman with copies of all relevant correspondence and minutes of the meeting held with the Complainant on 5th February 2008.

The Ministry also provided information as to the remit of the Inspectors and explained that they are appointed under section 16 of the Employment Act for the purposes of this Act. In essence, the Inspectors 'police' and seek to enforce the Act in the manner that the Act prescribes (the relevant extract from the Employment Act was also attached). By way of random inspections and of reported possible breaches of the Act, the Inspectors undertake investigative work to establish whether there has indeed been a possible breach of the Act. The Inspectors do not take sides but consider the pertinent issues in relation to statutory provisions (i.e. employment legislation) and will seek to establish whether a possible breach arises. Upon any possible breach being detected the matter will be brought to the attention of the party concerned by way of seeking to have the possible breach put right. Where the matter is not 'amicably' put right, it is referred to Attorney General Chambers for advice on how to best proceed.

In the Complainant's particular case, upon having undertaken the due investigation, the Inspectors were not able to establish that in the given circumstances a relevant breach had been committed. In consequence the Complainant was informed that the Inspectors could not take her case any further.

The Ministry then took issue with some of the statements that the Complainant had chosen to make in putting her case to the Ombudsman.

The Ministry most vehemently refuted the Complainant's statement to the effect that the Inspectors seem to have simply sided with the Company and that this may be as a direct result of the Company working for Government and thus Government siding with their Agent. They reiterated that the Inspectors do not take sides but consider the pertinent issues in relation to statutory provisions (i.e. employment legislation).

The Ministry also took issue with the Complainant's statement to the effect that the Director had said that he could arrange for the dismissal to be backdated to November 2007 which would enable the Complainant to apply for unemployment benefit. They contended that his was not true. The Director has no powers and it is not his business to arrange for any dismissal to be backdated; and further, entitlement to unemployment benefit is not determined by the Director.

After carefully perusing the Ministry's letter, on the 23rd April 2008, the Ombudsman wrote to the Ministry seeking clarification on some specific points.

> 1. Whether the Inspectors considered within their investigation the effects of the Company not submitting the termination document within the 7 days required by law and why they came to the conclusion the submission of the Notice of Termination of Employment nearly eighteen months after the event was not a breach of employment law.
>
> 2. Whether the Inspectors considered within their investigation the fact that if the Complainant's last day of work was the 11 May 2006 how then could it be said that her employment was terminated on that date because she "failed to attend work" (as stated on the "Termination of Employment" form submitted by the Company).

3. It would appear that the alleged ex-gratia payment did not comply with the Income Tax legislation in that permission had not been sought from the Income Tax Commissioner and that under the criteria for ex-gratia payments it was unclear how it would be given that status based on the facts available, especially since income tax and social insurance was deducted from the payment.

The Ministry replied that the Inspectors did consider within their investigation the fact that the Company had not submitted the termination document within the 7 days required by s 13 and concluded that the employer had not wilfully withheld the submission of such a document because as explained in letter dated 7th November 2007 from the Company's lawyers to the Senior Labour Inspector, the Company had been awaiting developments as to possible continuation of employment by the Complainant. Upon no advancement in this connection the Notice of Termination was then submitted for the Complainant.

The Ministry stated that it was a fact that the Complainant '*failed to attend work*' after what turned out to be her last day of work i.e. 11th May 2006

As regards the Ombudsman's statement that the alleged ex-gratia payment did not appear to comply with the income tax legislation, the Ministry arranged for all necessary information to be passed on to the Commissioner of Income Tax for whatever investigation and action he considered appropriate.

Comments and Considerations

The Ombudsman had to consider the actions of the parties involved in this complaint, i.e. the Complainant and the Ministry.

The Complainant

The Complainant, upon being faced with an employment situation which she was not pleased with, decided to seek her Union's assistance; this occurred 11th May 2006 or soon thereafter. The Union instructed lawyers to assist the Complainant but given that one year later the Complainant's situation had not resolved, she decided to seek the assistance of the Inspectors.

On inspection of the Inspectors' file in respect of this complaint, the 'Complaint Form' showed that the complaint lodged had been in respect of the non-payment of wages from November 2006 to the date of lodging the complaint, i.e. 23rd August 2007, plus a balance in respect of leave.

The Complainant had brought the matter to the Inspectors some fifteen months after the event.

The Inspectors

The Inspectors' handling of this complaint raised serious administrative concerns. From the information available to the Ombudsman, it appeared that the Inspectors had misdirected themselves in dealing with the complaint.

1. The complaint received had been in respect of the non-payment of wages for the period November 2006 to the date of the complaint, i.e. 23rd August 2007 plus the balance of her annual leave.

2. The Ministry's own record showed that despite the fact that the Inspectors had been advised that there were lawyers involved and that there had been alternative offers of employment and refused, on the 27th September 2007 the Inspectors issued instructions to the Company to pay the Complainant. There was no record in the Ministry's files as to how this decision had been arrived at, yet to the best of the Ombudsman's knowledge the instruction had not been met and no further payment had been made to the Complainant.

3. On 3rd October 2007, six days after the instructions to pay was issued, the Inspectors, after speaking to the Company's lawyers inform the Complainant that they will not take her case as she had been offered alternative employment and she could take the case up with the Industrial Tribunal.

4. A post script note shows that the Inspectors then instructed the Company to submit terminations in respect of the Complainant.

5. The termination form was delivered to the Inspectors on 9th November 2007 which showed the termination date as 11th May 2006. On 4th January 2008, about two months later, the Inspectors spoke to the Company in relation to the submitted terminations to change the termination date to December 2006. Again there is no information on file, so far as the Ombudsman could determine, as to what issues were considered and how this decision was taken.

6. Subsequent to the various episodes contained at points 1-5 above, during the meeting that the Complainant and her husband held with the Director of Employment on 5th February 2008 the Complainant was informed that the Director was disputing the Termination Date and that his office was trying to establish the actual date of termination. In the end the Company informed the Director that they would not change the termination date as the Complainant did not work beyond the date already submitted.

7. Whether the Company was correct in submitting the Notice of Termination with the 11th May 2006 as termination date is not within the scope of this investigation and no comment will be made about it. However, what is certain is that the Ministry did not appear (at different stages) to be prepared to accept the termination date as provided by the Company.

Conclusion

It was the Ombudsman's opinion that this case had brought to light flaws of an administrative nature within the Inspectors' investigation procedures and made the following recommendations:

The heading of their complaint form should simply be headed 'Complaint Form' and not as at present 'Record of Possible Breaches of the Ordinance' [in any event it should read 'Act' and not 'Ordinance']

The Complaint Form should be precisely that, a complaint form, detailing the complaint as presented to the Inspectors. No other information as to any action taken should be contained in that form.

The Complaint should be signed by the Complainant.

There should be a clear record of the Inspectors' actions and the reasons for such actions.

GIBRALTAR
PORT AUTHORITY

CASE SUSTAINED
RECOMMENDATIONS MADE

CS/771

COMPLAINT AGAINST THE PORT AUTHORITY FOR THE DELAY IN REGISTERING THE COMPLAINANT'S BOAT

Complaint

The complainant had submitted her application for a 'Fast Launch or Pleasure Craft Licence' on the 15th August 2007 and was advised by the Captain of the Port that her application would take approximately 2 to 3 weeks to process. In early November (11 weeks later) she had still not been issued the required licence and decided to email her complaint to the Ombudsman.

The complainant was aggrieved that not only was her vessel categorised as a fast launch but that the Fast Launch Licence application had taken an unacceptable excessive length of time to process. She further explained that both her and her husband had been given false hope week after week and felt that they had been treated unfairly.

Type of licence

The complainant explained that in July 2007 she and her husband purchased a British registered family cruiser. Before selecting the cruiser they researched the procedure and requirements in order to bring such a vessel into Gibraltar. They read the Port Authority (Authority) Website and the Gibraltar Register of Shipping Website; they also read the Gibraltar Merchant Shipping (Pleasure Yachts) Regulations 1997. Adhering to the guidelines illustrated in the websites they assumed that all that was required was to register with the Registry of Pleasure Yachts at Companies House in Gibraltar and provide the documentation as requested on the Registry Website. However, when they approached the Customs to pay the import duty they were referred to the Authority who advised them that their vessel came under the fast launch category as it exceeded the speed/length ratio of 1:6 and that they must apply for a Fast Launch Licence in order to be able to use the vessel in Gibraltar

It is worth noting at this point that the fast launch categorisation of vessels had been introduced by the Government in order to suppress the illegal smuggling of tobacco though the Tobacco Act 1997, the Imports and Export (Control) Regulations 1987 and the Fast Launch (Control) Act 1987.

The complainant further explained that she was surprised that her vessel was categorised as a fast launch, there had not been any reference to this specific category in either of the Port or Ship Registry websites and she could not understand why a vessel that had the same engine that was fitted by the manufacturer with a maximum speed of 30 knots (the minimum requirement which any boat of the same size and weight must have), had a capacity for four people to sleep in and had an aft cabin, a kitchen, a toilet and a shower, would be described as a "fast launch".

Nonetheless the complainant completed the necessary form and complied with the list of requirements for a Fast Launch Licence, in the meantime her boat was sealed by customs

The complainant explained that she removed her boat to Spanish waters when she had not received a response to her application after four weeks. Given that she had paid for a year's mooring in Gi-

braltar it was an added expense for the vessel to be birthed in Spain. However, this was the only way in which she was able to enjoy the use of the vessel with her family.

Fast Launch Licence Application

Whilst chasing the progress of her application the complainant explained that the Authority had passed her to numerous government departments (Customs, the RGP – the Commissioner and the CID, Office of the Deputy Governor, the Financial Secretary, the Chief Ministers Office) none of them were able to assist with her application. She further explained that after six weeks she managed to trace her application and the Authority told her that it would be processed and ready by the following week. It was not ready the following week, but again promises of just another week were made; this continued for 3 more weeks.

On the 30th October 2007 (11 weeks after the original application) the Authority required the complainant to prove the boat was registered in her name and the complainant submitted her Certificate of British Registry. The Authority took a copy of the Certificate and advised the complainant that her application had to be approved by the Chief Minister and should be ready for collection on the 2nd November 2007. When the complainant discovered that in fact it was not ready on the 2nd she sought the assistance of the Ombudsman and registered a complaint against the Authority.

Investigation

The Ombudsman wrote to the Authority seeking information as to the delay being experienced by the complainant in her application for a licence. As the Ombudsman had not received a reply after three weeks he sent a further letter requesting a reply by return of post. The Authority apologised for the delay in replying to the Ombudsman by telephone and by fax the following day, explaining that the absence of an assistant in the office had caused a backlog in the workload.

The Delay

In reference to the delay experienced by the complainant the Authority explained that various government departments were required to authorise such a licence (Captain of the Port, Collector of Customs and the RGP) before being sent to the Financial Secretary and then to the Chief Minister for final authorisation. The Authority explained that there had been a "big lapse of time" waiting for the Chief Minister as he was out on business and very busy. Three weeks later (23 November 2007) the Financial Secretary and Chief Minister met to discuss the application and the complainant received her licence the following working day.

Website information

The Ombudsman confirmed from his own research that neither the Port or Registry websites made reference to the existence of Fast Launch Licences, there was no indication that the information contained in the websites was incomplete, not even a disclaimer that may prompt the reader to check for more up to date information, as contained in other Government websites such as the laws of Gibraltar.

The Authority acknowledged that their website did not include any details of a fast launch categorisation of vessels in Gibraltar and that their website was in need of updating.

Defining a fast launch

Under section 2 of the Fast Launches (Control) Act 1987 it states:

> *'"fast launch" means a vessel which does not exceed 60 feet in length overall and is fitted with an engine or engines of an aggregate 200 or more brake horsepower and having a speed/length ratio of or greater than 1.6 as defined below'*

The section also explains the calculation as a formula. On applying this formula to the complainant's vessel the Ombudsman confirmed that it fell within the definition of fast launch.

Conclusions

The two aspects of the complaint were 1) categorisation of the complainant's vessel as a fast launch and 2) the delay in processing the complainant's application for a Fast Launch Licence and lack of information prior to application and during its consideration.

The Ombudsman noted the complainant's confusion in the categorisation of her pleasure yacht as a fast launch. She had been effectively caught up in legislation that had not been intended for pleasure yacht owners. However, the legislation was clear and had been appropriately applied; her vessel came under the category of fast launch.

In regard to the delay of 14 weeks to process the complainant's application the Ombudsman agreed with the complainant that this was an excessive amount of time which the Authority had not been able to justify. The complainant had seemingly done all she could to ensure the progress of her application but she was hindered from the start; initially by the incomplete information available on the websites and then by the lack of management of her application by the Authority. Once the application had been submitted it appeared to take a life of its own, there had been very little, if any, response to her enquiries. The Authority had advised her that it would take 2 to 3 weeks and had not given justification for the subsequent delays.

The lack of information on the websites and during the application process was an example of poor administration, the Ombudsman referred to his Annual Report for 2006 "Good Administration"

> *3. Being Open and Accountable*
>
> *Being open and clear about policies, procedures and decisions, and ensuring that information and any advice provided is accessible, accurate and complete*

The Ombudsman therefore sustained this complaint because of the lack of information available to the complainant prior to her application and more importantly during its progress, also for the excessive unjustified delay of fourteen weeks (eleven weeks longer than advised), which had caused her additional costs and unnecessary stress.

The Ombudsman recommended that the Authority update their website to include information regarding Fast Launch Licences and that clearer guidelines are given to applicants on the path of their application, with responsibility of ensuring the minimum delay; these being the cornerstones of good administration.

Recommendation(s)

The Ombudsman recommended that the Authority update their website to include information regarding Fast Launch Licences and that clearer guidelines are given to applicants on the path of their application, with responsibility of ensuring the minimum delay.

GOVERNMENT HOSTEL

CASE NOT SUSTAINED IN RELATION TO THE MAIN ISSUE
CASE SUSTAIND IN RELATION TO THE SUBSIDIARY ISSUE
RECOMMENDATIONS AND SUGGESTIONS MADE

CS/773

COMPLAINT AGAINST THE MINISTRY OF FAMILY, YOUTH AND COMMUNITY AFFAIRS ("MINISTRY") ARISING FROM THE FACT THAT ALTHOUGH THE COMPLAINANT HAD APPLIED FOR A ROOM AT THE DEVIL'S TOWER GOVERNMENT HOSTEL ON 16 SEPTEMBER 2004, OVER THREE YEARS LATER HE HAD NOT YET BEEN GIVEN A ROOM THERE.

Complaint

Complaint against the Ministry of Family, Youth and Community Affairs ("Ministry") arising from the fact that although the Complainant had applied for a room at the Devil's Tower Government Hostel on 16 September 2004, over three years later he has not yet been given a room there.

Background

The Complainant lived in private rented accommodation in the town area in Gibraltar which he shared with other persons. He was desperate to move out since he was very dissatisfied with his living conditions there.

He had therefore made a written application for accommodation at the Gibraltar Government Hostels ("Hostels") on 16 September 2004.

[Ombudsman's general note in relation to the location of the Gibraltar Government Hostels.

There are two Government Hostels in Gibraltar, Buena Vista Hostel is situated in the south district of Gibraltar, the other Devil's Tower Hostel is situated in the north district of Gibraltar. Devil's Tower Hostel in within easy walking distance (approximately 10 to 15 minutes walking time) of the town centre whereas Buena Vista Hostel is much further away from the town centre (approximately 45 minutes walking time). There is a good regular bus service linking both the south and north districts with the town centre.]

As stated above the Complainant had applied to the Ministry on 16 September 2004 requesting hostel accommodation. The Ministry wrote to the Complainant on 14 June 2006 acknowledging receipt of his letter. They informed him that the current waiting list was being updated and if he still required accommodation the enclosed form had to be completed and returned by not later than the 7 July 2006.

The Complainant returned the form dated 21 June 2006 to the Ministry confirming that he wished to be accommodated at the Government Hostels as soon as a room became available and stated his preference as being Devil's Tower Hostel. The form contained a printed section which stated that the Complainant understood that this application expired one year from the date of application, and if he had not been offered a room within this period, he had to renew his application.

The Ministry by way of letter dated 5 July 2006 acknowledged receipt of the Complainant's applica-

tion dated 21 June 2006 for a room at Devil's Tower Hostel. They advised him that there were no rooms then available and that he had been placed in the waiting list. The letter also informed him that his application was valid for a period of 12 months until 22 June 2007. That it was therefore in his interest, should he still wish to be accommodated at the Government Hostel, to renew his application if no offer was made before this date.

The Complainant subsequently forwarded another application form dated 12 July 2007 to the Ministry confirming that he wished to be accommodated at the Government Hostels as soon as a room became available and stated his preference as being Buena Vista Hostel. This form like the previous one he submitted contained a printed section which stated that the Complainant understood that this application expired one year from then, and if he had not been offered a room within this period, he had to renew his application.

The Ministry wrote to the Complainant on 19 July 2007. They acknowledged receipt of his application dated 12 July 2007 for a room at Buena Vista Hostel. They advised him that there were no rooms then available and that he had been placed in the waiting list. The letter also informed him that his application was valid for a period of 12 months until 13 July 2008. That it was therefore in his interest, should he still wish to be accommodated at the Government Hostel, to renew his application if no offer was made before this date.

This letter contained a handwritten note which on the assumption that the abbreviation DT and BV respectively stood for Devil's Tower Hostel and Buena Vista Hostel, read as follows:

> *"First application DT* (Devil's Tower Hostel)
> *Second application BV* (Buena Vista Hostel) *(in desperate need for accommodation) but still wishes to be kept in DT* (Devil's Tower Hostel) *list if accommodated at BV* (Buena Vista Hostel)*"*

The Complainant subsequently wrote to the Ministry on 12 October 2007. In his letter he informed the Ministry that he had originally applied for a room in the Devils Tower Government Hostel on 16 September 2004 when he first wrote to them. Since then he had applied, as requested, on a yearly basis. He now wished to find out what position he was in and how much longer he must wait. The Complainant was worried as he found that others who he thought had been on the list for less time than him had been given a room before him. The Complainant ended his letter by stating that at the moment he was living in extremely over crowded conditions and for this reason would appreciate a room as soon as possible.

Since the Complainant had not received a reply, he wrote a chaser letter to the Ministry on 26 October 2007 referring to his above mentioned letter to which he was still awaiting a reply. He enclosed a copy of the letter for ease of reference, and went on to state that considering his circumstances and the fact that he was desperate for a proper room to live in, he would appreciate a reply as soon as possible.
The Ministry wrote to the Complainant on 24 October 2007 acknowledging receipt of his letter dated 12 October 2007 contents which had been noted. The letter went on to inform him that if he required any further information to please come to their office.

The Complainant subsequently being unhappy at not yet having been given a room the Devil's Tower Hostel came to see the Ombudsman with his Complaint.

Before commencing this investigation the Ombudsman first had to ascertain which Ministry had responsibility for Government Hostels. Although this was in the course of being transferred from the Ministry to the Ministry for Housing, this had not yet formally taken place and the Ombudsman therefore directed the Complaint to the Ministry.

Investigation

The Ombudsman's Correspondence with the Department

The Ombudsman wrote to the Ministry on the 4 January 2008 to inform them of the Complaint namely that although the Complainant applied for a room at the Devil's Tower Government Hostel on 16 September 2004, to date over three years later he had not yet been given a room there.

The Ombudsman requested the Department's comments and additionally, required to know:

1. When the Complainant was likely to be offered a room at the Devil's Tower Government Hostel.

2. What position the Complainant was currently on in the Devil's Tower Government Hostel Waiting List.

The Ministry sent a substantive reply within 1 week by way of letter dated 9 January 2008 received 16 January 2008. The above time taken to reply to the Ombudsman's letter was well within his guideline parameters which are reproduced below for Departmental Guidance, and was an example of good administrative practice.

[**Ombudsman's General Note for Departmental Guidance.**

The Ombudsman expects an acknowledgment of receipt of the complaint to be sent within 4 days of receipt of the complaint at the very latest.

With regard to an Initial Reply letter, the Ombudsman expects this, if required, to issue within 7 days of receipt of the complaint at the very latest.

A substantive reply to the Ombudsman's letter informing the Department of the Complaint, is expected from the Department by no later than 2 to 3 weeks from the date of his letter.

Should the Department for any reason be unable to provide a substantive reply within 3 weeks, a suitable holding letter should issue from the Department to the Office of the Ombudsman explaining why the 3 week time frame cannot be adhered to and confirming when the Department will be in a position to forward a substantive reply.]

In their letter dated 9 January 2008 the Ministry confirmed that the Complainant had applied for a room at Devil's Tower Hostel on 16 September 2004. Following a review of procedures and updating of waiting lists all applicants who still required accommodation at the hostels were asked to re-apply. The Complainant re-applied for a room on 22 June 2007 and requested to be placed on the Buena Vista Hostel waiting list, as he had a better chance of being offered accommodation at this hostel more quickly, and could later request to move to the Devil's Tower Hostel when a room became available. At the time he was 5th on the list.

The Complainant was now first on the list for Buena Vista Hostel and could be allocated a room at this hostel within the next few days. Since very few rooms become available at the Devil's Tower Hostel over a long period of time, it would be in his interest (if he had a pressing need for alternative accommodation) to move to Buena Vista Hostel when a bed became available. Preference for rooms at the Devil's Tower Hostel was first given to residents at the Buena Vista Hostel, so he stood a better chance of being allocated a room at the Devil's Tower Hostel in a much shorter period of time once he was already a resident at Buena Vista Hostel.

The Ministry ended their letter by stating that the Complainant would be shortly contacted with an offer of accommodation at Buena Vista Hostel.

The Ombudsman wrote to the Ministry on 6 February 2008 requiring confirmation that the Complainant had been contacted with an offer of accommodation at Buena Vista Hostel, the manner in which this was communicated to the Complainant and whether he accepted the offer of accommodation at Buena Vista Hostel.

Since the Ministry had not replied by the 15 February 2008, the Ombudsman again wrote to the Ministry referring to his letter dated 6 February 2008 to which he had not received a reply asking them to attend to this matter.

The Ministry replied to the Ombudsman on 21 February 2008 over 2 weeks subsequent to his letter dated 6 February 2008. This is far longer than the Ombudsman expects for a reply to the straight forward information he was seeking from the Ministry. The Ombudsman in this regard refers the Ministry to the **Ombudsman's General Note for Departmental Guidance** set out above.

In their letter the Ministry explained that a registered letter had been sent to the Complainant on 12th February 2008 advising him that a room was available at Buena Vista Hostel. The Complainant had met with the Hostels Manager on 19 February 2008 and informed him that he did not like the type of accommodation and environment in this hostel. Furthermore, since he had no means of transport he was not interested in taking up the offer. He then said he would think about it but had not come back to see the Hostel Manager. The Ministry ended their letter by stating that they could only conclude that the Complainant had no urgency in finding alternative accommodation.

The Ministry's above mentioned letter to the Complainant dated 12 February 2008 referred to his application for Hostel Accommodation and requested him to come to the Hostels Main Office.

The Ombudsman was not apprised whether or not the Complainant ultimately accepted the room that had been offered him at the Buena Vista Hostel. He however considered that this had no bearing in relation to the Complaint per se and his conclusion thereon.

Comments and Considerations

Relating to the substantive element of the Complaint ("Main Issue")

In relation to the substantive Complaint the Ombudsman having carefully considered the matter in detail decided not to sustain the Complaint.

The following facts and matters were instrumental in the Ombudsman arriving at his decision in this regard:

(1) The fact that the Ministry had carried out a review of procedures and up-dating of waiting lists following which all applicants who still required accommodation at the hostels had been asked to re-apply.

(2) The Ministry's clear and helpful explanation of the hostel accommodation situation that since very few rooms become available at the Devil's Tower Hostel over a long period of time, it would be in the Complainant's interest (if he had a pressing need for alternative accommodation) to move to Buena Vista Hostel when a bed became available. Preference for rooms at the Devil's Tower Hostel was first given to residents at the Buena Vista Hostel, so he stood a better chance of being allocated a room at the Devil's Tower Hostel in a much shorter period of time once he was already a resident at Buena Vista Hostel.

(3) That the Ministry following on from their statement contained in their letter to the Ombudsman dated 9 January 2008 that the Complainant was now first on the list for Buena Vista Hostel and could be allocated a room at this hostel within the next few days, had indeed relatively soon thereafter contacted the Complainant with an offer of accommodation at Buena Vista Hostel.

Relating to the subsidiary element of the Complaint ("Subsidiary Issue")

In relation to the subsidiary matter of lack of a timely reply to Complainant's initial application, the Ombudsman sustained this element of the Complaint.

The Ombudsman noted that the Department in their letter dated 14 June 2006 stated "We are in receipt of your letter dated 16 September 2004 for Hostel accommodation." If this was an acknowledgment of receipt of the Complainant's letter, this definitely amounted to maladministration arising from the unacceptable inordinate delay in attending to the same. If alternatively the Department does not acknowledge receipt of letters and this was instead a historical reference to the Complainant's letter by way of introduction to the main body of the letter dated 14 June 2006, this again amounted to maladministration since the Ombudsman is very strongly of the view that all letters must be attended to and dealt with substantively within a reasonable period of time or alternatively if this is not possible they must at least initially be acknowledged and subsequently dealt with. In this regard the Ombudsman referred the Department to his Recommendations below.

Conclusion

Case not sustained in relation to the Main Issue but sustained in relation to the Subsidiary Issue of lack of timely reply to the Complainant's initial application.

Recommendation(s) and Suggestions

That the Ministry:

(1) Puts in place an effective administrative system to ensure that all letters of application for Hostel accommodation are promptly acknowledged and replied to.

(2) By no later than the end of January in each and every year draws up and puts up in a place open to public viewing the two updated Hostel Waiting Lists.

That the Ministry:

(a) Amends its Hostel Application Form to state that the person understands that the application "expires at the end of this year" as opposed to "expires one year from today" as the form currently reads.

(b) Similarly amends its standard application reply form in relation to cases where no rooms are available and an applicant is placed on the waiting list, so that regardless of the date of application, the validity expires at the end of the year, with the requirement that should the applicant still wish to be accommodated at the Government Hostel, he must renew his application before the end of the year.

The above changes (a) and (b) would potentially have the following positive results:

Make it easier for applicants to remember to renew their application since they would then only have to remember that this has to be submitted during the month of December in each and every year.

Facilitate the annual production by the Ministry of a Hostel Waiting List for each hostel.

Allow the Ministry to draw up an accurate up to date Hostel Waiting List for each hostel early in January of each and every year.

HOUSING DEPARTMENT

CASE SUSTAINED

CS/785

COMPLAINT AGAINST THE HOUSING DEPARTMENT FOR NOT ASSIGNING COMMUNAL SPACE TO THE COMPLAINANT AS SELF CONTAINED TOILET FACILITIES

Complaint

The complainant's mother, who was ninety years old, lived in a flat in the same building as the complainant. The flat comprised of a kitchen and living room that also doubled as a bedroom (commonly known as a bed sit), her toilet facilities were accessed through the communal corridor adjacent to storage facilities used by a neighbour.

The complainant explained that although her mother had lived in this flat for a considerable period of time and did not want to move, she was concerned for her living conditions. There was a lack of internal washing and toilet facilities, and running water in the kitchen which meant that her mother had to bath standing up in the kitchen from a bowl of water obtained from the outside toilet sink.

In August 2006 she contacted the Reporting Office in the Housing Department and asked if alterations could be made to the communal toilet and storage area to give her mother an internal bathroom.

The complainant explained that the Technical Division of the Housing Department ("the Department") visited the site and although they expressed concern over the neighbour loosing her storage facilities if the area was dedicated to the complainant's mother, they agreed that if the neighbour was not paying for the storage facility then it could be allocated to her mother.

In September 2006 drawings were sent to the Buildings and Works Department with a comment that the attached drawings will '…achieve practical solution for all concerned'.

The complainant explained that the drawings did not fully encompass her mother's requirements because they included a storage area for the neighbour and that by using the space to encompass a storage area, space had been taken from her mother's already small living room/bedroom to gain access to the new bathroom. The complainant wrote to the Department asking that a higher priority be given to her mother's need for self contained sanitary facilities rather than that of the neighbour's storage requirements. She was advised by the Department to appeal to the Land/Work panel for a change in the planed conversion, which she did in March 2007

The complainant received a holding letter from the Department three weeks later explaining that her appeal was being considered and a further communication would be sent once a decision had been made.

The complainant did not receive a further letter with the results of her appeal. The next event was in April 2007 when an Estimator visited her premises to discuss the amended conversion; he held drawings amended in March 2007 of the layout preferred by the complainant and her mother. The complainant therefore assumed her appeal had been successful.

The following week the complainant received a letter from the Department (which she believed was sent to all tenants) requesting that household items were removed from the communal toilets by the

11 May 2007 in order for Buildings and Works to carry out the necessary repairs.

As the work did not start on 11 May 2007 the complainant contacted the Department to ascertain why. She received a letter from the Housing Manager dated the 25 June 2007 explaining:

> *'The Ministry for Housing maintains that the works required to provide you with proper sanitation facilities are necessary.*
>
> *However, I am instructed to inform you that these works are temporarily on hold at the present. The reason for this being that the Ministry for Housing is studying the possibility of providing* [the neighbour] *alternate storage facilities.'*

The complainant replied to the Department explaining the reasons why she believed her mother's sanitation requirements should take precedence over the need of her neighbour's storage and the effect the delays were having to a ninety year old woman who was blind in one eye and had to leave her flat to go to the toilet in the night. She requested a meeting with the Principal Housing Officer.

Directly after the meeting the complainant attended the offices of the Ombudsman to explain her frustration that the Department had changed the plans in order to address the concerns of a neighbour that they would not be able to access the washing line if sole use of the corridor was given to her mother. This, the complainant explained, was not true as access was available on the other side of the balcony.

The Ombudsman wrote to the Department on 25 July 2007 asking them to explain the process by which, and reasons why, the plans had again been changed and he reminded them of the basic sanitation requirements and age of the complainant's mother stressing a prompt reply.

Two days later the complainant advised the Ombudsman that workmen from the Department had visited her mother's premises and agreed that she should have sole use of the corridor as per her submission to the Land/Work Panel.

The same day the Department contacted the Ombudsman to explain that they had decided to proceed with the complainant's suggestion giving her mother sole use of the corridor. However, the Department suggested that the whole issue had been caused by the complainant getting sight of plans that had not been finalised. The Ombudsman asked that they reply to the Ombudsman's letter of 25 July 2007 explaining the process by which these decisions had been made.

The Ombudsman received a reply to his letter of the 25 July 2007 nearly three months later, the reply did not address the issues of concern expressed by the Ombudsman in his telephone conversation with the Department, subsequent to their visit to the complainant's premises in July 2007. The Ombudsman arranged a visit to the Department to identify for himself the decision making process used.

The Ombudsman was able to establish that subsequent to the complainant's request to provide internal sanitation facilities for her mother in August 2006, plans had been drawn up dated September 2006, there was record of the complainant requesting an alteration to the plans in January 2007 but the Land/Work Panel had decided to continue with their plans, which excluded sole use of the corridor. However, in March 2007 in response to a detailed appeal by the complainant the Panel decided to alter the plans giving sole access of the corridor to the complainant's mother.

There was no other record of the Panel discussing the plans any further. However, other Housing files showed that a stop had been placed on the work on 27 May 2007, this was explained by the Department as being in consequence to a neighbours concern on loosing her storage space and access to the washing line. This matter was not submitted to the Land/Work Panel for consideration.

The Department were not able to supply the Ombudsman with copies of the different sets of plans that had been made during the process of this case, nor were they able to explain why the complainant's request to change the plans had been submitted to the Land/Works Panel and the neighbours had not.

The complainant believed that the reason why her neighbour's requests were not submitted to the Panel was because she was related to a person in Housing that was involved in compiling the plans. The Ombudsman was not able to identify any evidence to substantiate this claim. In fact the Ombudsman was not able to identify any reason for this discrepancy.

Conclusion

The Ombudsman noted that it had taken over a year for the Department to decide the best way to provide what was a very basic need, internal sanitary facilities, to a very frail and elderly woman. The delay had been caused by an objection made by a neighbour for the loss of her storage space and additional access to a washing line. An appeal process had been rightly imposed on the complainant when she disagreed with the Panel's decision (although she never received a written reply to her appeal) yet this process had not been applied to the neighbour. This arbitrary use of administrative procedure amounted to maladministration for which the main victim was a partially sighted ninety year old women who had to leave her home to go to the toilet and wash in bowl in the kitchen. The Ombudsman sustained the complaint

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CASE NOT SUSTAINED

CS/791

COMPLAINT AGAINST THE HOUSING DEPARTMENT FOR AN ALLOCATION OF A FLAT IN CONTRAVENTION OF THE HOUSING ALLOCATION SCHEME

The complainant and his wife originally came to the Office of the Ombudsman with a complaint that their application for a government flat was taking too long.

The complainants were both aged 20 with a one year old child. They explained that they had applied for government housing when they married in July 2006 and later updated their application in December 2006 when their child was born.

They also explained that they were unable to live together as they did not get on with their in-laws and also due to the overcrowding it would create in their respective parents' homes. In March 2007 they were placed on the Social A list and the Medical Advisory Committee awarded them 200 medical points due to the complainant's wife's post natal depression.

The Ombudsman advised the complainants that there was no apparent maladministration as everything seemed to be in order with their housing application and that they needed to wait their turn on

their respective lists.

It was at this point that the complainants explained that they believed that an allocation made to a young couple ("Couple B") had been made in contravention of the Housing Allocation Scheme. They explained that Couple B had only been married for a few months and their son was only four months old and yet they had been allocated a flat before the complainants. They had brought this to the attention of the Housing Department at a meeting they attended a week earlier and were told that they were not the first ones to complain about that allocation but it had been made based on their points for waiting time.

Investigation

The Ombudsman was concerned at the fact that this was not the first time that Couple B's allocation had been brought to his attention either; he therefore decided that a formal investigation was warranted in order to allay peoples concerns about the allocation.

The Housing Department explained that Mr B of Couple B had applied for government housing in October 2002, when he was single and resided with his parents. He had updated his application in March 2007 when he married and he was included in the tenancy of his in-laws. He had therefore initially been on the 1RKB waiting list and then moved to the 2RKB waiting list where he had been 2nd with 6420 points. When they became parents in August 2007 their son was also included on the tenancy and their application moved from the 2RKB to the 3RKB waiting list and he was first on the list with a total of 7970 point, he was subsequently offered accommodation on 17 October 2007.

Conclusions

Couple B's application was made in 2002 whilst the complainant applied in 2006; by that time Couple B had far more points than the complainant, placing them much higher up on the waiting list. The allocation to Couple B had not been made in contravention of the Housing Allocation Scheme.

CASE NOT SUSTAINED

CS/792

COMPLAINT AGAINST THE HOUSING DEPARTMENT AS A RESULT OF WATER INGRESS TO HER FLAT

Complaint

The Complainant was aggrieved because since a private company ("the Company") contracted by the Housing Department ("the Department") had made temporary repairs to the roof of the building in which she resided, her flat ("the Flat") had suffered from severe water ingress. Water had penetrated into the building through the stairwell, which was a hazard for all those persons using the stairs, into the Flat by way of the bedroom ceiling and through the two windows in that same room. She explained that in all the years she had lived in the Flat it had never suffered from water penetration and claimed that this had now occurred as a result of works undertaken by the Company.

Background

As background, the Complainant explained that because the building had been in a general state of disrepair, the tenants wrote to the Department asking for repairs and maintenance. It was as a result of this lobbying that a tender was awarded to the Company to carry out some repairs. It now appeared that the Company did not adequately complete the repairs and as a consequence of missing guttering and mislaid tiles, the building and the Flat had suffered from water ingress.

The Complainant first reported the water ingress to the Reporting Office on 14th January 2008 and later that day, because she became concerned about the safety of the light switches in her Flat, phoned the emergency services. The electrician who attended her call informed her that the works that had been carried out to the building had been done by a private company and that as such he would write a report to the Department for them to take action. He further advised her to try and speak to an officer at Buildings and Works (B&W) to discuss the problem.

After having contacted various officers, on 21st January 2008, the Operations Manager inspected her Flat and again confirmed that he would be contacting the Department asking them to take action. He was later able to inform her that the Department had already paid the Company for the works and that the Department would be contacting the Company to ensure that they made the necessary repairs. Not being satisfied with the response to her grievance and because the Complainant felt that she was being passed from "pillar to post" she sought the assistance of the Ombudsman.

Investigation

The Ombudsman wrote to the Principal Housing Officer ("PHO") on 30th January 2008 explaining the complaint and highlighting two main areas of concern.

> The apparent lack of supervision of works undertaken by a private company on behalf of the Department
>
> The need for the Complainant to phone various officers in order to obtain replies to her concerns

In reply to the Ombudsman's letter, the PHO confirmed that the building had been identified for possible refurbishment in the next financial year, if their budget allowed. In addressing the Complainant's main areas of concern, he explained that supervised works had been undertaken in a neighbouring building to remove loose tiling in order to make the area concerned safe and watertight. He suggested that as a result, some guttering may have become loose or a tile could have been broken and that this could have caused the problem. The PHO felt that although the Complainant had regrettably experienced inconvenience due to the water ingress, the matter was being investigated and even though the source of the problem could not be substantiated at the time, he stated that developments had been duly communicated to her.

On 6th February 2008 the Complainant expressed her concern to the Ombudsman that the water ingress continued, damaging her property and causing serious stress to her family as they had to sleep in the living room to avoid the leaking ceiling in the bedroom. Although the Ombudsman would normally allow fifteen working days for a reply to the introduction of a complaint, in this instance he reminded the Department of the Complainant's concerns and requested a prompt reply. The following day, the Complainant informed the Ombudsman that workers had inspected the roof and had informed her that the cause of the water ingress was broken roof tiles and missing gutter-

ing. This had been reported to the Department some time ago but due to lack of funds, the repairs had not been undertaken.

As a temporary measure, on 21st February 2008 a tarpaulin was laid on the affected area and the Complainant was told that a permanent repair would be carried out within two weeks. Approximately six weeks later, on the 2nd April 2008 the Ombudsman was informed by the Complainant that the repairs had still not been carried out and that no indication had been given as to when these would be done. The Ombudsman sent a letter to the PHO informing him of the situation and requesting the rescheduled date of the repairs. On various occasions throughout this period, the Ombudsman had contacted B&W for updates on the situation and was aware that permits and permissions where in place for tower scaffolding to be erected on the site which was required in order to carry out the repairs. B&W had explained that the delay in commencing the works was due to other priorities. Nonetheless, they promised that this work would be the first to be undertaken after the Easter period.

On 21st April 2008 a letter was received from the Department informing the Ombudsman that the remedial works had been completed. Upon contacting the Complainant she informed the Ombudsman that she estimated only half of the repairs had been done. She was advised to contact B&W for an update and they explained that the Company had carried out works to the roof and replaced part of the guttering but mentioned that there was still more to do.

On 28th April 2008, the Complainant informed the Ombudsman that the scaffolding was being removed even though the repair had not been completed. She had advised B&W of this and although they were concerned that at the present time only emergency works should be carried out because the building was soon due for refurbishment, they arranged for the Company to return to the site to establish whether any further works would be done by the Department. B&W confirmed that the scaffolding would remain in situ until this was determined. Later that day B&W contacted the Ombudsman to advise him that they had spoken to the Complainant and she had agreed that damage had been caused from water ingress due to leaving the upper half of the window in the bedroom open, with the shutters closed, and due to the joints around the windows not being properly sealed. B&W agreed to send in workmen promptly to seal all joints around the window but were concerned that part of the Complainant's window was without glass and felt this would aid rainwater ingress even if the shutters were closed. The Complainant had told them that she did not want this repaired as it allowed ventilation through. B&W also mentioned that the Complainant had advised them that the scaffolders had broken the weather board but B&W had photographic evidence that this was damaged prior to the scaffolding being erected.

Conclusions

The two main areas of concern that the Ombudsman had highlighted to the Principal Housing Officer were:

The apparent lack of supervision of works undertaken by a private company on behalf of the Department, and

The need for the Complainant to phone various officers in order to obtain updates to her concerns.

(a) The apparent lack of supervision of works undertaken by a private company on behalf of the Department.

The Ombudsman was satisfied that the Department had acted in a proper manner when informed of the apparently deficient works. The Company was called back to the building and required to undertake the necessary repairs in order to address the water ingress into the Flat. Having said this, although it would have been almost impossible to assess whether there would be any water ingress in the absence of rain, the Department should have noticed the missing guttering at the conclusion of the works by the Company.

(b) The need for the Complainant to phone various officers in order to obtain updates to her concerns

Ever since the Ombudsman first offered its services to the people of Gibraltar, it has always advocated, as part of a good administrative procedure, for those entities under its jurisdiction to provide a 'one stop shop' where people can phone and have their grievance addressed without the need for the person to be referred from one phone number to another.
There are a number of entities that do offer such a service, but much more needs to be done in this field. The Ombudsman strongly urged all concerned to ensure that procedures and systems are put in place that will improve the service being provided to the ordinary citizen.

Given the events and the positive reaction of the Principal Housing Officer and the Department, albeit with an element of delay, the Ombudsman decided not to sustain the complaint. Instead he decided to write to the PHO urging him to put in place effective procedures that would finally do away with the practice of being referred from one number to another in order to secure a service.

Update

On the 27th May 2008 the Ombudsman contacted the Complainant's husband to receive an update on the situation. He advised that because there had been no water ingress, despite intense rainfall, he had asked the workmen who had returned to carry out further works not to do them. The workmen provided the Complainant with a contact number in case she required their assistance.

The Complainant's husband thanked the Ombudsman for the help provided to them and advised that they no longer needed his services.

CASE DISCONTINUED

CS/803

COMPLAINT AGAINST THE HOUSING DEPARTMENT FOR NOT AWARDING OVERCROWDING POINTS IN RESPECT OF HER HOUSING APPLICATION

Complaint

The Complainant was aggrieved because the Housing Department ("Department") would not award overcrowding points in respect of her housing application.

The Complainant explained that, together with her two children, she lived with her partner in his parents' home. The Government rented flat consisted of three bedrooms and a living room. One of the bedrooms was used by the parents ("the Tenancy Holders"). Another bedroom was used by the

partner's sister, her husband and their two year old daughter. The third bedroom was used by the Complainant's partner and their child, whilst the Complainant slept in the living room with her ten year old daughter.

The Department had explained to the Complainant that the Housing Advisory Committee ("HAC") on considering her application would not accept her inclusion onto the tenancy of where she lived as to do so would '*cause gross overcrowding'*. However, subsequent to a further request they did accept the address for application purposes but did not award overcrowding points. This effectively placed the Complainant very low down on the housing list which meant she would more than likely, be waiting a very long time before being allocated a flat.

Background

The Complainant explained that until 2003 she had lived with her husband and son in a privately owned property. However, subsequent to their divorce and sale of their home she had moved back with her parents to their privately owned property. She then applied for Government rented accommodation for herself and her son. Her application was accepted by the Department and she was duly placed on the housing pre-list (for the standard two years prior to entering the main waiting list).

In September 2006 the Complainant explained to the Department that she was desperate to leave her parents' home as she was living in constant fear of her brother (who also lived with his parents). They constantly argued and he had been both physically and verbally aggressive towards her and her two children; by this time, her younger son from her current partner was one year old. Her partner was living with his family whilst they waited for an allocation of a Government flat. HAC advised that they should:

> '*…follow the normal procedure and await allocation of a government flat on points.*
>
> *Although the Committee recognise the situation you are currently in, this is taken into account in the awarding of points on your application'*

In February 2007, upon checking the Housing Waiting List, the Complainant noted that her points had dropped from over 3,000 to just 600. The Department explained that this had been caused as a result of her sister (who also lived with her parents) being allocated a Government flat in October 2006; overcrowding points had been reduced/removed.

A couple of months later, in April 2007, the Complainant wrote to the Department explaining that her circumstances had changed. In February 2007 her parents had sold their home in Gibraltar and moved to Spain. Faced with very little choice she had also moved to Spain with her parents, but having found the experience too strenuous on herself and her children and not wanting to live in Spain separated from her partner, she returned to Gibraltar and moved into the Tenancy Holder's flat. She requested a meeting with the Housing Manager to discuss her case and explain further the crowded conditions she was forced to live in.

In June 2007, HAC considered an application for the Complainant and her two children to be included into the Tenancy Holder's flat but did not agree, as this would '*cause gross overcrowding'*. However, they did later agree at their meeting in August 2007 to accept the address for application purposes only. The result of this decision was that the Complainant would not be awarded overcrowding points.

In August 2007 the Complainant was informed by letter that given her position on the Housing Waiting List, she had been allocated a flat in Phase 2 of the new housing estate which was going to be built by Government for rental purposes. The Complainant pointed out to the Ombudsman that given that construction works for the development had not yet began, it would be some years before these flats would be ready and therefore offered very little comfort to her plight. The letter also informed her that if she occupied a high position in the list, it was likely that a post-war flat in an existing Government estate would become available earlier for allocation than the new flat. If that occurred, she would be given the option to surrender the allocation in the new estate and instead take the flat in the existing estate.

The Complainant appealed HAC's decision not to award her overcrowding points. In her letter dated 9th November 2007 she explained she had no option but to live in the Tenancy Holder's flat as her parents had moved to Spain. Apart from not wanting to live in Spain, she was fearful of her aggressive brother who also lived with her parents. She suggested that if she was not allowed overcrowding points then perhaps she should be considered as a homeless case and given points to reflect this or placed on an urgent allocation list for homeless people. She also highlighted to the Department that she was worried that she was no longer on the Housing Waiting List publicly displayed outside the Town Hall.

The Department sent a letter dated 15th November 2007 (which appeared to cross in the post with the Complainant's letter sent less than a week earlier) referring to their letter dated 22nd August 2007 and a calling card sent on 25th September 2007, neither of which had been replied to. They explained that her application had been temporarily suspended because neither she nor the Tenancy Holder had attended the Housing Allocation Counter to sign the necessary declaration as requested. Furthermore, she had not returned the Annual Review letter sent on 1st August 2007.

The Complainant received a further letter, this time in reply to her letter of 9th November 2007. The Department referred the Complainant to their letter of 15th November 2007 (enclosing a copy). The letter confirmed the Department were in receipt of her Annual Review letter, yet noted that the declaration form had still not been submitted.

The Complainant explained to the Ombudsman that the Department had suggested that if she were to get married to her partner, who was a soldier with the Gibraltar Regiment, they would be issued with married quarters. The Complainant explained that she did not want to marry her partner just to get accommodation. Furthermore, if her relationship were to end she would be "back to square one" and homeless.

The Complainant's housing application was confirmed on 18th December 2007, dated from 2003 for a 3RKB with a total of 1,190 points.

Investigation

In March 2008, the Complainant asked the Ombudsman to investigate her case. Based on the copies of correspondence supplied to the Ombudsman by the Complainant, the Ombudsman was satisfied that the administrative aspect of the Complainant's case had been handled efficiently by the Department. However, he was concerned about HAC's decision not to award overcrowding points. This was a topic under investigation at the time in regard to another case and the Ombudsman decided to hold his complaint in abeyance until the outcome of the other investigation (See CS782).

Case CS782

As explained earlier, Case Number CS782 was in respect of a complaint with similar circumstances as those presented by the present Complainant. In that case, HAC decided to allow the complainant and her son to be included in her partner's family tenancy, thus awarding overcrowding points.

Complainant's change of circumstances

A change in the Complainant's circumstances prevented the Ombudsman from inquiring as to whether the results of case CS782 could be applied to this investigation.

The Complainant explained that her relationship with her partner had ended and she had subsequently moved back to her parents' home in Spain. She believed their living conditions had placed an unbearable burden on their relationship, forcing them to separate. She has since sought the assistance of the Minister for Housing in her plight to return to her homeland with her children.

If the change of circumstances had not occurred, the Ombudsman would have raised the issue of the Complainant's partner being a longstanding tenant in his parents' home and would have requested HAC to reconsider their decision not to allow the inclusion of the Complainant and her son in the tenancy.

Conclusions

Due to the change of circumstances of the Complainant, the Ombudsman had to discontinue the investigation into this case.

CASE NOT SUSTAINED

CS/807

COMPLAINT AGAINST THE HOUSING DEPARTMENT ("THE DEPARTMENT") WITH REGARD TO NOT BEING ALLOCATED A FLAT AFTER BEING NINE YEARS ON THE GOVERNMENT HOUSING WAITING LIST AND ALSO IN RESPECT OF THE REMOVAL OF 1,200 POINTS FROM THE COMPLAINANT'S APPLICATION

Complaint

The Complainant was aggrieved with the Housing Department's as she had not been allocated a flat after being nine years on the Government Housing Waiting List. The Complainant was also aggrieved because her waiting points had been reduced by 1,200 which would further delay the allocation of a flat.

Background

The Complainant explained that she had been on the government housing waiting list since 1999 and had recently noticed that 1,200 points for the overcrowding conditions she and her husband and 8 year old daughter were living in were not included in the Annual Points Letter sent to her by the Department in November 2007, yet these points had been consistently present on previous years.

The Department offered to look into the loss of overcrowding points at a meeting the Complainant had requested on the 5 December 2007. An officer from the Environmental Agency ("EA") visited her premises on the 3 January 2008 to measure her living accommodation and the Complainant received a letter from the Department dated 25 February 2008, which stated:

> *Further to the meeting of the Housing Allocation Committee on the 20 February 2008.*
>
> *I regret to inform you that the Committee did not agree to your request and you should wait your turn on the Housing Waiting List.*

The Complainant explained that this letter was totally inadequate in explaining the reasons for the loss of 1,200 points and in desperation she telephoned the Ombudsman seeking his assistance.

On 3 March 2008 the Complainant explained her frustration and desperation to the Ombudsman when trying to obtain information from the Department on why she had lost 1,200 points, she believed the Department's letter of 25 February 2008 to be an insult given that she had been "waiting her turn" for the past 9 years. To now loose 1,200 points after 9 years waiting seemed grossly wrong, especially without any explanation.

The Complainant was extremely distraught on receiving such a letter and the Ombudsman was able to reassure her that although her reaction was fully understandable he believed there had been an administrative error in sending her the letter as it was a standard letter sent to those making a request to the Housing Allocation Committee ("HAC") and the request not being approved. He encouraged her to seek a more substantive explanation.

The Complainant returned to the Department for a second meeting explaining the disheartening effect of their letter. The Department explained that the overcrowding points had been removed as a result of the measurements provided by the EA. Not satisfied with this explanation the Complainant sought an appointment with the Housing Minister. The Department also arranged for a further inspection of the Complainant's property to confirm the measurements of their bedroom and whether they qualified for overcrowding points.

The Complainant received a letter from the Department dated 13 March 2008 which stated:

> *As a result of your meeting with the Housing Manager (Ag) on 3 March 2008, verification of the measurements of your current accommodation was requested from the Environmental Agency.*
>
> *The Environmental Agency confirms that the measurements in their report dated 8 January 2008 are correct. According to them, the disparity arose as the report dated March 1999 did not include the floor area taken up by fitted furniture.*

Before receiving the above letter the complainant wrote to the Ombudsman on 7 March 2008 requesting that he investigate her case.

Investigation

The loss of overcrowding points

The Ombudsman noted that the Department's letter of 13 March 2008 did not explain why the overcrowding points were not on the November 2007 Annual Points Letter, if it was the EA's measurements taken on the 8 January 2008 that had highlighted the discrepancy to the 1999 measurements. The Ombudsman put this point to the Department along with the following questions:

> *Why was the loss of overcrowding points referred to HAC?*
>
> *What request did HAC not agree to at their meeting on 20 February 2008?*
>
> *What prompted the removal of the overcrowding points in the November 2007 Annual Points Letter?*
>
> *How have the overcrowding points been calculated?*

In their reply the Department explained that in reference to points 1) & 2) above, the issue of loss of overcrowding points had not been referred to HAC, only the general issue of waiting for 9 years whilst others seemed to be allocated a flat after waiting much less time had been referred to them.

The Ombudsman also obtained all communications and reports for the Complainant's address held by the EA. There had been a total of five reports/measurements taken by the EA of the Complainant's address since first applying for government housing in 1999. The first report dated 16 March 1999 had the bedroom measurement as 13' x 12' = 156 square feet, this was different to the subsequent measurements taken in April 2002, April 2004, January 2008 and March 2008, which were all 13' x 14'6" = 188.5 square feet.

Referring to point 3, the Department provided an explanation as to why, given that the EA had established the true measurement of the Complainant's bedroom to be 188 square feet in 2002, why her overcrowding points had not been adjusted back then. The Department explained that they had conducted a thorough investigation and had established that when an Environmental Health Report ("EHO") was entered into the system the computer automatically generated a number for the report. On a yearly basis, after the two-year pre-list period, an anniversary letter advising applicants of their points was generated by the computer system. The computer programme that generated this letter used a formula to work out the said points; this formula comprises of the automatic EHO number provided by the system. In the present case, when the original EHO was entered in the system in 1999 the report number given was No.2. In 2004 when a new EHO report was entered the system again gave this report No.2.For this reason at the time of issue of the anniversary letter for this application the formula picked either of the reports, both numbered '2' and thus allowing and disallowing the overcrowding points respectively. This error had been corrected.

By way of information, the Department explained that two other applicants had been affected by the computer error although without any consequences as the two applicants were in the process of purchasing private properties.

The awarding of overcrowding points

The Ombudsman noted the Department had not answered his point 4) in their reply, he therefore

looked at the legislation and guidelines governing the awarding of overcrowding points, The Housing Allocation Scheme (Revised 1994) ("HAS")

Section 6 (b) of HAS states:

> *The numbers of points which will* [be] *appointed to an applicant in respect of overcrowding will be calculated by determining the square footage of the accommodation now occupied by the applicant and those with whom he is sharing accommodation and by deducting therefrom the square feet of the total standard space allowance in respect of each person so sharing (including the applicant) and allowing 50 points per square foot of the resulting figure.*
>
> *In determining the square footage of the accommodation now occupied by the applicant, the areas of corridors, landings, toilets, bathrooms, kitchen and living room will be excluded.*
>
> *60 square feet for each person not falling within paragraph (b) below* [mixing of sexes i.e. children of different sexes sharing]
> *25 square feet for each child under five years of age*

Applying the above the Complainant is allowed 180 square feet for her family compilation (60 square feet each for herself, her husband and her child (over 5 years old)), as her initial measurements were 156 square feet (i.e. excluding wardrobe floor space) the shortfall of 24 square feet (180 – 156) is multiplied by 50, giving a total of 1,200 points. However, when her accommodation was re-measured including the wardrobe floor space, the total square feet was 188, this being greater than 180 square feet the Complainant did not qualify for overcrowding points.

Comments and considerations

The EA initially calculated the Complainant's accommodation as 156 square feet in 1999, they measured the property again in 2002 and calculated 188 square feet. The discrepancy was noticed by the Department in 2004, being caused by the omission of the wardrobe floor space. However, the Complainant had been informed on a yearly basis that she still had 1,200 overcrowding points via her Annual Review letter. Subsequent to the intervention of the Ombudsman the Department had established that a computer error had been the cause of the error in the calculation of the overcrowding points.

The complainant informed the Ombudsman that subsequent to a meeting with the Minister for Housing HAC had awarded her 1,000 discretionary points in recognition that the computer error had erroneously led her to believe that her position on the waiting list was higher than it actually should have been.

Conclusions

When confronted with this complaint the Department initially referred the matter straight to HAC, unfortunately HAC did not appear to have been briefed fully on the facts of the complaint. A standard letter that did not address the loss of overcrowding points was sent to the complainant, adding insult to injury and causing the complainant to turn to the Ombudsman for assistance.

It had been the Ombudsman's intervention that had prompted a closer look at the cause of the removal of overcrowding points and establishing that a computer error had occurred.

The Ombudsman did not sustain the complaint because the Complainant had not in fact "*sustained injustice in consequence of maladministration"* (see section 13(a) of the Public Services Ombudsman Act) and additionally 1,000 discretionary points had been awarded in recognition of the Department's error.

In regard to the Complainant having been on the waiting list for 9 years without an offer of accommodation the Ombudsman also did not sustain the complaint as although this was a grossly excessive period of time maladministration had not been the cause. The Housing Scheme had been applied correctly in the Complainant's case.

HUMAN RESOURCES DEPARTMENT

CASE PARTLY SUSTAINED

CS/786

COMPLAINT AGAINST THE HUMAN RESOURCES DEPARTMENT FOR TREATING HER UNFAIRLY DURING A RECRUITMENT PROCESS

Complaint

The complainant was aggrieved that the Human Resources Department had treated her unfairly when she applied for an Administration Officer post in September 2006, in that they had:

1. Failed to supply her with a job description when requested, and
2. Failed to supply her with an adequate explanation as to the reasons why she had not been successful in securing the position applied for.

The Application

The complainant explained that she lived in the United Kingdom where she had worked as a Civil Servant for seven years. In August 2006 she sent her CV with a covering letter to the Gibraltar Government Human Resources Department ("the Department") seeking employment within the Department of Transport. The Department replied on 1 September 2006 by email explaining that although there were no specific vacancies in the Department of Transport they were recruiting for the position of Administrative Officer within the Civil Service, offering to forward an application form and noting that the closing date was the 15 September 2006. The complainant indicated her interest and the Department attached an application form along with the requirements for submission of the completed form and minimum academic qualifications required for the post.

On the 25 October 2006 the Department sent by email (and post) acknowledgement of the complainant's application form and an invitation to sit the aptitude test due to be held on 9 November 2006 at Westside School, requesting her confirmation of attendance. The following day the complainant confirmed her attendance by email and made her first request for the job description and specification along with a request of what the aptitude test involved.

> Note: the complainant also recalls sending a request for a copy of the job description by email to the Department on the 1 September 2006, as the complainant has not been able to supply the Ombudsman with supporting evidence of this email and its existence has no bearing on this investigation (see subsequent request sent on the 25 October 2006) it will not be referred to any further.

The complainant also made enquiries as to whether she could minimise her costs of travelling to Gibraltar by sitting the test in the United Kingdom or attending the interview at the same time as the test. The Department replied by email on the same day explaining that the job descriptions were currently unavailable and gave a general explanation of the Administrative Officer role as being the main Clerical grade in the Civil Service, varying dependent on the nature of the Government Department posted to, whether it was administrative or numeric related. They also explained that all applicants had to sit the test at the said date in Gibraltar and because the tests were marked by the Education Department the interviews, for those that pass the test, would be held at a later date. The complainant confirmed her attendance in Gibraltar for the test and requested further details of the content and duration of the test. The Department explained that these details were not available as the test

was conducted by the Education Department and they did not have access to them until the examination date. The complainant attended the aptitude test in Gibraltar as requested.

It took three months after the aptitude test to complete the short-listing process. In response to requests for an update made by the complainant the Department explained that the process was taking a long time because there had been a large amount of applicants for the post (300). The complainant made a request in early December 2006 for further information of the job she had applied for, but did not specifically request a job description; the Department explained that the selection process was taking longer than expected. In February 2007 the short-listing process was complete and the complainant was invited to attend an interview on 8 March 2007. In acknowledging her receipt of the invite for an interview the complainant made her second request for a job specification or competencies, for which there was no evidence of a reply. The complainant attended the interview but was not selected for the post.

Subsequent to non selection

When notified that she had not been selected for the post the complainant emailed a request to the Department on the 11 April 2007 for more details of why she had not been selected, she also indicated her wish to appeal the decision and asked that her email be acknowledged. Her email also highlighted that despite repeated requests for a job description none had been provided to her. In their reply sent five working days later the Department explained that candidates were assessed on their personal skills, attributes, qualifications, aptitude test, experience and their performance at the interview and that the Selection Board's decision when considering all these aspects was final.

Not satisfied with this response the complainant repeated her request for feedback on her performance at the interview, clarification as to why she had not been selected and confirmed she still wished to appeal the decision. Other information in the complainant's email indicated to the Department that she was under the misconception that the Gibraltar Civil Service was part of the United Kingdom Civil Service, the Department explained that they followed the laws of Gibraltar when recruitment was conducted and these laws did not always coincide with the laws of the United Kingdom, for example there was no appeals process for dissatisfied applicants since the decision of the Selection Board was final. They also explained that this did not preclude her from seeking independent legal advice or lodging a complaint with the Gibraltar Public Services Ombudsman. They confirmed to the complainant that they believed she had been fairly treated at all times and that the Selection Board acted in good faith and within the limits of its discretion.

The complainant believed that moving from the Civil Service in the United Kingdom to the Civil Service in Gibraltar would be a transfer as opposed to ceasing employment in one and being employed in another. The Department responded by explaining that the two Civil Service organisations were distinctly separate and that had she brought this belief to their attention earlier in the process the situation would have been fully explained. They also responded to her request for information stating that they were unable to assist her in this endeavour, and informed her that only 12% of the total number of applicants had been recruited.

Ombudsman

The complainant emailed the Ombudsman on 2 May 2007 requesting his advice and assistance in obtaining information about her application for the Administration Officer position. The Ombudsman replied on the same day explaining that matters of employment were outside the jurisdiction of the Public Services Ombudsman and that a request for personal data came under Data Protection

legislation for which the Gibraltar Regulatory Authority (GRA) were empowered to investigate and put the complainant in touch with them.

Data Protection Act 2004

The GRA wrote to the Department explaining that the complainant's request for personal data in regard to her application for Administration Officer was an "access request" under the Data Protection Act 2004 and that the Data Controller for the Department must ensure compliance with the request within 28 days.

The Department complied by sending all personal data held within their department on the complainant, this being her application form and information as to her score for the aptitude test.

Complaints to other entities

The Ombudsman had been informed that the complainant had also raised the complaint with, the complainant's local Member of Parliament in the United Kingdom, the European Ombudsman and the Chief Secretary in Gibraltar.

In addressing the complainant's issues regarding her non selection the Chief Secretary noted that there was no evidence of bias in the process and that the complainant had been suitable for the positions being recruited for but not the most suitable candidate. The complainant expressed expectations of feedback from her non selection and quoted codes of practice used in the UK such as Civil Service Code, Management Code and Recruitment Code. These UK Codes outline recruitment procedures that ensure 'fairness and openness' in the recruitment process. The Chief Secretary explained that these Codes do not apply to Gibraltar, however, principles of non-discrimination and equal opportunities are legislated on in the Laws of Gibraltar. Noting the previous correspondence between the complainant and the Department the Chief Secretary was satisfied that as full an explanation as possible had already been supplied to the complainant in regard to her non selection and that as there was no appeal on the Selection Boards decision he was satisfied that all her concerns had been adequately addressed.

Investigation

In late August 2007 the complainant returned to the Ombudsman requesting a formal investigation. On receipt of all the correspondence available sent by the complainant the Ombudsman decided that although employment issues fall outside his jurisdiction he was of the opinion that the subject matter of her complaint could be classed as an administrative action in respect of a pre-employment relationship matter and that he would instigate a formal investigation.

The Ombudsman received copies of all relevant correspondence held by the Chief Secretary, who had recently conducted his own enquiry into the complainant's grievance. The Ombudsman wrote to the Department highlighting the complaint on 9 October 2007; the issues under investigation were:

1. The Department did not supply the complainant with a job description when requested

2. The Department had not given adequate reasons for the complainant's non selection

As the Ombudsman had not received a reply to his letter after three weeks he sent a further letter requesting a reply by return of post, seven working days later he received a reply to his original let-

ter (a five week delay).

1. The Ombudsman noted the Department's comments in respect of the complaint of not having supplied the job description when requested, they stated:

> *'A generic job description for the post of Administrative Officer was available to all applicants who so requested it. No records are kept in this Office of applicants who request job descriptions. However, an officer from this Department does recall giving* [the complainant] *further particulars of the posts, given that vacancies existed in a number of Departments. The salary payable and qualification requirements were stated in the Official Notice placed in the local news media…'*

This response conflicted with the evidence available to the Ombudsman in that two specific requests had been made, the first on 26 October 2006 where the Department explained that the job descriptions were currently unavailable and the second on 19 February 2007 where there was no evidence of a reply.
The Ombudsman wrote again to the Department on the 18 December 2007 highlighting the apparent inaccuracy of in their previous letter, i.e.

> "*A generic job description for the post of Administration Officer was available to all applicants who requested it."*

In fact the job description was not available to the complainant when she requested it on 26 October 2006 because they were "*currently unavailable"* according to the Department's reply of the same date.

As the Ombudsman had not received a reply within 6 weeks (covering the Christmas period) he contacted the Department by telephone, they explained that they were experiencing difficulty in validating the relevant facts as copies of the email correspondence were no longer accessible on the computer systems. The Ombudsman offered to forward copies if necessary. The Department returned the call on the 5 February 2008 asking that the Ombudsman fax copies of documents referring to requests for a job description, which the Ombudsman did the same day.

The Ombudsman phoned a further 3 times, until eventually on the 21 February 2008 he received a reply to his letter sent on the 18 December 2007 (nearly 10 weeks later). In their reply the Department explained that the first request for a job description made by the complainant on the 26 October 2006 was not able to be sent because it had not yet been made available in electronic format and therefore was not available to be sent via email. The Department also noted that during the aptitude examination in November 2006 the complainant did not raise this as an issue when the Executive Officer introduced himself in person and collected her original certificates. In regard to the second request made on the 19 February 2007 the Department explained:

> *The officers in the Recruitment Section have confirmed that requests for job descriptions are not left unattended.*

The Department was of the opinion that the complainant had not made a further request after the 19 February 2007 because the job description had been forwarded to her at that stage, although they could not provide any supporting evidence to substantiate that claim.

2. The Department's reply confirmed that all personal data had been supplied to the complainant as

per the GRA instructions and that the Department had actioned all correspondence either directly with the complainant or to third parties which the complainant had engaged, such as the Data Protection Commissioner, a Member of the United Kingdom Parliament and the Chief Secretary.

The Ombudsman also considered the documentation made available by the Chief Secretary and was satisfied that the complainant's concerns in respect of an adequate explanation as to the reasons why she had not been successful in her application had been addressed.

Conclusions

The Ombudsman considered the two elements of the complaint.

Failure to supply a job description when requested

There was evidence that the complainant had made two requests for a job description via email, and although the Department replied to the first request by explaining they were currently unavailable, they did not explain that this referred only to an electronic format and that they were indeed available as a hard copy. The Ombudsman noted that without this detail the complainant was not in a position to request a hard copy be sent in the post, nor did the Department offer to send one in the post. The Department's response to the complainant's request appeared to have been mishandled to a degree that constituted maladministration.

With regard to the second request for a job description, which the complainant made on 19 February 2007, she claimed that no reply had ever been received. The Department could not furnish the Ombudsman with any proof that they had indeed replied to her second request and could only but speculate that she had received a copy as she had not made any further requests after 19 February 2007 and that all requests are met.

It was clear from the Department's response that they could not show that the complainant's request had been met; they could only but speculate that the job description was sent. The Ombudsman concluded that given the evidence of the complainant's second request and the Department's reply, on the balance of probabilities, it was reasonable to assume that she had indeed not received the job description.

Failure to supply an adequate explanation as to the reasons why the complainant had not been successful in securing the position applied for.

The complainant had been given as much of an explanation for her non selection as was possible given the statutory restrictions on sharing personal data of others. In the opinion of the Ombudsman the explanations given by the Department for the complainant's non selection had been adequate. She had been given her Aptitude Test score and told that although she had been suitable for selection at the interview (along with 154 others) she had not been the most suitable candidate.

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IMMIGRATION DEPARTMENT

CASE NOT SUSTAINED

CS/765

COMPLAINT AGAINST THE IMMIGRATION DEPARTMENT ("THE DEPARTMENT") CONSEQUENT ON THE COMPLAINANT HAVING HIS RESIDENCE PERMIT ONLY RENEWED FOR PERIODS OF 3 MONTHS.

Complaint

Complaint against the Immigration Department ("the Department") consequent on the Complainant having his residence permit only renewed for periods of 3 months.

Background

The Complainant was a Moroccan and subject to the Immigration Control Act, section 12(1) of which required him to have a residence permit to remain in Gibraltar. He had been residing in Gibraltar living at the same address (hereinafter referred to as "the old address") since 1980. He had been issued with 5 years residence permits the last of which expired on 17 May 2006.

Due to compelling family matters he apparently had no other option but to move out of the old address. Given the adverse conditions of the housing market in Gibraltar he had had to move into a private local hostel (hereinafter referred to as "the Hostel").

Subsequently upon expiry of his residence permit the Complainant had applied for a new residence permit but had only been issued with 3 months residence permits as opposed to the 5 years residence permits he had previously been issued with.

It was at this point in time that the Complainant being aggrieved at only being granted residence permits for periods of 3 months as opposed to the usual 5 years came to see the Ombudsman.

Investigation

The Ombudsman's Correspondence with the Department

The Ombudsman wrote to the Department on the 11th May 2007 presenting the Complaint, namely that the Complainant's residence permit was only being renewed for periods of 3 months and not 5 years.

The letter went on to explain the Complainant's situation as set out above.

The Ombudsman then stated that it could well be that the Hostel would be the Complainant's place of residence for a considerable amount of time, but it would still be his place of abode in Gibraltar.

The Ombudsman ended his letter by asking the Department why it had been decided to issue the Complainant with 3 monthly residence permits as opposed to those regularly issued, which were for periods of 5 years.

The Department acknowledged receipt of the Ombudsman's letter on the 15 May 2007 informing him that they would elicit the necessary information and revert with a substantive reply. This was

within what the Ombudsman considered was a correct time frame for the issue of an acknowledgment of receipt letter.

[**Ombudsman's General Note for Departmental Guidance.**

The Ombudsman expects an acknowledgment of receipt of the complaint to be sent within 4 days of receipt of the complaint at the very latest.

With regard to an Initial Reply letter, the Ombudsman expects this to issue within 7 days of receipt of the complaint at the very latest.

A substantive reply to the Ombudsman's letter informing the Department of the Complaint, is expected from the Department by no later than 2 to 3 weeks from the date of his letter.

Should the Department for any reason be unable to provide a substantive reply within 3 weeks, a suitable holding letter should issue from the Department to the Office of the Ombudsman explaining why the 3 week time frame cannot be adhered to and confirming when the Department will be in a position to forward a substantive reply.]

The Department sent a letter with their substantive reply on 8 June 2007. The letter explained that according to their records the Complainant had held a permit of residence since 6 March 1980 his last 5 year permit having expired on the 17 May 2006. During this period he had resided at the old address.

On the 16 May 2006 the Complainant attended at the Department's offices seeking an extension to his 5 year permit pending the renewal of his work permit. As a result the discretionary extension was granted until 31 May 2006 and again until 4 June 2006.

During this period the Department received information that the Complainant no longer resided at the old address. Upon subsequently checking their records the Department ascertained that a married couple were registered with the Department as residing at the old address.

As a result of this and once the Complainant returned to the Department's offices on 22 June 2006 with a new work permit he was asked to provide proof of abode. He then confirmed that he was residing at the Hostel on a temporary basis and he produced a letter to that effect.

To avoid the Complainant remaining undocumented with the possibility of being detained it was agreed to accept this as proof of residence despite the fact that it did not fall within the parameters of current immigration practice, and his permit was extended until 30 June 2006.

The Department raised this with the Head of the Civil Status and Registration Office and it was agreed to issue the Complainant with permits of residence that would be restricted to three months renewable until such time as he resolved his temporary accommodation arrangements. This would allow the immigration authorities to closely monitor the situation and ensure the Complainant continued residing in Gibraltar legally.

The Complainant then failed to attend the Department's offices until 24 November 2006 when he produced a new work permit. His accommodation remained temporary and he was issued with a quarterly permit which expired on 24 February 2007. This was later extended until 2 May 2007 and again until 23 July 2007.

The letter ended by stating that the Complainant's accommodation arrangements remained the same and by extension so did his permit of residence entitlement.

The Ombudsman replied by way of letter dated 15 June 2007, referring to the Department's letter and required:

A copy of the document setting out to "the parameters of current immigration practice", who established the parameters and the legislation under which they were made.

A copy of the letter the Complainant produced to the Department to the effect that he resided at the Hostel on a temporary basis.

To know how many persons who lived at the Government Devil's Tower Road and Buena Vista Hostels currently held 5 year Permits of Residence.

It however took a chaser letter to elicit a reply from the Department which did not come until the 31 July 2007. This delay in replying was not good administrative practice. In this regard the Ombudsman would refer the Department to the "**Ombudsman's General Note for Departmental Guidance"** set out above.

The Department in their letter dated 31 July 2007 dealt with the Ombudsman's three requirements in turn. In relation to item 1 the Department explained that the issuing of permits of residence to non-Gibraltarians was governed by section 18 of the Immigration Control Act which stated that the Principal Immigration Officer may issue to any non-Gibraltarian a permit of residence of different durations. These were broken down into eight categories one of which was a permit not to exceed five years.

The Department then stated that once they had verified that the Complainant had been residing on a temporary basis at the Hostel, his permit of residence was changed to quarterly periods. The Department explained that it had always been the practice to supply five year permits of residence when the person concerned had a permanent residence in Gibraltar, but that the Hostel was in the Department's view not a permanent residence.
The Department's letter went on to explain that if the Complainant were to be supplied with a five year permit of residence in what was a temporary residence their records would be incorrect and not current. However the Complainant could re-apply for a five year permit if he found suitable permanent accommodation.

In relation to item 2 the Department enclosed a copy of the letter from the Hostel that had been supplied to them by the Complainant.

With regard to item 3 the Department replied that there were 120 persons who held five year permits of residence living at the Government Devils Tower Road and Buena Vista Hostels.

The copy of the enclosed letter from the Hostel which was signed by the managing director read as follows:

"

TO WHOM IT MAY CONCERN

Dear Sir/Madam

This is to certify that the following person is residing with us at the following address

Mr (Complainant's name)
Passport No.

The Hostel
……..... Road
Gibraltar

If you would like any further information please do not hesitate to get in touch with us
"

The Ombudsman wrote back to the Department on 3 September 2007 referring them to their letter dated 31 July 2007 in which they stated that the issuing of permits of residence to non-Gibraltarians was governed by section 18 of the Immigration Control Act and that the Department also identified that there were eight different types of permits available vis-à-vis their duration; 18(1)(f) being the permit that carried the maximum period of five years. The section also stated that the Principal Immigration Officer may issue to any non-Gibraltarian a permit of different durations.

The Ombudsman then referred to the paragraph of the Department's letter which contained the statement that once the Department had verified that the Complainant had been residing on a temporary basis at the Hostel his permit of residence had been changed to quarterly periods. The Ombudsman requested information as to how the Department had ascertained the temporary basis of the Complainant's accommodation at the Hostel given that the Hostel's letter simply stated that the Complainant was residing at the Hostel.

The Ombudsman's letter continued by stating that irrespective of the above, the criteria that apparently had to be applied in deciding whether to issue a residence permit of up to five years (Section 18(1)(f)) was found at section 18(3) and contained a two-prong test, (a) whether the applicant held a valid certificate of employment issued under the provisions of section 25 of the Employment Act and (b) whether he was employed in Gibraltar. Section 18(3) read as follows:

> *(3) A permit of residence shall only be issued under the provisions of paragraph (f) of subsection (1) if the Principal Immigration Officer is satisfied that the applicant thereof, or the parent of an applicant under the age of eighteen or the spouse of the applicant, holds a valid certificate of employment issued under the provisions of section 25 of the Employment Act and is employed in Gibraltar.*

The Ombudsman went on to state that irrespective of the Department's opinion as to whether the Hostel was not a permanent residence or otherwise, that would not appear to be the applicable test. Similarly, it would appear that the present practice of only supplying five year permits of residence when the person concerned had a permanent residence in Gibraltar might well be *ultra vires*. This was especially so since any person requiring a residence permit was by definition not a permanent resident in Gibraltar and might choose or have no other alternative than to reside in less than adequate accommodation, but this was not part of the statutory requirement for the issue of the permit of residence.

The Ombudsman concluded his letter by stating that the above was based on the information provided by the Department in their letter that the issuing of permits of residence to non-Gibraltarians

was governed by section 18 of the Immigration Control Act; and added that if there were any statutory provisions that required a certain type of accommodation then, he would like to be informed about them.

Two chaser letters to the Department then issued from the Ombudsman.

The Ombudsman's Meeting with the Department.

A meeting was held at the Office of the Ombudsman on 29 October 2007 between the Ombudsman and the Chief Immigration Officer when this case was discussed and the Chief Immigration Officer confirmed that he would seek legal advice on the matter from the Attorney-General's Chambers.

On the 30 November 2007, the Department wrote to the Ombudsman, enclosing a copy of the letter containing the legal advice they had received from the Attorney-General's Chambers.

The letter from the Attorney-General's Chambers stated that section 18(1) of the Immigration Control Act made it clear that the decision of the Principal Immigration Officer to grant residence permits to non-Gibraltarians was a discretionary one, in that it stated:

> *(1) The Principal Immigration Officer may issue to any non-Gibraltarian a permit of residence of one of the following kinds-…*

and that the use of the work "may" denoted a discretion to act in a particular way.

The letter then explained that there were seven different types of residence permits of varying duration. That if a non-Gibraltarian applicant satisfied the two conditions in section 18(3), namely that he held a valid certificate of employment and that he/she was employed in Gibraltar, the Principal Immigration Officer still retained discretionary power in relation to their issue. Therefore five year permits were only available to persons who held valid employment certificates and employment in Gibraltar but were not granted as of right. The Principal Immigration Officer still retained a discretion as to whether or not to grant a 5 year or any other type of residence permit. The letter ended by stating that an aggrieved party might seek to judicially review a refusal to grant a residence permit and the Principal Immigration Officer might in due course be required to show that he had acted reasonably in all the circumstances.

<u>Comments and Considerations</u>

From the above investigation the Ombudsman concluded that there had been no maladministration, since the Department had discretion pursuant to section 18(1) of the Immigration Control Act in relation to the issue of residence permits for non-Gibraltarians as well as the length of time these were granted for.

However, although the Ombudsman noted that it had always been the practice to supply five year permits of residence when the person concerned had a permanent residence in Gibraltar and that the Complainant could reapply for a five year permit once he found suitable permanent accommodation, the Ombudsman was strongly of the view particularly because of the scarcity of housing in Gibraltar, that the parameters of what was considered "a permanent residence" and "suitable permanent accommodation" should and could properly and justifiably be interpreted by the Department in a wider manner. The "permanent" emphasis shifting from the structure/location of the accommodation to the length of time of habitation in the applicant's particular accommodation. Consequently

residency of an appropriate reasonable length of time in a hostel or hotel for that matter, could satisfy the "permanent residence/suitable permanent accommodation" requirement for the issue of a 5 year permit.

Recommendation(s)

(1) That the Department act proactively and consider exercising their discretion to grant the Complainant a lengthier residence permit than the 3 months residence permit currently issued to him given the Complainant's particular circumstances including:

(a) The length of time he had resided in Gibraltar which amounted to over 27 years

(b) His good conduct

(c) The reason for his move to the Hostel

(d) The fact that he was not eligible to apply for government rental housing

(e) The fact that it is common knowledge that private rental housing in Gibraltar, the only one available to the Complainant, was very scarce and expensive.

ROYAL GIBRALTAR POLICE

CASE SUSTAINED
RECOMMENDATIONS MADE

CS/800

COMPLAINT AGAINST THE COMMISSIONER OF THE ROYAL GIBRALTAR POLICE ("COMMISSIONER") FOR NOT REPLYING TO THE COMPLAINANT'S LETTERS IN RELATION TO HIS APPLICATION FOR A FIREARMS LICENCE

Complaint

Complaint against the Commissioner of the Royal Gibraltar Police ("Commissioner") for not replying to the Complainant's letters in relation to his application for a firearms licence.

The Complainant had applied for a vacancy which had arisen in a company ("the Company") which involved the culling of gulls. One of the requirements was the use of a firearm for gull culling within working hours between 8.00am to 3.00pm after which the firearm was kept secure under lock and key at the armoury.

He undertook a 3 weeks unpaid trial period at the end of which the Company informed him that he had been successful in his trial period and that the job was made available to him on condition that he obtained a firearms licence.

According to the Complainant the Company had helped administratively with the processing of the Complainant's application to the Commissioner for a firearms licence. The Complainant's application had however been rejected and written reasons for the refusal had been given to the Company although this had never been communicated to the Complainant formally in writing.

When it came to the Complainant's notice that his application had been refused, he wrote to the Commissioner on 21 January 2008 explaining his position in detail. In his letter he explained the employment prospect available to him, the situation of his family/dependents, how the working hours involved would allow him to assist with his children and the fact that he was at the time of application more mature and responsible than in his younger years. The Complainant concluded his letter by asking the Commissioner to review his application for a firearms licence.

In the absence of any response, the Complainant again wrote to the Commissioner on the 29 February 2008. He confirmed that he had taken his letter dated 21 January 2008 by hand, that up to the 29 February 2008 he had not had a written reply and would therefore appreciate a reply as soon as possible. The Complainant further mentioned that he had been verbally informed by a police officer that if he had not had a reply by that time it probably meant that he was not entitled to the firearms licence that his prospective employer has requested so as to employ him. The Complainant ended his letter by stating that he felt a reply should be given to him in writing with reasons as to why this decision had been made.

The Complainant then waited approximately 2 weeks and since he had not by then even received an acknowledgment from the Commissioner of receipt of his above mentioned letters, he came to see the Ombudsman with his Complaint.

Investigation

The Ombudsman wrote to the Commissioner on 14 March 2008 explaining the complaint, namely that the Complainant had written to the Commissioner on 21 January 2008 and again on 29 February 2008 and that he had not up to the 14 March 2008 received an acknowledgement or reply. Copies of the said letters were enclosed, and the Ombudsman enquired when the Complainant could expect a reply.

The Commissioner replied to the Ombudsman with an acknowledgment letter within 3 days. This was followed by a substantive reply from the Deputy Commissioner of the Royal Gibraltar Police ("Deputy Commissioner") within 2 weeks by way of letter dated 25 March 2008. The above time taken to reply to the Ombudsman's letter are well within his guideline parameters and are examples of good administrative practice.

[**Ombudsman's General Note for Departmental Guidance.**

The Ombudsman expects an acknowledgment of receipt of the complaint to be sent within 4 days of receipt of the complaint at the very latest.

With regard to an Initial Reply letter, the Ombudsman expects this to issue within 7 days of receipt of the complaint at the very latest.

A substantive reply to the Ombudsman's letter informing the Department of the Complaint, is expected from the Department by no later than 2 to 3 weeks from the date of his letter.

Should the Department for any reason be unable to provide a substantive reply within 3 weeks, a suitable holding letter should issue from the Department to the Office of the Ombudsman explaining why the 3 week time frame cannot be adhered to and confirming when the Department will be in a position to forward a substantive reply.]

The letter dated 25 March 2008 from the Deputy Commissioner in reply to the Ombudsman's letter confirmed that in late October 2007, the Company submitted an application for a firearms licence on behalf of the Complainant who was applying for a job with them.

The Royal Gibraltar Police ("Police") contacted the Company and informed them that they required that the Complainant gave a written "disclaimer" in order that the Police could disclose certain matters (if any) to them, as it was relevant to the issue of a firearms certificate.

The necessary paperwork was received (dated 5 November 2007) and the Police replied to the Company on 7 November 2007 that the licence had been refused.

The Deputy Commissioner went on to state in his letter that under the circumstances the Police believed that they had answered the request within a reasonable time frame.

As regards subsequent correspondence by the Complainant appealing the decision to refuse the licence, the Complainant could appeal the decision to the Magistrates Court as provided by the Firearms Act.

The Deputy Commissioner's letter ended by stating that although they had spoken to the Complainant they would write to him explaining the position of the Police.

Subsequently the Complainant provided the Ombudsman with a copy of the letter the Deputy Commissioner had sent him dated 25 March 2008. In that letter the Complainant was informed that with regards his application for a firearms certificate processed through the Company they had refused it on 7 November 2007.

The letter went on to explain the reasons for the refusal in detail and ended by informing the Complainant that if he wished to contest this decision he was perfectly entitled to do so at the Magistrates Court.

Comments and Considerations

The Ombudsman had in coming to a conclusion in relation to this complaint, considered the point made in the Deputy Commissioner's letter to him dated 25 March 2008 that the Police replied to the Company on 7 November 2007 that the licence had been refused and that they therefore believed that under the circumstances they had answered the request within a reasonable time frame.

The Ombudsman could not however agree with the view expressed above since the application for a firearms licence/certificate had been made by the Complainant and therefore a written reply in relation to it being granted or refused, was owed to and should have issued directly to the Complainant.

A written reply to the Complainant became all the more necessary as a consequence of the fact that section 4(8) and Schedule 1 of the Firearms Act gave a person aggrieved by a refusal of the Commissioner to grant him a firearms certificate a right to appeal to the Magistrates' Court against the refusal, notice of which appeal had however to be given by an appellant to the clerk to the Justices of the Magistrates' Court and also to the Commissioner within twenty-one days after the date on which the appellant received notice of the refusal.

In any case, regardless of the Company having been informed by the Police of the refusal to grant the Complainant a firearms licence, the Complainant's letters to the Commissioner dated 21 January 2008 and 29 February 2008 and his concerns expressed therein, required replying to within a short reasonable period of time. This had not occurred and hence his coming to see the Ombudsman with his complaint.

Conclusion

Given all of the above the Ombudsman decided to sustain the Complaint.

From the above investigation the Ombudsman concluded that there had been maladministration in that the Complainant had not in the period 21 January 2008 to the beginning of March 2008 received any acknowledgment or any other correspondence from the Commissioner in reply to his letters dated 21 January 2008 and 29 February 2008.

Recommendation(s)

(1) That in all cases applicants receive a written reply in answer to their application for a firearms licence/certificate. This requirement to apply regardless of the fact that a third party might have submitted the application on behalf of the applicant for administrative or any other reason. (The Ombudsman was in any case of the view that the instances which could arise necessitating a third party to submit an application on behalf of an applicant would be extremely rare).

(2) That if a firearms licence/certificate was refused the letter to the applicant communicating the same give reasons for the refusal.

(3) That the letter of refusal also inform the unsuccessful applicant of his right pursuant to section 4(8) and Schedule 1 of the Firearms Act to appeal to the Magistrates' Court against the Commissioner's refusal as well as the time limit within which to appeal.

(4) That an unsuccessful applicant should be called in by the Police to collect the above mentioned letter of refusal in person or alternatively it be sent to the person by registered post.

The institution of the above improvements would better the appeal procedure substantially by introducing that all important element of certainty, both as regards the fact that the person was aware of his right to appeal and the time within which to do this, and also because there would then be an unchallengeable record of when the time to appeal expired.

Update

The Royal Gibraltar Police informed the Ombudsman that they had reviewed the manner of dealing with Firearms Licences; allied to the Ombudsman's recommendations and had or would be making the following changes:-

1. They were in the process of changing the management structure of Firearms Licensing.

2. They would no longer accept any third party applications for Firearms Licences.

3. Should a Firearms Licence be refused they would personally hand over the letter or have the letter sent by Registered Post to the applicant (taking into consideration the statutory time limit for any Appeal).

The Ombudsman commended the Royal Gibraltar Police for the positive proactive way in which they had reacted to this report. It was apparent that report had been thoroughly perused and considered and the Recommendations accepted in the spirit in which they had been made, namely a desire for the improvement of the administrative services of the body or entity concerned.

The Ombudsman was very strongly of the view that this proactive attitude and willingness to improve administrative procedures demonstrated extremely good administration by the Royal Gibraltar Police and could only augur well for future administrative improvements.

SOCIAL SECURITY DEPARTMENT

CASE SUSTAINED

CS/789

COMPLAINT AGAINST THE DEPARTMENT OF SOCIAL SECURITY FOR DELAY IN PROCESSING THE COMPLAINANT'S APPLICATION FOR OLD AGE PENSION AND NON REPLY TO LETTERS

Complaint

The complainant was aggrieved that although he had applied to the Department of Social Security ("DSS") on the 19 March 2007 for his Old Age Pension, which was due on his retirement in September 2007, he had not received a response as of January 2008.

Previous investigation CS783

At the time of the receipt of this complaint the Ombudsman had already identified a serious backlog within the DSS in regard to processing Old Age Pension Applications. This was as a result of an investigation into a complaint brought by another complainant. The investigation revealed that due to the increase in workload during 2007, mainly caused by the first pension increase since 1988; the manual system of calculating such pensions had stretched the DSS resources to near breaking point. In these conditions it had been no surprise that human error had been the cause of the 10 month delay for that particular complainant.

The DSS explained that this was *'an isolated case'* and that not only had they apologised in writing to the complainant but, in order to prevent a repeat occurrence and provide a more efficient service, they had created a new pensions section which would deal solely with pension claims from abroad. This they believed would enable them to follow up and process more speedily those claims that require liaison with other social security institutions.

Current investigation

In reply to the Ombudsman's enquiries regarding this complainant's pension application the DSS identified an oversight that was again caused by human error. In response, they had apologised verbally to the complainant and in writing ensuring that his pension calculation was forwarded to him immediately and arrangements for backdating his payments since September 2007 were effected. The DSS also pointed out that they had given strict instructions to all their staff that all letters must be acknowledged.

Conclusion

The Ombudsman was obviously concerned that the previous case was not isolated as alleged by the DSS and that there was now another complainant that had been the victim of human error.

The Ombudsman had not sustained the previous case given that it was just one incident of human error during a very busy year. However, when faced with another complaint the Ombudsman was not able to extend the same discretion and sustained this complaint.

By way of interest the Ombudsman has taken an extract from the 2007 Annual Report explaining his concerns for 2008 for this Department;

> *'The Ombudsman is very concerned at what 2008 will bring in relation to this department meeting its administrative demands. It would not be an exaggeration to say that they are close to breaking point and it is only the dedication and professionalism of staff that has held things relatively together. This is a department in desperate need of modernization, to calculate pensions manually is extremely time consuming, a method that may have been adequate in 1988 but is certainly not so for the demands of today. If changes are not made in the coming year to meet the new demands for this department we will likely see an increase in complaints next year and in particular pensioners not receiving their pensions in time.'*

Update

On the 10 April 2008 the DSS informed the Ombudsman that:

> *'...the first steps are now in train to computerise the system operated by DSS in respect of pensions and other benefits'*

CASE NOT SUSTAINED IN RELATION TO THE MAIN ISSUE
CASE SUSTAINED IN RELATION TO THE SUBSIDIARY ISSUE
RECOMMENDATION MADE

CS/814

COMPLAINT AGAINST THE DEPARTMENT OF SOCIAL SECURITY ("THE DEPARTMENT") CONSEQUENT ON THE COMPLAINANT HAVING APPLIED TO THE DEPARTMENT FOR HIS OLD AGE PENSION IN JANUARY 2008 ENCLOSING THE RELEVANT DOCUMENTATION WHICH SHOWED HIS DATE OF BIRTH AS 1 JANUARY 1943, YET HE HAD BEEN INFORMED THAT HIS PENSION PAYMENTS WOULD COMMENCE AS FROM AUGUST 2008.

Complaint

Complaint against the Department of Social Security ("the Department") consequent on the Complainant having applied to the Department for his old age pension in January 2008 enclosing the relevant documentation which showed his date of birth as 1 January 1943, yet he had been informed that his pension payments would commence as from August 2008.

Background

The Complainant a Moroccan national having made the requisite contributions and reached the age of 65 was entitled to receive an Old Age Pension from the Government of Gibraltar.

His date of birth as recorded in his Moroccan passport was 1943. His certificate of good conduct

issued by the Royal Gibraltar Police on the 23 June 2008 stated that he was born on the 1 January 1943, with this same date appearing in his Gibraltar Health Authority Health Card.

In January 2008 the Complainant applied for his pension. He had not as at 23 June 2008 yet received his monthly payments. He had gone to the Department to complain about this and had been informed that he would not receive payment until August 2008.

The Complainant therefore wrote to the Department on 23 June 2008. In his letter he complained that in January 2008 he had applied for his pension, yet up to then he had still not received his monthly payments. He then explained that he had complained at the counter and had been informed that he would not receive payment until August 2008 which he found very unfair.

The Complainant enclosed documentation to prove that he was born in 1943. In his letter he went on to explain that at the time the month of birth was not noted in a birth certificate, but all subsequent official documentation had accepted his date of birth as 1943. He concluded his letter by stating that for pension rights, from what he had seen, January had always been held as the date of payment for pension cases. He awaited the Department's reply.

Five weeks passed and since he had not received any reply to his letter he approached the Ombudsman with his Complaint.

Investigation

The Ombudsman's Correspondence with the Department

The Ombudsman wrote to the Department on the 29 July 2008 presenting the Complaint, namely that the Complainant had applied for his old age pension in January 2008 enclosing the relevant documentation which showed his date of birth as 1 January 1943, yet he had been informed that his pension payments would commence as from August 2008.

The Ombudsman presented the additional Complaint that the Complainant had not received any reply to his letter dated 23 June 2008 a copy of which letter was enclosed for ease of reference.

The Ombudsman concluded his letter by requesting the Department's comments in this regard.

Correspondence between the Department and the Complainant

On the 5 August 2008 the Department wrote to the Complainant. They informed him that his application for an Old Age Pension has been approved with effect from 19 August 2008. That his first payment covering the period 19.08.08 to 31.08.08 amounted to £62.95 and that thereafter he would be entitled to £150.11 per month.

The Department advised the Complainant that a payment would be ready for collection at the Department on 19 August 2008 and advised him that the right of payment would be extinguished if payment of benefit was not obtained within the period of twelve months following the date on which payment became due. That should the Complainant wish payments to be credited into his bank account he was to complete the attached form.

The Department then went on to advise the Complainant that if he was dissatisfied with this decision he could appeal to the Closed Long Term Benefits Appeals Board and that an appeal had to be

in writing setting out briefly the grounds of appeal and addressed to the Secretary to the Board within eight days of the date of the Department's letter.

The Department's letter concluded by informing the Complainant that section 30 of the Social Security (Closed Long-Term Benefits and Scheme) Act provided that the above decision in relation to his old age pension could be reviewed at any time by the Director, if it could be proved that the decision was given in ignorance of, or was based on a mistake as to some material fact, or there had been any relevant change in circumstances.

Consequent to receipt of the Department's letter dated 5 August 2008, the Complainant on 7 August 2008 wrote to the Secretary to the Closed Long Term Benefits Appeals Board. He referred to the Department's letter dated 5 August 2008 and informed the Board that he appealed against the decision made by the Department in respect of having granted him an Old Age Pension with effect from 19 August 2008 when his birth date was recorded as the 1 January 1943 and not 19 August as the Department appeared to have decided. The Complainant enclosed a copy of his letter to the Department dated 23 June 2008 as well as copies of documentation with his birth date.

On the 8 August 2008 the Secretary of the Social Insurance Appeals Board wrote to the Complainant acknowledging receipt of his letter. The letter went on to advise him that the matters he raised in his letter were being looked into and a further communication would be addressed to him in due course.

The Department's Reply to the Ombudsman's Letter

In reply to the Ombudsman's letter the Department by way of letter dated 12 August 2008 explained that the Pension Section had been working under tremendous pressure during the past year and although regrettably a written reply was never given to the Complainant, they could confirm that he was verbally made aware of his position on his many visits to the Department.

The Department went on to explain that on 13 September 1968, the Complainant registered for social insurance purposes at the Department and the date of birth officially recorded was 19 August 1943. His application for an old age pension was therefore approved with effect from 19 August 2008 (i.e. when according to the Department's records he attained 65 years). The Complainant was dissatisfied with this decision and had appealed to the Closed Long-Term Benefits Appeals Board.

The Complainant was disputing the date of birth recorded in his social insurance record and the Department was currently investigating the matter. It was departmental policy that the original date of birth on the insured person's record was the only one valid for pension purposes and the date could only be amended if the Director of Social Security was satisfied that there was sufficient documentary evidence to do so.

The letter concluded by stating that a further communication would be sent to the Ombudsman as soon as they had concluded the investigation.

The Department's reply to the Ombudsman came within the Ombudsman's guidelines for attending to correspondence from him, which are reproduced below.

[**Ombudsman's General Note for Departmental Guidance.**

The Ombudsman expects an acknowledgment of receipt of the complaint to be sent within 4

days of receipt of the complaint at the very latest.

With regard to an Initial Reply letter, the Ombudsman expects this to issue within 7 days of receipt of the complaint at the very latest.

A substantive reply to the Ombudsman's letter informing the Department of the Complaint, is expected from the Department by no later than 2 to 3 weeks from the date of his letter.

Should the Department for any reason be unable to provide a substantive reply within 3 weeks, a suitable holding letter should issue from the Department to the Office of the Ombudsman explaining why the 3 week time frame cannot be adhered to and confirming when the Department will be in a position to forward a substantive reply.]

The Department followed their letter with another to the Ombudsman dated 27 August 2008 in which they informed him that they had concluded their investigation and in the absence of any documentary evidence to the contrary, the Department had given the Complainant the benefit of the doubt and accepted his date of birth as 1943. Following established procedure, his old age pension payments would therefore be backdated to 1 January 2008.

A letter from the Department to the Complainant subsequently ensued dated 2 September 2008 in which they informed him that following the recent decision taken by the Department to accept his date of birth as January 1943, he was now entitled to an Old Age Pension of £144.47 per month. His pension would be up-rated to £150.11 per month as from 1 April 2008. Arrears for this period would be paid accordingly. A payment would be ready for collection at the Department as soon as possible.

The Department's letter ended by advising the Complainant of his right to appeal against the decision and the procedure for doing so as well as explaining the provisions of section 30 of the Social Security (Closed Long- Term Benefits Scheme) Act 1996.

Comments and Considerations

Relating to the substantive element of the Complaint ("Main Issue")

From the above investigation the Ombudsman concluded that there had been no maladministration since it appeared that the Department had taken the proper and necessary administrative steps in an appropriate although possibly longer than was essentially required time-frame. What was being asked by the Complainant was in essence a request to the Department to exercise a discretion and accept that his date of birth be taken as 1 January 1943 when there was no conclusive evidence to this effect. In these circumstances the just over 2 months taken by the Department, from the Complainant's letter to the Department dated 23 June 2008 to the 27 August 2008 when the decision was arrived at, although slightly on the long side and which additionally was possibly accelerated by the presentation by the Ombudsman of the complaint on the 29 July 2008, was held by the Ombudsman not to amount to maladministration.

The Ombudsman nevertheless urged the Department to aim to process any future applications of this nature within a 6 weeks maximum time frame.

Relating to the subsidiary element of the Complaint ("Subsidiary Issue")

In relation to the subsidiary matter of lack of a timely reply to the Complainant's letter dated 23 June

2008, the Ombudsman sustained this element of the Complaint.

From the above investigation the Ombudsman concluded that there had been maladministration since there had been no substantive written reply by the Department to the Complainant's letter dated 23 June 2008 until their letter to him dated 2 September 2008.

The Ombudsman took on board the Department's comments as contained in their letter to him dated 12 August 2008 that the pension section had been working under tremendous pressure during the past year and although regrettably a written reply was never given to the Complainant, the Department could confirm that he was verbally made aware of his position on his many visits to the Department. The Ombudsman however remained unaltered in his view that all letters received by the Department must be both promptly acknowledged and also replied to substantively within a reasonable period of time. This was essential basic good administrative practice.

Conclusion

Case not sustained in relation to the Main Issue but sustained in relation to the Subsidiary Issue.

Recommendation

The Ombudsman therefore made the following Recommendation:

(1) That the Department puts in place an effective administrative system to ensure that all correspondence received (in the Complainant's case being his substantive letter dated 23 June 2008) is both promptly acknowledged and also replied to substantively within a reasonable period of time.
