OMBUDS WORK IN HIGHER EDUCATION

LIES POESIAT

VU University Press

A Practical Guide

Ombuds Work in Higher Education

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With a foreword by Prof. Vinod Subramaniam

Ombuds Work in Higher Education is a revised translation of the Dutch edition *Ombudswerk in het hoger onderwijs*, which was also published by VU University Press in September 2021.

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Foreword

The function of ombudsman is an increasingly important one in the university community. It gives members of the community – both students and staff – the opportunity to seek advice from, or air their grievances to, an independent individual who is bound by confidentiality. The threshold to approaching the ombudsman is often lower than that associated with an official complaints committee or similar organ. Vrije Universiteit (VU) Amsterdam has had an ombudsman function since 2002, initially for students, and later expanded to employees. Lies Poesiat has been the ombudsman at VU Amsterdam for many years, and draws upon her depth and breadth of experience in writing this accessible and practical guidebook to the role of ombudsman. Lies' publication shares the wisdom that she has gleaned in her role over the past years, and will undoubtedly serve as a beacon and reference work for colleagues in similar roles for years to come.

Prof. Vinod Subramaniam,
Rector Magnificus of VU Amsterdam

Introduction

This book is about a service within higher education that is both important and delicate: the ombudsman (m/f/x). In short, an ombudsman deals with complaints in an organisation. To this end, they apply legal techniques (audi alteram partem: a principle of natural justice where every person gets a chance of being heard), techniques from psychology (conversation techniques and mediation) and organisational knowledge. The latter is important to understand complex organisations, such as educational institutions, and their processes and social structures. This ensures complaints are dealt with by the appropriate official, team or department.

This publication discusses, among other things, the usefulness of the function of ombudsman, how the ombudsman's duties can be carried out, and gives examples of the types of complaints that are prevalent in higher education. Is the ombudsman the right person to deal with these complaints? And if not, where should they be submitted? All these topics are accompanied by case studies, something that has not been done before. Because the author is an ombudsman at a research-oriented university in Amsterdam, the Dutch context plays a significant role in this book. For this reason, the function of staff ombudsman is also discussed at length. This function is more common in the Netherlands than in other countries, which often only have ombudsmen for students. Although our practice might differ in terms of context and laws and regulations, there are common nominators that the Netherlands shares with other nations when it comes to characteristics of the ombudsman function. These fundamental characteristics are mostly the same worldwide: independence, impartiality and investigative powers.

A relatively new function

Universities in the United States began appointing ombudsmen in the 1960s in response to the student protest movements. In South America and Europe (Spain), an ombudsman was appointed in higher education

in 1985 and 1988, respectively.[1] These ombudsmen were also student ombudsmen. In the Dutch education system, the position of ombudsman is relatively new. The first ombudsman was appointed in 1996 at Delft University of Technology[2], the second in 1998 at the University of Amsterdam.[3] In both cases, they were appointed to deal with complaints of students.

In many countries, including the Netherlands, most ombudsman are institutional ombudsmen, also known as campus ombudsmen. They are employed by educational institutions and are only authorised to deal with complaints regarding the institution to which they belong. A national ombudsman investigates complaints about multiple institutions and, in many cases, is a government body or a sub-national body with a legal basis. For example, England and Wales have their own sub-national ombudsman for higher education: the independent adjudicator and chief executive for higher education. According to their former ombudsman, Felicity Mitchel, it 'was set up under the Higher Education Act 2004[4]– so government legislation introduced a requirement that higher education providers (universities and others) in England and Wales had to be members of a student complaints scheme, and is set up to run the scheme. All higher education providers have to be members of the scheme, and have to pay a subscription (based on the student numbers), under the Act.

It is set up as a company limited by guarantee (and also a charity) – so it is a private organisation, independent of government.'[5]

Another former independent adjudicator and chief executive for higher education in England and Wales, Rob Behrens, states: 'There are at least five variants of higher education ombudsmen. Often, more than one variant is present in any one country since not every higher educa-

1 Behrens (2017, 12-13).

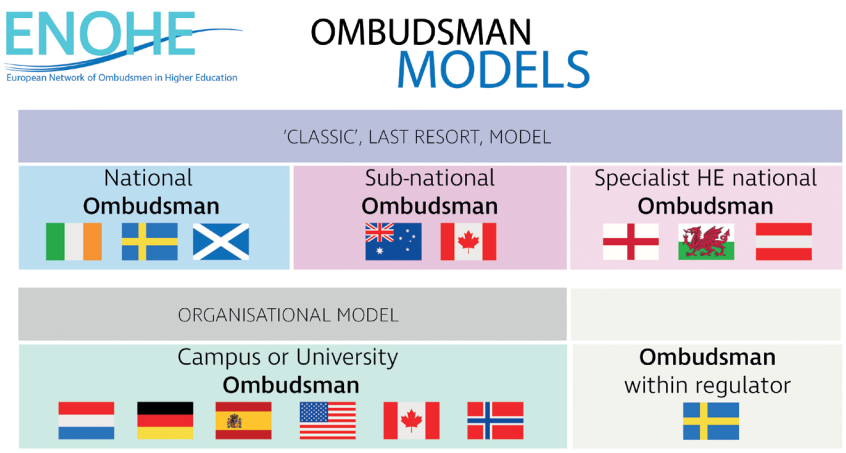
2 1 November 1996 Mr W. Knippenberg, (e-mail 1 May 2018 of TU Delft ombudsman, Mr N.W. Graafland) (personal communication).

3 Ms M.C. (Christel) Holtrop, first student ombudsman at UvA, founder of the National Network of Ombudsmen in Higher Education (LOOHO) in 2001, precursor of the Dutch Association of Higher Education Ombudsmen (VOHO) and the European Network of Ombuds in Higher Education (2003), precursor of ENOHE.

4 https://www.legislation.gov.uk/ukpga/2004/8/contents

5 E-mail 28 October 2021 (personal communication).

tion ombudsman is an ombudsman of last resort, resulting in the decisions of one ombudsman being referred to another.'[6]



Ditto note 6.

National ombudsmen for higher education can also be found in Sweden and Malta, among other countries. As mentioned above, these differences have to do with legislation. In the Netherlands, the function of student ombudsman is not enshrined in law, as is the case in Belgium[7] and Spain. This means that institutions can themselves choose whether or not to install an ombudsman. Some of these higher education institutions have not only appointed a student ombudsman, but also a staff ombudsman. This development is mainly seen in the Netherlands, where the staff ombudsman service has been laid down in the collective labour agreement for universities since 2021.

The number of ombudsmen in higher education is growing worldwide. There are now approximately 945 ombudsmen in around 140 countries.[8]

The word 'ombudsman' is of Swedish origin, where it means representative or advisor ('Ymbodz'). The term itself is gender neutral in the Swedish language: 'ombuds' means assignment and 'man' representative

6 Behrens (2017, 25).

7 *Codified decrees on higher education in Flanders*: https://data-onderwijs.vlaanderen.be/edulex/document.aspx?docid=14650 Art. II. 222, 279, 334.

8 Hertogh & Kirkham (2018, 18).

or proxy. For this reason, a female ombudsman is usually also called ombudsman.[9] The term as we know it was chosen because it is known to many and is also a 'unique and confidence-inspiring brand name'.[10] Incidentally, alternative forms of the word ombudsman are also used, such as ombuds. Some institutions prefer the title 'confidential advisor for personnel matters'.[11] If an alternative form fits the organisation better or is helpful in terms of accessibility, then this is perfectly acceptable. The job title ombuds officer or ombudsperson is also used. In the Netherlands, the title of ombudsman is not protected by national law. The same applies to the ombudsman's authorities. Therefore, there are ombuds officers in the Netherlands who are not allowed to assess complaints but do have investigative powers. These differences may be a bit confusing. It would seem reasonable that users of the ombuds service should at least know what to expect. Explicitly describing the function and powers of the ombudsman in legislation would take care of this problem. So far, however, this has not happened in the Netherlands. In Germany, with the exception of a few federal states, this is also not regulated by the federal government.[12]

To date, there is no training course for becoming an ombudsman in higher education. However, in the summers of 2018, 2019 and 2021, a five-day master class was held at Utrecht University to highlight all the different aspects of ombuds work.[13] In the Netherlands, it is not yet possible to obtain certification as an ombudsman. This is possible in the US, where the International Ombuds Association (IOA) offers a certification course for organisational ombudsmen. These are not only ombudsmen that work in the education system: 'there are no training, educational, or work experience requirements needed to register for and sit for the CO-OP® exam.'[14] After passing the exam, the ombudsman is a Cer-

9 Teppema & Herfs (2014, 71).

10 Behrens (2017, 17).

11 As at Utrecht University.

12 E-mail of Complaint and Improvement Management, Technical University of Darmstadt, Mr W. Hertlein, 29 October. 2021) (personal communication).

13 Herfs & Klijn (2018). Ombudsfunctionaris in breed perspectief (A broader view on ombuds officers) https://www.utrechtsummerschool.nl/courses/law-economics/ombudsfunctionaris_in_breed_perspectief_in_dutch.

14 https://www.ombudsassociation.org/co-op-examination

tified Organizational Ombudsman Practitioner (CO-OP®).[15] This means each ombudsman brings a different prior education and experience to their learning. Some are lawyers, psychologists, or literary scholars, like I am. Most of them have a common background in education, from student counsellor or career advisor to lecturer or professor. You could say the 'course', the accumulation of experience and knowledge, starts on the day of their appointment as ombudsman.

It is clear from the above that the job of an ombudsman is multifaceted and requires commitment. An ombudsman considers various parties' accounts and practices. The questions that arise from this are largely the questions that are also addressed in this book. How can ombudsmen carry out their work correctly and effectively? How do they deal with the complainant (the person making the complaint) and the respondent (the person being complained about)? Should complaints of students and employees be handled differently? And how do ombudsmen maintain impartiality? Why is independence necessary for ombudsmen to carry out their work?

In the course of the following chapters, these questions will be answered. As there is still little professional literature available on the practice of ombuds work, I will not only address the above and other questions, but also talk about the day-to-day work of ombudsmen. This way, both new ombudsmen and other staff members responsible for complaints handling can take note of this. This also applies to employees, students and ombudsmen who want to know more about ombuds methods in general. For example, board members who are considering appointing an ombudsman, or legal affairs officials, student counsellors and HRM representatives. Members of representative advisory bodies may also be interested in the ombudsman's work and working methods.

Ombudsmen are not only appointed at universities, but also at universities of applied sciences. They are also becoming more commonplace in other sectors, such as at teaching hospitals. But as the European Ombudsman Emily O'Reilly says, while they may operate in different fields, their methods are the same.[16]

15 More information: https://www.ombudsassociation.org/about-the-co-op-credential.

16 Emily O'Reilly, European Ombudsman, ENOHE Conference Strasbourg France, lecture June 2017 (personal communication).

Reader's guide

This book can be read in two ways, either from cover to cover or you can just read a standalone chapter at a time. For readers who wish to dip in and dip out, the text is structured as a lookup book. Partly for that reason, some repetition has been deliberately written into the text. To guide the reader through the book as a whole, an overview of the different chapters is provided below.

Chapter 1 'Where can a complainant go to make a complaint?' lays out various routes for filing complaints, broken down by type of complaint, and looks at the ombudsman's role in this process. This chapter is particularly interesting for decision-makers, such as policymakers, managers and directors. In Chapter 2, 'How can an ombudsman help?', considerations for appointing an ombudsman and the added value of appointing an ombudsman are discussed. Chapter 3, 'What do employees and students complain about?', describes what types of complaints the ombudsman is authorised to investigate. These three chapters form the first, exploratory part of the book.

The subsequent chapters, from Chapter 4 (Tasks and responsibilities of the ombudsman) to Chapter 13 (Drawing up a complaint report), look specifically at the ombudsman's methods and professional practice. These chapters give insight into various aspects of the role of ombudsman, ranging from practical and social aspects to psychological aspects. These three chapters form the second part of the book.

The last part covers broader applications and dimensions of ombuds work. Chapter 14, 'The ombudsman as watchdog', talks about the ombudsman's role in raising issues of concern. Chapter 15 takes a broader organisational perspective to address the question: What is required for an ombudsman to succeed? This chapter focuses on the possibilities and limitations of ombuds work. Chapter 16, 'Complaint registration and the ombudsman's annual report', highlights the importance of proper complaint registration and the value of information gathering by the ombudsman. This brings us to the topic of peer-to-peer consultation, which is discussed at length in Chapter 17. Chapter 18 looks at the role, knowledge and professionalism of the ombudsman as an often solitary practitioner in both national and international professional networks. Chapter 19, 'Effective conflict resolution in organisations', places the function of ombudsman within the framework of an organisational culture and looks at the importance of conflict resolution in this setting.

This chapter aims to provide policymakers, managers and directors with tools to identify and prevent complaints at an early stage to prevent escalation, and describes various resources that can be used for this purpose.

At the back of the book, you will find two appendices: a brief guide for student ombudsmen and for staff ombudsmen, which provide information about the support resources that are available to students and staff members.

This book was written especially for new ombudsmen and those seeking the services of an ombudsman, but it is also a treasure trove of information for, for instance, Human Resource Management (HRM) consultants, student counsellors, legal staff and members of participations councils.

Justification

The persons described in this publication have been anonymised to prevent individuals or their departments from being identified. To further guarantee anonymity, some feminine and masculine pronouns have been interchanged, either independently or in consultation with the parties involved, or indefinite pronouns have been used. Where the male form is used in relation to persons, this also refers to the female and gender-neutral form. Also, the number of contact moments and the amount of time spent have not been specified in detail. The cases described have been reduced to the main points. The quotations from English sources have been translated for ease of reading.

This book follows the general concept of 'complaint' in accordance with publications by the National Ombudsman of the Netherlands and publications in international journals in which a complaint is defined as an expression of dissatisfaction made to or about an organisation regarding the standard of service provided or the conduct of employees.

1

Where can a complainant go to make a complaint?

Complaints can arise for many different reasons within educational institutions. Who deals with the complaint depends on the nature of the complaint. Complaint handling processes also vary from country to country. In some countries, such as Italy and the Netherlands, complaints related to undesirable conduct, sexual harassment and discrimination can be submitted to an ombudsman or a confidential counsellor. A confidential counsellor acts as an advocate. They can, if desired, arrange for the complainant to see the Complaints Committee for Undesirable Behaviour, HR, or an office of dispute resolution where the complaint is assessed. Most chairmen of complaints committees have external positions and are not employed by the organisation. Their impartiality guarantees the objective handling of the complaint.

If students suspect that academic integrity rules have been violated, they can contact a confidential counsellor for academic integrity.

Serious wrongdoing, such as fraudulent acts, can be reported through the Whistle-blowers' Regulations. A student or employee can also have a complaint about a behaviour or treatment they perceive as unfair, careless or improper. This type of complaint is an expression of dissatisfaction in which the complainant feels that 'the interests or viewpoints of the institution are at odds with those of the complainant. These issues or problems also fall under the definition of complaint.'[17] All these types of complaints can be discussed with an ombudsman.

17 Van der Vlugt, Meulenaar & Meijer (2018, 7).

Unspoken complaints

There are not many educational institutions which have appointed an ombudsman. In fact, ombudsmen, and staff ombudsmen in particular, are still rather rare around the world. So where can complainants or victims turn for help? This is an important question, also in a social sense. It is important to detect incidents or potential misconduct early. However, staff members are often reluctant to report incidents to management for fear of repercussions. This is certainly true for employees with fixed-term employment contracts, such as PhD candidates. Moreover, an employee cannot simply contact a national ombudsman about their manager's improper conduct. The national ombudsman is a statutory officer who handles citizens' complaints relating to administrative agencies. This means the complaint must have arisen in a public institution and should first be made through the institution's reporting system.[18] This also applies to students.

In the event of employee complaints, the complainant does not have the right to file an objection or appeal if the complaint does not concern a decision, but rather behaviour resulting from the implementation of laws and regulations or the lack thereof. It would seem logical if complaints of employees were dealt with by the organisation itself. However, this can be problematic. Many students are also hesitant to voice their complaints within the school environment. Although a complaints committee should be accessible, not many students actually file a complaint when a teacher breaches their duty. What's more, complaint processes are often time consuming – and time is something students do not have. Most students have student loans and study delays are costly. Take, for instance, a Master's student who is taking a one-year course (which actually boils down to 10 months of classes). Do you think he has the time to embark a lengthy complaint process?

According to the Adviescommissie Behoorlijk Bestuur (Advisory Committee on Good Governance), 'many organisations lack a culture that facilitates giving feedback. Not having an outlet for positive or negative feedback can hinder the functioning of the organisation as a whole. This is usually caused by huge gaps in communication between shop floor staff and management, commercialisation, bureaucratisation, or

18 General Administrative Law Act Art. 9.20:1 (The Netherlands).

staff taking responsibility for work that is not their own. Organisations need to invest in mechanisms that encourage staff to speak up. There are institutionalised forms of participation for employees and customers, and there are people and places where people can report violations, such as confidential counsellors (for undesirable behaviour and discrimination), and whistle-blowers' regulations. But that is not enough.'[19]

Without a culture in place that allows feedback, people don't feel encouraged or supported to file a complaint. It may even put them off discussing it all together, especially if they fear repercussions. So, what is the added value of an ombudsman?

19 Adviescommissie Behoorlijk Bestuur (2013, par. 3.6).

2

How can an ombudsman help?

In the last few decades, more and more educational institutions have opted for an ombudsman model instead of a system with a complaints officer and a complaints committee. Some ombudsmen are not allowed to assess complaints but can review and handle reported complaints. In those cases, a complaints committee coexists and works alongside the ombudsman office. In some countries, it is required by law to appoint an ombudsman or part of a collective labour agreement obligation or national directive. In Australia, for example, the 'principles underpinning these guidelines are based on those outlined in the Australian Standard, Guidelines for complaints handling in organisations.'[20] In countries where this does not apply, institutions can decide for themselves whether to appoint an ombudsman and whether they are given the power to assess complaints.

In higher education, a faculty or service is often first given the opportunity to handle the complaint itself. Students can speak to a programme coordinator, study advisor or student counsellor about their complaint. Employees can take matters up with their manager or HR. In some places, such as in Flanders (Belgium), students can turn to a faculty ombudsperson. A complaints committee or institutional ombudsman is a second-tier mechanism to be used once internal complaint processes have been exhausted. However, in some cases, complaints may also be submitted directly to an ombudsman.

What is the difference between a complaints committee and the ombudsman? As mentioned above, a complaints committee usually consists of external members who are not employed by the institution. When a complaint is submitted, the committee holds a hearing to assess the complaint. Most ombudsmen investigate and assess complaints

20 ACT Ombudsman & Commonwealth Ombudsman (2016, 2).

themselves. However, there is another important difference. When a complaint is filed with the complaints committee, it is formally submitted and the respondent is immediately informed of the accusation, in accordance with the complaint procedure. The ombudsman process offers another option: complainants can discuss their complaint confidentially and only ask for advice. (Ombudsmen have a duty of confidentiality.) Complainants therefore tend to make use of this possibility rather than file a complaint with a complaints committee. As mentioned earlier, organisations often don't have an open culture where issues can be freely discussed. Therefore, many people are afraid to come forward with their complaints because they are afraid of retaliation from colleagues or supervisors (whether this is justified or not). The ombudsman offers a safe alternative to discuss concerns and understand their options without fear of retaliation. It is therefore only logical that the ombudsman deals with much more complaints than a complaints committee.

Complaint handling by the ombudsman also has benefits for the organisation. Complaints are often resolved early. Throughput is generally high thanks to early resolution of cases. Ombudsman-led mediation can help to clarify matters, without committing to a fully-fledged mediation process. This is beneficial for everyone involved, including the organisation.

The ombudsman collects information about the organisation based on the conversations held and the complaints made. This information can be shared with the board and management, for example in an annual report. The organisation can then take necessary action based on the ombudsman's recommendations. But there is another important difference between an ombudsman and a complaints committee. If the complainant agrees to or requests ombudsman-led mediation, the ombudsman can first see whether it is possible to resolve the complaint without using a formal procedure. If successful, a formal complaint does not need to be filed, eliminating the need for an assessment. In this sense, the ombudsman also plays a role in the prevention of complaints by resolving early, without escalation. This is not only a pleasant way to resolve complaints for all parties involved, it has also proven to be effective as a means to prevent absenteeism, litigation,[21] and unnecessary employee or student departure. The ombudsman also contributes

21 Herfs (2016, 53).

to social safety in an organisation in this way. A complaints committee does not provide these options. This is one of the reasons why many organisations opt for an ombudsman instead of a complaints officer and a complaints committee.

Ombudsman as first point of contact

Some complainants skip the first-tier resource, i.e., complaint handling by a faculty or service, and bring their case directly to the ombudsman. This tends to happen in situations where there is a breach of trust with the respondent and/or management, or in which complainants are in a position of dependency. Educational institutions typically have several employees on fixed-term contracts. At universities, for example, this concerns employees with a tenure track appointment or PhD programme candidates. It can be difficult for these individuals to discuss a complaint directly with their supervisor. Often, they are afraid of repercussions and prefer to speak confidentially with an ombudsman. This also applies to students who may feel they are in a position of dependency towards their teachers or thesis supervisors. In such cases, it is important that an ombudsman deals with the complaints to prevent escalation. Ultimately, this is in the direct interest of all parties involved.

The Netherlands Scientific Council for Government Policy (WRR) stated with regard to the involvement of 'third parties': 'Many semi-public organisations have changed considerably in character over the past decades, but the internal checks and balances that are necessary to keep administrators on the right path have not always evolved along with these changes.' Third parties can keep directors and members of the Supervisory Board on their toes. According to WRR, directors generally benefit from an internal 'counterpart' who ensures the organisation's identity, objectives and social added value are safeguarded. These internal parties can act as 'antennas' to pick up signals in the workplace or society, especially where supervisory boards lack sensitivity or have lost touch with the reality of what is happening on the work floor. It is precisely in these situations where they can serve as 'fire alarms' or 'internal whistle-blowers'.[22]

22 Scientific Council for Government Policy (WRR) (2014, 9 onwards).

Considerations like the ones discussed above play a pivotal role in the appointment of an ombudsman. However, more than anything, the board and employees will have to be convinced that complaint handling is a valuable tool for improvement and for restoring trust in the organisation. Complaints also stimulate performance by revealing areas that need to be improved.[23] An ombudsman ensures that the laws and regulations are being followed. This not only implicitly ensures the legal protection of students and staff members, but also strengthens the protection of rights and the equality of minorities. This is of great importance given the fact that educational institutions are very diverse in terms of geography, values, beliefs, practices, and human diversity. In this way, the ombudsman contributes to inclusiveness.

A win-win for everyone

Professor Emeritus of Public Affairs at Arizona State University, Lawrence D. Mankin, states that: 'Unlike the grievance system's win-lose equation, the ombudsperson program aims for a win-win outcome.' [24] In other words, all parties benefit from the efforts of an ombudsman. Ombudsmen also contribute to social security (although they are not in every country involved in the substantive review of complaints concerning undesirable behaviour). When employees or students feel that procedures are not carried out properly, are kept in the dark or communication is inadequate, this contributes to an unsafe study or work environment. Can't students contact their study advisor or student counsellor? Or in the case of employees, isn't a supervisor or HRM consultant the person to speak to?

Absolutely. And many complaints are indeed resolved in this way. But in the case of trust issues, or if people are being sent from pillar to post or complaints need to be assessed, complainants turn to the ombudsman. The powers of the ombudsman are extensive and can lead to a breakthrough in cases that have reached a deadlock. Ombudsmen have investigative powers and may request information and documents concerning the subject matter under investigation. Employees may refuse to provide the necessary information to an official, but they are obliged to

23 Van der Vlugt et al. (2018, 10).

24 Mankin (1996, 49).

provide this information to the ombudsman. This can aid the resolution process and, in addition, lead to an assessment that is based on *all* available information.

Complaining is something many people do not like to do. Feedback can be uncomfortable to give, and many organisations have a culture that does not encourage people to address unwanted behaviours. This can make it difficult for complainants to voice their concerns. The dependency position and power relationship between the complainant and the respondent are also complicating factors. Another reason that people find complaining difficult is that they want to avoid conflict at all costs. However, the ombudsman's independent status and the possibility to discuss complaints in a confidential atmosphere encourages them to come forward. An ombudsman can clarify complaints, explain regulations and, for example, provide information on possible options for complainants to resolve the matter themselves. The accused party does not need to be informed at this stage. If the complainant discusses the issue with the respondent and they succeed in reaching a solution among themselves, this is a win-win for everyone.

Up to now I have talked about complaints in general. But what qualifies as a complaint? What does it encompass and what not?

3

What do students and employees complain about?

A complaint can be any act, treatment, behaviour or state which a staff member or student perceives as unfair, careless or improper. Because the differences and similarities between student complaints and employee complaints are equally important, I will discuss these two groups separately in this chapter.

Student complaints

Students want high-quality education and facilities, irrespective of whether their tuition fees are high or low. If students don't get 'value for money' this can lead to complaints. Students can come to the ombudsman with all kinds of complaints, ranging from poor thesis supervision to alleged unreasonable treatment from a lecturer. These complaints and ensuing problems can lead to study delays. Study delay is costly, so students tend to reach out to the ombudsman quickly to ask for help. Students also complain about other issues. The types of complaints that the ombudsman can handle depend, of course, on the ombudsman's powers, which in many cases have been established by the institution. Complaints can be about any of the following topics:

- Organisational
- Administrative
- Accessibility
- Treatment
- Communication
- Housing[25]

25 If provided by the university.

- Information provision (inaccurate or lack of information)
- Facilities/provisions
- Procedures (right of inspection, marking period)
- Financial
- Education:
  - Supervision
  - Quality
  - Coordination (scheduling)
- Research
- Undesirable behaviour[26]
  - Bullying
  - (Sexual) intimidation
  - Discrimination
  - Aggression
- Legality (i.e. with regard to Education and Examination Regulations)
- University registration/course enrolment

Below are some examples of complaints to give some idea of issues that are brought to the ombudsman.

A I've been waiting for a thesis supervisor to be assigned to me for three months.

B My grade, which was entered into the digital registration system, has been changed.

C It's been more than three weeks and my teacher still hasn't answered my e-mail.

D I'm denied access to lectures.

26 If the ombudsman has the power to deal with these complaints. The Netherlands differs from other countries in this regard. In Dutch higher education institutions complaints regarding undesirable behavior are dealt with by a confidential counsellor who provides support in such cases.

In the event of complaints as described above, the ombudsman will ask the student for details in order to understand the circumstances of the complaint and consult the applicable regulations and procedures.

The following example of a complaint about planning illustrates that discussing a situation can provide clarity. 'A third-year undergraduate made an appointment with the ombudsman to say that she had submitted her work placement report on time, but that it was found to be unsatisfactory. She was given an opportunity to correct her report. However, the assessors were on holiday until 1 August, which put plans for graduating before 1 September under serious pressure. The student found the programme planning to be inconsistent in allowing an opportunity to correct a report but not ensuring that assessors would then be available. She considered this to be a serious omission. In order to hear both sides of the case, the ombudsman contacted the work placement coordinator, who agreed that the final submission date was very close to the summer recess, and undertook to change this for the coming academic year to avoid problems of this kind. The programme apologised to the student for the distress she experienced. Fortunately, the student was still able to graduate before 1 September. This is an important deadline in connection with the strict separation between Bachelor's and Master's studies and the payment of tuition fees. The ombudsman was able to close the case.'[27]

An ombudsman can also refer a complainant to the appropriate support service, as in this example: 'A Master's student contacted the ombudsman because his thesis supervision did not go well. According to the student, the thesis supervisor had not given him enough instructions and the instructions he had been given were not always very useful. As a result, the student had to contact the thesis supervisor frequently. The student said that this meant that all the hours he had been allocated for supervision were used up while he felt that he still needed supervision. The student said he had attempted to get more hours, but the thesis supervisor would not agree to this. Intervention by the academic advisor did not help either. However, he told the ombudsman that he had not yet contacted the thesis coordinator. The academic advisor had mentioned this option but he was unsure what the thesis coordinator would have been able to do for him and he didn't try to find out.

27 Poesiat (2013, 19).

The ombudsman informed the student about the Master's Thesis Regulations. These state that the thesis coordinator mediates in the event of a dispute. He could also have discussed the fact that he needed extra supervision hours with the thesis coordinator. The student indicated that he was not aware of this option and that he would contact the thesis coordinator before enlisting the help of the ombudsman. A few days later, he let the ombudsman know that the thesis coordinator had resolved the matter as far as he was concerned.' [28]

Employee complaints

Like students, employees tend to complain about procedures that have not been carried out (correctly), rules that were violated, cooperation with team members, or the division of tasks. Most employee grievances are about:

- Appointment
- Treatment
- Communication
- Facilities/provisions
- Pay
- Performance and appraisal
- Relocation/internal mobility
- Career development
- Dismissal/termination of employment
- Undesirable behaviour[29]
  - Bullying
  - (Sexual) intimidation
  - Discrimination
  - Aggression
- Legality
- Reintegration
- Reorganisation
- Cooperation
- Job application
- Division of tasks/workload

28 Poesiat (2019-2020, 25).

29 If the ombudsman has the power to deal with these complaints.

Incidentally, most issues are resolved at the first tier, i.e., by immediate superiors, possibly with support from an HRM consultant. However, people are often unwilling to speak to their HR team if there are trust issues with management. Many employees see HR as an extension of management – and therefore not impartial – and would rather submit their complaint to an ombudsman.

For example, in the case of appointment-related issues or work reintegration after long-term sick leave. Or in the case of enquires about their legal position, such as their employment contract or contracted hours, or about the way in which a manager has handled questions on this subject. However, some institutions have limited the jurisdiction of the ombudsman to certain functions. In such case, ombudsmen cannot interfere with judicial decisions or handle complaints that are still open to appeal or objection.

An ombudsman can deal with enquiries about procedures and matters pertaining to collective labour agreements, leave arrangements or working hours. They also act as confidential and impartial advisors to whom PhD candidates can turn in cases of conflict surrounding their doctoral projects.[30]

Complaints about underperforming colleagues or managers also tend to be submitted to an ombudsman.

Workload-related stress can also be a reason to complain to an ombudsman. The ombudsman can mediate in such situations in an attempt to reopen channels of communication. In some situations, cooperation (e.g., between employees, an employee and their manager, or a professor and a member of the Faculty Board) can be so difficult that an employee sees no other option than to turn to an ombudsman for help. There are also situations where employees step into the role of manager. If managers allow this to happen, this can lead to a shift in power. Colleagues may refuse to respect the employee's instructions, resulting in cooperation issues. An ombudsman can clarify matters for both parties by asking questions.

Ombudsmen listen and provide practical advice based on laws and regulations. In some cases, it is enough to explain the law in more detail. If necessary, they will refer the problem on to the appropriate support

30 Herfs (2021).

service, such as a confidential counsellor. Here are some examples of complaints that are brought to an ombudsman:

A I told my supervisor that I'm interviewing for another job. Since then, I haven't been assigned any tasks.

B I haven't had an annual consultation or appraisal review with my manager for years, but I have received a list stating the areas that I should improve on.

C I was promised the position of professor, but now the university decided not to recruit for the role after all.

D I was promised a fixed-term contract if my performance review was satisfactory, but the appraisal interview never happened and I didn't get a new contract.

In the above cases, the ombudsman will have to speak to the complainants and staff members to ensure that both sides of the argument are heard. The complaints raise a number of questions. A: Does the employee still perform other tasks? B; Has the employee asked for an annual consultation or appraisal interview? C: Was it a promise or a commitment? D: Have any reasons been given as to why no new contract has been agreed upon yet? These types of questions can be expected of an ombudsman.

The following is an example of a complaint regarding cooperation and poor communication. 'A staff member with more than 10 years in the job complained to the ombudsman about sudden difficulties in working with his manager. He felt that this was now affecting his working relationship and his motivation. He had been ill for a long period and now fully recovered for one month. On his return, he had been given a different workplace and was allocated different duties, which he fully understood. However, he felt that his manager's planned schedule was unrealistic and failed to understand why he needed to have weekly consultations with his manager. He felt he was being intensively monitored by his manager, which made him feel insecure. He asked the ombudsman if this was permitted. When he had raised these frequent consultations with the manager, he had not received any clear answer. The most recent annual review had been five months previously. This had been

satisfactory, he said, apart from a few minor issues. Despite this, he was concerned that the manager was planning to end the contract of employment in the near future on the basis of poor performance.

The ombudsman is unable to assess any complaint on whether a schedule is realistic or not since she is unable to judge the specific substance of it. In addition, having weekly meetings does not constitute grounds for complaint. However, she did note that the staff member was experiencing problems with cooperation. In order to clarify the case and prevent escalation towards conflict and a complaint in the future, she contacted the manager with permission of the staff member. The manager explained that the staff member required additional support as a result of his long-term illness. This was also compounded by the fact that he was working in a different area and had different duties. In order to ascertain whether this support was required, he was conducting weekly meetings as standard. He felt that this would prevent a recently recovered staff member from being overburdened and reveal any issues at an early stage. He was unaware of the staff member's interpretation of events and hoped that this discussion would allay his worries.

The ombudsman reported back on this meeting to the staff member. He responded with relief and was pleased with the intervention of the ombudsman.'[31]

If an employee is unhappy with the result of their appraisal, most employers will have an appeals process or mechanism in place to address the issue. An ombudsman is not competent to handle such complaints. However, they may consider complaints regarding performance and appraisal in certain circumstances. For example, in the case of poor communication. Poor communication can cause a lack of predictability and stability within the workplace, leading to an unsafe environment. This can destroy trust in managers and ultimately affect employee performance.

The following is an example of a complaint that at first glance appeared to be about performance and appraisal. 'A staff member reported to the ombudsman that he had heard from his manager several days previously that he would not be given a permanent contract. His third fixed-term contract was due to expire by operation of law in two months' time. Eight months previously, he had had an annual review

31 Poesiat (2013-2014, 22).

in which, he said, his performance had been deemed to be satisfactory. However, the manager had given him some recommendations. He also moved onto the next salary scale (increment). For this reason, he said, he had been counting on being offered a permanent contract because his position would still exist after the reorganisation and he assumed that he was performing well. His question was why it was only now that he was being told of his unsatisfactory performance. He felt that he had been robbed of the opportunity to improve. However, he did not want the ombudsman to mediate or submit a complaint since he felt that the game was already over. The ombudsman explained that he had an opportunity to ask his manager for an exit interview. This would give him the chance to discuss the procedure followed and the lack of communication he had experienced. The staff member arranged to have the interview and reported back to the ombudsman that he had been able to put forward his case.'[32]

Sometimes a complaint that is initially brought to the ombudsman changes to something else after the ombudsman and the complainant discuss the issue. In this example, an employee contacted the ombudsman for help after his new manager insisted that he only perform the tasks listed in his job description. The tasks that were not in his job description would be assigned to someone else. The employee thought this was unfair, because he had been carrying out these tasks for many years and enjoyed doing so. He felt he was being treated unjustly. The ombudsman explained that an employer determines what tasks employees perform in accordance with the job profile. Employees have the duty to carry out the tasks assigned to them. What's more, they should not be assigned any tasks that do not fit the position they have been hired for. If tasks are wrongly assigned, a manager will want to rectify the problem, the ombudsman explained. But how come, she wanted to know, had the employee been assigned tasks that were not in his job description? Tasks that are not in the job description cannot be evaluated during annual performance and appraisal reviews. So, how are they evaluated? It is obvious that this will cause problems. The employee said that over the years, these tasks had gradually become his responsibility. There had been plans to reassess his job description six months ago following the increase in responsibilities, but the arrival of the new manager put a

32 Poesiat (2013-14, 21).

stop to this. The manager never explained why. The ombudsman asked how he felt about this. The employee felt disappointed, because had the position been reassessed, the tasks would not have to be transferred to another employee. The ombudsman asked whether the complaint did not actually concern the manager's refusal to allow the job to be re-evaluated without stating reasons, causing the employee to feel disadvantaged. The employee agreed with this, after which the ombudsman suggested that he should take up the matter with his manager first. Perhaps the manager could agree to a re-evaluation. After all, feedback from superiors on his performance reviews had always been good.

This case illustrates that ombudsmen, with their knowledge of regulations and procedures, might arrive at a different conclusion than the complainant. That is why in order to get to the bottom of the complaint, it is important to gain a complete understanding of the events surrounding the complaint and any underlying issues or experiences that may have led to the complaint.

When it comes to complaint handling, every case is different and therefore requires a careful, personalised approach. This calls for ombudsmen with specific qualities and talents. What qualities are required depends on the job content.

4

Tasks and responsibilities of the ombudsman

The fundamental characteristics of ombuds work are mostly the same worldwide: independence, impartiality and investigative powers. An ombudsman handles and investigates (if that power has been granted by the institution or by law) complaints and reports of students and/or employees concerning alleged improper conduct, or improper or unreasonable treatment, by an employee or administrative body, and conducts independent and impartial investigations to that end. As an impartial and independent third party, the ombudsman can provide advice on various options in dispute resolution processes, on rights and obligations in legal matters, and can help mediate between two conflicting parties. Structural violations and organisational bottlenecks are reported to the relevant management, board and/or Executive Board. After the investigation, a report is prepared detailing the findings and any appropriate recommendations on the matter investigated. As a result, the cause of the complaint can be resolved or put right. In this way, ombudsmen contribute to a healthy, respectful and safe work or study environment. However, in most cases, the issued advice is not mandatory for a board or management to follow.

Ombudsmen perform their work independently and impartially, and are not subordinate to anyone. They are authorised to make requests for information from institutions, call in experts to evaluate the information, launch investigations on their own initiative, and can recommend that specific appropriate action be taken to resolve the complaint. In assessing complaints, ombudsmen will use legal techniques, such as audi alteram partem (a principle of natural justice where every person gets a chance of being heard) as well as mediation methods. They also possess knowledge of laws and regulations, especially in the field of education. Ombudsmen might have a degree in a field such as psychology, as interpersonal skills are essential in this context. They also use their knowledge of organisa-

tional dynamics to identify underlying causes of problems and disputes. The latter is important in order to understand complex organisations such as educational institutions and their processes and social structures. This allows them, on the one hand, to gain better insight into the complaint and, on the other, provide tools and strategies to address the problem or come up with a fair and equitable solution.

Last resort

Within institutions, the ombudsman is generally an office of last resort. This means that complainants need to address their issue through any available complaint process before contacting the ombudsman. The ombudsman handles cases related to conflicts, procedures and dysfunctional relations between teachers and students or managers and staff members. They deal with and ultimately resolve often complex and sensitive complaints through counselling, ombudsman-led mediation and complaint assessment.

The duties and powers of the ombudsman are laid down by the board of the institution in the Ombudsman Regulations, in consultation with the Participation Council. These regulations outline the complaint procedure and the role of the ombudsman in it. This framework and the associated powers are important for an efficient and process-based complaint handling process. The regulations also establish the position of ombudsman. Ombudsmen perform their work independently and are not subordinate to any body of power. Otherwise, they/he would not be able to mediate as an impartial third party or investigate a complaint without being exposed to potential conflict of interest. The International Ombudsman Association in the US states that: 'Each Ombudsman office should have an organizational Charter or Terms of Reference, approved by senior management, articulating the principles of the Ombudsman function in that organization and their consistency with the IOA Standards of Practice.'[33]

So, what might the ombudsman's profile in higher education look like?

33 IOA Standards of practice, preamble. https://www.ombudsassociation.org/assets/docs/IOA_Standards_of_Practice_Oct09.pdf

The Vereniging Ombudsmannen in het Hoger Onderwijs (Dutch Professional Association of Higher Education Ombudsmen, VOHO) has drawn up a profile model for the ombuds function:

Profile model

'The official

1. has a degree in conflict resolution and relevant experience to fulfil his/her role effectively.
2. possesses specific expertise in (or at least has an affinity with) the subject matter,
   i.e., knowledge or an understanding of higher education laws and regulations, and procedures of the relevant institute of higher education, and the complex dynamics that exist in educational institutions.
3. has an academic mindset.
4. has strong analytic abilities and can distinguish between complaints, objections and appeals.
5. is prepared to develop professionally as ombudsman, through further training and regular consultation/intervention, at both the national and international level.

Attitude

The official

1. has an impeccable record of professional behaviour and is non-controversial.
2. operates neutrally and with credibility and authority.
3. displays perseverance in the face of pressure of others.
4. is aware of the importance of impartiality.
5. is aware of the importance of confidentiality.

Skills/competencies

The official

1. has a high degree of organisational sensitivity and excellent verbal and written communication skills.
2. is able to act independently and finds it natural be self-reliant.

3 must be able to handle confidentiality, and is empathetic, conscientious and reliable when it comes to his/her work.
4 has the skills to deal with conflicts of interest and resistance, organise and communicate effectively, formulate and develop policy proposals, and to translate insights and information into improvement projects.
5 communicates clearly and is able to reach clear agreements with the complainant and the accused.
6 is able to establish the facts, present findings without making judgements, and establish whether a procedure or action was carried out with due care.
7 is skilled in providing advice, mediating conflicts, investigating cases and giving recommendations.' [34]

Mediation skills

According to VOHO, an ombudsman does not necessarily have to be a lawyer, as long as they have demonstrable knowledge of laws and regulations and extensive experience with the organisational context of the institution to which they are appointed. As most complaints are resolved through counselling or ombudsman-led mediation and rarely lead to a formal investigation, most institutions find the ability to mediate effectively more important than legal knowledge. The former independent adjudicator and chief executive for higher education in England and Wales, Rob Behrens, states: 'The lived experience of higher education ombudsmen involves a constant transfer between ethical, operational, inter-personal, didactic, diplomatic and public management domains.'[35] According to the Dutch National Ombudsman, ombudsmen should be able to 'competent at handling difficult conversations and conflict, and possess good analytical skills.'[36]

Certain complaints are very complex requiring ombudsmen to use their analytical skills (see previous chapter) to get to the core of them. A complaint can also be multi-layered, in which case the complaint is a symptom of an underlying issue. Some complainants are unaware that

34 https://verenigingombudsmannenho.nl/profiel/
35 Behrens (2017, p 43).
36 Van der Vlugt et al. (2018, p 5).

rules were violated. Ombudsmen must be able to draw such a conclusion. They must be able to weigh up which approach or procedure gives the complainant the best chance of resolving the complaint. Here, too, strong analytical ability is key. Until complaints are resolved, there is always a risk of escalation. So choosing the right approach is essential.

In order to handle complaints carefully and effectively, ombudsmen must also be able to stand firm. Although the Ombudsman Regulations clearly specify the regulatory framework for handling complaints, an ombudsman may have to deal with forces that are driving in a different direction. Sometimes complaints lead to workplace tension or anger. People may feel hurt or humiliated when a complaint is lodged with the ombudsman. An ombudsman may be attacked for investigating or reporting on the complaint. The respondent might call into question the ombudsman's competence to handle the complaint. Or be convinced that nothing is wrong and find it absurd that the complainant has turned to the ombudsman for help. The ombudsman might be blamed if the complaint is not resolved despite the apology that has been offered. Forces like these can make an ombudsman's work difficult, so it is important that the ombudsman is able to resist pressure and respond effectively. This means that ombudsmen should be able to explain:

- Their independent and impartial position.
- The fact that a complainant has a legal right to complain.
- The complaint procedure, which gives the respondent the opportunity to present their version of events in the complaint report.
- The role of an ombudsman as a neutral arbiter, which means they should also be able to act as ombudsman for the respondent.

In some cases, a respondent may even go as far as to submit a complaint against the ombudsman to the Executive Board. The ombudsman must then be given the opportunity to present their version of events (audi alteram partem). Even then, it is important that the ombudsman carries on with the complaint investigation undeterred, unless the board relieves him of his duties and initiates a vote of no confidence.

Furthermore, it is essential for ombudsmen to be aware of their role and responsibilities, especially when it comes to impartiality. How can they give substance to their role as impartial examiner of the facts?

5

Role of the ombudsman

Ombudsmen are appointed to deal with complaints and reports and, if necessary, to investigate them. The Ombudsman Regulations set out the frameworks that enable this to be achieved. One of these frameworks is the ombudsman's impartial role. The principle of impartiality is of great importance: there must be impartiality in order to be able to mediate conflicts and investigate complaints. If ombudsmen side with the complainant or act as their advocate, they can no longer investigate the complaint as an impartial third party. After all, if they consider the complaint to be well-founded, they may be accused of favouritism. This can cause them to lose their credibility, casting suspicion over the investigation. Therefore, in the first meeting with a complainant or respondent, it should be emphasised that an ombudsman works as a neutral, impartial party and therefore needs to hear both sides of the story. As a result, the respondent may be more prepared to deliver their version of events, which may lead to information that helps resolve the complaint or will benefit the assessment. However, if someone has been wronged or it is clear that laws or regulations have been violated, then the ombudsman has no choice but to intervene. This is not about choosing sides but about reacting on facts.

The ombudsman as investigator

In order to be able to assess a complaint, an investigation is required. Ombudsmen are also investigators. They investigate the complaint and collect, process and prioritise information accordingly. For this reason, a provision has been included in the Ombudsman Regulations that states that the ombudsman may request statements or information from any employee whenever he deems them necessary for establishing the facts. That is not without obligation. After all, an ombudsman cannot investigate the complaint and arrive at the truth if not all the necessary in-

formation becomes available. Therefore, they should be able to request documents or arrange a meeting with and/or carry out an inspection at the institution or organisation. Because of these powers, which are laid down in the Regulations, an ombudsman's position differs from that of other officials in the organisation. Contrary to the ombudsman, HRM consultants, confidential advisers and trade union officials have no right to information and investigative powers. Nor do student counsellors and study advisors. A respondent can tell another employee that he doesn't want to talk about it. It is not possible for any employee or official to deny the ombudsman any information. However, the ombudsman can only access personal files with the consent of the person concerned.

How do ombudsmen maintain their impartial position? Emotions play a central role in the process of conflict and resolution. For ombudsmen, it is important to recognise emotions correctly and act upon them. This includes emotions of the complainant and of themselves. During the intake interview, complaints may evoke feelings of surprise, dismay or empathy. However, showing compassion is one thing, prematurely or uncritically agreeing with a complainant is another. While ombudsmen may sympathise with the complainant's frustration caused by an alleged incident, they must be able to respond substantively to the complaint in order to discuss the possibilities objectively. This is where generalisation comes in. For example, an ombudsman can indicate that, in general, a manager can be expected to comply with procedures, and continue to discuss the possibilities in the case of non-compliance. Or an ombudsman could say that, generally speaking, when an employee does not respect a manager's authority, this can affect the employment relationship. Generalising problems can give complainants and respondents insight into their actions and their likely effect. For ombudsmen to fulfil their role effectively, the complainant must be aware of and have confidence in their impartiality. If confidence is there, they will not be seen as a representative of the institution, but rather a sparring partner to discuss important decisions or options in a case. Respondents who realise and accept that this is the ombudsman's role will feel more comfortable and share information more easily, which in turn benefits the complaint investigation.

The ombudsman, as an impartial third party, can therefore also explain to a complainant why the organisation has chosen a particular course of action. After all, in addition to acknowledging the complaint, the role of the ombudsman is to clarify issues and offer informal ad-

vice. Example: a complainant feels that the organisation owes him an apology for being treated unfairly by his supervisor (who has since then resigned), something which the organisation refuses to do. In this case, the ombudsman can explain that the organisation is not in a position to apologise because the complaint concerning the alleged unfair treatment has not been assessed. Before something can be done, it first needs to be established that it actually happened. The demand for an apology may, in an extreme case, even be considered defamation of character. By giving a general explanation of how the law works in practice, the ombudsman does not take sides but instead provides clarity.

Being impartial also means that ombudsmen cannot reprimand complainants for having acted in a certain manner. They cannot tell complainants that they have brought the situation upon themselves. However, they can help complainants realise that, in a general sense, certain actions have consequences, and point out the risks of following through with the action they are about to take. The ombudsman's questions can also encourage self-reflection.

Question-asking can be an effective tool to remain neutral and perceptive in analysing events and situations. It is important that the presented questions are not suggestive or reproachful but rather focused on fact-finding. Ombudsmen should be aware that while 'Why' is considered an open-ended question, it actually creates defensive responses. Dropping the 'Why' and using 'How' or 'What' instead makes questions sound less judgemental. So, 'Why did you do this?' becomes 'How did this happen?' This is more in line with the ombudsman's role as impartial examiner of the facts. Similarly, an ombudsman does not make assumptions about motives or about what a complainant hopes to achieve. An ombudsman's job is to search for facts, often specifically by asking questions.

Some complainants want the ombudsman to accompany them to a meeting with a manager or teacher, or ask for help with drawing up a letter, such as a statement of defence. By doing so, the ombudsman risks being seen as the complainant's advocate, and no longer neutral or independent. This is undesirable, because an ombudsman must at all times remain fully impartial so as not to jeopardise the outcome of any complaint. What's more, ombudsmen must not only be impartial, their impartiality must also be visible to third parties. Therefore, it makes sense that complainants are not referred to as 'clients', as is customary in law firms.

Role awareness and professional distance

Ombudsmen not only has an impartial role during the complaint investigation, but also in their relations with others in the organisation. When dealing with staff, ombudsmen must be ever conscious of this role. This means that they must always keep a professional distance and cannot become friends with staff members. After all, if a complaint is lodged against 'a friend of the ombudsman', this places him in a difficult position. How will the ombudsman be able to remain impartial and provide unbiased assessments? Role awareness also applies to the use of social media platforms such as Facebook. For instance, it would not be wise for ombudsmen to accept friend requests from people they have a professional relationship with, as this can send a wrong message. LinkedIn, on the other hand, is an online social networking website specifically designed for professionals, so being present on LinkedIn is not a problem.

Institutional ombudsmen must also be aware that using social media or talking to the press can have consequences. Posting on social media:

- can be traced back to cases, leading to privacy issues;
- may give the impression that the ombudsman is taking sides, which might undermine confidence in the institution of ombudsman;
- can be perceived as a way to influence policy processes, while this is up to the board, management and participation council.

Using social media can therefore create problems in the performance of an ombudsman's duties. Ombudsmen also make recommendations or suggestions for improvements to policy, practice and procedures as a result of shortcomings identified as a result of complaints. This information can be made public via an annual report after the board and management have been informed.

Furthermore, an ombudsman is expected to comply with the rules and guidelines of the organisation. This may sound obvious, but this also applies to matters such as digital signatures or the font used in documents written by the ombudsman. This means that documents must be drawn up in accordance with the house style guidelines of the organisation concerned. So role awareness is more than being aware of one's impact during conversations with complainants.

Knowledge about the organisation and staff can inadvertently affect an ombudsman's impartiality and objectivity. It is important to be aware of this. For example, an ombudsman may know that a manager is work-

ing less hours due to personal issues. This should not, of course, affect the manager's performance. An ombudsman cannot take this knowledge into account as this would make him biased.

The ombudsman's ethnic background can also cause a complainant or respondent to assume that the ombudsman is on their side. This may be the case if, for example, the ombudsman belongs to a minority group. Ombudsmen should be aware of this and, if necessary, point out that they strive to be objective and free from bias, and treat all parties fairly without favour or prejudice.

Investigating departments

In some cases, ombudsmen are asked by the board to investigate a department and come up with recommendations. An ombudsman can only do so under the conditions provided for in the Ombudsman Regulations. However, an ombudsman cannot conduct an investigation if:

- The Regulations do not confer powers on the ombudsman or prohibit the execution of other tasks for the institution in addition to the function of ombudsman.
- The recommendations can have consequences for employees. This would represent a loss of impartiality. (How can ombudsmen help employees if they are no longer impartial?)

There are also other issues:

- The board can hide behind the recommendations made by the ombudsman or use them to push their own agenda, which can call the ombudsman's impartiality into question.
- The investigation may make employees feel unsafe at work. Who can potential complainants turn to if a procedure relating to the investigation is not carried out properly?

Frequent consultations between the ombudsman and the board, management or department heads can also send a signal to potential complainants. It may be perceived as submissive, which can cause the ombudsman to lose credibility as an impartial party and leave complainants reluctant to discuss or lodge a complaint.

Most Ombudsman Regulations explicitly state that the function of ombudsman is incompatible with any other function in the organisation. This is to avoid conflict of interest and to ensure that complainants

as well as respondents know that the ombudsman is truly impartial. In addition to having an independent position within the organisation, the ombudsman must also maintain an attitude and demeanour of impartiality. The same can be expected of the ombudsman's workplace. In no way may the impression be created that the ombudsman is an instrument of HRM or the education department. So, what conditions must be met for ombudsmen to be able to perform their duties properly? This subject will be dealt with in the next chapter.

6

Conditions for ombuds work

A condition to perform the duties associated with the office of ombudsman is that sufficient budget to undertake ombuds-related tasks is allocated upon appointment, and that the mandate must be recorded in an agreement, such as the Ombudsman Regulations. This is mainly to ensure the independent position of the ombudsman. The ombudsman's powers must be clear in advance, not only to the users but also to the ombudsman. If the organisation in question wants to establish what powers the ombudsman has, the Participation Council may need to agree to this. The regulations should describe the powers of the ombudsman, the complaint procedure as well as the independent position of the ombudsman. As mentioned earlier, ombudsmen perform their work independently and are not subordinate to any body of power. They must be able to address complaints impartially and carry out their work unhindered, with functional and administrative independence. This is an indispensable and perhaps the most important attribute of the ombudsman.[37] People who make use of ombudsmen must be able to trust that they are independent. Unlike a member of an external complaints committee, an ombudsman is employed by the organisation against which the complaint is directed. Therefore, 'additional controls are needed to safeguard the quality of the complaint handling process.'[38]

Even if the outcome of the ombudsman's investigation is disagreeable to an institution or department, they should still be able to disclose this information without being inconvenienced in any way. The Ombudsman Regulations should set out the powers of the ombudsman, the resources at the ombudsman's disposal, and how and for how long the ombudsman will be appointed. This will allow ombudsmen to carry out

37 Behrens (2017, 44).

38 Van der Vlugt et al. (2018, 27).

their functions independently. The unlimited reappointment of the ombudsman is a good thing in this respect, because it allows for the accumulation of experience, and this in turn benefits the complaint handling process. The duration of the ombudsman's appointment does not have to be equated to the length of their employment contract. A contract of employment can be concluded alongside an appointment as ombudsman.

Facilitating the ombuds function

The function of ombudsman is usually facilitated by a department, such as Administrative Affairs. Facilitation by HRM, which is a reporting mechanism representing both the employee and employer, or student affairs might call the ombudsman's impartiality into question. This should be avoided at all times. The organisational positioning of the ombudsman must be carefully chosen to eliminate any appearance of partiality. Furthermore, there must be sufficient budget allocated to the office of ombudsman to enable the ombudsman to properly perform the functions and duties within the set time limits set and to make the ombuds services accessible to everyone.

What other essentials need to be in place before an ombudsman is appointed? In the first place, a suitable workspace. An ombudsman should have a private workspace that is quiet and free of distractions. As the Ombudsman Regulations say, complainants must be able to speak confidentially without being overheard. Ombudsmen have a professional duty of confidentiality and a private workplace enables them to fulfil this duty. It is also important that others do not see who enters or leaves the ombudsman's office. For this reason, Administrative Affairs or Student and Educational Affairs is not a suitable office location. A flexible workstation is not preferred. Ombudsmen should be able to leave papers on their desk during breaks or appointments without them being seen by employees walking by. As mentioned above, the ombudsman has a duty of confidentiality.

In order for the ombudsman to really be of service, individuals must be fully aware of the existence of the institution. This means organisations must clearly inform staff and students of the possibilities to file a complaint, and where this can be done. Web pages should be easy to find and include all the relevant information to reach the ombudsman. All these factors contribute to the ombudsman's accessibility. Anoth-

er important condition is that there must be an environment in which complainants feel able to come forward with their concerns. They must be given the confidence that their complaint is handled fairly and confidentially. Managers can contribute to the process in which complaints and conflicts are dealt with by ensuring that complaints are seen as feedback and free advice, rather than criticism. This will make it easier for complainants to come forward and also enable solutions to be found and implemented.

In order to be effective in resolving conflicts and complaints, the ombudsman must be supported by the top decision-makers (the board). In case a manager does not comply with the recommendations made by the ombudsman, he must be able to ask the executive board for help at any time. If the board takes the complaint handling process seriously, this will increase its effectiveness.[39]

Scope of ombuds function

To determine the scope of the ombudsman function, a formula can be used to calculate the FTE (Full-time Equivalent) value, the unit that indicates the workload of an employed person. HRM departments use the HR ratio (Human Resource Staffing Ratio), which measures the number of company-wide employees supported by each individual HR function employee. The rule-of-thumb ratio is 1.4 full-time HR staff per 100 employees.[40] For an ombudsman, the number of employees is generally higher. Ultimately, the institution determines the scope for the ombuds work, but this scope must allow accessibility and effective complaint handling within time limit specified in the complaint procedure. In this sense, the number of cases that the ombudsman deals with per year is of less importance since the office of ombudsman is a service. The scope of the function also determines the accessibility of the function.

Now that the function and roles of the ombudsman and the conditions for ombuds work have been discussed, we'll move on to the complainants. How is initial contact with complainants made?

39 Van der Vlugt et al. (2018, 10).

40 Van den Hout (2019).

7

Initial contact with complainants

Once the conditions outlined in the previous section are met, the door is open to complainants. The ombudsman should provide an accessible service, so the process of making a complaint must be easy for complainants to access and understand. Complaints should be accepted in a number of different ways, including via e-mail, over the phone, via text such as WhatsApp messages, or via a digital contact form that does not necessarily require complainants to state their reasons when submitting a complaint. Accessibility is necessary for complainants to feel safe to bring complaints forward. Complainants can feel very vulnerable, especially when making serious accusations against their supervisors or teachers. Accessing help should therefore be as easy as possible. (Note: text messaging can provide a useful channel through which complainants can directly approach an ombudsman. However, WhatsApp should only be used for making appointments or asking brief questions, not to discuss complaints in detail.)

It is also in the interest of organisations to enable complainants to report complaints. Complaints contain valuable information about relevant problems about tasks, services or conduct. This information is important for quality management and can be used as a basis for improvements. Before the first meeting with the complainant, the ombudsman can ask the complainant to provide letters, documents or other evidence about the case. To ensure that the complaint does not escalate, it is important that a timely appointment with the complainant is made. The point of departure is that complainants who contact the ombudsman about an issue should get an appointment within one week. If getting an appointment takes too long this also puts pressure on the organisation: some complainants will take their complaint elsewhere if they feel they are not heard. Long waiting times can also cause further frustration for the complainant. Although it is possible to kick-start the process by talking over the phone or via e-mail, in most cases complaints will need to be discussed (and further explored) face to face. No meeting will take

place if the ombudsman cannot consider the complaint (because it falls outside his jurisdiction), the complainant has insufficient personal interest in the subject matter of the complaint, or if the complainant does not want to meet the ombudsman face to face.

Quick response to initial inquiry for support

Most complaints are reported by e-mail. In many cases, the details of the complaint are not sufficiently clear or complete. Some e-mails are emotional or angry, others contain just a short description of the alleged incident, or simply a few conclusions which the complainant has drawn. However, whatever the manner in which the complaint or incident is brought to the attention of the ombudsman, it is essential that the complainant receives a reply as soon as possible, along with an invitation to discuss the complaint if applicable. Often an ombudsman is the first person from whom the complainant receives a prompt reply. This makes the complainant feel heard and respected, which is the basis of their confidence in the ombudsman's operations.

Authorised or not?

Before taking on a case, an ombudsman must determine, on the basis of the Ombudsman Regulations, whether or not he is authorised to handle the complaint. For example, a complaint is generally only admissible if the person concerned has exhausted all internal procedures. This is because the way ombudsmen work is as a second-tier mechanism, a last resort within reasonable limits. This means that an ombudsman can only take action if the complainant has exhausted first-tier mechanisms (i.e., complaint mechanisms within the organisation), is dissatisfied with the outcome, or is unable to submit the complaint to a first-tier mechanism due to a breach of trust. If another support service, such as the confidential counsellor for undesirable behaviour, is authorised to deal with the complaint, the ombudsman will notify the complainant as soon as possible. So the initial challenge is determining who should handle the complaint. This can be difficult because in many cases it is not possible to deduce this from the e-mail.[41]

41 Herfs (2018, 13).

There may also be 'grey areas' as the following example illustrates. The ombudsman receives an e-mail from a complainant, in which he says that he feels intimidated and wronged. During the initial conversation with the complainant, the ombudsman learns that procedures have not been followed and that the complainant's complaint was dismissed as nonsense. This made the complainant feel that he is being treated unfairly. So, the complaint does not concern the unjust treatment of the complainant (which falls outside the jurisdiction of the ombudsman and should be referred), but rather a carelessly executed procedure, causing the complainant to feel aggrieved. In this case, the ombudsman is competent to deal with the complaint. These kinds of nuances are not always clear and need to be examined during a first meeting with the complainant. Also, an ombudsman should be aware that complainants may not define the reported behaviour as unwanted. By asking probing questions, the ombudsman can gain insight into the complainant's experiences in order to refer him to the appropriate professional.

Furthermore, the Ombudsman Regulations state that an ombudsman is not authorised to deal with complaints that are open to appeal or objection. The ombudsman may, however, draw the complainant's attention to this possibility. So to start with, the ombudsman must know the difference between a complaint and a dispute, an objection, an appeal or a wrongdoing, which is to be reported via the Whistle-blowers' Regulations. A complaint is defined as any oral or written expression of dissatisfaction. A dispute is a collective difference on a matter ('failure to agree'). For example, a difference of opinion between an employee and an employer regarding a decision or legal position. The ombudsman cannot take action if other options and procedures for complaints, objections, or appeals exist for the actions that resulted in the complaint. Because these boundaries are not always clear cut, an ombudsman should conduct an extensive intake interview in order to get more clarity. Does the complainant disagree with a decision, or does he object to the way in which the decision has been communicated? What happens if he has not been informed of the decision at all? A complainant has the right to object to a decision, but if no decision is taken, for example because the manager refuses to provide written confirmation, the complainant is entitled to bring the matter to the attention of the ombudsman. Since the decision has not been made available in writing, the complainant cannot exercise his right to object to it. So, the purpose of the intake is also to

determine whether or not the complaint falls within the ombudsman's jurisdiction.

Sometimes complaints have been escalated to a court of justice. The complainant may have hired a lawyer or a legal adviser (possibly arranged through legal assistance insurance). Whether or not the ombudsman is competent to examine cases once they've been escalated will need to be checked carefully. An ombudsman cannot handle a case if:

- There are still other means of objection or appeal.
- The complaint has been submitted to a first-tier mechanism and a reasonable period for a response has not yet elapsed.
- The case is already before the court.

The Ombudsman Regulations can be sent to complainants at an early stage, so that they are aware of the ombudsman's duties and powers, and have a clear understanding of the steps involved in the complaint procedure.

Complaints at the first tier

Can complaints not be dealt with by HRM? Absolutely. Many complaints are resolved at the first tier, i.e., by complainants' immediate supervisors. However, in situations where there is a breach of trust, employees often refuse or are reluctant to bring their complaint to HRM. As someone who represents the firm, an HRM manager cannot be considered a neutral mediator of conflicts between employees and managers. In conflict situations, employees want advice from an impartial third party, such as an ombudsman. They want to know if the way they are being treated is acceptable. This is the most frequently asked question that ombudsmen get. Without going into detail, the ombudsman can, in general terms, explain how procedures should be carried out and inform the complainant of their right to take the complaint further.

Complaints from students made at the first tier are handled by coordinators, for example a thesis coordinator, programme manager or the Bachelor's or Master's coordinator of the study programme. Complaints about the administration of educational programmes or about invigilators can be submitted to the head of the education office. If no satisfactory solution is found, students may make a complaint at the second tier, the ombudsman. It is therefore important to check with the complainant whether they have exhausted all first-tier complaint processes. The

ombudsman can only take up a case if a complainant is unsatisfied after going through the first-tier system, or if they don't want or are unable to discuss the complaint at the first tier.

Most Ombudsman Regulations contain a time limit for submitting complaints. For instance, the complainant can lodge a complaint if the problem occurred not longer than a year ago. In this case the complaint is admissible. But even if the complaint is not admissible, the ombudsman may still be able to help if there were good reasons for the delay. Sometimes the effects of misconduct take long to become apparent.

In some cases, students file a complaint after they have graduated. This can be done if the time limit for filing a complaint has not yet expired. For instance, if a student has suffered study delays due to poor thesis supervision, this can only be determined after the student has graduated. So filing a complaint after graduation should be possible.

Touchstones for admissibility of complaints

During the intake interview, the applicable laws and regulations are the first touchstone. Furthermore, an ombudsman needs to have some psychological insight into the complainant's thinking. What motivates people to complain? Why do they feel they have been treated unfairly, and what makes them feel that way? This requires making a conscious choice to be culturally sensitive in order to get to the bottom of the issue and find out what the complainant's needs are. Instead of making assumptions, ombudsmen use the intake interview to get this information. Only then can they work towards solving the problem. It is also important to let a complainant know at the beginning of the process as to what an ombudsman can or cannot do to ensure the complainant's expectations are reasonable and realistic. All this calls for the deployment of competencies, such as the ability to empathise with people and dig into their thoughts.[42] Question asking and probing are important skills in this respect. Holding up a mirror or asking the complainant to step in the shoes of the respondent can also be a powerful technique. Ombudsmen must have good communication skills, and be able to summarise information effectively and clarify matters without passing judgement.

42 Meulenbroek (2008, 43).

According to sociologist of law Naomi Creutzfeldt, the reason why complainants turn to the ombudsman is usually because, in short, they:

- 'seek a solution to their problem;
- want a listening ear;
- want guidance and advice;
- want to get an authority to apologise;
- want financial compensation;
- hope for a change in laws;
- want to raise matters of public interest;
- want to be treated with some level of service and respect;
- want someone with an impartial view to assess the complaint;
- hope to get what they are legally entitled to.'[43]

Furthermore, complainants need to 'believe it is acceptable to make a complaint, and know how to make it – including who to make it to, what information it must contain, and any relevant time limits.'[44]

Most Ombudsman Regulations state that if the ombudsman finds that the complaint is manifestly unfounded, the file will be closed. In such case, the ombudsman should explain the legislation in this matter to help complainants understand why their complaint is not valid. Sometimes the explanation of an impartial third party, such as an ombudsman, can help complainants to get closure and move on. When complainants are angry or persistent, it can be difficult to explain that regulations have not been violated at all. The below points can be helpful when dealing with challenging behaviour during a bad news conversation:

- Give the complainant a fair opportunity to present their position and a chance to 'blow off steam.'
- Find out how familiar they are with the applicable laws and regulations.
- Take the time to explain what regulations have been followed.
- Be careful about your language and tone. The complainant should not get the impression that you are taking sides.
- After having explained the regulations, ask complainants if there is anything that could have been done differently.

43 Creutzfeldt (2016, par. 4 onwards).

44 ACT Ombudsman & Commonwealth Ombudsman (2016, 34).

- Give complainants time to process what is being said and to change their mind.

During this meeting, the ombudsman will need to use rhetoric skills to convince the complainant that their complaint is unfounded.

It is also important to ensure that complainants do not take their complaint elsewhere because they feel it has not been dealt with adequately. Unnecessary escalation won't do the case any good and only costs the organisation time and money. If the ombudsman suspects that the complainant wants to pursue an unfounded complaint elsewhere, this needs to be addressed openly and immediately.

Hidden agendas concealed in complaints

Complainants may have a hidden agenda or vested interest in making the complaint. An example of a hidden agenda or vested interest could be to get someone fired or reprimanded. When a hidden agenda is suspected, an ombudsman can explain that employees are usually not dismissed because of a complaint, even if the complaint is founded. The reported complaint is likely to be discussed during an annual performance and appraisal review. As a result, disciplinary action may or may not be taken by the employer. The ombudsman does not interfere with such decisions. Moreover, the ombudsman and the complainant are not involved in such conversations. Furthermore, ombudsmen do not render recommendations as to what type of disciplinary action should be taken. They look at complaints and, if well-founded, can suggest changes or recommendations to remedy the consequences of the complaint or prevent recurrence. They do not express an opinion regarding the performance of employees. So, in addition to listening to the complainant and what they wish to be addressed, the initial meeting provides a perfect opportunity to set and adjust expectations, especially when complainants have unrealistic expectations of what the ombudsman can do. In order to recognise and deal effectively with hidden agendas, ombudsmen should be politically astute and choose the right discussion techniques.[45]

Complainants are often in a difficult position. Employees may feel that issuing a complaint may jeopardise their job or relationship with

45 Meulenbroek (2008, 127).

their superiors. So, the stakes can be high. Much like the world of business, educational institutions have a hierarchical system of leadership. Most employees, in particular PhD candidates, tenure trackers and temporary workers in supporting roles, have fixed-term employment contracts. Many students feel dependent on their teacher's guidance. The decision to file a complaint against a teacher or superior can therefore be a difficult one. For this reason, it is important to stress from the outset that any information shared with the ombudsman is confidential and that the ombudsman will not discuss the complaint with the respondent unless permission is given. When it comes to confidentiality, it does not matter whether the complainant is a student or an employee. However, complaints of employees are usually more complex and elaborate.

In 2014, the Canadian Human Rights Commission studied barriers into human rights justice, including within the context of filing complaints. 'Although this study focussed on the rights of indigenous women, the results are relevant to many types of vulnerable individuals and groups. These barriers include:

- lack of awareness of and education on rights;
- linguistic and economic barriers;
- inaccessible information due to the use of complex language;
- low literacy levels;
- lack of internet access;
- mental health issues;
- fear of re-victimisation in the complaint process;
- fear of retaliation by the community for making a public complaint;
- lack of trust in the public sector;
- systemic discrimination against individuals and groups.'[46]

An ombudsman must be aware of the barriers and hurdles complainants have overcome before finally asking for help. When dealing with complainants, it is important to be culturally sensitive towards their needs while being clear about the methods to be used and the possibilities. This is all the more true when dealing with complainants with challenging behaviour.

46 Hertogh & Kirkham (2018, 271).

8

Dealing with challenging complainant behaviour

Ombudsmen sometimes say that a hard part of their job is handling behaviour of some people who complain. It is not so much the complainants who are a problem, but rather their behaviour: the way in which the complaint is brought forward. The following example is of a complainant with unreasonably persistent behaviour. The student in question submitted nearly 30 complaints, with each e-mail containing a detailed description of various events with no distinction between main and secondary issues. The ombudsman needed to look back through the e-mails to see exactly what was said and determine if she was competent to deal with the issues, which was an extremely time-consuming task. As it turned out, most complaints were about general policy and the content or assessment of examinations. In both cases, the ombudsman is not the appropriate place to have these matters considered. Not the ombudsman but other bodies, such as participations councils and examination boards, have been set up to deal with these issues. However, it is an ombudsman's job to refer complainants to the appropriate agency or organisation when they are unable to deal with a request. After a lengthy discussion during which the ombudsman explained what she could and could not do, the complainant finally understood and was directed to the right body.

Manipulative behaviour

In addition to persistent behaviour, an ombudsman may also have to deal with manipulative behaviour. The National Ombudsman of the Netherlands has a guide that offers tips and advice on how to respond to challenging behaviour, remain neutral, and focus on the task at hand, namely, deal with the complaint. Below are some examples of challenging behaviours:

- ‘excessive or persistent complaining;
- emotional behaviour;
- domineering behaviour;
- manipulative behaviour;
- verbal attacks;
- paranoid behaviour (e.g., holding conspiracy theories).’[47]

According to behavioural expert Cornelis van Putten, these behaviours can manifest themselves as:

- ‘refusal to accept the ombudsman’s decision;
- unrealistic expectations about how the ombudsman handles the case or what he can achieve;
- unreasonably uncooperative;
- unreasonable arguments or irrational beliefs;
- undesirable behaviour: intimidation, threats, stalking, etc.’[48]

Ombudsmen may also have to deal with querulants, individuals who obsessively feel wronged. The following principles apply to managing the challenging conduct of querulants:

- Structure the conversation and be clear when it comes to personal boundaries and expectations.
- Be clear, firm and honest.
- Keep emotions under control.
- Do not take the complainant’s reactions personally.
- Be aware of signs of querulous tendencies.

Van Putten advises the following to manage complaints well from the beginning:

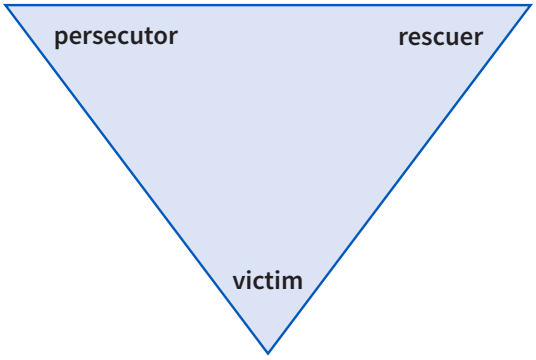
- ‘Be mindful of mindset: complaints handling is an integral part of ombuds work.
- Categorise complaints to ensure that trivial and unreasonable complaints are omitted.
- Ensure that complainants understand what the organisation can and cannot do.

47 National Ombudsman (2010).

48 Van Putten (2019). Handouts Training Lastig klaaggedrag (Handouts Challenging Complainant Behaviour Training) (personal communication).

- Explain the process and timelines clearly.
- Communicate clearly and firmly both verbally and in writing.
- Inform the complainant of any changes in procedure.'[49]

It is also possible that communication between the complainant and the ombudsman is not constructive and effective, but dysfunctional.[50] Some complainants deliberately interact in this manner to get what they want. This behaviour is represented in the Drama Triangle or Karpman's Drama Triangle, after the psychologist who first observed and defined it in 1968, Stephan Karpman.[51] The model describes three roles: victim, rescuer and persecutor.



What behaviour do complainants exhibit when they step into one of these roles?

> 'Prosecutor: tries to control the situation by accusing others. For example: 'It's all your fault.'
>
> Rescuer: constantly intervenes on behalf of others (the victim) and tries to save them from perceived harm. For example: 'I'm just trying to help and do the right thing.'

49 Van Putten (2019) (personal communication).

50 With thanks to P.J. (Peter) May, solution-focused therapist, Metacontact/Therapie Den Bosch (The Netherlands), for his in-depth explanation of the drama triangle model (personal communication).

51 More information: Karpman (2014).

Victim: manipulates others by assuming to be powerless. For example: 'Why do bad things keep happening to me? Everyone's better off than me.'[52]

Example: A complainant feels victimised and wants the ombudsman to deal with his complaint. When the ombudsman explains that he is not authorised to deal with the complaint, the complainant takes on the role of prosecutor: the ombudsman should help him, he is not doing his job properly. When the ombudsman then explains the regulations, the complainant switches to the role of rescuer. His complaint can set a precedent for future actions and serve as an example for other victims, so he demands that the ombudsman deal with his complaint anyway. When the ombudsman repeats that he is not able to deal with the complaint, then the complainant says that more people will be victimised (role of prosecutor). Ombudsman can also take on the role of rescuer by forcing their advice on the complainant, saying that the issue will only be resolved if their advice is followed. What should ombudsmen do if the complainant objects to everything they say? What is the best way to respond? How to step out of the drama triangle?

To begin with, ombudsmen must be aware of the roles they play or have been placed in. If a complainant has trapped them in the drama triangle, they should acknowledge what is going on and find ways to shift out of that position. This means stop acting the victim, rescuer or persecutor. If an ombudsman has taken on the role of rescuer, they can ask what the complainant thinks of the suggestions instead of imposing them. In the role of prosecutor, it is important not to treat the complainant in a way that is pedantic or moralising but instead remain impartial.

If cases where ombudsmen are not competent to investigate complaints, they can explain that it doesn't matter what the complainant says or does at this point because they are not in a position to take action. This should be communicated politely and patiently, yet clearly and firmly. It is also a good idea to set boundaries by not tolerating unpleasant behaviour, and to announce that the file will be closed. This can then be confirmed by e-mail.

52 http://www.talentinontwikkeling.org/dramadriehoek-stephen-karpman.html

Querulous behaviour and mental health

Challenging complainant behaviour may also be caused by some form of mental health disorder. According to the literature available, few studies have been conducted on this topic.[53] It goes without saying that an ombudsman is not a psychiatrist. However, most ombudsmen are savvy enough to make the distinction between reasonable and unreasonable complaints, and spot warning signs that a complainant's conduct is unusual. Here's an example from my practice that highlights this issue. A student complained about eavesdropping equipment that had been placed in sockets and wanted to file a complaint against the faculty who refused to look for the equipment. As said earlier, the ombudsman can reject complaints that are manifestly ill-founded or plainly unjustified. However, querulous complainants are likely to find an ombudsman's refusal to consider their complaint unacceptable. A possible strategy in such a case could be to go along with the complainant's story for the purpose of persuading them to seek professional help.

Another case involved a student who claimed that the university had shared information with public broadcasters. According to the student, the newsreader had mentioned his name on the evening news. In cases like these, the above tips on challenging complainant behaviour can be useful. It may also be necessary to consult with other professionals, such as a student psychological counsellor, to discuss and identify any risks. Moreover, an educational institution has a duty of care. This includes the obligation to refer complainants for further professional advice or treatment if it becomes clear that the complaint is beyond the ombudsman's scope of practice.

Ombudsmen may also have to deal with querulants. The term querulants, or querulous complainants, refers to individuals who pursue complaints with an unusual degree of persistence. They obsessively feel wronged and demand justice for themselves through the complaint handling process. Dealing with querulous complainants will be a struggle as they are never satisfied with the outcome. Their behaviour may be caused by an underlying reason, such as a mental health problem or disorder. Their engagement with the complaint process may even exacerbate their psychiatric symptoms, inevitably causing the process to be

53 Crijns & Dautzenberg (2019, 15).

dragged on even further. However, one must not be too quick to label complainants as querulants. Querulous behaviour can also be displayed by those who are relentlessly driven by a pursuit of justice, such as social activists or whistle-blowers.[54]

Threats made by complainants should always be taken seriously and help should be sought immediately. Steps to take in the event of threatening behaviour include:

- Consult a fellow ombudsman or psychologist about possible risks.
- Inform the head of security and discuss whether the incident should be reported to the police and if so, who will file the police complaint.
- Inform the person or persons at whom the threat is directed (in consultation with security).
- Inform the head of department of the threatened person (and if applicable the board).
- Make sure you can do your job safely, for example by having a duress alarm installed that lets you silently signal security in the event of a threatening situation.

According to the Ombudsman Regulations, ombudsmen can breach confidentiality if complainants pose an imminent threat to either themselves or a third party.

Dealing with challenging behaviour can be difficult and upsetting. There are training programmes available on this subject which ombudsmen could consider attending.

Above all, it is important to deal with a person's complaint on its merits, regardless of their behaviour. The fact that a person exhibits challenging behaviour does not mean that they do not have a legitimate complaint. Which brings us to the following question. What is a legitimate complaint?

54 Tewarie & Van der Zwaard (2016, 36).

9

How to formulate a complaint

For an ombudsman to determine whether a complaint is legitimate, and whether the ombudsman is the right support service to address the issue, a meeting needs to take place with the complainant. If an ombudsman feels that a complaint should be investigated, they will look at evidence from both sides (with the complainant's permission). It is essential that this is done cautiously and strategically to ensure impartiality. It's OK for ombudsmen to empathise with a complainant, but they should resist the temptation to express an opinion at this stage. They should stay neutral when communicating with the respondent about the complaint: the process will not work if the respondent believes that the ombudsman is siding with the complainant. For example, statements like 'the manager refused to answer the complainants e-mail', should be rephrased as 'according to the complainant, the manager refused to reply to his e-mail message'.

Making a complaint

Complainants should submit their complaint in writing. If a complainant needs assistance, the ombudsman can also draw up the complaint based on the report of the initial interview. In the latter case, the complaint should be read back to the complainant for verification of accuracy before it is sent to the respondent. It is the ombudsman's job to put the complainant's grievance into words. Sometimes people feel overwhelmed by emotions and this can make it difficult to formulate a coherent story. An ombudsman should be able to trace the complaint from the information provided and rephrase it. This can be required for respondents to fully understand the nature of the complaint against them. When the complaint is put in writing, reference can be made to the regulations that the complainant believes have been violated. The complaint can state what the complainant thinks the respondent has done

wrong. It should not be an opinion or judgement, but a plain and concise statement of the facts. Sometimes it can be difficult for complainants to objectively document their experiences. A complainant may claim that his supervisor has treated him unfairly and is not doing his job properly. This is a judgement, not a complaint. An event that demonstrates that the complainant was treated unfairly can be considered a complaint. So, an ombudsman should look for the complaint behind the criticism.

Not all complainants submit written complaints. An ombudsman may also receive complaints through telephone enquiries and sometimes a complaint is formulated after an initial interview. In some cases, an ombudsman writes the complaint based on the interview notes and sends it to the complainant for approval. It is essential that a complaint is formulated correctly before it is sent to the subject of the investigation. What does the complainant accuse the respondent and/or institution of? When did the complaint occur? Was it an isolated event or an ongoing situation? Why does the complainant believe the misconduct may have taken place? What laws or regulations have allegedly been violated?

Here are a number of key questions that can help start an intake meeting with a complainant.

- What brings the complainant to the ombudsman?
- What does the complainant hope to achieve?
- What does the complainant expect from the ombudsman?

Identifying the remedy the complainant is seeking help to determine whether the complainant's expectations about the outcome are realistic or need to be managed. Be clear about what can and cannot be achieved in a case (e.g., an apology/expression of regret for the person's experience). Emphasise that an ombudsman does not represent or act as an advocate for any party. The ombudsman is an independent party tasked with addressing a complaint. This means the ombudsman cannot accompany complainants to meetings to which they have been invited. Ombudsmen should identify and seek to clarify any ambiguities in the wording of the complaint. This, too, is part of their role as impartial examiner of the facts.

Facts can mean different things in different contexts. This may sound vague, but it usually holds true when it comes to complainants. If a student complains that his teacher is ignoring him because he is not answering his e-mails, then we know for a fact that the student has not

received a reply. However, drawing any meaning from this fact is itself a projection. There may be some truth in it or may not, we do not know. Perhaps the teacher is ill, on holiday or busy. Hence the importance of enquiry. Facts can mean anything: this should be the ombudsman's basic attitude. Therefore, it is essential for an ombudsman to approach all complainants with an open mind and simply listen without passing judgement. After all, the investigation has only just started.

At the end of an intake, the ombudsman can discuss the options with the complainant (e.g., filing the complaint or ombudsman-led mediation). The next step is to discuss the potential outcomes and the risks that may result from submitting the complaint. The ombudsman should also give the complainant time to reconsider and return later to make a formal complaint. At the end of the interview, always check whether the complainant is satisfied with the proposed action.

Legislation and regulations

Prior to and after the initial interview, the ombudsman will check whether the applicable regulations have been followed. This means ombudsmen ought to be informed of what the regulations of the organisation in question are. It is also important that they stay on track with changing laws and regulations. Most organisations have officers that equip ombudsmen with this information. Any changes in relevant laws are regulations should be monitored and periodic consultations held. This information is an ombudsman's reference framework for monitoring compliance based on which a case can be recommended for investigation. The ombudsman can also find out which regulations have been drawn up or changed based on the agenda of the Participation Council. Attending meetings between participation bodies and the board can be useful in this respect. An ombudsman should also ensure that complainants are aware of the applicable laws and regulations.

The previous sections focussed on the ombudsman's working methods and practice, and the relationship between the ombudsman and the complainant. But equally important is the ombudsman relationship with the respondent. As an impartial problem-solving resource, the ombudsman needs all the facts on both sides.

10

Audi alteram partem: hearing the accused

An ombudsman may, with the complainant's consent, contact a respondent (the person accused of the alleged misconduct) to find out his version of events. During this interview, question-asking is an effective way to gather information and to get the respondent to think about the complainant's situation. If the respondent can put himself into the complainant's shoes, this can be the beginning of conflict resolution. The ombudsman must always be aware that respondents may distort or conceal the truth. Here, too, it is vital that the ombudsman gently raises the issue of the complaint in a neutral manner, asking for the accused's response and account of the situation without passing judgement. Ombudsmen should not be guided by their position matters, nor should any personal consequences for the complainant or the respondent affect their judgement and decision-making, as this would jeopardise their impartiality.[55]

An investigatory interview with a respondent can be seen as part of the principle of 'audi alteram partem', Latin for, hear the other side. It means no accused will be condemned unless given full chance to prepare and submit their case and rebuttal to the opposing party's arguments. This principle can be used as a method to arrive at the truth, or as part of the mediation process or investigation. An interview with the person under investigation can also be called an exploratory interview. This encourages the meeting to be less intimidating to respondents, who may feel nervous or angry about being the subject of a complaint. What's more, the ombudsman's efforts are aimed at de-escalating a conflict. The ombudsman must take into account *all* the circumstances of

55 Meulenbroek (2008, 130).

the case, including those of the accused. Escalation is undesirable for all parties, including the accused.

Initial contact with respondents

When sending an e-mail to invite the respondent to an exploratory interview, the Ombudsman Regulations should be included as an attachment to ensure the respondent is aware of the duties and powers of the ombudsman. Be sure to stress in the e-mail that all interactions with the ombudsman, including by e-mail, are confidential. This is important to prevent ombudsman e-mails from being forwarded to colleagues or managers. This goes both ways: the ombudsman is not allowed to forward e-mails to third parties or include more people as recipients in an e-mail (cc/bcc). As said before, all efforts should be made to prevent escalation. Escalation will complicate the position of those involved and reduce the chances of successful ombudsman-led mediation. People may feel they are losing face if a case is made public. This can cause people to stick to their guns and make the process of finding a solution to a complex issue even more difficult. In some cases, the accused employee will invite an HRM consultant to sit in on the investigatory interview. This, too, is undesirable in view of escalation. Having other people present can also make it more difficult for the accused to acknowledge responsibility for the incident or conduct. As a result, both parties can become locked in their positions. The ombudsman should therefore determine how each investigation will be conducted. However well-intentioned the motives, a request for an HRM consultant to be present during meetings may be rejected for this reason.

In the investigatory interview, it is also important to emphasise the ombudsman's neutral position and methods. There may have been special circumstances in the case that required the respondent to deviate from procedures or regulations. In the interview, the ombudsman can ask the respondent if their opinion or approach would have been the same if these special circumstances had not occurred. How does this relate to the regulations? Hence, the purpose of the interview is not only for the ombudsman to gather information, but also for the respondent to reflect on what has happened. This can help the respondent to, if applicable, acknowledge that their actions have caused harm and express a willingness to engage in a process that will help resolve the issue.

It is therefore important to be sensitive to the interests of all those involved. Good judgement and sensitivity also applies to communication: an ombudsman must be careful when choosing words or phrases to get a message across. In e-mail communications at the request of a complainant, it would be wise to refer to the issue as a 'matter', not a 'complaint'. It is also important to arrange an appointment promptly. A complaint can be stressful and anxiety inducing for everyone involved. Setting up a meeting swiftly can help prevent the issue from escalating and provide clarity on both the content of the complaint and the complaint handling procedure. It is important to take into account that respondents may exhibit behaviour that can be perceived as difficult, such as manipulative or querulous behaviour.

At the end of the investigatory interview, the ombudsman should mention that a draft report of the meeting will be prepared. The respondent must be given the opportunity to submit proposals for changes or to add information within a specified period of time (e.g., 10 days). If the ombudsman decides not to incorporate the proposed changes, the amended text can be added to the report as an appendix. As a matter of procedural fairness, the respondent will receive a copy of the report.

The report of the interview may be included in the ombudsman's complaint report. The respondent should be informed of this. If the matter is resolved in another manner, the report will only be included in the ombudsman's file. In such case, ombudsmen are advised not to send the interview report to the complainant or to others. This could evoke strong emotions and cause things to still escalate. It goes without saying that this must be avoided. The report can serve as a basis for informing the complainant of what has been shared during the investigatory interview.

Impartial at all times

Ombudsmen are expected to be keenly aware of their duty of confidentiality. If a complainant alleges that the ombudsman agrees with him, an ombudsman cannot comment on this. After all, this would require revealing details about conversations with the complainant, which would compromise confidentiality. Ombudsmen can only explain in general terms that they are impartial at all times and do not make decisions without informing the persons concerned first. However, they can address behaviour and remind complainants of their obligation of confi-

dentiality. Should the respondent accuse the ombudsman of partiality, the ombudsman can ask the respondent to produce information to substantiate this suspicion. After they have been given the opportunity to respond to any complaints about their conduct, the complaint can be directed to the board that appointed the ombudsman.

Some institutions want to support the individual against whom a complaint has been made. This is unnecessary. Ombudsmen are not prosecutors, but investigators. They ensure the rights of all parties are upheld impartially and that grievances are investigated. Support is therefore undesirable. The complainant may even feel intimidated by the school as an institution, or by the company, if it supports the respondent during a procedure. This could give the complainant the impression that the institution, rather than wait for the investigation to take its course, already formed an opinion. Another reason is to prevent the appearance of arbitrariness. (Do they provide support to all respondents or only in this particular case? And what about support for complainants?)

In a number of countries, complainants who submit a complaint to a committee for undesirable behaviour receive support from a confidential adviser. In such a case, complainants can go to the ombudsman if they believe that the procedure was not followed correctly, but they cannot appeal against a decision of the complaints committee. The ombudsman is not an appeal body unless he has been granted that power. The ombudsman is an impartial resource with a duty of confidentiality. In the following section, we take a closer look at the obligation to observe confidentiality.

11

Duty of confidentiality

How does an ombudsman ensure that all complaints are dealt with confidentiality? As mentioned earlier, a private workspace is a basic requirement. Complainants must be able to speak confidentially without being seen or overheard. This is one of the reasons why it is important that no one, except possibly an appointed secretary, has access to the ombudsman's agenda, e-mail or complaint records.

In communications with the complainant, the respondent or other parties, ombudsmen should stress that they have a duty of confidentiality and that the Ombudsman Regulations prohibit the disclosure of the identity of the complainant and the accused as well as complaint information. This applies not only to the ombudsman, but to everyone involved in the case. Disclosure of information can be very damaging to a case and escalate relations, resulting in litigation, student dropout or absenteeism. Therefore, it is essential that ombudsmen explain the duty of confidentiality from the outset of the professional relationship. An added plus is that complainants and respondents will be more willing to share information if they are informed about confidentiality in advance.

It is possible that a complainant sends the respondent an e-mail, adding the ombudsman as secondary recipient (cc), saying that he has discussed the matter and that the ombudsman agrees with him. As an impartial third party, the ombudsman only gives a recommendation when a formal complaint is assessed. So it is highly unlikely that the ombudsman has acted in the manner alleged by the complainant. However, the respondent may not be aware of this and take it as the truth. In such a case, the ombudsman should contact the complainant in person and explain that the complainant should rectify the matter by e-mail, including the ombudsman as secondary recipient. Attempts at rectification should come from the complainant, not the ombudsman, in order to avoid an appearance of loss of impartiality.

Comment, no. Response, yes.

It can happen that an official, such as a student counsellor or study advisor, contacts the ombudsman to discuss an issue a student is having, and subsequently discusses the outcome of this conversation with the student. Even if the student relays the ombudsman's 'advice' to the respondent, and the respondent approaches the ombudsman about this, the ombudsman still has a duty of confidentiality towards the complainant. In such case, an ombudsman can explain what the obligation of confidentiality entails, so that the respondent understands why he is unable to comment on this. Speaking hypothetically and in general terms, the ombudsman can discuss in an e-mail what options are available to the student. Before sending such an e-mail, telephone contact can be made with the various parties involved to explain the role and methods of the ombudsman.

Ombudsmen can also be approached by the press to comment on an issue. The same applies in this situation: commenting on a case is always inappropriate, no matter how flattered one may feel. Not being able to trust that information is safe with the ombudsman decreases trust in the ombudsman's office. Ombudsmen can use these situations to explain their methods and the kinds of complaints they deal with. There are exceptions to the general rule of confidentiality. Ombudsmen may breach confidentiality if there is a risk of serious harm to others or themselves.

Ombudsmen explain their methods. So what dispute resolution options are available to complainants?

12

Advice or ombudsman-led mediation?

No matter the service option (i.e., advice or mediation), every case requires some degree of research. If only to gain insight into relevant laws and regulations. In some cases, other officials will need to be heard. These findings must be shared with the complainant. Some complaints are rejected at the initial assessment stage simply because regulations have been followed.

What dispute resolution methods are available to an ombudsman? First of all, this choice is determined by the laws and regulations that govern the ombudsman's frameworks and powers. Under Flemish law, for example, the ombudsman acts as a mediator.[56] Ombudsmen in educational institutions in the Netherlands are endowed with powers through the institution's regulations or complaint procedure (advise, mediate, investigative power). This also applies to countries where a campus ombudsman has been appointed. In some cases, they also have the power to assess complaints (power to adjudicate). What services can an ombudsman offer? First of all, the ombudsman can refer the complainant to the appropriate body. The ombudsman can also offer the complainant advice. Another option is ombudsman-led mediation: this can be useful when all parties agree to work together for a mediated solution to their conflict. And finally, the complainant can file a formal complaint to be investigated and assessed by the ombudsman. A report to the management or board is also a possibility. The ombudsman chooses the option that provides the best chances of successful resolution and is most suitable to the complainant and the case. This means that the ombudsman must be well-informed and provide well-considered advice to the complainant. If the chosen option does not produce the desired result and

56 Vlaamse regering (2013) Art II 279.

the case escalates, this can lead to new complaints, possibly even about the ombudsman.

Referral

Where a complaint falls outside an ombudsman's jurisdiction, the complainant should be referred to the appropriate support service. For example, if an appeal is still possible, the ombudsman is not authorised to handle the complaint. Or if the complaint concerns undesirable behaviour and should be directed to another resource, such as a confidential counsellor for undesirable behaviour, as is the case in some countries. Referring a complainant to another competent authority may seem like a fairly uncomplicated process, but in some cases it's not that simple at all. The ombudsman will have to talk to a complainant to decide who is best suited to deal with the complaint. Some complainants have multiple complaints or more than one theme within their complaint. In such case, an ombudsman can consult the Ombudsman Regulations, which should provide clarity whether the complaint is within the ombudsman's jurisdiction. Sometimes there are a wide variety of grievance mechanisms to raise concerns, each with their own rules and procedures. This can be very confusing for complainants. The ombudsman can provide guidance and discuss the possibilities in these situations. If the case does not go as the complainant had hoped, the complainant can return to the ombudsman to discuss what next steps to take. It could be that actions of another official give rise to complaints that can be submitted to the ombudsman.

The ombudsman must also be alert to potential discrimination issues. Complainants may turn to the ombudsman because of the way they're being treated at work. For example, if they are not given a promotion that they feel they deserve. The ombudsman can explain that employees have the right to appeal against decisions made. However, if it becomes apparent during the interview that the employee has not been promoted because they took too many sick days, this could be a case of discrimination on the basis of chronic illness. Although an ombudsman is not always authorised to investigate such complaints, they can refer the complainant to a confidential counsellor for undesirable behaviour for support.

Advice

The Ombudsman Regulations set out how complaints are to be handled. The ombudsman proposes a course of action and the complainant can decide whether to pursue the complaint in this manner or not. The ombudsman determines how the complaint is handled, but may only meet with the respondent or other people involved to discuss the problem with the complainant's permission. Consent in relation to the ombudsman pursuing the case must be obtained for confidentiality reasons. However, although the complainant grants permission, it is the ombudsman who is in control of the process.

First of all, the ombudsman will advise the complainant on the best course of action to resolve the issue himself, if possible. Sometimes the best way to sort out a problem is to talk to the person in question informally. It is important to reassure complainants that they can return to the ombudsman if they are dissatisfied with the response. This option should be explicitly mentioned. The ombudsman will also explain the relevant laws, regulations and procedures. With this knowledge, complainants can, in some cases, discuss the matter themselves with their supervisor or teacher.

Example:[57] 'An employee makes an appointment with the ombudsman to discuss a particular issue. He wants advice on whether his manager is allowed to make changes to his working hours without further consultation or explanation. The ombudsman asks the employee whether he has put this question to the HRM consultant. The employee replies that he considered doing so, but that he does not want his manager to know and therefore prefers to put his question to the ombudsman. In addition, taking this course of action can lead to the filing of a complaint, depending on the ombudsman's response.

The ombudsman then explains to him that the Collective Labour Agreement[58] states that:

1 'The 38-hour working week is completed within a stretch of 78 business hours.

57 Poesiat (2017, 22).

58 Art. 4.3 http://www.vsnu.nl/files/VSNU%202017/CAO%20NU%202%20juli%20 2016%20-%2030%20juni%202017.pdf

2 The term 'business hours' is defined as the hours between 7.00 and 21.00 or 8.00 and 22.00 from Monday to Friday, and between 7.00 and 15.00 or 8.00 and 16.00 on Saturdays.'

If the nature of the work so requires, the employer can set specific work times, for example in the case of front desk staff. If work times have to be changed, the employee must, under certain circumstances, be given the opportunity to make the necessary adjustments in his private life. Furthermore, a manager is required to explain why a change in work times is necessary. Work times are generally drawn up in consultation, after all. In addition, the Collective Labour Agreement offers scope for working outside the traditional structure of a nine-to-five job.

The employee says he is happy to have been informed about the regulations and will use this information as a basis for asking his manager to explain why a change in work times is necessary. The ombudsman closes the file.'

Here's another example.[59] 'A student says that he has failed an exam and insists that this cannot be correct. He suspects that the lecturer has made a mistake and sends the lecturer an e-mail to ask if they can look at his exam paper together in the near future. The teacher replies that the moment at which students can view their graded work has not yet been determined. The student believes that he is not being taken seriously and contacts the ombudsman to ask why he is not being allowed access to his graded exam paper in the short term?

The ombudsman consults the programme's Academic and Examination Regulations. The regulations state that *for at least twenty working days after the announcement of the results of a written interim examination, the student can, on request, inspect his/her assessed work, the questions and assignments set in it, as well as the standards applied for marking.* They go on to state that if a student is unable to inspect his/her work for an urgent reason, an alternative opportunity must be given.

The student wanted an alternative opportunity for inspection (i.e. at an earlier time) because he felt certain that he had done enough to pass the exam. The regulations do not provide for this option and in this case it is therefore up to the lecturer to make a goodwill gesture. If the lec-

59 Poesiat (2017, 17).

turer refuses to do so, this does not provide the student with grounds for complaint. After all, the regulations have been observed. The lecturer could have explained these rules to the student, but he did not. The student interprets this response as unwillingness. It is agreed that the student will contact the lecturer to point out that an explanation would have helped him understand the lecturer's decision. If that does not go as planned, he will contact the ombudsman again.'

The ombudsman can discuss the possible scenarios and implications with the complainant during a consultation. It is up to the complainant – not the ombudsman – to decide how to proceed. To help the complainant make this decision, a motivational interviewing approach should be used. An ombudsman should avoid steering the direction of the discussion by providing 'information, instructions and advice'.[60] They can, however, guide the discussion while resisting the so-called 'righting reflex – that reflex to fix, solve, advise, correct, lay out a plan of action, in a directive way'.[61] An example of the righting reflex in action is when an ombudsman tells a complainant that a certain choice will yield a good result. The problem with the righting reflex, and associated directive communication style, is that it turns interlocutors into opponents[62] and generates a degree of tension between them. Motivational interviewing, on the other hand, is a collaborative conversation style that strengthens a person's own motivation and commitment to change.[63] It gives complainants the freedom to consider the options provided and choose what suits them best. As a result, they gain perspective and feel more in control, which benefits the case as well as their own state of mind.

Ombudsman-led mediation

In the course of an informal resolution process, an ombudsman may propose ombudsman-led mediation as an option to the complainant. Ombudsman-led mediation is different from full-fledged mediation, in that the aim is to find a resolution within a shorter timeframe and that

60 Miller & Rollnick (2018, 20).
61 Idem, p. 22.
62 Idem, p. 24.
63 Idem, p. 28.

it focuses on the complaint itself. It should be possible to resolve the matter in one or two meetings without a legally binding agreement. It is the ombudsman's job to ensure both parties reach a mutually acceptable solution. Ombudsmen do not act as mediators or negotiators during the mediation process. They do make use of mediation techniques to resolve the dispute.

In this section, I will discuss the conditions for using these techniques. But let me begin by explaining what mediation is.

Mediation is a process of negotiation where parties in a dispute come together voluntarily to discuss the matter with an independent mediator. Both parties must commit to the process and work towards a mutually agreed upon goal. Through the mediation process the mediator writes reports about the preceding talks, which are to be approved by both parties. These reports lead to an agreement about how the issue will be resolved, which is recorded in a document. This document is a legally binding agreement, in higher education this is usually a settlement agreement. Some mediators have 'an evaluative role if they provide feedback and make recommendations to the parties as to the outcome of the issue'.[64] An ombudsman cannot fulfil this role. Ombudsmen cannot actively participate, because they must still be able to make a final decision. For mediation to be successful, they must remain an impartial third party. In principle, ombudsman-led mediation consists of one or two sessions, and is only aimed at resolving the complaint, for example through an apology or mutual understanding about the circumstances surrounding the complaint. Unlike standard mediation, ombudsman-led mediation does not result in a legally binding decision.

While ombudsmen are not mediators, they do make use of mediation techniques. The Mediator Federatie Nederland (Netherlands Federation of Mediators, MfN) defines mediation as a process in which a neutral person (the mediator) facilitates communication between the disputants to assist them in reaching a mutually acceptable agreement. 'Mediators help separate feelings from facts and bring the problem back into perspective. They are neutral and not concerned with blameworthiness. Mediators do not solve problems; they help others solve them for themselves. It is their problem, so the best solution will be the one they come up with together.

64 Klijn (2004, 44).

This brings us to the conditions for successful mediation.

- The parties participate in the mediation process voluntarily.
- The parties are obliged to actively cooperate to find a solution to the problem.
- The parties must achieve consensus on the solution.
- The mediator, parties and any advisers and/or experts are obliged to observe confidentiality.
- The mediator may arrange to speak with each party individually (caucus).
- The parties that reach an agreement through mediation record those agreements in a (settlement) agreement. This agreement is signed by the parties and is legally binding.'[65]

These conditions also apply to ombudsman-led mediation, with the exception of concluding a legally binding agreement. If mutual agreements are made between parties, the ombudsman can record these agreements and send them to those involved. Should one of the parties fail to comply with what has been agreed upon, a new complaint can be submitted to the ombudsman.

Ombudsman-led mediation can also take the form of a three-way discussion led by the ombudsman. There is also a model called 'shuttle diplomacy', where the two parties in dispute are in different locations and the ombudsman 'shuttles' between them to try to help them reach an agreement. In some cases, an ombudsman starts out with shuttle diplomacy and later arranges a three-way meeting. In order for ombudsman-led mediation to take place, all participants must consent to this in advance. After all, they cannot be forced to cooperate. Obtaining that consent means explaining the benefits to all participants in the process. It is also possible that if mediation does not lead to a resolution of the dispute, it can help those involved to understand each other's point of view. Parties often want closure, to put the problem behind them and move on. Ombudsman-led mediation can help with that and help parties to find common ground to continue on. The ombudsman's role in this process is that of an impartial and neutral moderator facilitating

65 Groep Arbeidsmediation, Mediatorsfederatie Nederland. (2013).

a three-way conversation. Confidentiality is at the heart of ombudsman-led mediation and is critical to a successful resolution.

Ombudsman-led mediation and complaint handling never leads to a legally binding outcome imposed on the parties. The ombudsman does not possess a legally binding power of decision. Partly for this reason, as well as for reasons of confidentiality, the ombudsman's reports are not included in the complainant's personnel file or student records. The role of the ombudsman is also different from that of a mediator in this sense.

In some countries, alternative dispute resolution (ADR) is used to resolve disputes. ADR is designed to settle disputes outside of the courtroom through arbitration, binding advice or mediation. Which method is used depends on the ombudsman's powers. Kyle Shiroma, an American attorney, is in favour of 'the addition of restorative justice processes to the toolchest of ombuds offices [which] can help the office to become more adept at resolving multiple types of issues. Restorative justice focuses on repairing the harm committed and healing the community that was affected, not punishing the offender for violating a policy'.[66] This, too, can be achieved through ombudsman-led mediation.

Model of conflict escalation

The model of conflict escalation can be used by ombudsmen as a tool to help determine whether mediation might be a suitable option and has any prospect of success. The model has been developed by the Austrian organisational consultant and conflict researcher Friedrich Glasl (1941), and describes nine stages of conflict escalation and associated behaviours. The nine stages are grouped into three levels: level 1 (win-win), level 2 (win-lose) and level 3 (lose-lose). The level that has been reached on the nine-step scale says something about the chances of the conflict being resolved through mediation. The nine stages of Glasl's model of conflict escalation are:

Stage 1 – Tension
Stage 2 – Debate
Stage 3 – Actions instead of words!

66 Shiroma (2018, 260).

Stage 4 – Coalitions
Stage 5 – Loss of face
Stage 6 – Threat strategies and demands/sanctions
Stage 7 – Limited destruction
Stage 8 – Total annihilation
Stage 9 – Together into the abyss[67]

Fase 1			Fase 2			Fase 3		
1								
Hardening of debate	2							
Deadlock	Intellectual violence	3						
No mutual understanding		Actions instead of words	4					
	Feeling superior	Non-verbal communication	Stereotyping	5				
Not open to each other's viewpoints	Polarisation	Matter of prestige	Conflict intensifies	Character attack/loss of face	6			
	Debating style	Dig into position	Search for sympathisers	Dirty tricks, blows below the belt	Threats	7		
Cooperative active conflict resolution	Scoring points	Loss of empathy	Search for allies	Wanting to expose each other	Panic reactions	Object/ enemy images	8	
Mobilising assistance	Evoking annoyance	Not mutually responsible	Coalitions	Cutting all ties with each other	Sanctions	Violence	Systematic annihilation	9
Selective attention	Seeking allies through humour	Hindering resolution	Uncompromising, black-and-white thinking	Immoral behaviour	Stress	Causing harm to opponent	Destruction of opponent	Together in the abyss
Win-win			**Win-lose**			**All or nothing (lose-lose)**		

https://transitiemanagement.wordpress.com/2013/06/23/conflicten-op-de-werkvloer/

67 Glasl (2004, 236, 237) (2015, 231 onwards).

In most level-3 conflicts, litigation has commenced: lawyers have been engaged and the case may have gone to court. At this stage, ombudsman-led mediation is virtually hopeless. Level-1 or level-2 conflicts can still to be solved either peacefully among each other or with help through external professional support.

In cases where, based in part on the model of conflict escalation, it seems impossible to resolve a complaint through three-way meetings, there is clearly little point in proceeding in this manner. When a complaint has been lingering for a long time and the parties involved have already 'dug in' with respect to their positions, it is generally difficult to find a common frame of reference. However, if the preliminary meeting (based on a 'shuttle diplomacy') reveals there is potential for resolving the dispute and an apology might be offered, then a three-way meeting is more likely to bear fruit. The complaint can then be discussed further at that three-way meeting, led by the ombudsman. Such a meeting is also more likely to be productive when the parties involved are familiar with each other's positions in advance, so that no surprises are sprung on them during the meeting. This method does not require interview reports to be exchanged in advance, but the ombudsman must discuss the contents of the reports to ensure everyone is fully informed. This also provides the ombudsman with the opportunity to gauge the reactions of the parties and to discuss any observations. Also, when people are confronted with each other's viewpoints on paper their differences may be exacerbated. This can lead to a hardening of positions, whereas in an oral discussion the ombudsman can provide context, which makes parties more willing to listen to each other. If the discussion does not lead to a favourable outcome and a formal complaint is filed, the interview reports must be included in the complaint report. The parties should be made aware of this.

If the parties are willing to try to resolve the issue by means of a three-way dialogue, the ombudsman will act as a moderator. The ombudsman is not a participant, but facilitates the dialogue and supports the parties in their attempt to resolve their issues. This involves summarising the narrative, articulating the essence of each party's position, and introducing points that were raised by the parties beforehand. If no apology is offered during the session, it is not the ombudsman's place to comment on this. Apology cannot be imposed. The ombudsman could ask what the complainant had hoped the outcome would be and then ask the accused to respond. As a moderator, it is also the ombudsman's job to ensure no

new issues are raised during the session. If mutual agreements are made between parties, the ombudsman will record these agreements and send them to those involved. The interview report of the three-way dialogue drafted by the ombudsman is only to be kept in the ombudsman's own file.

Three-way meetings conducted as part of ombudsman-led mediation are held on neutral territory (e.g., in the ombudsman's office). It's a good idea to mention this beforehand.

Case examples: staff

'A staff member complained to the ombudsman that she had not been notified about plans to expand the department in which she works. She was also not told about the vacancy. Since the vacancy was on a salary scale higher than her current scale, she would have liked to have applied. She explained that someone else had now been appointed. The staff member felt that this had robbed her of the opportunity to apply for the vacancy. She also felt that her supervisor had acted inappropriately in not notifying her, but she did not wish to submit a complaint. She asked if the ombudsman could raise her complaint and act as intermediary because she did not want her relationship with her supervisor to be undermined by approaching the situation herself. She understood that the case was irreversible, but believed it should still be brought to the attention of her supervisor. In a meeting with the ombudsman, the supervisor explained that communication could indeed have been better, but his intentions were positive. The department had needed to be expanded in order to reduce the pressure of work, which would actually be of benefit to the staff member. In addition, the supervisor was not aware of the staff member's ambitions. After the ombudsman discussed this response with the staff member, a meeting took place between the supervisor and the staff member. Since this ended satisfactorily, the ombudsman was able to close the file.' [68]

Another example. 'An employee of one of the service departments complained to the ombudsman about the way in which the supervisor had allocated tasks. The employee has been working at VU Amsterdam for almost 10 years, is over 55 and had indicated to her supervisor that

68 Poesiat (2015, 20).

she was finding it increasingly difficult to cope with the technical aspects of her work, and that she would therefore prefer to move to another position within the university. The supervisor arranged a meeting with a careers advisor. However, from that point on, another colleague was asked to do her work and she was no longer be invited to staff meetings. This made her feel that she was no longer part of the team, even though she had not been moved to a different position. She stated that she felt offended by the conduct of her supervisor because it made her feel that she was unappreciated and she would go to work with a headache every day. The ombudsman indicated that she could contact the manager (to hear the other side of the case) and look at whether the complaint could be resolved through mediation. However, the employee rejected this solution due to concern that this would exacerbate the situation. The ombudsman offered the employee the opportunity to consult the HRM consultant. He or she could perhaps speak with the manager, and there were also other options such as secondment. The employee thanked the ombudsman and said she would consider these options.

The ombudsman closed the file.'[69]

Case examples: students

'A Master's student had heard about the student ombudsman through a fellow student, and called to make an appointment. He had failed an exam. This meant he had to re-take the exam, including the lectures. (The lectures are so specific that attendance is required.) The student had completed all the courses, had almost finished his thesis and had already found a job. This made it difficult to attend lectures in the middle of the day, he said. What's more, the course he had to follow is intended to prepare for students for their Master's thesis, which he had nearly completed. The student did not understand why he was expected to sit in on the lectures again. After all, he said, he had not missed a single lecture of the same course last semester. His request to the Board of Examiners to only do the exam and be exempted from taking the lectures had been rejected.

The ombudsman discussed the possibility of appealing the board's decision with the student and mentioned that because an appeal was

69 Poesiat (2018, 18).

possible, she was not able to take on the case. The student responded that he didn't have time to wait for a lengthy appeal as the lectures had already started. The ombudsman agreed that it was in both the student's and the programme's interest to settle the matter. After all, everyone benefits when students graduate quickly and successfully. The ombudsman discussed the matter with the lecturer and asked for his opinion. The lecturer explained that the lectures were not required for students who have completed or almost completed their thesis. He advised the student to contact his thesis supervisor immediately about the submission date for his thesis. He also suggested discussing the matter with the student himself to see if it could be resolved. The ombudsman passed this information on to the student. Two weeks later, the student let the ombudsman know that he had spoken with the lecturer and that he had been exempted from some of the lectures. The ombudsman was able to close the file.'[70]

Here is another case example. 'The ombudsman received a telephone call from a former student. The student claimed that when he obtained his Bachelor's degree, he noticed some spelling errors and typos in the certificate. He informed the faculty of this and asked for a new certificate. The faculty told him that he had to hand in the old degree certificate first, and that he should pick up the new one in person at a later date. The student sent the faculty several e-mails, asking whether there was another way to get the corrected certificate because he was too busy with his studies to drop by. This did not get him any further. Still without a certificate, the student asked if he could be reimbursed for travel expenses made in order to pick up the degree, seeing he no longer had a student public transport pass. He also preferred to pick up the degree at a time that did not require him to take time off from work. After all, he argued, it was the university's mistake, not his.

The ombudsman asked the student to send her a copy of the Bachelor's degree and all e-mails relating to the case. She then contacted the faculty about the matter. The faculty regretted that the certificate contained spelling mistakes, but stressed that it was legally valid. They suggested that the degree with the mistakes be returned by registered mail and that they would work out a convenient time for picking up the corrected certificate. Travel allowance would be considered.

70 Poesiat (2007, 15).

The ombudsman contacted the student to discuss the faculty's proposal: the faculty would accommodate his requests, but he would have to pay the extra charge for registered mail, since he had ample opportunity to return the old degree certificate. The student contacted the student administration to make an appointment to pick up the degree.'[71]

One last example: 'A Master's student complained about his thesis supervision. His thesis design had been turned down. The thesis supervisor had approved it, but the second reader had turned it down. The student thinks that his supervisor was to blame for this. When the student discussed the matter with the thesis supervisor, he had the impression that in retrospect the thesis supervisor agreed with the second reader. This had undermined his confidence in the supervisor. He was wondering if the thesis supervisor was capable of helping him to pass his course. The student felt let down because now he had fallen behind with his course work. The student had sent an email to the thesis coordinator about this, but he had not responded. The academic counsellor helped to arrange a meeting with him, but according to the student this had resulted only in incomprehension. Then the student asked the ombudsman to mediate so that supervision could get underway again and he could finish his course quickly.

The ombudsman first observed that no thesis agreement had been drawn up with specific agreements as to a time line and supervision meetings. It also turned out that if the first and second readers have different opinions about a thesis design, the thesis coordinator is supposed to appoint an independent third assessor (Master's Thesis Regulations). In this case the thesis coordinator had by then also read the thesis design and also turned it down. The regulations also provide that if a student has been working on the thesis for more than six months – which was the case here – new agreements have to be made about the subject, the supervision, etc. In an interview with the ombudsman the thesis coordinator admitted that the supervision had not gone well and said that in this case he was prepared to leave the choice of a new subject to the student, and that if the student were to ask for a new supervisor he would give his consent.

71 Poesiat (2007, 16).

The student asked the ombudsman, as an independent party, to organise a three-way meeting led by her, so that he could be sure he would have an opportunity to discuss his whole complaint with the thesis coordinator. As a result, new agreements were made about the student's progress, a new supervisor and a different second reader. The student was satisfied with the outcome and hoped to finish his course soon. This was the conclusion of the case.'[72]

Intervention

The ombudsman can intervene in cases in which it is evident, for example on the basis of documents, that laws or regulations have been violated. (This has nothing to do with partiality on the part of the ombudsman.) In an intervention, the ombudsman will contact the official concerned to discuss the possibility of a rapid resolution. This can be in cases where a lecturer acts outside the authority of the Faculty Board, for example by denying a student access to a course.

The following is an example of an intervention. 'A Master's student at another university contacted the ombudsman because he wanted to take an optional component with lectures from the Bachelor's degree programme at VU, but was unable to register because this Bachelor's subject is available only for Bachelor's students. The student said he had been unable to find anything to this effect in the prospectus, but that the course had already been in progress for a week, and he was keen to register as soon as possible to avoid study delay.

The ombudsman contacted the teaching coordinator, who explained that the faculty had restricted admission to the course because of capacity problems, adding that the course was full.

The ombudsman responded that, in general, capacity may be limited only through a registration limit. Furthermore, the Faculty Board and the Executive Board sometimes set a limit on admission to Master's programmes, but only for a whole programme, not for an individual course. The Higher Education and Research Act provides only for a limitation that is necessary for educational reasons (e.g., practicals or tutorials).[73]

72 Poesiat (2009, 17-18).

73 Higher Education and Research Act Section 7.34 paragraph 1c.

The faculty then immediately registered the student for the course and allowed him access.

The ombudsman closed the file.'[74]

If advice or mediation is not an option or does not end in a satisfactory solution for the complainant, then a formal complaint can be made. In this case, the ombudsman carries out a full assessment of the complaint, which is documented in a complaint report. The procedure for making a formal complaint is laid down in the Ombudsman Regulations.

In practice, few formal complaints are submitted to ombudsmen. Generally, employees are afraid of repercussions and only file a formal complaint after leaving their job. Most students only submit a formal complaint after they have already completed the course that the complaint relates to, or after they have graduated. This means that complaints that are brought to an ombudsman are usually handled by through advice or ombudsman-led mediation.

Some regulations state that ombudsmen may carry out investigations on their own initiative if there are signs of a potential problem. In this case, an ombudsman does not have to wait for a complaint to be filed before taking action to address or investigate the problem, thus preventing the risk of unnecessary escalation.

There are criteria that must be taken into account when drawing up a complaint report. The next chapter deals with these reporting requirements.

74 Poesiat (2012, 17).

13

Drawing up a complaint report

Besides having a significant role in ombudsmen-led mediation and providing advice, some ombudsmen also handle complaints through assessment. The complaint report detailing the assessment of the complaint can of course only be drawn up if the ombudsman has been authorised to assess the complaint.

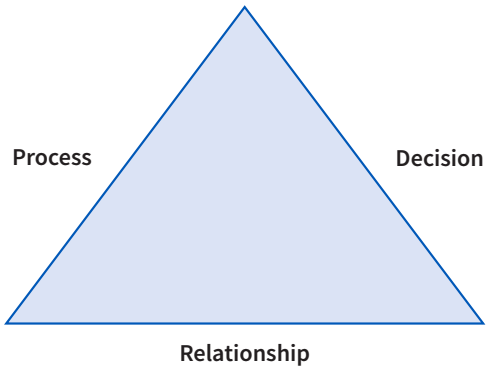
If the complainant does not request for the complaint to be assessed but only wants advice or ombudsman-led mediation, a formal inquiry will not take place. By 'formal' I mean in accordance with the complaint procedure set forth in the Ombudsman Regulations. If a formal complaint is filed, a complaint report must be drawn up in accordance with the Ombudsman Regulations. When all parties have been heard, all information should be included in the report: i.e., all relevant facts, findings and positions, in addition to a description of the complaint and the context in which the complaint has been raised (investigation phase). During this phase, the ombudsman should not express any opinions. The draft complaint report is then shared with those involved for feedback purposes. The report should be updated based on the feedback provided, after which the parties are given the opportunity to read the updated report. This method is aimed at collecting as much information as possible about the complaint. In some cases, after reading the draft version, a respondent or complainant may offer an extra piece of information that turns out to be crucial. Only when all the necessary information has been gathered, and no new information becomes available, can the ombudsman proceed to assess the complaint.

Aim and content of the complaint report

The assessment issued should come as no surprise to the readers of the complaint report (e.g., managers or directors of education). They should be able to arrive at a judgement themselves while reading the report,

based on the complaint, the relevant regulations and the responses of the respondent and other parties. Finally, at the end of the report, the ombudsman arrives at an assessment. If a complaint is well-founded, the ombudsman can formulate recommendations to resolve the case and to prevent recurrence. These recommendations cannot pertain to a legal decision or sanction relating to the accused. This is not up to the ombudsman. However, the solution is only one aspect of the complaint report. The purpose of the report is also to analyse and clarify the complaint as well as the circumstances surrounding the complaint.

In other words, a complaint report is not just about judgement and substantiation. An ombudsman must be able to indicate precisely why certain forms of conduct may or may not be appropriate, formulated in terms of correctness, reasonableness, proportionality and due diligence. A tool that can be used to explain how you arrived at a fair and balanced decision is the so-called Fairness Triangle. Applied to the process of complaint handling and assessment, this tool states that the sides of the triangle must receive equal attention in order for the process to be perceived as fair. The three sides of the triangle are:[75]



The Fairness Triangle was developed by the Ombudsman Office of the University of Saskatchewan, Canada, and includes a checklist that can be used to, based on the results, review and assess whether a complainant has been treated fairly and justly. It allows the ombudsman to examine how the complainant was informed, what process was used, and whether reasons were given why this process was chosen. With regard to the

75 Manitoba (2013, 6-8).

decision, the ombudsman can examine whether the person making the decision had the authority to do so. Note: the ombudsman does not assess the content of the decision, only whether or not the process was followed correctly. Again, this depends on the authority of the ombudsman.

The ombudsman will also look at the human side of fairness, i.e., the relationship between the complainant and the respondent. Was the respondent respectful and accessible? Did they take time to understand the complainant's perspective? This is what the checklist looks like:

The process

- The person(s) who will be affected by a decision is given advance notice that a decision will be made.
- The person affected by a decision is given the information that will be considered when a decision is made.
- The person affected by a decision is given a meaningful opportunity to state or present his or her case.
- The person affected by a decision is given an opportunity to challenge or dispute any information that might be contrary to his or her position when a decision is being made.
- The decision maker be thorough and thoughtfully review all the information provided by the person affected by a decision.
- The decision maker be impartial (unbiased and without a personal interest in the outcome of the decision).
- The decision maker give meaningful reasons for the decision that are understandable to the person affected.

The decision

- The person making the decision must have the authority under law to make the decision.
- The decision cannot require anyone to do something that is illegal or not authorized by law.
- The decision must be reasonable, and the reasoning behind the decision must be understandable to the people affected.
- The decision cannot discriminate against the person affected on any of the prohibited grounds listed in the Manitoba Human Rights Code or the Charter of Rights and Freedoms; for example, marital status, race, religion, sexual orientation, or disability.
- The decision cannot be oppressive, meaning that the decision should avoid creating unnecessary obstacles for the person affected.

The relationship

In addition to meeting the expectations set out in a council's code of conduct, the soft side of fairness is also about being courteous, timely, clear, and direct in communication.

This means:

- Taking the time to listen.
- Being approachable.
- Respecting confidentiality.
- Being clear with people about what you can or cannot do.
- Apologizing if you make a mistake.'[76]

If an ombudsman finds it difficult to arrive at a final decision, it can be helpful to consider how things should have gone. What could, for instance, reasonably have been expected of a teacher or manager? In the report, the ombudsman's considerations or conclusion should logically lead to a final decision on a case. Only then will the decision that is issued be accepted. This will also build trust and confidence in the ombudsman.

Template for complaint reports

The Ombudsman Regulations set out the full process for investigating complaints (the complaint procedure). It usually states that the respondent and the complainant should be given the opportunity to respond to the complaint and each other's point of view. As mentioned earlier, all responses should be included in the complaint report. However, not all documents supplied, such as e-mail correspondence between parties, need to be included: only those documents that are necessary to be able to assess the complaint. The same applies to regulations that are described. (Note: it is important to explicitly mention that not all e-mails will be published in the report so that all parties know what to expect.)

It can be helpful to have a template for structuring the complaint report. This ensures the structure of the report is logical and no points are overlooked. This is what a template could look like:

76 Manitoba (2013); Herfs (2016 [b], 30).

- File number with start and end date and designated as 'confidential'.
- Introduction with the complainant's personal details, the general nature of the complaint (e.g., dispute about the provision of information or a procedure), and description of the context.
- The complaint submitted by the complainant (including a description of any action the complainant has taken to resolve the dispute informally and how he found out about the ombudsman's office).
- Relevant regulations with references.
- Steps taken in the investigation (logbook).
- Facts and findings (here, the ombudsman can include relevant statements in chronological order with references to the quoted source, such as e-mails or letters).
- The position of the complainant.
- The position of the respondent.
- Positions of other relevant parties.
- Feedback on the draft complaint report (featured in full).
- The complaint (stated a second time).
- Assessment and conclusion, and recommendation in the event of a well-founded complaint.

Keeping good records of the complaint investigation is essential and will help with drawing up the complaint report. To make the process of filling the logbook easier, it helps when contact moments, such as conversations, are recorded as the investigation is taking place.

In the introduction to the report, more information can be provided about the complainant, such as how long they have worked for the institution, what kind of employment contract they have, or what their position entails. For students, it is important to mention the study programme and study year. Here the ombudsman can also describe the relationship between the complainant and the respondent. After the introduction, list the complaints the complainant has submitted and which complaints the ombudsman is not authorised to handle. These may include, for example, time-barred complaints or complaints about other organisations. In the latter case, the ombudsman can inquire whether sufficient action was taken by the complainant's organisation to address the complaint itself or seek help elsewhere.

Often what is called a complaint in singular will in fact contain more than one allegation. In such cases, the complaint can be broken down in separate elements for the sake of clarity and precision (e.g., response to complaint part A or B).

The ombudsman should draft a final assessment when all information and details have been disclosed. In the conclusion or considerations, the assessment framework is described, as well as the tasks or roles that can be expected of those involved based on the applicable regulations. Based on this framework, the ombudsman evaluates the events and the process followed in order to arrive at an opinion. The investigation is a process that takes some time. Ombudsmen will have to go through, map and describe the entire case. And when the time comes to make a decision, they must be able to consider and analyse all the evidence. Therefore, it is important to keep all parties informed of progress and give a timeframe for when the report is likely to be completed.

The conclusion can contain recommendations to the board to resolve the case (e.g., offering an apology), or to prevent recurrence in the future. To be successful, an apology must meet specific conditions; just saying sorry is not enough. The ombudsman can point this out to the respondent. The National Ombudsman of the Netherlands has issued an 'Excuuskaart', which describes five steps for apologising effectively:

- 'Acknowledge and offer an explanation.
- Ask questions and show insight.
- Give an appropriate response.
- Offer the apology at the right time.
- Reflect on the lessons that have been learned.'[77]

The ombudsman may, for instance, recommend changing the manner in which information is provided by an organisation or advise to consider amending protocols or regulations. In this sense, an ombudsman can contribute to the improvement of quality in institutions. Unfortunately, change is not always welcomed with open arms. Former independent adjudicator and chief executive for higher education in England and Wales Rob Behrens carried out a survey among the international community of higher education ombudsmen and found that 'being an effective manager of change' was the most difficult to deliver in their or-

77 National Ombudsman (2016, [2]).

ganisation.'[78] To make adaptation to change easier, it helps to offer clear and well-crafted recommendations and to discuss the report in person. But ultimately, it is up to the institution to decide whether the recommendations will be implemented.

The report must be sent to all parties involved. The ombudsman should propose to discuss the report in a meeting. However, the outcome of the assessment is final and cannot be altered.

In the Netherlands, complaints about public educational facilities and the ombudsman's assessment can be submitted to the National Ombudsman by the complainant or the respondent, should they not agree with the outcome. The National Ombudsman can only assess complaints about government institutes. If the complaint concerns a private institution or organisation, the only avenue left is to take the case to court.

So far, we have looked at typical duties, methods and services of an ombudsman. There is, however, a function that has not been discussed so far: the function of the ombudsman as a watchdog.

78 Behrens (2021, 9).

14

The ombudsman as a watchdog

As discussed in the previous chapters, the duty of an ombudsman is to investigate complaints and attempt to resolve them, usually through advice or ombudsman-led mediation. But ombudsmen can also play an important role in raising issues and holding organisations to account by acting pre-emptively and identifying structural problems or shortcomings. For example, if an ombudsman receives several complaints or reports about the same issue, for example someone's leadership style, they may decide to report it. They can also raise issues of concern following an investigation when no prior complaints or reports have been reported. The authority to do so must, however, be expressed in the Ombudsman Regulations. Also, the issues must be of a structural rather than a random nature.

Don't accuse, report!

In most cases, the procedure for reporting concerns is specified in the Ombudsman Regulations. An ombudsman can report potential concerns to the management or the Executive Board during a meeting or via an internal confidential memo. The memo is not sent to the complainant and the respondent(s) as the ombudsman is not required to inform them. When raising the issue of concern, it is important to mention that this is not an investigation. After all, no formal complaint has been lodged (although there may have been confidential discussions about the issue). The ombudsman can, however, share *findings* and indicate that complaints have been expressed within a specific department. The purpose of raising this issue is not to accuse the organisation – an ombudsman is not a prosecutor – but rather to report that there may be a pattern of problems that could ultimately endanger education, research or business operations. The problems could, for instance, concern reg-

ulations that are not being followed or matters which are hindering or could hinder cooperation or social safety.

Before reporting the issue of concern, it would seem reasonable to hear both sides. This way, the respondent is aware that a complaint or report against him has been discussed with the ombudsman, and this provides him with the opportunity to respond to the issue both in writing and orally. The management or board can then decide whether an investigation or another action is appropriate. This is not for the ombudsman to decide. It is advisable to mention that the role of the ombudsman's role as watchdog is different from that of mediator in a complaint process. The organisation should not confuse the two. Ombudsmen always remain impartial, whatever role they take on. However, in the role as watchdog the impression might arise that the ombudsman is siding with the complainant. This needs to be explained to avoid a situation of misperception.

In addition, an issue that is reported is not the same as a complaint report in which an opinion is issued. It is an indication of a potential risk, not a presumption of guilt.

If, after raising the issue, the ombudsman receives another complaint about the same issue, the issue that was previously reported to a Faculty Board or director of a service could then be escalated to a higher tier or reported again to the Executive Board. This could indicate that the issue has not been sufficiently addressed. It is not the ombudsman's job to follow up on issues that have been raised or to check if the matter has been resolved. The board can, however, request the ombudsman to conduct an investigation (see Chapter 5).

When a complaint is reported, some respondents may feel as if they don't have any rights. In such situations it is important to stress that the ombudsman, as an impartial third party, has no vested interest in the outcome of any issue and is committed to ensuring *everyone* is treated fairly. If management takes action based on a reported incident, such as suspend an employee, this can be a blow to an employee's honour and reputation. Especially since the disciplinary measure was not taken based on the outcome of an investigation and judgement, as would be expected.

Management can also decide, based on an issue that is reported by the ombudsman, to have the matter investigated with the ombudsman acting as intermediary. As a professional complaint handler, the first thing an ombudsman will do is conduct interviews to find out whether

the complaint is verified: in other words, has the problem or incident existed or taken place? In doing so, an ombudsman must be aware of any hidden agendas or manipulative complainant behaviours (see also Chapter 8). Before reporting on the complaint or starting an investigation, the ombudsman gathers information and reviews relevant documentation. It should be clear to notifiers that the ombudsman will not voluntarily disclose any information they provide in confidence or their identity. However, they are not anonymous, as their names and functions are known to the ombudsman. (In most cases, the Ombudsman Regulations state that the ombudsman is not authorised to investigate anonymous complaints.) However, this does not concern an assessment of a complaint or complaint investigation, but rather a report about a potentially worrisome issue. Reports provide a way to unearth information that would otherwise remain below the surface. An organisation's management or board is not able to act on information unless they know about it. So, in this way, reporting issues contributes to a safe work or study climate for everyone.

Report to the Faculty Board

An example. 'A Bachelor's student complained that the faculty had not informed him in good time about the possibility that a module may entail a mandatory excursion which also has to be paid for. If you are unable to participate in the excursion you have to submit a medical certificate and then the faculty will give you an alternative assignment. According to the student this information was not to be found on the website or in the course and examination regulations. They only stated that students would have an opportunity to go abroad. The student felt that due to the lack of information he was faced with a fait accompli and put to additional expenses, since he had already paid tuition fees. He also thought that submitting a medical certificate violated students' privacy; and he regarded doing an alternative assignment as a punishment, not something that generated knowledge.

Although the ombudsman was not competent to handle a complaint about this matter, since it concerned general faculty policy, she did make some inquiries so as to be able to advise the student or refer him elsewhere. She established that information about the mandatory excursion was in fact not included in the course and examination regulations. She also established that while a faculty may make a component of a module

mandatory and may ask for a contribution, it must offer an alternative if the student is unable to pay the required amount or cannot participate for some other reason. If the student does not agree with the alternative assignment, he can lodge an objection with the Examination Board.

The ombudsman informed the student of this and after discussing the matter with him brought it to the attention of the Faculty Board. The Director of Education agreed to make different arrangements in consultation with the Board of Studies and to communicate them clearly to students. The student decided to go to the Examination Board. At that point the file could be closed.'[79]

The next chapter focuses on a broader question and is based on all aspects of the ombudsman's practice and working methods. Here, we will look at what conditions are necessary to successfully perform an ombudsman's duties.

79 Poesiat (2009, 18).

15

What is required for an ombudsman to succeed?

There are some key principles that apply to the duties of an ombudsman, such as:

- knowledge of laws and regulations;
- creative in seeking solutions;
- participate in intervision (see the next chapter);
- motivate parties to help find a solution;
- motivate organisations to resolve issues;
- tenacity;
- fearless in dealing with authorities;
- keep all parties informed of progress;
- maintain control over the complaint procedure.

There are also specific skills and experience that an ombudsman should have.

Let me explain some of the above principles in more detail.

Knowledge of laws and regulations and creative in seeking solutions

One of the most important skills of an ombudsman is creativity. An ombudsman should be able to resolve conflicts creatively. The objective is also to find a satisfactory solution for all parties, and a solution that also fits the problem. Getting everyone to agree to a solution also requires a certain strategy. It is important to include those involved in the thought process from possibility to solution. Ombudsmen should also apply their organisational knowledge, knowledge of laws and regulations, and cultural knowledge to craft feasible solutions, conclusions and recommendations. Which regulations can offer a solution to resolve the complaint? The overall goal is to create recommendations that are doable (i.e., feasible and practical). An ombudsman must also attempt

to raise awareness of rights: what is the complainant entitled to and are they aware of this? The last step is to work towards a solution that is acceptable for all parties. When presenting a solution, the powers that an ombudsman has play an essential role in arriving at a solution. If needed, ombudsmen are able to launch their own investigations in case a respondent refuses to cooperate. If respondents are aware of the ombudsman's investigative power, this can help bring a case to a solution at an early stage. Even though most complaints are resolved informally without the need for formal investigation, it is precisely this power that can bring solutions closer.

Motivate parties to help find a solution

Of course, the complainant and the respondent can also offer suggestions to resolve the issue. Sometimes it may no longer be possible to resolve the issue, in which case the institution will have to come up with another form of compensation. For example, by offering a student who has suffered study delay due to organisational processes an amount that corresponds to the amount of tuition fee paid. The ombudsman does not have a role in how the matter is settled. Ombudsmen are not advocates for any parties in a dispute and therefore cannot interfere in issues involving liability.

An example. 'A Master's student complained about her thesis supervisor's conduct in the final phase and the grading for her Master's thesis. She claims that she submitted her final thesis, but then heard nothing from her thesis supervisor, and also received no grade. The student sent several e-mails to the thesis supervisor, but they went unanswered. After two months the student contacted the second assessor and the study advisor, but still heard nothing, and she was unable to find the grade on VU-net. On the other hand, examination regulation states that an assessment must be given within 20 days. She felt let down because the situation was delaying the completion of her studies.

In order to hear both sides of the case, the ombudsman contacted the thesis supervisor, who was on a research assignment abroad. He admitted straight away that the situation should never have arisen, but that he had been waiting for the opinion of the second assessor, who he said had just arrived. The lecturer then apologised to the student about how the procedure had been handled, and the poor communication. He sent the grade, which was satisfactory, without further delay to the programme

secretariat. The ombudsman reported the case to the thesis coordinator in view of the study delay that the student had incurred. The thesis coordinator immediately passed the information on to the Faculty Board. The Faculty Board then refunded two months' tuition fees to the student. The student was satisfied with the solution and with the apologies, and completed her studies later the same month.

The file was closed.'[80]

Fearless in dealing with authorities

Being an ombudsman requires tenacity. Ombudsmen must be able to convince an organisation that admits wrongdoing that the responsibility for resolving the issue lies with them (while remaining impartial and objective). They may have to escalate the issue to higher decision levels in order to force a decision. Ombudsmen cannot be intimidated or hindered from doing their duty even when they have to step on the toes of the authorities. This requires fearlessness and also short lines of communication with the Executive Board.

Keep all parties informed of progress

In the handling of a case, it is advisable to properly inform the parties involved whether the complaint will be dealt with, how the process works and how the settlement will take place.[81] Furthermore, all parties should be kept informed of progress. This is the only way people can feel that they are being taken seriously, and it will help to further strengthen the ombudsman's impartiality.

In the previous chapters, we touched upon the topic of complaint registration. The next chapter discusses this in more detail.

80 Poesiat (2012, 18).

81 Meulenbroek (2008, 129).

16

Complaint registration and the ombudsman's annual report

In most cases, it is the responsibility of the ombudsman to keep records of documents and ensure dossiers are complete and orderly. It is important to have some system of documentation or method in place to do so. This will give the ombudsman more control over which cases are closed and which are still open and need to be followed up on. As a result, pending cases can be kept moving, reducing backlog. It also ensures that the records and files can be found and retrieved by others, for example by colleagues and successors.

Compiling a dossier

During an initial meeting with complainants, the ombudsman can have them fill in a contact form. This can serve as a cover page for the dossier. A serial number can be added to this page so that it is clear how many cases have been taken up. E-mails and documents, such as handwritten notes concerning the case, can be stored in the dossier. The ombudsman can create an additional digital dossier. Furthermore, the complainant should give permission for disclosure of personal information relating to the complaint (e.g., personnel file/student file). There should be a signature field for this purpose on the contact form.

It is advisable to make a report of investigatory interviews with respondents and to discuss this report with the respondent to confirm the information has been understood correctly. This way, the statements cannot be refuted later by anyone, since they were verified and agreed upon. There is always that risk if there is no report. In the case of mediation, the report serves as a basis for feeding back the information discussed to the complainant.

If a formal complaint is submitted to the ombudsman for investigation, the interview report should be included in the complaint report. It is useful to have an approved report available.

The organisation or institution concerned will also want to know how many complaints have been received by the ombudsman, and what those complaints were about. Can a pattern be identified? Are there any structural problems that require structural solutions?[82] This is information that is reported on in an annual report and this exchange of information by the ombudsman is very important for drawing lessons to be learned.[83]

Before closing a case, it is also important to record specific details, such as:

- the duration of the case;
- how did the complainant find out about the ombudsman;
- who is the complainant? (e.g., support staff, academic staff, Bachelor's or Master's student, what study year, etc.);
- the nature of the case;
- the unit or department to which the complaint relates;
- whether it concerns a complaint, inquiry or report;
- method of resolution (referral, advice, ombudsman-led mediation, complaint assessment).

This information will also be helpful when contacting relevant parties during the process if, for example, more complaints on the same issue are received. When patterns of complaints become apparent, the ombudsman has a duty to report them (see also Chapter 14).

The ombudsman's annual report

The ombudsman's annual report documents what the ombudsman has achieved during the year. It should, in any case, contain the number of cases dealt with and an anonymised summary of these cases. The Ombudsman Regulations set out the minimum requirements for the annual report. The cases handled should be described in such a way as to protect the privacy of the person or persons concerned. In the annual

82 Gerrichhauzen & Partners & KWH (n.d., 23).

83 Van der Vlugt et al. (2018, 19).

report, the ombudsman publishes findings, observations and recommendations. Findings are based on advice and mediation cases. Recommendations can of course only be made after assessing a complaint. The findings and recommendations provided in the annual report should be described in general terms so that their applicability to a wider range of units or departments can be considered. Also, this prevents that information is traced back to specific persons or units.

The ombudsman should also specify the number of complaints that were assessed and indicate where the complaints arose.

It is important to discuss the annual report with the board before it is made available to the rest of organisation. After informing the board, the annual report can be published on the organisation's website and distributed across the organisation and beyond, if desired. The report can also be presented to certain bodies, such as the Participation Council, Directors' Council, HRM consultants and study advisors. This provides an opportunity for sharing recommendations, which will not only benefit the organisation but also increase awareness for the ombudsman office and its role. This, in turn, will enhance support for and trust in the ombudsman's handling of complaints in the future.

All this together will help achieve the ultimate goal: a healthy organisation with a transparent culture and a fruitful collaborative environment that enables effective conflict resolution. The ombudsman plays a role in achieving this. To be effective, an ombudsman may benefit from peer-to-peer consultation. We will look at this in the next section.

17

The importance of peer-to-peer consultation

The function of ombudsman is usually a solitary one. This means that often ombudsmen do not have colleagues with whom they can talk about a case. When dealing with difficult issues or dilemmas, this can be a problem. That is why intervision, as mentioned briefly in a previous chapter, is so important, particularly for complex cases or simply to get someone else's opinion. When seeking a solution to a complaint via ombudsman-led mediation or advice, it can be helpful to discuss an anonymised case confidentially with colleagues during an intervision session. Explaining and summarising the case will help to obtain a helicopter view, which leads to more grip on a case. Collectively analysing the problem and share multiple possible solutions can also help to get on the right track.

Intervision is a way 'to learn with and from each other through situations and problems that arise in daily working practices, based on personal learning objectives and a structured approach.'[84]

What applies to intervision is also applicable to peer-to-peer consultation. Especially in situations where ombudsmen feel that their emotions may be clouding their judgement or in cases where exceptional circumstances apply, receiving feedback from peers can be extremely helpful. A professional outsider has a fresh perspective which might put an ombudsman onto the track to a solution or lead to novel insights (e.g., the possibility of submitting an objection). In this sense, peer-to-peer consultation and intervision allow ombudsmen to develop both professionally and personally. A fellow ombudsman can hold up a mirror and ask questions that make them look at cases in a different way. Moreover, they can learn from professionals who may have experience

84 Mediatorsfederatie Nederland (n.d. 7).

dealing with similar issues and can offer tips. It is also important that the intervision is conducted in a safe, trusted group in which an ombudsman can be vulnerable and talk openly and honestly.

The function of ombudsman is dynamic and constantly evolving. This is another reason why peer-to-peer consultation on both a national and international level is important.

Enquiry and advice

An ombudsman should always avoid discussing cases within the organisation, even when leaving out the person's name or information. However, an ombudsman can consult the organisation's legal representative about laws and regulations. Organisations have a wealth of knowledge available but accessing this information can be a challenge, so it's helpful to know who to contact for what kind of information (see Appendix 1 and 2). This also applies to colleagues in an ombudsman's own network: they may also be able to provide valuable information. Before any steps are taken, ombudsmen should get advice from as many experts as they can. Professional associations can also be useful in this respect. Peer consultation and intervision ultimately promote the professionalism of the ombudsman office.

One aspect that has not yet been discussed is national and international cooperation between ombudsmen, which is the main topic of the next chapter.

18

National and international networks

Joining a professional association has many benefits and, as mentioned above, contributes to the professional development of the ombuds profession. At professional association meetings, the implementation of the Ombudsman Regulations, the ombudsman's impartial role and all aspects of complaint handling are discussed. The association brings together a diversity of knowledge and experience, and stimulates the exchange and application of this knowledge, which contributes to improving the quality of ombuds work. One of the few associations for ombudsmen in higher education is located in the Netherlands, the Vereniging Ombudsmannen in het Hoger Onderwijs (VOHO).[85]

In the United States, the International Ombudsman Association (IOA), a general association, aims 'to advance the profession of organizational ombudsman and ensure that practitioners are able to work to the highest professional standards.'[86] The association supports 'organisational ombudsmen worldwide, working in corporations, non-profit organisations, government entities, non-governmental organisations as well as educational institutions.'[87] In addition to its *Standards of Practice* and *Code of Ethics*, the IOA also developed *Best Practices*[88] to promote the development of the ombuds profession. The *Best Practices* can also be found in the Ombudsman Regulations which are used in institutions throughout the Netherlands.

85 https://verenigingombudsmannenho.nl/

86 https://www.ombudsassociation.org/learn-about-ioa

87 https://www.ombudsassociation.org/learn-about-ioa

88 https://www.ombudsassociation.org/assets/docs/IOA_Best_Practices_Version3_101309_0.pdf

The American International Ombudsmen Association[89] and journals for scholarly articles and information relevant to the ombudsman profession also provide a wealth of information on recent developments pertaining, for instance, to the right of complaint and jurisprudence in the field of ombuds work.

These contacts are indispensable, especially given the solitary nature of the job.

Canada has an association intended exclusively for ombudsmen in educational institutions. The Association of Canadian College and University Ombudspersons (ACCUO) is, as their website says, 'a bilingual and independent association dedicated to promoting and fostering an understanding and appreciation of the role of an Ombudsperson within universities and colleges across Canada and to support its members through networking, education and professional development opportunities.'[90] The ACCUO works in close collaboration with the European Network of Ombuds in Higher Education (ENOHE).

ENOHE is an association and an informal network for ombudsmen in higher education, and the only international association. It organises an annual conference for higher education ombudsmen to share ideas, collaborate, and explore new theories, concepts, and practices of ombuds offices.[91] ENOHE does not only represent European higher education ombudsmen but also has members from countries outside Europe, such as the United States, Canada, Mexico, Israel and Australia. Ombudsmen have varying powers depending on the country. Some ombudsmen, like in Israel, can handle appeals against decisions of the Examination Board, and there are ombudsmen who also handle claims about housing and sexual misconduct, such as in the US. In some countries, like Germany, higher education ombudsmen do not adjudicate, but they can resolve complaints by means of advice or mediation. Mexican ombudsmen also deal with violations to human rights to education. But although the powers and type of complaints differ per country, the methods to resolve complaints are the same everywhere. So, there is a lot that can be learned from each other.

89 For more information, visit http://www.ombudsassociation.org/About-Us/IOA-Standards-of-Practice-IOA-Best-Practices.aspx

90 http://accuo.ca/about/a-word-about-the-association/

91 https://www.enohe.net/what-is-enohe/

19

Effective conflict resolution in organisations

There are many publications about complaint management and provisions for handling customer complaints. However, these publications do not always apply to the field of education. Companies have front-line staff or customer service departments that are tasked with resolving complaints (e.g., by rectifying problems with their product or services, or offering compensation in the form of gift vouchers.) This is not the way things are done in the world of education. For many students and employees, getting a complaint to be acknowledged is far from easy. In the business world it is not uncommon for an employee to give a customer their telephone number. In educational institutions, complainants often find it difficult to reach employees by telephone to discuss a complaint. Integral complaint management, however, requires that complainants can easily submit their complaints. This allows complaints to be brought to the attention of the organisation so that they can be resolved promptly in order to restore the trust of the customer.

Educational institutions tend to look at this differently. What's more, most staff members of educational institutions, if they can be reached by telephone at all, are not well aware of where complaints should be directed. Also, they are rarely trained to deal with complaints. This climate makes it easy for complaints to escalate into full-blown disputes. In the service industry, the customer is always right. This service-minded attitude is hard to find in the educational field.

What is the danger of not handling complaints effectively?

It appears that when people want to complain to an educational institution it is not always clear where they can go with their complaint or concern. Also, complainants often end up being sent from pillar to post. Some complainants send e-mails to a variety of staff, in the hopes that

someone deals with the complaint. The longer they have to wait for a response, the more frustrated they become and the more likely they are to send e-mails to even more employees, in some cases up to the board level. This is not only a waste of staff members' time, it also does nothing to foster a resolution of the problem at hand. When complaints are not handled effectively, this can lead to negative consequences. Students might experience study delays and employees might be subjected to unnecessary stress and escalation. This is undesirable for everyone involved, including the organisation, as this can affect education, research or operations.

Another issue is that individuals may find it difficult to come forward with a complaint. If the respondent is in a position of trust or authority over the complainant and is someone upon whom the complainant depends, say a professor or thesis supervisor, the complainant may be afraid of repercussions (whether rightly so or not). While educational institutions seem like informal organisations where people call one another by their first name, they tend to be formal and bureaucratic. This can make it difficult to voice a concern, let alone submit a formal complaint for investigation. Complainants often feel that they work in a small world where everyone knows everyone. If complainants are labelled as troublemakers, this could ruin their career. As a result, especially in the case of undesirable behaviour, it can take years before a complainant has the courage to come forward. [92] Although complaints of a general nature tend to be reported sooner, there usually is a certain degree of reluctance to voice complaints. In practice, formal complaints are rarely submitted to the ombudsman.

In cases where complaints were handled effectively by educational institutions, many lessons have been learned. Some institutions improved their information provision, redefined their business processes, and revised regulations and protocols. Targeted measures were taken to resolve complaints and prevent recurrence.

During this process, the ombudsman offers an accessible and safe place to resolve differences and explore matters of concern in an efficient and process-oriented way. In addition, the ombudsman can refer complainants to the appropriate office or individual so that their complaint is addressed properly and promptly. As mentioned earlier,

92 Logtenberg & Van de Wiel (2019).

the ombudsman is a second-tier mechanism, a 'fall-back' facility. This means that in general complaints are only admissible if the complainant has exhausted all first-tier procedures, (i.e., addressed the matter internally with a manager or education coordinator). But in the first tier there is still a lot of room for improvement and there are many lessons that can be learned from the way in which companies handle customer complaints. Swift resolution also ensures continuity (of work, research or study) is not jeopardised.

When the ombudsman is brought into a situation, it is at a point when a complaint exists and allegations have been made. Dealing with the complaint in a careful and sensitive manner helps restore trust in the organisation. Especially when the complaint is founded and the complainant is offered an apology or gets fair compensation for their grievance. By appointing an ombudsman, organisations are sending a message that they encourage an environment where complaints are handled seriously and thoroughly. This, too, builds trust in the organisation. 'An effective complaint management system is an essential part of providing quality service. People who have poor experiences with universities will speak out as loudly as they can to as many people as they can. Social media has the capacity to spread negative comments far more pervasively than ever before.'[93] So, in addition to handling complaints carefully and thoroughly, it is also important to focus on preventing complaints in the first instance. This brings me to the following question. Where do complaints originate and how can organisations avoid them?

What are the consequences of organisational conflict?

'Organisations that lack trust often have higher rates of staff turnover and workplace conflict, and tend to develop a toxic culture of gossip and backstabbing. Ultimately, this lack of trust will affect performance and permeate the annual report. In short, trust creates the conditions for an effective organisation where people treat each other with respect and pursue common objectives.'[94]

That is the goal. But what if it is not achieved in practice? In 2017, 23% of employees in the Netherlands indicated that they had had a con-

93 ACT Ombudsman & Commonwealth Ombudsman. (2016, 6).

94 Ten Hoedt (2013, 14).

flict with an immediate colleague; 15% reported to have had a conflict with their supervisor.[95] A study conducted in 2019 in the Netherlands by two trade union organisations showed that most university employees who have been confronted with a socially unsafe working environment blame the problems on poor leadership. Older employees (aged 36-55) in particular reported negative experiences at work (78%), though also quite a few employees aged between 26 and 35 (65%) also reported similar experiences.[96] In the US, a sample of 1515 university administrators completed a survey of leadership skills, preparedness for the administrative role, and job satisfaction. The survey showed, among other things, that it is 'training in the nuances of behavioural and conflict management that may be most in need'.[97]

Conflicts also cost money. According to professor of Organizational Psychology Martin Euwema, a Dutch university spends an average of EUR 71,672 annually on conflict resolution, with conflicts taking on average 28 months to be resolved. This amount is so high because, says Euwema, exit schemes are more commonly agreed upon by universities.[98] So conflicts and complaints not only cost money, but also harm the organisation as a whole. It has an effect on the education they provide, the research they conduct and on their operations. In concrete terms, conflicts that employees or students experience create feelings of stress and frustration, which adversely affect people's ability to feel safe and fulfil their potential. This can cause employees to become demotivated and even lead to work-related absenteeism and dismissal. In students, stress can cause study delay and dropout.

Most people react to stress in one of three ways: fight, flight or freeze.[99] However, these reactions do not solve the issue at hand. To fight is to confront the situation aggressively, which can cause the conflict to escalate into a legal dispute. Legal disputes are time consuming and the outcome is not always favourable for the complainant.

Flight means you run from the situation, for example by calling in sick or dropping out of a course. This behaviour does not solve problems – it usually lays the foundation for bigger problems in the future.

95 TNO (2018, 15).
96 FNV/VAWO (2019, 9).
97 Morris & Laiple (2015, 249).
98 Euwema, Beetz, Driessen & Menke (2007, 11).
99 Dialogue BV (z.d.).

When people freeze, they find themselves unable to act against a situation or they may even deny it, which obviously does not lead to a solution. Media coverage, for instance, can affect people's attitudes toward undesirable behaviour. It can cause managers to respond ineffectively or even deny claims of undesirable behaviour because the complaints could have implications for themselves or the reputation of their department. Managers may feel they are protecting their department by downplaying or keeping quiet about what happened. In such cases, complainants are rarely referred to a confidential counsellor for undesirable behaviour or to an ombudsman. Usually, the subject of the complaint will be told by their manager that a complaint has been made about them but without going into details, hearing their side of the story or investigating the matter. Employees usually turn to the ombudsman when their manager takes corrective action in response to the alleged misconduct by, for example, removing them from a role or asking them to take part in an improvement programme. In their opinion, they have been unfairly treated and denied the opportunity to present their version of events. They feel their manager acted as if they were guilty even though there is nothing other than the complaint or report itself to suggest this is true. If employees experience undesirable behaviour, it is a manager's responsibility to refer them to a confidential counsellor or ombudsman who can support them with a report or filing a complaint, if desired. The alleged misconduct can then be investigated and assessed by, for example, the Complaints Committee for Undesirable Behaviour. An investigation can clarify the accuracy of the allegations. Ignoring the problem won't.

Reporting undesirable behaviour early

The Vrije Universiteit Amsterdam (VU) offers an additional way to report undesirable behaviour. Since 2018, the university has a special reporting procedure called the Social Safety Hotline, which was introduced to meet integrated safety objectives. At VU Amsterdam, reports of worrying or inappropriate conduct are handled by social safety coordinators, supported by a social safety expert team.[100] This multidisciplinary team includes staff from across VU Amsterdam, including the ombudsman, who are all experts in their own fields and also have an affinity

100 https://vu.nl/en/about-vu/more-about/safe-social-setting-on-campus

with social safety and prevention. The team's method focuses on early detection and monitoring, integrated follow-up and aftercare.

Any behaviour that is perceived as unsafe or worrying can be reported. The expert team will provide advice and assistance, and conduct a risk assessment. Unsafe or worrying behaviour can include inappropriate conduct but also disturbed behaviour (e.g, suicidal behaviour or psychoses), or behaviour that causes others to feel unsafe (e.g., radicalisation, stalking). The social safety expert team is trained and possibly certified in dealing with unsafe behaviour.[101] The hotline is an accessible resource for complainants to turn to for guidance and support. In many cases, complaints can be resolved with the help from the hotline. Not only complainants, but also others who have experienced or witnessed unsafe or worrying behaviour, such as fellow students, supervisors or teachers, can use the hotline to make a report.

As has been said before, a conflict is a costly matter. Especially when the case has to be settled in a court of law. Conflicts can also cause reputational damage. Can organisations prevent complaints? And if so, how? This publication is not the place to answer these questions in detail, but it is important that they are raised for further consideration.

Developing conflict resolution skills

As mentioned earlier, the ombudsman is a second-tier mechanism within an institution. Resolving complaints before they reach the ombudsman is therefore a task and responsibility of reporting mechanisms at the first tier. Managers, HRM, study advisors and teachers are often the first to notice a problem. It is necessary that they 'develop conflict resolution skills and mediation skills that enable them to intervene in (imminent) conflict situations proactively and effectively.'[102] The above-mentioned US survey among 1515 university administrators showed that they 'felt least well prepared in the areas of […] handling grievances and appeals'.[103] A training programme that empowers people with the skills to resolve conflicts constructively (e.g., by listening actively to both sides of the story, avoiding discussions to prove a point, etc.) could be help-

101 Hoffman, van der Meer, [et al.] (2020).

102 Dialogue BV (n.d.).

103 Morris & Laiple (2015, 241).

ful in this respect. The training should be repeated periodically to keep skills sharp. Organisations could consider making the training mandatory for new managers. In any case, it is important that staff members know how to handle complaints and are aware of what avenues are available to make complaints, so that they can encourage employees and students to make use of them. Complaint policies should be clear, accessible and communicated across all levels of the organisation so that everyone is aware that complaint procedures exist.

Not only managers should receive training on how to deal with conflict. Other staff members, such as teachers, could also benefit from coaching, mentoring programmes or intervision. This can give them a better understanding of their own behaviour under pressure and more insight into what causes grievances in the workplace.[104] These methods may enable others to recognise warning signs and, if necessary, address issues before they cause problems.

Unfortunately, intervision as a professional learning and development tool is not very common in higher education. Many teachers feel they don't have time for intervision with everything else they have on their plate. As understandable as this may be, it is wise to look at the broader picture: intervision leads to an improvement in the quality of education. Moreover, intervision contributes to the prevention of conflicts. Employees who participate in intervision are generally used to giving and receiving feedback, which makes it easier for them to discuss problems when they arise. Training in feedback skills is also beneficial. All this helps to build a supportive working culture where issues can be discussed openly. This is helpful in resolving complaints or preventing them at an early stage.

Intervision has another advantage. When discussing problematic behaviour of students during the intervision sessions, straightforward practical advice can be of great benefit because it allows teachers to address issues before they turn into bigger problems. This, too, helps to create a safe work or study environment. However, more will need to be done to ensure a culture of answerability within educational institutions. Changes in power structures, for example, could also contribute to this. Due to the hierarchical structure of educational institutions, which is established in administrative regulations, there is often one person in a

104 Dialogue BV (n.d.).

position of authority in a department. This could be taken into account when drawing up such regulations to prevent complaints in a later stage.

Gathering information on departments can also help solve and prevent complaints. Such information would make it possible to intervene quickly in departments where problems arise and assess the immediate effect of an intervention. According to ombudsman Paul Herfs[105] (2021), 'fellows and external PhD students (those enrolled in a PhD training programme without being employed by the university) tend not to show up in university records. We should be keeping track of how many are on schedule, how many have suffered delays (and why) and how many PhD candidates have dropped out (after how many years).' There are things management and boards can do to prevent complaints, such as measuring lecturer satisfaction, using the Employee Monitor, and organising training courses for staff members and supervisors.[106]

Does the board also have a role in preventing complaints? Former ombudsman of Delft University of Technology, Job van Luyken, argues for a zero-tolerance policy and for the board to enforce it decisively.[107]

No matter how well complaint handling processes may be designed and executed, prevention is always the better option.

105 Dr. Paul Herfs ombudsman HKU University of the Arts Utrecht, and former ombudsman of Utrecht University and HU University of Applied Sciences Utrecht.

106 More information: Van Rees, Wagenaar, Herfs & van Montfort (2021, 55, 56).

107 Van Luyken (2021, 9).

20

Ombudsman system proven to be effective in the Netherlands

Initially seen as a formal process, complaint handling was taken for granted by most organisations for a long time. Because few complaints were submitted to grievance committees, many directors failed to see the added value of the ombudsman system. But that notion slowly changed. By the turn of the 20th century, mediation as a complaint resolution method became institutionalised as a recognised profession. Mediation proved not only to be a cheaper, but also a more effective strategy for resolving conflicts. While some educational institutions reacted to these developments by appointing an ombudsman, the total number of ombudsmen in the Netherlands was still very small. However, much has changed since the first ombudsman was appointed at a Dutch institution of higher education in 1996. Due to the inception of the #MeToo Movement in 2017, news coverage of sexual transgressive behaviour and related public discourse have become much more prevalent. Propelled by this and other developments, trade unions, student organisations and participation councils started demanding that educational institutions meet their obligation to provide a socially safe workplace and learning environment. They claimed that as an impartial and independent entity with investigative powers, ombudsmen could act as mediators and investigators, and offer a safe place for complainants to come forward. Their role in resolving complaints on a wide variety of issues would contribute to ensuring the social safety of students and staff.

The actions of the trade unions and participation councils, which also caught the attention of national politics[108], resulted in the Ombuds Officer Pilot Programme for personnel, which was launched at four Dutch universities (see also Chapter 1). Based on the results of the pilot's fi-

108 https://www.parlementairemonitor.nl/9353000/1/j9vvij5epmj1ey0/vlf1hn07s6h2

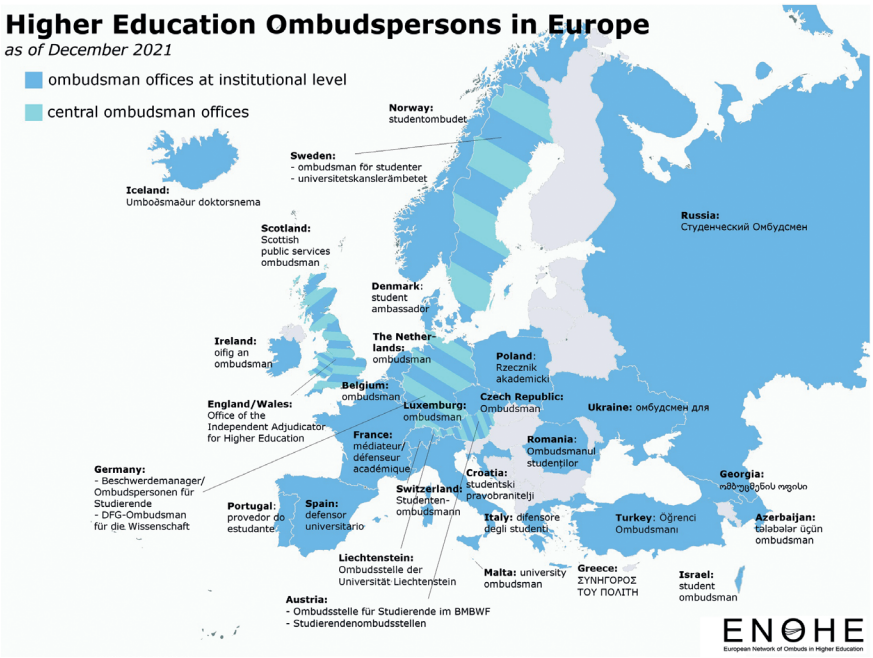
nal evaluation, all parties agreed that as of 1 July 2021, a staff ombudsman should be appointed at each university in the Netherlands. In other countries, staff ombudsmen are less common. Most ombudsmen that are appointed are student ombudsmen.

An important result has now been achieved for university personnel in the Netherlands. However, only 10 out of the 55 institutions of higher education in the Netherlands have appointed an ombudsman for students. This could change if an ombudsman service at universities and universities of applied sciences were to be enshrined in the law, as is the case in Austria and Belgium (Flanders).[109]

There seems to be sufficient political willingness on the part of European actors for this to happen. In the Rome Ministerial Communiqué of 19 November 2020, the Ministers responsible for higher education in Europe reaffirmed their commitment to developing a more inclusive, innovative, interconnected and resilient European Higher Education Area (EHEA) by announcing: 'We recognize the importance of safeguarding student rights through legislation; we commit to developing and supporting them in our national systems through dedicated measures and structures, such as student ombudspersons or similar solutions that already exist in many EHEA countries. We commit to enabling such arrangements within our countries and higher education systems and will encourage cooperation within the European Network of Ombuds in Higher Education (ENOHE).'[110]

109 Leidenfrost, Rothwangel (2017, 4).

110 EHEA (2020, 5). Rome ministerial communiqué: 19 November 2020. EHEA, Rome.



Leidenfrost (2021, re-edited map 2018).

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Appendix 1
Brief Guide for Student Ombudsmen

The Ombudsman Regulations or mandate set out the ombudsman's duties and powers. These regulations also describe the complaint procedure. Regulations in which the rights and duties of students are stated are an important source of information.

The Student Obligations or Student Code is leading.

The Education (or Teaching/Academic) and Examination Regulations describe the rules and regulations that study programmes have to adhere to (e.g., marking period, right of inspection, etc.). Every programme in the Netherlands has its own Examination Regulations.[111]

Some institutions have a Quality Assurance Manual which contains policies and procedures designed to manage the quality of education. This manual can provide useful information when investigating complaints.

The Administrative Regulations is where information about the institution's governance structure can be found as well as information on the tasks and powers of officials.

Legal Affairs or Student Affairs can offer advice on a range of general issues.

Who can a student be referred to?

Some institutions have an overview of resources students can address with their problems. This overview can be used as an additional referral guideline.

Complaints about inappropriate behaviour, such as bullying, stalking, discrimination, aggression and inappropriate sexual conduct, can be reported confidentially to an ombudsman or confidential counsellor. If necessary, an external complaints committee will investigate and assess the complaint.

111 Based on Art.7.13 of the Higher Education and Research Act https://maxius.nl/wet-op-het-hoger-onderwijs-en-wetenschappelijk-onderzoek/artikel7.13

The Examination Board assesses requests and complaints of students concerning exams. The duties of the Examination Board are laid down in the Dutch Higher Education and Research Act.

A student may appeal against a decision made by the Examination Board. Appeals should be submitted to the Examination Appeals Board.

Because ombudsmen are impartial, they cannot assist students during this process or accompany them to a hearing. The Legal Office, student union or student counsellor is able to provide support.

A student may, under certain conditions, lodge an appeal against a ruling by the Examination Appeals Board if they disagree with a decision. In the Netherlands, this can be done with the Higher Education Appeals Tribunal. It is not mandatory to retain a lawyer. Lodging an appeal costs € 49 per case (Tribunal's registry fee in 2021). The website of the Appeals Tribunal for Higher Education (in Dutch: College van Beroep voor de Examens, CBHO) lists in what cases an appeal can be lodged. See: www.cbho.nl/.

Requests from students that deviate from general policy, for example a request for more supervision hours, can be submitted to a coordinator or programme director.

A student can lodge an objection with the Executive Board against a decision by a director of a department or the Faculty Board.

As an impartial third party, the ombudsman cannot intervene in liability issues such as reimbursement of tuition fees. To this end, a student can submit a reasoned request to the Faculty Board.

The ombudsman cannot deal with complaints relating to general policy. Student with complaints of a general nature should be referred to a participation body, such as to a the Faculty Council or Student Council, or to a Programme Committee which consists of equal numbers of students and staff. However, if rules or regulations are uncertain or terms are subject to more than one meaning, or could lead to arbitrariness, then the ombudsman may be competent to deal with the complaint.

Privacy-related complaints should be submitted to the ombudsman or to the Executive Board, depending on the institution. The ombudsman may consult with the Data Protection Officer (DPO) if necessary. For complaints about violations of scientific integrity, the first point of contact is the university's confidential counsellor for academic integrity.

Students who suspect a case of misconduct or wrongdoing can report to the Whistle-blowers' Regulations confidential counsellors. This also applies to violations of legal regulations, or threats to public health, safety or the environment due to improper conduct or a failure to act. The violations must be of a structural rather than random nature.

Many universities require students to register for modules and exams. If students are late registering and the lecturer does not allow them to take the exam, this can lead to complaints. Students can, however, always submit a request for late placement when the regular registration period for the course has closed. This can usually be done through a head of the education office or programme director.

What support staff are available for students?[112]

Confidential counsellor for undesirable behaviour

Complaints about inappropriate behaviour, such as bullying, stalking, discrimination, aggression and inappropriate sexual behaviour can be reported confidentially to a confidential counsellor or ombudsman.

Study advisor/academic counsellor

A study advisor is affiliated with a faculty and can provide advice on matters related to the degree programme. If students suffer study delays through no fault of their own, for example due to disability, this should be reported to the study advisor.

Student counsellor/student dean

A student counsellor provides support, advice and information. Students can contact them about matters not directly related to the content of their degree programme, such as registration and deregistration

112 This is not an exhaustive list. The available resources may vary per institution or country.

issues, or urgent housing or financial problems. Discussions with a student counsellor are confidential. A student counsellor can also provide assistance with applying for the Profile Fund (Dutch fund that offers financial assistance in the event of study delay due to special circumstances) or with appeals and objections.

An International Office offers support to international students. Most universities also have a student counsellor for international students.

Student psychological counsellor

Student psychological counsellors are psychologists who are specialised in study-related problems. They offer short individual counselling for problems such as fear of failure, procrastination, problems with concentration, study-related stress or graduation issues.

Confidential counsellor or ombudsman for academic integrity issues

Students with questions or complaints/reports about academic integrity can contact a confidential counsellor for academic integrity or the ombudsman. Some examples of issues involving academic integrity:

- 'My name was left off a publication I contributed to.'
- 'We can't agree on the order of the cited authors.'
- 'One of my colleagues is using my work without citing me.'

Student Life Officer

The Student Life Officer is the first point of contact for students to discuss any issue related to student life and is available to meet with students individually to offer support and advice.

Student Liaison Officer

The Student Liaison Officer supports students during their studies by providing appropriate information, advice and guidance, and by offering opportunities to develop and improve study skills.

Outside the educational institution, students can contact a legal aid centre or student union for assistance.

Student council

Students can contact the student council if they have questions or complaints about general policy matters.

Appendix 2
Brief Guide for Staff Ombudsmen

The Ombudsman Regulations or mandate set out the ombudsman's duties and powers. These regulations also describe the complaint procedure. Regulations that define the rights and duties of employees, such as the Code of Conduct or Collective Labour Agreement,[113] are an important source of information. Some organisations have an employee handbook or guide which contains policies and procedures designed to manage the quality of education. These sources can provide useful information when investigating complaints.

The Administrative Regulations is where information about the institution's governance structure can be found as well as information on the tasks and powers of officials.

Legal departments or HRM can offer advice on a range of general issues.

Who can a staff member be referred to?

Some institutions have an overview of resources employees can address with their problems. This overview can be used as a referral guideline. As a first step, staff members should raise concerns with their supervisor or their supervisor's superior.

HRM consultant

HRM consultants or advisers are the first point of contact for employees on any HR related queries. They support and advise management of faculties, departments and units on personnel and organisational issues in a broad sense, and advise and mediate on individual issues. HRM also informs and advises managers and employees about employment conditions and personnel regulations.[114]

113 In the Netherlands: cao.

114 Internal document VU Intranet (2021) (personal communication).

Confidential advisor

Complaints about inappropriate behaviour, such as bullying, stalking, discrimination, aggression and inappropriate sexual conduct, can be reported confidentially to an ombudsman or confidential counsellor. If necessary, an external complaints committee will investigate and assess the complaint.

Employee participation

The ombudsman cannot deal with complaints relating to general policy. The Works Council and Participation Council defend the interests of employees. However, if rules or regulations are uncertain or terms are subject to more than one meaning, or could lead to arbitrariness, then the ombudsman may be competent to deal with the complaint.

Research integrity officer, confidential counsellor or ombudsman for academic integrity issues

For complaints about a suspected violation of academic integrity, the first point of contact is the university's research integrity officer, confidential counsellor for academic integrity or the ombudsman. They can also offer advice and guidance about submitting a complaint to the institution's Academic Integrity Committee. The decisions of this committee can be appealed. In the Netherlands, this can be done with the Landelijk Orgaan Wetenschappelijke Integriteit (LOWI), an independent advisory body that issues opinions to the boards of its affiliated institutions regarding possible violations of principles of research integrity.[115]

Whistle-blowers' Regulations confidential counsellors

Staff members who suspect a case of misconduct or wrongdoing can report to the Whistle-blowers' Regulations confidential counsellors. This also applies to violations of legal regulations, or threats to public health, safety or the environment due to improper conduct or a failure to act. The violations must be of a structural rather than random nature.

Executive Board

A staff member can lodge an objection with the Executive Board against a decision by a director of a department or the Faculty Board. Priva-

115 https://lowi.nl/

cy-related complaints should be submitted to the ombudsman or to the Executive Board, depending on the institution's regulations. The Ombudsman may consult with the institution's Data Protection Officer (DPO) or privacy lawyer if necessary.

As an impartial third party, the ombudsman cannot intervene in liability issues. In such case, employees should submit a reasoned request themselves to a body with power of decision.

What support staff are available for employees?

Confidential counsellor for undesirable behaviour

Complaints about inappropriate behaviour, such as bullying, stalking, discrimination, aggression and inappropriate sexual behaviour can be reported confidentially to a confidential counsellor or ombudsman and, if desired, submitted to an external complaints committee.

Staff welfare officer

Some institutions have a staff welfare officer. Their duty is to ensure that the staff's mental well-being and safety are always considered and protected. This is done through:

- short-term guidance of employees who (may) become incapacitated for work; due to psychosocial problems;
- individual or group counselling;
- advice to management and HR (Social Medical Team);
- early detection;
- support in the event of personal or work-related problems.[116]

Research integrity officer, confidential counsellor or ombudsman for academic integrity issues

For complaints about a suspected violation of academic integrity, the first point of contact is the university's research integrity officer, confidential counsellor for academic integrity or the ombudsman. Some examples of issues involving academic integrity:

- 'My name was left off a publication I contributed to.'
- 'We can't agree on the order of the cited authors.'

116 Internal document VU Intranet (2021) (personal communication).

- 'One of my colleagues is using my work without citing me.'
- 'My colleague's work is sloppy. What should I do?'[117]

They can also offer advice and guidance about submitting a complaint to the institution's Academic Integrity Committee. The decisions of this committee can be appealed. In the Netherlands, this can be done with the Landelijk Orgaan Wetenschappelijke Integriteit (LOWI), an independent advisory body that issues opinions to the boards of its affiliated institutions regarding possible violations of principles of research integrity.[118]

Occupational physician

When staff members fall ill, want advice to prevent becoming incapacitated for work or are worried about aspects of their work or health, they can talk to an occupational physician. Occupational physicians provide assistance and maintain regular contact with employees who are not able to work because of illness. It's also important that both the employer and employee stay in regular contact during absence, especially if it is long term. Occupational physicians also provide advice to managers and employees about the possibilities to return to work and, if needed, about making adjustments to help them return to work.[119]

Counsellor for legal issues

Some institutions have a counsellor that can provide advice on employment law issues.

Trade union officer

Trade union officers negotiate with employers to further the interests of their union's members and act as their first point of contact.

Outside the educational institution, a trade union, legal aid centre or legal assistance insurance can provide employees with guidance and advice on their legal position.

117 Internal document VU Intranet (2021) (personal communication).
118 https://lowi.nl/
119 Internal document VU Intranet (2021) (personal communication).

IN THIS GUIDE, ALL ASPECTS OF OMBUDS WORK IN HIGHER EDUCATION ARE DISCUSSED CLEARLY AND THOROUGHLY, FROM THE IMPLEMENTATION AND CONTEXT OF THE OMBUDS FUNCTION, THE EVERYDAY PRACTICE OF AN OMBUDSMAN (M/F/X) TO INTERNATIONAL DIFFERENCES IN TERMS OF THE OMBUDSMAN'S MANDATE AND POWERS.

How can ombudsmen carry out their work correctly and effectively? What kinds of complaints do they investigate? How do they deal with complainants and respondents? Should complaints of students and employees be handled differently? And how do ombudsmen maintain impartiality?
This book is not only relevant to ombudsmen worldwide, but is also an insightful read for administrators, policy staff and potential users of the ombuds service.

Lies Poesiat has worked as an ombudsman at the Vrije Universiteit (VU) Amsterdam since 2007. Prior to this, she held the position of ombudsman at the University of Amsterdam. Lies Poesiat served on the steering committee for the European Network for Ombuds in Higher Education (ENOHE) for many years, is co-founder and former chair of the Dutch Association of Higher Education Ombudsmen (VOHO) and gives lectures about her work both nationally and internationally.

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