UNJUST FORFEITURE

Report on an investigation into alleged unfair labour practice by the Department of Home Affairs

Report No: 7 of 2013/14

PUBLIC PROTECTOR
SOUTH AFRICA

REPORT NO 7 OF 2013/2014


"Unjust forfeiture"

REPORT ON AN INVESTIGATION INTO AN ALLEGED UNFAIR LABOUR PRACTICE BY THE DEPARTMENT OF HOME AFFAIRS
# INDEX

**Executive summary**

1. **INTRODUCTION**

2. **THE COMPLAINT**

3. **POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR TO INVESTIGATE THE COMPLAINT**

4. **THE ISSUES CONSIDERED BY THE PUBLIC PROTECTOR**

5. **THE INVESTIGATION**

6. **EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION**

7. **EVALUATION OF THE EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION**

8. **LEGAL AND REGULATORY FRAMEWORK**

9. **ANALYSIS AND CONCLUSION**

10. **FINDINGS**

11. **REMEDIAL ACTION**

12. **MONITORING**
Executive Summary

(i) "Unjust forfeiture" is a report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, and section 8(1) of the Public Protector’s Act, 1994.

(ii) The report communicates the Public Protector’s findings and directives on appropriate remedial action following an investigation into a complaint lodged by Mr R Marimi on 14 February 2011 alleging improper prejudice suffered as a result of the Department of Home Affairs’ decision to withdraw him from posting at the Cuban Foreign Mission in April 2010, based on allegations of acts of misconduct in Cuba. The alleged maladministration involved the Department’s failure to afford him an opportunity to answer to the allegations against him before the decision to withdraw him was made, the Department’s failure to institute a disciplinary hearing against him regarding those allegations subsequent to his return to South Africa and the withdrawal of his Cost of Living Allowance (COLA), (estimated to be USD 42 896), which he was entitled to as a designated official posted in Cuba.

(iii) The Public Protector considered and investigated the following issues:

(a) Did the Department withdraw the Complainant from a foreign posting in Cuba and was such withdrawal procedurally flawed and improper?

(b) Was the delay by the Department to hold a disciplinary hearing to deal with the allegations against the Complainant prior to his resignation unreasonable and improper?

(c) Was the Department’s decision to withhold the Complainant’s Cost of Living Allowance due to him by virtue of being posted at the Cuban Foreign Mission after withdrawing him improper?
(d) If the answer to any of the above issues is in the affirmative, was the Complainant prejudiced as envisaged in section 6(4)(a)(v) of the Public Protector Act?

(iv) The investigation was conducted by way of telephonic and written correspondence with officials at the Department of Home Affairs (the Department) and the perusal of documents received. Applicable legislation, policies and relevant prescripts were also analysed and applied. Subsequent to the provisional report being issued, a meeting was held with the officials from the Department regarding the provisional findings made.

(v) The Public Protector makes the following findings:

(a) Did the Department withdraw the Complainant from a foreign posting in Cuba and was such withdrawal procedurally flawed and improper?

(aa) The Department withdrew the Complainant from a foreign posting in Cuba.

(bb) The withdrawal was in violation of Clause 5.3 of its contract with him, which required that he be withdrawn on the recommendation of the host country or the Head of the Mission.

(cc) The conduct of the Department was improper as envisaged in section 182(1)(a) of the Constitution and constitutes maladministration in terms of section 6(4)(a)(i) of the Public Protector Act;

(b) Was the delay by the Department to hold a disciplinary hearing to deal with the allegations against the Complainant prior to his resignation unreasonable and improper?
(aa) The Department delayed to hold a disciplinary hearing to deal with allegations of misconduct against the Complainant.

(bb) The delay was in violation of Paragraph 7.2(c) of the Public Service Disciplinary Code and Procedures which requires that the disciplinary hearing be held within a maximum period of 60 days.

(cc) The delay was unreasonable and improper as envisaged in section 182(1)(a) of the Constitution and constitutes maladministration in terms of section 6(4)(a)(i) of the Public Protector Act;

(c) Was the Department's decision to withhold the Complainant's Cost of Living Allowance due to him by virtue of being posted at the Cuban Foreign Mission after withdrawing him improper?

(aa) The Department withheld the Complainant’s Cost of Living Allowance (COLA) due to him by virtue of being posted at the Cuban Foreign Mission after withdrawing him.

(bb) The Department’s decision to withhold the Complainant’s cost of living allowance due to allegations of misconduct against him contravened Paragraph 6.2.1(iii) (COLA) of the Foreign Service Dispensation which provides that according to the DPSA, letter dated 22/02/2006, if an official is recalled due to a Labour Relations action he/she is regarded as being on official duty and hence that rule will apply.

(cc) The conduct of the Department in withholding the Complainant’s COLA after withdrawing him due to allegations of misconduct against him was improper as envisaged in section 182(1)(a) of the Constitution and constitutes maladministration in terms of section 6(4)(a)(i) of the Public Protector Act; and
Constitution and constitutes maladministration in terms of section 6(4)(a)(i) of the Public Protector Act; and

(d) Was the Complainant prejudiced as envisaged in section 6(4)(a)(v) of the Public Protector Act by the Department’s decision to withdraw him from the Cuban Foreign Mission, the delay in holding a disciplinary hearing against him regarding allegations of misconduct in Cuba and the withholding of his COLA due to him by virtue of being posted at foreign mission?

(aa) The Complainant suffered an injustice or prejudice as envisaged in section 6(4)(a)(v) of the Public Protector Act, in that:

I. He was treated unfairly;

II. He unfairly lost his cost of living allowance that he was legally entitled to;

III. His name and reputation remain tarnished due to the failure to afford him an opportunity to clear his name; and

IV. His human dignity was impaired.

(vi) Appropriate remedial action to be taken in terms of section 182(1)(c) of the Constitution is that:

(a) The Director-General of the Department should ensure that the Complainant’s allowances which accrued to him in terms of his contract of placement in the Cuban Foreign Mission entered into with the Department, is paid to him together with interest at the prescribed rate of 15,5% per annum from the date of his withdrawal from Cuba until the date he transferred to Correctional Services;
(b) The Director-General of the Department should investigate the reasons why the case was not dealt with properly and take the necessary action against any person who may have failed to act as required by law and policy; and

(c) The Director-General of the Department should ensure that the Complainant is provided with a letter of apology for the prejudice he suffered as a result of the conduct of the Department in this matter.
REPORT ON AN INVESTIGATION INTO AN ALLEGED UNFAIR LABOUR PRACTICE BY THE DEPARTMENT OF HOME AFFAIRS

1. INTRODUCTION

1.1 "Unjust forfeiture" is a report of the Public Protector in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).

1.2 The report is submitted to the Minister of Home Affairs, Ms G N M Pandor and the Director-General of the Department of Home Affairs, Mr M Apleni, in terms of section 8(1) of the Public Protector Act.

1.3 A copy of the report is also provided to Mr Marimi (the Complainant) in terms of section 8(1) of the Public Protector Act.

1.4 The report relates to an investigation into a complaint of alleged unfair labour practice by the Department of Home Affairs (the Department).

2. THE COMPLAINT

2.1 On 14 February 2011, the Public Protector received a letter of complaint from the Complainant in which he alleged that:

2.1.1 On 26 April 2010 he received a letter from Mr J W McKay, Deputy Director-General of Immigration Services, informing him that the Department was in possession of documentation which contained allegations of serious acts of misconduct against him whilst he was a transferred/diplomatic official based in the South African Embassy in Cuba.
2.1.2 The letter stated further that based on these allegations he was withdrawn with immediate effect and he would be notified of the disciplinary steps that the Department would institute against him.

2.1.3 The allegations were not investigated in terms of the Public Service Coordinating Bargaining Council (PSCBC) Resolution 1 of 2003: Disciplinary Code and Procedures.

2.1.4 On 26 May 2010, he instructed Nishani Pather Attorneys to act on his behalf with a letter of enquiry to which the Department did not respond. On 26 July 2010, he wrote a letter to Mr McKay in which he raised concerns regarding the delay by the Department to respond to his attorneys' enquiry and the fact that he was not provided with a copy of the allegations levelled against him. However, no response was received thereto.

2.1.5 On 1 September 2010, he received a letter from Mr M S M Malaka stating that the Department intended to institute disciplinary action against him and that he should respond within 5 working days why disciplinary action should not be instituted against him, to which he responded on 2 September 2010, however, again nothing followed from the Department.

2.1.6 From May until December 2010, he did not receive USD 42 896 (R307 897.19 as per the exchange rate then) in allowances due to him from the Department.

2.1.7 The Department acted unfairly against him for the following reasons:

2.1.7.1 The decision by the Department to withdraw him prior to a procedurally fair disciplinary hearing was improper and a violation of his constitutional right to fair labour practice;
2.1.7.2 The Department’s decision to withhold the payment of his Cost of Living Allowance (COLA) on the basis of his withdrawal was improper and prejudiced him; and

2.1.7.3 The Department failed to finalise the disciplinary proceedings within a reasonable period of time so that his reputation could be cleared and the unresolved matter has resulted in prejudice to his reputation.

3. **POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR TO INVESTIGATE THE MATTER**

3.1 The Public Protector was established in terms of section 181(1)(a) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

3.2 Section 182(1) of the Constitution provides that the Public Protector has the power to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice, to report on that conduct and take appropriate remedial action. It further directs that the Public Protector has additional powers prescribed in legislation.

3.3 The Public Protector is further empowered by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs and to resolve the disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.4 The Department of Home Affairs is an organ of state and its conduct amounts to conduct in state affairs, as a result this matter falls within the ambit of the Public Protector’s mandate.
3.5 The jurisdiction of the Public Protector was initially not disputed by any of the parties prior to the release of the provisional report. However, the Department subsequently disputed the jurisdiction of the Public Protector in its response to the provisional report.

3.6 The Department’s argument regarding the Public Protector’s jurisdiction

3.6.1 The Department contested the jurisdiction of the Public Protector on the basis that the Complainant did not exhaust his remedies in terms of the Public Service Act, 1994 as provided for in section 6(3) of the Public Protector Act. The Department seems to have confused jurisdiction with the discretion of the Public Protector in terms of section 6(3) of the Public Protector Act.

3.6.2 The Department conceded that “in terms of the Constitution, the Public Protector Act and the SCA, the Public Protector has jurisdiction to investigate any conduct in state affairs and in public administration in which, such conduct is alleged or suspected to be improper or to result in impropriety or prejudice”. (own emphasis)

3.6.3 The Department however, argued that:

“in terms of section 6(3) of the Public Protector Act, the Public Protector may refuse to investigate matters if the person ostensibly prejudiced is an officer or employee in the service of the State or is a person to whom the provisions of the Public Service Act is applicable and has not taken all reasonable steps to exhaust the remedies conferred upon him or her in terms of the said Public Service Act or whether the person ostensibly prejudiced by the conduct referred to in
whether the person ostensibly prejudiced by the conduct referred to in subsections (4) and (5) and has not taken all reasonable steps to exhaust his or her legal remedies." (the Department’s emphasis)

3.6.4 The Department further argued that:

"the Public Protector has jurisdiction to deal with the matter if the person is an officer or employee in the service of the State and that person has taken all reasonable steps to exhaust the remedies conferred upon him in terms of the Public Service Act." (the Department’s emphasis)

3.6.5 The Department also referred to section 157(1) of the LRA which provides that subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court. (the Department’s underlining)

3.6.6 In amplification of its argument regarding the provision referred to above, the Department cited Gcaba v Minister for Safety and Security and Others case in which the Constitutional Court held that the problem the legislature sought to address in enacting the LRA was to overcome the perpetual tribulations caused by the multiplicity of laws, as well as overlapping and competing jurisdictions of the different courts. The Constitutional Court further held that the LRA should be a litigant’s first port of call in employment disputes.

3.6.7 The Constitutional Court also referred to the principle espoused in SANDU v Minister of Defence case where the court held that where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that

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2 2010 (1) SA 238 (CC) at paras 35 and 36.
legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard.\(^3\)

3.6.8 The Constitutional Court held that the employee cannot, avoid the dispute resolution mechanisms provided for in the LRA by alleging a violation of a constitutional right in the Bill of Rights. The Constitutional Court further held that it could not have been the intention of the legislation to allow an employee to raise what is essentially a labour law dispute under the provisions section157(2). The Constitutional Court further held that what is in essence a labour dispute as envisaged in the LRA should not be labelled a violation of a constitutional right in the Bill of Rights simply because the issues raised could also support a conclusion that the conduct of the employer amounts to a violation of a right entrenched in the Constitution.\(^4\)

3.6.9 The Department also highlighted that the Constitutional Court in Gcaba\(^5\) case also dealt with the issue whether labour matters amounts to administrative action subject to review and held that generally employment and labour relationship issues do not amount to administrative action within the meaning of PAJA. In this case the Constitutional Court further held that section 33 of the Constitution does not regulate the relationship between the State as employer and its workers. It further held that when a grievance is raised by an employee relating to the conduct of the State as an employer and it has few or no direct implications or consequences for other citizens, it does not constitute administrative action.

3.6.10 The Department argued that from the description of the complaint it is clear that the cause of action is founded on fair labour practice and therefore falls within the exclusive jurisdiction of the LRA. The Department reiterated that the Constitutional Court stated that a litigant/complainant cannot base its

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3 Supra at para 37.
4 n3 supra at para 38.
5 n3 supra at para 64.
claim on the LRA and then choose to bypass the dispute resolution mechanisms established in terms of the LRA.

3.6.11 The Department argued that since the entire cause of action relied on by the Complainant was founded on the LRA, the Public Protector has no jurisdiction to entertain the matter.

3.6.12 The Department argued that the Complainant has to show that the Public Protector has the necessary jurisdiction in that he has exhausted all remedies available to him in terms of the Public Service Act and the LRA; and that his complaint is not based on an unfair labour practice which is specifically dealt with in section 191 of the LRA.

3.6.13 The Department also referred to Clause 5 of its Contract of Placement in Foreign Mission entered into with the Complainant and emphasised that an employee may be withdrawn if it is deemed to be in the interest of the Department, the country or the employee and/or if there is a violation of the code of conduct.

3.6.14 The Department further highlighted that in terms of Clause 10 of the contract, any dispute between the Employer and the Employee arising out of the interpretation or application of the contract shall be settled amicably through consultation or negotiation between the Employer and the Employee and shall be done in accordance with the dispute resolution procedures of the Department as well as all applicable labour law processes. In this regard the Department referred to section 191 of the LRA which deals with disputes about unfair dismissal and unfair labour practices as well as case law relating to that section. The Department argued that the Complainant failed to comply with the dispute resolution procedures provided for in his employment contract.
3.7 The Public Protector's response to the Department's argument on jurisdiction

3.7.1 The Department conceded in its response to the provisional report that the Public Protector has jurisdiction in terms of the Constitution and the SCA to investigate any conduct in state affairs or in the public administration which is alleged or suspected to be improper or to result in impropriety or prejudice.

3.7.2 Section 2 of the Constitution provides that: "the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled." (own emphasis)

3.7.3 The Department contended that section 157(1) of the LRA provides that the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of the LRA or in terms of any other law are to be determined by the Labour Court. However, it should also be noted that section 157(1) is subject to the Constitution.

3.7.4 Since section 182(1) of the Constitution provides that: "the Public Protector has the power as regulated by the national legislation to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice", therefore, in terms of section 2 of the Constitution, the Public Protector is not precluded by section 157(1) of the LRA to investigate this matter. (own emphasis)

3.7.5 The Department's argument against the Public Protector's jurisdiction based on the Gcaba\(^6\) case cannot be sustained on the basis that the Constitutional Court in that case was called upon to pronounce on the jurisdiction of the courts and not of the Public Protector.

\(^6\) n3 supra.
3.7.8 The Department further highlighted that in the Gcaba case, the Constitutional Court held that the employee cannot avoid the dispute resolution mechanisms provided for in the LRA by alleging a violation of a constitutional right in the Bill of Rights. It should be noted that the pronouncement of the Constitutional Court in this regard, was in the context of matters dealt with by the courts specifically in the context of the jurisdiction of the High Court and the Labour Court and not by the Public Protector. It is also worth noting that the Complainant did not allege a violation of a constitutional right in the Bill of Rights. However, when making a finding the Public Protector is not precluded from making a finding of a violation of a constitutional right in the Bill of Rights if the evidence proves such.

3.7.9 The Department’s assertion that labour relations issues do not amount to administrative action within the meaning of PAJA is correct. However, it is not clear why the assertion was made since the Public Protector does not exercise powers in terms of PAJA in investigating this matter but in terms of the Public Protector Act.

3.7.10 Notwithstanding that the complaint is based on unfair labour practice in terms of the LRA, the Public Protector has jurisdiction in terms of section 182(1) of the Constitution as alluded to above. Any conduct within the meaning of section 182(1) of the Constitution includes alleged unfair labour practice.

3.7.11 The Department further sought to rely on section 6(3) of the Public Protector Act in arguing that the Public Protector does not have jurisdiction to deal with this matter. Section 6(3) of the Public Protector Act provides that:

"the Public Protector may refuse to investigate a matter reported to him or her, if the person ostensibly prejudiced in the matter is an officer or employee in the service of the State or is a person to whom..."
the provisions of the Public Service Act, 1994, are applicable and has, in connection with such matter, not taken all reasonable steps to exhaust the remedies conferred upon him or her in terms of the said Public Service Act, 1994; or prejudiced by the conduct referred to in subsections (4) and (5) and has not taken all reasonable steps to exhaust his or her legal remedies in connection with such matter."

(own emphasis)

7.2.11 The Department seems to confuse may with must in the context of section 6(3) of the Public Protector Act. In terms of this section the Public Protector has discretion whether to investigate this matter or not and as such the Public Protector has exercised such discretion to investigate for the reasons outlined hereunder.

3.7.9 The Complainant did not provide the Public Protector with any information or reasons in his letter of complaint regarding why he chose to lodge his complaint with the Public Protector instead of the Public Service Commission or the relevant bargaining council. However, upon assessment of his complaint it was clear that there was a prima facie case of alleged maladministration with regard to the manner in which he was withdrawn from Cuba and the failure to proceed with disciplinary action against him despite allegations made. It is for that reason that the Public Protector decided to investigate the matter in terms of the powers granted in section 6(4)(a)(i) of the Public Protector Act. Section 6(4)(a)(i) of the Public Protector Act provides that the Public Protector shall, be competent to investigate on his or her own initiative or on receipt of a complaint, any alleged maladministration in connection with the affairs of government at any level.
4. THE ISSUES CONSIDERED BY THE PUBLIC PROTECTOR

4.1 The following issues were considered and investigated by the Public Protector:

4.1.1 Did the Department withdraw the Complainant from a foreign posting in Cuba and was such withdrawal procedurally flawed and improper?

4.1.2 Was the delay by the Department to hold a disciplinary hearing to deal with the allegations against the Complainant prior to his resignation unreasonable and improper?

4.1.3 Was the Department’s decision to withhold the Complainant’s Cost of Living Allowance due to him by virtue of being posted at the Cuban Foreign Mission after withdrawing him improper?

4.1.4 If the answer to any of the above issues is in the affirmative, was the Complainant prejudiced as envisaged in section 6(4)(a)(v) of the Public Protector Act?

5. THE INVESTIGATION

The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act, 1994.

5.1 Key sources of information

5.1.1 Correspondence

5.1.1.1 The letter of complaint;
5.1.2.2 Correspondence with the Complainant;

5.1.3 Various correspondence and enquiries with the Department of Home Affairs:

i. Mr J W McKay, Deputy Director-General of Immigration Services dated 30 March 2011 and 26 May 2011;

ii. Mr R Oppelt, Director: Labour Relations dated 14 July 2011, 30 August 2011 and 14 September 2011;

iii. Mr M Apleni, Director-General dated 16 February 2012; and

iv. Ms P Molapo from the Chief Directorate: Foreign Offices Coordination 28 May 2012

5.1.4 Various correspondence and enquiries with the Department of Correctional Services:

i. Mr T S Moyane, National Commissioner dated 27 October 2011 and 10 April 2012;

ii. Mr J Mekoa, Director: Administration dated 10 May 2012; and

iii. Mr L Thekisho, DC Employee Relations dated 18 July 2012.

5.1.2 Documentation

5.1.2.1 Voluminous documents relating to the complaint in the form of 8 letters and e-mail correspondence between:

i. The Complainant and the Department;
ii. The Department of International Relations and Cooperation (DIRCO) and the Department of Home Affairs (DHA); and

iii. The Public Protector South Africa (PPSA) and DHA/DIRCO.

5.1.3 Meetings

5.1.3.1 Meeting held between the Public Protector and Mr M Apleni, Director-General of the Department of Home Affairs on 30 January 2013.

5.2 Legislation and other prescripts

5.2.1 The Constitution of the Republic of South Africa, 1996;

5.2.2 Labour Relations Act 66 of 1995;

5.2.3 DHA’s Standard Contract of Placement in Foreign Mission in use from 2005;

5.2.4 PSCBC Resolution 1 of 2003: Disciplinary Code and Procedures; and

5.2.5 Foreign Service Dispensation 2010.

6. EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

6.1 The Complainant’s submission

6.1.1 The Complainant provided the Public Protector with a copy of a letter dated 26 April 2010, which he allegedly received through the office of the Ambassador to the Republic of Cuba from the Deputy Director-General:
documentation that contained allegations of very serious acts of misconduct whilst based in Cuba as a transferred/diplomatic official. The letter further stated that as a result of the nature of the allegations and the impact they may have on the relations between South Africa and Cuba it was decided by the Department to withdraw him from Cuba with immediate effect. The Complainant was also informed that on his arrival in South Africa he would be informed of the disciplinary steps that the Department intends instituting against him.

6.1.2 The Complainant also provided the Public Protector with a copy of a letter dated 26 May 2010, which his attorneys allegedly addressed to the Director-General of the Department indicating the following:

6.1.2.1 The Complainant was removed from his post without due process and that such removal contravened the prescripts in the Public Service dealing with the procedure in handling disciplinary matters;

6.1.2.2 The Complainant was not given an opportunity to respond to the allegations as espoused in the letter dated 26 April 2010 from the Deputy Director-General: Immigration Services;

6.1.2.3 No allegations were put to the Complainant before the Department’s unilateral action to remove him from his post was taken. Further that the Complainant is unaware of the nature of the Department’s allegations;

6.1.2.4 The Complainant is being “unfairly prejudiced” in that the Department’s conduct prevents him from qualifying for certain benefits due to him in terms of his secondment;
6.1.2.5 The Department’s conduct had embarrassed and insulted the Complainant without any cause; and

6.1.2.6 The Department had not followed the procedure as laid down in Resolution 1 of 2003 which provides that the Complainant may be suspended with full emoluments after being afforded an opportunity to respond to any allegations.

6.1.3 The Complainant further provided the Public Protector with a copy of a letter dated 26 July 2010, he allegedly addressed to the Deputy Director-General: Immigration Services in which he indicated that it had been one month and four days since he returned from Cuba on 12 June 2010 and that he received no communication regarding the disciplinary steps that the Department intended to institute against him.

6.1.4 The Complainant also submitted a copy of a letter dated 1 September 2010 he allegedly received from the Director-General’s office which advised him of the intended disciplinary action and which provided him with an opportunity to provide reasons within five (5) working days from the date of receipt of the letter as to why the Department should not institute disciplinary action against him. The letter contained the following allegations:

6.1.4.1 The Complainant and his colleague, on or about 15 March 2009 at or near the city of Cienfuegos in Cuba, were in a state of intoxication, insulted a group of Cuban citizens and threw a can of beer at them. Further that, on the same day, he was also disrespectful and insulted two patrol officers;

6.1.4.2 Whilst performing official duties in Cuba, he was involved in serious traffic law violations;
6.1.4.3 Whilst performing official duties in Cuba he, on a very dangerous occasion tried to enter an unauthorised area and had to be detained by Cuban State Security agents; and

6.1.4.4 During December 2009 whilst performing official duties in Cuba, he physically attacked and insulted, in a disrespectful manner, a Cuban airport customs official.

6.1.5 The Complainant provided the Public Protector with a copy of a letter dated 2 September 2010, in which he allegedly responded to the Department’s intended disciplinary action against him. In the letter, the Complainant raised the following issues with the Department:

6.1.5.1 The Department took a unilateral decision to recall him without following all procedures as stipulated in the Labour Relations Act;

6.1.5.2 The Department was issued with a letter dated 26 May 2010 from his attorneys and no response was made thereto;

6.1.5.3 A letter of withdrawal was issued on 26 April 2010 but he was only served with a letter of intent to institute disciplinary action against him on 1 September 2010 (4 months and 5 days) which to him was unfair as he had lost certain benefits that were due to him during that period;

6.1.5.4 The Department did not wait for the Ambassador’s report or a report from DIRCO before withdrawing him and DIRCO was only informed of the withdrawal a month after the letter was given to him; and

6.1.5.5 A request for physical evidence, to enable him to respond to the allegations levelled against him, was included.
6.1.6 In response to the Public Protector’s provisional report, the Complainant indicated that he had read the contents thereof and fully supports the intended findings and remedial action contained therein.

6.2 The Department’s response

6.2.1 The Public Protector made an enquiry on 30 March 2011 and followed up on 26 May 2011 with the Department regarding the Complainant’s allegations. On 7 July 2011 a response was received to which a copy of an Aide Memoire7 (Memorandum) addressed to the South African Embassy purportedly by the Cuban Ministry of Foreign Affairs and a copy of the Department’s letter of intended disciplinary action against the Complainant was attached. The allegations against the Complainant are also contained in the aforementioned Memorandum. The Memorandum stated inter alia that:

"In recognition of the excellent relations between Cuba and South Africa, Deputy Minister...informed that the Ministry of Foreign Affairs had agreed that the Deputy Minister summon the Ambassador with all these elements and, without requesting him to get them out of the country or to declare them ‘persona non grata’, point out to him emphatically that new incidents would not be tolerated."

6.2.1.1 According to the Department’s response, the Complainant was withdrawn from Cuba after a formal complaint was received by the South African Ambassador in Cuba from the Cuban government regarding his conduct. The Department indicated to the Complainant in a letter dated 1 September 2010 that it intended instituting disciplinary action against him.

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7 Aide memoire – is defined as something that helps you to remember something. (www.macaumillandictionary.com).
The term is used to refer to notes, or memoranda, that are taken to jog one’s memory later.
The name was used in the UK diplomatic service. (www.phrases.org.uk)
6.2.1.2 The Department indicated that prior to taking disciplinary action against the Complainant, it was summoned to a meeting by DIRCO to discuss further allegations of misconduct that were uncovered against him during a later visit by DIRCO to Cuba. It advised that the documents relating to the acts of misconduct committed by the Complainant were, however, in a foreign language and DIRCO undertook to have the documents translated and transcribed and also undertook to secure witnesses to assist the Department during the disciplinary process.

6.2.1.3 The Department stated further that during the period of awaiting the transcribed documents, the Complainant resigned and assumed employment with the Department of Correctional Services (DCS). Further that due to his resignation and the outstanding documentary evidence from DIRCO, the Department was not in a position to finalise the disciplinary process initiated against the Complainant as he was no longer its employee.

6.2.1.4 The Department concluded that it is of the view that the allegations against the Complainant were of a very serious nature and warranted his withdrawal from Cuba. Therefore the Department is not in a position to agree with the Complainant’s statement that he is owed USD 42 896 by it. Further that the Department does not agree with the view that it committed an unfair labour practice when it decided to withdraw the Complainant from Cuba. (own emphasis)

6.2.2 Another follow up enquiry was made with the Department on 14 July 2011 regarding the issue that the Department allegedly did not follow the Labour Relations Act when dealing with the Complainant’s matter and that in terms of the Foreign Service Dispensation the Complainant was entitled to the COLA in terms of paragraph 6.2.1(iii) which was withheld.
6.2.3 The Department responded on 30 August 2011 and advised that the provisions of Clause 5.3 of the contract entered into between the Department and the Complainant provided that:

"The employee represents the Employer and the Republic of South Africa at large, he or she strictly adhere to and behave in accordance with the Code of Conduct mentioned in, Chapter 2 of the Public Service Regulations, 2001. Should the said Code of Conduct be violated whereby the Employer or Country is brought in disrepute, the Employee shall, on the recommendation of the host country or head of the Mission, immediately be withdrawn from service abroad."

6.2.4 The Department contended that it acted in accordance with the above provision and that the Complainant would as a result not be eligible or entitled to the allowances that he forfeited as a result of his conduct in Cuba, which ultimately led to his recall. The Department indicated that the disciplinary process against the Complainant could not be finalised and that a decision had been made to forward the Complainant's disciplinary record to DCS. The matter has since been sent back and forth between the Department and DCS without any resolution or end in sight.

6.2.5 During the investigation the Public Protector was provided with a copy of an e-mail dated 26 February 2010, sent by the Ambassador of South Africa to Cuba (the Ambassador) to the Deputy Director-General: Human Resources at DIRCO by the Complainant. In the e-mail, the Ambassador requested the Deputy Director-General: Human Resources to consider paying an urgent visit to the Cuban Mission in order to help them to deal with the allegations against the Complainant and his colleague. However, nowhere in the correspondence did the Ambassador recommend that they immediately be withdrawn from the service abroad.
6.2.6 Subsequent to the issuing of the provisional report, the Public Protector held a meeting with the DG of the Department on 30 January 2013 at the request of the Minister of Home Affairs.

6.2.6.1 During that meeting the DG indicated the following:

(a) The Complainant left the Department at the end of November 2010 and not end of December 2010;

(b) Around 17 February 2010, the South African Ambassador in Cuba was called by the Foreign Ministry in Cuba regarding allegations of misconduct by the Complainant and his colleague;

(c) Subsequently the Ambassador received and Aide Memoire from the Cuban Foreign Ministry regarding the alleged misconduct by the Complainant and his colleague;

(d) The withdrawal of the Complainant was not the same as suspension and that the result of his disciplinary action was not determinant of whether he would stay in Cuba. The DG further indicated that withdrawal means that as a posted official you take all your belongings and get back to the Republic;

(e) The Complainant was withdrawn in terms of Clause 5(3) of his contract with the Department on the recommendation of the Ambassador;

(f) The Complainant arrived on 12 June 2010, but claims COLA for May 2010 including December. According to the DG if anything the Complainant should be claiming COLA for June – November 2010. The DG indicated that COLA was only payable when an official
was suspended. However, the Complainant was not suspended but withdrawn; and

(g) There were delays in dealing with the disciplinary proceedings.

6.2.6 In written response to the findings in the provisional report, the Department reiterated that the Complainant was not suspended but was withdrawn from the Cuban Mission therefore the section regarding suspension relied on by the Public Protector has no bearing on the matter. The Department further argued that the allegations against the Complainant are a violation of clause 5 of the Code of Conduct for Public Servants in that it is *prima facie* acts of misconduct as provided for in Annexure A to the Disciplinary Code and Procedure for the Public Service: Resolution 1 of 2003.

6.2.7 The Department indicated that the failure to institute a disciplinary hearing against the Complainant within a reasonable time was exacerbated by the fact that it requested a report from DIRCO, on the allegations against the Complainant which report was only provided to it towards the end of September 2010. However, the Department argued that the resignation/transfer of the Complainant and his subsequent employment with the DCS was only brought to the attention of its Directorate: Labour Relations towards the end of 2011. The Department indicated that it subsequently held meetings with DCS in order to deal with the intended disciplinary hearing and the matter was only resolved towards the end of 2012.

6.3.17 The Department conceded that the delay is long but argued that the Complainant has recourse in terms of the collective agreement to deal with it in the GPSSBC.
6.3.18 With regard to the payment of COLA, the Department argued that in terms of the Foreign Service Dispensation and the Determination on the Foreign Service Dispensation, COLA is only paid to an employee who is deployed at a Foreign Service Mission. The Department further argued that such COLA is withdrawn once an official is transferred back to the Republic. The Department submitted that the Complainant had not raised the issue of the non-payment of COLA in the correct forum.

6.3.19 The Department highlighted that the letter of withdrawal of the Complainant specifically stated that "As a result of the nature of the allegations and the impact it may have on the relations between South Africa and Cuba it has been decided to withdraw you from Cuba with immediate effect." The Department submitted that the procedure followed in arriving at that decision was as a result of communications received from the Host Country and the Head of Mission being the Ambassador. The Department further submitted that it was the Ambassador who received the letter and handed same to the Complainant.

7. EVALUATION OF THE EVIDENCE OBTAINED DURING THE INVESTIGATION

7.1 Did the Department withdraw the Complainant from a foreign posting in Cuba and was such withdrawal procedurally flawed and improper?

7.1.1 It is common cause that the Complainant was withdrawn from the Cuban Foreign Mission in April 2010 on allegations of acts of misconduct whilst in Cuba.

7.1.2 In its response to the Public Protector's provisional report, the Department contended that in terms of Clause 5 of its Contract of Placement in Foreign Mission entered into with the Complainant an employee may be withdrawn if
it is deemed to be in the interest of the Department, the country or the employee and or if there is a violation of the Code of Conduct. The Department has however, not provided any evidence to proof that it was in its interest, the country or the Complainant to withdraw him from the Cuban Mission, except to highlight that the letter of withdrawal specifically stated that "As a result of the nature of the allegations and the impact it may have on the relations between South Africa and Cuba it has been decided to withdraw you from Cuba with immediate effect".

7.1.3 A perusal of the Aide Memoire addressed to the Ambassador by the Cuban Ministry of Foreign Affairs indicates that there was no recommendation or request to withdraw the Complainant from the Cuban Mission as captured hereunder, contrary to what the DG indicated in the meeting with Public Protector on 30 January 2013:

"In recognition of the excellent relations between Cuba and South Africa, Deputy Minister...informed that the Ministry of Foreign Affairs had agreed that the Deputy Minister summon the Ambassador with all these elements and, without requesting him to get them out of the country or to declare them 'persona non grata', point out to him emphatically that new incidents would not be tolerated." (emphasis added)

7.1.4 Clause 5(3) of the Contract of Placement specifically provides that: "should the said Code of Conduct be violated whereby the Employer or country is brought in disrepute, the Employee shall, on the recommendation of the host country or Head of the Mission, immediately be withdrawn from service abroad." The Department contended that the procedure followed in arriving at the decision to withdraw the Complainant was as a result of communications received from the Host Country and the Head of Mission being the Ambassador but failed to outline or provide evidence of what that
procedure entailed. The Department did not provide any evidence to indicate that the Complainant was given an opportunity to respond to the allegations before the decision to withdraw him was taken. The Department also did not provide concrete evidence to prove that the Head of the Mission had recommended that the Complainant be withdrawn from Cuba. Although the DG contended at the meeting with the Public Protector on 30 January 2013 that the Complainant was withdrawn on the recommendation of the Ambassador, the Department did not provide any diplomatic note, minutes of a meeting or correspondence to prove that the Head of the Mission had recommended that the Complainant be withdrawn.

7.1.6 In its response to the provisional report, the Department reiterated that the allegations against the Complainant is a violation of the Code of Conduct in that it is *prima facie* acts of misconduct as provided for in Annexure A to the Disciplinary Code and Procedure for the Public Service 1 of 2003. However, the Department did not prove such allegations before withdrawing him from the Cuban Mission.

7.1.7 Whilst it is acknowledged that the allegations against the Complainant were of a serious nature, he was withdrawn from the Cuban Mission without being given an opportunity to respond to them. Contrary to the Department’s contention, the allegations of *prima facie* acts of misconduct against the Complainant could only have constituted a violation of the Code of Conduct if they had been proved. The Department seems to have concluded that the Complainant is guilty of those alleged acts of misconduct and withdrew him from the Cuban Mission without proving them.
7.2 Was the delay by the Department to hold a disciplinary hearing to deal with the allegations against the Complainant prior to his resignation unreasonable and improper?

7.2.1 The Complainant was advised of his withdrawal from the Cuban Foreign Mission on the basis of alleged acts of misconduct by a letter dated 26 April 2010. He subsequently received a letter dated 1 September 2010 informing him of the Department’s intended disciplinary proceedings against him and was requested to provide reasons within 5 days why such disciplinary action should not be taken against him.

7.2.1.1 The Department argued that the allegations against the Complainant were of a very serious nature and warranted his withdrawal from Cuba but failed to institute any disciplinary action against him subsequent to the letter dated 1 September 2010.

7.2.1.2 It is noted that despite the Complainant having addressed a letter dated 26 July 2010 to the Deputy Director-General: Immigration Services in which he indicated that it had been one month and four days since he returned from Cuba on 12 June 2010, nothing had been communicated to him regarding the disciplinary steps that the Department intended instituting against him.

7.2.1.3 The Department’s letter of intended disciplinary action against the Complainant was only despatched to him on 1 September 2010, four months after he had been informed that he was being withdrawn from the Cuban Mission on allegations of misconduct.

7.2.1.4 The Department argued that the reason for the delay was caused by that prior to taking disciplinary action against the Complainant, it was summoned to a meeting by DIRCO to discuss further allegations of
misconduct that were uncovered against him during a later visit by DIRCO to Cuba. The Department argued further that, the documentation relating to the additional acts of misconduct committed by the Complainant were however in a foreign language and DIRCO undertook to have the documents translated and transcribed and also undertook to secure witnesses to assist the Department during the disciplinary process.

7.2.1.5

The same explanation was also given during the meeting of 30 January 2013. The Department did not provide any explanation as to why it did not proceed with the disciplinary action on the basis of the already established alleged “prima facie” of acts of misconduct against the Complainant for which he was withdrawn from the Cuban Foreign Mission, and add further allegations later when they had been confirmed.

7.2.1.6

The Department did not provide any evidence to indicate that the delay in proceeding with the disciplinary action against the Complainant was communicated to him.

7.2.1.7

The contention by the Department that the Complainant was not suspended but was withdrawn from the Cuban Mission therefore the section regarding suspension relied on by the Public Protector has no bearing on the matter is misconstrued. Paragraph 7.2(a)(i) of the Disciplinary Code and Procedures provides that the employer may suspend an employee on full pay or transfer the employee if the employee is alleged to have committed a serious offence. The withdrawal of the Complainant from Cuba constitutes transfer in the context of paragraph 7.2(a)(i) referred to above. The Public Service Commission (PSC) recorded in its “Report on Management of Precautionary Suspension in the Public Service” June 2011, that the
"Department of Home Affairs indicated that it considers transfers as an alternative to precautionary suspension especially in cases of employees working abroad in foreign missions." This was clearly the case with the Complainant. (own emphasis)

7.2.1.8 No disciplinary hearing was instituted against the Complainant until he resigned in November 2010 and joined Correctional Services despite an inordinately long period of time having elapsed since he was withdrawn from the Foreign Mission in Cuba.

7.3 Was the Department’s decision to withhold the Complainant’s Cost of Living Allowance due to him by virtue of being posted at the Cuban Foreign Mission after withdrawing him improper?

7.4.1 The Department argued that the allegations against the Complainant were of a very serious nature and warranted his withdrawal from Cuba. Therefore it is not in a position to agree with the Complainant’s statement that he is owed USD 42 896 by it. The Department further argued that it also disagreed with the view that it committed an unfair labour practice when it decided to withdraw the Complainant from Cuba.

7.4.2 The Department further argued that it acted in accordance with Clause 5.3 of the Contract of Placement in Foreign Mission entered into with the Complainant when it withdrew him from Cuba and that he would as a result not be eligible or entitled to the allowances that he forfeited as a result of his conduct in Cuba.

7.4.3 In a meeting with the Public Protector on 30 January 2013 and in its response to the Public Protector’s provisional report, the Department

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contended that COLA is only paid to an employee who is deployed at a
Foreign Service Mission and that such is withdrawn once an official is
transferred back to the Republic. The Department further contended that the
Complainant had not raised the issue of non-payment of COLA in the correct
forum in terms of his Contract of Placement at a Foreign Mission.

7.4.4 In its response to the provisional report, the Department did not dispute that
in terms of Paragraph 6.2.1(iii) of the Foreign Service Dispensation, 2010, the
DPSA letter dated 22/02/2006, which provides that: "if an official is
recalled due to a Labour Relations action he/she is regarded as being on
official duty and hence paragraph 6.2.1(iii) of COLA will apply", is applicable
to the Complainant. (own emphasis).

7.4.5 Paragraph 6.2.1(iii) of COLA provides that a designated official absent from
Mission on official duty for a period of 1 to 60 days is entitled to 100% of the
applicable COLA amount payable whether Accompanied COLA (AC) or
Unaccompanied COLA (UC) Further that a designated official absent from
the Mission on official duty for a period 61 days and more is entitled to 50%
of the applicable COLA amount payable whether AC or UC.

7.4.6 The Department has not provided any evidence to suggest that the
Complainant was recalled or withdrawn for any other reason(s) except for a
labour relations action on the basis of his alleged misconduct. The fact that
the Department contended in its response to the provisional report that the
Complainant knew or reasonably ought to have known that he would not be
sent back to Cuba, if he had to collate all his personal effects, does not
detract from the fact that he was withdrawn on account of a labour relations
action.

7.4.7 On proper construction Clause 6.2.1 of the Foreign Service Dispensation
does not support the Department's contention that once withdrawn from a
Foreign Service mission as in the circumstances of the Complainant, COLA does not become applicable, except for providing that in the case of the Head of Mission who is absent from the mission because of being recalled after 31 days and more and a designated official absent from duty on unpaid leave, 0% COLA is payable. Clause 6.2.1 does not make any reference to a person in the circumstances of the Complainant other than the reference made to the DPSA letter dated 22/02/2006 as alluded to above.

8. LEGAL AND REGULATORY FRAMEWORK

8.1 The Constitution, 1996

8.1.1 Section 2 of the Constitution provides that "the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

8.1.2 Section 7(2) provides that: "The State must respect, protect, promote and fulfil the rights in the Bill of Rights.

8.1.2.1 In terms of section 7(2) the Department had an obligation to respect, protect, promote and fulfil the Complainant’s right to fair labour practices.

8.1.3 Section 23(1) provides that: "Everyone has the right to fair labour practices."

8.1.3.1 In terms of section 23(1) the Complainant has a right to fair labour practices.

8.2 Public Protector Act, 1994

8.2.1 Section 7(9) of the Public Protector Act provides that:
"If it appears to the Public Protector during the course of investigation that any person is being implicated in the matter being investigated and that such implication may be to the detriment of that person or that an adverse finding pertaining to that person may result, the Public Protector shall afford such a person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances."

8.2.2 The Public Protector issued a provisional report in accordance with section 7(9) of the Public Protector Act on 12 December 2012. The provisional report was distributed on the basis of confidentiality to provide the recipients therein an opportunity to respond to its contents.

8.2.3 The provisional report was submitted to the Minister of Home Affairs, Ms G N M Pandor and the Director-General of the Department of Home Affairs, Mr M Apleni. The Complainant was also provided with a copy of the provisional report.

8.3 Labour Relations Act, 1995 (LRA)

8.3.1 Section 186(2)(b) defines among others "Unfair labour practice as – any unfair act or omission that arises between an employer and an employee involving the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee."

8.3.1.1 In terms of section 186(2)(b) the withholding of the Complainant’s COLA after being withdrawn from the Foreign Mission in Cuba on the basis of untested allegations of serious acts of misconduct constituted unfair disciplinary action short of dismissal.
8.4 Public Service Coordinating Bargaining Council (PSCBC) Resolution 1 of 2003 (Disciplinary Code and Procedures)

8.4.1 Paragraph 2.2 of the Disciplinary Code and Procedures provides that: "discipline must be applied in a prompt, fair, consistent and progressive manner." (own emphasis)

8.4.1.1 In terms of Paragraph 2.2 the Department had a duty to institute disciplinary proceedings against the Complainant fairly and without undue delay.

8.4.2 Paragraph 7.2(a) (i) provides that the employer may suspend an employee on full pay or transfer the employee if the employee is alleged to have committed a serious offence;

8.4.3 Paragraph 7.2(b) provides that a suspension of this kind is a precautionary measure that does not constitute judgment, and must be on full pay;

8.4.4 Paragraph 7.2(c) provides that if an employee is suspended or transferred as a precautionary measure, the employer must hold a disciplinary hearing within a month or 60 days, depending on the complexity of the matter and the length of the investigation. Further that the chair of the hearing must then decide on any further postponement

8.4.4.1 In terms of Paragraphs 7.2(a) (i) and (c) the Department is within its right to transfer an employee if he or she is alleged to have committed a serious misconduct. However, the Department is obliged to hold a disciplinary hearing within a month or 60 days depending on the complexity of the matter and the length of the investigation.
8.5 Foreign Service Dispensation, 2010

8.5.1 The Foreign Service Dispensation provides for the Cost of Living Allowance (COLA) for officials designated for deployment in the Foreign Service abroad.

8.5.2 Paragraph 6.2.1(iii) of COLA provides that a designated official absent from Mission on official duty for a period of 1 to 60 days is entitled to 100% of the applicable COLA amount payable whether Accompanied COLA (AC)\(^9\) or Unaccompanied COLA (UC)\(^10\). Further that a designated official absent from the Mission on official duty for a period 61 days and more is entitled to 50% of the applicable COLA amount payable whether AC or UC. It further provides that according to the DPSA letter dated 22/02/2006, if an official is recalled due to a Labour Relations action he/she is regarded as being on official duty and hence this rule will apply. (emphasis added)

8.5.2.1 In terms of the DPSA letter dated 22/02/2006, the Complainant is entitled to 100% of the applicable COLA within the first 60 days after being withdrawn from the Foreign Mission in Cuba and thereafter 50% of the applicable COLA until the disciplinary proceedings against him had been concluded as he was supposed to be regarded as being on official duty despite being recalled due to a Labour Relations action.

8.6 Department's standard Contract of Placement in Foreign Mission

8.6.1 Clause 5.3 of the contract provides as follows:

"The employee represents the Employer and the Republic of South Africa at large, he or she strictly adhere to and behave in accordance

\(^9\) Applies to married couples.
\(^10\) Applies to single designated employee.
with the Code of Conduct mentioned in, Chapter 2 of the Public Service Regulations, 2001. Should the said Code of Conduct be violated whereby the Employer or Country is brought in disrepute, the Employee shall, on the recommendation of the host country or head of the Mission, immediately be withdrawn from service abroad.”

(emphasis added)

8.6.1.1 In terms of clause 5.3 of the Contract of Placement in Foreign Mission entered into between the Department and the Complainant, the Complainant could only be withdrawn from the service abroad on the recommendation of the host country or head of the Mission.

9. ANALYSIS AND CONCLUSION

9.1 Did the Department withdraw the Complainant from a foreign posting in Cuba and was such withdrawal procedurally flawed and improper?

9.1.1 It is not disputed that the Department withdrew the Complainant from the Cuban Foreign Mission on the grounds of alleged misconduct.

9.1.2 In terms of Clause 5.3 of the contract of placement in foreign mission, the Complainant could only have been withdrawn on the recommendation of the host country or head of the Mission. Save for alleging that the Complainant was withdrawn on the recommendation of the South African Ambassador to Cuba, the Department did not provide the Public Protector with evidence in that regard.

9.1.3 Therefore in the absence of such evidence, in the form of a diplomatic note, correspondence or minutes of a meeting at which such a recommendation was made, the withdrawal was not in accordance with Clause 5.3.
9.2 Was the delay by the Department to hold a disciplinary hearing to deal with the allegations against the Complainant prior to his resignation unreasonable and improper?

9.2.1 It is clear from the evidence that the Department inordinately delayed holding a disciplinary hearing against the Complainant after he was withdrawn from the Cuban Foreign Mission in May 2010.

9.2.2 In terms of Paragraph 7.2(c) of the Public Service Coordinating Bargaining Council (PSCBC) Resolution 1 of 2003 (Disciplinary Code and Procedures), the Department was obliged to hold a disciplinary hearing within the maximum period of 60 days subsequent to his withdrawal.

9.2.3 The Department did not hold the disciplinary hearing within the 60 days period stipulated by the Disciplinary Code and Procedures. The Department also failed to inform the Complainant about the causes of its delay in proceeding with a disciplinary hearing against him.

9.3 Was the Department’s decision to withhold the Complainant’s Cost of Living Allowance due to him by virtue of being posted at the Cuban Foreign Mission after withdrawing him improper?

9.3.1 The evidence submitted confirmed that the Department withdrew the Complainant from the Cuban Foreign Mission on the grounds of alleged *prima facie* acts of serious misconduct. The Complainant was accordingly transferred back to the Republic of South Africa.

9.3.2 The evidence obtained indicated that when dealing with misconduct, the Department of Home Affairs considers transfers as an alternative to precautionary suspension especially in cases of employees working abroad in foreign missions.
9.3.3 In terms of Paragraph 6.2.1(iii) of the Foreign Service Dispensation, 2010, read with the DPSA letter dated 22/02/2006, the Complainant is entitled to 100% of the applicable COLA within the first 60 days after being withdrawn from the Foreign Mission in Cuba and thereafter 50% of the applicable COLA.

9.3.4 According to the DPSA letter dated 22/02/2006, if an official is recalled due to a Labour Relations action he/she is regarded as being on official duty.

9.3.5 There is no doubt that the Complainant was recalled or withdrawn due to a Labour Relations action.

9.3.6 The Department’s conduct of withholding the Complainant’s COLA after being withdrawn from the Foreign Mission in Cuba on the basis of untested allegations of serious acts of misconduct constituted unfair disciplinary action short of dismissal in terms of section 186(2)(b) of the LRA. The Department undoubtedly used the forfeiture of allowances as a disciplinary mechanism against the Complainant to his prejudice in terms of section 186(2)(b) of the LRA.

9.3.7 The conduct of the Department in the circumstances also violated the right of the Complainant to fair labour practices in terms of section 23(1) of the Constitution. The Department also had a duty to respect, protect, promote and fulfil the right of the Complainant to fair labour practices in terms of section 7(2).

9.3.7 The Department’s contention that the Complainant did not raise the issue of non-payment of COLA in the correct forum in terms of his Contract of Placement at a Foreign Mission, does not take the matter further in the light of the discussion regarding the Public Protector’s jurisdiction in this matter.
10. FINDINGS

The Public Protector’s findings are the following:

10.1 Did the Department withdraw the Complainant from a foreign posting in Cuba and was such withdrawal procedurally flawed and improper?

10.1.1 The Department withdrew the Complainant from a foreign posting in Cuba on the basis of allegations of misconduct against him.

10.1.2 The withdrawal was in violation of Clause 5.3 of its contract with him, which required that he be withdrawn on the recommendation of the host country or the Head of the Mission.

10.1.3 The conduct of the Department was improper as envisaged in section 182(1)(a) of the Constitution and constitutes maladministration in terms of section 6(4)(a)(i) of the Public Protector Act;

10.2 Was the delay by the Department to hold a disciplinary hearing to deal with the allegations against the Complainant prior to his resignation unreasonable and improper?

10.2.1 The Department delayed to hold a disciplinary hearing to deal with allegations of misconduct against the Complainant.

10.2.2 The delay was in violation of Paragraph 7.2(c) of the Public Service Disciplinary Code and Procedures which requires that disciplinary hearing be held within a maximum period of 60 days.

10.2.3 The delay was unreasonable and improper as envisaged in section 182(1)(a) of the Constitution and constitutes maladministration in terms of section 6(4)(a)(i) of the Public Protector Act;
10.3 Was the Department's decision to withhold the Complainant's Cost of Living Allowance due to him by virtue of being posted at the Cuban Foreign Mission after withdrawing him improper?

10.3.1 The Department withheld the Complainant's Cost of Living Allowance (COLA) due to him by virtue of being posted at the Cuban Foreign Mission after withdrawing him.

10.3.2 The Department's decision to withhold the Complainant's cost of living allowance due to allegations of misconduct against him contravened Paragraph 6.2.1(iii) (COLA) of the Foreign Service Dispensation read with the DPSA letter dated 22/02/2006, which provides that an official who is recalled due to a Labour Relations action he/she is regarded as being on official duty and hence is entitled to be paid the appropriate percentage of COLA.

10.3.3 The conduct of the Department in withholding the Complainant's COLA after withdrawing him due to allegations of misconduct against him was improper as envisaged in section 182(1)(a) of the Constitution and constitutes maladministration in terms of section 6(4)(a)(i) of the Public Protector Act; and

10.4 Was the Complainant prejudiced as envisaged in section 6(4)(a)(v) of the Public Protector Act by the Department's decision to withdraw him from the Cuban Foreign Mission, the delay in holding a disciplinary hearing against him regarding allegations of misconduct in Cuba and the withholding of his COLA due to him by virtue of being posted at foreign mission?

10.4.1 The Complainant suffered an injustice or prejudice as envisaged in section 6(4)(a)(v) of the Public Protector Act, in that:
10.4.1.1 He was treated unfairly;

10.4.1.2 He unfairly lost his cost of living allowance that he was legally entitled to;

10.4.1.3 His name and reputation remain tarnished due to the failure to afford him an opportunity to clear his name; and

10.4.1.4 His human dignity was impaired.

11. REMEDIAL ACTION

The appropriate remedial action to be taken in terms of section 182(1)(c) of the Constitution is the following:

11.1 The Director-General of the Department should ensure that the Complainant’s allowances which accrued to him in terms of his contract of placement in the Cuban Foreign Mission entered into with the Department, is paid to him together with interest at the prescribed rate of 15.5% per annum from the date of his withdrawal from Cuba until the date he transferred to Correctional Services;

11.2 The Director-General of the Department should investigate the reasons why the case was not dealt with properly and take the necessary action against any person who may have failed to act as required by law and policy; and

11.3 The Director-General of the Department should ensure that the Complainant is provided with a letter of apology for the prejudice he suffered as a result of the conduct of the Department in this matter,
12. MONITORING

12.1 The Public Protector will require the Director-General of the Department to:

12.1.1 Provide proof of payment within 30 days from the date of this report in terms of the remedial action to be taken at paragraph 11.1 above;

12.1.2 A report on the action taken in terms of the remedial action to be taken at paragraph 11.2 above within 60 days from the date of this Report; and

12.1.3 A copy of the letter of apology addressed to the Complaint in terms of the remedial action to be taken at paragraph 11.3 above within 30 days from the date of this Report.

12.2 The Public Protector will monitor compliance with the remedial action taken at regular intervals.

ADV TN MADONSELA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 25/07/2013

Assisted by: M I MATLAWE
SENIOR INVESTIGATOR: SERVICE DELIVERY