THE COST OF SPEECH

Report on an investigation into a complaint of prejudice suffered as a result of an internal communique issued by the Commission for Conciliation Mediation and Arbitration in response to a presentation made to the Parliamentary Portfolio Committee on Labour

Report No: 8 of 2013/14
REPORT ON AN INVESTIGATION INTO A COMPLAINT OF PREJUDICE SUFFERED AS A RESULT OF AN INTERNAL COMMUNIQUE ISSUED BY THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION IN RESPONSE TO A PRESENTATION MADE TO THE PARLIAMENTARY PORTFOLIO COMMITTEE ON LABOUR
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Executive Summary

(i) "The Cost of Speech" is my report as the Public Protector issued 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 my findings and directives on appropriate remedial action following an investigation into a complaint lodged by Mr S Dlamini (the Complainant) in September 2010, alleging prejudice suffered as a result of an internal communiqué issued by the Commission for Conciliation, Mediation and Arbitration (CCMA) in response to a presentation made by him and the Chairperson of the Society of Part-Time Commissioners and Labour Law Practitioners of South Africa (SPC & LLPSA) to the Parliamentary Portfolio Committee on Labour (the Portfolio Committee). The Complainant lodged the complaint in his representative capacity as an official of the SPC & LLPSA. However, none of his colleagues who appeared before the Portfolio Committee, made any submissions as interested parties in the matter as they were no longer in the employ of the CCMA.

(a) The Complainant principally alleged the following:

(aa) The Managers and Director of the CCMA acted improperly when they circulated an internal communiqué using state resources to attack the office bearers of the SPC & LLPSA;

(bb) They were attacked without adhering to the audi alteram partem rule;

(cc) The Director of the CCMA (the Director) and some senior managers form part of the Governing Body that interviews the part-
time commissioners during the renewal of their contracts; and
attacking some of these commissioners in the memorandum could
mean that they will not be objective during these interviews; and

(dd) The internal communiqué was selective and only attacked the
commissioners who were part of the delegation to Parliament.

(b) The Complainant requested my office to investigate and take the
following remedial action:

(aa) Declare the CCMA senior management and its Director’s conduct
as highly improper;

(bb) Declare that their conduct is prejudicial to the three individuals
involved and the SPC & LLPSA, and possibly its entire leadership;

(cc) Direct the Director and those Senior Management Team members
who were part of the communiqué not to sit-in in any interview
panel that would in future interview the said individuals and not be
party to the discussions and decision-making involving the three
individuals;

(dd) Find the CCMA conflicted in respect of the three individuals and
order that they be interviewed by a professional independent
body/panel made up of Senior Counsel and an assessor. The
Senior Counsel involved must be agreed by all parties involved,
or, if no agreement is reached, the Senior Counsel appointed by
the local Bar Council;

(ee) Recommend to the Governing Body of the CCMA to charge the
Director; and
(ff) Any other appropriate relief.

(iii) On analysis of the matter, the following issues were considered and investigated:

(a) Whether the conduct of the CCMA in referring to the Complainant and his colleagues who appeared before the Portfolio Committee in a manner in which they were referred to in its communiqué was improper as envisaged in section 182 of the Constitution and an act of maladministration as envisaged in section 6 of the Public Protector Act;

(b) Whether the Complainant was prejudiced by the CCMA communiqué of 18 August 2010;

(c) Whether the Complainant’s contract was terminated on the basis of him having made a presentation to the Portfolio Committee on Labour; and

(d) Whether the Chairperson of the Human Resource Sub-Committee of the CCMA Governing Body acted improperly in his handling of the Complainant’s dispute with the CCMA. If so did such conduct cause the Complainant prejudice?

(iv) The investigation was conducted by way of written correspondence and a meeting with officials of the CCMA and the Complainant; and the perusal of documents received. An attempt to resolve the matter through Alternative Dispute Resolution (ADR) means failed. The Constitution, applicable legislation and the contract of service between the CCMA and the Complainant were also analysed and applied.
(v) My findings are the following:

(a) Was the conduct of the CCMA in referring to the Complainant and his colleagues who appeared before the Portfolio Committee in a manner in which they were referred to in its communiqué improper as envisaged in section 182 of the Constitution and an act of maladministration as envisaged in section 6 of the Public Protector Act?

(aa) The CCMA’s conduct in publishing information regarding the poor performance or work quality of the Complainant and others in its communiqué when it had recourse to deal specifically with the Complainant’s poor performance or work quality in terms of clause 5.1 of its contract with him was improper. Such conduct constitutes maladministration;

(b) Was the Complainant prejudiced by the CCMA communiqué of 18 August 2010?

(aa) The Complainant did not suffer specified personal prejudice by virtue of the communiqué as he was not identified by name.

(bb) However, it is clear that the drafters of the communiqué and those people who were directly involved with the proceedings against the Complainant and his colleagues who appeared in Parliament, intended to humiliate them in retaliation to what they said in Parliament.

(cc) Furthermore, as a member of an easily identifiable group, the Complainant did suffer a degree of prejudice in the form of
loss of face and injured feelings due to the negative spotlight unduly cast by the CCMA’s communiqué on the group.

(c) Was the Complainant’s contract terminated on the basis of him having made a presentation to the Portfolio Committee on Labour?

(aa) I was persuaded that the CCMA terminated the Complainant’s contract on the basis of performance, specifically, late submission of arbitration awards; and

(bb) While I did not find convincing evidence of retaliatory action, the Complainant’s perception of the termination of his contract as retaliatory action, is justified in the circumstances.

(d) Did the Chairperson of the Human Resource Sub-committee of the CCMA Governing Body act improperly in his handling of the Complainant’s dispute with the CCMA? If so did his conduct cause the Complainant prejudice?

(aa) The Chairperson of the HRSC failed to take a decision regarding the termination of the Complainant’s contract after he had made representations to him. Such failure to take a decision constituted administrative action in terms of PAJA and adversely affected the Complainant’s right to procedurally fair administrative action. The conduct of the Chairperson of the HRSC in this regard was improper and constitutes maladministration.
(bb) The Chairperson of the HRSC made an undertaking to the Complainant to resolve his dispute with the CCMA and failed to revert to him regarding the outcome of his efforts in that regard.

(cc) His conduct in the circumstances violated his constitutional obligations in terms of section 195(1)(a) and (f) of the Constitution to promote a high standard of professional ethics and accountability, and as such constitutes maladministration; and

(dd) The Complainant was prejudiced by the improper conduct of the Chairperson of the HRSC’s in that it deprived him the opportunity to expeditiously proceed with arbitration in his dispute with the CCMA.

(vi) Appropriate remedial action to be taken in accordance with section 182(1) of the Constitution is the following:

(a) The Director of the CCMA, must within 14 days from the date of this report, issue a letter of apology to the Complainant for publishing information regarding his poor performance or work quality which the CCMA had recourse to deal with in terms of clause 5.1 of its contract with him;

(b) The Director of the CCMA must, within 30 days from the date of this report, afford the Complainant an opportunity to have his dispute with the CCMA referred to arbitration in terms of clause 12 of his contract with the CCMA at the CCMA’s expense; and
(c) The Chairperson of the CCMA Governing Body must, within 60 days from the date of this report, take appropriate action against the Chairperson of the HRSC regarding his conduct towards the Complainant.
REPORT ON AN INVESTIGATION INTO A COMPLAINT OF PREJUDICE SUFFERED AS A RESULT OF AN INTERNAL COMMUNIQUÉ ISSUED BY THE COMMISSION FOR CONCILIATION ARBITRATION AND MEDIATION IN RESPONSE TO A PRESENTATION MADE TO THE PARLIAMENTARY PORTFOLIO COMMITTEE ON LABOUR

1. INTRODUCTION

1.1 "The Cost of Speech" is my report as the Public Protector issued 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 in terms of section 8(3) of the Public Protector Act, 1994 to:

1.2.1 Ms N M Oliphant, Minister of Labour (the Minister);

1.2.2 Mr N T P Nhleko, Director-General (the DG) of the Department of Labour; and

1.2.3 Ms T Cohen, Chairperson of the CCMA Governing Body.

1.3 Copies of the report are distributed to the following persons in terms of section 8(3) of the Public Protector Act:

1.3.1 Mr S Dlamini, Secretary General of the Society of Part-Time Commissioners and Labour Law Practitioners of South Africa, the Complainant in this matter;

1.3.2 Mr E Monage, Commission for Conciliation, Mediation and Arbitration Governing Body: Chairperson of the Human Resource Sub-Committee; and
1.3.3 Ms N Khan, the Director of the Commission for Conciliation, Mediation and Arbitration.

1.4 The report relates to an investigation into a complaint of prejudice allegedly suffered by the representatives of the Society of Part-Time Commissioners and Labour Law Practitioners of South Africa (SPC & LLPSA), as a result of maladministration involving an internal communiqué issued by the Commission for Conciliation, Mediation and Arbitration (CCMA) in response to a presentation made to the Parliamentary Portfolio Committee on Labour (Portfolio Committee).

1.5 This is my second report involving allegations of abuse of power by the CCMA management in the form of retaliatory action taken against commissioners resulting in the termination of services under questionable circumstances. The previous report titled “Administrative action must be fair and must be seen to be fair” involved the CCMA’s removal of Adv N C Mdladla (who reportedly passed away subsequently), from a bargaining council panel and subsequent blacklisting on other bargaining councils.

2. THE COMPLAINT

2.1 The Complainant is the Secretary General of the SPC & LLPSA. On 10 August 2010, the Complainant and the Chairperson of the SPC & LLPSA briefed the Portfolio Committee and “raised grievances about the way in which commissioners were treated under the administrative set-up of the CCMA”, the challenges faced by the commissioners and suggested the way forward.
2.2 On 18 August 2010, the CCMA issued an internal communiqué to all staff members, through its senior management, responding to the SPC & LLPSA’s briefing to the Portfolio Committee.

2.3 In September 2010, the Complainant lodged a complaint with this office, in which he alleged the following:

2.3.1 The managers and the Director of the CCMA (the Director) acted improperly when they circulated an internal communiqué using state resources to attack the office bearers of the SPC & LLPSA;

2.3.2 They were attacked without adhering to the *audi alteram partem* rule;

2.3.3 The Director and some senior managers form part of the Governing Body that interviews the part-time commissioners during the renewal of their contracts; and attacking some of these commissioners in the memorandum could mean that they would not be objective during these interviews; and

2.3.4 The internal communiqué was selective and only attacked the commissioners who were part of the delegation to Parliament.

2.4 The Complainant requested the following findings and remedial action:

2.4.1 Declare the conduct of the CCMA Senior Management and its Director as highly improper;

2.4.2 Declare that their conduct is prejudicial to the three individuals and the SPC & LLPSA, and possibly its entire leadership;
2.4.3 Direct the Director and those Senior Management Team members who were part of the communiqué not to sit-in in any interview panel that would in future interview the said individuals and not be party to the discussions and decision making involving the three individuals;

2.4.4 Find the CCMA conflicted in respect of the three individuals and order that they be interviewed by a professional independent body/panel made up of Senior Counsel and an assessor. The Senior Counsel involved must be agreed by all parties involved, or, if no agreement is reached, the Senior Counsel appointed by the local Bar Council in this regard;

2.4.5 Recommend to the Governing Body of the CCMA to charge the Director, and

2.4.6 Any other appropriate relief.

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

3.1 The Public Protector is an independent constitutional office 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. Section 182(2) directs that the Public Protector has additional powers prescribed in legislation.
3.3 The Public Protector is further mandated by the Public Protector Act, 23 of 1994, 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 means deemed appropriate by him or her.

3.4 The CCMA is an organ of state and its conduct amounts to conduct in state affairs. This matter accordingly falls within the jurisdiction of the Public Protector.

3.5 The jurisdiction of the Public Protector was not disputed by any of the parties.

3.6 Section 7(9)(a) of the Public Protector Act provides that:

“If it appears to the Public Protector during the course of an 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 person an opportunity to respond in connection therewith, in any manner that may be expedient under the circumstances.”

3.7 The affected parties were provided with the copy of my provisional report in terms of section 7(9)(a) to afford them an opportunity to comment thereon.
4. THE ISSUES CONSIDERED AND INVESTIGATED

4.1 On analysis of the matter, the following issues were considered and investigated:

4.1.1 Whether the conduct of the CCMA, in referring to the Complainant and his colleagues who appeared before the Portfolio Committee in a manner in which they were referred to in its communiqué, was improper as envisaged in section 182 of the Constitution and an act of maladministration as envisaged in section 6 of the Public Protector Act;

4.1.2 Whether the Complainant was prejudiced by the CCMA communiqué of 18 August 2010;

4.1.3 Whether the Complainant’s contract was terminated on the basis of him having made a presentation to the Portfolio Committee on Labour; And

4.1.4 Whether the Chairperson of the Human Resource Sub-Committee of the CCMA Governing Body acted improperly in his handling of the Complainant’s dispute with the CCMA. If so did such conduct cause the Complainant prejudice?

5. THE INVESTIGATION

5.1 Investigation approach:

5.1.1 The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act, 1994.
5.1.2 It consisted of written correspondence and a meeting with officials of the CCMA and the Complainant; the perusal of documents received. An attempt to resolve the matter through Alternative Dispute Resolution (ADR) means failed. The Constitution, applicable legislation and the contract of service between the CCMA and the Complainant were also analysed and applied.

5.2 Key sources of information:

5.2.1 Correspondence

5.2.1.1 Written communication with Ms N Khan, the Director of the CCMA dated 9 November 2010 and 17 January 2012;

5.2.1.2 Telephonic and written communication with Mr C Todd of Bowman Gilfillan Attorneys on behalf of the CCMA dated 23 November 2010, 30 November 2010, 1 December 2010, 14 December 2012 10 January 2013 and 29 January 2013;

5.2.1.3 Telephonic and written communication with the Complainant on various dates;

5.2.2 Meetings

5.2.2.1 Meetings with the Complainant on various dates; and

5.2.2.2 A meeting with the Complainant, Ms N Khan and Mr E Monage the Chairperson of the Human Resource Sub-Committee of the CCMA Governing Body on 28 March 2012.
5.2.3 Documents

5.2.3.1 The letter of complaint submitted by the Complainant;

5.2.3.2 Copy of the CCMA's internal communiqué dated 18 August 2010;

5.2.3.3 Relevant extracts of the proceedings of the Portfolio Committee meeting on 10 August 2010;

5.2.3.4 Statement of the CCMA Governing Body dated 11 August 2010;

5.2.3.5 Copy of the e-mail sent to the Director by the Complainant dated 17 January 2010;

5.2.3.6 Copy of the CCMA's investigation report into the Complainant's alleged late arbitration awards; and

5.2.3.7 Written responses received from Bowman Gilfillan Attorneys on behalf of the CCMA dated 30 November 2010 and 29 January 2013;

5.3 Legislation and other prescripts

5.3.1 The relevant provisions of the following legislation and other prescripts were considered and applied where appropriate:

5.3.1.1 The Constitution of the Republic of South Africa of 1996 as amended;

5.3.1.2 The Public Protector Act No. 23 of 1994;

5.3.1.3 Promotion of Administrative Justice Act No. 3 of 2000;

5.3.1.4 The Labour Relations Act No. 66 of 1995;
5.3.1.5 The Contract of Service between the CCMA and the Complainant attached to a letter of offer of appointment dated 19 September 2007; and

5.3.1.6 Court Jurisprudence and Public Protector Touchstones or principles discerned from previous Public Protector and other Ombudsman reports.

6. EVIDENCE AND INFORMATION OBTAINED DURING THE INVESTIGATION

6.1 Complainant’s Submission

6.1.1 The Complainant alleged that he and his colleague, the Chairperson of the SPC & LLPSA, briefed the Portfolio Committee on 10 August 2010, and raised concerns about the way in which commissioners were treated under the administrative set-up of the CCMA, the challenges faced by the commissioners and suggested the way forward in that regard. The Complainant further alleged that a copy of their presentation to the Portfolio Committee was sent to the CCMA and that the CCMA did not raise any objection to the said presentation.

6.1.2 On 18 August 2010, the CCMA allegedly issued an internal communiqué through its senior management responding to the SPC & LLPSA’s briefing to the Portfolio Committee. The Complainant provided a copy of the said communiqué.

6.1.3 In the communiqué, the CCMA expressed grave concern by senior management that certain part time commissioners had raised grievances directly with the Portfolio Committee and that the commissioners had never raised those matters internally through the CCMA processes.
6.1.3.1 The CCMA further stated that the few part-time commissioners who appeared in Parliament did not have the support of the vast majority of commissioners (Full or Part Time), who are committed to upholding their office and the good name of the CCMA. The CCMA further stated that the majority of individuals who appeared in Parliament had blemished records, or did not service the CCMA (referring to them as CV Commissioners). It was also stated that some of those individuals had either been sanctioned or were in the process of being sanctioned for breaching the code of conduct of CCMA commissioners.

6.1.3.2 The CCMA further stated that one of them was an ex-commissioner who was refused a new contract due to his poor performance (late awards, losing files, failing to arrive for hearings and lack of ability. It was further alleged that another had at least 16 late arbitration awards in the last 18 months, and had his work allocation suspended for a period up to 28th June 2010. The CCMA also alleged that the same commissioner had faced serious sanction for two further late awards issued in the month preceding the communiqué.

6.1.4 The Complainant alleged that the managers of the CCMA and Director acted improperly by using state resources to attack the office bearers of the SPC & LLPSA when they circulated the communiqué referred to above.

6.1.5 He also alleged that they were attacked without adhering to the *audi alteram partem* rule.

6.1.6 He further alleged that the Director and some senior managers form part of the Governing Body that interviews the part-time commissioners during the renewal of their contracts; and attacking some of these commissioners in the memorandum could mean that they will not be objective during these
interviews and the internal communiqué was selective and only attacked the commissioners who were part of the delegation to Parliament.

6.1.7 The Complainant also provided a copy of an e-mail sent to the Director on behalf of the SPC & LLPSA, dated 17 January 2010. The printed e-mail indicated that a copy of the SPC & LLPSA’s Constitution was attached thereto.

6.1.7.1 The contents of the e-mail indicated that the Complainant requested a meeting with the Director and indicated that he would be accompanied by a delegation of the members of the executive of the SPC & LLPSA. The Complainant further requested the Director to provide him with a number of dates on which she would be able to meet with them and also provided her with his mobile number for engagement on the dates of her availability. The Complainant alleged that the purpose of initiating interaction with the CCMA was to enable them to engage the CCMA on matters of mutual interest affecting the commissioners.

6.1.8 The Complainant indicated in a meeting on 21 October 2011, that his contract with the CCMA had been terminated on 15 December 2010 due to alleged late submission of arbitration awards. The Complainant provided a copy of his terminated contract, Commissioners’ Code of Conduct, letter of refusal of appointment and the response received after making representations regarding alleged late submission of arbitration awards.

6.1.9 The Complainant alleged, during the meeting referred to above, that the Governing Body: Chairperson of the Human Resource Sub-Committee (Chairperson of the HRSC) had contacted him and undertook to resolve the issue of the alleged late submission of arbitration awards and the termination of his contract. He further alleged that he had met the Chairperson of the
HRSC on 1 April 2011 in the presence of the Director at the former’s office to discuss the matter where he had indicated that only two of his arbitration awards had been submitted late.

6.1.9.1 The Complainant further provide a copy of a printout of alleged mobile phone text messages between him and the Chairperson of the HRSC allegedly from the day they met in Cape Town and thereafter. The printout listed the various alleged text messages as follows:

(a) From: Elias GB  
   Sent: 03 March 2011 2:16 PM  
   To:  
   Cc:  
   I’m staying at cape sun and I will be at the hotel at 20H30

(b) From: Elias GB  
   Sent: 04 March 2011 1:56 PM  
   To:  
   Cc:  
   Elias.monage@kellygroup.co.za

(c) From: Elias GB  
   Sent: 10 March 2011 12:06 PM  
   To:  
   Cc:  
   Ok

(d) From: Elias GB  
   Sent: 13 March 2011 11:22 PM  
   To:
Cc:
Ok

(e) From:
Sent: 08 April 2011 3:11 PM
To: Elias GB
Cc: 
Ntate Monage you promised to revert back to me today, the 8th April 2011 on the representations i made to you last week Friday. Can you please revert to me on the update.
Kind regards. Sipho Dlamini

(f) From:
Sent: 03 May 2011 7:47 AM
To: Elias GB
Cc: 
Dear Mr. Monage, I hope u & yr family enjoyed the holidays. With my career having been put on hold, I couldn’t even enjoy the Freedom Day i sacrificed my youth days to realize. U will recall that after the meeting we held at your offices on the 1st April 2011 u promised to come back to me on the 8th April after meeting with other members of your committee. I will appreciate if u could come back to me on the outcome as promised on the 1st April 2011.
Sincerely. Sipho Dlamini

(g) From: Elias GB
Sent: 03 May 2011 7:55 AM
To:
Cc:
My sincere apology as I awaiting for few things. Hopefully I will conclude this matter this week. Regards Elias

(h) From:
Sent: 03 May 2011 8:31 PM
To:
Cc:
Thank you for the update. Enjoy the rest of your day. Sipho Dlamini

(i) From:
Sent: 09 May 2011 7:50 AM
To: Elias GB
Cc:
Mr. Monage, Good day. I am now getting into a disastrous financial & professional situation. When can i expect feedback from you as promised? Sincerely. Sipho Dlamini

(j) From:
Sent: 07 June 2011 9:27 AM
To: Elias GB
Cc:
Mr. Monage, good morning. We met with the office of the Minister last week Monday. She is concerned that despite the fact that we told her that u were dealing with my issue at the beginning of the year already (when we met in Cape Town) u have not yet reverted back to me. We are in the middle of the year already and i am still waiting for u to revert back to me. This is grossly unfair. When can I get your decision as promised. Kind regards. Sipho Dlamini
(k) From:
Sent: 02 July 2011 9:00 AM
To: Elias GB
Cc:

Dear Mr. Monage, I sent you an urgent e-mail yesterday. I hope you received it. Kind regards. Sipho Dlamini

6.1.9.2 In terms of the printout, where it is indicated as "From: Elias GB", the text message is alleged to be from the Chairperson of the HRSC to the Complainant and where it is indicated as "To: Elias GB", the text message is alleged to be from the Complainant to the Chairperson of the HRSC.

6.1.10 The Complainant contended that the one award was submitted late due to the parties having agreed on the day of the hearing that the applicant's representative would submit the closing arguments in writing after the school holidays upon the latter's return from travelling with his family. The Complainant stated further that in the other award the parties had agreed on the day of the hearing that the applicant employees would go and collate information regarding their earnings and dates of engagement and submit them at a later stage. The Complainant contended that based on the Chairperson of the HRSC's undertaking, he had waived his right to have the matter resolved through arbitration in terms of clause 12 of his contract.

6.1.10.1 The Complainant provided the Public Protector with a copy of an e-mail that he allegedly sent to the Chairperson of the HRSC dated 1 July 2011 regarding this matter. In the aforesaid e-mail, the Complainant refers to his alleged numerous interactions and correspondence via e-mail and mobile phone text messages with the Chairperson of the HRSC on various dates. The Complainant further indicated that he wanted to put on
record that his first encounter with the Chairperson of the HRSC was through the Chairperson of the HRSC's own endeavour in an attempt to resolve the dispute between him and the CCMA.

6.1.10.2 He further wanted to put it on record that they met for the first time on 3 March 2011 in Cape Town and the second time on 1 April 2011, at the Chairperson of the HRSC's offices in Sandton in the presence of the Director (CCMA), whereupon he made representations to him. He also wanted to place on record that the Chairperson of the HRSC had personally made an undertaking to revert to him on 8 April 2011 with a response.

6.1.10.3 The Complainant indicated that he specifically wanted to place on record that due to the undertaking given by the Chairperson of the HRSC from 3 March 2011 in Cape Town, he held over the legal steps that he had already instituted in a hope that the matter would be resolved amicably, since he was involved and taking into account his position in the CCMA.

6.1.11 The Complainant also provided a copy of correspondence which he allegedly addressed to the Director-General of the Department of Labour, Mr N Nhleko and copied the Minister on 21 August 2011, complaining about the conduct of the Chairperson of the HRSC and highlighting the challenges that he encountered as a commissioner of the CCMA.

6.1.11.1 The correspondence alluded to above was purportedly sent by e-mail on 21 August 2011 as an attachment to Adv Unathi Bongco and Ms Mpumi Mnconywa in the office of the Minister was copied thereon. The evidence further indicated that Ms Mpumi Mnconywa responded to the Complainant on 14 November 2011 with a blank e-mail.
6.1.11.2 The Complainant alleged that he did not receive any response from the Director-General or the Minister regarding the correspondence alluded to above.

6.1.12 In response to my provisional report, the Complainant raised a new issue which was not part of the investigations in this matter and alleged that the CCMA seems to have instructed the bargaining councils not to use his services as a panellist and that the CCMA has no power to do that as it is improper conduct which is prejudicial to him. The bargaining councils allegedly involved are the following:

(a) Metal and Engineering Bargaining Council;

(b) Transnet Bargaining Council;

(c) South African Passenger Bargaining Council; and

(d) All other Bargaining Councils in South Africa.

6.1.13 The Complainant requested that I make a finding and take remedial action on the conduct of the CCMA and/or the relevant bargaining councils. The Complainant did not provide any evidence to support his new allegation. The issue was not investigated as it did not form part of his initial complaint.

6.1.14 The Complainant further argued that I appeared to have made negative finding/s on the alleged lateness of the awards. He argued that he had consistently denied and challenged this allegation. He also argued that he had disputed the alleged lateness of sixteen (16) awards for which he was ultimately suspended. The Complainant further disputed the lateness of the two (2) awards that he subsequently explained to the Chairperson of the HRSC. The Complainant indicated that he could not have issued the two
awards because the cases were not finalised until closing arguments and/or all relevant information had been submitted by the parties.

6.1.15 The Complainant submitted that the alleged lateness of the awards is the crux of his argument which will be the dispute that the arbitration has to determine and issue a ruling on. The Complainant argued that I could not, therefore not make a finding on the issue as the arbitration will ultimately have to rule on that. The Complainant argued that the lateness of the awards is alleged and not a fact hence the need for the arbitration which he alleged the CCMA has passionately delayed. The Complainant advised against my making any findings of fact on the lateness or otherwise of his awards.

6.1.16 The Complainant argued that the way the finding in relation to the allegations was coined would be prejudicial to him going forward.

6.1.17 The Complainant argued that the Chairperson of the HRSC accompanied by the Director of the CCMA had a meeting with him on 1 April 2011 wherein he made an undertaking that he would revert to him on 8 April 2011 on the representations he had made on that day. The complainant further argued that the subsequent mobile phone text messages between the parties, was evidence of that undertaking and that the Chairperson of the HRSC never reverted to him.

6.1.17.1 The Complainant argued that the Chairperson of the HRSC had initiated that engagement with him and never saw it through and that he had caused him not to pursue the arbitration route thereby delaying everything. The Complainant further argued that he ultimately used the funds he would have used for arbitration purposes including an extra night in Cape Town, the cost of a hired vehicle and associated costs.
6.1.18 The Complainant also argued that the arbitration was supposed to have taken place early in 2011 and that with the delay by the CCMA and the intervention by the Chairperson of the HRSC, that may take place in the first quarter of 2013 at the earliest, being two years later. The Complainant argued that the cost for that would invariably be far more than it would have been more than two years ago.

6.1.19 The Complainant submitted that either the CCMA or the Department of Labour must bear 100% of the legal costs of the alleged delayed arbitration.

6.1.20 The Complainant contended that the remedial action taken that the Minister of Labour investigates and address the governance issues raised with the Portfolio Committee be done in consultation with the SPC & LLPSA as an interested party. He further alleged that the Chairperson of the Portfolio Committee directed so and that in the meeting of 3 March 2011 in Cape Town, the Minister of Labour met with him and the President of the SPC & LLPSA and undertook to work with that organisation.

6.2 CCMA’s response

6.2.1 The CCMA responded through its attorneys to the Complainant’s allegations, with the following arguments:

6.2.1.1 “The CCMA did not believe that it or its Director acted improperly as alleged (whether as contemplated in section 182(1) of the Constitution or otherwise) in issuing the communiqué which is the subject matter of the complaint, for the following reasons:

a. The communiqué was issued in the ordinary course of the CCMA’s operations in circumstances in which it was appropriate and
reasonable to deal with, among the various other matters dealt with in it, certain specific allegations that had been raised in the parliamentary portfolio committee by certain part-time commissioners without prior notice to the CCMA and without the issues raised in the portfolio committee having been raised in advance through internal CCMA processes.

b. The communiqué did not refer to or identify either the SPC & LLPSA or its office bearers in the communiqué, and the CCMA has no formal relationship with that organisation. It is not clear on what basis the complainant suggests that the three office bearers of that organisation were attacked in the communiqué. It appears that they have identified themselves from certain references in the communiqué to unnamed part-time commissioners.

c. Although the CCMA was approached (during or about February 2010) by representatives of the SPC & LLPSA, that organisation has to date failed to respond to a request by the CCMA that it provides a copy of its constitution, and an indication of its membership and objectives. The CCMA regards these particulars to be reasonably necessary to establish a proper basis for further engagement with the organisation. Not only have no such particulars been provided, but there has been no further interaction between the organisation and the CCMA. In the circumstances there is no reasonable basis upon which the complainant can allege that the organisation or its three office bearers, were in that capacity, criticised in the communiqué.

d. Insofar as it is suggested in the complaint that criticism was directed at the organisation and its office bearers without them being given an opportunity "to present their side of the story", the communiqué was in fact, to the extent that it dealt with what had been stated in the
parliamentary committee, the first opportunity for the CCMA to communicate to its own stakeholders and community its response to what had been stated in the parliamentary portfolio committee. Not only was the CCMA reasonably entitled to set out a response of this kind, it was appropriate for it to do so in this way in circumstances in which it had been given no prior warning of what would be stated in the portfolio committee, had been given no opportunity to respond to what was said there, and what was said there had been widely reported in the public media.

e. The CCMA not only had a right but also a duty to communicate appropriately to its stakeholders and community in these circumstances, and it did not have a duty to seek out a response before it did so from those persons who had chosen, without prior recourse to the CCMA and without prior notice to it, to direct criticism in a public forum at the CCMA as an institution and its governing body.

f. Finally, insofar as the complaint suggests that it would not be fair for the Director to be involved in interviews that may take place in the future concerning office bearers of the SPC & LLPSA, it must be pointed at that an appointment of a commissioner of the CCMA is made by the governing body of the CCMA under statutory powers and responsibilities conferred on it by the applicable provisions of the Labour Relations Act, specifically section 117 of that Act. The governing body members are appointed by the Minister on being nominated by NEDLAC (under section 116 of the Act), and the governing body must include equal representation by the State, organised labour and organised business.
g. The Director of the CCMA is required to provide whatever assistance in the process of appointing commissioners as may reasonably be expected of her in the exercise of her own statutory responsibilities. The governing body is entitled, in the exercise of its statutory responsibilities, to take into account the past record of performance of commissioners in deciding whether or not to make future appointments. It is in the public interest and the interests of the important statutory dispute resolution functions of the CCMA that the governing body should take into account all relevant considerations, including considerations such as these, when it makes future decisions of this kind. Appointments of commissioners are made following a detailed and comprehensive appointment and interview process that takes into account a wide range of relevant considerations. Any person who applies for appointment as a commissioner, including office bearers of the SPC & LLPSA, will be given a fair opportunity in the course of the appointment process, including in any interview, to present his or her own credentials and to deal with his or her performance and track record during any prior period of appointment as a commissioner of the CCMA."

6.2.2 An attempt to get further clarity from the Director to the CCMA's response through correspondence dated 17 January 2012, proved futile.

6.2.3 The CCMA responded my provisional report through its attorneys, stating the following:

6.2.3.1 The CCMA did not dispute that the drafters of the communiqué had the Complainant in mind when they referred to a commissioner who had at least 16 late arbitration awards in the last 18 months, had his work allocation suspended for a period up to 28 June 2010, and faced serious
sanction for two further late awards issued in the month preceding the communiqué. This is contrary to what the CCMA had alleged in its initial response to the Public Protector's enquiry.

6.2.3.2 The CCMA pointed out that what it intended to communicate in the letter dated 30 November 2010 addressed to the Public Protector was that the drafters of the communiqué specifically refrained from identifying the commissioners by name. The attorneys further pointed out that means, with the exception of those who were involved in drafting the communiqué or dealing with proceedings directly against the Complainant, the recipients of the memorandum would not have been aware that the Complainant was the person being referred to.

6.2.3.3 The CCMA conceded that the Complainant would of course also have been able to identify the reference as being to him. However, the internal CCMA community to whom the e-mail was addressed would not have been aware of his identity or have understood the communiqué to single him out personally.

6.2.3.4 The CCMA argued that its submission in relation to the above is very material in the light of what would occur if the Director of the CCMA were to comply with the remedial action envisaged in paragraph 10.1 of the Provisional Report. The CCMA further argued that if the Director were to issue a further internal communiqué which referred to the communiqué of 18 August 2010, it would probably be necessary, since the first communiqué was sent some two and half years ago to attach the earlier communiqué for this to make sense.

6.2.3.5 The CCMA further argued that if an apology was now given to the Complainant, that would for the first time inform a large proportion of the
recipients of the e-mail (many of whom may either be new to the organisation or, if they were present at the time, have forgotten about the incident altogether) of the original allegations against the Complainant.

6.2.3.6 The CCMA argued that it does not believe that the Complainant in fact suffered personal harm in consequence of the initial communiqué, and does not believe that he would have been identified by the large majority of recipients of the communiqué. It also does not accept that the communiqué “transcended the boundary” of its rights to defend its reputation in response to the criticism leveled at it by the Complainant and others.

6.2.3.7 The CCMA argued that it would be counter-productive to issue a further communiqué that effectively aggravates any harm that might have been caused or as it is of the view that it would cause the very harm to the reputation of the Complainant that he is concerned to avoid. The CCMA indicated that it is willing to explore a possible resolution of the matter that would assist the Public Protector to conclude the investigation. The CCMA further stated that it would be happy to engage with the Public Protector further to identify whether there might be a more appropriate means for it to address the Complainant’s matter in a private manner that does not aggravate the harm to his reputation.

6.2.4 The CCMA argued that the provisional finding that the conduct of the Chairperson of the HRSC constituted maladministration because he denied the Complainant an opportunity to have his dispute with the CCMA referred to arbitration, is based on a serious error of fact that appears to have arisen from a misrepresentation of the fact of the matter by the Complainant. In this regard the CCMA provided copies of correspondence between the Chairperson of the HRSC and the Complainant; and between its legal
representatives and the Complainant's legal representative to the Public Protector.

6.2.4.1 The CCMA pointed out that the Complainant's complaints against the CCMA arose from certain decisions that were communicated to him in two letters dated 15 December 2010. The CCMA indicated that the Complainant raised his objection to those decisions in an e-mail dated 17 January 2011 and that its Director responded in a letter dated 18 January 2011. The CCMA provided the Public Protector with a copy of the Complainant's e-mail to the office of its Director dated 21 January 2011 in which the Complainant requested arbitration.

6.2.4.2 The copy of the e-mail indicated that the Complainant proposed five arbitrators for consideration and requested dates for a meeting on which the CCMA or its representatives would be available to meet his legal representative to narrow the issues where possible and for a process of discovering documents. The Complainant also requested the CCMA to copy his legal representative in any correspondence that it enters into with him. The Complainant requested a response on or before 28 January 2011.

6.2.4.3 The CCMA legal representatives responded to the Complainant's legal representative by e-mail on 28 January 2011 and copied him. The CCMA legal representative sought to confirm with the Complainant's legal representative whether he agreed to proceed on the basis suggested by the Complainant. The CCMA legal representatives further sought to confirm that on the alternative, if he believed it appropriate for the representatives to meet first, before any procedure suggested by the Complainant had been agreed, they would be available to meet in the
Sandton area Tuesday the following week between 13h00 and 16h00, or Wednesday between 11h00 and 14h00.

6.2.4.4 The CCMA legal representatives indicated that if those times were not convenient to the Complainant’s legal representative, they could schedule a telephone call instead to discuss and if possible agree on the process that is to be followed to deal with the matter.

6.2.4.5 The Complainant’s legal representative responded by e-mail dated 2 February 2011 and indicated that the suggested dates and times would not be suitable for him and suggested that they communicate telephonically on the mutually convenient date and time for an initial meeting.

6.2.5 The CCMA indicated that on or about 3 March 2011, the Complainant by chance, bumped into the Chairperson of the HRSC at the Cape Sun Hotel. The CCMA argued that the meeting was not planned and was neither requested nor scheduled. The CCMA further stated that in the conversation that followed the Complainant raised issues concerning the CCMA’s decisions concerning him and the Chairperson of the HRSC suggested that he put his concerns in writing. The CCMA argued that no undertakings were given of any kind other than that the Chairperson of the HRSC would give consideration to the issues that the Complainant raised in writing.

6.2.5.1 The CCMA pointed out that on 5 March 2011, the Complainant addressed an e-mail to the Chairperson of the HRSC and requested that he be given an opportunity to make oral representations to the HRSC. In that e-mail the Complainant indicated that the HRSC took the decision to terminate his contract based on written representations only.
6.2.5.2 The CCMA also pointed out to the e-mail of 15 March 2011 addressed to the Chairperson of the HRSC by the Complainant. The e-mail indicated that the Complainant raised his concerns regarding the CCMA's delay in resolving the matter by arbitration. The CCMA argued that the Complainant could only have been referring to the period between 2 February 2011, when his legal representative communicated that the dates proposed by the CCMA's legal representatives were not suitable for a meeting, and 5 March 2011 when he wrote his first letter to the Chairperson of the HRSC.

6.2.5.3 The CCMA pointed out that was a period of just over a month and that during that period neither the Complainant nor his legal representative had taken any proactive steps to pursue the matter following the communications of 28 January 2011 and 2 February 2011. The CCMA further pointed out that in the e-mail of 15 March 2011, the Complainant indicated that he had decided to withdraw the arbitration process in favour of the HRSC's intervention in the matter.

6.2.5.4 The CCMA pointed out that the Complainant stated the reason for his decision to withdraw the arbitration process as being the CCMA's alleged inaction on the arbitration process, and that he did not allege that his decision was influenced or informed by any representations made by the Chairperson of the HRSC. Further that the Complainant made it clear that it would be his decision, once he had received a response from the CCMA to review the necessity for arbitration.

6.2.5.5 The e-mail of 15 March 2011 indicated that the Complainant had declared a dispute in the middle of January 2011 and requested that certain documents be forwarded to him. According to the e-mail, those included the HRSC report that the CCMA management relied on in the
termination and non-renewal of his contract. According to the e-mail, as at that date the CCMA had not forwarded him or his legal representative those documents. The e-mail referred to above also indicated that the Complainant raised the concern that the delay accounted to close to seven (7) months that he had been made not to work and earn a living.

6.2.5.6 According to the Complainant that period included the period from when his work was allegedly suspended on 24 August 2010 until on 15 December 2010 when he was issued with a termination and non-renewal letters of his contract, including from the date he declared a dispute in the middle of January 2011 up to 15 March 2011.

6.2.5.7 The CCMA pointed out that on 16 March 2011, its legal representatives wrote to the Complainant and his legal representative and made it clear that the HRSC had resolved not to intervene in the matter. The CCMA further pointed out that should the Complainant persist with his contention that there is a dispute of the kind contemplated in his contract with the CCMA, it remained willing to participate in an arbitration process to resolve any such dispute.

6.2.5.8 In the correspondence referred to above the CCMA’s legal representatives made no reference to the documents allegedly requested by the Complainant, the request by the Complainant to make oral representations to the HRSC as allegedly provided for in clause 1.2 of his contract in his e-mail of 5 March 2011 including the alleged delay in resolving the matter by arbitration.

6.2.5.9 The CCMA also pointed out to a letter dated 30 March 2011 addressed to the Complainant's legal representative by its legal representatives in which the contents of the e-mail of 16 March 2011 were repeated. The
Complainant’s legal representative accordingly responded in a letter dated 1 April 2011, indicating that his instructions were that the Complainant is still exhausting all available internal avenues including engagement with the HRSC and the Director of the CCMA with the view to resolve the matter amicably. The Complainant’s legal representative further indicated that the Complainant’s withdrawal of the arbitration process was conditional and that should the Complainant not attain an amicable resolution of the matter, he would instruct them accordingly.

6.2.5.10 The CCMA conceded that the Chairperson of the HRSC and its Director did agree to meet with the Complainant and did attempt to establish whether there was any merit in his objections on the facts regarding the late awards. The CCMA pointed out that although the HRSC had decided against intervention, the Complainant continued to press the Chairperson of the HRSC with allegations that the factual basis for the decisions that had been taken, and specifically the allegation concerning late awards, was incorrect.

6.2.5.11 The CCMA pointed out that the Chairperson of the HRSC decided in the light of the CCMA’s dispute resolution role, that he would meet the Complainant in the presence of the CCMA Director to listen to what he had to say. The CCMA further pointed out that the Chairperson of the HRSC had in mind that if the CCMA’s case management had indeed relied on incorrect facts concerning the Complainant’s late awards, that might (depending on the extent of the inaccuracies) provide a basis to raise the matter once again in the HRSC. According to the CCMA the Chairperson’s intentions were conciliatory and were intended to identify whether in fact a wrong might have been done as the Complainant alleged.
6.2.5.12 The CCMA alleged that in the meeting that took place, the Complainant presented various versions and excuses for the late awards and that he admitted that some awards had been late, but contended that some that had been recorded as late were in fact not late. The CCMA pointed out that at the conclusion of the meeting the Chairperson of the HRSC requested its Director to re-examine the facts concerning the late awards and to report back to him whether or not the information that had been relied upon was correct. The CCMA further pointed out that the Chairperson of the HRSC informed the Complainant that if it was shown that the facts had been incorrectly presented to the HRSC before the relevant decisions were taken he would initiate a review of the decisions.

6.2.5.13 The CCMA indicated that its Director duly conducted an audit and a report was prepared for the Chairperson of the HRSC. According to the CCMA that process took longer than had initially been expected and that the Chairperson of the HRSC was still awaiting the outcome of that investigation, when he sent the text message to the Complainant on 3 May 2011 and apologised for the delay. The CCMA argued that when the Chairperson of the HRSC did subsequently receive the relevant report, he was satisfied that the facts had not been misrepresented by the CCMA's case management, and that the Complainant's version was untrue in material respects.

6.2.5.14 The CCMA further argued that the investigation of the matter by the Chairperson of the HRSC was not a substitute for an external legal process, such as arbitration which the Complainant remained entitled to pursue if he did not accept the CCMA's decision. The CCMA also argued that at no stage was the Complainant told that the Chairperson of the HRSC's initiative would preclude him from pursuing his rights through arbitration.
6.2.5.15 The CCMA argued that the steps taken by the Chairperson of the HRSC cannot on any reasonable basis be construed as maladministration or a failure to ensure that the Complainant's dispute with the CCMA was resolved. The CCMA further argued that the Complainant could not reasonably have construed the meetings and the indication of a desire to conclude the matter as a representation or an undertaking to him that those efforts would in fact result in the matter being resolved to his satisfaction.

6.2.5.16 The CCMA indicated that if any facts dealing with this issue are disputed and the Public Protector wished to take further steps to reach a conclusion on what the true facts were, it would be happy to facilitate further meetings with the Public Protector or to provide sworn affidavits that confirm the correctness of what had been stated if that is considered necessary to bring the investigation to finality.

6.2.5.17 The CCMA emphasised the following:

(a) It had held itself available to conduct the arbitration should the Complainant had elected to proceed with his dispute;

(b) The Complainant unilaterally withdrew the arbitration proceedings before the material meetings and interactions with the Chairperson of the HRSC;

(c) Its legal representatives made it clear to both the Complainant and his legal representative that the Complainant should clearly indicate whether he intended to pursue the arbitration;
(d) Neither the Complainant nor his legal representative indicated, at any stage after his meetings and interactions with the Chairperson of the HRSC that he wished to pursue the arbitration.

6.2.6 The CCMA did not agree with the remedial action indicated in paragraph 10.4 of the provisional report. It argued that there was no reasonable basis for a recommendation that the issues raised by the Complainant in August 2010 should be further investigated and that no such recommendation can reasonably be given effect to at this stage. The CCMA proposed that for that reason the remedial action in paragraph 10.4 in the provisional report should fall away. Alternatively, that if the Public Protector wished to persist in taking such a remedial action despite what they have stated, the remedial action should be addressed to the CCMA’s Governing Body being the body duly appointed under LRA that is responsible for governance of the CCMA and that the remedial action should set out in specific terms what issues should be addressed.

6.2.7 The CCMA did not agree with the intended finding that the CCMA management had violated the Complainant’s right to freedom of expression, his right to freedom of association and his right not to be unfairly discriminated against. The CCMA also argued that its communiqué could not be classified as a form of discrimination in violation of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA).

6.2.8 In essence the CCMA reiterated its previous argument submitted in response to the initial enquiry in this matter.
6.3 The Minister’s response

6.3.1 The Minister indicated that regarding the remedial action envisaged at paragraph 10.3 of the provisional report, the appropriate body to look into the conduct of the Chairperson of the HRSC is the CCMA Governing Body. The Minister also indicated that in terms of the LRA, she does not appoint the CCMA subcommittees and their chairpersons. She further indicated that the LRA only empowers her to appoint the CCMA Governing Body and the CCMA Governing Body appoints the CCMA committees and subcommittees.

6.3.2 The Minister indicated that she would ensure that the CCMA Governing Body takes appropriate action against the Chairperson of the Human Resources Subcommittee if the final finding was that he be censured.

6.3.3 In response to the remedial action envisaged at paragraph 10.4 of the Provisional Report, the Minister argued that:

6.3.3.1 After she had carefully studied the provisional report, she came to the conclusion that the Complainant only raised the issues that were encapsulated in the communiqué, in which he alleged that they will have adverse effect on the interviews to renew their contracts as commissioners. Therefore, it is not understood how the investigator reached a conclusion that involves issues of governance which he or she seeks the Minister to look into;

6.3.3.2 The investigator rightly stated that that the issues of CCMA governance were raised with the Parliamentary Portfolio Committee on Labour but nowhere in the provisional report is there an indication that the Portfolio Committee has not dealt with the Complainant’s complains or where the
Complainant had expressed dissatisfaction on how the Portfolio Committee dealt with the complaints;

6.3.3.4 Is not understood how the investigator came to the conclusion that the Portfolio Committee has not addressed Complainant's complaints;

6.3.3.5 The Portfolio Committee has the powers to call public entities to come and account to it;

6.3.3.6 The issues on governance were not raised with her and argued that it cannot be expected that she should deal with issues that have not come to her attention;

6.3.3.7 The Constitution of the Republic of South Africa which is the supreme law of the land clearly articulates the separation of powers between the Executive Authority and Parliament and that she cannot speak on behalf of Parliament since she does not have that authority; and

6.3.3.8 When the Public Protector has come to the conclusion in her final report, as it is required of her, she shall ensure that the CCMA Governing Body implements the findings.

6.4 Attempted Alternative or Appropriate Dispute Resolution (ADR)

6.4.1 A decision was made to attempt to resolve the matter through mediation in pursuit of the Public Protector's appropriate dispute resolution means which include conciliation, mediation and negotiation.

6.4.2 A mediation meeting took place on 26 March 2012. The focus of the meeting was to try to reconcile the parties with the view to resolve the differences between them relating to the disputed late arbitration awards, the alleged
undertaking made by the Chairperson of the HRSC to resolve the matter and to establish the cause of the alleged delay in that regard.

6.4.3 However, the matter could not be resolved since the parties could not agree on a resolution. The Chairperson of the HRSC literally walked out of the meeting citing time constraints despite a plea to him to remain in attendance. During that meeting the Chairperson of the HRSC admitted that he had promised to consider the issue of the Complainant’s alleged late submission of arbitration awards but denied that he undertook to resolve the matter as alleged by the Complainant.

6.4.4 The Chairperson of the HRSC undertook to provide a copy of the report of an independent investigation carried out regarding the alleged late submission of arbitration awards by the Complainant. The report was duly received on 10 April 2012. The report was attached to the letter dated 5 April 2011 addressed by the Director to the Chairperson of the HRSC in which she made recommendations that the Complainant not be allowed to return as a commissioner. Considering that the Director and the Chairperson of the HRSC met with the Complainant on 1 April 2011, it appears there was an error in the date. The reasonable date would have been 5 May 2011.

6.4.5 The report stated that consequent to a meeting on 1 April 2011 held between the Director, the Chairperson of the HRSC and the Complainant it was agreed that an independent audit be conducted of and as to whether the Complainant had only ever had two late awards during his tenure as a Commissioner, as he had indicated in the meeting with the Chairperson of the HRSC and the Director. The report recorded that of the 60 awards rendered, the Complainant delivered 40% (24 awards) of all awards during his CCMA tenure after the 14 days cut-off time and 60% (36 awards) were
not late. Of the 24 awards allegedly delivered late, 10 were default awards and 14 ordinary awards.

6.4.6 The report further stated under the heading titled “Brief” that consequent to the meeting on 1 April 2011, the Director briefed the legal department of the CCMA to carry out the investigation. The Complainant challenged the independence of the report and its relevance as having no legal or other basis for its existence or commission by the CCMA and requested that the Public Protector confine her findings to the complaint relating to the CCMA internal communiqué of 18 August 2010.

7. EVALUATION OF THE EVIDENCE OBTAINED DURING THE INVESTIGATION

7.1 Was the conduct of the CCMA in referring to the Complainant and his colleagues who appeared before the Portfolio Committee in a manner in which they were referred to in its communiqué improper as envisaged in section 182 of the Constitution and an act of maladministration as envisaged in section 6 of the Public Protector?

7.1.1 It is common cause that the Complainant and his colleague, the Chairperson of the SPC & LLPSA made a presentation to the Portfolio Committee on 10 August 2010, regarding the challenges the commissioners faced within the CCMA and suggested a way forward in that regard.

7.1.2 It is also common cause that the CCMA issued an internal communiqué on 18 August 2010 in response to what was discussed in the Portfolio Committee meeting on 10 August 2010.
7.1.3 It is not disputed that the CCMA communiqué stated that the majority of individuals who appeared before the Portfolio Committee had blemished records or did not service the CCMA, referring to them as CV commissioners. The CCMA admitted in its response to my provisional report that the reference to a commissioner having at least 16 late arbitration awards was directed at the Complainant.

7.1.4 The CCMA disputed that the Complainant suffered personal harm in consequence of the communiqué and also does not believe that he would have been identified by the large majority of recipients of the communiqué. The CCMA further disputed that the communiqué transcended the boundary of its rights to defend its reputation in response to the criticism levelled at it by the Complainant and others.

7.1.5 The CCMA also contended that the communiqué was intended for its internal stakeholders and was neither distributed more broadly nor reported on in public and that the Complainant was at no stage identified in any commentary thereto. The CCMA further contended that the purpose of the communiqué was to communicate effectively to its internal stakeholders its response to criticism that had been brought by a certain group of commissioners unexpectedly and without prior warning and which were in the views of its leadership completely unwarranted.

7.1.6 The CCMA did not advance any reasons why it was necessary to make reference to the Complainant and his colleagues' service records or work performance albeit without identifying them by names in its response to the presentation made to the Portfolio Committee. The CCMA has also not indicated that it would have not been able to communicate effectively with its internal stakeholders without making reference to the Complainant and his colleagues' service records or work performance.
7.1.7 In the circumstances it is clear that there was no need to refer to the service records or work performance of the Complainant and his colleagues in its communiqué. The CCMA could have effectively communicated with its internal stakeholders without making reference to the Complainant and his colleagues’ service records or work performance.

7.2 Was the Complainant prejudiced by the CCMA communiqué of 18 August 2010?

7.2.1 The Complainant alleged that they were attacked without adhering to the *audi alteram partem* rule. The Complainant further contended that communiqué was selective and only attacked the commissioners who were part of the delegation to Parliament.

7.2.2 The CCMA on the other hand argued that the Complainant did not suffer any personal harm owing to the communiqué, as he could not have been identified by a large majority of the recipients of the communiqué except its drafters and those people who were directly involved with proceedings against him.

7.2.3 In the circumstances although the CCMA argues that the Complainant and his colleagues who were referred to in the communiqué did not suffer any actual harm, there a level of harm that occurred as the readers could tell that all of the negative behaviour attributed to those that spoke to the Portfolio Committee, was attributable to the easily identifiable. The only redeeming aspect was that a reader could not have easily told who was responsible for which of the improprieties attributed to members of the group in the communiqué, which made clear reference to them as a group.
7.2.4 It is clear that the drafters of the communiqué and those people who were directly involved with the proceedings against the Complainant and his colleagues who appeared in Parliament, intended to humiliate them in retaliation for what they said in Parliament.

7.3 *Was the Complainant’s contract terminated on the basis of him having made a presentation to the Portfolio Committee on Labour?*

7.3.1 It is common cause that the Complainant was advised by a letter dated 15 December 2010 that his contract with the CCMA had been terminated due to the alleged late submission of arbitration awards.

7.3.2 The Complainant disputed that he submitted arbitration awards late and argued that he only ever had two late awards during his tenure as a Commissioner. He contended that the one award was submitted late due to the parties having agreed on the day of the hearing that the applicant’s representative would submit the closing arguments in writing after the school holidays upon the latter’s return from travelling with his family. The Complainant further stated that in the other award the parties had agreed on the day of the hearing that the applicant employees would go and collate information regarding their earnings and dates of engagement and submit them at a later stage.

7.3.3 The CCMA on the other hand submitted that it commissioned an investigation into the alleged late arbitration awards by the Complainant subsequent to his meeting with the Chairperson of the HRSC and the Director on 1 April 2011 and the investigation report recorded that of the 60 awards rendered, the Complainant delivered 40% (24 awards) of all awards during his CCMA tenure after the 14 days cut-off time and 60% (36 awards)
were not late. Of the 24 awards allegedly delivered late, 10 were default awards and 14 ordinary awards.

7.3.4 It should be noted that the alleged lateness or otherwise of the Complainant’s arbitration awards was not investigated as it did not form part of his complaint. Instead the Complainant requested that I confine my findings to the CCMA internal communiqué of 18 August 2010. It was envisaged that the issue of the alleged late arbitration awards would be resolved by the attempted ADR failing which it shall be subject to arbitration in terms of the contract of service between the CCMA and the Complainant.

7.3.5 The Complainant did not provide my office with any evidence of retaliatory action in connection with the termination of his contract. However, his perception of the termination of his contract as retaliatory action is justified in the circumstances in the light of the CCMA’s communiqué.

7.4 Did the Chairperson of the Human Resource Sub-committee of the CCMA Governing Body act improperly in his handling of the Complainant’s dispute with the CCMA? If so did his conduct cause the Complainant prejudice?

7.4.1 It is common cause that the Complainant and the Chairperson of the HRSC met in Cape Town on 3 March 2011 and again in Sandton on 1 April 2011 in the presence of the Director.

7.4.2 It is also common cause that the Complainant made representations to the Chairperson of the HRSC regarding the alleged late arbitration awards at the meeting of 1 April 2011 alluded to above.
7.4.3 It is not disputed that the Chairperson of the HRSC promised to consider the issue of the Complainant's alleged late submission of arbitration awards and revert to him with a response in that regard.

7.4.4 It is disputed that the Chairperson of the HRSC initiated the meeting of 3 March 2011 in Cape Town as alleged by the Complainant. The CCMA contended that the Complainant by chance bumped into the Chairperson of the HRSC at the Cape Sun Hotel. The CCMA further contended that the meeting was not planned and was neither requested nor scheduled.

7.4.4.1 The evidence revealed that the Chairperson of the HRSC sent a text message from his mobile phone to the Complainant on 3 March 2011, around 2:16 pm informing him that he is staying at the Cape Sun (presumably hotel) and that he will be at the hotel at 20H30.

7.4.4.2 The evidence also revealed that the Complainant sent the Chairperson of the HRSC an e-mail dated 1 July 2011 in which he sought to put in on record that his first encounter with him was through his (the Chairperson of the HRSC) own endeavour in an attempt to resolve the dispute between him and the CCMA. The evidence further revealed that the Complainant sent the Chairperson of the HRSC a text message from his mobile phone on 2 July 2011 at 9:00 am referring him to the e-mail of 1 July 2011 referred to above.

7.4.4.3 I was not provided with any evidence regarding what the Chairperson of the HRSC's response was to the Complainant's e-mail or text message referred to above. In its response to the provisional report, the CCMA referred to the e-mail sent to the Chairperson of the HRSC by the Complainant on 5 March 2011, in which he requested that he be given an opportunity to make oral representations to the HRSC. The CCMA also
referred to the e-mail sent to the Chairperson of the HRSC by the Complainant on 15 March 2011, in which the Complainant raised his concern about the CCMA’s alleged delay in resolving the matter by arbitration. The CCMA however made no mention of the e-mail sent to the Chairperson of the HRSC by the Complainant on 1 July 2011 or to the text messages between the Complainant and the Chairperson of the HRSC referred to above.

7.4.4.4 It seems appropriate to conclude, on a balance of probabilities, that the meeting between the Chairperson of the HRSC and the Complainant was arranged by the Chairperson of the HRSC contrary to the CCMA’s contention.

7.4.5 It is also disputed that the Chairperson of the HRSC undertook to resolve the matter as alleged by the Complainant. The CCMA argued that no undertakings were given of any kind other than that the Chairperson of the HRSC would give consideration to the issues that the Complainant raised in writing.

7.4.5.1 When it was pointed out to him in the Complainant’s e-mail dated 1 July 2011 that he had given the undertaking on 3 March 2011 in Cape Town to resolve the matter, the Chairperson of the HRSC did not respond to the e-mail or deny that he had made such an undertaking.

7.4.5.2 Similarly the Chairperson of the HRSC did not deny that the Complainant had held over the legal steps that he had already instituted in a hope that the matter would be resolved amicably since he was involved and taking into account his position in the CCMA.
7.4.5.3 Although the CCMA in its response to the provisional report, pointed out that its legal representative had addressed an e-mail dated 16 March 2011 to the Complainant and his legal representative advising him that the HRSC had resolved not to intervene in his matter, it has not provided any evidence that indicated that the Chairperson of the HRSC in his personal capacity in the light of his meeting with the Complainant on 3 March 2011 in Cape Town, had also decided not to intervene in the matter.

7.4.5.4 On the contrary there was another meeting arranged between the Complainant, the Chairperson of the HRSC and the Director of the CCMA on 1 April 2011, which indicated that the Chairperson of the HRSC remained seized with the matter. It is clear from the evidence that beyond the meeting of 1 April 2011, the Complainant had a justified expectation that the Chairperson of the HRSC would revert to him with some feedback.

7.4.5.5 The conclusion above is further reinforced by the text message the Chairperson of the HRSC sent to the Complainant on 3 May 2011, in which he apologised and indicated that he would conclude the matter that week.

7.4.5.6 The CCMA did not provide my office with any evidence which indicated that the Chairperson of the HRSC’s involvement with the Complainant’s matter had ceased; what the outcome of such involvement was and whether it was communicated to the Complainant.

7.4.5.7 It seems appropriate to conclude, on the balance of probabilities, that the Chairperson of the HRSC made an undertaking to resolve the matter. The fact that the Chairperson of the HRSC did not inform the
Complainant about the outcome of his involvement in the matter up until 7 June 2011 when he had an opportunity to do so indicated that the verification of the late awards as alleged by the CCMA could not have been the only issue outstanding between the parties. It would have been easier for the Chairperson of the HRSC to inform the Complainant about the outcome of the verification of the late awards and that would have been the end of their interaction if there was no other issue outstanding between them.

7.4.5.8 Even assuming for a moment that the Chairperson of the HRSC did inform the Complainant about the outcome of the Director’s verification of the late awards, the fact remains that he created an expectation on the Complainant that he would act in one way or the other to resolve his matter. On the available evidence, it is difficult to find a reasonable alternative explanation why the Complainant would seek to rely on an undertaking to resolve his matter if no such undertaking was made. It is also inconceivable that the Complainant would withdraw the arbitration process if no undertaking to resolve his matter through other means was made. It is equally difficult to understand why the Complainant would persist with the Chairperson of the HRSC even when he was informed that the HRSC decided not to intervene in the matter.

8. LEGAL AND REGULATORY FRAMEWORK

8.1 Was the conduct of the CCMA in referring to the Complainant and his colleagues who appeared before the Portfolio Committee in a manner in which they were referred to in its communiqué improper as envisaged in section 182 of the Constitution and an act of maladministration as envisaged in section 6 of the Public Protector?
8.1.1 Contract for services between the CCMA and the Complainant

8.1.1.1 Clause 5.1 provides that: "Despite clause 1, the CCMA may at any time terminate this contract immediately on account of –

(a) any serious breach of this contract or act of serious misconduct; or
(b) incapacity to perform the functions of the Commissioner; or
(c) poor performance or work quality;
(d) a material violation of the Commissioner’s Code of Conduct;
(e) any conduct that brings the CCMA into disrepute."

8.1.1.2 The CCMA had an avenue to deal with issues regarding the poor performance or work quality of the Complainant who was still in its employ in terms Clause 5.1 of its contract with him. In the circumstances it was unethical for the CCMA to refer to the Complainant and his colleagues in the manner in which they were referred to in its communiqué.

8.2 Was the Complainant prejudiced by the CCMA communiqué of 18 August 2010?

8.2.1 While the Complainant did not suffer quantifiable individual prejudice, it is clear that together with the other members of the Executive of SPC&LLPSA, he was humiliated by the communiqué,

8.2.2 In the absence of quantifiable harm it was difficult for me to appeal to borrow from the law of delict. However, I found a wealth of jurisprudence on apologies as an effective remedy particularly wrongs involving injured feelings, in the Ombudsman family. The work of the Dutch Ombudsman stands out in this regard as he has written a lot on the value of a simple
unconditional apology. I found his arguments to resonate with the African value of *ubuntu*, embraced by the Constitutional Court in *S v Makwanyane* as one of the founding values of our constitutional democracy. An apology may not have patrimonial value but it does have a way of affirming a person’s human dignity and, more than anything, sends a message that a person matters.

8.3 Was the Complainant’s contract terminated on the basis of him having made a presentation to the Portfolio Committee on Labour?

8.3.1 Contract for services between the CCMA and the Complainant

8.3.1.1 Clause 5.1 provides that: “Despite clause 1, the CCMA may at any time terminate this contract immediately on account of—

(a) any serious breach of this contract or act of serious misconduct; or
(b) incapacity to perform the functions of the Commissioner; or
(c) poor performance or work quality;
(d) a material violation of the Commissioner’s Code of Conduct;
(e) any conduct that brings the CCMA into disrepute.”

8.3.1.2 The Complainant’s contract could only be terminated in terms of the circumstances outlined under Clause 5.1 of his contract with the CCMA.

8.4 Did the Chairperson of the Human Resource Sub-committee of the CCMA Governing Body act improperly in his handling of the Complainant’s dispute with the CCMA? If so did his conduct cause the Complainant prejudice?

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1 1995 (3) SA 391.
8.4.1 Promotion of Administrative Justice Act, 2000 (PAJA)

8.4.1.1 Section 1 defines administrative action among others as any decision taken, or any failure to take a decision by a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision; which adversely affects the rights of any person and which has a direct, external legal effect.

8.4.1.2 The CCMA is established as a juristic person in terms of section 112 of the Labour Relations Act No. 66 of 1995 to perform a public function of labour disputes resolution and its Human Resource Sub-Committee (HRSC) is established in terms of section 121 to assist it. The conduct of the Chairperson of the HRSC when acting in that capacity falls within the definition of administrative action in terms of section 1.

8.4.1.1 Section 3(1) provides that administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair.

8.4.1.2 The Complainant was entitled to procedural fairness regarding the termination of his contract with the CCMA in terms of section 3(1).

8.4.1.3 Section 3(2)(b) provides that in order to give effect to the right to procedurally fair administrative action, an administrator, subject to sub-section (4), must give a person referred to in sub-section (1)-

(i) adequate notice of the nature and purpose of the proposed administrative action;
(ii) a reasonable opportunity to make representations;

(iii) a clear statement of the administrative action;

(iv) adequate notice of any right of review or internal appeal, where applicable; and

(v) adequate notice of the right to request reasons in terms of section 5.

(vi) The Complainant was entitled to be provided with adequate notice regarding the termination of his contract with the CCMA, a reasonable opportunity to make representations in that regard, a clear statement of the administrative action; adequate notice of any right of review or appeal of the decision to terminate his contract and adequate notice of the right to request reasons for the termination of his contract with the CCMA in terms of section 3(2)(b).

8.4.2 The Constitution, 1996

8.4.2.1 Section 195(1)(a) and (f) of the Constitution provides that public administration must be governed by the democratic values and principles enshrined in the Constitution, including that a high standard of professional ethics must be promoted and maintained; and that public administration must be accountable.

8.4.2.2 The Chairperson of the HRSC had a constitutional obligation to promote a high standard of professional ethics and accountability in his interaction with the Complainant in terms of section 195(1)(a) and (f) of the Constitution.
8.4.3 Contract for services between the CCMA and the Complainant

8.4.3.1 Clause 12.1 provides that: “Disputes about interpretation, application or termination of this contract shall be referred for determination to an independent arbitrator- agreed upon by the parties; or failing agreement, appointed by the Chairperson of the General Council of the Bar.” (Emphasis added).

8.4.3.2 The Complainant had a right to have his dispute with the CCMA referred to arbitration in terms of Clause 12.1.

9. ANALYSIS AND CONCLUSION

9.1 Was the conduct of the CCMA in referring to the Complainant and his colleagues who appeared before the Portfolio Committee in a manner in which they were referred to in its communiqué improper as envisaged in section 182 of the Constitution and an act of maladministration as envisaged in section 6 of the Public Protector?

9.1.1 The CCMA had recourse in terms of clause 5.1 of its contract of service with the Complainant, which provides that the CCMA may at any time terminate the contract immediately on account of among others poor performance or work quality or any conduct that brings it into disrepute.

9.1.1.1 Therefore even if the CCMA was of the view that the conduct of the Complainant in making a presentation to the Portfolio Committee brought it into disrepute, it should have dealt with such conduct in terms of clause 5.1 instead of disseminating information regarding the Complainant and his colleagues in the SPC & LLPSA’s poor performance or work quality to its stakeholders.
9.1.1.2 Similarly the issue of the Complainant and his colleagues' poor performance or work quality, is an issue regulated by clause 5.1 and not an issue for its stakeholders' consumption.

9.1.2 The CCMA did not tender any explanation as to why it would not have been able to communicate with its stakeholders effectively without referring to the Complainant and his colleagues' service records. The conduct of the CCMA in the circumstances was improper.

9.2 Was the Complainant prejudiced by the CCMA communiqué of 18 August 2010?

9.2.1 While no quantifiable personal harm or prejudice may have been suffered by the Complainant, him and his colleagues who appeared before the Portfolio Committee, were clearly humiliated or suffered loss of face, as a result of the communiqué.

9.2.1 It did not require rocket science for the readers of the communiqué to establish that that each of the persons that appeared before the Portfolio committee was responsible for some of the improprieties attributed to members of the group to whom direct reference was made in the communiqué. On that basis there were some injured feelings and if the publication of this professional information was not justified, it follows that some remedy is deserved for the injured feelings. The jurisprudence on apologies as an effective Ombudsman remedy and an element of our constitutional value of ubuntu, has a place in this context.
9.3 Was the Complainant's contract terminated on the basis of him having made a presentation to the Portfolio Committee on Labour?

9.3.1 The Complainant did not provide my office with any evidence of retaliatory action in connection with the termination of his contract.

9.3.2 However, his perception of the termination of his contract as retaliatory action, is justified in the circumstances in the light of the CCMA's communiqué.

9.4 Did the Chairperson of the Human Resource Sub-committee of the CCMA Governing Body act improperly in his handling of the Complainant's dispute with the CCMA? If so did his conduct cause the Complainant prejudice?

9.4.1 The Complainant was entitled to procedural fairness regarding the termination of his contract with the CCMA in terms of section 3(1) of PAJA.

9.4.2 The Complainant was also entitled to be provided with adequate notice regarding the termination of his contract with the CCMA, a reasonable opportunity to make representations in that regard, a clear statement of the administrative action; adequate notice of any right of review or appeal of the decision to terminate his contract and adequate notice of the right to request reasons for the termination of his contract with the CCMA in terms of section 3(2) (b) of PAJA.

9.4.1 The evidence revealed that the Complainant made representations to Chairperson of the HRSC whom the evidence also revealed that he made an undertaking to resolve the Complainant's dispute with the CCMA. The Chairperson of the HRSC's failure to take a decision regarding the
termination of the Complainant’s contract after he made representations to him, constituted administrative action in terms of section 1 of PAJA. His conduct in the circumstances adversely affected the Complainant’s right to procedurally fair administrative action.

9.4.2 The Chairperson of the HRSC had a constitutional duty in terms of section 195(1)(a) and (f) to promote a high standard of professional ethics and accountability in his interaction with the Complainant.

9.4.2.1 The Chairperson of the HRSC did not revert to the Complainant regarding his attempts to resolve his dispute with the CCMA despite several reminders in that regard.

9.4.4 Despite providing the Complainant with an opportunity to make representations in terms of section 3(2)(b)(ii) of PAJA regarding the termination of his contract, the Chairperson of the HRSC failed to provide the Complainant with the outcome of such representations.

9.4.5 The Complainant could not expeditiously proceed with the arbitration in his dispute with the CCMA as he was awaiting the Chairperson of the HRSC to revert to him as undertaken.

10. FINDINGS

My findings are the following:

10.1 Was the conduct of the CCMA in referring to the Complainant and his colleagues who appeared before the Portfolio Committee in a manner in which they were referred to in its communiqué was improper as envisaged in section 182 of the Constitution and an act of
maladministration as envisaged in section 6 of the Public Protector Act?

10.1.1 The CCMA’s conduct in publishing information regarding the poor performance or work quality of the Complainant and others in its communiqué when it had recourse to deal specifically with the Complainant’s poor performance or work quality in terms of clause 5.1 of its contract with him was improper. Such conduct constitutes maladministration;

10.2 Was the Complainant prejudiced by the CCMA communiqué of 18 August 2010?

10.2.1 The Complainant did not suffer specified personal prejudice by virtue of the communiqué as he was not identified by name.

10.2.2 However, it is clear that the drafters of the communiqué and those people who were directly involved with the proceedings against the Complainant and his colleagues who appeared in Parliament, intended to humiliate them in retaliation to what they said in Parliament.

10.2.3 Furthermore, as a member of an easily identifiable group, the Complainant did suffer a degree of prejudice in the form of loss of face and injured feelings due to the negative spotlight unduly cast by the CCMA’s communiqué on the group.

10.3 Was the Complainant’s contract terminated on the basis of him having made a presentation to the Portfolio Committee on Labour?
10.3.1 I was persuaded that the CCMA terminated the Complainant's contract on the basis of performance, specifically, late submission of arbitration awards; and

10.3.2 While I did not find convincing evidence of retaliatory action, the Complainant's perception of the termination of his contract as retaliatory action, is justified in the circumstances.

10.4 Did the Chairperson of the Human Resource Sub-committee of the CCMA Governing Body act improperly in his handling of the Complainant's dispute with the CCMA? If so did his conduct cause the Complainant prejudice?

10.4.1 The Chairperson of the HRSC failed to take a decision regarding the termination of the Complainant's contract after he had made representations to him. Such failure to take a decision constituted administrative action in terms of PAJA and adversely affected the Complainant's right to procedurally fair administrative action. The conduct of the Chairperson of the HRSC in this regard was improper and constitutes maladministration.

10.4.2 The Chairperson of the HRSC made an undertaking to the Complainant to resolve his dispute with the CCMA and failed to revert to him regarding the outcome of his efforts in that regard.

10.4.3 His conduct in the circumstances violated his constitutional obligations in terms of section 195(1)(a) and (f) of the Constitution to promote a high standard of professional ethics and accountability, and as such constitutes maladministration; and
10.4.4 The Complainant was prejudiced by the improper conduct of the Chairperson of the HRSC's in that it deprived him the opportunity to expeditiously proceed with arbitration in his dispute with the CCMA.

11. REMEDIAL ACTION

Appropriate remedial action to be taken in accordance with section 182(1) of the Constitution is the following:

11.1 The Director of the CCMA, must within 14 days from the date of this report, issue a letter of apology to the Complainant for publishing information regarding his poor performance or work quality which the CCMA had recourse to deal with in terms of clause 5.1 of its contract with him;

11.2 The Director of the CCMA must, within 30 days from the date of this report, afford the Complainant an opportunity to have his dispute with the CCMA referred to arbitration in terms of clause 12 of his contract with the CCMA at the CCMA's expense; and

11.3 The Chairperson of the CCMA Governing Body must, within 60 days from the date of this report, take appropriate action against the Chairperson of the HRSC regarding his conduct towards the Complainant.

12. MONITORING

12.1 The Director of the CCMA must within 30 days from the date of this report provide the Public Protector with a copy of the letter of apology referred to at paragraph 11.1 above;
12.2 The Director of the CCMA must within 30 days from the date of this report provide the Public Protector with a progress report regarding the steps that she has taken to ensure that the remedial action referred to at paragraph 11.2 above is implemented;

12.3 The Chairperson of the CCMA Governing Body must within 60 days from the date of this report provide the Public Protector with a progress report regarding the steps she has taken to implement the remedial action referred to at paragraph 11.3 above;

12.4 The Chairperson of the CCMA Governing Body must ensure that the Director of the CCMA implement the remedial action referred to at paragraphs 11.1 and 11.2; and

12.5 The Minister of Labour must ensure that the Chairperson of the CCMA Governing Body implements the remedial action referred to at paragraph 11.3 above.

12.6 The Public Protector will monitor the implementation of the remedial action taken in paragraph 11 above at regular intervals.

ADV T N MADONSELA
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 25/09/2013
Assisted by: MR M I MATLAWE – SENIOR INVESTIGATOR: SERVICE DELIVERY