
PUBLIC PROTECTOR
SOUTH AFRICA

REPORT No 18 of 2017/18

"Allegations of maladministration in the matter between Ms Moipone Tryphina Molebatsi and the Department of Rural, Environmental and Agricultural Development"

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER PREJUDICE SUFFERED AS A RESULT OF THE ALLEGED MALADMINISTRATION BY THE NORTH WEST PROVINCIAL DEPARTMENT OF RURAL, ENVIRONMENTAL AND AGRICULTURAL DEVELOPMENT
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Executive Summary

(i) This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 (Constitution) and section 8(1) of the Public Protector Act, 1994 (Public Protector Act).

(ii) The report deals with the outcomes of an investigation into alleged failure by the North West Provincial Department of Rural, Environment and Agricultural Development (the Department) to implement the approved outcome of the Labour Relations Unit’s investigation into her absorption grievance and as a result of such failure suffered prejudice.

(iii) The Complainant is a 59 year old adult female, employed by the Department at Bojanala Platinum District. The Complainant alleged that she was absorbed into the Department on 01 January 1998. Subsequent to her absorption she noticed that she was demoted from salary level 5 to salary level 3. She was placed on grade 1 of level 3 and her annual salary decreased from R37, 422.96 (Thirty seven thousand, four hundred and twenty two rand, ninety six cents) to R30, 396.00 (Thirty thousand, three hundred and ninety six rand) per annum. After lodging a grievance with the Department, an internal investigation was conducted and a report in respect of her absorption grievance was issued on 26 March 2004 by the Department’s Labour Relations Unit and it undertook to rectify the discrepancies and effect payment to her. Payment was not effected and the Department issued circular 5/2006 which closed all absorption related cases.

(iv) In the main the Complainant alleged that the Department failed to implement the approved outcome of the Labour Relations Unit’s investigation into her absorption grievance and as a result she suffered prejudice.

(v) The Department did not dispute that it had undertaken to correct the Complainant’s absorption. Although the Department contended that circular 5/2006 which closed all absorption related cases still stood and it also applied to
this complaint, it did not dispute that the author of the circular, the then HOD, advised the Complainant that all decisions which were taken prior the issuing of the circular were not affected by the contents of the circular.

(vi) On analysis of the complaint, the following issues were identified and investigated:

(a) Whether the Department unduly failed to implement the approved outcome of the Labour Relations Unit's investigation into the Complainant's absorption grievance, and

(b) Whether the Complainant was prejudiced as a result of the Department's conduct.

(vii) The investigation process was conducted through meetings and interviews with Complainant and relevant officials of the Department as well as inspection of all relevant documents and analysis and application of all relevant laws.

(viii) The Public Protector issued a section 7(9) notice dated 07 April 2017 to the Department and the Head of the Department responded in a letter dated 02 March 2017 as follows: "The department has noted the intended findings and remedial action with regard to this matter and wish to indicate that there is no further evidence to submit." Based on the response and the fact that no further evidence could be provided the Public Protector proceeded to adjudicate on the matter.

(ix) Key laws taken into account to determine if there had been maladministration by the Department and prejudice to the Complainant were principally those imposing administrative standards that should have been complied with. Those are the following:

(a) Section 33 of the Constitution and section 3 of the Promotion of Administrative Justice Act No. 3 of 2000 (PAJA) was relied on to determine
whether the Department improperly failed to take into account the relevant considerations to give effect to the Complainant’s right to procedurally fair administrative action;

(b) Section 195(1) of the Constitution, which provides for the right of everyone to be treated impartially, fairly, equitably and without bias was relied on to affirm the Complainant’s rights in that regard and to determine whether she was prejudiced by the conduct of the Department; and

(c) The Department does not have an internal policy dealing with grievance procedures to be embarked upon by its employees as such the Public Service Co-ordinating Bargaining Council (PSCBC) Resolution no. 14 of 2002 is employed by the Department for the advancement of sound labour relations and addressing of grievances as such the Public Protector relied on same to determine if there was any violation on the part of the Department.

(x) Having considered the evidence uncovered during the investigation against the relevant regulatory framework, the Public Protector makes the following findings:

(a) Regarding whether the Department unduly failed to implement the approved outcome of the Labour Relations Unit’s investigation into the Complainant’s absorption grievance:

(aa) The allegation that the Department improperly failed to implement the approved outcome of the Labour Relations Unit’s investigation into the Complainant’s absorption grievance is substantiated.

(bb) Although the Department wrote a letter dated 11 January 2013 to the Complainant advising her of its decision regarding her grievance and informing her of its reasons for not considering her claim, the Department failed to take into account the relevant
considerations to give effect to the Complainant’s right to procedurally fair administrative action in that regard.

(cc) The Department dealt with the matter in an appropriate way by accepting the Complainant’s grievance when the matter was initially raised by the Complainant on 22 October 2001. Of importance to note is that the Department conducted an investigation on the matter through its Labour Relations Unit and as such findings were made in favour of the Complainant, recommendations were made and subsequently accepted by the Department.

(dd) The Department undertook to implement the recommendations per letter dated 26 March 2004. However, this was never implemented.

(ee) The Department’s failure to implement the outcome of the investigation, in violation of sections 33 and 195(1) of the Constitution, constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

(b) Regarding whether the Complainant was prejudiced as a result of the Department’s conduct

(aa) The allegation that the Complainant was prejudiced as a result of the Department’s conduct is substantiated.

(bb) The Complainant was prejudiced by the conduct of the Department as envisaged in section 182(1) (a) of the Constitution because had the Department timeously implemented the outcome of the investigation it would have placed her in a better financial
position but failure to implement the outcome meant that she lost
on potential notch progression, monthly salary adjustment, the
Government Employee Pensions Fund (GEPF) contributions, and
any other promotion associated with the position.

(xi) In the light of the above findings the Public Protector is taking the following
remedial action as contemplated in section 182(1)(c) of the Constitution:

(a) The Head of the Department must ensure that the outcome of the
investigation into Complainant’s absorption grievance is implemented
retrospectively from January 1998 within 30 working days from the date of
this report;

(b) The Head of the Department must ensure that the Complainant is paid all
monies having taking into account the notch progression that would have
been due to her had the recommendations of the investigation into her
absorption been implemented effectively from January 1998, together with
interest, from January 1998 to date of final payment, calculated at the
applicable rate (at the time) as prescribed by the Minister of Justice and
Constitutional Development in terms of section 1(2) of the Prescribed Rate
of Interest Act 55 of 1975 within 30 working days from date of this report;

(c) The Head of the Department must reimburse the GEPF with the cost
implications, including arrear employer and employee contributions, within
60 working days from the date of this report; and

(d) The Head of the Department must write a letter of apology to the
Complainant for the prejudice caused to her within 30 working days from
the date of this report.
REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF IMPROPER PREJUDICE SUFFERED AS A RESULT OF THE ALLEGED MALADMINISTRATION BY THE NORTH WEST PROVINCIAL DEPARTMENT OF RURAL, ENVIRONMENTAL AND AGRICULTURAL DEVELOPMENT

1. INTRODUCTION

1.1 This is a report of 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, 23 of 1994 (the Public Protector Act).

1.2 The report is submitted in terms of section 8(3) of the Public Protector Act to the following officials:

1.2.1 The Director-General of the North West Provincial Government: Dr Lydia Sebego;

1.2.2 The Member of the Executive Council for Rural, Environment and Agricultural Development: Honourable Manketse Tlhape; and

1.2.3 Head of the Department of Rural, Environment and Agricultural Development: Dr Poncho Mokaila.

1.3 A copy of the report is also submitted to the Complainant, Ms Moipone Tryphina Molebatsi, to inform her about the outcome of the investigation.

1.4 The report deals with the outcomes of an investigation into alleged failure by the North West Provincial Department of Rural, Environmental and Agricultural Development (the Department) to implement the approved outcome of the Labour Relations Unit’s investigation into the Complainant’s absorption grievance and as a result of such failure she suffered prejudice.
2. THE COMPLAINT

2.1 Ms Moipone Tryphina Molebatsi (the Complainant) is an employee at the Department.

2.2 On 02 April 1990 she was employed as a Community Development Worker by Agricultural Corporation (Agricor) Dinokana Service Centre, a former parastatal of the erstwhile Bophuthatswana Government.

2.3 On 01 January 1998, following an interview for an unadvertised post, the Department absorbed her as a Senior Registry Clerk Grade II as per her appointment letter. She reported for duty at Rustenburg Regional Office on 05 January 1998.

2.4 After absorption she noticed that she was demoted from salary level 5 to salary level 3 and placed on grade 1 of salary level 3, her annual salary had dwindled from R37, 422.96 (Thirty seven thousand, four hundred and twenty two rand, ninety six cents) to R30, 396.00 (Thirty thousand, three hundred and ninety six rand) per annum. She raised her dissatisfaction with her immediate manager who was unable to resolve the matter. She then escalated the matter to higher authorities internally on 22 October 2001.

2.5 During her queries she noted that in terms of her qualifications her absorption document stated standard 9 (now Grade 11) as her highest qualification obtained although her highest qualification at the time of the absorption was standard 10 (now Grade 12).

2.6 After lodging a grievance with the Department, an internal investigation was conducted and a report in respect of her absorption grievances was issued on 26 March 2004 from the Department’s Labour Relations Unit and the following outcome was relayed to her:
2.6.1 The Senior Executive Officer approved her job title be rectified to read Senior Registry Clerk Grade 11;

2.6.2 Her educational standard be corrected from Standard nine to Standard ten;

2.6.3 Her experience and educational standard be taken into consideration, and

2.6.4 Her annual salary of R30951 be rectified, adjusted and the difference be paid out to her.

2.7 The Department, however, failed to implement the approved outcome of the investigation and instead chose to subject her from one fruitless process to another.

2.8 During 2006, the then HOD, MP Mogotho (the then HOD), issued a circular advising all staff at the Department that all grievances relating to the 1996/97 absorption would no longer to be considered by the Department and declared the subject matter closed. Staff were advised to follow other external dispute resolution mechanisms in case they still felt aggrieved. The Complainant approached the then HOD for clarity in respect of the circular and the response was that the circular did not affect her, but nothing was done to rectify the erroneous absorption.

2.9 In the main the Complainant alleged that the Department failed to implement the approved outcome of the Labour Relations Unit's investigation into her absorption grievance and as a result of such failure she suffered prejudice.

2.10 She had escalated the matter to various authorities including, the Office of the Premier, the Presidency as well as the Office of the Public Service Commission without success.
3. POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The Public Protector is an independent constitutional body established under 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, as regulated by legislation,

(a) 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;
(b) to report on that conduct; and
(c) to take appropriate remedial action."

3.3 The Public Protector has additional powers and functions prescribed by national legislation as per the provisions of section 182(2).

3.4 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector has additional power to resolve disputes involving conduct in state affairs through conciliation, mediation, negotiation or any other mechanism he or she deems appropriate.

3.5 The Department is an organ of state and its conduct and the conduct of its officials constitute conduct in state affairs, as a result this matter falls within the ambit of the Public Protector's mandate.

3.6 The power and jurisdiction of the Public Protector to investigate and take appropriate remedial action were not disputed by any of the parties.
3.7 In the Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect. The Constitutional Court further held that: "When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences."

4. THE INVESTIGATION

4.1 Methodology

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

4.1.2 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration.

4.1.3 The process involved sourcing and analysing documents, correspondence, interviews and examination of regulatory instruments, including constitutional provisions, legislation, regulations, relevant court decisions and applicable previous Public Protector Decisions or Touchstones.

4.1.4 The Public Protector issued a section 7(9) notice dated 07 April 2017 to the Department and the Head of the Department responded in a letter dated 02 March 2017 as follows: "The department has noted the intended findings and remedial action with regard to this matter and wish to indicate that there is no

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1 [2016] ZACC 11; 2016 (3) SA 580 (CC) and 2016 (5) BCLR 618 (CC) at para [76].
2 Supra at para [73].
further evidence to submit." Based on the response and the fact that no further evidence could be provided the Public Protector proceeded to adjudicate on the matter.

4.2 Approach to the investigation

4.2.1 Like every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:

4.2.1.1 What happened?

4.2.1.2 What should have happened?

4.2.1.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration?

4.2.1.4 In the event of maladministration what would it take to remedy the wrong or to place the Complainant as close as possible to where they would have been but for the maladministration or improper conduct?

4.2.2 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation.

4.2.3 The enquiry regarding what should have happened, focuses on the law or rules that regulate the standards that should have been met by the Department to prevent improper conduct and/or maladministration as well as prejudice.

4.2.4 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration. Where a Complainant
has suffered prejudice the idea is to place him or her as close as possible to where they would have been had the state institution complied with the regulatory framework setting the applicable standards for good administration.

4.3 On analysis of the complaint and available information, the following were issues considered and investigated:

4.3.1 Whether the Department unduly failed to implement the approved outcome of the Labour Relations Unit’s investigation into the Complainant’s absorption grievance, and

4.3.2 Whether the Complainant was prejudiced as the result of the Department’s conduct.

4.4 Key sources of information

4.4.1 Documents:

4.4.1.1 A statement giving full particulars of the complaint and chronology of events dated 07 April 2014;

4.4.1.2 A copy of a Report on an investigation of grievance submitted by the Complainant dated 26 March 2004; and

4.4.1.3 Admin Circular No. 5/2006;

4.4.2 Correspondence sent and received

4.4.2.1 Letter from the Complainant to the Department (HRM: Rustenburg Regional Office) dated 22 October 2001;

4.4.2.2 Letter from the Complainant to the Department (Assistant Director Admin) dated 24 October 2001;

4.4.2.3 Letter from the Complainant to the Department (HRM: Rustenburg Regional Office) dated 24 May 2002;
4.4.2.4 Letter from the Complainant to the Department dated 04 September 2003;
4.4.2.5 Letter from the Complainant to the Department (Director: HRM: Bojanala Region) dated 11 October 2003;
4.4.2.6 Letter from the Department (Labour Relations) to the Complainant dated 09 December 2003;
4.4.2.7 Letter from the Complainant to the Department (Labour Relations) dated 15 December 2003;
4.4.2.8 Letter from the Department (Labour Relations) to the Complainant dated 06 February 2004;
4.4.2.9 Letter from Department (Labour Relations) outcome of grievance dated 07 June 2004;
4.4.2.10 Letter from the Department (Manager Service Condition) dated 12 October 2004;
4.4.2.11 Letter from Complainant to the Department (the then HOD) dated 13 July 2006;
4.4.2.12 Response letter from the Complainant to the Office of the MEC dated 13 July 2006;
4.4.2.13 Letter from the Department (the then HOD) to the Complainant dated 20 July 2006;
4.4.2.14 Letter of referral to Public Service Commission (PSC) dated 17 April 2007;
4.4.2.15 Response letter from the Office of the MEC to Complainant dated 16 January 2008;
4.4.2.16 Response letter from the PSC to Complainant dated 16 January 2008;
4.4.2.17 Response letter from the Department (Director: Bojanala District) to Complainant dated 16 January 2008;
4.4.2.18 Letter from the Complainant to the Department (Director: Bojanala District) dated 24 November 2009;
4.4.2.19 Response letter from the Department (Director: Bojanala District) to Complainant dated 11 December 2009;
4.4.2.20 Letter to the then HOD, Mr. P. Mogothe dated 08 January 2010;
4.4.2.21 Letter from Complainant to Office of the Premier dated 03 August 2010; and
4.4.2.22 Other correspondence submitted by the Complainant, including e-mails and attachments, submitted between 2011 and 2014, mostly correspondence between the Complainant and Office of the HOD.

4.4.3 Meetings and interviews

4.4.3.1 Meeting with Complainant on 07 April 2014 regarding issues raised;
4.4.3.2 Telephone discussion between the Public Protector and the Complainant on 26 September 2014 to clarify issues raised by her;
4.4.3.3 Meeting with the Head of the Department, Dr Poncho Mokaila, on 27 August 2014; and
4.4.3.4 ADR session held on 31 August 2015.

4.4.4 Legal and Regulatory Framework

4.4.4.1 The Constitution;
4.4.4.2 Promotion of Administrative Justice Act 03 of 2000 (PAJA); and
4.4.4.3 Public Protector Act;

4.4.5 Case Law

4.4.5.1 Sokhela & Others v MEC, Agriculture & Environmental Affairs (KwaZulu-Natal) & Others ([2009] JOL 23782 (KZP) at para [52])
5. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH THE APPLICABLE LAW AND PRESCRIPTS

5.1 Regarding whether the Department unduly failed to implement the approved outcome of the Labour Relations Unit's investigation into the Complainant's grievance, if so did such failure constitute improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(i) of the Public Protector Act:

Common cause issues

5.1.1 It is common cause that on 01 January 1998 the Complainant was absorbed into the Department as Senior Registry Clerk.

5.1.2 After absorption, the Complainant noticed that she was demoted from salary level 5 to salary level 3 and placed on grade 1 of salary level 3, her annual salary had dropped from R37, 422.96 to R30, 396.00 per annum. She raised her dissatisfaction with her immediate manager without the matter being resolved. She then escalated the matter to higher authorities on 22 October 2001.

5.1.3 As per a letter dated 06 February 2004 from the Labour Relations Unit to the Complainant, the then HOD, nominated Mr Chris Kheswa, Ms Alice Tshephe and Mr Save Motlagomang and requested the Complainant to select one of the said officers to serve as an Investigating Officer in terms of the Grievance Rules. Mr Save Motlagomang was selected by the Complainant and was subsequently appointed to conduct the investigation.

5.1.4 On 26 March 2004 the minutes, findings and recommendations by the Investigating Officer were submitted to the Deputy Director General of the
Department which revealed that there were discrepancies during and post the absorption process and the Department through, its Labour Relations Unit, undertook to rectify the errors as per a letter dated 07 June 2004 from Labour Relations to the Complainant.

5.1.5 On 07 June 2004 the outcome of the investigation was relayed to the Complainant advising her as follows:

"Following your grievance regarding the 1997 absorption, the investigation has been completed and the outcome is as follows:

i. The Senior Executive Officer approved that your Job title be rectified to read Senior Registry Clerk Grade 11,

ii. Your educational standard be corrected from Standard nine to Standard ten,

iii. Your experience and educational standard be taken into consideration, and

iv. Your annual salary of R30951 (P) be rectified, adjusted and the difference be paid out to you.

5.1.6 Whilst awaiting the Department to rectify her absorption status as agreed the Department issued an Admin Circular 05/2006 informing all employees that “…the continuation of the absorption can no longer be justified, morally, ethically or otherwise. It is no longer in the interest of anyone to pursue this matter given inherent problems associated with absorption… this process is officially closed with immediate effect”.

5.1.7 The then HOD in a letter, dated 20 July 2006 addressed to the Complainant, pronounced the following to her:

"Kindly be informed that my decision on the above-mentioned matter is effective from the date of the circular and it does not affect previous decisions taken prior to that date"
Issues in dispute

5.1.8 The factual dispute was whether the Department committed to and later defaulted on an agreement and/or undertaking to implement the recommendations that they approved relying on the contents of Admin Circular No 5/2006 for its deviation and whether the Department intended to revoke previous decisions in respect of Complainant’s absorption grievance in issuing Admin Circular No. 5/2006

Application of the relevant law

The Complainant’s Right to Proper Conduct and Good Administration

5.1.9 During the investigation the Public Protector uncovered that the Department does not have a Departmental Policy dealing with grievance procedures and/or rules. The Department relies on the Public Service Co-ordinating Bargaining Council Resolution no. 14 of 2002. It thus is important to point out that the role of the Public Protector is not to replace the role of the Council. The role of the Public Protector in this regard is to make a determination in respect of the conduct of the Department towards the Complainant. Such conduct is an administrative one. This matter was accordingly dealt with in terms of the PSCB resolution 14 of 2002 and was dismissed for late submission to the Council. The Public Service Commission rejected the matter and the reason advanced in so doing was that there is no dispute rather a delay by the Department to implement the recommendations. The Public Protector thus agrees with the view held by the Public Service Commission.

5.1.10 When dealing with people, the Department, like all other organs of state, has a duty to eschew improper conduct as envisaged in section 182 of the Constitution or maladministration in various manifestations as envisaged in section 6 of the Public Protector Act. The proscription of improper conduct and maladministration or bad administration can be viewed as concomitantly
giving the people the right to proper conduct and good administration. In determining the content of proper conduct, the Public Protector considers lawfulness, justice and general acceptability of conduct in the light of the founding values of South Africa as enshrined in the Constitution.

5.1.11 The Department also had a duty, in its dealings with the Complainant, to ensure that its decisions and actions meet the test of just administrative action as envisaged in section 33 of the Constitution which states that “everyone has the right to administrative action that is lawful, reasonable and procedurally fair”.

5.1.12 The Department’s conduct further needs to be tested against the principles of good administration outlined in section 195(1) of the Constitution, which state, among others, that “services must be provided impartially, fairly, equitably and without bias”; and that “public administration must be accountable”. Among other things, the Department’s conduct should have complied with the specific requirement of section 195, that:

(1) Public administration must be governed by democratic values and principles enshrined in the Constitution, including the following principles:

(a) A high standard of professional ethics must be promoted and maintained;

(b) ....

(c) Public administration must be development oriented;

(d) Services must be provided impartially, fairly, equitably and without bias;

(e) People’s needs must be responded to...

(f) ....

(g) ....

(h) Good human-resource management and career development practices, to maximize human potential, must be cultivated"
Duty imposed by the Promotion of Administrative Justice Act 3 of 2000 (PAJA)

5.1.13 In ensuring just and fair administrative action, when dealing with people, the Department, like all other organs of state, has a duty to shun improper conduct and the parameter is set by PAJA. Section 1 of PAJA which provides as follows:

"Administrative action" means any decision taken, or any failure to take a decision, by –

(a) an organ of state, when –

(i) exercising a power in terms of the Constitution or a provincial constitution; or

(ii) exercising a public power or performing a public function in terms of any legislation; ...

(b) ...........

(c) which adversely affects the rights of any person

5.1.14 In Sokhela & Others v MEC, Agriculture & Environmental Affairs (KwaZulu-Natal) & Others ([2009] JOL 23782 (KZP) at paras [52]), the court held per Wallis J that:

"As section 3(2)(a) of PAJA makes clear what will constitute a fair administrative procedure depends upon circumstances of each case. However, in general, in order to give effect to the right to procedurally fair administrative action the person affected must be given adequate notice of the nature and purpose of the proposed administrative action; a reasonable opportunity to make representations and a clear statement of the administrative action. Ordinarily the entitlement to make representations will involve an entitlement to present and dispute information so as to ensure that the person making the decision is properly and correctly informed before doing so. That is hardly surprising bearing in mind that one of the grounds upon which the decision of an administrator may be set aside is because
irrelevant considerations were taken into account or relevant considerations were not considered.” (Public Protector’s emphasis)

Conclusion

5.1.15 The Department dealt with the matter in an appropriate way by accepting the Complainant’s grievance when the matter was initially raised by the Complainant on 22 October 2001. It is important to note that the Department conducted an investigation on the matter through its Labour Relations Unit, findings were made in favour of the Complainant and recommendations were made and subsequently accepted by the Department.

5.1.16 The Department did not dispute that it had undertaken to correct the Complainant’s absorption. Although the Department contended that circular 5/2006 which closed all absorption related cases still stood and it also applied to this complaint, it did not dispute that the author of the circular, the then HOD, advised the Complainant that all decisions which were taken prior to the issuing of the circular were not affected by the contents of the circular.

5.1.17 The Public Protector has set out the version of both sides concerning the events subsequent to the issuing of the Department’s Admin Circular 05/2006. It thus is the Public Protector’s view that these events do not raise a genuine dispute of fact that cannot be resolved. The differences between the Complainant and the Department are largely concerned with the interpretation and the conclusions to be drawn from the facts of the then HOD response letter to the Complainant’s wherein he stated that his decision in respect of the Admin Circular 05/2006 is effective from the date of the circular and it does not affect previous decisions taken prior to that date.

5.1.18 It can be concluded that the Department had a constitutional and statutory duty to observe the provisions of just administrative action as encapsulated in section 33 of the Constitution and section 3 of PAJA once it had made a
decision regarding the Complainant’s grievance, but failed to uphold these constitutional duties.

5.2 Regarding whether the Complainant was prejudiced as the result of the Department’s conduct:

5.2.1 It is common cause that the Department did not implement the approved outcome of the Labour Relations Unit’s investigation into Complainant’s absorption grievance.

5.2.2 The Complainant would have benefitted financially had the Department acted accordingly.

5.2.3 The Complainant’s potential notch progression, monthly salary adjustment, higher interest in the GEPF, and any other promotion associated with the position were affected.

Application of the relevant law

5.2.4 Writers such as Stephen Owen, *The Ombudsman: Essential elements and common challenges: The international ombudsman anthology: selected writings from the International Ombudsman Institute*. Linda C. Reif, *International Ombudsman Institute*, 1999, accentuated the view that the Ombudsman system of oversight and accountability has developed in response to the shortcomings of legislative and judicial method in ensuring that individuals receive appropriate consideration and protection against adverse government action:

“A finding of administrative negligence and a recommendation … to remedy the harm caused by it pursuant to ombudsman legislation is not necessarily based on the same findings that a court would require to establish legal liability. Ombudsman authority to recommend remedial action derives from the premise that a fair remedy with respect to administrative wrongdoing is not
always available at law. ...to a large extent, the office of the ombudsman is established by legislatures in recognition of the inadequacy of the courts to deal with many injustices arising from the nature of modern bureaucracy.

5.2.5 This is a premise that was equally fundamental to the creation of the institution of the Public Protector as an entity to remedy prejudice and impropriety caused by maladministration or improper conduct in terms of section 182(1)(c) of the Constitution.

Conclusion

5.2.6 In that regard, the Public Protector is of the view that the failure by the Department to implement the approved outcome of the Labour Relations Unit’s investigation into the Complainant’s grievance was irrational and unfair as it affected her right to benefit financially.

6. FINDINGS

6.1 Regarding whether the Department unduly failed to implement the approved outcome of the Labour Relations Unit’s investigation into the Complainant’s grievance:

6.1.1 The allegation that the Department unduly failed to implement the outcome of the internal investigation report is substantiated.

6.1.2 The reasons advanced by the Department in justification for its failure to act properly towards the Complainant are not cogent. The preliminary processes of labour law had been complied with and the Department agreed to rectify discrepancies relating to the Complainant’s absorption subsequent to the investigation report issued by the Labour Relations Unit nothing more was required but implementation.
6.1.3 The Department's failure to implement the outcome of the investigation, in violation of sections 33 and 195(1) of the Constitution, constitutes improper conduct as envisaged in section 182(1) of the Constitution and maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act.

6.2 Regarding whether the Complainant was prejudiced as the result of the Department's conduct:

6.2.1 The allegation that the Complainant was prejudiced as a result of the Department's conduct is substantiated.

6.2.2 The Complainant was prejudiced by the conduct of the Department as envisaged in section 182(1) (a) of the Constitution because had the Department implemented the outcome of the investigation it would have placed her in a better financial position. Failure to implement the outcome meant that she lost out on potential notch progression, monthly salary adjustment, higher interest in the GEPF, and any other promotion associated with the position.

6.2.3 The Department, in this regard, behaved contrary to the constitutional duties imposed on it and contrary to the values of the Constitution. The Department treated the Complainant with a lack of respect and with a level of disdain that reflects very poorly indeed on an organ of state bound by the Constitution.

7. **REMEDIAL ACTION**

In light of the above findings the Public Protector is taking the following remedial action as contemplated in section 182(1) (c) of the Constitution:

7.1 The Head of the Department must ensure that the outcome of the investigation into Complainant's absorption grievance is implemented retrospectively from January 1998 within 30 working days from the date of this report;
7.2 The Head of the Department must ensure that the Complainant is paid all monies having taking into account the notch progression that would have been due to her had the recommendations of the investigation into her absorption been implemented effectively from January 1998, together with interest, from January 1998 to date of final payment, calculated at the applicable rate (at the time) as prescribed by the Minister of Justice and Constitutional Development in terms of section 1(2) of the Prescribed Rate of Interest Act 55 of 1975 within 30 working days from date of this report.

7.3 The Head of the Department must reimburse the GEPF with the cost implications, including arrear employer and employee contributions, within 60 working days from the date of this report; and

7.4 The Head of the Department must write a letter of apology to the Complainant for the prejudice caused to her within 30 working days from the date of this report.

3. MONITORING

8.1 The Head of the Department must, within 14 working days of the issuing of this report, submit an Action Plan indicating how the remedial action will be implemented.

8.2 The Head of the Department must submit a report, within 30 working days as of the date of the report, to the Public Protector on the progress made with the implementation of the remedial action.

ADV SUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 30/09/2017