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Allegations of maladministration and undue delay against the North – West Department of Education and Sports Development

REPORT ON AN INVESTIGATION INTO ALLEGATIONS OF UNDUE DELAY AND MALADMINISTRATION BY THE NORTH-WEST DEPARTMENT OF EDUCATION AND SPORTS DEVELOPMENT RELATING TO THE PROCESSING OF MR NGAKANE’S APPLICATION FOR EARLY RETIREMENT ON THE GROUNDS OF ILL HEALTH
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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 (the Constitution) and section 8(2A) of the Public Protector Act, 1994 (the Public Protector Act).

(ii) The report relates to an investigation into allegations of undue delay and maladministration by the North-West Department of Education and Sports Development relating to the processing of Mr RWB Ngakane's application for early retirement on the grounds of ill health.

(iii) The complaint was lodged by Mr RWB Ngakane on 12 February 2015.

(iv) Based on an analysis of the complaint, the following issues were considered and investigated:

(a) Whether the Department unduly delayed to inform the Complainant of the outcome of his application for early retirement on grounds of ill-health, and whether such undue delay amounts to maladministration.

(b) Whether the Department unduly delayed to submit the Complainant's exit documents, with proof of payment of the arrear contributions to the GPAA in order for the benefits to be processed and paid to the Complainant amounts to maladministration.

(c) Whether the conduct of the Department improperly prejudiced the Complainant and if so, what would it take to place the Complainant
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as close as possible to where he could have been had the Department acted properly.

(v) The investigation was conducted in terms of section 182(1) of the Constitution and sections 6 and 7 of the Public Protector Act. It included correspondence with the North-West Department of Education and Sports Development (Department) and the Government Pensions Administration Agency (GPAA), a meeting with officials of the GPAA, an analysis of the documents and information obtained during the investigation and application of the relevant legislation, policy and jurisprudence.

(vi) Having considered the evidence obtained during the investigation against the relevant regulatory framework, I make the following findings:

(a) Regarding whether the Department unduly delayed to inform the Complainant of the outcome of his application for early retirement on grounds of ill-health.

(aa) The allegation that the Department unduly delayed to inform the Complainant of the outcome of his application for early retirement on grounds of ill-health, is substantiated.

(bb) The undue delay is in violation of the Batho Pele Principle of redress and a contravention of sections 195(1)(g) and 237 of the Constitution; and

(cc) The conduct of the Department constitutes improper conduct as envisaged in Section 182(1) of the Constitution and maladministration and undue delay as envisaged in Section 6(4) (i) & (ii) of the Public Protector Act.
(b) Regarding whether the Department unduly delayed to submit the Complainant’s exit documents, with proof of payment of the arrear contributions to the GPAA in order for the benefits to be processed and paid to the Complainant is improper and amounts to maladministration.

(aa) The allegation that the conduct of the Department referred to in paragraph (iv)(b) was improper and constitutes maladministration, is substantiated.

(bb) The undue delay is in violation of the Batho Pele Principle of redress and a contravention of sections 195(1)(g) and 237 of the Constitution; and

(cc) The conduct of the Department constitutes improper conduct as envisaged in Section 182(1) of the Constitution and maladministration and undue delay as envisaged in Section 6(4) (i) & (ii) of the Public Protector Act.

(dd) The undue delay of the Department to submit the Complainant’s exit documents, with proof of payment of the arrear contributions to the GPAA in order for the benefits to be processed and paid to the Complainant 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.
(c) Regarding whether the conduct of the Department improperly prejudiced the Complainant.

(aa) The allegation that the Complainant suffered prejudice as a result of the undue delay by the Department to submit exit documents and proof of payment of arrear contribution to the GPAA which resulted in the delay to process and pay pension fund benefits to the Complainants, is substantiated;

(bb) The Complainant was unduly denied an opportunity to access money which could have made his financial position more tenable; and

(cc) The conduct of the Department resulted in prejudice as envisaged in Section 182(1) of the Constitution and improper prejudice as envisaged in Section 6 (4) (v) of the Public Protector Act.

(vii) The appropriate remedial action I am taking in terms of section 182(1)(c) of the Constitution is with the view of placing the Complainant as close as possible to where he would have been had the improper conduct and maladministration not occurred, and is the following:

(a) The Administrator of the Department: Mr JNT Mohlala

(aa) Issue a written apology within fourteen (14) working days from the date of the report to the Complainant apologising for the delay to submit his exit documents with proof of payment of arrear contribution to the GPAA, which resulted in the delay to process and make payment of his pension benefit within a reasonable time;
(bb) Take urgent steps to pay the complainant the arrear monthly contribution that was deducted from the Complainant's lump sum payment in the sum of R4468.57 with interest at the prescribed rate determined in the Prescribed Rate of Interest Act, 1975, as applicable for the period from the date that the arrear contribution was deducted from the lump sum benefits of the Complainant to the date of actual payment, within sixty (60) working days from the date of this report.
1. INTRODUCTION

1.1 This 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(2A) of the Public Protector Act, 1994 (the Public Protector Act).

1.2 The report is submitted in terms of sections 8(1) and 8(3) of the Public Protector Act to:

1.2.1 The Administrator Mr JNT Mohlala and the Superintendent – General of the North - West Department of Education and Sports Development Ms SM Semaswe.

1.2.2 The Minister of Basic Education, Ms Matsie Angelina Motshekga.

1.2.3 The North West MEC for Education.

1.2.4 The Chief Executive Officer of GPAA, Mr Krishen Sukdev.

1.3 A copies of the report is also provided to Mr RWB Ngakane, who lodged the complaint, to inform him of the outcome of my investigation.
1.4 The report relates to an investigation into allegations of undue delay and maladministration by the North-West Department of Education and Sports Development relating to the processing of Mr Ngakane’s application for early retirement on the grounds of ill health.

2. THE COMPLAINT

2.1 The complaint was lodged by Mr RWB Ngakane (the Complainant) on 11 February 2015.

2.2 In the main, the Complainant alleged that:

2.2.1 He was on sick leave for an extended period of time from 2008 and he stopped receiving his salary from the Department in November 2014.

2.2.2 When he made an enquiry with the officials of the Department he was advised that he had been discharged from service on grounds of ill-health in May 2014. The Department furnished him with a letter dated 02 April 2014 but only date stamped 19 December 2014; signed by Ms Pooe of the Department, on behalf of the District Director of the Dr Kenneth Kaunda District, Mr H Motara.

2.2.3 He had not received the letter mentioned in paragraph 2.2.2 above until same was handed to him on 19 December 2014, nor was he ever informed that his employment was terminated on grounds of ill health in any other manner.

2.2.4 On 06 February 2015, an official of the Department assisted the Complainant to complete exit documents, and further advised the Complainant that the salary paid to him from May 2014 to November 2014 was an overpayment; and as such, that it would be deducted from Complainant’s pension benefit.
2.2.5 As at June 2015, the Government Pensions Administration Agency (GPAA) had not received the Complainant’s exit documents, and proof of payment of arrear contributions from the Department.

2.2.6 The Complainant alleged that the Department created an impression that he was still an employee as he continued to receive his salary from May 2014; and further that the failure to pay his salary in December 2014 caused his medical aid membership to lapse due to non-payment.

2.2.7 The Complainant alleges that he has suffered emotional and psychological distress as he was, and still is, on psychiatric medication which he could not access due to the non-payment of his salary in December 2014. This emotional and psychological distress was exacerbated by the subsequent lapping of his medical aid membership and the delay by the Department to process his exit documents for purposes of his pension benefit pay-out. Furthermore, he alleges that as a result of the actions of the Department, he lost his house as well as policies and insurances which had lapsed.

2.3 In essence, the Complainant alleged that there was undue delay by the Department to inform him of the approval of his application for early retirement due to ill health, and that the Department’s undue delay to submit his exit documents with proof of payment of arrear contributions to the GPAA amounted to maladministration, which resulted him suffering prejudice, by only receiving payment of his pension benefit eighteen (18) months after the approval of his termination of employment on grounds of ill health.
3 POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR

3.1 The Public Protector is an independent constitutional institution, 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 national 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 Section 182(2) directs that the Public Protector has additional powers and functions prescribed by national legislation.

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 is also given power to resolve disputes through conciliation, mediation, negotiation, advising the complainant regarding appropriate remedies or any other means that may be expedient under the circumstances.

3.5 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\(^1\). The Constitutional Court further held that: "When the 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.\(^2\)

3.6. In the above-mentioned matter of the Economic Freedom Fighters v Speaker of the National Assembly and Others, the Chief Justice Mogoeng stated the following, when confirming the powers of the Public Protector:

3.6.1 Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles (para 65);

3.6.2 An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced (para 67);

3.6.3 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints. It is the most the Public Protector could do in terms of the Interim Constitution. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint (para 68);

3.6.4 The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow (para 69);

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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]
3.6.5 Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to (para 70);

3.6.6 The Public Protector’s power to take appropriate remedial action is wide but certainly not unfettered. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made (para 71);

3.6.7 Implicit in the words “take action” is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And “action” presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence(para 71(a));

3.6.8 She has the power to determine the appropriate remedy and prescribe the manner of its implementation (para 71(d));

3.6.9 “Appropriate” means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case (para 71(e));

3.7 In the matter of the President of the Republic of South Africa v Office of the Public Protector and Others (91139/2016) [2017] ZAGPPHC 747; 2018 (2) SA 100 (GP); [2018] 1 All SA 800 (GP); 2018 (5) BCLR 609 (GP) (13 December
2017), the court held as follows, when confirming the powers of the Public Protector:

3.7.1 The constitutional power is curtailed in the circumstances wherein there is conflict with the obligations under the Constitution (paragraph 71 of the judgment);

3.7.2 The Public Protector has the power to take remedial action, which include instructing the President to exercise powers entrusted on him under the Constitution if that is required to remedy the harm in question (paragraph 82 of the judgment);

3.7.3 Taking remedial action is not contingent upon a finding of impropriety or prejudice. Section 182(1) afford the Public Protector with the following three separate powers (paragraph 100 and 101 of the judgment):

a) Conduct an investigation;
b) Report on that conduct; and
c) To take remedial action.

3.7.4 The Public Protector is constitutionally empowered to take binding remedial action on the basis of preliminary findings or prima facie findings (paragraph 104 of the judgment);

3.7.5 The primary role of the Public Protector is that of an investigator and not an adjudicator. Her role is not to supplant the role and function of the court (Paragraph 105 of the report);

3.7.6 The fact that there are no firm findings on the wrong doing, does not prohibit the Public Protector form taking remedial action. The Public Protector's
observations constitute *prima facie* findings that point to serious misconduct (paragraph 107 and 108 of the Judgment); and

3.7.7 *Prima facie* evidence which point to serious misconduct is a sufficient and appropriate basis for the Public protector to take remedial action (paragraph 112 of the judgment).

3.8 The Department is an organ of state and its conduct amounts to conduct in state affairs, as a result the matter falls within the ambit of the Public Protector's mandate.

3.9 The jurisdiction of the Public Protector to investigate this matter was not disputed by the parties.

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 undue delay or maladministration.

4.2 **Approach to the investigation**

4.2.1 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 improper conduct or maladministration, what would it take to remedy the wrong or, where appropriate, to place the complainant as close as possible to where she/he would have been, but for the improper conduct or maladministration?

4.2.1.5 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. In this particular case, the factual enquiry principally focused on whether the Complainant was timeously notified of the approval of his early retirement on grounds of ill health, and also whether the Department unduly delayed to submit the Complainant's exit documents with proof of contribution of arrear maintenance to the GPAA.

4.2.1.6 The enquiry regarding what should have happened, focuses on the standard that should have been met by the Department in notifying the Complainant of the approval of his request for early retirement on grounds of ill-health, and the standard that should have been met by the Department to timeously submit exit documents and proof of contribution to the GPAA, to prevent maladministration or prejudice.

4.2.1.7 The enquiry regarding the remedy or remedial action seeks to explore options for redressing the consequences of maladministration.
4.3 On analysis of the complaint, the following issues were considered and investigated:

4.3.1 **Issue 1:** Whether the Department unduly delayed to inform the Complainant of the outcome of his application for early retirement on grounds of ill-health, and whether such undue delay constitutes maladministration;

4.3.2 **Issue 2:** Whether the Department unduly delayed to submit the Complainant's exit documents, and payment of the arrear contributions to the GPAA in order for the benefits to be processed and paid to the Complainant is improper and amounts to maladministration; and

4.3.3 **Issue 3:** Whether the Complainant was improperly prejudiced by the alleged conduct of the Department.

4.4 Key sources of information

4.4.1 Documents

4.4.1.1 Court order, High Court of South Africa (North West Division, Mahikeng), case number 1972/13, dated 12 June 2014.

4.4.1.2 A copy of a letter to the Complainant from the Human Resources Management, North West Department of Education, dated 2 April 2014, and 18 December 2014.

4.4.1.3 A copy of a letter to Complainant from the GPAA, dated 20 November 2015.
4.4.2 Correspondence between the Public Protector and:


4.4.2.2 The Office of the MEC, Directorate: Legal Services, dated 23 March 2015.


4.4.3 Meeting held

4.4.3.1 Meeting held with the Head of Department, Dr Molale on 5 August 2015 and a copy of Settlement Agreement, dated 5 August 2015.

4.4.3.2 Minutes of a Meeting, dated 9 November 2015.

4.4.4 Legislation and other prescripts


4.4.4.2 The Public Protector Act No 23 of 1994.

4.4.4.3 The Labour Relations Act No 66 of 1995.
4.4.4.4 The Government Employees Law, 1996.

4.4.4.5 Employment of Educators Act 76 of 1998.

4.4.4.6 The Promotion of Administrative Justice Act No 3 of 2000.

4.4.4.7 The Prescribed Rate of Interest Act, 55 of 1975.

4.4.4.8 Policy on Service Delivery – Batho Pele Principles.

4.4.5 Jurisprudence considered

4.4.5.1 Gwetha v Transkei Development Corporation Ltd and Others [2005] ZASCA 51, 2006 (2) SA 603 (SCA);

4.4.5.2 Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others [2016] ZACC 11; 2016(3) SA 580(CC).

4.4.6 Notices issued in terms of section 7(9) of the Public Protector Act

4.4.6.1 Notice issued in terms of section 7(9)(a) of the Public Protector Act to the Superintendent - General, Mrs SM Semaswe, on 26 June 2019.

4.4.6.2 Response to the section 7(9)(a) notice from the Superintendent – General, dated 8 July 2019, informing that the matter was referred to the Administrator, since the Department is placed under Administration in terms of Section 100(1)(b) of the Constitution, 1996.
5. THE DETERMINATION OF THE ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS

5.1 Regarding whether the Department unduly delayed to inform the Complainant of the outcome of his application for early retirement on grounds of ill-health, and whether such undue delay constitutes maladministration;

*Common cause or Undisputed Facts*

5.1.1 It is common cause that the Complainant was employed as a teacher with the Department from 1992, and he applied for early retirement due to ill health, and that his application was subsequently approved on 1 May 2014.

5.1.2 It is also common cause that the complainant continued to receive his salary during the period May 2014 to November 2014.

5.1.3 It is common cause that according to the letter dated 2 April 2014, the application for retirement due to ill health was approved by the Department on 2 April 2014. Furthermore the letter had an imprint that appears to be a fax date print, which date appears as “19 Dec 2014”, and the second letter was dated “19-12-2014” which was prepared by the Department for all the Complainant’s creditors, indicating that the Complainant has applied for his benefits as a result of this retirement, and that the process is a long one with a request for patience from recipients of the letter.
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Issues in dispute

5.1.4 The issue for my determination is whether my Department informed the Complainant of the outcome of his application for early retirement due to ill health.

5.1.5 The Complainant alleges that he applied for early retirement due to ill health, and he did not get a response from the Department until his salary was not paid on the 19th of December 2014. He made enquiries with the nearest office of the Department of Education in the Bojanala District and was informed that his salary was terminated. He followed up with the Provincial office and was informed that his services were terminated on grounds of ill health.

5.1.6 The official who assisted him further faxed two letters to him on the 19th of December 2014, the first letter informed him that the Head of the Department had granted approval for termination of his services on medical grounds with effect from 1 May 2014. The second letter was addressed to his creditors informing them that he has applied for his pension benefits as a result of retirement and that the process is long drawn out and the delay in timeous payment may adversely affect the recipient and family, and they were requested to exercise patience as the Department expedites the process of payment.

5.1.7 At the time that he approached my office on the 11th of February 2015, his pension benefits had not yet been paid.

5.1.8 The Department did not provide my office with any evidence that they informed the Complainant about the outcome of his application for early retirement due to ill health prior to 19 December 2015.

5.1.9 There was no response to the section 7(9) Notice, dated 25 June 2019.
Application of the relevant law

5.1.10 The termination of services of educators is regulated under Chapter 4 of the Employment of Educator's Act\(^3\), 1998 (the Educator's Act). "Section 12 provides that an educator may be discharged on account of ill-health. The Procedures in respect of ill health or injury is set out in paragraph 3 of Schedule 1 that requires that the employer upon receipt of an application for discharge of service on account of ill health to investigate the extent of the ill health or injury. Furthermore in terms of paragraph 5 of Schedule 1 provides as follows:

"(5) After the investigation of the extent of the educator's ill health or injury, the employer must provide the educator with a written report setting out the results of findings of the investigation;"

Conclusion

5.1.11 Based on the legal framework above, the Department should have conducted an investigation to the extent of the Complainant's ill health and provided him with a written report setting out the results.

5.1.12 There is no evidence that the Department complied with Section 12 read with Schedule 1 of the Educator Act and provided the Complainant with a written report on the outcome of the investigation into the Complainant’s ill health. Furthermore there is no evidence that the Department informed the Complainant of the outcome of his application for early retirement prior to 19 December 2014.

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\(^3\) Employment of Educators Act 76 of 1998.
5.2 Regarding whether the Department unduly delayed to submit the Complainant’s exit documents, with proof of payment of the arrear contributions to the GPAA in order for the benefits to be processed and paid to the Complainant is improper and amounts to maladministration.

**Common cause or Undisputed Facts**

5.2.1 It is common cause that according to the letter sent to the Complainant on 19 December 2014, his application for retirement due to ill-health was approved by the Head of Department on 1 May 2014.

5.2.2 As at June 2015, the Government Pensions Administration Agency (GPAA) had not received the Complainant’s exit documents, and proof of payment of arrear contributions from the Department.

5.2.3 It is further common cause that according to the letter from GPAA dated 17 November 2015, the Complainant’s withdrawal forms were rejected seven (7) times, due to outstanding contributions of R901.90 (employee contribution) and R1563.48 (employer contribution) for the 2010 to 2011 period. The total arrear contribution plus interest accrued at the time of the letter was R5370.47. According to GPAA the Department insisted that they had paid over all contributions that were due and resubmitted the withdrawal (Z102 form) forms four (4) times without providing proof of the payment of the arrear contributions.

5.2.4 The letter further highlighted that in terms of Section 17 (2) of the Government Employee Pensions Law, Act 1996 (GEP Law) the employer is obliged to make contributions to the fund in respect of every member employed in its service. Further to that, the employer “has a concomitant duty to collect contributions in terms of Rule 8 of the GEP Law”.

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5.2.5 It is furthermore common cause that the GPAA sent another letter to the Department on 9 November 2015 requesting the Department to make payment of the arrear contributions to enable the GPAA to process payment of the Complainants' pension benefits.

5.2.6 The GPAA reported the arrear contributions as follows:

<table>
<thead>
<tr>
<th></th>
<th>EMPLOYER</th>
<th>EMPLOYEE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Contribution</td>
<td>R 1563.48</td>
<td>R 901.90</td>
</tr>
<tr>
<td>Interests</td>
<td>R 1842.28</td>
<td>R 1062.81</td>
</tr>
<tr>
<td>Sub-total</td>
<td>R 3405.76</td>
<td>R 1964.71</td>
</tr>
<tr>
<td>Grand Total</td>
<td></td>
<td>R5370.47</td>
</tr>
<tr>
<td>Sum of Employer contribution plus interest and employee interest</td>
<td>Amount employee Entitled to</td>
<td>R4468.57</td>
</tr>
</tbody>
</table>

5.2.7 It is also common cause that at the time of entering into a settlement agreement with the Department on 5 August 2015, a year had lapsed and the Department had not rectified the Z102 withdrawal forms and subsequently they had also not made payment of the outstanding contributions to the GPAA to process and pay the Complainant.

5.2.8 It is not in dispute that the payment of the Complainant's pension benefits was only effected on 18 November 2015 after the intervention by my office. As a result of the intervention, the GPAA approved a recommendation made to deduct the R5370.47 as debt owed by the member to enable the GPAA to
process the pension benefits that were due to the Complainant who was sick and in a dire financial position due to the non-payment of his pension benefits.

**Issues in dispute**

5.2.9 The issue for my determination is whether the Department unduly delayed to submit the exit documents of the Complainant and to make payment of the arrear contributions to the GPAA to enable them to effect payment of pension benefits to the Complainant.

5.2.10 As stated above the issues are common cause, and the Department did not provide my office with an explanation or reason for non-payment on the full contributions to GPAA on behalf of the Complainant. The Department did not provide me with an explanation or a reason for not submitting the correct Z102 with the proof of payment of the arrear contributions to the GPAA.

**Application of the relevant law**

5.2.11 Section 8.1.3 of the Government Employees Pension Law Act 21 of 1996 (GEP Law) states that “*any amount which a member or an employer is obliged to pay the Fund in terms of Rule 11 or 12 shall be recovered from the members pensionable emoluments or from the employer as the case may be, monthly or in such a manner and at such time and in such instalments as the Board may determine; and immediately paid to the Fund: Provided that if an employer does not pay the contributions to the Fund within seven days after it becomes due interest shall be paid by the Employer to the Fund at the rate prescribed as from such due dates.*"
5.2.12 Section 17(2) of the GEP Law obliges the employer to make contributions to the Fund in respect of every member employed in its service. Therefore it is not the member's obligation to ensure that contributions are paid over to the Fund and the latter has a concomitant duty to collect contributions in terms of rule 8 of the GEP Law.

5.2.13 Section 21(3) (a) of the GEP Law states that “any amount that is payable to the Employer or the Fund by any member in the employment of such employer on the date of his or her retirement or discharge, or which the employer is liable to pay in respect of such member; may be deducted from the benefit payable to such member, pensioner or beneficiary under this Law in a lump sum or in such instalments as the Board may determine”. (own emphasis).

5.2.14 Section 26 of the GEP Law states that:

“(1) Notwithstanding anything to the contrary in any law contained, a benefit payable in terms of this Law shall be paid to the member, pensioner or beneficiary entitled to such benefit within a period of 60 days from the benefit becoming payable to the member, pensioner or beneficiary, which 60 days shall be calculated from the day following the date on which the benefit becomes payable: Provided that a benefit shall become payable to a member, pensioner or beneficiary on the last day of service at the employer of that member or pensioner or the death of that pensioner”.

Conclusion

5.2.15 Based on the information traversed above, the Department failed to comply with section 17(2) of the GEP Law in that it did not process the Complainant’s pension contributions to the GPAA as required. Despite the GPAA’s request to
address the arrear contributions in respect of the Complainant, the Department still did not accede to the GPAA’s request.

5.2.16 Consequently, the Complainant serviced the arrear contributions through his lump sum pension benefit, including the Department’s portion which was calculated at R3405.76. According to Section 8.1.3 of the GEP Law the Department is liable to also pay the interest as they did not submit the exit documents within seven days.

5.2.17 Based on the evidence above, the Department delayed to submit the exit documents (Z102 withdrawal forms) and proof of payment of arrear contribution to the GPAA. This resulted in GPAA making payment to the Complainant on 18 November 2015, which was eighteen (18) months after the HOD approved the termination of the Complainant’s employment on grounds of ill health.

5.2.18 The Department was obliged to submit exit documents, and proof of payment of arrear contributions timeously so that the Complainant can be paid his pension benefits.

5.3 Regarding whether the conduct of the Department was improper and prejudiced the Complainant.

*Common cause or Undisputed Facts*

5.3.1 It is common cause that the Complainant’s early retirement on grounds of ill-health was approved by the HOD on 1 May 2014 and that he was only notified of this on 19 December 2014.

5.3.2 It is also common cause that the Complainant received his last salary payment in November 2014, and that he received payment of his pension benefits
eighteen (18) months later on 18 November 2015. During the period of November 2014 to November 2015, which is approximately a year, the Complainant had no source of income.

5.3.3 It is also common cause that the Department failed on four occasions to re-submit the Z102 withdrawal forms and did not provide the GPAA with proof of payment relating to outstanding contributions.

*Issues in dispute*

5.3.4 The Complainant submitted that he suffered improper prejudice as a result of the Department’s conduct and did not have income for a period of a year due to the Department’s undue delay to submit the correct withdrawal forms to the GPAA. As a result of this, his medical aid with the Government Employees Medical Scheme (GEMS) lapsed, and he found himself in a position where his health deteriorated as he could not pay for his medical treatment.

5.3.5 The Complainant submitted further that his funeral and educational policies with the Metropolitan Life insurance lapsed, as he was unable to keep up with the payments. Furthermore, he was studying for a higher diploma at the Potchefstroom Teachers College, and had to discontinue his studies as he was unable to pay for tuition fees.

5.3.6 The Complainant submitted that he had to accept the recommendation that the outstanding contribution of R5370.47 be deducted from his pension as debt owed by the member to enable the GPAA to process the pension benefits to him. This amount included an amount of R1563.48 which is the employer’s contribution, R901.90 employee contribution and interest of R2905.09 levied by the GPAA due to late payment. His portion of the contribution was deducted from his salary by the Department and he accepted the recommendation as he was in
a dire financial position and notwithstanding several undertakings, the Department failed to fulfil its obligation to pay over the arrear contributions to GPAA.

5.3.7 The Department did not provide my office with an explanation or reason for the non-payment of the full contributions and submitted the correct Z102 withdrawal form to GPAA on behalf of the Complainant.

Application of the relevant law

5.3.8 The White Paper on Transforming Public Service Delivery issued by the Government in 1997 identified eight Batho Pele Principles for transforming public service delivery. The principles relevant to the present complaint are:

Courtesy: Citizens should be treated with courtesy and consideration.

Redress: If the promised standard of service is not delivered, citizens should be offered an apology, a full explanation and a speedy and effective remedy; and when complaints are made, citizens should receive a sympathetic, positive response.

Value for money: Public services should be provided economically and efficiently in order to give citizens the best possible value for money.

5.3.9 “Appropriate remedial action” is defined by the provisions of section 6(4)(c) the Public Protector Act which provides that I shall be competent, at a time prior to, during or after an investigation, if I deem it advisable, to refer any matter which has a bearing on an investigation, to the appropriate public body or authority affected by it or to make an appropriate recommendation regarding the redress of the prejudice resulting therefrom or to make any other appropriate recommendation I deem expedient to the affected body or authority.
Conclusion

5.3.10 Based on the evidence discussed above the Department did not apply the Batho Pele Principles when dealing with the personal circumstances of the Complainant. The Department also failed to speedily provide the Complainant with the appropriate redress after they signed the Settlement agreement and gave an undertaking to remedy the situation and pay the complainant benefits that were due to him.

5.3.11 The Department was required to comply with the terms of the Settlement Agreement dated 5 August 2015 in order to comply with the Principles of Batho Pele, to have a speedy and effective remedy where the promised standard of service was not delivered within a reasonable time, but the Department failed to do so.

5.3.12 Having regard to the evidence, the regulatory framework determining the standard that the Department should have complied with and the impact on the Complainant, I am likely to make the following adverse findings against the Department of Education.

6. FINDINGS

Having considered the evidence uncovered during the investigation against the provisions of the applicable legislation and policy prescripts, I make the following findings:

6.1 Regarding whether the Department unduly delayed to inform the Complainant of the outcome of his application for early retirement on grounds of ill-health, and whether such undue delay constitutes maladministration.
6.1.1 The allegation that the Department unduly delayed to inform the Complainant of the outcome of his application for early retirement on grounds of ill-health, and that such undue delay amounts to maladministration is substantiated.

6.1.2 The Department approved the Complainants application for early retirement on grounds of ill health on 01 May 2014, but only informed him of this on 19 December 2014.

6.1.3 There is no evidence that the Department complied with Section 12 read with Schedule 1 of the Educators Act and provided the Complainant with a written report on the outcome of the investigation into the Complainant’s ill-health. Furthermore, there is no evidence that the Department informed the Complainant on the outcome of his application for early retirement prior to 19 December 2014.

6.1.4 The Department’s conduct in this regard amounts to maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

6.2 Regarding whether the Department unduly delayed to submit the Complainant’s exit documents, with proof of payment of the arrear contributions to the GPAA in order for the benefits to be processed and paid to the Complainant is improper and amounts to maladministration.

6.2.1 The allegation that the Department delayed to submit to the GPAA the complainants exit documents, and proof of payment of arrear contributions is substantiated.
6.2.2 The GPAA confirmed that the withdrawal forms were rejected seven (7) times, and the Department failed to rectify same to the date that payment was made by the GPAA to the complainant.

6.2.3 The amount of R5370.47 was not paid by the Department and was deducted by the GPAA from the Complainant’s lump sum benefit in order to effect payment of pension benefits to the complainant.

6.2.4 The Department’s conduct in this regard amounts to maladministration as envisaged in section 6(4)(a)(i) of the Public Protector Act and improper conduct as envisaged in section 182(1) of the Constitution.

6.3 Regarding whether the conduct of the Department was improper and prejudiced the Complainant.

6.3.1 The allegation that the Complainant was improperly prejudiced by the conduct the Department is substantiated.

6.3.2 The Complainant was unduly denied an opportunity to access money which could have made his financial position more tenable; and

6.3.3 The conduct of the Department resulted in prejudice as envisaged in Section 182(1) of the Constitution and improper prejudice as envisaged in Section 6 (4) (v) of the Public Protector Act.

7. REMEDIAL ACTION

The appropriate remedial action I am taking in terms of section 182 (1)(c) of the Constitution, with the view to placing the Complainant as close as possible to
where they would have been had the improper conduct and maladministration not occurred, is the following:

7.1 The North West Department of Education and Sports Development to:

7.1.1 Issue a written apology within fourteen (14) working days from the date of this report to the Complainant apologising for the delay to submit exit documents and proof of payment of arrear contribution to enable his pension benefits to be processed and paid to him within a reasonable time;

7.1.2 Take urgent steps to pay the complainant the arrear monthly contribution that was deducted from the Complainant’s lump sum payment the arrear contributions in the sum of R4468.57 with interest at the prescribed rate determined in the Prescribed Rate of Interest Act, 1975, as applicable for the period from the date that the arrear contribution was deducted from the lump sum benefits of the Complainant to the date of actual payment, within sixty (60) working days from the date of this report.

8 MONITORING

8.1 The Public Protector’s remedial action will thereafter be monitored monthly until such time as it has been complied with in full.

ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE REPUBLIC OF SOUTH AFRICA
DATE: 04/09/2019

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