REPORT OF THE PUBLIC PROTECTOR IN TERMS OF SECTION 182(1)(b) OF
THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 AND
SECTION 8(1) OF THE PUBLIC PROTECTOR ACT, 1994

PUBLIC PROTECTOR
SOUTH AFRICA

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REPORT ON AN INVESTIGATION INTO ALLEGED MALADMINISTRATION AND
IMPROPRIETY IN DEALING WITH INCAPACITY LEAVE OF MRS VK KRAAI BY THE
DEPARTMENT OF EDUCATION AND SPORTS DEVELOPMENT, DR KENNETH KAUNDA
DISTRICT
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Executive Summary

(i) This is my report 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 Act, 1994.

(ii) The report deals with the outcome of an investigation into alleged maladministration and impropriety in dealing with incapacity leave of Mrs VK Kraai by the Department of Education and Sports Development, Dr Kenneth Kaunda District.

(iii) The Complainant alleged that in September 2015 to July 2016, she applied for incapacity leave and provided the doctor’s motivation report, but the Department rejected her incapacity leave application. The period she applied for was then regarded as unpaid leave and was liable to pay the Department for the said period for unjustified enrichment. The Department deducted an amount of R1 172.08 monthly as repayment to reimburse the Department for unpaid leave though her capped leave days and the 2016/18 circle sick leave days were utilised to settle the debt.

(iv) The Complainant’s contention in this regard is that the Department’s decision to deduct an amount of R1 172.08 monthly from her salary is not legal, was unfair, unjust and unreasonable as it was based on the wrongful interpretation of Personnel Administrative Measures which govern the management of leave days for Educators, moreover that she was injured whilst on duty. The Complainant therefore want the Department to reimburse her a sum of R28 129. 89.

(v) The Department disputed the allegation and is adamant that since the Complainant’s application for temporary incapacity leave was refused, she was indebted to the Department for 38 days taken between 23 February 2016 and 31 March 2016. Therefore she had to reimburse the Department a sum of R28 129. 89.
(vi) On analysis of the complaint, the following issues were identified and investigated:

(a) Whether the North West Provincial Department of Education and Sports Development irregularly deducted a total of R28 129.89 from the Complainant's salary for unpaid leave.

(b) Whether the Complainant suffered any prejudice as a result of the conduct of the North West Provincial Department of Education and Sports Development.

(vii) The investigation process was conducted through correspondence issued to and received from the Department; meeting held; analysis of relevant documents received; conducted research and consideration of applicable legal prescripts.

(viii) Section 7(9) Notices were issued to the Superintendent General (HOD): Mrs SM Semashwe; the Administrator for the Department: Mr JNT Mohlala; Dr Kenneth Kaunda District Director: Mr B Monale.

(ix) Key laws and policies 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 by the Department or its officials when dealing with this complaint. These are the following.

(a) 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 Municipality;
(b) Employment of Educators Act 76 of 1998 (EEA, 1998), Section 4(1) which requires the Minister to determine the salaries and other conditions of service for educators.

(c) Personnel Administrative Measures (PAM), published in the General Notice 948 Published in Government Gazette No. 39684 dated 12 February 2016, providing for the consolidation of the terms and conditions of employment of educators, determined in terms of section 4 of the EEA, 1998.

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

(a) Regarding whether the North West Provincial Department of Education and Sports Development irregularly deducted a total amount of R28 129.89 from the Complainant’s salary for unpaid leave.

(aa) The allegation that the Department irregularly deducted a total amount of R28 129.89 from the Complainant’s salary for unpaid leave is substantiated.

(bb) My investigation revealed that a total amount of R28 129.89 was deducted from the Complainant’s salary for unpaid leave for the period 5 October 2015 to 31 March 2016. Evidence at my disposal, however, indicates that when calculating the Complainant’s unpaid leave, the Department irregularly included the education institution closure period as part of her unauthorised leave. An education closure period is defined as a scheduled period that education institutions close at the end of each term and during which period teaching and learning activities are discontinued.

(cc) In terms of paragraph H.4.2.1 of the PAM 2016, the Complainant was regarded as being on annual leave during institution/school closure periods and therefore, the Department should not have included the closure periods
when it determined the Complainant’s unpaid leave days between October 2015 and March 2016.

(dd) Furthermore, evidence at my disposal indicates that the Complainant took ninety-seven (97) unauthorised leave days between October 2015 and March 2016 instead of 136 days as claimed by the Department. The Department used the Complainant’s 62 capped and 36 sick leave days to cover all her 97 unauthorised leave she took between October 2015 and March 2016.

(ee) The conduct of the Department in the circumstances is in contravention of section 195 of the Constitution and Chapter H of the PAM 2016.

(ff) The conduct of the Department also 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 suffered prejudice as a result of the conduct of the North West Provincial Department of Education and Sports Development under the circumstances.

(aa) The allegation that the Complainant suffered prejudice as a result of the conduct of the Department is substantiated.

(bb) The Complainant suffered serious financial prejudice because the Department irregularly deducted a total amount of R28 129.89 from her salary as unpaid leave.

(xi) In the light of the above findings I am taking the following remedial actions as contemplated in section 182(1)(c) of the Constitution:
(aa) Ensure that the Complainant is reimbursed an amount of R28 129.89, within 30 working days from the date of this report.

(bb) Write a letter of apology to the Complainant for the prejudice caused to her within 30 working days from the date of this report.

(cc) Ensure that the Department’s Human Resources Management official in particular Mrs Mokgakala undergo training on the application of PAM, to avoid the recurrence of the same mistake.

(dd) The Administrator must, within 15 working days of this report, submit an Action Plan to my office indicating how the remedial action will be implemented.

(ee) The submission of the implementation plan and the implementation of my remedial action shall, in the absence of a court order directing otherwise, be complied with within the period prescribed in my report.
REPORT ON AN INVESTIGATION INTO ALLEGED MALADMINISTRATION AND IMPROPRIETY IN DEALING WITH INCAPACITY LEAVE OF MRS VK KRAAI BY THE DEPARTMENT OF EDUCATION AND SPORTS DEVELOPMENT, DR KENNETH KAUNDA DISTRICT

1. INTRODUCTION

1.1 This is my report 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 Premier of the North West Provincial Government: Prof. Job Mokgoro for noting;

1.2.2 The Member of the Executive Council (MEC) for the Department of Education & Sports Development: Ms Mmaphefo Matsemela;

1.2.3 The Superintendent General (HOD) for the Department of Education & Sports Development: Mrs SM Semashwe;

1.2.4 The Administrator for the Department of Education & Sports Development: Mr JNT Mohlala;

1.2.5 The Department of Department of Education & Sports Development, Dr Kenneth Kaunda District Director: Mr B Monale;

1.3 A Copy of the report is also submitted to the Complainant, Mrs Kelebogile Vivian Kraal, to inform her about the outcome of the investigation:
1.4 The report deals with the outcome of an alleged maladministration and impropriety in dealing with incapacity leave of Mrs VK Kraai by the Department of Education and Sports Development, Dr Kenneth Kaunda District.

2 THE COMPLAINT

2.1 The complaint was lodged with my office on 1 February 2017 by Mrs Kelebogile Vivian Kraai (the Complainant), an adult female Educator at Keotshepile Primary School, alleging that:

2.1.1 On 10 March 2009, whilst she was teaching in class, a chalkboard fell on her right foot, leaving her big toe fractured and the other toe dislocated. The school principal took her to hospital where she received medical treatment, and since the accident, she has experienced continuous pain on her foot that forces her to take pain medication daily. The pain has been worsening daily, making it difficult for her to walk and stand for a longer period. This resulted in her teaching whilst sitting down;

2.1.2 The Department has failed to contribute towards her medical expenses despite having suffered the injury whilst on duty. To date, she still undergoes treatment at her own expense;

2.1.3 In September 2015 to July 2016, she applied for incapacity leave and provided the doctor's motivation report, but the Department rejected her incapacity leave applications. The period she had applied for was then regarded as unpaid leave and was liable to pay the Department for the said period for unjustified enrichment. To her surprise, the Department deducted an amount of R1 172.08 monthly, to reimburse the Department for unpaid leave, though her capped leave days were utilised to settle the debt. Subsequent to the decision to decline her incapacity leave, she applied for early retirement and the Department declined her application; and
2.2 The Complainant approached me for relief on the basis that the Department had treated her unfairly when it deducted money from her salary whereas she was injured whilst on duty. The Department must take responsibility for her medical costs.

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 Section 182(2) of the Constitution states 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 the powers to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.
3.5 In re Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others¹ the Constitutional Court, per Mogoeng CJ, held that the remedial action taken by the Public Protector has a binding effect[at para 76]. 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."² The Court further confirmed the Public Protector’s powers as follows:

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

3.5.2 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. (paragraph 67);

3.5.3 Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as 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 (paragraph 68);

3.5.4 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

¹ [2016] ZACC 11; 2016 (3) SA 590 (CC) and 2016 (5) BCLR 618 (CC) at para [76].
² at para [73].
their nature, context and language, to determine what course to follow. (paragraph 69);

3.5.5 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. (paragraph 70);

3.5.6 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. (paragraph 71);

3.5.7 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; (paragraph 71(a);

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

3.5.9 “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 (paragraph 71(e));

3.5.10 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:

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

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

3.5.10.3 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 (paragraphs 100 and 101 of the judgment):

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

3.5.10.4 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);

3.5.10.5 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 judgment). [This was a finding on EEF judgment as well];

3.5.10.6 The fact that there is no firm findings on the wrong doing, this 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

3.5.10.7 *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).

3.6 Regarding the exercise of my discretion in terms of Section 8(9) to entertain matters which arose more than two (2) years from the occurrence of the incident, and in deciding what constitute ‘special circumstances’, some of the special circumstances that I took into account to exercise my discretion favourably to accept this complaint, includes the nature of the complaint and the seriousness of the allegations; whether the outcome could rectify systemic problem in the state administration; whether I would be able to successfully investigate the matter with due consideration to the availability of evidence and/or records relating to the incident(s); whether there are any competent alternative remedies available to the Complainant and the overall impact of the investigation; whether the prejudice suffered by the complainants persists, whether my refusal to investigate perpetuates the violation of Section 195 of Constitution, whether my remedial action will redress the imbalances of the past. What constitute as ‘special circumstances’ depends on the merits of each case.

3.7 The institution mentioned in this report is a government Department, as a result the complaint falls within the ambit of the Public Protector’s mandate. Accordingly, the Public Protector has the power and jurisdiction to investigate and take appropriate remedial action in the matter under investigation.

3.8 The power and jurisdiction of the Public Protector to investigate and take appropriate remedial action were not disputed by any of 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, 1994.

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.

4.2 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 Municipality 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 Notice in terms of section 7(9) of the Public Protector Act

4.3.1 During the investigation process, I issued notice in terms of Section 7(9)(a) of the Public Protector Act (Notice), to the Department dated 7 August 2019, to afford the Department an opportunity to respond to the Public Protector's provisional findings. No response was received from the Department.

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

4.4.1 Whether the North West Provincial Department of Education and Sports Development irregularly deducted a total of R28 129.89 from the Complainant’s salary for unpaid leave.

4.4.2 Whether the Complainant suffered any prejudice as result of the conduct of the North West Provincial Department of Education and Sports Development under the circumstances of this case.
4.5 Key sources of information

4.5.1 Documents received

4.5.1.1 Annexure B: Application Form for Temporary Incapacity Leave by the Complainant for the period 23 February 2016 until 31 March 2016;

4.5.1.2 Minutes & Decision of SOMA (Disability Assessment Organisation) on application for short period temporary incapacity leave by the Complainant;

4.5.1.3 Human Resource Management’s letter bearing a date stamp of 20 June 2016, communicating the outcome of an application for temporary incapacity leave for the period 23 February 2016 to 31 March 2016, to the Complainant;

4.5.1.4 Human Resource Management’s unsigned letter responding to the Complainant dispute about the decision of SOMA;

4.5.1.5 NWPG PERSAL SYSTEM on the Complainant’s Leave record;

4.5.1.6 Department’s letter of demand bearing date stamp 1 November 2016 demanding an amount of R28 129.89 from the Complainant.

4.5.2 Correspondence sent and received

4.5.2.1 Letter dated 14 July 2017 to the Department addressed to the attention of the then District Director Mr Hasinbhay Motara;

4.5.2.2 Letter dated 22 February 2018 to the Department addressed to the attention of the District Director Mr Benny Monale;
4.5.2.3 Letter dated 2 July 2018 to the Department addressed to the attention of the District Director Mr BE Monale;

4.5.2.4 Letter dated 20 November 2018 to the Department addressed to the attention of Mr BE Monale;

4.5.2.5 Response dated 20 March 2018, received from the Department District Director Mr BE Monale;

4.5.2.6 Response dated 16 July 2018, received from the Department District Director Mr BE Monale

4.5.3 Meetings and Interviews

4.5.3.1 Meeting held on 5 February 2019 with the Department represented by Mr P Tyatya; Mrs M Mokgakala and Mrs I Molope;

4.5.4 Legal and Regulatory Framework

4.5.4.1 The Constitution of the Republic of South Africa 108 of 1996;
4.5.4.2 Public Protector Act 23 of 1994;
4.5.4.3 Employment of Educators Act 76 of 1998
4.5.4.4 Personnel Administrative Measures, 1999

4.5.5 Case Law

4.5.5.1 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) and 2016 (5) BCLR 618 (CC);

4.5.5.2 M.A Gamede v The Public Protector (992646/2015) [2018] ZAGPPHC 865; 2019(1) SA 491(GP).
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 North West Provincial Department of Education and Sports Development irregularly deducted a total of R28 129.89 from the Complainant’s salary for unpaid leave.

*Common cause issues*

5.1.1 The Complainant is employed by the Department as an Educator at Keotshepile Primary School. She was injured whilst on duty in 2009 and the incident was reported to the Compensation Fund, where the latter found that the liability under the Compensation for Occupational Injuries and Diseases Act, 1993 should be accepted by the Department. The Department then paid the Complainant’s medical treatment, including hospital bills.

5.1.2 During October 2015 and February 2016, the Complainant applied for incapacity leave for the period 5 October 2015 to 31 December 2015 and 23 February 2016 to 31 March 2016 respectively, but the application was declined and 38 leave days were treated as unpaid leave which resulted in a debt of R28 129.89. The total amount of R28 129.89 was deducted from her salary, at monthly instalments of R1 172.08 from November 2016 until October 2018.

*Issues in dispute*

5.1.3 The Complainant argued that the Department’s decision to deduct R28 129.89 from her salary was improper as it was based on the wrongful interpretation of Personnel Administrative Measures which govern the management of leave days for Educators, moreover that she was injured whilst on duty.
5.1.4 She reported that subsequent to the decision to decline her incapacity leave application, the Department allegedly requested her to elect whether the leave days she had taken between the period of October 2015 to March 2016, should be treated as annual leave and/or unpaid leave. The Complainant said that she informed the Department that the days should be regarded as annual leave and authorised the Department to use her sixty-two (62) days capped leave days.

5.1.5 She indicated further that the Department allegedly advised her that she had been absent from work for a total period of 136 days between the period October 2015 and March 2016 and that her 62 capped leave days were insufficient to cover the 136 unauthorised leave days. As a result of this shortfall, the Department allegedly advised her that it would access the 36 sick leave days she was entitled to for the 2016/2018 leave cycle.

5.1.6 Despite the utilisation of sixty-two (62) capped and thirty-six (36) sick leave days, the Department is said to have advised the Complainant that there was still a shortfall of 38 days that they would categorise as unpaid leave days. As a result of this shortfall, the Department allegedly advised her that she was thus indebted to the Department in the amount of R28 129.89. According to the Complainant, the Department concluded that the said amount would be deducted from her monthly salary at equal instalments of R1 172.08.

5.1.7 The Complainant argued that she was indeed on unapproved leave from 5 October 2015 until 31 March 2016. She indicated that on 5 October 2015, the schools were on September recess and resumed on 12 October 2015 for the school term that ended 9 December 2015. She further contended that she did not report for duty for the first term in 2016 which started on 13 January 2016 until 18 March 2016.

5.1.8 The Complainant argued that it was improper for the Department to have included the school recess period as unpaid leave as the Department's
policy regulating educators’ leave categorise the recess period as annual leave for all educators. She would like the Department to recalculate her unpaid leave deducted from her salary. She reported that the actual leave days she took between the period 5 October 2015 and 31 March 2016 can be summarized as follows:

<table>
<thead>
<tr>
<th>PERIOD</th>
<th>LEAVE DAYS</th>
<th>UNPAID LEAVE DAYS</th>
</tr>
</thead>
<tbody>
<tr>
<td>4th School Term 2015</td>
<td>47 days</td>
<td>Motivation on how the days were calculated</td>
</tr>
<tr>
<td>(12 October – 09 December 2015)</td>
<td></td>
<td>This were “scheduled working time” and formal days the Complainant was expected at school.</td>
</tr>
<tr>
<td>1st School Term 2016</td>
<td>50 days</td>
<td>46 days were formal days “scheduled working time” and since it is a norm for educators to report days before learners</td>
</tr>
<tr>
<td>(11 January – 18 March 2016)</td>
<td></td>
<td>2 extra days were allocated to the Department beginning 2016 school year</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>97 days</td>
<td>Total working day the Complainant was absent from school</td>
</tr>
<tr>
<td>Complainant 62 Capped days</td>
<td></td>
<td>Complainant had 15 days remaining to cover her 2016 leave.</td>
</tr>
<tr>
<td>were used for period ended</td>
<td></td>
<td>The complainant was absent from school for 50 days the 1st term of 2016. However Complainant had 51 days (36 + 15 days) to use for the 2016 leave taken from 11 January to 18 March 2016.</td>
</tr>
<tr>
<td>December 2015</td>
<td></td>
<td>The Complainant had sufficient (51) days to cover for her 2016 leave, she was therefore not at any stage on unpaid leave and rather the Department owes her a day.</td>
</tr>
<tr>
<td>Complainant was entitled to 36 sick leave days for the period 2019/2018 cycle</td>
<td>Add the 36 sick leave days to the balance of 15 capped days after deduction of 47 leave days from 62 capped leave days = 51 days</td>
<td></td>
</tr>
<tr>
<td>Leave day still due to the Complainant</td>
<td>Deduct 47 days for the 4th term from 62 capped days = 15</td>
<td></td>
</tr>
<tr>
<td></td>
<td>1 day</td>
<td></td>
</tr>
</tbody>
</table>

5.1.9 The Complainant argued that the information reflected in the table above, shows that in line with the policy regulating educators’ leave, she was not on duty for 97 days not 136 days as claimed by the Department. Based on the above information, if the Department used her sixty-two (62) capped leave days and 36 sick leave, she therefore had no unpaid leave as both capped and sick leave amount to 98 days which the Department used for her 97 unauthorised leave days.
5.1.10 My office raised the matter with the Department through a letter dated 14 July 2017, addressed to the then Department District Director Mr Hasinbay Motara and later with Mr Benny Monale (Mr Monale) the current Departmental District Director, on 22 February 2018, when no response was forthcoming from the Department.

5.1.11 Mr Monale, responded as per a letter dated 20 March 2018 "Inter alia" that:

"Ms Kraai applied for incapacity leave on 24 November 2015, for a period of 62 days from 5 October 2015, which was declined by SOMA. She then lodged a grievance on 16 September 2016, which was also declined. ........... She then requested the department to utilised (sic) her capped leave days to cover the days not approved.

Again she applied for another incapacity leave from 23 February 2016 to 31 March 2016 (38 days), which was forwarded to SOMA for assessment and it was declined. She collected the letter to that effect on 20 June 2016 and did not lodge any dispute.

In terms of the policy if she did not lodge a dispute within 5 working days the department has to continue to process leave without pay. The total cost of 38 days leave without pay amounted to R28 129.89. The amount which she agreed with Finance Section that it should be deducted on monthly basis at an amount of R1 172.08 starting from November 2016.

....................."

5.1.12 Subsequently, a meeting was held on 5 February 2019 between my investigating team and the Department, represented by Mr P Tyatya the Deputy Director, Mrs I Molopo: Assistant Director Human Resource, and Mrs Mokgakala the Principal HR Officer. Ms Mokgakala explained that in terms of the Departmental Leave Policy (PAM), unpaid leave is calculated
by counting calendar days, which include weekends and school holidays. That the first leave taken from 3 October 2015 until 31 December 2015 was covered by 62 capped leave days and the Complainant’s 2016/18 sick leave cycle days were utilised to cover the period 4 January to 22 February 2016. The period 23 February until 31 March 2016, to a total of 38 days, were not covered and remained unpaid leave, hence the debt.

5.1.13 The evidence obtained reveals that the Department, in particular Ms Mokgalaka, who worked with the leave application of the Complainant, had erred in calculating her sick leave days. The last school quarter resumed on 12 October 2015 and ended on 9 December 2015, giving a total of 43 days and the first quarter of 2016 resumed on 11 January 2016 for educators and ended on 18 March 2016, a total of 50 days. Therefore the Complainant was away from the classroom for 93 days.

**Application of the relevant legal framework**

5.1.14 Section 195(1)(a) of the Constitution, provides that the:

“(1) Public administration must be governed by the 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) …
(f) Public administration must be accountable
(g) …
(h) Good human-resource management …must be cultivated.”

5.1.15 Section 195(1)(a) of the Constitution, requires that the public administration must be governed by the democratic values and principles enshrined in the Constitution which include, *inter alia*, the promotion and maintenance of a
high standard of professional ethics and an accountable public administration; good human resource management must be cultivated. Failure by the Department to properly determine the leave days taken by the Complainant in this regard therefore does not uphold these democratic values and principles.

5.1.16 The Complainant is employed in terms of the Employment of Educators Act 76 of 1998 (EEA, 1998), and section 4(1) of EEA, 1998 provides "*inter alia*" that:

"Notwithstanding anything to the contrary contained in any law, but subject to the provisions of this section, the Labour Relations Act or any collective agreement concluded by the Education Labour Relations Council, the Minister shall determine the salaries and other conditions of service of educators".

5.1.17 The Minister therefore developed conditions of employment for educators known as Personnel Administrative Measures initially promulgated under Government Gazette 19767 on 18 February 1999 and subsequently revised in the General Notice 948 published in Government Gazette No. 39684 dated 12 February 2016 (PAM 2016) on consolidation of the terms and conditions of Employment of Educators Determined in terms of Section 4 of the Employment of Educators Act, 1998:

The Employment of Educators Act defines an educator as follows:

"educator" means any person who teaches, educates or trains other persons or who provides professional educational services, including professional therapy and education psychological services, at any public school, further education and training institution, departmental office or adult
basic education centre (sic) and who is appointed in a post on any educator establishment under this Act.”

5.1.18 Chapter H of the PAM 2016 regulates the educators' leave measures.

5.1.18.1 Paragraph H.4 regulates annual leave of educators within the Department and H.4.2 deals with the annual leave entitlement of institution-based educators.

5.1.18.2 Paragraph H defines the institution-based educator as:

“an educator who is employed at an education institution and whose normal duties are discontinued during institution closure periods.” The Complainant was an educator at Keotshepile Primary School and was therefore an institution-based educator in terms of the PAM 2016.

5.1.18.3 Paragraph H defines the institution-based educators’ scheduled working time as:

(a) All the time during a school term, both during and outside the formal school day, that institution-based educators must perform duties in terms of the measures in Chapter A”.

(b) Days during an institution closure period that have been scheduled by the Minister.

5.1.18.4 Paragraph H defines an institution closure period as “the scheduled period that education institutions close at the end of each term and during which period teaching and learning activities are discontinued”. The working days for the Complainant were therefore during a school term and some of the recess period, holidays and weekends so determined by the Minister.

5.1.18.5 Paragraph H.4.1.1 of the PAM 2016 provides that:
"Educators are entitled to annual leave with full pay during each leave cycle of 12 months, commencing on 1 January of each year”.

5.1.18.6 Paragraph H.4.2.1 states as follows:

"An institution-based educator will be regarded as being on annual leave during institution closure periods that are outside of scheduled working time..."

5.1.18.7 In terms of the above provisions, an institutional-based educator, in this case the Complainant, is entitled to annual leave during closure of the education institution/schools. However, the Department submitted that when calculating the Complainant’s unpaid leave, it included the education institution/school closure periods.

5.1.18.8 Paragraph H.17 provides for the conditions on how an unpaid leave for continuity of service is calculated, inter alia, that:

"H.17.3: The limitation of 120 days referred to in sub-paragraph H.17.1 shall not apply to an educator in cases where the period concerned extends from the day immediately following the last day of a term to the day immediately preceding the first day of the term after a full term has elapsed”.

5.1.18.9 In terms of the above provisions, for purposes of considering or calculating incapacity leave period/days for “institution-based educator” and in this case the Complainant, the school recess period does not form part of the leave and are excluded. This therefore means that, at the time the Department determined the Complainant’s leave days between October 2015 and March 2016, the school recess days were not supposed to have been included.

Conclusion
5.1.18.10 The evidence and information obtained indicate that the Department did not follow the provisions of the PAM 2016 in dealing with her leave subsequent to her incapacity leave application being declined.

5.2 Regarding whether the Complainant suffered prejudice as a result of the conduct of the North West Provincial Department of Education and Sports under the circumstances.

5.2.1 The Complainant argued that the Department’s decision to irregularly deduct R28 129.89, over a period of 23 months from November 2016 until October 2018 from her salary as unpaid leave, caused her serious financial prejudice. She lost R1 172.08 for 23 months as part of her salary which could have been invested or used for her needs, particularly her chronic medication. The Department confirmed that there were no further deductions against the Complainant as at the end of November 2018.

5.2.2 On the other hand, the Department submitted that the Complainant did not suffer any financial prejudice because her unpaid leave was properly calculated.

Conclusion

5.2.3 Based on the evidence before me, it can be concluded that the conduct of the Department in irregularly calculating the Complainant’s unpaid leave caused her financial prejudice.

6. FINDINGS

Having considered the evidence uncovered during the investigation against the relevant regulatory framework, I have make the following findings:
5.3 Regarding whether the North West Provincial Department of Education and Sports Development irregularly deducted a total amount of R28 129.89 from the Complainant's salary for unpaid leave.

5.3.1 The allegation that the Department irregularly deducted a total amount of R28 129.89 from the Complainant's salary for unpaid leave is substantiated.

5.3.2 My investigation revealed that a total amount of R28 129.89 was deducted from the Complainant's salary for unpaid leave for the period 5 October 2015 to 31 March 2016. Evidence at my disposal, however, indicates that when calculating the Complainant's unpaid leave, the Department irregularly included the education institution closure period as part of her unauthorised leave. An education closure period is defined as a scheduled period that education institutions close at the end of each term and during which period teaching and learning activities are discontinued.

5.3.3 In terms of paragraph H.4.2.1 of the PAM 2016, the Complainant was regarded as being on annual leave during institution/school closure periods and therefore, the Department should not have included the closure periods when it determined the Complainant's unpaid leave days between October 2015 and March 2016.

5.3.4 Furthermore, evidence at my disposal indicates that the Complainant took ninety-seven (97) unauthorised leave days between October 2015 and March 2016 instead of 136 days as claimed by the Department. The Department used the Complainant's sixty-two (62) capped and thirty-six (36) sick leave days to cover all her 97 unauthorised leave she took between October 2015 and March 2016.

5.3.5 The conduct of the Department in the circumstances is in contravention of section 195 of the Constitution and Chapter H of the PAM 2016.
5.3.6 The conduct of the Department also 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.

5.4 Regarding whether the Complainant suffered prejudice as a result of the conduct of the North West Provincial Department of Education and Sports under the circumstances.

5.4.1 The allegation that the Complainant suffered prejudice as a result of the conduct of the Department is substantiated.

5.4.2 The Complainant suffered serious financial prejudice because the Department irregularly deducted a total amount of R28 129.89 from her salary as unpaid leave.

6 REMEDIAL ACTION

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

6.1 The Administrator must:

6.1.1 Ensured that the Complainant is reimbursed an amount of R28 129.89, within 30 working days from the date of this report.

6.1.2 Write a letter of apology to the Complainant for the prejudice caused to her within 30 working days from the date of this report.

6.1.3 Ensure that the Department’s Human Resources Management official in particular Mrs Mokgakala undergo training on the application of PAM, to avoid the recurrence of the same mistake.
MONITORING

7.1 The Administrator must, within 15 working days of this report, submit an Action Plan to my office indicating how the remedial action will be implemented.

7.2 The submission of the implementation plan and the implementation of my remedial action shall, in the absence of a court order directing otherwise, be complied with within the period prescribed in my report.

ADV. BUSISWE MKHWEBANE
PUBLIC PROTECTOR OF THE REPUBLIC OF SOUTH AFRICA
DATE: 05/09/2019

Assisted by: Klerksdorp Regional Office