REPORT OF THE ROUNDTABLE SESSION ON UNDERSTANDING THE CAUSES OF AND ENDING UNFAIR TREATMENT IN THE WORKPLACE

PUBLIC SERVICE COMMISSION
DECEMBER 2018
FOREWORD

The Public Service Commission (PSC) is mandated to investigate grievances of employees in the public service and make recommendations. It also monitors grievance management by departments. In the execution of this mandate the PSC observed that there are certain grievances that continue to be lodged in high numbers by employees. This is the reason why the PSC decided to create a platform to encourage discussions on labour relations issues affecting government departments, communicate its findings and recommendations across departments, and deal with the nature of grievances that are prevalent with a view to minimising such cases.

From the analysis of grievance trends for the past three years, the PSC identified unfair treatment as the highest cause of grievances and therefore deemed it necessary to focus on the causes of unfair treatment in the workplace. This is important because fair treatment in the workplace should be seen within the context of the promotion of human rights. This is manifested in the fact that section 23 of the Constitution of the Republic of South Africa, 1996, provides that “everyone has a right to fair labour practice”; section 10 stipulates that everyone has an inherent dignity, right to have their dignity respected and protected. Equally important, section 33 states that everyone has a right to administrative justice principles of legality, rationality and procedural fairness.

Unfair treatment refers broadly to unfair labour practice as defined in the Labour Relations Act of 1995 under Section 186(2)(a)(b)(c) and (d) as well as other forms of unfair treatment which manifests in the form of, inter alia, victimisation, bullying, discrimination, intimidation, harassment and sexual harassment in the workplace, as well as cyberbullying.

Striving for fair treatment, essentially fair labour practice in the workplace is a human rights issue. Therefore, the PSC, and all employers have the constitutional obligation to promote, deepen and advance the Constitutional values and rights as contained in the Constitution, by promoting the supremacy of the Constitution and the rule of law, human dignity and equality of treatment.

The PSC hopes that the issues discussed during the roundtable which are summarised in this roundtable report, will assist various stakeholders in promoting fair labour practices in the public service.


MS M MARAIS-MARTIN

COMMISSIONER
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<table>
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<th>Acronym</th>
<th>Description</th>
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<tbody>
<tr>
<td>DG</td>
<td>Director-General</td>
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<tr>
<td>DDG: LMP</td>
<td>Deputy Director-General</td>
</tr>
<tr>
<td>DPSA</td>
<td>Department of Public Service and Administration</td>
</tr>
<tr>
<td>EAP</td>
<td>Employee Assistance Programme</td>
</tr>
<tr>
<td>EXCO</td>
<td>Executive Committee</td>
</tr>
<tr>
<td>HRM</td>
<td>Human Resource Management</td>
</tr>
<tr>
<td>HODs</td>
<td>Heads of Departments</td>
</tr>
<tr>
<td>ILO</td>
<td>International Labour Organisation</td>
</tr>
<tr>
<td>LRA</td>
<td>Labour Relations Act</td>
</tr>
<tr>
<td>PILIR</td>
<td>Policy on Incapacity Leave and Ill-Health Retirement</td>
</tr>
<tr>
<td>PSA</td>
<td>Public Service Act</td>
</tr>
<tr>
<td>PSC</td>
<td>Public Service Commission</td>
</tr>
<tr>
<td>PSCBC</td>
<td>Public Service Coordinating Bargaining Council</td>
</tr>
<tr>
<td>PSR</td>
<td>Public Service Regulations</td>
</tr>
<tr>
<td>SABPP</td>
<td>South African Board for People Practices</td>
</tr>
<tr>
<td>SMS</td>
<td>Senior Management Service</td>
</tr>
<tr>
<td>TIL</td>
<td>Temporary Incapacity Leave</td>
</tr>
</tbody>
</table>
1. **INTRODUCTION AND BACKGROUND**

1.1 **Introduction**

In terms of section 196 (4)(f)(ii) of the Constitution of the Republic of South Africa, 1996, (the Constitution, 1996) the Public Service Commission (PSC) is mandated to investigate grievances of employees in the Public Service concerning official acts or omissions, and recommend appropriate remedies. Based on grievances handled the PSC is able to obtain a clear perspective on the leading causes of grievances amongst employees in the Public Service.

The PSC also monitors the management of grievances within departments through bi-annual reporting by Heads of Departments (HoDs). From the biannual reports, trends are analysed and the PSC is able to determine the nature of grievances that are more prevalent in departments.

Since recommendations on grievances are mainly provided to particular departments, other departments are not privy to those recommendations, and as such may not be able to improve their practices and systems using the PSC recommendations, as long as grievances of a similar nature were not lodged against them on a particular subject matter. For this reason, the PSC decided to create a platform where it could communicate its findings and recommendations across departments, without necessarily mentioning individual employees and departments that were involved in specific grievance cases. The platform also seeks to deal with the nature of grievances that are prevalent with a view to minimising such cases. From the analysis of grievance trends for the past three years, the PSC identified unfair treatment as the highest cause of grievances and therefore deemed it necessary to focus on the causes of unfair treatment in the workplace.

1.2 **Objectives of the Roundtable**

The overall purpose of the roundtable session to engage on PSC findings and recommendations relating to grievances and deal with unfair treatment in the workplace. Give a global picture; deal with unfair treatment and identify other labour relations issues affecting departments. Concerning unfair treatment the objectives were the following:

- Present grievance trends in the Public Service, and PSC findings and recommendations on investigated grievances.
- Give a global perspective on unfair treatment matters in the workplace as observed by the International Labour Organisation (ILO).
- Provide an understanding of the causes and impact of unfair treatment on labour relations and organisational performance.
• Present and discuss case law on unfair treatment.
• Look at possible ways for improving employer-employee relationship, with specific emphasis on supervisor-supervisee relationship.

The Roundtable took place on the 29 October 2018 and was attended by delegates from various national departments, organised labour as well as invited specialists (Refer to Annexure A for list of participants).

1.3 Format of the Roundtable

The Roundtable was held over one day and divided into a number of sessions. Each session comprised of presentations by expert panellists who offered opinions and solutions to some of the identified challenges with respect to specific topics. This was followed by an interactive discussion with comments and questions from the floor.

1.4 Structure of the report

The report is divided into four sections, inclusive of the introduction and background section. The remainder of the report is structured as follows:

• Section 2 provides a presentation on public service grievance trends and PSC findings and recommendations;
• Section 3 presents a global perspective on understanding the causes and impact of unfair treatment on labour relations and organisational performance
• Section 4 provides an presentation on Understanding the causes and impact of unfair treatment on labour relations and organizational performance (South Africa)
• Section summarises lessons from various case law relating to unfair treatment
• Section 5 presents the overall conclusion of the report.

2. PUBLIC SERVICE GRIEVANCE TRENDS AND PSC FINDINGS AND RECOMMENDATIONS

2.1 Public service grievance trends

Commissioner Moira Marais-Martin from the PSC set the scene by presenting trends on the nature of grievances in the Public Service for the 2014/15, 2015/16, 2016/17 and 2017/18 financial years, as set out in the Figure 1 below:
As can be seen, in the past three to four financial years, the highest number of grievances lodged by employees related to-

- performance management,
- salary-related grievances,
- unfair treatment
- application approval, and
- filling of post.

From grievance reporting by departments, in all the four financial years PMDS, unfair treatment and salary problems were among the top three nature of grievances handled by departments. In the 2017/18 financial year, unfair treatment was the highest. Similarly, with regard to grievances handled by the PSC, the top three highest number of grievances related to the PMDS, salary problems and unfair treatment, as depicted in Figure 2 below.
2.2 PSC findings and recommendations on investigated grievances

The Commissioner also presented a summary of findings and recommendations on grievances investigated by the PSC:

2.2.1 Findings and recommendations on grievances relating to filling of posts

Delegates were informed that most of the grievances concerning the filling of posts related to not being shortlisted; not being appointed after attending interviews; and being appointed at a lower salary scale.

In such instances, the PSC’s recommendations included, inter alia, the following:

- Where it was found that there was an irregularity in the process of appointment, the recommendation was that the Department should seek redress of the irregularity in a court of law as indicated in Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal [2013] ZACC 49; 20149 (3) BCLR 333 (CC); (2014) 35 ILJ 613
(CC) (18 December 2013), where the Court, in relation to section 5(7)(a) of the Public Service Act, 1994, viewed functionaries as being not only entitled but duty bound to seek the redress of an irregularity in a court of law.

- Where the Selection Committee deviated from the advertised requirements of the post in order to reduce the shortlist, it was recommended that the Department should in future ensure that selection committees do not deviate from the advertised requirements of a post, and that HR should play its advisory role during the process.

- Where the approving authority decided not to appoint the candidate recommended by the Selection Committee, it was recommended that in terms of the Public Service Regulations it is peremptory that the Executive Authority should record his/her reasons for not approving the recommended candidates. The PSC emphasized that-
  
  - decision-makers must always bear in mind the compliance obligation of legality, rationality, accountability and fairness, as well as the duty to provide reasons to those affected by the decision, when so requested. Furthermore, that it should be noted that the decision-maker does not only develop reasons when requested to provide them, but the reasons should precede decision-making and must be there even before being requested.

  - providing reasons ensures that authorities exercise their powers in a manner that is not irrational or arbitrary. This is premised on the constitutional values of transparency and accountability.

  - throughout the selection process, all involved should record reasons for decisions taken. This should happen even at the early stages of dealing with the long applications list. E.g. if a candidate is disqualified for not certifying copies of certificates, it should be recorded as such in the long list.

2.2.2 Findings and recommendations on PMDS, salary related, and ill-health application grievances

In Table 1 below the Commissioner summarized findings and recommendations made by the PSC in other nature of grievances.
<table>
<thead>
<tr>
<th>Nature of grievance</th>
<th>Cause of grievance</th>
<th>Recommendations made</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>PMDS</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Undue delay in finalising performance reviews.</td>
<td>Departments to finalise performance assessments of employees within timeframes set by the PSC (e.g. 30/60 days) of receipt of PSC recommendation and provide the PSC with proof.</td>
<td></td>
</tr>
<tr>
<td>Reduction of performance scores to remain within the 1,5% allocated budget.</td>
<td>Original performance assessment scores to be reinstated and employees should be rewarded according to their performance in terms of the policy. Department to look at other measures to acknowledge good performance. For instance, awarding a reduced performance bonus but explain this to employees.</td>
<td></td>
</tr>
<tr>
<td>Performance assessments not conducted.</td>
<td>Performance assessment to be conducted (i.e. where this was not due to employee’s fault).</td>
<td></td>
</tr>
<tr>
<td>Moderation Committee reduced individual employee’s performance assessment score contrary to departmental policy.</td>
<td>Moderation Committee to reinstate the score agreed between the aggrieved employee and supervisor, and follow the correct procedure as laid down in the policy.</td>
<td></td>
</tr>
<tr>
<td>Refusal or failure to pay performance bonus due to insufficient funds / budget.</td>
<td>Departments to, in future scale down the applicable percentages to be granted to qualifying employees, or set tighter standards for the granting of cash bonuses.</td>
<td></td>
</tr>
<tr>
<td>Performance agreements not concluded.</td>
<td>Steps should be taken against the official responsible for failing to enter into a performance agreement.</td>
<td></td>
</tr>
<tr>
<td>Unjustified deductions from employee salary.</td>
<td>Aggrieved employee(s) should be refunded.</td>
<td></td>
</tr>
<tr>
<td><strong>SALARY RELATED</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Failing to follow applicable prescripts before making deductions from salary.</td>
<td>In other cases departments were found to have failed to follow applicable prescripts before making such deductions. For instance, non-compliance with the provisions of with section 34 of the Basic Condition of Employment Act, 1997. The PSC recommended in those cases that departments should stop making deductions and follow the correct procedure before deductions could be made from employees’ salaries.</td>
<td></td>
</tr>
<tr>
<td>Grading of posts.</td>
<td>Departments to job-evaluate posts and adhere to the principle of ‘equal pay for work of equal value’, and ensure that employees do not function in posts that are over- or under-graded.</td>
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</table>

**NOTE:** In the 2016 Public Service Regulations, the executive authority is vested with a discretion to downgrade or upgrade a post that is not graded correctly, but in the event that an incumbent meets the requirements for absorption in an upgraded post (Regulation 45 (2)), the incumbent should be
<table>
<thead>
<tr>
<th>Nature of grievance</th>
<th>Cause of grievance</th>
<th>Recommendations made</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Non-payment of allowances or overtime.</td>
<td>Acting allowance or overtime payment to be made where this was found to have been unlawfully and unfairly withheld.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>In different Labour Court cases it was held that for an employee to claim a right to a benefit he must be able to prove that that right arises from a contract, statute or collective agreement. E.g. IMATU obo Verster v Umhlathuze Municipality &amp; others [2011] 9 BLLR 882 (LC); South African Post Office Limited v Commission for Conciliation, Mediation and Arbitration and others [2012] JOL 29252 (LC) and Apollo Tyres South Africa (Pty) Limited v CCMA &amp; Others.</td>
</tr>
<tr>
<td></td>
<td>Incorrect salaries.</td>
<td>Correcting salary levels of employees in cases where it was found that the employee was placed on an incorrect salary level.</td>
</tr>
<tr>
<td>ILL HEALTH APPLICATION APPROVAL</td>
<td>Application for leave emanating from injury on duty declined by the Department and deductions made from the aggrieved's salary.</td>
<td>The Department should urgently attend to the Ill-Health applications as contemplated in the Code.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Leave without pay should be reversed and the aggrieved be reimbursed the monies unlawfully deducted from his/her salary.</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Train employees on how to handle cases relating to injuries on duty.</td>
</tr>
<tr>
<td>Nature of grievance</td>
<td>Cause of grievance</td>
<td>Recommendations made</td>
</tr>
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<tr>
<td>Temporary incapacity leave and subsequent ill-health retirement application declined allegedly due to insufficient evidence was provided.</td>
<td>The Department should request the aggrieved to provide medical reports and where necessary also obtain a second medical opinion; and the Department to stop deducting money from the aggrieved’ s salary without following procedure. The Department should investigate the issue of sending incomplete and unsigned application form to the Health Risk Manager, and take remedial action against the employee(s) responsible.</td>
<td></td>
</tr>
</tbody>
</table>
| Application for temporary incapacity leave declined. | The Health Risk Manager should first request medical records from the treating specialists, and assess them before declining the application. The Department should not just use the HRM recommendations and decline the application without applying its mind to information provided. In making a decision the employer must consider the HRM advice, additional information provided by the employee and all other relevant information available to the employer.  
  - In *Imatu obo Strydom v Wintzel Municipality and SA Local Government and Others*, Case No. CA 08/08 LC the Court held that the conclusion as to the employee’s capability or otherwise can only be reached once a proper assessment of the employee’s condition has been made.  
  - The Court further held that importantly, if the assessment reveals that the employee is permanently incapacitated, the enquiry does not end there, the employer must then establish whether it cannot adapt the employee’s work circumstances so as to accommodate the incapacity, or adapt the employee’s duties, or provide him or her with alternative work if same is available.” | |

With respect to timeframes, the Department should observe the timeframes prescribed in the PILIR. For instance, -  
  - in order for an application to be considered, the application form and supporting document must be submitted within 5 working days.  
  - the employer must within 30 days of receipt of the application and medical certificate, approve or refuse the TIL granted conditionally.
The employer must also request the employee to indicate in writing, within 5 days of the date of the employer’s notice whether or not the period of unconditional leave should be covered by annual leave (to the extent of the available annual leave credits) or unpaid leave.

2.3 Overview of unfair treatment grievances

2.3.1 Statistical overview of unfair treatment grievances

The Commissioner presented trends on unfair treatment grievances lodged with the national and provincial departments for the financial years 2013/14; 2014/15; 2015/16; 2016/17 and 2017/18 as depicted in Figure 3 below:

![Figure 3: Trends on unfair treatment grievances lodged with national and provincial departments](image)

A distinction was made between unfair treatment on the part of the employer and the employee, respectively. When it emanates from the employer, it may result in employees lodging grievances against the employer, whilst unfair treatment on the part of the employee may result in the employer instituting disciplinary proceedings against the employee. Unfair treatment, she
explained, include unfair labour practice as defined in section 186(2)(a)(b)(c) and (d) of the LRA and other forms as may broadly be classified into the following categories:

- Discrimination,
- Harassment,
- Sexual harassment,
- Bullying,
- Cyber-bullying,
- Intimidation, and
- Victimisation.

2.3.2 Examples of unfair treatment grievances investigated by the PSC and their underlying causes

Discrimination: In some grievances employees complained about being discriminated against in the implementation of Resolution 3 of 2009 (Revised salary structures: Level 1-12). In other cases grievances were about exclusion from unit meetings, allocation of work and other unit activities.

Harassment: There were cases where employees were aggrieved about derogatory remarks; shouting and insults; overloading with too much work on short-time frames; threatening with disciplinary process; and being used to attend to personal matters of the supervisor.

Bullying: There were also cases where managers referred grievances about subordinates disrespected them - using power by association with supervisor’s senior(s); creation of unhealthy work environment; and use of humiliating language; mobbing and sabotage.

Victimization: The PSC also investigated grievances relating to-

- transferring staff from one unit to other sections without consultation with the unit head;
- separating a unit from the rest of the organisation by accommodating them in a building without resources;
- delaying confirmation of probation without any sound reasons;
- avoiding or delaying to fill a post to which the aggrieved was the successful applicant; and
- reducing performance scores without valid reasons.

Referring to sexual harassment the Commissioner indicated that this includes touching, text messages, and verbal comments; and that cyber-bullying occurs through the use of social media
and other communication technology platforms to intimidate, harass, embarrass or victimise others.

2.3.3 Findings and recommendations made by the PSC on investigations dealing with unfair treatment

The PSC found some grievances to have substance and others unsubstantiated. In instances where cases were lodged by managers against subordinates, the aggrieved were advised to follow the disciplinary process. In some of the cases the PSC observed that there was an issue of personality clashes or inability of parties to deal with conflict. In cases where poor conflict management was a problem the PSC recommended that the parties be taken for training on conflict management. Where it was found that the alleged treatment of the employee by the supervisor was unfair or unlawful, the PSC recommended that processes be followed to discipline the supervisor and where necessary, affected parties should be taken through the EAP. In serious cases where it was found that the relationship between the supervisor and supervisee had so irrevocably broken down and had also failed even after mediation and training, the PSC would recommend that steps be taken to transfer one of the parties to a suitable place identified by the department.

2.3.4 Sexual harassment grievances

The Commissioner indicated to the delegates that concerning sexual harassment grievances, the following merits attention:

  - Section 10 - “Everyone has inherent dignity and the right to have their dignity respected and protected.”
  - Section 12(1) - “Everyone has the right to freedom and security of the person, which includes the right not to be treated or punished in a cruel, inhuman or degrading way.”
  - Section 12(2) - “Everyone has the right to bodily and psychological integrity, which includes the right to security in and control over their body…”

- In terms of Code of Good Practice on the Handling of Sexual Harassment Cases, obligations of the employer is, inter alia, -
  - To develop clear procedures to deal with sexual harassment (section 7 of the Code). The procedures should ensure the resolution of problems in a sensitive, efficient and effective way.
To have a designated person outside of line management, whom victims may approach for confidential advice. This person should be someone with the counselling and relevant labour relations skills and experience, and should be able to provide support and advice on a confidential basis.

Employers and employees must ensure that grievances about sexual harassment are investigated and handled in a manner that ensures that the identities of the persons involved are kept confidential.

Failure by the employer to take reasonable steps to eliminate sexual harassment may lead to vicarious liability in which the department becomes responsible for the actions of its employees.

Although the Code is intended to guide employers and employees, perpetrators and victims of sexual harassment may include employers, managers, supervisors, employees, job applicants, clients, suppliers and contractors.

A non-employee who is a victim of sexual harassment may lodge a grievance with the employer of the harasser where the harassment has taken place in the workplace or in the course of the harasser’s employment.

She further indicated that the PSC has observed, among others, that in employer-employee relationships where unfair treatment is alleged or perceived, any of the following manifest themselves:

- Absence from work, leading to disciplinary process;
- Numerous sick leave applications, at times prolonged to an extent of long term ill-health application;
- Refusal by employee to sign performance agreement or to submit performance assessment documents;
- Numerous letters of intention to discipline by the employer; etc.

All these may, directly or indirectly, negatively affect employee performance and service delivery. It is true that there are many causes of grievances in the work environment and employees have the right to lodge grievances, and the employer has the duty to attend to those grievances.

Based on the statistics presented by the PSC, it is clear that on an annual basis, the highest number of grievances lodged with departments relate to performance management, salary-related matters and unfair treatment. Unfair treatment cases can negatively affect employee well-being and performance, as well as organisational performance.
From its experience, the PSC has found that it is fairly easy to deal with grievances emanating from salary and performance management matters because it is often easy to identify the cause of the act or omission based on available prescripts. However, unfair treatment grievances are not easy to deal with due to the complexity of the concept and how it manifests itself in practice.\(^1\)

3. UNDERSTANDING THE CAUSES AND IMPACT OF UNFAIR TREATMENT ON LABOUR RELATIONS AND ORGANISATIONAL PERFORMANCE: GLOBAL PERSPECTIVE

3.1 Introduction

Mr Limpho Mandoro from the International Labour Organisation (ILO) prefaced his presentation by stating that the ILO uses ‘equality’ and not ‘fairness’. He indicated that certain historical and political issues may make people not to be treated equally. He mentioned that unfair treatment and inequality are different issues relating to discrimination. In dealing with these issues, he indicated, there is no distinction between private sector and public service. The difference is right of association, enjoyment of civil and political rights and collective bargaining.

The Constitution of the ILO (1919) upholds the principle of ensuring opportunities for development and equitable economic treatment for all. The Declaration of Philadelphia concerning the aims and purpose of the ILO (1944) states that “all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.” He further stressed that the declaration applies to persons/employees in the public service or private sector. By its nature, the public service is a uniform institution where application of standards and prescripts are uniform and provide protection to employees. For that reason discrimination problems are less in the public service as opposed to the private sector. These include race, colour, sex, civil status, sexual harassment, religion, not giving rights to indigenous people, political opinion, family responsibility, disability, trade union membership, age. For age, you must be able to prove that there are certain inherent requirements that require people of a certain age to do or not do certain things.

He indicated that the main standard to curb discrimination in the workplace is the Discrimination (Employment and Occupation) Convention, 1958 (No. 111), whose purpose is to protect all persons against discrimination in employment or occupation.

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\(^1\) Refer to Volume 7 of the Grievance Management Communique, PSC Website, under Newsletter.
3.2 Discrimination

According to the ILO discrimination is defined as: "any distinction, exclusion or preference [based on certain grounds] which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation". The definition contains three key elements:

- A factual element (the existence of a distinction, exclusion or preference originating in an act or omission) which constitutes a difference in treatment;
- A ground on which the difference in treatment is based; and;
- The objective result of this difference in treatment (the nullification or impairment of equality of opportunity or treatment).

3.2.1 Grounds of discrimination

Mr Mandoro provided the following examples of what constitutes valid grounds upon which employees can claim to be discriminated against:

- Race and colour: the ethnic group to which an individual belongs by reason of heredity;
- National extraction: distinctions between the citizens of the same country on the basis of a person's place of birth, ancestry, origin, etc.;
- Sex: Distinctions which use the biological characteristics and functions that differentiate men from women;
- Civil and marital status, family situation, pregnancy and confinement;
- Sexual harassment;
- Religion;
- Social origin: when an individual's membership in a class, socio-occupational category or caste determines his or her occupational future; and
- Political opinion: opinions expressed or demonstrated, and without violent methods.

According to Mr Mandoro, other grounds for discrimination should be determined in consultation with the most representative organizations of employers and workers and with other appropriate bodies. These other grounds could include who should be included in family responsibility leave; discrimination based on different types of disability; state of health; discrimination based on belonging to a trade union that has minority membership; and retirement age for example.

3.2.2 Fields covered by the Discrimination Convention, 1958 (No. 111)

The Discrimination (Employment and Occupation) Convention includes the following broad fields in an effort to cover potential aspects of discrimination-
- Access to training, occupation and employment,
- Terms and conditions of employment;
- Access to vocational guidance and placement services;
- Access to training and employment of one’s own choice on the basis of individual suitability for such training or employment;
- Advancement in accordance with one’s individual character, experience, ability and diligence;
- Security of tenure of employment;
- Remuneration for work of equal value; and
- Protection of workers’ personal data.

3.2.3 Measures not deemed to be discrimination

There are instances where the employer puts measures in place that could appear to be discriminatory to employees, but are not. For instance, -

- inherent requirements of a particular job.
- measures affecting an individual suspected of activities prejudicial to the security of the State.

In the event an individual believes that the measure is discriminatory against him/her, s/he shall have the right to appeal to a competent body separate from the administrative or governmental authority. Qualifications based on political opinions may in certain circumstances constitute a bona fide qualification for senior administrative posts involving special responsibilities for the development of government policy.

3.2.4 Special measures of protection or assistance

Measures provided for in international labour standards include special measures on behalf of indigenous or tribal peoples; persons with disability; older persons, as well as those designed to protect maternity or the health of women. In addition, other special measures include those designed to meet the particular requirements of certain persons, for example, transformation measures such as affirmative action.

3.3 Violence and harassment

According to Mr Mandoro, there is currently no ILO Convention on violence and harassment at the workplace. The draft Violence and Harassment Convention is currently under discussion and it is likely to be adopted by the International Labour Conference in June 2019. The purpose of
the standard is to protect all workers against violence and harassment in the world of work, occurring in the course of, linked with or arising out of work. A worker as defined covers all persons working in all sectors of the economy.

The draft Violence and Harassment Convention describes violence and harassment as: “a range of unacceptable behaviours and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm, and includes gender-based violence and harassment”.

From the 80-country studies undertaken, 60 countries regulate physical and psychological forms of violence and harassment at work under a variety of terms, such as “harassment”, “bullying”, “mobbing”, “violence”, “abuse” and “maltreatment”.

3.3.1 What constitutes violence and harassment at work?

The draft convention outlines four facets of violence and harassment in the workplace. These are-

- **Gender-based violence**: if it stems from unequal power relationships between men and women; or it is perpetrated against people because they do not conform to socially accepted gender roles; or against non-gender conforming persons who are lesbians, gay, bisexual or transvestite.
- **Physical violence and harassment**: use of physical force against another person or group, that results in physical, sexual or psychological harm.
- **Psychological violence and harassment**: covers a range of verbal and non-verbal abuse, psychological and sexual harassment, bullying, mobbing and threats, and includes manipulating a person’s reputation, isolating the person, withholding information, assigning tasks that do not match capabilities or giving impossible goals and deadlines.
- **Psychosocial risks**: structural or organisational features of a person’s work such as heavy workloads, low levels of decision-making autonomy, low status, rigid working routines and insufficient relational care without concern for well-being of workers.

3.3.2 Who is involved in violence and harassment at work?

Depending on the type of institution, acts of violence and harassment can be committed by the employer, employee, student, clients and members of the public. Violence and harassment can happen horizontally and vertically. In demonstrating this, Mr Mandoro indicated that in the United Kingdom Trades Union Congress, 54% per cent of respondents stated they were sexually harassed by colleagues, 17 % by a direct manager or someone with direct authority and 3% by
junior colleagues. Furthermore, in Canada, 80% of teachers reported encountering violence at least once in their career. In a study of primary and secondary teachers in Turkey and the Republic of Korea found that the most prevalent form of workplace violence was students targeting teachers as indicated 49% in Turkey and 67% in the Republic of Korea.

3.3.3 Causes of violence and harassment in the world of work

According to Mr Mandoro, the following are causes of violence and harassment in the workplace:

- A power imbalance in the workplace: He indicated that this occurs-
  - when a manager uses formal power to bully a worker; or
  - by informal power of a dominant group in a workplace, such as “upward workplace mobbing”, where workers harass supervisors;

- Negative societal and workplace culture that promotes bullying on the basis of gender, race or ethnicity, class, etc;

- Discrimination on the basis of difference or perceived difference: He indicated that in some workplaces there is creation of “in-groups” that target “out-groups” who are perceived as deserving violence and harassment;

- Peer pressure and support to commit sexual violence: According to Mr Mandoro, some men have a sense of “ownership” or “conquering” women;

- Working environment that make violence and harassment easy to occur – working at night in dark unprotected places; providing services to frustrated / angry members of the public, etc;

- Lack of clear policy against violence and harassment or lack of effective implementation of such policy where it exists.

3.3.4 Impact of violence and harassment in the world of work

Mr Mandoro stated that violence and harassment can-

- result in employees experiencing physical and emotional scars requiring rehabilitation and counselling due to anxiety, depression, headaches and sleep disorders which negatively impact on job performance;
- be an obstacle to women entering and remaining in the workforce;
- result in workers leaving a particular workplace or the workforce altogether;
- cause direct financial costs for the employer such as absenteeism, turnover, litigation and compensation; and
- cause indirect costs of reduced productivity, and knock-on effects, which can harm the reputation and image of the organisation.
3.3.6 Measures taken by different countries for minimize and deal with violence and harassment in the workplace

According to Mr Mandoro, different measures are taken by different countries to minimise or deal with violence and harassment in the workplace:

The majority (i.e. 65 out of the 80 countries) analysed have legislation that imposes a general duty of care on employers. Countries also collect data on violence and harassment to assist them in for developing informed law and policy. Specific risk assessments are conducted taking into account the possibility of assault against employees, and have established violence prevention committees. Some countries have strengthened their dispute resolution mechanisms by putting in place workplace grievance procedures for violence and harassment and system for protection complainants, witnesses and whistle-blowers. In some countries, workers’ organization initiatives are encouraged; awareness campaigns and training programmes are conducted; collective agreements to address violence and harassment are concluded. Some countries have also adopted codes and guidelines to deal with violence and harassment.

He indicated that some countries have also taken some measures to combat bullying, and that these include the following:

- Promotion of a positive workplace culture;
- Identification of bullying behaviours early;
- Manage workplace stressors and risks;
- Sound workplace policies that serve as a preventative tool to tackle bullying;
- Minimisation of the impact of bullying on teams; and
- Workplace support to victims of domestic violence.

4. UNDERSTANDING THE CAUSES AND IMPACT OF UNFAIR TREATMENT ON LABOUR RELATIONS AND ORGANISATIONAL PERFORMANCE

4.1 Introduction

According to Professor Monray Marsellus Botha from the University of Pretoria, unfairness is intractably linked with the distribution of scarce resources, which permeates all spheres and levels of social life. Scarce resources are not only distributed in the family, but also in the contexts of work, sports, friendship relations, the political arena, public organisations, legal settings, and
more. The distribution of scarce resources is a problem affecting society at the micro, meso and macro levels².

The micro level includes the family, friendship relationships, school, sport and work teams and meso level includes work organization and the courts whereas the macro level includes political bodies, national economy, and others. Distribution and redistribution of income via taxation is an example of a distribution issue at the macro level.

People frequently evaluate the distribution of scarce resources in terms of justice or fairness. A child may evaluate the amount of his/her household chores as unfair, and citizens may evaluate their tax burden as fair. A well-established finding is that fairness is of great importance and affects people’s feelings and actions in social interaction. For instance, fairness and unfair treatment can be linked to the following instances:

- satisfaction with and acceptance of decisions,
- perceived legitimacy of authorities,
- task performance,
- organizational citizenship,
- anti-social behavior,
- employee theft,
- use of influence tactics,
- responses to layoffs, work satisfaction, and
- commitment to groups and society, and more.

According to several authors, “among the myriad stressors impacting workers’ well-being, perceived unfair treatment as among the most pernicious. Reflecting psychological and sociological theories on hierarchical relations in society generally and work specifically, unfair treatment may be defined as discriminatory behaviors and policies, influenced by multiple pathways of social and economic context often based on gender, race, or ethnicity.”³

Due to the competitive work environment, unfair treatment may also occur in the form of hostile work environments as a vehicle for advancement at others’ expense, or as a way of marginalizing women or members of particular racial/ethnic groups, or in work settings where norms are supportive of harassment, bullying, violence and weak or authoritarian leadership exist.

4.2 Aspects of unfair treatment

² Vermunt and Törnblom “Distributive and Procedural Justice”.
³ see Schulz et al., 2000; Guyll, Correspondence to: Genevieve M. Ames, ames@prev.org. Matthews, & Bromberger, 2001.
Professor Botha highlighted the following aspects of unfair treatment\(^4\) -

- Gender or racial/ethnically-based discrimination; and
- Elevated stress experienced by victims of overt or subtle unfair treatment.

Unfair treatment and discrimination might overlap - unfairness may "include institutional or structural forms of systematic discrimination" such as barriers to educational and employment opportunities\(^5\). Unfair treatment at the workplace can have three different faces:

- Fairness of outcomes (distributive fairness)
- Fairness of procedures used for allocation decisions (procedural fairness)
- Fairness of interpersonal treatment during procedures (interactional fairness)

Professor Botha also noted that most problems lie in procedural fairness but that this is linked to distributive fairness. Interpersonal interactional fairness focuses on interpersonal fairness and are handled via the grievances or disciplinary processes.

### 4.3 Organisational justice

Professor Botha indicated that fairness plays an important role in the workplace and employees expect to be treated fairly, relative to their colleagues. The employer must therefore be conscious about employee’s perceptions of fairness and unfairness.

Employees pay attention to the recruitment process (in as far as fairness in selection decisions are made), pay systems (pay rise), pay determination, performance appraisals, job losses and layoffs, suspicions of employment, promotions and promotion opportunities, development opportunities (based on cadre deployment/employment of incompetent people, party affiliation employment). Some examples of bad practices in the recruitment process are when advertisements are written with a specific person in mind. The advertisement specifically states criteria which are out of the norm for the position. There must also be fairness in training opportunities, disciplinary handling, grievance handling and communication at all times.

Gender, nepotism, race, favouritism, excessive influence from government and unions, etc. affect employees as well as organisational performance. Injustice in organisations is one of the greatest hurdles that result in poor performance of employees in different ways. Organisational injustice is considered the basic building block of job dissatisfaction. For example, most men find themselves

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\(^4\) see Schulz et al. (2000:315)

\(^5\) see Colquitt, Greenberg, & Zapata-Phelan, 2005.
in organisations for 30 plus years and when a woman enters the institution later the department offers her a lower salary level. There is no buffer built-in to assist those women entering the workforce. The courts are cautious to suggest prescriptive measures to deal with remuneration.

4.4 Causes of unfair treatment

Professor Botha indicated that the root causes of unfair treatment include work hours, benefits, remuneration relating to equal work for equal value, performance appraisal and feedback, training and development, staff turnover on productivity, racism, workplace bullying, discrimination (including sexual harassment), favouratism, inconsistency, organisational culture and family responsibilities. The Figure 4 below sets out the triggers of workplace deviance and the effect that it has on the organisation.

![Figure 4: Triggers of workplace deviance and the effect that it has on the organisation performance.](image)

4.5 The legal framework for fair treatment

The collapse of the apartheid systems made way for the new government to promulgate a series of Acts that sought to build a humane, inclusive, non-racial and caring society. The following legislative provisions support fair treatment in the workplace –


Basic Conditions of Employment Act 75 of 1998: focusing on working conditions.


Skills Development Act 98 of 1998: focusing on the training and development of the workforce.

4.6 Measures to assist in ending unfair treatment

In order to end unfair treatment in the workplace the employer must be transparent and accountable, ensure fair practices, be consistent in dealing with its employees, instill discipline and be fair when applying disciplinary measures; encourage worker voice and communicate effectively since communication is key towards ensuring sound labour relations.

Other measures include rewarding pro-social behavior and penalising deviant behavior; leading by example; nurturing a trusting organizational environment; adopting an Organisation/Company Code of Ethics for everyone; implementing fair, equitable and reasonable policies for compensation, rewards, promotions, and organisational actions; and respecting the rights and well-being of all employees, irrespective of rank.

5. CASE LAW ON UNFAIR TREATMENT

5.1 Introduction

Mr Thabang Rapuleng from Cliffe Dekker Hofmeyer Inc. provided an overview of various case law dealing with harassment, workplace bullying and insubordination.

5.2 Harassment

Mr Rapulane explained harassment as an unwelcome and persistent conduct that is hostile and intimidates, demeans and humiliates the affected party. Types of harassment include sexual harassment, workplace bullying, racial harassment and derogatory remarks.

He indicated that the courts have zero-tolerance attitude towards sexual harassment, and gave an example of the following cases to demonstrate this:
• Writing sexually explicit statements that involved a female colleague on a toilet wall - *National Union of Metalworkers of SA on behalf of Prezens and Duferco Steel Processing (Pty) Ltd* (2006) 27 ILJ 1282 (BCA).

• Promising better marks to female students in exchange for sexual favours - *University of Venda v M & others* (2017) 38 ILJ 1376 (LC).

• Propositions, at first that are not direct but take a form of innuendo and suggestions with the obvious implication to engage in sexual intercourse - *Gaga v Anglo Platinum Ltd & others* (2012) 33 ILJ 329 (LAC). In this case an employee of one company was dismissed for sexually harassing an employee of another company and the LAC held that the dismissal was fair.

5.3 Workplace bullying

Mr Rapuleng indicated that workplace bullying is defined as any unfavourable or offensive conduct which has the effect of creating a hostile workplace environment. Workplace bullying can take different forms, including spreading of malicious rumours, verbal abuse, intolerance of psychological, medical or personal problems, humiliating or demeaning conduct, marginalisation, abuse of disciplinary processes and (unjustified) demotion or transfer.

There are many examples of caselaw dealing with workplace bullying, however, the following were alluded to by the presenter:

• Employee marginalised after suffering nervous breakdown.
  “…he found himself being excluded from things at work that he had previously been involved in. He was given menial tasks to do… at first, he was treated with sympathy and understanding, but this changed to being treated, in the applicant’s words, “like I had a contagious disease”* - *Marsland v New Way Motor & Diesel (2009) LC.*

• Employee marginalised after suffering nervous breakdown. The court concluded that “It is beyond question that the plaintiff’s years at naval staff college were wretched. He had nothing to do, and did it in an atmosphere of marginalisation…” *- Murray v Minister of Defence (2008) SCA.*

• The employer published the employee’s final written warning in a newsletter to the parents of the residents - the employee resigned and claimed constructive dismissal and further stated that he was humiliated by the employer’s conduct - *Pretoria Society for the Care of the Retarded v Loots LAC.*
5.4 Defiant behaviour and insubordination

Mr Rapulane referred roundtable participants to the following case law, which demonstrated defiant behavior or insubordination:

- The employee was dismissed for stubbornly refusing to undertake to repay money erroneously paid to him. It was found that the employee was defiant rather than deceitful. His ongoing refusal and lack of remorse was seen as a contributor to a breakdown of employment relationship and the dismissal was found to be fair - *Theewaterskloof Municipality v SA Local Government Bargaining Council (Western Cape Division) & others (2010) 31 ILJ 2475 (LC).*

- He indicated that *insubordination* is willful and serious refusal by an employee to obey lawful and reasonable instruction or deliberate and serious challenge to employer’s authority; and that *insolence* is conduct that is offensive, disrespectful, impudent, cheeky, rude, insulting or contemptuous.

- Dismissal is only justified if insubordination or insolence is willful and serious - *Palluci Home Depot (Pty) Ltd v Herskowitz & others (2015) 36 ILJ 1511 (LAC).*

- Gross insubordination — Employee deliberately and persistently refusing to obey formal instruction to stop posting allegations detrimental to employer on Facebook, Dismissal was found to be fair - *Beaurain v Martin NO & others (1) (2014) 35 ILJ 2443 (LC).*

6. HR PERSPECTIVE ON IMPROVING RELATIONSHIPS AT WORK

6.1 Introduction

Ms Kgomotso Mopalami from SABPP, asserted that people tend to ignore the fact that good relationships are a precondition for high productivity. This means employers and employees should value what they see and go further to serve as exemplars by living their organisational values.

She indicated that research conducted by the *Corporate Leadership Council* showed that employee commitment can increase discretionary effort by 57%, which in turn can lead to a 20% performance improvement. In addition, every 12% improvement in commitment can decrease an
employee’s probability of departure by 11 percent\(^6\). With regard to employee commitment, Ms Mopalami explained that there are two types, rational and emotional commitment.

**Rational commitment** is the extent to which respondents feel that someone or something within their organization provides financial, developmental, or professional rewards that are in employees’ self-interest. **Emotional commitment** is the extent to which employees derive pride, enjoyment, inspiration, or meaning from something or someone within the organization. She stated that if people see meaning in what they do, they will stay and do more. When people derive some meaning in what they do productivity levels will increases. The **Figure 5** below is the Corporate Leadership Council’s Model of Employee Engagement.

![The Corporate Leadership Council’s Model of Employee Engagement](image)

**Figure 5: The Corporate Leadership Council’s Model of Employee Engagement.**

### 6.2 Getting better results through people

Research suggest that most people say they would be willing to give more discretionary effort if they or their organisation were better managed, whereas 44% of employees perform their work just to keep their jobs while 19% of employees indicated that they are willing to outperform if they are motivated. **Figure 6** below illustrates the Discretionary Effort Model.

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\(^6\) SABPP Fact Sheet on Workplace Bullying [www.sabpp.co.za](http://www.sabpp.co.za)
Leadership is important in contributing towards employee commitment and employees expect from their supervisors-

- clear indication of expectations – job description and performance standards;
- proactive assistance to reach those standards;
- honest and timely feedback on actual performance;
- role modelling of organization’s values;
- duty of care - legitimate and safe work instructions;
- fair decisions on compensation, benefits, time off; and
- support with career development.

She warned that employers should not confuse their employees, but should ensure that they know exactly what is expected from them. There should be clear performance standards, which make their roles clear. Managers must engage with employees because they need assistance directly from their leaders. If honest and timely feedback is not given, there will be problems in the long term.

Human resource units must assist departments to put in place policies, systems and procedures that will promote fairness and enhance organisational performance. Trust, respect and fairness are important in maintaining sound relations between employers and employees. Whilst these qualities are expected from both parties, managers are the first to create trust and role-model the organisational values.
6.3 **Possible causes of unfairness on the part of the supervisor**

According to Ms Mopalami attitudes and beliefs, organisation’s policies and processes, perceived fairness of own situation and lack of training are possible causes of unfairness on the part of the supervisor. On the part of the employee she indicated that the possible causes are perceived lack of legitimacy of appointment of supervisor and team culture embedded in team history. She stated that the key measure to ensure fairness is regular and accurate communication between the employer (i.e. supervisors/managers) and employees.

6.4 **Workplace bullying**

Ms Mopalami indicated that bullying is not only found in high schools, but also occurs in the workplace. She stated that there is a fine line between firm performance management and bullying. The difference lies in the intention of the action: *where the intention is to hurt, demean or humiliate an employee through direct or indirect negative actions*, the manager has crossed the line and becomes a bully⁷.

She suggested that due to a fine line between bullying and firm management of performance, it is preferable for employers, in a code of conduct and/or policy on workplace bullying, to give specific examples of what constitutes bullying. For example, copying emails that are critical of someone to people who do not need to know or should not be shared with amounts to bullying because the copying (cc-ing) of the email in this manner affects good relations in the organisation. In addition, making threats or comments about job security without foundation constitute bullying. Likewise, preventing individuals from progressing by intentionally blocking promotion or training opportunities amounts to bullying.

7. **DELEGATES’ INPUTS / COMMENTS TO THE PRESENTATIONS**

Delegates made, among others, the following comments:

- Due to the definition of sexual harassment and the latest court decisions on the matter, there is a possibility of an increase of the number of unfair treatment cases of this nature in departments. The challenge is that when senior managers are on the wrong, there is reluctance on the part of the employer to discipline them. Senior managers do not want to take discipline against their fellow senior managers. When managers bully employees, the PSC’s recommendations are not taken seriously. However if it is a junior employee the departments are quick to implement discipline.

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⁷ *Bullying and Harassment at Work*. [www.acas.org.uk](http://www.acas.org.uk)
Perceived unfair treatment based on salary differences is as a result of new employees who would want to compare their salaries with those who are on the same level or performing the same job but have long been in service.

Concerning the application for TIL or ill-health, the PILIR says the department must apply their minds after receiving a recommendation from the Health Risk Manager (HRM). This is considered problematic because how can the department differ with recommendations of the HRM Risk Managers who are experts in the field, and the department is not. The PSC indicated that even if decision-makers in departments are not medical practitioners, they still have to look at all other issues and make an informed decision. An example was given of a case where the HRM declined the PILIR, and six months thereafter the person passed on. In another case the HRM declined the application of the employee and his spouse took him to work on a wheelbarrow as evidence that the person is sick. The problem is that the HRM just recommends without asking for second opinion; they rely only on what is written by the doctor of the applicant. In addition, the timeframes to comply with PILIR are not reasonable, and the PSC and DPSA need to look into this.

There are at times challenges of organised labour assuming management responsibility, or situations where two labour organisations are fighting and forget that they represent the employees.

Mr Mandoro ILO indicated that the dividing line for collective bargaining is getting thinner and thinner. This also points to issues of appointments and promotions because unions are now sitting in during the process. He stated that bargaining has become a double-edged sword and at times unions hold management at ransom. Concerning rivals about membership numbers he suggested that there is a need to look into where did things go wrong because things are getting worse every day. He indicated that the line is getting thinner and thinner in terms of what is bargain-able and what is a management prerogative.

Employees from Employee Relations / Labour Relations sections are victimised when dealing with investigations of senior managers. They do not process grievance investigations against senior managers to conclusion because of fear of victimization. It is suggested that the presentation on unfair treatment should be made to FOSAD and at departments’ EXCO meetings.

On the issue Ms Mopalami indicated that everybody in HR must be registered with a professional body so that people should be charged if they are doing things that are not right. Mr Rapuleng added that failing to take disciplinary action is in itself also misconduct; and failure to implement an award is in itself a misconduct; it is also a contempt of court.
8. CONCLUSION

It was suggested that the PSC should not only use the database on grievances to determine trends and the underlying causes, but should go to departments to collect data from employees and practitioners. Unions should also take responsibility for engaging in campaigns and training programmes to empower their members. The PSC can also learn from other countries, such as Australia’s guideline for handling unfair treatment as it is considered the best in the world.

It was agreed that a lack of accountability and consequences is a major contributor to unfair treatment in the public service, hence there is a view that disciplinary action is never taken against senior managers. The DPSA must report on all cases where disciplinary measures have not been implemented to the PSC and Parliament and EAs and HODs must account to Parliament for failure to implement disciplinary measures.

In addition, employees must be brave to challenge unfair treatment in the workplace because in the end, the only way to end unfair treatment is through reporting all cases, dealing with them through the relevant organisational processes and procedures and in some instances through the courts.
ANNEXURE A

The Roundtable discussion was attended by representatives of Human Resource Management and Development (HRM&D) and Labour Relations components within National Departments, organised labour, Bargaining Councils and the Office of the Public Protector. All National Departments were identified and invited by the PSC to attend the Roundtable discussion. Delegates from the following Departments honored the PSC’s invitation and were in attendance:

1) Agriculture, Forestry and Fisheries
2) Basic Education
3) Communication
4) Defence
5) Education Labour Relations Council (ELRC)
6) Gauteng Provincial Office of PSC
7) General Public Service Sectoral Bargaining Council (GPSSBC)
8) Government Printing Works
9) Health
10) Higher Education and Training
11) Home Affairs
12) Human Settlements
13) Independent Police Investigative Directorate (IPID)
14) Justice and Constitutional Development
15) Labour
16) Mineral Resources
17) National Office of PSC
18) National Prosecuting Authority (NPA)
19) National Treasury
20) Office of the Public Protector
21) Police and Prisons Civil Rights Union (POPCRU)
22) Public Enterprises
23) Public Servants Association (PSA)
24) Safety & Security Sectoral Bargaining Council (SSSBC)
25) Science and Technology
26) Statistics RSA
27) Telecommunication and Postal Services
28) Tourism
29) Trade and Industry
30) Transport
The following Speakers made presentations:

- Ms Kgomotso Mopalami, Head for Research Innovation at the South African Board for People Practices
- Mr Thabang Rapuleng, Director of Employment Relations at Cliffe Dekker Hofmeyr Inc.
- Professor Monray Marsellus Botha, Head of Department and Associate Professor in the Department of Merchantile Law at the University of Pretoria
- Mr Limpopo Mandoro from the International Labour Organisation

Also in attendance were the following PSC and OPSC officials:

- Deputy Chairperson, Mr B Mthembu
- Commissioner M Marais-Martin
- Commissioner TB Luthuli
- Commissioner M Seloane
- Commissioner SS Nkosi
- Director-General and senior/middle managers.