THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Case Number: C479/2017

Reportable

Of interest to other judges

In the matter between

SEKHOSHE DAYS RAMAILA Applicant

and

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES First Respondent

MINISTER OF PUBLIC SERVICE AND ADMINISTRATION Second Respondent

DIRECTOR-GENERAL: JUSTICE AND CONSTITUTIONAL DEVELOPMENT Third Respondent

DEMOCRATIC NURSING ORGANISATION OF SOUTH AFRICA Fourth Respondent

LABOUR COURT

HEALTH AND OTHER SERVICE

PERSONNEL TRADE UNION OF SOUTH AFRICA Fifth Respondent

NATIONAL PROFESSIONAL TEACHERS'

ASSOCIATION OF SOUTH AFRICA Sixth Respondent

NATIONAL EDUCATION, HEALTH AND ALLIED

WORKERS' UNION Seventh Respondent

POLICE AND PRISONS CIVIL RIGHTS UNION Eighth Respondent

PUBLIC SERVANTS ASSOCIATION Ninth Respondent

SOUTH AFRICAN DEMOCRATIC TEACHERS UNION Tenth Respondent

SOUTH AFRICAN POLICE UNION Eleventh Respondent

Heard: 10-11 May 2018; 15-16 October 2018; 6-8 February 2019.

Delivered: 28 February 2019.

Summary: Discrimination: Pay progression – Employment Equity Act s 6. Review – Promotion of Administrative Justice Act – PSCBC Resolution 1 of 2012. New entrants to public service entitled to pay progression only after 24 months as opposed to 12 months. Relevant provision discriminatory in terms of EEA; reviewed and set aside in terms of PAJA.

JUDGMENT

LABOUR COURT

STEENKAMP J :

Introduction

[1] The applicant, Mr Sekhoshe Days Ramaila, is a senior state law adviser. He was appointed from outside the public service when he was in private practice as an attorney. In terms of a provision of a Resolution of the Public Service Co-ordinating Bargaining Council (PSCBC), he was entitled to pay progression only after 24 months, as opposed to his colleagues who started in the same job at the same time, but who had been appointed from within the public service, who qualified for pay progression after 12 months. He argues that the differentiation amounts to unfair discrimination in terms of the Employment Equity Act[1]; and he seeks to have the relevant resolution – as administrative action, being deemed to be a Ministerial determination -- reviewed and set aside in terms of the Promotion of Administrative Justice Act.[2]

Background facts

[2] Much of the evidence before the Court was common cause. Mr Ramaila testified and argued on his own behalf. The respondents called two witnesses, viz Messrs Zamokwakhe Khuzwayo and Anthony Canham.

[3] The Applicant was appointed as a State Law Adviser (at grade LP7-LP8) in the Department of Justice and Constitutional Development (DoJ) in terms of a written contract of employment and commenced work on the 2nd of March 2015 in the Office of the Chief State Law Adviser, Cape Town. He was appointed together with five other State Law Advisers, namely Mr Kgaogelo Lekoloane (previous employer: National Prosecuting Authority ("NPA"); Ms Lucinda le Roux (previous employer: the NPA); Ms Inge Ontong (previous employer: South African Police Services); Ms Veuonia Grootboom (previous employer: Judicial Inspectorate for Correctional Services); and Mrs Refilwe Mhlwatika (previous employer: Provincial Treasury: Northern Cape).

[4] The Applicant and Ms Inge Ontong, Ms Veounia Grootboom and Ms Refilwe Mhlwatika were placed on twelve months' probation whereas Mr Kgaogelo

[1] Act 55 of 1998 (EEA).

[2] Act 3 of 2000 (PAJA).

LABOUR COURT

Lekoloane and Ms Lucinda le Roux were not placed on probation since they had apparently already completed their probation while they were at the NPA.

[5] The contract of employment signed by the Applicant has the same terms as those signed by the other State Law Advisers. The material terms of the Applicant's employment are set out in the contract of employment and Annexure A attached thereto. The contract of employment states, amongst other things, the following:

22.1 that his employment is subject to the conditions of appointment as stipulated in Annexure A (clause 1.2.2);

22.2 that he would be expected to sign a Performance Agreement with clear and specific deliverables (clause 1.3);

22.3 that the general conditions of service and benefits specified in Annexure A will be as stipulated and provided for in terms of the Public Service Act, 1994 ("the Act") and the Public Service Regulations, 2001 ("the Regulations").

[6] Annexure A attached to the Contract of Employment states, amongst other things, the following:

23.1 public servants entering the state, regardless of their different backgrounds, skills and experience need to be orientated around a common programme to understand and implement the agenda of the state (clause 3.1.11);

23.2 a Compulsory Induction Programme (the "CIP") is applicable with effect from 01 November 2012 to, amongst others, the following employees: employees appointed on salary levels 1 to 14 in a production, supervisory, managerial, Occupation Specific Dispensation and non OSD post in the Public Service with effect from 1 July 2012 (clause 3.1.11(a));

23.3 the CIP is a one year programme and an employee has twenty-four months from the date of being appointed to the Public Service to successfully complete the CIP;

LABOUR COURT

23.4 only upon successful completion of the CIP will an employee qualify for an annual pay progression commencing with effect from 1 April of the new cycle (clause 3.1.11); and

23.5 the probation period of an employee shall not be confirmed unless an employee has successfully completed at least one of the CIP (clause 3.1.11).

[7] The Applicant signed a Performance Agreement in accordance with the provisions of the Contract of Employment. The Performance Agreements that the Applicant and the other State Law Advisers signed are the same in all respects and contain the same Key Results Areas (KRAs), namely:

24.1 KRA 1: Scrutiny and drafting of laws;

24.2 KRA 2: Drafting of preliminary opinions for Cabinet, amendments for Parliamentary Committees when required and attending Parliamentary Committees when required;

24.3 KRA 3: Drafting of legal opinions and vetting of international agreements and accompanying legal opinion; and

24.4 KRA 4: Executive administrative functions.

[8] During November 2015, the DoJ arranged for the Applicant to attend an induction programme from 19 to 20 November 2015 required for the purpose of confirmation of probation. The Applicant and Mss Inge Ontong and Veounia Grootboom attended the induction programme together with other officials from various components of the DoJ. Ms Mhlwatika did not attend as she had already resigned from the DoJ at that time. The first and third respondents[3] initially admitted in their pleadings that this was the compulsory induction programme (CIP) referred to in the annexure to the contract of employment; halfway through the trial they amended their pleadings and withdrew this concession.

[9] Subsequent to the attendance of the induction programme and completion of the 12 months' probation period, the DoJ issued the Applicant with a confirmation letter dated 25 November 2015 and also confirmed the applicant's probation and his employment as permanent. To this effect, the DoJ sent the Applicant an email

[3] The Minister of Justice and Correctional Services; and the Director-General: Justice and Constitutional Development, respectively.

LABOUR COURT

dated 02 August 2016 advising of the confirmation of his probation and the fact that his date of receipt of salary will be changed from the end of the month to the 15th of the month.

[10] In addition to the fact that the Applicant signed a Contract of Employment and Performance Agreement with the same terms as the other State Law Advisers, the job requirements that the Applicant and the other State Law Advisers had to meet in order to qualify for the appointment as State Law Advisers were also the same. They all wrote the same competence assessment test and underwent an interview process. They all had the same salary scale attendant to their posts as State Law Advisers and they all started at the same minimum notch of their salary scale as reflected in the job advertisement.

[11] Besides the orientation regarding the functioning of the Office of the Chief State Law Adviser and the job the Applicant would be doing as a State Law Adviser, he had only two sets of training which were as follows:

28.1 A five day workshop on the interpretation of statutes conducted by the Justice College where he was promised a certificate of attendance which he has not received to date; and

28.2 a four day workshop on the interpretation of statutes at the University of Cape Town where he received a certificate of attendance,

[12] These workshops took place in 2015 during which time the Applicant was still on probation. He attended these workshops together with the other State Law Advisers.

[13] Of the State Law Advisers appointed at the same time as the Applicant, only the Applicant and Mss Veounia Grootboom and Lucinda le Roux are still occupying their positions as State Law Advisers. The rest have since resigned from their posts in the Office of the Chief State Law Adviser.

LABOUR COURT

Performance assessment for the financial year 2015/2016

[14] Following the performance assessment for the financial year starting from 01 April 2015 and ending on 31 March 2016, the Applicant achieved an overall annual rating of 100% which was confirmed by a letter from the DoJ dated 16 February 2017 and signed by the Human Resource Director, Mr Motshweni. It states:

> ***"OUTCOME OF PERFORMANCE ASSESSMENT FOR FINANCIAL YEAR: 1 APRIL 2015 TO 31 MARCH 2016***
>
> *During the moderation process on your performance for the abovementioned assessment period, you achieved an overall annual rating of 100%. Please note that the Department could not process any payments in respect of the Performance Management Policy as a result of the following: 24 months on the salary level not completed (new appointee to Public Service)"*.

[15] Ms Veounia Grootboom and Ms Lucinda le Roux achieved the same performance assessment outcome (i.e. an overall annual rating of 100%) in respect of the financial year 2015/2016. However, Mss Veounia Grootboom and Lucinda le Roux were awarded an annual pay progression for the financial year 2015/2016 whereas the Applicant was not.

<u>The differentiated pay progression policy (PSCBC Resolution 9 of 2001 and PSCBC Resolution 1 of 2012 and the Policies)</u>

PSCBC Resolution 9 of 2001

[16] The starting point leading to this anomaly is the "Agreement on improvement in conditions of service of public service employees for the period 2001/2002, 2002/2003 and 2003/2004 and other matters of mutual interest" (PSCBC Resolution 9 of 2001), a collective agreement that was concluded in the Public Sector Coordinating Bargaining Council in 2001. Clause 4 of PSCBC Resolution 9 of 2001 deals with pay progression and states:

> "4. PAY PROGRESSION
>
> 4.1 The employer shall pay the R850 (eight hundred and fifty rand) as an once off and final payment in terms of Resolution 7 of 2000.

LABOUR COURT

4.2 The work on the new pay progression model for the Public Service is referred back to the pay progression task team established by Council.

4.3 The Sector shall align the PSCBC framework to their sectoral skills and competency requirements.

4.4 The new sectoral dispensation on the pay progression system shall be implemented on 1 April 2002.

4.5 The employer shall allocate 1% of the wage bill for increments effected in terms of the pay progression system.

4.6 Payments in terms of the pay progression system shall be effected for the first time on 1 July 2002 and thereafter on 1 July each year.

4.7 Those employees who benefit from the pay progression system will receive the benefit in addition to the increases referred to in Clause 3 above.".

[17] The effect of PSCBC Resolution 9 of 2001 is that the duration for the eligibility for annual pay progression in respect of all employees in the public service was 12 months. Accordingly, PSCBC Resolution 9 of 2001 did not differentiate between employees in the public service with regard to the employment environment from which the employees came before being appointed into a post in the public service.

PSCBC Resolution 1 of 2012

[18] The position ushered in by PSCBC Resolution 9 of 2001 prevailed until 2012 when the "Agreement on salary adjustments and improvements on conditions of service in the public service for the period 2012/13-2014/15" (PSCBC Resolution 1 of 2012) was concluded in the Public Sector Coordinating Bargaining Council. Clause 4 of PSCBC Resolution 1 of 2012 deals with pay progression and states as follows:

"4. PAY PROGRESSION

4.1 Parties agree to amend clause 4.6 of PSCBC Resolution 9 of 2001 in order to develop and professionalise the public service.

4.2 The qualifying period for first time participants will be extended from 12 to 24 months. The amendment will take effect from 1 July 2012.

4.3 Upon completion of the 24 months period, an eligible first time participant will qualify for pay progression annually."

LABOUR COURT

[19] It is apparent from clause 4.1 of the PSCBC Resolution 1 of 2012 – and indeed common cause from the evidence before Court -- that the words "in order to develop and professionalise the public service" depict the object sought to be achieved by the extension of the duration for the eligibility for pay progression from 12 months to 24 months in respect of the employees referred to in clause 4.2 as "first time participants".

Incentive Policy Framework

[20] Subsequent to the conclusion of PSCBC Resolution 1 of 2012, the Minister for Public Service and Administration[4] formulated an Incentive Policy Framework for Employees on Salary Levels 1 to 12 and those covered by Occupation Specific Dispensation (the "Incentive Policy Framework") which was communicated under a cover letter dated 04 October 2012.

[21] It is apparent from paragraphs 1 to 8 of the cover letter dated 04 October 2012 that the Incentive Policy Framework elucidates and supplements the amendments in clauses 4.1 to 4.3 of the PSCBC Resolution 1 of 2012 regarding pay progression. In terms of clause 1 (scope of applicability) of the Incentive Policy Framework, State Law Advisers are covered by such Incentive Policy Framework. Clause 4 of the Incentive Policy Framework defines the words "pay progression", "pay progression cycle" and "First time participants" as follows:

> "4.2 'Pay progression' means progression to a higher notch within the same salary level or scale, limited to the awarding of 3 notches per pay progression cycle for non-OSD employees and the number of notches provided for in the respective OSD for OSD employees.
>
> 4.3 'Pay progression cycle' means a continuous period of 24 months running from 1 April to 31 March of the year following the next year, for first time participants and 12 months, running from 1 April to 31 March of the next year, for employees other than first time participants.
>
> 4.4 'First time participants' means a new appointee to the Public Service in a production or supervisory or managerial OSD or non-OSD post. … It includes employees who have previously resigned from the public service and who are re-appointed in the public service".

[4] The second respondent (Ms Lindiwe Sisulu at the time).

LABOUR COURT

[22] Part A of the Incentive Policy Framework deals with pay progression and states as follows:

> "PART A – PAY (NOTCH) PROGRESSION
>
> 5. Employees are eligible for pay progression, effective from 1 July of a year.
>
> 6. With effect from 1 July 2012, the qualifying period for pay progression for First (1st) time [*sic*] participants, is twenty-four (24) months....
>
> 7. The pay progression cycle for employees other than 1st time participants is twelve (12) months…. [*sic*]
>
> 8. The pay progression cycle for first time participants does not affect employees' probation periods.
>
> 9. Pay progression is not automatic, but based on actual service in a particular salary level for the respective periods as determined in terms of this policy and based on the achievement of at least a satisfactory performance rating for the said period in line with departmental specific performance management systems.
>
> 10.Pay progression shall not be effected automatically by PERSAL/PERSOL.
>
> 11.Pay progression is awarded to qualifying employees in addition to possible annual cost-of-living adjustments.
>
> 12...
>
> 13.The following Accelerated Pay Progression provisions apply with effect from 01 July 2012:
>
> 13.1 Non-OSD employees on salary levels 1 to 12:
>
> 13.1.1 Accelerated pay progression by the awarding of
>
> 13.1.1.1 One (1) notch to eligible employee with satisfactory performance rating.
>
> 13.1.1.2 Two (2) notches for employees with above average assessments, limited to 10% of eligible employees with the stipulated assessment.
>
> 13.1.1.3 Maximum of three (3) notches for employees with excellent performance assessments, limited to 5% of eligible employees with the stipulated assessment.
>
> 13.2 OSD Employees. As contained in respective OSDs."

[23] Paragraphs 7 and 13.1.1 of the Incentive Policy Framework were amended. The amendments were communicated by the DPSA under cover letter dated 03 November 2012 to which the Incentive Policy Framework incorporating the

LABOUR COURT

amendments was attached. However, it is not clear what was exactly amended in paragraph 13.1.1.

Performance Policy

[24] In 2014, the DoJ approved and signed the Performance Management Policy dated 21 May 2014 and circulated it within the DoJ via Circular 052 of 2014. Part C of the Performance Management Policy states that the Performance Management Policy is authorised, influenced, affected and bound by, amongst others, the following legislative framework: the Constitution, the Labour Relations Act, the relevant Collective Agreements of the PSCBC and GPSSBC, the GPSSBC Resolution 1 of 2008 and the Ministerial Determinations of 2008.

[25] The Performance Management Policy applies within the DoJ and the performance of employees (including the Applicant and Ms Veounia Grootboom and Ms Lucinda le Roux) in the DoJ is assessed according to the stipulations of this Policy.

[26] Clause 6.3(ii) and 6.4(ii) of the Performance Management Policy state that newly appointed employees in the public service are eligible for pay progression after serving a continuous period of 24 months:

> "6 RECOGNITION OF PERFORMANCE
>
> 6.1 …
>
> 6.2 …
>
> 6.3 Performance Bonuses (Merit Award)
>
> (i) An employee shall be considered for a performance bonus on completion of 12 months' continuous service on the same salary level at the end of March.
>
> (ii) A newly appointed employee in the public service shall be eligible for the pay progression after serving a continuous period of 24 months.
>
> (iii)……..
>
> ……...
>
> 6.4Pay Progression
>
> (i) Only employees who have completed a 12 month service on the same salary notch at the end of March will qualify for a pay progression provided that the employee was assessed and found fully effective.

LABOUR COURT

(ii) Newly appointed employees in the Public Service to a post as from 01 July 2012 onwards shall qualify for a pay progression only after 24 months of unbroken service.

(iii)…"

Similarity between clauses 6.3(ii) and 6.4(ii) of the Performance Policy and clause 6 of the Incentive Policy Framework

[27] Insofar as the provisions of clause 6.3(ii) and 6.4(ii) of the Performance Policy state that a newly appointed employee in the public service is eligible for pay progression only after serving a continuous period of 24 months, they mirror clause 6 of the Incentive Policy Framework.

Differentiation of first time participants by the Incentive Policy Framework and the Performance Management Policy

[28] PSCBC Resolution 1 of 2012, the Incentive Policy Framework and the Performance Management Policy differentiate between new appointees to the public service and other employees with regard to the duration for the eligibility for pay progression. New appointees to the public service are required to serve a period of 24 months before they qualify for annual pay progression whereas the other employees qualify for annual pay progression after only 12 months.

Reasons for and the object sought to be achieved by the differential treatment regarding the duration for the eligibility for pay progression

[29] In terms of clause 4.1 of the PSCBC Resolution 1 of 2012 and paragraph 2 of the cover letter dated 04 October 2012 to the Incentive Policy Framework the purpose for and/or the object sought to be achieved by the extension of the duration for eligibility for pay progression from 12 to 24 months in respect of new appointees to the public service and its resultant differentiation is "to develop and professionalise the public service".

[30] Furthermore, paragraph 4 of the cover letter dated 04 October 2012 (referred to above) further states what seems to be the motivation for the extension contained in clause 4.2 of the PSCBC Resolution 1 of 2012 by stating the following:

LABOUR COURT

> "The extension of the pay progression period will enhance or ensure proper in-service training of new appointees. The probation period however remains unchanged in terms of the current prescripts".

[31] From the pleadings and the evidence the parties led before the Court, the factual background regarding PSCBC Resolution 9 of 2001, PSCBC Resolution 1 of 2012, the Incentive Policy Framework and the Performance Management Policy is not in dispute. It is against this policy framework that the Court must deal with the facts from which the dispute arose.

The reason the Applicant did not receive annual pay progression

[32] The reason the Applicant did not receive annual pay progression despite obtaining a performance assessment outcome overall annual rating of 100% is that, in terms of the Performance Management Policy and the Incentive Policy Framework—

(a) the Applicant is a "new appointee to the Public Service"; and

(b) he had not yet completed 24 months but only 12 months' service at the time of the outcome of the performance assessment for the financial year in question *i.e.* Financial Year: 1 April 2015 to 31 March 2016.

[33] The Applicant was denied annual pay progression despite the fact that he and Ms Veounia Grootboom and Ms Lucinda le Roux—

33.1 had achieved the same performance assessment outcome for the financial year 2015/2016;

33.2 had to meet the same job requirements in order to be appointed into their posts as State Law Advisers;

33.3 are all placed on twelve months' probation (with the exception of those who had already done the probation in their previous jobs in the Public Service);

33.4 have signed performance agreements with the same KRAs;

33.5 were appointed at the same salary scale and had to start at the same minimum notch of their salary scale; and

33.6 are doing the same work and work of equal value.

LABOUR COURT

Effect of differentiation

[34] The effect of the differentiation regarding the duration for the eligibility for pay progression is that, in consequence of the Applicant having been denied annual pay progression and the other State Law Advisers having been awarded annual pay progression—

34.1 the salaries of the other State Law Advisers have increased;

34.2 due to the increase, the other State Law Advisers earn more than the Applicant and there is thus pay disparity;

34.3 the pay disparity will persist *ad infinitum* due to the fact that, by the time the Applicant receives his first pay progression, the other State Law Advisers will be receiving their second pay progression;

34.4 the Applicant is underpaid in relation to the other State Law Advisers and is suffering damages in the amount that he would have received from the pay progression.

34.5 the Applicant's achievement of performance assessment outcome overall annual rating of 100% for the financial year 2015/2016 counts for naught insofar as the awarding of annual pay progression as an incentive for fully effective performance is concerned, because any annual pay progression the applicant may receive will be based on the performance assessment outcome for the financial year 01 April 2016 to 31 March 2017 going forward.

The lodging of a complaint

[35] The Applicant wrote to the DoJ and the DPSA on 07 and 10 March 2017 respectively to complain about the differentiation regarding the duration for the eligibility for pay progression which had led to the Applicant not being awarded annual pay progression for the financial year 2015/2016.

LABOUR COURT

[36] On 09 March 2017, the DoJ responded to the Applicant's complaint by way of an email, the essence of which is that—

36.1 the Incentive Policy Framework is a directive ("the Directive") from the Second Respondent and that the DoJ is required to comply with it;

36.2 by implementing the two year period applicable to first time participants with regard to pay progression, the DoJ is simply complying with the Directive which it cannot change or deviate from; and

36.3 the DoJ cannot unilaterally change the PSCBC Resolution 1 of 2012 without the concurrence of the Minister of Public Service and Administration.

[37] However, the DPSA did not provide any substantive response to the Applicant's complainant save to refer the Applicant back to the DoJ through an email dated 22 March 2017.

[38] Seeing that the complaint was not resolved nor a proper and comprehensive response provided, the Applicant submitted a dispute referral form for unfair discrimination to the Commission for Conciliation, Mediation and Arbitration (the CCMA). It was set down for conciliation on 09 May 2017. The DoJ did not attend the conciliation process and only DPSA did. Conciliation failed and a certificate of non-resolution was issued. The applicant then referred the dispute to the Labour Court.

The Applicant's case

[39] The Applicant's case is that the differentiation with regard to the duration for the eligibility for pay progression is not rational and that it amounts to unfair discrimination on an arbitrary ground against the Applicant as a new appointee to the public service.

[40] The Applicant also contends that the provisions of PSCBC Resolution 1 of 2012 which introduced the differentiation with regard to the duration for the eligibility for annual pay progression are deemed to constitute a determination made by the Minister and that to the extent that that is so, the determination constitutes

LABOUR COURT

administrative action which is capable of review and setting aside in terms of PAJA.

[41] The Respondents[5] deny that the differentiation is irrational and unfairly discriminates against the Applicant on arbitrary grounds.

Onus of proof

[42] In terms of section 11(2)(a), (b) and (c) of the EEA, the Applicant bears the onus of proof. The parties also agreed to this as common cause in the pre-trial conference minute. Section 11(2) of the Employment Equity Act reads as follows:

> "**11 Burden of proof**
>
> (1) If unfair discrimination is alleged on a ground listed in section 6 (1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination-
>
> (a) did not take place as alleged; or
>
> (b) is rational and not unfair, or is otherwise justifiable.
>
> (2) If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that-
>
> (a) the conduct complained of is not rational;
>
> (b) the conduct complained of amounts to discrimination; and
>
> (c) the discrimination is unfair.". (own underlining)

[43] In this case, the applicant bases his claim of unfair discrimination on an arbitrary ground. He alleges that the "ground" of differentiation between first time entrants and other employees in the public service is not rational and that it amounts to unfair discrimination.

LABOUR COURT

[5] Only the first to third respondents oppose the relief sought, although the applicant cited eleven respondents who may have an interest in the dispute. When I refer to "the respondents" as a matter of convenience, I refer to the first, second and third respondents.

[44] Section 6 of the EEA provides:

> "Prohibition of unfair discrimination
>
> (1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth, or on any other arbitrary ground.
>
> ...
>
> (4) a difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1), is unfair discrimination."

[45] Section 11 then deals with the burden of proof.

[46] The question of onus in terms of s 11 of the EEA is commented on in *Labour Law through the Cases*:[6]

> "No definitive meaning has thus far been given to the words 'alleged' and 'allegation', used to describe the evidentiary burden placed on the applicant in bringing a claim of unfair discrimination. An unsupported allegation of unfair discrimination clearly cannot succeed. Even if the burden of proving fairness rest on the employer, it has been held that an employee should provide sufficient evidence in support of her/his claim 'to cast doubt on' the employer's explanation or 'to show that there is a more likely reason than that of the employer".

[47] As this Court recently commented in *Sasol*[7] this summary is consistent with the jurisprudence both before and after the amendment of section 11 which took effect in August 2014. In *Janda v First National Bank* [8] -- a case dealing with an alleged automatically unfair dismissal in terms of s 187(1)(f) of the LRA – the court held:

> 'As stated earlier, there is a single issue with the burden on the employer. This essential point is obscured if one speaks of "the employee must prove" or a

[6] Du Toit et al, *Labour Law through the Cases* (LexisNexis, Issue 21, 2018) at EEA-37 s.v. "alleged" (footnotes omitted).

[7] *Sasol Chemical Operations (Pty) Ltd v CCMA* [2019] 1 BLLR 91 (LC); (2019) 40 *ILJ* 436 (LC) esp paras [12] – [20].

[8] [2006] 12 BLLR 1156 (LC) par [18].

LABOUR COURT

> "shifting" of the onus or a duty "to establish a prima facie case that the reason for the dismissal was an automatically unfair one" (For example Dupper et al *Essential Employment Discrimination Law* at page 130). The evidentiary burden placed upon an employee creates the need for there to be sufficient evidence to cast doubt on the reason for the dismissal put forward by the employer or, to put it differently, to show that there is a more likely reason than that of the employer. A failure to present such evidence creates the risk of the employee losing his or her case. The essential question however remains, after the court has heard all the evidence, whether the employer upon whom the onus rests of proving the issue, has discharged it. (*Zeffertt (supra)* at page 132 to 134.)"

[48] And in *Kroukam v SA Airlink (Pty) Ltd*[9] Davis JA held:

> "In my view, section 187 imposes an evidential burden upon the employee to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. It then behoves the employer to prove to the contrary, that is to produce evidence to show that the reason for the dismissal did not fall within the circumstance envisaged in s 187 for constituting an automatically unfair dismissal."

[49] More recently, after the amendment of s 11, the court held in *Sethole & others v Dr Kenneth Kaunda District Municipality*[10]:

> … [E]ven if Section 11 of the EEA after its amendment is considered, there is a clear distinction, where it comes to the issue of who bears the onus, between a case of discrimination based on one of the listed grounds in Section 6(1) of the EEA, and a case based on any other unlisted arbitrary ground. In the case of a claim of discrimination based on a listed ground, an allegation of such kind of discrimination by a complainant suffices, and the onus is then on the respondent party to prove it does not exist. But in the case of a discrimination claim based on any other unlisted arbitrary ground, the onus is on the complainant to prove that discrimination based on that ground exists. Considering that the applicants' claim is squarely based on such an unlisted arbitrary ground, they would in any event bear the onus to prove the existence of discrimination, in terms of Section 11(2) of the EEA, as it stands after amendment."

[9] [2005] 12 BLLR 1172 (LAC) par [28].

[10] [2018] 11 BLLR 74 (LC) par [25].

LABOUR COURT

[50] In *Sasol (supra)* this Court expressed the opinion that the position in terms of the amended section 11 must be that set out by the learned authors in *Labour Relations Law: A Comprehensive Guide*[11]:

> "Section 11(1), like its predecessor, states that the respondent employer must disprove the unfair discrimination 'alleged' by an employee in order to avoid liability. The term 'alleged' has not been consistently interpreted by the courts. It must be presumed to mean something less than making out a *prima facie* case, as would be required in the ordinary course when the burden of proof is not reversed. However, the weight of authority indicates that it means more than an unsupported contention or mere accusation. At the very least, as in the case of automatically unfair dismissal, it is suggested that the employee must produce 'sufficient evidence to cast doubt on the reason' put forward by the employer for its action; that is to say, If the employee succeeds in discharging this evidential burden, '[i]t then behoves the employer to prove the contrary'."

[51] If this interpretation is correct, the "first stage" of the inquiry in *Harksen* has been significantly altered and the earlier case law remains applicable largely in repect of alleged unfair discrimination on unlisted grounds, as in the case before me.

Legal issues

[52] The parties did not agree to the framing of the legal questions the Court is required to deal with in the pre-trial minute. The Applicant submits that there are two sets of questions before the Court. I agree.

[53] The first set of questions is informed by the provisions of section 11(2) of the Employment Equity Act while the second set of questions relates to the issue of whether the provisions of the PSCBC Resolutions, the Incentive Policy Framework and the Performance Management Policy constitutes administrative action, and whether they are reviewable and capable of being set aside in terms of PAJA.

[54] The first set of questions is thus:

54.1 Is the differentiation against first time participants with regard to the duration for eligibility for annual pay progression rational?

[11] Du Tot et al, *Labour Relations Law: A Comprehensive Guide*(6 ed 2015) at 696 (footnotes omitted). (Published after the amendments to s 11 of the EEA).

LABOUR COURT

54.2 Does the differentiation against first time participants with regard to the duration for eligibility for annual pay progression amount to discrimination?

54.3 If the differentiation amounts to discrimination, is it unfair?

Is the differentiation against first time participants with regard to the duration for eligibility for annual pay progression rational?

[55] The conduct complained of is the differentiation with regard to the duration for the eligibility for pay progression (the differentiated pay progression policy) pursuant to which the Applicant was denied annual pay progression for the financial year 2015/2016. Until 2012 when the PSCBC Resolution 1 of 2012 was concluded, the duration for the eligibility for annual pay progression in the public service was 12 months in respect of all employees. The differentiated pay progression policy changed this in that it requires first time participants, which is defined as meaning new appointees to the public service[12], to serve a period of 24 months before they are eligible for annual pay progression whereas employees other than those defined as new appointees to the public service qualify for annual pay progression only after 12 months.

[56] The stated object sought to be achieved by the differentiated pay progression policy is "to develop and professionalise the public service" while the differentiated pay progression policy is a measure or means which is meant to achieve the stated object. There is therefore no dispute, as Mr *Ramaila* pointed out, that the differentiated pay progression policy constitutes a measure and that "to develop and professionalise the public service" constitutes the object or the end sought to be achieved through that measure. There is also no gainsaying that "*to develop and professionalise the public service"* is a legitimate purpose and a proper end to pursue, as Mr Ramaila readily conceded. But still that does not make the differentiation rational.

[57] Since the differentiated pay progression policy differentiates with regard to the duration for the eligibility for annual pay progression between employees in the public service, namely employees defined as new appointees to the public service and employees other than those defined as new appointees to the public

[12] The Incentive Policy Framework makes it clear that "first time participants" includes employees who had previously resigned from the public service and who are re-appointed in the public service.

LABOUR COURT

service, it is required that the differentiated pay progression policy must be rationally connected to the purpose or object for which it is designed to achieve. There must be a rational connection between the differentiated pay progression policy and its object, namely "to develop and professionalise the public service". In other words, the object sought to be achieved must bear a rational connection to its means of realisation.

[58] Annual pay progression is an incentive which is meant to incentivise employees whose performance is fully effective. That is, the performance which meets the employer's expectations. In other words, annual pay progression serves to acknowledge the employees' hard work and reward it so that the employees could keep up the good work and work even harder. It is not in recognition for length of service.

[59] Employees qualify for annual pay progression after their performance has been assessed and they have achieved an overall rating of 100%. If an employee achieves an overall rating of more than 100% -- as illogical as that is -- that employee qualifies for a performance bonus over and above the annual pay progression. It is apparent that pay progression is performance-based.

[60] However, employees who are defined as new appointees to the public service such as the Applicant are denied this incentive despite achieving an overall rating of 100%. The reason for that is nothing more than that they are new appointees to the public service and that they must complete 24 months before they are eligible for annual pay progression. This is done ostensibly in order "to develop and professionalise the public service".

[61] New appointees are also required to complete a Compulsory Induction Programme (CIP) in order for their probation to be confirmed and to qualify for annual pay progression. The CIP is said to be a one year programme. However, employees may take up to two years to complete the CIP. But even if a new appointee completes the CIP within a year and has their probation confirmed and achieves a performance assessment rating of 100%, the new appointee would in terms of the differentiated pay progression policy still be denied annual pay progression if the new appointee has not yet completed 24 months' service. Again, all this is ostensibly because the 24 months to which the new appointees

LABOUR COURT

are subjected to before they are eligible for annual pay progression is meant to develop and professionalise the public service.

[62] The question that arises is, how will the stated object of the differentiated pay progression policy be achieved by denying employees an incentive they are entitled to as a result of achieving the required performance assessment outcome? Mr Ramaila submitted that annual pay progression is an incentive which is based on the employee's performance and denying new appointees such an incentive when they have achieved the required performance assessment outcome cannot develop and professionalise the public service. I agree. In fact, it is likely to achieve the opposite result. As Mr Ramaila argued, it will lead to demoralisation of employees and this will make it even more difficult to professionalise the workforce and the work environment where the workforce is demoralised and demotivated. It is clear that the object of annual pay progression is to incentivise employees and that is completely different from the object sought to be achieved by the differentiated pay progression policy. I agree with Mr Ramaila that there is no rational connection between the differentiated pay progression policy and the object sought to be achieved.

[63] As I debated with counsel in argument, a contemporary example springs to mind. Ms Shamila Batohi was recently appointed as the new Director of Public Prosecutions after the disastrous reign of her immediate predecessors in that important post. She comes with a wealth of experience, including her work as a legal advisor to the prosecutor at the International Criminal Court. Yet, in terms of the definition in the Incentive Policy Framework, she is to be seen as a first time participant; and in terms of the stated policy, she will only be eligible for pay progression after 24 months, even if she works miracles and prosecutes everyone involved in state capture within 12 months. That cannot be rational.

[64] With regard to the question whether there is a rational connection between the differentiation regarding to the duration for the eligibility for pay progression and what is stated to be the object of such differentiation, the test set out by the Constitutional Court in *Harksen v Lane N.O.*[13] is well known:

> "(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government

[13] 1997 (11) BCLR 1489 (CC) para [53].

LABOUR COURT

purpose? If it does not, then there is a violation of section 8(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination."

[65] The differentiated pay progression policy—

(a) differentiates with regard to the duration for the eligibility for annual pay progression between employees in the public service, namely employees defined as new appointees to the public service, as opposed to employees other than those defined as new appointees to the public service; and

(b) it does not bear a rational connection to its object, even though such an object appears to be a legitimate one.

[66] I agree with Mr Ramaila's submissions that—

57.1 A rational connection exists if the differentiation is an *"appropriate and effective"* means to achieve the measure's legitimate objective. The differentiated pay progression policy is certainly not an *"appropriate and effective"* means in the circumstances to achieve the stated objective, namely *"to develop and professionalise the public service"*.[14]

57.2 Differentiating against new appointees with regard to the duration for the eligibility for annual pay progression, purportedly to develop and professionalise the public service, when such differentiation is not an appropriate and effective means to achieve the stated objective does not amount to acting rationally.

57.3 The fact that the stated object sought to be achieved bears no rational connection to the differentiation regarding the duration for the eligibility for pay progression as a purported means of its realisation and that the differentiation is not an appropriate and effective means and that it is incapable of achieving the stated object, renders the differentiation to be for no good reason and thus arbitrary, so much so that it is iniquitous and penal in its effect.

[14] See *Harksen v Lane* par [57].

LABOUR COURT

[67] Consequently, there is no rational connection between using “new appointee” as a factor determining the duration for the eligibility for annual pay progression and the objective of developing and professionalising the public service.

Whether the differentiation against first time participants with regard to the duration for eligibility for annual pay progression amounts to discrimination

[68] The differentiation is with regard to the duration for the eligibility for annual pay progression, the stated object of which is to develop and professionalise the public service. The ground or the basis on which the Applicant is differentiated against regarding the duration for the eligibility for annual pay progression is the fact that he is said to be a first time participant, which is defined as meaning a *new appointee to the public service*.

[69] The fact that the Applicant is defined as a new appointee to the public service triggers the differentiation to be applied between the Applicant and his comparators, which differentiation requires him to serve 24 months before he could be eligible for annual pay progression. It is therefore apparent that “new appointee to the public service” is an attribute, characteristic or distinguishing feature which has led to the Applicant to be subjected to the duration of 24 months’ service before he could qualify for an annual pay progression, while other employees need serve only 12 months before they qualify for annual pay progression.

[70] Although the Applicant, Ms Veounia Grootboom and Ms Lucinda le Roux were appointed at the same time, and they all started at the same minimum notch of the salary scale attendant to the post of State Law Adviser, Ms Veounia Grootboom and Ms Lucinda le Roux were awarded annual pay progression after 12 months (financial year 2015/2016) whereas the Applicant was not awarded annual pay progression, simply because he is defined as a new appointee to the public service.

[71] I agree that the fact that the Applicant bears the attribute, characteristic or distinguishing feature, namely “new appointee to the public service”, has the potential to affect the Applicant adversely in a comparably serious manner insofar as the awarding of or qualifying for annual pay progression is concerned. Not

LABOUR COURT

only does it have the potential; that is exactly what the facts in this case demonstrate.

[72] That much is clear from the common cause facts:

63.1 The Applicant (appointed from private practice into a post in the public service) and the other State Law Advisers (appointed from within the public service into a post in the public service), are all new to their posts as State Law Advisers.

63.2 The Applicant and the other State Law Advisers have the same key result areas in terms of their performance agreements.

63.3 The Applicant and the other State Law Advisers had to meet the same requirements in order to be appointed into their posts as State Law Advisers.

63.4 The salary scale attendant to the Applicant and the other State Law Advisers' post is the same.

63.5 The Applicant and the other State Law Advisers started at the same minimum notch of their salary scale.

63.6 The Applicant and the other State Law Advisers achieved the same performance assessment outcome for the financial year 01 April 2015 to 31 March 2016 (100% fully effective).

63.7 The other State Law Advisers received annual pay progression for the financial year 2015/2016 while the Applicant did not receive the annual pay progression.

63.8 The reason the Applicant did not receive the pay progression is that he is a "new appointee to the public service" and had not yet completed 24 months' service but only 12 months since being appointed.

[73] The only difference between the Applicant and the other State Law Advisers is the employment environment from which they came prior to being appointed into their posts as State Law Advisers. The Applicant came from private practice – where he acquired relevant experience in the legal field -- whereas the other State Law Advisers came from within the public service sector. Therefore, the

LABOUR COURT

Applicant and the other State Law Advisers are in the same position in all respects other than their previous posts elsewhere within or outside the public service.

[74] Despite being in the same position as the other State Law Advisers, the Applicant is differentiated against with regard to the duration for the eligibility for pay progression, the stated objective of which differentiation is "to develop and professionalise the public service".

[75] The Applicant is discriminated against on the ground that he is a new appointee to the public service. Therefore, being a "new appointee to the public service" is the reason the Applicant is receiving disparate treatment insofar as the duration for the eligibility for pay progression is concerned. Being a "new appointee to the public service" is used as a distinguishing feature or attribute or characteristic to treat new appointees to the public service differently from other employees when it comes to the duration for the eligibility for annual pay progression. This distinguishing feature, attribute or characteristic, which has the appearance of being neutral, does not only have the potential to affect but actually affect employees appointed from outside of the public service into posts in the public service adversely in a comparably serious manner particularly if regard is had to the fact that the stated objective of the differentiation bears no rational connection to the differentiation which is used as a mechanism to achieve the stated object.

[76] To determine whether or not the differentiation amount to discrimination, the Constitutional Court stated the following in *Harksen*[15] :

> "(b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:
>
> (i) Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. <u>If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to</u> impair the fundamental human dignity of persons as human beings <u>or</u> to <u>affect them adversely in a comparably serious manner.</u>
>
> (ii) <u>If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"?</u> If it has been found to have been on a specified ground, then

[15] Above par [53].

LABOUR COURT

unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2).

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (Section 33 of the interim Constitution)."

[77] In this case —

68.1 the differentiation regarding the duration for the eligibility for annual pay progression on the ground that an employee is *a new appointee to the Public Service* (which is used as a distinguishing feature, attribute or characteristic to subject such an employee to the differentiation), viewed objectively, has the potential to affect employees appointed from outside of the public service into posts in the public service adversely in a comparably serious manner; and

68.2 differentiating against new appointees to the public service with regard to the duration for the eligibility for annual pay progression, ostensibly in order to develop and professionalise the public service, when there is no rational connection between the differentiation and the object sought to be achieved, is arbitrary.

Whether or not the discrimination is unfair

[78] I have accepted that the differentiation with regard to the duration for the eligibility for pay progression in light of the facts and the circumstances of this case is irrational and that it amounts to discrimination. The remaining question is whether the discrimination is unfair.

[79] In *Harksen*[16], the Constitutional Court stated that "[t]he test for unfairness focuses primarily on the impact of the discrimination on the complainant and

[16] Above par [52]. See also *IMATU v City of Cape Town* [2005] 11 BLLR 1084 (LC) [per Murphy AJ].

LABOUR COURT

others in his or her situation". And in *IMATU v City of Cape Town*[17] Murphy AJ explained:

> "The impact of the discrimination complained of on the complainant is generally the determining factor regarding the unfairness of alleged discrimination. Factors which must be taken into account include: the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage; the nature of the provision or power and the purpose sought to be achieved by it; the extent to which the discrimination has affected the rights or interests of complainants and whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature."

[80] The differentiation with regard to the duration for the eligibility for pay progression has the following effect:

80.1 The Applicant has been denied annual pay progression for the financial year 2015/2016 while the other State Law Advisers (Ms Veounia Grootboom and Ms Lucinda le Roux) have received annual pay progression in respect of the same financial year.

80.2 The annual pay progression received by the other State Law Advisers in respect of the financial year 2015/2016 has resulted in an increase in the other State Law Advisers' annual salaries and so their monthly salaries.

80.3 The increase in salaries of the other State Law Advisers has resulted in a pay disparity between the Applicant and the other State Law Advisers in that the other State Law Advisers now earn more than the Applicant.

80.4 The pay disparity persists despite the fact that the Applicant and the other State Law Advisers started at the same salary notch and have all achieved the same performance outcome deserving of an incentive in the form of annual pay progression.

80.5 The pay disparity is continuous, in that, when the applicant receives his first pay progression as a State Law Adviser, the other State Law Advisers will be receiving their second pay progression as State Law Advisers.

[17] *IMATU v City of Cape Town* [2005] 11 BLLR 1084 (LC) par [82].

LABOUR COURT

80.6 The differential treatment to which the Applicant is subjected to with regard to the duration for the eligibility for annual pay progression creates a difference in the terms and conditions of employment between the Applicant and the other State Law Advisers insofar as the duration for eligibility for annual pay progression is concerned.

[81] The difference in terms and conditions of employment persists despite the fact that the Applicant and the other State Law Advisers are employees of the same employer and their work is the same and of equal value.

[82] The differential treatment to which the Applicant is subjected to regarding the duration for the eligibility for annual pay progression puts the Applicant at a disadvantage of not being able to progress, in so far as annual pay progression is concerned, at the same level as the other State Law Advisers.

[83] The pay disparity between the Applicant and the other State Law and the fact that the applicant is deprived of the opportunity to progress at the same level as the other State Law Advisers with regard to annual pay progress by the differential treatment has resulted in the Applicant being underpaid in relation to the other State Law Advisers despite doing not only the same work but work of equal value.

[84] Considering the effect of the discrimination as demonstrated above, the differentiation amounts to unfair discrimination. And it cannot be justified, either in terms of the provisions of Regulation 7(1)(a) of the Employment Equity Regulations; section 198D(2)(a) of the LRA; or clause 7.3.1 of the Code of Good Practice on Equal Pay / Remuneration for Work of Equal Value; or the Constitution.

[85] Van Niekerk J restated the principles pertaining to equal pay claims in *Pikitup*[18]:

> "The relevant legal principles are clear – a mere differentiation does not necessarily constitute an act of discrimination. Discrimination occurs when the differentiation has as its basis one of the specified listed grounds referred to in s6, or an unspecified or analogous ground, or an arbitrary ground, referred to in the section. The pleading in a claim such as the present must necessarily establish the differentiation and the basis on which the claim is made, in other words, a link

[18] *SAMWU v Pikitup Johannesburg (SOC) Ltd* [2017] ZALCJHB 183 (LC) par [6].

LABOUR COURT

between the differentiation and a specified or an unspecified ground. Where reliance is placed on the latter, it is not sufficient to contend that the policy or practice complained of is arbitrary. The case must necessarily be made [that it] is analogous to a specified ground and based upon or shares a common trend with a specified ground and in particular, that it exhibits attributes or characteristics which have the potential to impair the fundamental dignity of the applicants as human beings (see *Ntai v South African Breweries Ltd* [2001] 2 BLLR 186 (LC).

In other words, a litigant claiming unfair discrimination on an unidentified, arbitrary ground must clearly identify the ground relied upon and secondly, shares characteristics with those specified grounds listed in s 6 (1)."

[86] More recently, whilst overturning the judgment of the court *a quo* on appeal, the LAC in *Duma*[19] nevertheless accepted that the ground of differentiation on the basis of "geographical location" may form the basis of an unfair discrimination claim. Davis AJA noted[20]:

"Two decades ago in *Louw v Golden Arrow Bus Services (Pty) Ltd*, Landman J (as he then was) wrote:

'Discrimination on a particular "ground" means that the ground is the reason for the disparate treatment complained of. The mere existence of disparate treatment of people, for example, different races is not discrimination on the ground of race unless the difference in race is the reason for the disparate treatment. Put differently, for the applicant to prove that the difference in salaries constitutes direct discrimination, he must prove that his salary is less than Mr Beneke's salary because of his race.'

Hence, a claimant in an equal pay claim must establish that the work done by a person who can be reliably classified as a comparator is the same or similar work. In a claim for work for equal value, it behoves a claimant to establish that the tasks performed by the comparator and the claimant are of equal value, having regard to the required degree of skill, physical and mental effort, responsibility and other factors. If one examines the text of the OSD, it is clear that care was taken to provide for the scenario that, where a particular legal officer for example, performs certain tasks which require a particular amount of time, another officer occupying

[19] *Minister of Correctional Services v Duma* [2017] ZALAC 78, overturning (on the facts) the judgment in *Duma v Minister of Correctional Services* (2016) 37 *ILJ* 1135 (LC); [2016] 6 BLLR 601 (LC).

[20] Paras [21] – [24].

LABOUR COURT

the same position who has a more demanding set of work pressures may be shown justifiably to be paid more.

…

The question with which the court grappled in *Mangena*[21], *supra*, comes back to haunt this case, namely was there an adequate factual foundation to sustain the claim that respondent was on a salary notch which was unjustified because of her geographical location. It is this factual foundation which permits a court to examine whether the complainant suffered an assault to her dignity and whether her rights or interests have been unfairly affected.

The shadow of these principles looms large in the present dispute precisely because it was fought out on the basis of a stated case. It may well be, given the notorious inability of our legal system to expedite trials so that they are reasonably affordable for litigants such as the respondent, that respondent had little option but to litigate on the basis of a stated case. But the difficulty with a stated case in general and the facts of this case in particular is that in an EEA based case, a burden of proof rests upon a claimant such as respondent. She was required, at the very least, to show that the nature and volume of work which she performed in her position was similar to that of legal officers holding the same position in the four provinces who occupied a higher grade level and thus that the ground of differentiation (which was not a specified ground) was indeed geographical location."

[87] In this case, Mr Ramaila relies on an analogous, arbitrary ground of discrimination. And he has shown that the ground of differentiation is irrational; and that there is no rational relation between the pay progression measure and its stated purpose.

The second set of legal issues: PAJA review

[88] The Applicant argued that:

88.1 In terms of section 5(6)*(a)* of the Public Service Act, the provisions of clauses 4.1 to 4.3 of PSCBC Resolution 1 of 2012 which extends the period for eligibility for pay progression in respect of first time participants in the Public Service from 12 to 24 months are deemed to be a determination made by the Minister of Public Service and Administration ("the Deemed Ministerial Determination of 2012").

[21] *Mangena and others v Fila South Africa (Pty) Ltd and others* (2010) 31 *ILJ* 662 (LAC).

LABOUR COURT

88.2 In terms of section 5(6)*(b)* of the Public Service Act, the Incentive Policy Framework constitutes a directive issued by the Minister which elucidates or supplements the Deemed Ministerial Determination of 2012 for the purposes of proper implementation of the PSCBC Resolution 1 of 2012.

88.3 The Deemed Ministerial Determination of 2012, the Incentive Policy Framework and the Performance Management Policy constitute administrative actions in terms of section 1*(a)*(ii) of the Promotion of Administrative Justice Act ("PAJA") and are therefore reviewable in terms of section 6 of PAJA for the reason that the differentiation against the new appointee with regard to the duration for the eligibility for annual pay progression is:

88.3.1 not rationally connected to the stated objective sought to be achieved, namely to develop and professionalise the public service (section 6(2)*(f)*(ii)*(aa)* of PAJA); or

88.3.2 unconstitutional or unlawful for unfairly discriminating against new appointees to the public service (6(2)*(i)* of PAJA).

[89] In light of this argument, the following questions arise:

(a) Whether or not the provisions of clauses 4.1 to 4.3 of the PSCBC Resolution 1 of 2012 which extends the period for eligibility for pay progression in respect of first time participants in the Public Service from 12 to 24 months are deemed to be a determination.

(b) Whether or not the Incentive Policy Framework constitutes a directive issued by the Minister to elucidate or supplement the Deemed Ministerial Determination of 2012.

(c) Whether or not the Ministerial Determination of 2012 and the Policies constitute administrative actions in terms of section 1*(a)*(ii) of PAJA and are therefore reviewable on the grounds set out in section 6(2)*(f)*(ii)*(aa)* and 6(2)*(i)* of PAJA.

[90] I am persuaded that—

90.1 In terms of section 5(6)*(a)* of the Public Service Act, clauses 4.1 to 4.3 of the PSCBC Resolution 1 of 2012 (which extends the period for eligibility for pay progression in respect of first time participants in the Public Service

LABOUR COURT

from 12 to 24 months) are deemed to be a determination made by the Second Respondent, the Minister of Public Service and Administration, in terms of section 3(5) of the Public Service Act.

90.2 In terms of section 5(6)*(b)* of the Public Service Act, the Incentive Policy Framework constitutes a directive.

90.3 In terms of section 1*(a)*(ii) of the Promotion of Administrative Justice Act, the Deemed Ministerial Determination of 2012, the Incentive Policy Framework and the Performance Management Policy constitute administrative action and are reviewable for the reason that the differentiation provided for therein with regard to the duration for eligibility for annual pay progression to which the new appointees are subjected to is not rationally connected to the stated objective sought to be achieved.[22]

[91] I am satisfied that the Ministerial determination and the Policies constitute administrative action and are reviewable under PAJA. It is administrative in nature, being the exercise of a public power, and it has direct external legal effect on employees similarly situated to the applicant. In *Free Market Foundation*[23], when dealing with a bargaining council resolution, Murphy J commented:

> "From the foregoing discussion it is evident that any determination of whether a bargaining council resolution is administrative action in terms of PAJA will depend in the final analysis on the peculiar facts. I incline to agree with COSATU, NUMSA, the Minister and the bargaining councils that PAJA ordinarily will apply and thus that the decision of the bargaining council will be subject to PAJA review. The strongest argument against such a conclusion may be that the resolution being deliberative is not a decision of an administrative nature. Unfortunately, as said, no argument was presented in relation to this issue, which was not specifically raised in the affidavits. If the decision is administrative action then it will be reviewable on grounds of reasonableness (at least rationality), legality and due process. If, on the other hand, the bargaining council resolution is not administrative action under PAJA, it still will be subject to rationality and legality review under the rule of law provision in section 1 of the Constitution. Review in terms of the principle of legality may involve a lower standard of scrutiny than a reasonableness review under

[22] *Association of Mineworkers and Construction ("AMCU") v Minister of Labour* (2018) 39 *ILJ* 1549 (LC) paras [19] to [23].

[23] *Free Market Foundation v Minister of Labour* (2016) 37 *ILJ* 1638 (GP); [2016] 3 All SA 99 (GP); 2016 (4) SA 496 (GP); [2016] 8 BLLR 805 (GP) par [81].

LABOUR COURT

> PAJA, but it still can be far-reaching and includes the requirements of rationality, legality and a duty not to act arbitrarily, capriciously or with ulterior purpose. There must be a rational relationship between the exercise of the power and the purpose for which the power was given. Moreover, there is explicit statutory protection against discrimination. In terms of section 32(3)(g) of the LRA the collective agreement may not discriminate against non-parties, a matter I will discuss later. And hence the charge of inconsistency with the Constitution for want of adequate judicial supervision of the bargaining council process is not sustainable."

[92] The contested provision in PSCBC Resolution 1 of 2012 – which is deemed to be a ministerial determination – is not rational. There is no rational relationship between the exercise of the power and the purpose for which it was given, i.e. to "develop and professionalise" the public service. And it adversely affects the rights of the applicant and similarly situated employees in the public service.

[93] Furthermore, by treating the first time participants unequally in comparison to other employees simply by their mere labelling as such in the manner that the Policies do, this unequal treatment constitutes unfair discrimination prohibited in terms of section 6(1) and (4) of the Employment Equity Act.

[94] The difference in the terms and conditions of employment, between first time participants and other employees, in so far as pay progression is concerned, resulting from the application of the Policies cannot be justified.

The First and Third Respondents' defence

[95] The First and Third Respondents'[24] response can be divided into three parts:

95.1 The first part deals with a special plea regarding the joinder of Ms Grootboom. They have abandoned the special plea.

95.2 The second part is the response to the allegations of fact set out in the Applicant's statement of claim. It is in this part that they set out their defence.

95.3 The third part comprises the legal issues arising from the facts of the case, as seen by the respondents.

[96] The First and Third Respondents deny:

[24] The Minister of Justice and Correctional Services; and the Director-General: Justice and Constitutional Development.

LABOUR COURT

96.1 that the Applicant attended the Compulsory Induction Programme mentioned in clause 3.1.11 of Annexure A to his contract of employment;

96.2 that the letters from the DoJ dated 25 November 2015 and 2 August 2016 confirm the Applicant's probation in accordance with the Directive on the Implementation of the Compulsory Induction Programme, 2012;

96.3 that the Applicant has not received any "in-service training" whatsoever since the completion of his probation at the end of March 2016 and that he had only two sets of training which took place in 2015 when he was still on probation.

The First and Third Respondents' denial that the Applicant attended CIP

[97] The Applicant pleaded that he had attended the Compulsory Induction Programme which he is required to attend in order for his probation to be confirmed. This allegation of fact was initially admitted by the First and Third Respondents but later on retracted, leading to an amendment and consequent delay in the trial, with the results that the First and Third Respondents deny that the Applicant attended the CIP.

[98] The First and Third Respondents contend that the Applicant attended the PSIP (Public Sector Induction Programme) which was phased out in 2012, even though he only did so in 2015. The contention goes on to say that the Department's confirmation of the Applicant's probation was not in accordance with the October 2012 Directive. The Department obtained a report from the National School of Government and on the basis of the contents of that report stated that the NSG has no record of the Applicant.

[99] The Applicant's response to that was that it is the responsibility of the DoJ to enrol him for the CIP.

[100] It emerges from the contents of the Directive on the Implementation of the Compulsory Induction Programme and a comparison with the sample confirmation letter from the NSG regarding the CIP, and the letter confirming his probation, that the induction programme the Applicant was made to attend by the employer, namely the DoJ, was not the CIP but PSIP. And according to clause 12.1 of the October 2012 Directive, the PSIP was phased out in 2012. Once that had been clarified, Mr Ramaila had no difficulty to admit that the induction

LABOUR COURT

programme he was made to attend is not the CIP described in the October 2012 Directive but the PSIP. However, he submitted that:

100.1 the admission that he did not attend the CIP but the PSIP is not fatal to his case and that it is the responsibility of the DoJ to enrol him into the National School of Government for the CIP and/or provide the CIP training.

100.2 the fact that he did not attend the CIP does not change anything. Even if he had attended the CIP he would still have not been awarded pay progression for the financial year 2015/2016 because the policy says that, as a new appointee, he must complete 24 months before he could qualify for annual pay progression. Therefore, attendance or not of the CIP, makes no difference insofar as the 24 months duration is concerned.

[101] Mr Canham, a deputy director dealing with training in the Department of Justice, who testified for the First and Third Respondents, conceded under cross examination that it is the responsibility of the DoJ to enrol the Applicant into the CIP and that the DoJ has failed to discharge its responsibility in that regard. He also explained the process:

> "It is for the supervisor to inform HR about the employee, that an employee has started on a specific day, and then HR will register and book the employee for the compulsory induction programme. So, the responsibility is with the supervisor to inform HR of the appointment. The appointment letter or appointment email will then be sent to Justice College informing my section of the person's employment and then I will start the process of enrolling the person."

[102] To date – even after the trial had started in May 2018 – the Department has taken no steps to enrol Mr Ramaila in the CIP. Mr Canham specifically stated that it was "a mistake" for the DoJ to not enrol him into the CIP. And Mr Canham conceded that the DoJ has failed to enrol the Applicant into the CIP despite the DoJ knowing that it made the Applicant to attend the PSIP instead of the CIP, and also despite the DoJ having a Service Level Agreement, which Mr Canham mentioned for the first time during cross examination, to provide the CIP internally to its employees.

[103] It is undisputed that the Applicant has never been told to go to the NSG or Justice College to attend CIP by the DoJ despite the Applicant been present at work at all material times except when being on annual leave or off sick.

LABOUR COURT

[104] The orientation guide to the CIP, prepared by the National School of Government, reiterates that "the aim of this extension [in Resolution 1 of 2012] in the pay progression period is to ensure the development and professionalising period of public servants". Yet the DoJ has still not enrolled the applicant in the CIP, and it has not explained satisfactorily how that stated aim is met through the extension of the pay progression period to 24 months when it is common cause that the CIP can be concluded within 12 months – in fact, the programme content itself is dealt with over a mere 25 days. The First and Third Respondent's denial that the letters from the DoJ confirm the Applicant's probation in accordance with the Directive on the Implementation of the Compulsory Induction Programme

[105] It is common cause that the Applicant's probation was confirmed. However, the First and Second Respondents contend that the confirmation was not in accordance with the Directive on the Implementation of the Compulsory Induction Programme. This is apparently due to the fact that the Applicant has not attended the CIP but the PSIP, as directed by the Department.

[106] Although the First and Third Respondents claim that the probation was erroneously confirmed they have not done anything to have the alleged erroneous confirmation of the probation either rectified, reversed or reviewed and set aside. In my view, the fact that the probation has been confirmed, which presupposes that all requirements relating to the confirmation of the probation have been complied with, cannot be ignored and as such the confirmation is of force and effect, irrespective of the alleged error, until reviewed and set aside.[25]

[107] The First and Third Respondents' contention that the confirmation of the probation was not in accordance with the Directive on the Implementation of the Compulsory Induction Programme flies in the face of the fact that it is the DoJ's responsibility to enrol the Applicant into the CIP. The Department has not discharged this responsibility and Mr Canham conceded as much. And it has not rectified or explained its mistake. That is inexplicable in the light of the current litigation; the respondents' initial concession that Ramaila had attended the

[25] *Oudekraal Estates (Pty) Limited v The City of Cape Town* [2004] 3 All SA 1 (SCA) para [26].

LABOUR COURT

induction programme; and its subsequent amendment and withdrawal of that admission mid-trial. As the Constitutional Court stated in *Khumalo*[26]*:*

> "[35] Section 195 provides for a number of important values to guide decision makers in the context of public-sector employment. When, as in this case, a responsible functionary is enlightened of a potential irregularity, section 195 lays a compelling basis for the founding of a duty on the functionary to investigate and, if need be, to correct any unlawfulness through the appropriate avenues. This duty is founded, inter alia, in the emphasis on accountability and transparency in section 195(1)(f) and (g) and the requirement of a high standard of professional ethics in section 195(1)(a). Read in the light of the founding value of the rule of law in section 1(c) of the Constitution, these provisions found not only standing in a public functionary who seeks to review through a court process a decision of its own department, but indeed they found an obligation to act to correct the unlawfulness, within the boundaries of the law and the interests of justice.
>
> [36] Public functionaries, as the arms of the state, are further vested with the responsibility, in terms of section 7(2) of the Constitution, to "respect, protect, promote and fulfil the rights in the Bill of Rights." As bearers of this duty, and in performing their functions in the public interest, public functionaries must, where faced with an irregularity in the public administration, in the context of employment or otherwise, seek to redress it. This is the responsibility carried by those in the public sector as part of the privilege of serving the citizenry who invest their trust and taxes in the public administration.
>
> [37] In the context of public-sector employment, this is fortified by section 5(7)(a) of the PSA which provides:
>
> "A functionary shall correct any action or omission purportedly made in terms of this Act by that functionary, if the action or omission was based on error of fact or law or fraud and it is in the public interest to correct the action or omission."

[108] The failure of the Department to correct its error in this case would understandably leave a particularly bitter taste in Mr Ramaila's mouth, given its stated objective to "develop and professionalise" the public service.

[26] *Khumalo and Another v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC; 2014 (3) BCLR 333 (CC); (2014) 35 *ILJ* 613 (CC); paras [35] to [37].

LABOUR COURT

The First and Third Respondents' denial that the Applicant has not received any "in-service training" whatsoever since the completion of his probation at the end of March 2016

[109] Inexplicably, the First and Third Respondents continued to deny the Applicant's contention that has not received any "in-service training" whatsoever since the completion of his probation at the end of March 2016 and that he had only two sets of training which took place in 2015 when he was still on probation. Those were a five day workshop on the interpretation of statutes conducted by the Justice College, and a four day workshop on the interpretation of statutes at the University of Cape Town.

[110] The respondents have not led any evidence to contradict these factual allegations.

The Second Respondent's defence

[111] The Second Respondent's[27] response can also be divided into three parts:

111.1 The first part comprises a copy and paste exercise, reiterating the provisions of the Public Service Act, 1994; the Public Service Regulations, 2001; the Labour Relations Act; the Employment Equity Act; the Employment Equity Regulations, 2014; and the DPSA Annual Report 2011/2012, some statements regarding PSCB Resolution 1 of 2012, the DPSA Annual Report 2012/2013, the Service Charter, 2013, and some statements and excerpts from DPSA Annual Reports 2013/2014, 2015/2016 and 2016/2017.

111.2 The second part seems to entail three defences to the Statement of Claim. Those will be set out below.

111.3 The third part comprises the legal issues as the Minister sees them.

[112] The defences comprise three denials. The Second Respondent denies that—

112.1 the extension of the period for eligibility for pay progression from 12 months to 24 months in respect of first time participants in the public service as set out in clause 4.1 to 4.3 of the PSCBC Resolution 1 of 2012 is

[27] The Minister of Public Service and Administration.

LABOUR COURT

reviewable and stands to be set aside as being irrational, alternatively unreasonable and/or unjustifiable;

112.2 the differentiation contained in clause 6 of the Incentive Policy Framework and in clause 6 of the DoJ's Performance Management Policy is irrational, arbitrary and unfairly discriminates against first time participants in the Public Service; and

112.3 the Applicant is entitled to pay progression.

[113] The Second Respondent contends that—

113.1 the differentiation in Resolution 1 of 2012, the Incentive Policy Framework and the Performance Management Policy ("impugned provisions") is fair and rational taking into consideration the history and rationale behind the conclusion of Resolution 1 of 2012 and subsequent steps to implement its provisions;

113.2 the impugned provisions are fair, rational and justified by regulations 7(1)(a),(f) and (g) and 7(2)(a) and (b) of the Employment Equity Regulations, 2014; and

113.3 the impugned provisions are fair, rational and further justified by the fact that they are applied in a proportionate manner on all first time participants in the Public Service; the State as the employer sought to achieve labour peace and to build a constructive and mutually beneficial relationship with organised labour; and the State as the employer sought to remove threats of strikes and "ugly scenes of public servants destroying property".

The Second Respondent's contention that the differentiated pay progression policy is fair and rational taking into consideration the history and rationale behind the conclusion of Resolution 1 of 2012 and subsequent steps to implement its provisions

[114] It seems from the Second Respondent's argument that it contends that three things make the differentiated pay progression policy fair and rational, namely its history; the rationale behind the conclusion of Resolution 1 of 2012; and the subsequent steps taken to implement the provisions of the PSCBC Resolution 1 of 2012.

LABOUR COURT

[115] It is not clear from the evidence what that history is on which the Minister relies. As regards the alleged rationale behind the conclusion of the PSCBC Resolution 1 of 2012, Ms *Dzai* told Mr Ramaila in cross-examination that *"[t]he witness that I am going to be calling from the DPSA will testify on the rationale behind Resolution 1 of 2012 but before he does that, I want to take you to the witness bundle. I will take you to the specific pages therein that will explain to you the rationale behind the phrase to professionalise and develop the public service"*. She then referred him to a number of paragraphs in the DPSA's various annual reports and claimed that those paragraphs explain the rationale behind the phrase "to develop and professionalise the public service". Conversely, Mr Zamokwakhe Khuzwayo, a director of human resource development and strategy who testified for the Second Respondent, conceded under cross examination that neither the DPSA's annual reports nor the Public Service Charter deal with the PSCBC Resolution 1 of 2012 or the differentiated pay progression policy.

[116] Mr Khuzwayo's evidence in chief was helpfully summarised by Mr Ramaila in his argument. It can be reduced to six elements: (1) his views on why there is differentiation; (2) his views as to what professionalization entails; (3) an explanation of the difference between annual reports and financial statements; (4) his comments on the various paragraphs contained in the various annual reports in the witness bundle; (5) an explanation of what the "Directive on the implementation of the Compulsory Induction Programme (CIP) in the Public Service" is and what its purpose is; and (6) the background into the Public Service Charter.

116.1 As regards the first element, Mr Khuzwayo set out his views on why there is differentiation. In essence, he stated that the differentiation is not exclusively a practice in the Public Service, but it is a practice that "is there".

116.2 As regards the second element, Mr Khuzwayo explained to the court what professionalisation means, in his view. He explained it as meaning a *"process by which you want to ground or orientate or hold to a pillar of standard that which you have defined for the people who are employed in an organisation or in a system"*. He went on to say that professionalisation must have at least two aspects to it, namely vertical and horizontal aspects.

LABOUR COURT

He said the vertical aspect is linked to academic qualification whereas the horizontal aspect is linked to the general conduct into the system.

116.3 As regards the third element of his evidence, he explained what the difference between an annual report and financial statement is. He stated that annual reports contain information relating to the Department's performance and financials, whereas financial statements deal with financials only. He stated further that the compilation of the annual report is a requirement provided for in the PFMA. This was of little relevance to the dispute before the Court.

116.4 As regards the fourth element of his evidence, Mr Khuzwayo commented on the various paragraphs in the various annual reports discovered by the respondents. He initially stated that, as reflected in the Minister's foreword to the 2012/13 annual report, that was the first time that a "multi-year" wage settlement agreement was concluded with organised labour. However, during cross-examination he conceded that the PSCBC Resolution 9 of 2001 is also a multi-year settlement agreement and that it obviously precedes Resolution 1 of 2012. Mr Khuzwayo further conceded that neither the DPSA's annual reports nor the Public Service Charter deal with either the PSCBC Resolution 1 of 2012, the Incentive Policy Framework or the Performance Management Policy with regard to the differentiated pay progression policy.

116.5 As regards the fifth element of Mr Khuzwayo's evidence, he explained that the Directive on the Implementation of the Compulsory Induction Programme simply deals with the implementation of the Compulsory Induction Programme.

116.6 Concerning the sixth element of his evidence, Mr Khuzwayo merely gave background into how the Public service Charter came about and what it seeks to achieve. He conceded under cross-examination that the Public Service Charter does not deal with the pay progression policy nor explain the alleged rational connection between the differentiated pay progression and the object sought to be achieved.

[117] On balance, Mr Khuzwayo's evidence does not explain any rational connection between the differentiation regarding the duration for the eligibility for pay

LABOUR COURT

progression and the object sough to be achieved by such differentiation, namely "to develop and professionalise the public service"; and it fails to justify the unfair discrimination emanating from the application of the differentiated pay progression policy on the Applicant as a new appointee to the public service.

[118] As regards the alleged subsequent steps to implement the provisions of the PSCBC Resolution 1 of 2012, it is undisputed that the conclusion of the PSCBC Resolution 1 of 2012 led to the DPSA making the Incentive Policy Framework and the DoJ making the Performance Management Policy, all of which implement the differentiation regarding the duration for the eligibility for pay progression provided for in clause 4 of the PSCBC Resolution 1 of 2012. The so called history, rationale and steps taken to implement Resolution 1 of 2012, neither sets out a rational connection between the differentiation regarding the duration for eligibility for pay progression and the stated object, nor explain such rational connection, if any.

The Second Respondent's contention that the impugned provisions are fair, rational and justified by regulations 7(1)(a),(f) and (g) and 7(2)(a) and (b) of the Employment Equity Regulations, 2014

[119] The grounds referred to in Employment Equity regulations 7(1)(a), (f) and (g) are the employees' respective seniority or length or service; the existence of a shortage of relevant skill; and any other relevant factor that is not unfairly discriminatory. The differentiation with regard to the duration for the eligibility for annual pay progression is not based on any one or a combination of the abovementioned ground. It is not in recognition of the length of service as suggested by Mr Khuzwayo during his evidence in chief and cross-examination, or as argued by Ms *Dzai*. Length of service is dealt with separately in clause 5 of the PSCBC Resolution 1 of 2012 and has nothing to do with the pay progression provided for in clause 4 of the PSCBC Resolution 1 of 2012.

[120] Ms *Dzai* sought to rely for her argument based on length of service on the judgment of this Court in *Pioneer Foods v WAR.*[28] But that case is to be distinguished from the present one. That case concerned an appeal in terms of s 10(8) of the EEA. The lower rate of remuneration paid to the seven complainants

[28] [2016] 9 BLLR 942 (LC); (2016) 37 *ILJ* 2872 (LC).

LABOUR COURT

in that case was a consequence of a term in two successive collective agreements between Pioneer and FAWU. One of the terms of the agreement provides:

> "New entry minimums for new employees from outside the Company; to be at 80% of the current Grades in each category for two years."

[121] This came about because FAWU persuaded Pioneer that it should reduce the extent to which it was then using the services of various forms of "precarious" employees, including employees supplied by labour brokers. At the same time FAWU proposed the creation of a scale "that showed differentiation between people who started now and people who have been in the company for years". It proposed this because "there is a lot of unhappiness from the long serving workers, that a person who start today, earn the same as a person who's been here for donkey year (sic)." The 80% scale was applied to all "new employees from outside the company"; it was not directed only at persons who happened formerly to have been employed by a labour broker. Moreover, the lower scale would only be applicable for the new employees' first two years. It was based on an agreement that came about to recognise length of service. The court held that the rationale was not unfair in that case.

[122] In this case, the differentiation with regard to the duration for the eligibility for annual pay progression and the resultant differentiation in terms and conditions of employment it has on the Applicant and the other State Law Advisers is not based on what is contemplated in regulation 7(2)*(a)* and *(b)*. The stated rationale is to "develop and professionalise" the public service. The fact that such differentiation is applied to all new appointees to the public service and not to the Applicant only does not make the differentiation rational and not unfairly discriminatory. In fact, the application of the differentiation regarding the duration for the eligibility for pay progression to not only the Applicant but all new appointees to the public service means that all new appointees to the public service are unfairly discriminated against.

[123] In the recent case of *Naidoo*[29], Prinsloo J followed the reasoning of this Court in *Pioneer Foods* and the commentary in Du Toit[30]. She commented:[31]

[29] *Naidoo and Others v Parliament of the Republic of South* Africa (C 865 / 2016) [2018] ZALCCT 38 (12 December 2018).

LABOUR COURT

> "Differentiation per se does not constitute discrimination. Differentiation on a specified ground of discrimination is presumed to constitute unfair discrimination, which presumption is rebuttable. Given that an arbitrary ground is synonymous with an unlisted / unspecified ground, the test for whether discrimination is established, is that set in *Harksen* namely, if there is differentiation based on an unspecified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them adversely in a comparably serious manner."

[124] I agree. And in this case, it has been established on the facts that the pay progression policy affects Mr Ramaila and similarly situated employees – viz "first time entrants" – in a comparably serious manner.

Labour peace

[125] The second respondent's argument that the extension of eligibility for pay progression from 12 to 24 months would somehow ensure labour peace and prevent strikes is entirely irrational and without foundation. The respondents led not a shred of evidence that there was any such demand from organised labour for such an extension, much less the threat of a strike or unlawful destruction of public property. That argument is without any merit.

Conclusion

[126] For these reasons, I hold that the applicant is entitled to the relief sought.

[127] With regard to costs, I take into account that Mr Ramaila appeared in person. Consequently, he did not incur any legal costs. And I feel constrained to comment, as an aside, that Mr Ramaila did an excellent job. The old adage of a litigant representing himself "having a fool as a client" did not apply in this case. Mr Ramaila was at all times thoroughly professional, courteous and well prepared. His cross examination and presentation of argument – both written and oral – would put many practising counsel to shame. It must, unfortunately, also be said that the legal team for the first to third respondents were not always as well prepared, leading to unnecessary delays – for example, that occasioned by

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[30] Du Toit et al, *Labour Relations Law: A Comprehensive Guide* (6 ed 2015) at 683.

[31] *Naidoo* par [36].

LABOUR COURT

the application to amend their papers in October 2018 in order to withdraw an earlier concession, leading to a lengthy and unnecessary delay. In fact, Ms *Dzai* acknowledged the unprofessional way in which the respondents' legal team represented them in her heads of argument:

> "We (first to third respondents together with the legal representatives) made numerous mistakes during the conduct of these proceedings, i.e. late delivery of the [Minister's] response, which caused delay on the first day of the trial; late delivery of the notice of intention to amend (almost four months later); late application for leave to amend which resulted in the postponement of the trial. Eventually when the Registrar forwarded the notice of set down for the continuation of the trial from 4 to 8 February 2019, I asked that we commence on Wednesday 6 February instead, because I had a vacation planned for 31 January to 5 February 2019. As a result, the matter could not proceed on 4 and 5 February 2019. To make matters worse, on the morning of 6 February 2019, the day of trial, the witness bundle was not paginated, and our candidate attorney had to run out of court to fix the witness bundle and came back to court ten minutes later. My instructing attorney also arrived 30 or so minutes late. We have offered numerous apologies as well, but no amount of apologies and explanation will satisfactorily address the delays caused by us in these proceedings. Accordingly, I respectfully apologise once again for our conduct in these proceedings and acknowledge that the administration of justice has been affected by the delays caused by us in these proceedings. The court roll was unnecessarily clogged up by our conduct in this matter, unnecessarily so. In this regard, I take heed and hope our clients and the rest of our legal team will take heed from the following presentation by Judge van Niekerk at the SASLAW annual conference 2017:
>
> 'A major contributor to the case load overload is the high number of 'hopeless' cases that are referred to the court. Examples include delaying tactics, squeezing opponents out financially, misrepresentation of facts, excessive legal fee making, unnecessary information overload, technical point-taking and, often, plain incompetence by parties or their legal representatives. The Judges have expressed their displeasure about this state of affairs. They have alerted parties and legal representatives that they will face the wrath of the court if they persist in bringing hopeless cases to court. They can expect heavy criticism and punitive costs orders as punishment for malicious litigation and unprofessional conduct.' "

[128] Although Mr Ramaila did not incur legal costs in the strict sense, he had to pay for flights from Pretoria – where he now lives and works – and accommodation in

LABOUR COURT

Cape Town, where the trial ran. He should not be out of pocket for those costs. In law and fairness, the first to third respondents should pay for those disbursements, within reason.

Order

[129] I therefore make the following order:

129.1 The differentiation in the provisions of clause 6 of the Incentive Policy Framework for Employees on Salary Levels 1 to 12 and those covered by Occupation Specific Dispensation made by the second respondent (the Minister of Public Service and Administration) extending the qualifying period for pay progression for first time participants from 12 months to 24 months, is irrational, arbitrary and unfairly discriminates against the applicant and other first time participants.

129.2 The differentiation in the provisions of clause 6 of the Performance Management Policy of the Department of Justice and Constitutional Development which provides that a newly appointed employee in the public service is eligible for pay progression only after serving a continuous period of 24 months is irrational, arbitrary and unfairly discriminates against the applicant and other newly appointed employees.

129.3 Clauses 4.1 to 4.3 of PSCBC Resolution 1 of 2012, extending the qualifying period for pay progression for first time participants from 12 to 24 months, is reviewed and set aside.

129.4 The decision of the Department of Justice and Constitutional Development not to grant the applicant pay progression is declared to be invalid.

129.5 The first and third respondents are ordered to direct the relevant functionary in the Department of Justice and Constitutional Development to effect the necessary adjustment to the applicant's salary in order to reflect the pay progression he is entitled to pursuant to the performance assessment for financial year 1 April 2015 to 31 March 2016; and all consequent pay progression adjustments.

LABOUR COURT

129.6 The first to third respondents are ordered to pay the applicant's reasonable costs and disbursements, jointly and severally, the one paying, the other to be absolved.

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Steenkamp J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	In person.
FIRST TO THIRD RESPONDENTS:	Ms L X Dzai
Instructed by:	The State Attorney, Cape Town (P Melapi).

LABOUR COURT