

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/KZN/868/03/SM

In the complaint between:

RAJENTHARAN T PADAYACHEE

Complainant

and

TELKOM PENSION FUND

First Respondent

OLD MUTUAL EMPLOYEE BENEFITS

Second Respondent

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS
ACT OF 1956**

1. This complaint, lodged with the Pension Funds Adjudicator in terms of section 30A(3) of the Pension Funds Act, 24 of 1956 ("the Act") on 19 June 2003, concerns the issue of liability arising from negligent misstatement by a pension fund and the company that administers it. It relates to the administration of the Telkom pension fund ("the fund"), alleging that the complainant has suffered financial prejudice by reason of maladministration by the fund and/or its administrator, Old Mutual Employee Benefits.
2. The complainant is Rajentharan T Padayachee. He was employed by Telkom from 4 January 1982 until the termination of his employment on 31 May 2003 on grounds of total and permanent disability as defined in the rules of the fund. He remains a member of the fund from which he is receiving a disability annuity benefit. The fund is administered by Old Mutual Employee Benefits, a division of Old Mutual Life Assurance

Company (SA) Ltd (“the administrator”). A response to the complaint was received from the principal officer of the fund, Mr W J Myburgh.

3. No hearing was held in this matter and in determining the complaint I have relied on the parties’ respective written representations, submissions and documentary evidence.

The facts

4. The facts in brief are that in February 2003 the complainant was diagnosed with erythrodermic psoriasis, a painful and debilitating skin condition. He applied for disability benefits and his application was approved on 6 May 2003. The letter of approval indicated that the complainant was “Permanently disabled” in terms of the rules of the fund (termed the Statutes of the Telkom Pension Fund).

5. The definition of disability in the applicable rules reads as follows:

disability: disability of a member resulting from an accident, illness or disorder not occasioned by the member’s own doing and preventing the member totally and permanently from following his own profession or any other profession for which he is reasonably qualified in terms of his education, training and experience, and “disabled” has a corresponding meaning. The Board decides in its own discretion whether a member is disabled for purposes of the Statutes.

6. Clause 4.4 of the rules sets out the benefits on disability as follows:

“4.4(1) Subject to the provisions of subclause (2), an A-member who becomes disabled shall retire with benefits as set out in clause 4.1; provided that his pensionable service shall be increased for this purpose by the shortest of the following periods:

- (i) One third of the member’s actual period of pensionable service at the date of his retirement as a result of disability.

- (ii) The period between the date of his retirement as a result of disability and his statutory retirement date.
 - (iii) Five years.
- (2) An A-member who becomes disabled as a result of an injury arising out of and in the course of his employment, shall retire with benefits as set out in clause 4.1; provided that the member's pensionable service be increased by the period contemplated in clause 4.4(ii); ...
 - (3) An A-member who retires as a result of disability shall become a pensioner for purposes of the Statutes and shall be entitled to the benefits and subject to the conditions applicable to pensioners of the Fund."

7. The clause 4.1 benefits referred to are as follows:

4.1 Retirement on reaching the statutory retirement age

"An A-member who reaches his statutory retirement age shall retire on his statutory retirement date with the following pension benefits:

- (1) A gratuity of 6,72 percent of his pensionable emoluments on retirement multiplied by the period of his pensionable service
- (2) An annuity of $1/55^{\text{th}}$ of his pensionable emoluments on retirement multiplied by the period of pensionable service, *plus* the additional annuity amount"

8. There is no dispute between the parties that the complainant is an A-member. Additional annuity amount as it relates to A-members is defined in the rules as being an annual amount equal to R360 or such other amount as the board of trustees may determine from time to time.

9. The complainant received an estimate dated 9 May 2003 from the administrator setting out the disability benefits to which he would be entitled as at 31 May 2003. The relevant portion reads:

“The following is an estimate of the benefits that this member will be entitled to:

Gratuity	R292 083.07
Annuity	R78 386.80 p.a. (R6 615.57 per month)”

- 10 He noticed that this estimate was substantially lower than the amounts indicated as disability benefits on a couple of recent benefit statements. One such statement, headed “STATEMENT OF YOUR BENEFITS AS AT 1 APRIL 2002”, indicated that the complainant would receive the following disability benefit:

“DISABILITY BENEFIT

Should you, on medical grounds, become permanently disabled to work and such disability is admitted by the Trustees, you will receive a gratuity and a monthly pension.

Gratuity (Cash lump sum)	R512,389
Monthly pension	R11,583”

- 11 When the complainant queried this discrepancy, a Mr Keith Culbert, data and money administrator at Old Mutual, wrote to him on 19 May 2003 with the following explanation:

“We have investigated the disability benefit that was shown on your benefit statement (dated 01 April 2002). The disability benefit that is reflected on your benefit statement is based on your normal retirement age of 65 years and years of service until this date.”

12. With his salary advice for May 2003, the complainant received yet another annual benefit statement, printed on 13 May 2003 and headed

“STATEMENT OF YOUR BENEFITS AS AT 31 MARCH 2003”, wherein the cash lump sum gratuity disability benefit is again reflected as being R512 389 and the monthly pension as R11 583, exactly as in the April 2002 statement.

13. The complainant then lodged a complaint, pointing out that his decision to apply for disability benefits had been “concluded taking the amount reflected on the certificate into account”; he also complained that he should have been paid an enhanced benefit in terms of rule 4.4(2) on the grounds that his disease was caused or exacerbated by stress in the workplace.
14. The principal officer’s response was that the complainant had been paid in accordance with the formula in the rules (the figures and calculations were provided to support this); that “your benefit statement of 31 March 2003 that you received from Old Mutual reflected your benefits as at your normal retirement date as on 30 April 2028”; and that “it is confirmed that your retirement due to medical disability was not as a result of an injury on duty as you are suffering from a genetic skin disease”.
13. Not satisfied with the response the complainant lodged his complaint with this office, alleging that he had been prejudiced as a result of the maladministration and/or negligence of the respondents. He states:

“Had I been informed of this “printing error” (which incidentally was made twice in two financial years...) prior to being declared medically unfit, I could have sought alternate, more expensive treatment and/or made arrangements with my promoter to retain my employment.

14. The second leg of his complaint relates to his contention that his illness was “aggravated by specific conflict incidents” during his career at Telkom, evidence for which he tenders to furnish on request. Since the pension fund rules in his view make provision for “injury on duty and work related

illness”, he believes this is all the more reason why he is entitled to the amounts reflected in the benefit statements.

15. By way of relief the complainant claims the gratuity and annuity amounts set out in the benefit statements. He also claims unpaid leave, but since that is an employment issue beyond the jurisdiction of this office I make no finding thereon.
16. The formal response submitted to this office by the principal officer on behalf of the fund after the complaint was lodged essentially reiterates the position he took in his initial responses to the complainant, as outlined above.
17. The issues for determination are in my view the following:
 - (a) Whether the statements of benefit as at 1 April 2002 and 31 March 2003, respectively, misstated the complainant’s disability benefit entitlement;
 - (b) Whether the fund and/or the administrator acted negligently in issuing these statements to the complainant;
 - (c) Whether the fund and/or administrator acted unlawfully in issuing these statements;
 - (d) Whether the complainant suffered a loss as a result of the issuing of these statements to him;

I deal with each of these in turn.

Misstatement

18 In a letter dated 10 June 2003 responding to the complainant's querying of the discrepancy between the disability values reflected on the benefit statements, on the one hand, and those reflected on the letter of 9 May 2003 on the other, the principal officer of the fund offers the following explanation after giving a detailed calculation of the complainant's benefit:

"Your benefit statement of 31 March 2003 that you received from Old Mutual reflected your benefits as at your normal retirement date as on 30 April 2028."

19 While this could well have been the fund's intention, it is not borne out by the benefit statement. What the statement says is that it is a "STATEMENT OF YOUR BENEFITS AS AT 31 MARCH 2003". There is no ambiguity in this heading. Its plain meaning is that the amounts reflected on the statement will be paid out to the member in the event of such member becoming permanently disabled (within the definition in the rules) on or before 31 March 2003. If the member should become disabled at some time after 31 March 2003 but before the next annual benefit statement, I read the statement as saying that the amount that can be expected will be at least the amount reflected as at 31 March 2003, adjusted by the addition of additional service and salary at exit. This is borne out by the preamble to the statement, which reads:

"THE INFORMATION AS INDICATED ON THIS STATEMENT IS BASED ON CURRENT DATA AS SUPPLIED BY TELKOM SA. THIS DATA WILL BE AUDITED UPON YOUR EXIT FROM THE FUND, WHICH COULD HAVE AN EFFECT ON YOUR FINAL BENEFIT."

20 There is no explanation on the statement cautioning the reader that the values reflected thereon are based on the

retirement benefit as at the projected retirement date of 30 April 2028. While the disability benefit values shown on the statement are the same as the retirement benefit values, one is immediately struck by the qualification accompanying the retirement benefit values which is nowhere to be found in respect of the disability benefit values. The qualification is in my view significant for purposes of understanding the difference between what is promised by way of retirement benefit on the one hand and a disability benefit on the other. The qualification reads:

“If you have completed ten years of qualifying service and have reached the age of 55 years, you may retire earlier than your normal retirement date (provided this is approved by Telkom). Your benefit will obviously be less than as set out above, as your years of service will be less. The benefit (gratuity and monthly pension) will then be reduced by 4% per annum for each year you retire before your normal retirement date.

The above figures are based on your current salary and will increase as the salary increases.”

21

It is clear that this qualification is meant to advise the member that by 30 April 2028 the retirement benefit values may be quite different from the values shown on the statement of benefit as at 31 March 2003. That there is no such qualification in respect of disability benefit values suggests in my view that the values shown on the statement are the values to which the member will be entitled in the event of disability on or before 31 March 2003, provided that the member will be entitled to at least those values if he should be disabled after that date but before the next annual benefit statement. After all, the following promise appears on the statement under “DISABILITY BENEFIT” without any qualification:

“Should you, on medical grounds, become permanently disabled to work and such disability is admitted by the Trustees, you will receive a gratuity and a monthly pension

Gratuity (Cash lump sum): R512, 389
Monthly pension: R 11, 583"

(My emphasis)

22 The "RESIGNATION BENEFIT" section of the statement reads:

"Should you resign **you will receive** a cash lump sum of R214,271."

(My emphasis)

Clearly, as is the case with the disability benefit promise, this is not a value as at 30 April 2028 but as at 31 March 2003. The promise is that if the member should resign on or before 31 March 2003 this is the amount he can expect, and if he should resign at any time in the following year but before that year's benefit statement, he can expect payment of this amount adjusted with reference to the data applicable on the date of his exit.

23 It also stands to reason that the death benefit payable and reflected on the statement as follows:

"Should you die before retirement:

A cash lump sum will be payable to your widow/dependants and/or your nominated beneficiaries: R682, 874"

is the amount payable if and when the member dies before retirement and not only on 30 April 2028. So why should the reader assume that the disability benefit value shown on the statement is any different?

24 If the fund's explanation in the letter dated 10 June 2003 and addressed to the complainant that "[y]our benefit

Trust Bank van Afrika Bpk 1979 (3) SA 824 (A); Siman & Co (Pty) Ltd v Barclays National Bank Ltd 1984 (2) SA 888 (A) at 913F-914C; International Shipping Co (Pty) Ltd v Bentley 1990 (1) SA 680 (A) at 694D-I; Bayer South Africa (Pty) Ltd v Frost 1991 (4) SA 559 (A) at 568D-F, 574I-575D. In this case I consider the following factors to be important:

(1) *The context in which the benefit statements were furnished*

The statements were furnished within the context of the legal duty that the fund has to the complainant under section 7D(c) of the Act, namely, to ensure that adequate and appropriate information is communicated to the complainant as regards, among other things, his benefits.

(2) *The nature of the statements*

The statements relate to matters in respect of which the fund and the administrator have intimate knowledge and expertise. Furnishing these statements forms part of the normal business of the fund and it is, moreover, its legal duty to do so.

(3) *The purpose of the statements*

The information contained in these statements is intended to enable the complainant to make informed decisions appertaining his rights, benefits and duties. Inaccurate or false information could have serious financial consequences.

(4) *Relationship between the parties*

The relationship between the complainant and the fund is one of trust. The complainant makes financial contributions to the fund so that when he retires (whether by reason of disability or old age) he will be relatively financially secure. The fund then contracts the administrator to administer its business and ensure that the complainant's plans for his retirement are realised when that time comes.

(5) *Considerations of public policy*

I consider that, on the application of the standard laid down in *Bayer South Africa (Pty) Ltd v Frost 1991 (4) SA 559 (A) at 468D-F*, there are no public policy considerations that would preclude this tribunal from finding liability. In that case the court said:

“[I]n order to avert the danger of limitless liability and to keep the cause of action within reasonable bounds, it is the duty of the Court (a) to decide whether on the particular facts of the case there rested on the defendant a legal duty not to make a misstatement to the plaintiff (or, to put it the other way, whether the making of the statement was in breach of this duty and, therefore, unlawful) and whether the defendant in the light of all the circumstances exercised reasonable care to ascertain the correctness of his statement; and (b) to give proper attention to the nature of the misstatement and the interpretation thereof, and to the question of causation.”

I am satisfied, as I have already shown, that the fund had a legal duty toward the complainant which it failed to heed, and that it and the administrator failed to exercise reasonable care to ascertain the correctness of the benefit statements. What now remains is consideration of the question of causation.

34 For the reasons set out above, the complaint must fail.

General remarks

35 The circumstances of this case are a cause for serious concern. Benefit statements are intended to inform members of their rights, benefits and duties in terms of the rules of the fund. Funds have a legal duty to communicate adequate and appropriate information to members. The fund in this case has shown scant regard for that legal duty and this is to be lamented by all in the retirement industry.

36 The administrator is paid a fee to administer the business of the fund. That business includes accurate and effective communication with members of the fund. The administrator's conduct in this case is as lamentable as that of the fund. Its explanation that the complainant's disability benefit values as reflected on the benefit statements as at 1 April 2002 and 31 March 2003, respectively, were in fact "*based on your normal retirement age of 65 years and years of service until this date*" is at best implausible. If the explanations of both the fund and the administrator are to be believed, then all benefit statements issued by the administrator along similar lines are misleading.

37 It is with regret that on the facts of this case I am unable to make the fund and the administrator pay for the disregard with which they have approached their respective obligations. On a more favourable set of facts I will not hesitate to do so.

DATED AT CAPE TOWN ON THIS THE 31st DAY OF MARCH 2004.

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VUYANI NGALWANA

PENSION FUNDS ADJUDICATOR