IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

HELD AT JOHANNESBURG

Case No: PFA/GA/2574/2005/ZC

In the complaint between:

C Alais	**First Complainant**
G Harrington	**Second Complainant**

and

Telkom Pension Fund	**First Respondent**
Telkom SA Limited	**Second Respondent**
Old Mutual Employee Benefits (a division of Old Mutual Life Assurance Company (SA) Limited)	**Third Respondent**

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 OF 1956 ("the Act")

Introduction

[1] This matter relates to a dispute between the first and second complainants ("the complainants") on the one hand, and the respondents on the other. It concerns a dispute arising from the Telkom Pension Fund ("the fund") paying the complainants early retirement benefits in terms of rule 5.3 of the fund's statutes, which rule regulates the payment of early retirement benefits. The complainants contend that they should have been paid benefits regulated by rule 5.7 of the fund's statutes which regulates retrenchment and reorganisation benefits. The fund and Telkom SA Limited ("the employer") take the view that the complainants were indeed paid in terms of the correct rules as they had voluntarily taken early retirement. The complainants hold a contrary view saying that they accepted early retirement on the basis that they would receive pension benefits in terms of rule 5.7 of the fund's statutes ("the retrenchment benefit rule"). This complaint hinges on whether the complainants in fact voluntarily retired early or were retrenched by the employer.

Complainants' case

[2] The complainants allege that prior to accepting early retirement from the employer they received benefit estimates from Old Mutual Employee Benefits ("Old Mutual"), the fund's administrators, via the employer. The second complainant avers that one Ms S Adenhoff of Old Mutual advised him that the

estimate he received was correct and that the employer had directed Old Mutual to apply rule 5.7 of the fund's statutes ("the retrenchment rule") in the calculation of the pension benefit. These facts, it is further contended, were communicated to the first complainant and on the basis of these estimates and the "package" offered they agreed to take early retirement as at 1 April 2004.

[3] The complainants aver that after retirement it emerged that the employer had directed that rule 5.3 (the early retirement benefit rule) be applied in the calculation of their benefit with the result that they were paid a lesser benefit. This the employer did, they argue, without informing them. The complainants are aggrieved that the employer failed to inform them about this change or "that a mistake had been made in applying the TPF (the fund) rules". They allege that the fund, Old Mutual and the employer misled them regarding the pension benefit payable upon their early retirement. They further submit that due consideration should be given to the fact that their posts were abolished due to re-organisation in the employer. In the circumstances, they seek payment of their retirement benefits in terms of rule 5.7 of the fund's statutes, the rule which regulates retrenchment benefits.

First and Second respondents' defences

[4] The fund and employer in a joint response raised a number of defences notably that:

[4.1] The complainants were contract workers and since they had not reached the statutory retirement age they were only entitled to benefits in terms of rule 5.3 of the fund's statutes. The apposite portions of the rule read:

> "5.3 Retirement before reaching the statutory retirement age
>
> (1) …
>
> (2) If the services of a contract employee are terminated as a result of –
>
> (i) …
>
> (ii) …
>
> (iii) any other reason with the approval of the employer,
>
> he shall become entitled to an annuity in terms of clause 5.1."

They submit that the provisions of this subsection contemplate that a fixed term contract may be terminated prior to its expiry date. It is further submitted that the phrase "any other reason" is "an expression in wide and unlimited language and has to be interpreted as such". It is, moreover, submitted that this phrase includes termination due to redundancy, re-organisation and operational requirements. This sub-clause, they argue, entitles the affected employees to one benefit only, namely, a benefit in terms of rule 5.1 of the fund's statutes and excludes the payment of all other benefits.

[4.2] It is further submitted that the retirement benefit estimates received from Old Mutual by the complainants reflected the benefits payable on retirement and not the benefits payable in respect of early retirement.

[4.3] The second respondent further denies that it ever requested the third respondent to determine the benefits in terms of rule 5.7 of the fund's statutes (the retrenchment rule) or that it changed the pension remuneration.

[4.4] They lastly contend that the contracts of employment of the complainants were terminated as part of a re-organisation process in the second respondent, which in the case of the complainants were effected through early retirement. Thus, they argue, the use of the word "retrenched" in the certificate of service is simply a generic term which does not entitle the complainants to a retrenchment benefit.

Third respondent's response

[5] Old Mutual in its response simply advised that it agreed with the first and second respondents' response.

Determination and reasons therefor

[6] It seems to me that the material dispute in this matter is whether the complainants voluntarily accepted early retirement or whether they were retrenched. This antecedent dispute has to be resolved before I can determine which rule is applicable. It is, in my view, essentially a labour dispute *albeit* with a pension component and consequences.

[7] In *Armaments Development and Production Corporation of SA Ltd v Murphy N.O. and Others* [1999] 11 BPLR 227 (C) the court held that the complaint assumed the very issue that had to be decided before the complaint could be adjudicated, that is whether a restructuring or reorganisation has indeed taken place. It held that the Adjudicator did not have jurisdiction to decide the question since it did not fall within sub-paragraph (c) of the definition of a complaint. This, with respect, is true of this case as well.

[8] The Court said (at 232 A – H):

> "10. The difficulty that I have with Mr Rautenbach's contention is that the words *in relation to a fund* are extremely broad in ambit. Any dispute between an employer and employee relating to a service contract, which has a pension component, could be said to have arisen in relation to a fund. This would be so even if the pension aspect is only a minor or inconsequential feature of the dispute. For example if the real issue between the employer and employee relates to dereliction of duty, by the employee, one of the consequences of which would be a forfeiture of some of the pension benefits, the

Adjudicator would be clothed with jurisdiction to determine what is essentially a labour dispute, which should be raised before the Labour Courts.

11. …

12. Mr Rautenbach referred to the case of *Lorentz v Tek Corporation Provident Fund and Others* 1998 (1) SA 192 (W) and in particular a dictum of Navsa J at 229I that a pension fund is an integral part of the employer/employee relationship. This does not mean, however, that every labour dispute between employer and employee is "in relation to a fund". In the *Tek* case, the issue was the employer's role in administering the fund in question through trustees appointed by Tek. In that context the dictum is entirely in place. It affords little assistance in this case.

13. Mr Franklin referred to the Labour Relations Act 66 of 1995 [LRA 95] which was enacted to provide, *inter alia*, for the effective resolution of labour disputes and in particular unfair labour practices. Schedule 7 Part B item 2(1)(b) deals specifically with the conduct of an employer relating to the provision of benefits to an employee. Jurisdiction over such disputes is vested in the Commission for Conciliation, Mediation and Arbitration. Considering the manner in which LRA 95 has conferred exclusive jurisdiction on the Labour Courts for certain labour issues, and that section 210 provides that LRA 95 shall prevail in the event of conflict with any other Act, the Adjudicator's powers should not be widely construed."

(Emphasis added)

[9] While the issue in this matter has a pension component to it, it is my view that it is nonetheless essentially a labour issue between the employer and the complainants. That the resolution thereof has pension consequences is not, by itself, sufficient to clothe the adjudicator with jurisdiction.

[10] As this is an employment-related complaint and following the reasoning of the High Court in *Armaments supra*, the appropriate forum to hear this matter is the Commission for Conciliation, Mediation and Arbitration ("the CCMA") in this regard. The Director of the CCMA's contact details are as follows:

The Director:	Mr D Allie
Physical Address:	20 Anderson Street Johannesburg
Postal Address:	Private Bag X94 Marshalltown 2107
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[11] In the circumstances, the matter can at this stage not be entertained in this forum.

DATED at Johannesburg this the day of 2006.

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Vuyani Ngalwana
Pension Funds Adjudicator

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Section 30M filing: Magistrate's Court