IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/GA/1609/2002/RM

In the complaint between:

U SINATRA **Complainant**

and

GERMISTON MUNICIPAL RETIREMENT FUND **Respondent**

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

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[1] This matter concerns whether a rule amendment that was registered in December 2000 is unfairly discriminatory on the ground of age. The rule in issue reads as follows:

> "7.1(1)(c) If a Member leaves Service as the result of his having been declared redundant or having been retrenched, then he shall become entitled to a lump sum benefit equal to:
>
> (a) …
>
> (b) an additional amount to be paid by his Employer, which is equal to the lesser of
>
> (i) the value as calculated by the Actuary of the difference between the Member's Normal Retirement Date (sic) and his age on his next birthday, multiplied by 8%, multiplied by his Member's Share; and
>
> (ii) 100% of his Member's Share."

[2] The reference to “Normal Retirement Date” in the rule cannot be correct because it is, for purposes of this rule, impossible to work out the difference between a date, on the one hand, and an age on the other. Thus, such reference must be taken to be a reference to normal retirement age which is defined in the rules of the respondent fund as 65 years.

[3] For purposes of determining this complaint I considered it unnecessary to hold a hearing as I am satisfied with the sufficiency of the written submissions of both parties on their respective positions.

[4] The complainant charges that rule 7.1(1)(c)(b)(i) in particular is unfairly discriminatory on at least three grounds. The first is that the closer a retrenched member is to normal retirement age (65) the less the “additional amount” he will receive, ultimately a 65 year old receiving zero. Secondly, the rule has the effect of rendering older employees cheaper to retrench than younger employees. Thirdly, older employees tend to find it more difficult to find alternative employment after retrenchment. In the result he urges that the rule be amended to exclude the age factor and afford all retrenched employees the right to an additional amount payable by the employer equal to 100% of the member’s share.

[5] For its part the fund says the purpose of the additional benefit is to "*partially compensate for the loss of future earnings suffered by a member as a result of retrenchment*". It continues:

> "In order to achieve this, it is appropriate that a larger benefit be paid to younger members than for older members. A younger member who does not find alternative employment will suffer a greater relative loss than an older member in the same position."

[6] It avers that younger members "*suffer more from the effects [of retrenchment and] should receive a relative bigger assistance* (sic)". It urges further:

> "The differentiation of the benefit in the rule recognizes elements such as the level of expertise and experience, training, education and the life expectancy of the retrenchee. A younger retrenchee generally has a longer life expectancy, low level of expertise and experience and may require more training for future employment opportunities. The disadvantageous (sic) of younger employees generally constitutes (sic) the advantageous (sic) of older employees. In order to "compensate" for these disadvantageous, (sic) the rule confers a larger benefit to younger retrenchees."

[7] It then concludes:

> "It is therefore the Fund's submission that the provisions of Rule 7.1(1)(c) is (sic) based on sound principles which introduces (sic) positive measures by the employer to alleviate the effects of retrenchments proportional to the level of hardship that retrenchees would have to endure."

[8] A proper approach to ascertaining the constitutionality of a measure in terms of the equality provisions of the Constitution has been laid down by the Constitutional Court in numerous cases and it can be summarized as follows: If the differentiation that is the subject of complaint bears no rational connection to a legitimate purpose advanced to validate it, then the differentiation violates the equality provision. If there is such rational connection, the next enquiry is whether the differentiation nevertheless constitutes unfair discrimination. This enquiry is, in turn, done in two stages. The first is whether the differentiation is discriminatory. If it is, the second is whether such discrimination is unfair (see *Harksen v Lane NO and Others 1998 (1) SA 300 (CC) at paragraphs [45] and [46]; Jooste v Score Supermarket Trading (Pty) Ltd 1999 (2) SA 1 (CC) at paragraph [11]*). If it is unfair, the further enquiry is whether it is justified under section 36(1) of the Constitution.

[9] Now, the connection that the fund seeks to draw between the differentiation, on the one hand, and the legitimate purpose advanced for it, on the other, is that younger members are prone to greater suffering from retrenchment (by reason of their lack of expertise and experience as well as longer life expectancy) than older members.

[10] But is the connection rational? Before one reacts with outrage and emotion to

any such suggestion, one needs to consider the facts. In order to demonstrate the unfairly discriminatory operation of the rule, the complainant submits:

> "Application of the formula shows that Members up to the age next birthday of 52 or less will receive on retrenchment additional benefits equal to 100% of their Member's share while Members from age next birthday equal to from 53 to 65 (sic) will receive additional benefits equal to 96% at 53 decreasing proportionally to zero at 65."

[11] He then gives an example of three members, one aged 52, another 55 and the third 60, each with a member's share of R1 million.

[11.1] On the application of the rule in issue, the 52 year old would on retrenchment receive an additional amount of R1 040 000 calculated as follows:

> 13[1] (being the difference between his normal retirement age of 65 and his age on his next birthday) X 8% X R1 million (being his Member's Share)

[11.2] The 55 year old would receive an additional amount of R800 000 calculated in the same way (10 X 8% X R1 million) and footnoted caveat equally applicable.

[1] In truth, the member's age on his next birthday will be 53 and so the difference should be 12

[11.3] The 60 year retrenchee would, according to the complainant, receive by comparison a paltry R400 000 (5 X 8% X R1 million).

[12] More accurately, however, the 52 year old (ignoring the caveat) would receive his member's share of R1 million (rule 7.1(1)(c)(a)) plus another R1 million (being the lesser of R1 040 000 and R1 million)(rule 7.1(1)(c)(b)); the 55 year old R1,8 million and the 60 year old R1,4 million.

[13] The complainant's examples, with respect, lose sight of an option that members of 55 and older have of taking early retirement in terms of rule 4.2. On his own version, a 53 year old would get 96% of the additional amount. Thus, while the explanations (if they can be called that) of the fund for the differentiation are enough to leave one with a sense of outrage, a closer scrutiny of how the differentiation in fact impacts on the various age categories of members throws up a different and less offensive picture.

[14] For these reasons, I do not consider the rule constitutionally offensive.

DATED AT JOHANNESBURG ON THIS 24TH DAY OF JANUARY 2005

VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR