IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR
(HELD IN CAPE TOWN)

CASE NO: PFA/WE/6843/2006/KM

In the complaint between:

D **Complainant**

and

CAPE JOINT PENSION FUND ("the fund") **Respondent**

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

Introduction

[1] This complaint stems from a dispute between the complainant and the fund concerning the amount of pensionable salary which ought to be recognized for purposes of calculating his retirement benefit, as well as his and his employer's contributions to the fund.

[2] The parties are as cited above. The complaint was received on 9 January 2006. The fund responded in two sets of submissions dated 13 February 2006 and 21 February 2006 respectively. On 28 March 2006 the complainant replied to the response, and a supplementary response was received on 2 June 2006. The complainant replied to that response on 7 August 2006 and a final response was received from the fund on 19 September 2006.

[3] Having read and considered the written submissions before me, I do not deem it necessary to hold a hearing in this matter.

Background

[4] This complaint emanates from the era of restructuring of the local municipalities in the late 1990's and early 2000's, as a consequence of political transformation in the country. The complainant was employed by various local authorities, and became a member of the fund on 1 September 1982 as a consequence of such employment. In 2000 the Still Bay Municipality, by which he was then employed, amalgamated with five other municipalities to become the Langeberg Municipality ("the employer"). The complainant was appointed as the Municipal Manager of the municipality in terms of ("section 57") of the Local Government: Municipal Systems Act 32 of 2000 ("the Municipal Act") with effect from 1 November 2001. Immediately prior to taking up this position, the complainant's pensionable salary amounted to R128 328. On 14 November 2001 the complainant and

the municipality agreed that out of a total package of R500 000 per year, R250 000 would constitute his pensionable salary.

[5] In September 2004 there was a change in the political control of the municipality, and the newly elected council thereafter entered into negotiations with the complainant with a view to his possible replacement as municipal manager. In due course, agreement was reached, and the complainant vacated the post of municipal manager at the end of February 2005 to take up the newly created position known as Head of Planning Services. (The local authority was subsequently renamed the Hessequa Municipality.) As at the end of February 2005 the complainant's total package as municipal manager had increased to R653 075 per year, of which R330 000 was agreed between himself and his employer to be pensionable salary. With the shift to his position of Head of Planning, his total package remained the same (R653 075 per year), but his pensionable salary had increased to R360 000.

[6] The fund is a defined benefit fund that provides benefits to employees in local government. It had its origin in a Provincial Ordinance, which, at the time of promulgation, involved only one employer. In the new legislative environment, each participating employer (being a discrete municipal authority) is a separate legal entity. There are currently approximately 150 local government participating employers in the fund. Being a defined benefit scheme, the fund is actuarially valued, and the actuary determines what the contribution rate should be by dividing the amount of money that needs to be contributed to fund benefits with the total salary bill of all contributing members.

[7] The Municipal Act makes specific provision, in terms of section 57, for municipal and certain other managers to be employed on a fixed term "cost to company" basis. Members who are employed in these positions therefore have an absolute discretion to determine what portion of their packages is pensionable. These members are also on limited term contracts as prescribed by legislation, with the result that the funding period of any increased liability in respect of retirement benefits is very short.

[8] One consequence of such a "cost to company" arrangement is that the municipality and employee can significantly increase the employee's retirement benefit (by a substantial increase in pensionable salary) without having to fund this largesse. The present complaint is a good example of such a case, where the fund, if the complaint is upheld, will incur a further funding liability of R572 800, which has not been financed by either the employer or the employee through contributions.

[9] With a view to controlling its financial liabilities in such circumstances, and to avoid unfair cross-subsidisation, the fund amended its rules by the adoption of amendment no 4 on 12 December 2001 with an effective date of 1 July 2001. The Registrar of Pension Funds ("the Registrar") registered the amendment on 16 October 2002. The relevant portions of this amendment will be reproduced below, but in essence it provided for a limitation on increases in pensionable salary in respect of contract employees. The definition of "contract employee" was also expanded by this amendment.

[10] The complainant's case is that neither the amendment nor the definition of "cost to company" employee can have application to him, and that the fund should recognize the full extent of his pensionable salary for benefit

purposes. The central dispute in this case therefore concerns an interpretation of the content and application of the fund rules and relevant legislation. However, the broader issue centers around the question of whether the fund should have large liabilities imposed on it without its consent, in circumstances where its remaining members and other participating employers will be prejudiced by having to subsidise unfunded benefits.

[11] Throughout the time of his employment the complainant remained a member of the fund, and was still an active member when the complaint was lodged with this office. He subsequently retired from service with effect from 1 September 2006, and elected to commute his entire benefit for a cash lumpsum.

The complaint

[12] The dispute pertains to two distinct periods: 1 November 2001 to 28 February 2005 (when he served as Municipal Manager), and 1 March 2005 to 31 August 2006 (when he served as Head of Planning Services). The complainant also relies on two distinct grounds for relief. He claims that rule amendment 4, which had the effect of reducing his pensionable salary with retrospective effect, was invalidly made ("the first complaint"). In respect of the second period only, he contends that he was not appointed in terms of section 57. He accordingly submits that the amendment does not apply to him with regard to this period ("the second complaint").

The first complaint

[13] In support of the first complaint the complainant contends that the adoption of amendment no 4 by the board of trustees was unreasonable, arbitrary, and irrational, and comprised a violation of his constitutional right to equality. He therefore requests a declarator that the amendment is invalid. This argument spawned an enormous amount of paperwork by both parties in the extensive papers filed of record. However, I will not rehearse all the arguments for and against this proposition in view of the jurisdictional constraints which will be set out in the determination section.

The second complaint

[14] The second complaint concerns the interpretation to be placed on the definition of "contract employee" and the phrase "cost to employer". It is the complainant's case that he does not fall into the definition of "contract employee" since the contract he entered into with effect from 1 March 2005 (the second period to which this complaint relates) was not governed by section 57, and this is expressly recorded in the contract. Furthermore, so it is argued, he cannot be regarded as a "cost to employer" employee as the contract, once signed, did not make provision for him to determine the proportion of his package that would constitute pensionable salary. In this regard the complainant also requests a declarator stating that he has not been a "contract employee" since 1 March 2005, and that his pensionable emoluments are as set out in his contract of employment, namely R360 000

per year as at March 2005, subject to any increases therein.

[15] The salient terms of the complainant's contract will be set out below in the determination section, as will section 57, and the relevant definitions and provisions of the fund rules.

Additional relief

[16] The complainant, in addition to the above main arguments, has also asked for an interdict preventing the board from further amending the rules to reduce his pensionable salary in the event that his complaint is successful. He also requests that I interdict the board from exercising its discretion in terms of rule 22 in the event of a finding that he is not a "contract" or "cost to employer" employee. Rule 22 gives the board the power to limit increases in the pensionable salary of any employee in the last three years prior to retirement.

Response

The first complaint

[17] The fund denies that rule amendment no 4 was unreasonable, capricious, or an infringement of the complainant's constitutional rights. It states, moreover, that the Registrar approved the rule amendment on 16 October 2002, and that he was obviously also so persuaded. For reasons that will

become apparent below, the further arguments in support of this contention will not be set out here.

The second complaint

[18] The fund has been at pains to point out the far-reaching effect of a ruling in the complainant's favour in this matter. It contends that the very mischief which rule amendment no 4 was adopted to cure will be undermined, and the fund, through reserves and the contributions of other participating employers and members, will end up subsidizing the additional cost of the complainant's benefit, and others in a similar position to him. The cost in respect of the present benefit, over and above what has already been funded for, amounts to an additional R572 800. This has not been contested by the complainant.

[19] Concerning the complainant's disputed status as a "contract employee" the fund points out that regard must be had to substance over form. It maintains that the contract between the complainant and the employer, in terms of which the complainant became the Head of Planning Services from 1 March 2005, looked at holistically and in the context of the background municipal restructuring, is one which clearly falls within the scope of section 57. The fact that the complainant and the employer attempted to "contract out" of the provisions of the legislation cannot assist them, according to the fund, as the wording of the section is peremptory, and may not be thwarted by agreement between the parties. In this regard, so it is claimed, the complainant and the employer were acting *in fraudem legis*.

[20] In support of this interpretation, the fund cites the following factors which, it contends, demonstrate that the complainant was in fact a "manager directly accountable to the municipal manager" as described in section 57.

[20.1] It is clear from the organogram of the Hessequa Municipality (attached as Annexure 1A to the fund's second response dated 21 February 2006) that the head of planning services division reports directly to the municipal manager.

[20.2] The terms of the contract between the complainant and the employer reveal that it could not have been an ordinary contract based on the standard municipal conditions of service in terms of section 66 of the Municipal Act, as claimed by the complainant, for the following reasons:

[20.2.1] The contract was for a fixed term of seventeen months, after which the complainant would take early retirement;

[20.2.2] No ordinary contract could have contained a provision that the employer undertook to pay the legal expenses of the employee to the extent of R200 000 in the event of a dispute between the employee and the pension fund;

[20.2.3] It could not have been part of the standard terms and conditions for the employer to undertake to pay an amount of R600 000 in favour of the

complainant one month before the expiry of the contract;

[20.2.4] The clause in which the employer undertakes to make additional contributions of R4 416 per month to the fund cannot be a standard clause;

[20.2.5] It could never have been part of the standard terms and conditions that an employer would undertake to pay out 180 days accrued leave in cash on termination of the employment relationship.

[21] The fund submits, in the alternative, that the complainant falls within the scope of "other cost to company contract appointments" contained in the definition of "contract employee" in the fund rules. It argues that since the complainant was manifestly in a position to negotiate the terms of his new contract, he would have had the power in the negotiating stage to set his pensionable salary, even if the express terms of the contract do not provide for him to revise it unilaterally.

Additional relief

[22] On the question of the interdicts that the complainant has belatedly requested (since they were not foreshadowed in his original complaint), the fund submits that they are premature. It maintains that both interdicts involve a discretion on the part of the trustees (to amend the rules on the one hand and to limit the complainant's pensionable salary on the other) which has not yet

been exercised.

Costs

[23] The fund therefore requests that the complaint be dismissed. It has also asked for costs on the scale as between attorney and client on the basis that the litigation has been frivolous and vexatious, and that the complainant has not come to this tribunal with clean hands.

Determination and reasons therefor

The first complaint

[24] It will be expedient for me to deal with the first complaint at the outset. The complainant requests a declarator that amendment no 4 to the fund rules is invalid. It is common cause that the amendment was adopted by the board of trustees and thereafter submitted to the Registrar for approval in terms of section 12 of the Act. The complainant has not challenged the assertion that this amendment was duly approved by the Registrar.

[25] In terms of section 12 the Registrar's approval of any rule amendment is a constitutive requirement for validity. He is required to consider whether such amendment is consistent with the Act, and whether it is it is financially sound. If he is satisfied that it fulfils both of these conditions he must register the provision. It is clear that the Registrar exercises a limited

discretion insofar as he must be satisfied that these prerequisites have been met.

[26] The Supreme Court of Appeal recently had occasion to examine the jurisdiction of this tribunal in relation to the approval (or registration) of rule amendments by the Registrar in *Joint Municipal Fund and Another v Grobler and Others* [2007] 1 BPLR 1 (SCA). This case was an ultimate appeal from a ruling by the Pension Funds Adjudicator flowing from a challenge to a registered rule amendment. The court held at 8C-D as follows:

> "Plainly the Adjudicator can only "make the order which any court of law may make" in respect of a matter within his competence. As I have said, a rule amendment and its validity are beyond that competence. So, without any doubt, is an instruction by the Adjudicator to the Registrar to cancel a rule registration."

[27] In view of the above it is clear I do not have the jurisdiction to pronounce on the validity of a duly registered rule amendment, nor to set it aside as requested by the complainant.

[28] The first complaint must therefore fail.

The second complaint

[29] In order to assess the merits of the second complaint, it is necessary to set out section 57 of the Municipal Act, the relevant fund rules, and various excerpts of the complainant's contract of employment, on which both parties rely in order to establish whether the complainant falls within the definition

of a "contract employee" for purposes of determining his pensionable salary.

[30] Section 57 reads as follows:

> "A person to be appointed as the municipal manager of a municipality, and a person to be appointed as a manager directly accountable to the municipal manager, may be appointed to that position only –
>
> (a) in terms of a written employment contract with the municipality complying with the provisions of this section; and
>
> (b) subject to a separate performance agreement concluded annually as provided for in subsection (2)."

[31] The definition in the fund rules of "contract employee" pursuant to amendment no 4 reads as follows:

> "an EMPLOYEE who, either on the date of entering service or through a change of the current conditions of service, is appointed on a contract basis in terms of Section 57 of the Local Government Municipal Systems Act, 2000 and other "cost to company" contract appointments."

[32] It is common cause (given the validity of rule amendment no 4) that should the complainant be found to fall within the above definition, his pensionable salary must be determined within the limits imposed by the amended definition of "pensionable emoluments" read with rule 18.7, which provides for the employer to fund any enhanced benefit arising out of a greater increase in pensionable salary than that permitted by the rules. In the present case this would lead to a significant reduction in the complainant's pensionable salary, and consequently his retirement benefit.

[33] I turn now to the complainant's employment contract embodying his conditions of service as Head of Planning for the Hessequa Municipality. The terms relevant to the issue for decision can be summarized as follows:

[33.1] Clause 1: The new employment contract formed part of the conditions of termination of the previous contract of employment between the complainant and the Municipality governing his position as a municipal manager appointed in terms of section 57;

[33.2] Clause 3: It was specifically placed on record that the contract was not entered into in terms of section 57 of the Municipal Act, and that apart from the specific terms set out in the contract, the employer's standard conditions would apply;

[33.3] Clause 4 (read in conjunction with the macro-structure organogram furnished by the employer, and attached as annexure 1A to the fund's 2nd response): The complainant was appointed to the position of Head of Planning Services as depicted in the macro-organisational structure of the Council, which shows the encumbent reporting directly to the municipal manager;

[33.4] Clause 5: The agreement was for a fixed term commencing 1 March 2005 and ending on 31 October 2006, whereafter the complainant would take early retirement;

[33.5] Clause 9: The complainant would be entitled to a basic pensionable salary of R360 000 per annum, subject to increases;

[33.6] Clause 12.3: It was placed on record that in terms of the pension fund rules as they then stood, the complainant's pension benefit would be calculated on his pensionable salary over the last 12 months of service. In the event of any reduction in pension benefits consequent to the non-acceptance by the fund of the pensionable salary, the employer undertook to pay the legal costs incurred by the complainant up to a maximum of R200 000, in order to assist him to enforce his rights against the pension fund;

[33.7] Clause 12.4: The employer undertook to pay the complainant a lumpsum amount of R600 000 prior to termination of service in order to compensate him for the loss of income in respect of the termination of the previous contract of employment; and

[33.8] Clause 12.5: The employer would pay an additional monthly contribution of R4 416 in favour of the complainant to the pension fund over and above its liabilities in terms of the fund rules.

[34] In respect of the second period to which the complaint relates, it is evident that the complainant was no longer a municipal manager appointed in terms of section 57, but it must still be determined whether he was nevertheless "a manager directly accountable to the municipal manager". If he was, it is

clear on a plain reading of the statute that his appointment had to be made in terms of the provisions of section 57. I agree with the fund that it was not open to the municipality or the complainant to "contract out" of the legislative provisions. I am also in agreement that the substance rather than the form of the contract is determinative of whether or not it falls within the scope of this section.

[35] Clauses 1 and 12.4 of the contract cited above make it clear that it formed part and parcel of a delayed retrenchment package. This is indicative of an extensive negotiation process between the parties, the substance of which, when comparing the two contracts of employment, was that the complainant would take a sideways demotion at the same remuneration, and that the new contract would terminate prior to normal retirement, in compensation for which he would be paid R600 000. An additional variation was that the pensionable salary of the complainant would be substantially increased in this period, giving rise to an unfunded cost to the pension fund of the order of R572 800. In summary the retrenchment package would amount to R1 172 800, and the fund would be called on to subsidise a little less than half this amount.

[36] That trouble was brewing, and that the parties to the contract anticipated resistance from the fund, is borne out by the very unusual provision contained in clause 12.3. In terms hereof the employer agreed to assist the complainant in pursuing his claim against the fund, through a contribution of R200 000 towards his legal costs.

[37] Perhaps the most significant aspect of the appointment is that the complainant reported directly into the municipal manager. This has nowhere

been contested by the complainant in the voluminous pleadings filed in this case. He has, however, pointed out that he is not referred to as a "manager" in his contract. I do not think this takes the matter much further. Whatever the designation, the head of planning in a municipal structure, with a direct reporting line to the municipal manager, can only be a managerial position.

[38] Finally, the fact that the parties found it necessary to record in clause 3 that the appointment was not governed by section 57 suggests a keen awareness of the impact of that section on the pension entitlements of the complainant, and points rather to a concerted attempt to evade these consequences. No matter how deliberately the contract is dressed up as something else, the substantive terms must dictate its actual form.

[39] It is with no difficulty that I conclude, in view of the above, that the complainant was indeed "a manager directly accountable to the municipal manager", and therefore appointed in terms of section 57. For that reason, he falls within the definition of "contract employee" contained in the fund rules, and is subject to the limitation on pensionable emoluments set out in the new definition thereof as amended.

Additional relief

[40] The relief sought in terms of rule 22 is dependent on a finding that the complainant is not a "contract employee" as defined. It therefore falls away. Equally, the relief aimed at preventing the fund from effecting future rule amendments would be nugatory in view of my conclusion on the main complaints.

Costs

[41] Finally, although the fund has sought a costs award against the complainant, the fund has not placed any attorneys on record in the defence of this matter, and is accordingly not entitled to its costs.

Relief

[42] The complaint is dismissed.

DATED AT CAPE TOWN ON THIS DAY OF 2008.

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR