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Please quote our reference: PFA/EC/5549/2005/NVC

Re: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 of 1956 (“the Act”): C G Weakley v Unispin Pension Fund (“the fund”)

Introduction

[1] Your complaint concerns the fund’s refusal to pay you a retrenchment benefit instead of an early retirement benefit. The reformulated complaint was received on 28 October 2005 and a letter acknowledging receipt thereof was sent to you on 17 November 2005. On the same date a letter was dispatched to the fund requesting it to submit a response to your complaint by 12 December 2005. After requesting an extension on 28 November 2005, the fund’s response was received on 20 January 2006. On 11 May 2006 the response was sent to you for a reply by 9 June 2006. Your reply was received on 21 July 2006. After considering the written submissions before me, I consider it unnecessary to hold a hearing in this matter. My determination and reasons therefor appear below.

Complaint

[2] In September 1999, when you were 55, you were retrenched by your employer, Saprotex International (Pty) Limited. You were informed by your broker that you had two options in respect of your pension benefits, and that you could either withdraw from the fund and invest the benefit in a preservation fund, or you could take early retirement. You elected the withdrawal option. However, the fund advised you that you had to take early retirement in view of reaching the age of 55. You subsequently received R81 843.93 in a cash lump sum, and the balance of R212 579.84 was transferred to Old Mutual Investment Frontiers for the purchase of a pension. In 2000 the fund paid you a further cash amount of

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Office Manager: L Manuel

R73 186.71, being your allocation of surplus which arose in the fund, when it transferred its members to the Unispin Provident Fund, and although you had retired by then, it was due to you in your capacity as a pensioner of the fund.

- [3] You contend that you could have received twice your accumulated contributions, which include the employer's contributions, plus interest, if you were granted a retrenchment benefit by the fund, and this benefit would have exceeded the value of your early retirement benefit. You allege that the early retirement benefit includes a forfeiture with negative impact on the retirement benefit.
- [4] You also state that you want to be compensated for the loss of potential earnings, and be afforded the opportunity to invest R35 021.64 in your pension fund, being the difference between the one third lump sum and the maximum non-taxable amount.

The response

- [5] No response has been received from the fund. Old Mutual filed a response on its own behalf, in which it states that the withdrawal rule is only available to a member of the fund if no retirement benefit is available. As you were eligible for early retirement in terms of rule 4.1.1(ii) you were required to take early retirement and were not permitted to transfer the benefit to a preservation fund.
- [6] According to Old Mutual you had purchased a pension from an insurer (with the two thirds of your pension benefit) and hence the surplus allocation of R73 186.71 was payable to you in the form of a 13th cheque, and not as an increase to the capital of your pension annuity.
- [7] Old Mutual concludes that as it acted as an agent for the consultants and the fund, any complaint directed against it should be dismissed.

Determination and reasons therefor

- [8] It is of grave concern to me that it has been six years from the time that you left the fund, in September 1999, to the date you submitted a complaint to this tribunal on 28 October 2005.
- [9] Section 30I of the Act reads:

“(1) The Adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint is received by him or her in writing.

(2) If the complainant was unaware of the occurrence of the act or omission

contemplated in subsection (1), the period of three years shall commence on the date on which the complainant became aware or ought reasonably to have become aware of such occurrence, whichever occurs first.

(3) The Adjudicator may on good cause shown or of his or her own motion -

- (a) either before or after expiry of any period prescribed by this Chapter, extend such period; [or]
- (b) condone non compliance with any time limit prescribed by this Chapter.”

[10] It is clear from the complaint that the events to which it relates occurred more than three years before your complaint was received by this office.

[11] There is good reason for a limit to be imposed on the time during which litigation may be launched and the Constitutional Court has pronounced on this. In *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) the Court said (at paragraph [11]):

“Rules that limit the time within which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigation damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can be obtained have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They serve a purpose to which no exception in principle can cogently be taken.”

[12] However, that the complaint was lodged outside the three year time period in terms of section 30I of the Act is not the end of the matter as I still have discretion to extend the three year time period or to condone non-compliance therewith.

[13] The Supreme Court of Appeal (or Appellate Division as it was then known) has pronounced upon the standard that must be met for condonation to be granted in circumstances like these. In *Melane v Santam Insurance Company Limited* 1962 (4) SA 531 (A) the court said (at 532B-E):

“In deciding whether sufficient cause has been shown, the basic principle is that the Court has discretion, to be exercised judicially upon a consideration of all facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant is the degree of lateness, the explanation therefor, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective *conspectus* of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of

the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interest in finality must not be overlooked."

[14] Your prospects of succeeding in this matter are poor as the merits do not favour you. The rules of the fund prohibit a member from electing any other benefit if he qualifies for a retirement benefit, and it appears that you qualified for an early retirement benefit, having been 55 and within 10 years of the retirement age of 65, when you exited the fund. In terms of section 13 of the Act, the rules of the fund are binding. Further, you have not offered any explanation for why you waited six years to submit your complaint, nor have you submitted proof of any steps that you may have taken in the interim to rectify this grievance. I am not persuaded, in the absence of compelling reasons, which are not present in this case, that good cause exists to condone the late submission of this complaint.

[15] The complaint is time-barred and the file is hereby closed.

Dated at Cape Town on this the day of 2007.

Yours faithfully

Vuyani Ngalwana
Pension Funds Adjudicator

