



HEAD OFFICE

Johannesburg

2nd Floor, Sandown House

Sandton Close 2, Sandton, 2196

PO Box 651826, Benmore, 2010

Tel (011) 884-8454 □ Fax (011) 884-1144

E-Mail: enquiries-jhb@pfa.org.za

Cape Town

2nd Floor, Oakdale House, The Oval

Oakdale Road, Newlands, 7700

P O Box 23005, Claremont, 7735

Tel (021) 674-0209 □ Fax (021) 674-0185

E-mail: enquiries@pfa.org.za

Website: www.pfa.org.za

Our ref: PFA/GA/7948/2006/RM

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT 24 OF 1956 (“the Act”) – F REYERS (“the complainant”) v UNIVERSITY OF PRETORIA PENSION FUND (“first respondent”) AND LEKANA EMPLOYEE BENEFIT SOLUTIONS (“second respondent”)

1. Introduction

1.1 This matter concerns the quantum and mode of payment of an early retirement benefit that was paid to the complainant by the first respondent.

1.2 The complaint was received by this office on 3 April 2006. On 6 April 2006 a letter acknowledging receipt of the complaint was sent to the complainant. On the same date a letter was dispatched to the second respondent, who administers the first respondent, giving it until 28 April 2006 to submit a response to the complaint. The second respondent sent responses on 27 June 2006, 11 July 2006, 26 February 2007 and 25 October 2007. The complainant sent replies on 25 October 2006, 23 January 2007 and 28 March 2007.

1.3 Subsequent to considering the written submissions before this tribunal, it is unnecessary to hold a hearing in this matter. The determination and reasons therefor follow.

2. The background facts

2.1 The complainant was an employee of the University of Pretoria (“the employer”). By virtue of his employment he first became a member of the Government Employees Pension Fund (“GEPF”) and then, from 1 January 1995, he became a member of the first respondent. The complainant’s benefit from the GEPF was

M Mohlala (Adjudicator), C Nkuhlu (Snr Assistant Adjudicator), K MacKenzie (Snr Assistant Adjudicator), R Maharaj (Snr Assistant Adjudicator), M Ndaba (Snr Assistant Adjudicator), M Daki (Snr Assistant Adjudicator), E de la Rey (Snr Assistant Adjudicator), N van Coller (Assistant Adjudicator), L Mbalo (Assistant Adjudicator), S Gcelu (Assistant Adjudicator), M Ramabulana (Assistant Adjudicator), S Mothupi (Assistant Adjudicator), P Mphephu (Assistant Adjudicator), C Seabela (Assistant Adjudicator), P Myokwana (Assistant Adjudicator), L Nevondwe (Assistant Adjudicator), AP Lehana (Assistant Adjudicator), S Mokgara (Assistant adjudicator), L Molete (Assistant Adjudicator), T Nawane (Assistant Adjudicator)

Financial Manager: F Mantsho, Accountant: R Soldaat

transferred to a retirement annuity fund, whereafter he started contributing to the first respondent from 1 January 1995 until he took early retirement on 31 December 2003. The complainant's normal retirement would have been in July 2007, so he retired three and a half years before his normal retirement date.

- 2.2 The complainant's early retirement benefit was computed in terms of rule A2.2.1 as follows:

$R266\ 060.29$ (final average salary) \times 2% \times 9 years service = $R47890.85$, reduced by 21.5% due to retiring three and a half years early (0.5% for each month between the actual retirement date and the normal retirement date), giving an annual pension of $R37\ 594.32$.

3. The complaint

- 3.1 The complainant's complaints are summarised as follows:

3.1.1 The complainant avers that the so-called early retirement penalty is excessive. The complainant alleges that he was penalised $R98\ 624$ for taking early retirement. This penalty is, in the complainant's opinion "excessive and punitive."

3.1.2 The complainant avers that he should be permitted to defer payment of his pension from the first respondent to a later date, alternatively, he should be permitted to move his early retirement benefit to an insurer so that he could purchase a living annuity.

4. The response

4.1 The second respondent administers the first respondent and it responded to the complaint. They are of the view that the complaint pertains to the interpretation of the first respondent's rules and the operation of defined benefit pension funds. They advised that a similar complaint was received in 2004 and a legal adviser responded to the complainant's complaint on 8 July 2004. With regard to the first leg of the complaint they submit that rule A2.2.1 is applicable. The formula to calculate the early retirement benefit is 2% of the average final salary times years of uninterrupted service. This is then reduced by 0.05% for each month of retirement before the normal retirement date. The reduction applicable is an actuarial adjustment made to the capital value required by the first respondent to provide members with a benefit from an earlier age, thus using the value accrues in the first respondent to actual retirement age as opposed to the higher value that would be accumulated in the first respondent had the complainant and employer contributed until his normal retirement age.

4.2 With regard to the quotation of $R448\ 892$ quoted to the complainant by an employee of the second respondent in November 2003, the second respondent submitted that the quotation was incorrect since it was not computed in terms of the rules of the first respondent. The second quotation of $R350\ 268$ reflected the

capital value underlying the complainant's pension on 24 November 2003. However, even this value is merely a notional value placed on the first respondent's liability to the complainant at a particular point in time. It is not an actual accumulation of contributions as the complainant seems to assume.

- 4.3 Concerning the second leg of the complaint, the second respondent submits that the capital or actuarial value underpinning the complainant's retirement benefit would have remained the same whether the complainant had received a pension from the first respondent or used the capital to purchase an annuity from an insurer. In terms of the first respondent's rules it is not allowed to purchase an annuity from an insurer. Similarly, the rules do not allow members the option of a deferred pension. The first respondent is a defined benefit fund registered as such with the Financial Services Board ("FSB") and it has to be managed in terms of its registered rules. Should any member be allowed a deferred pension or to purchase a pension outside the fund, the first respondent's administration would be in contravention of the registered fund rules.

5. Determination and reasons therefor

5.1 *Introduction*

- 5.1.1 The first respondent is a registered pension fund in terms of the provisions of the Act and it is bound by its rules in the same way as its members, officials, shareholders and persons claiming under the rules (see section 13 of the Act). By virtue of the binding nature of the rules, the trustees of the first respondent, the members, the employer and any service provider such as the administrator of the first respondent may only do that what is set forth in the rules (see *Tek Corporation Provident Fund & Another v Lorentz* [2000] 3 BPLR 227 (SCA) at 239D-E). Thus, the complainant's complaints must be determined with reference to the prevailing fund rules and the law pertaining to the complaint.

5.2 *Complaint about the quantum of the complainant's early retirement benefit*

- 5.2.1 The first respondent is a defined benefit fund rather than a defined contribution fund. In a "defined benefit fund" the retirement benefit promised is calculated in relation to the member's salary (usually at or near retirement age) and the number of years of service. The benefit entitlement can therefore be determined at any time in relation to the member's salary. The employer undertakes to meet the balance of the cost of providing the promised benefit. There is no correlation between the benefit that is paid to a member and the investment returns achieved by the pension fund. Where there is a shortfall between the benefit due and the value of the assets the fund is holding on behalf of the members, then the employer is liable to make up the difference.
- 5.2.2 In a "defined contribution fund" on the other hand, only the rates of contribution required from both members and the employer are stipulated in the rules, and the emerging benefit is determined by the amount of pension that can be

purchased at retirement by applying the total amount of contributions paid by and on behalf of the member during his membership, together with fund growth thereon. The amount of a member's actual retirement benefit cannot be determined until he has retired. The benefit paid by defined contribution funds is dependant on the underlying performance of the fund's assets and are subject to the vagaries of the financial markets; whereas the benefit from a defined benefit fund is computed in terms of the rules and is fixed in the sense that it is not dependent on the performance of the fund's underlying investments and the employer would have to make good any deficit in funding a benefit that is payable if the pension fund is under-funded.

5.2.3 The complainant belongs to a defined benefit fund and rule A2.2.1 applies to his early retirement benefit, the computation whereof was explained in paragraph 2.2 *supra*. The complainant is aggrieved that his benefit was reduced by approximately 21.5% due to the fact that he retired three and a half years before his normal retirement date. But, the reduction factor used is in terms of rule A2.2.1 and there is nothing wrong *per se* with the use of the reduction factor since the complainant decided to retire before his normal retirement date and the rules clearly stipulate the operation of the reduction factor. The percentage of the reduction in benefit on early retirement is determined by calculating the number of months short of normal retirement age the member is when the member decides to take early retirement. Thus, the further away from normal retirement a member is when electing for early retirement the greater will be the reduction of the retirement benefit the member receives (see *Wilson v South African Mutual Life Assurance Society Pension Fund and Another* [2000] 6 BPLR 693 (PFA) at 695). Thus, the complainant's early retirement benefit was computed in terms of the rules and he is not entitled to any greater benefit.

5.3 *Complaint about a deferred pension and purchasing a pension annuity from an insurer*

5.3.1 As mentioned in paragraph 5.1.1 *supra* a pension fund can only act in terms of its registered rules. In the present matter the fund rules do not permit members to defer their pensions to a later date. Secondly, with regard to the complainant's request that he be allowed to purchase a pension annuity from an insurer, the rules only permit that retiring members be paid their pension from the fund itself. There is no provision in the rules for the outsourcing of pensions by purchasing of annuities from insurers. Therefore, the complainant cannot succeed with this leg of the complaint as well since there is no provision in the rules for the options he proposes. The respondents have suggested that the complainant approach the board of management with his proposals regarding amending the rules to permit outsourcing of pensions. This is an option he ought to consider.

6. Relief

6.1 In the result, the complaint cannot succeed and is dismissed.

SIGNED AT JOHANNESBURG ON THIS DAY OF 2008

Yours faithfully

Mamodupi Mohlala
Pension Funds Adjudicator