



**IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR
(HELD IN JOHANNESBURG)**

CASE NO: PFA/GA/6173/2005/ZC

In the complaint between:

D KANIEWSKI

Complainant

and

GLENRAND MIB BENEFIT SERVICES (PTY) LTD

First Respondent

KRUPP ENGINEERING PENSION FUND

Second Respondent

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

Introduction

- [1] The complaint concerns the first respondent's failure to act upon the complainant's directive of switching her investment from the "conservative" to the "balanced" portfolio in the second respondent.
- [2] The complaint was received by this office on 25 October 2005 and on 8 November 2005 a letter acknowledging receipt of the complaint was sent to the complainant. On 8 November 2005, a letter was dispatched to the first respondent giving it until 28 November 2005 to file a response to the complaint. On 6 December 2005 the first respondent furnished the response and on 16 February 2006 this office sent that response to the complainant.
- [3] On 5 June 2006 Drobis & Associates Attorneys (the legal representatives of the complainant at that time) furnished a reply to the response on the complainant's behalf. During the course of our investigation it became evident that the second respondent had an interest in this matter. The Adjudicator directed that the second respondent be joined as a party to the proceedings in terms of section 30G(d) of the Act. On 24 July 2007 this office sought a response from the second respondent. On 13 August 2007 Mr L Frahm of Bell Dewar & Hall Inc filed a response on behalf of the second respondent. On 30 August 2007 this office sought the complainant's further submissions, in the event that she wished to make any, pursuant to the second respondent's response. The complainant omitted to file further submissions.

[4] I have had regard to the complainant and the first and second respondent's submissions that the complainant has not cited the second respondent as a party to these proceedings and that no relief is sought against it.

[5] After reviewing the written submissions, it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

Factual Background

[6] The complainant is employed by Thyssenkrupp Engineering ("the employer"). By virtue of her employment she became a member of the second respondent. From the complaint and the first respondent's response to the complaint it appears that members of the second respondent have a right to choose their individual investment options ("switches") from predetermined classes of investment options. Further, the second respondent's administrator (the first respondent in this matter) has a duty to facilitate such switches.

Complaint

[7] The complainant alleges that the first respondent failed to facilitate her directive to change her investment option from the "conservative" to the "balanced" portfolio.

[8] She submits that at the end of 2003 she completed and submitted an investment switch form which instructed the first respondent to change her investment option

from investing her funds in the “conservative” portfolio to investing them in the “balanced” portfolio. In proving that the switches were duly changed by the first respondent to the “balanced” portfolio she attached to the complaint her member benefit statement as at 1 January 2004, which indicates that her investments in the second respondent were indeed in the “balanced” portfolio.

[9] She contends that the following year (2005) the first respondent changed her investment portfolio from the “balanced” to the “conservative” portfolio. Further, she submits that the first respondent informed her that the benefit statement which it had furnished her with as at 1 January 2004, indicating that her investments were invested in the “balanced” portfolio, was a typing error.

[10] She submits that as she had completed and submitted an investment switch form which instructed the first respondent to change her investment option. The first respondent denies that it had received her investment switch form despite it having made representations to her over a period of a year that her funds are invested in the “balanced” portfolio.

[11] Further, she submits that the loss that she has suffered as a result of the first respondent’s failure to implement her directive is in the amount of R50 000.

[12] Furthermore, she submits that the first respondent’s failure to facilitate her directive to change her investment options constitute a material misrepresentation, which she says amounts to negligent or innocent misrepresentation. She argues that:

“In law there are consequences of a material misrepresentation whether amounting to negligent or innocent in that: The misrepresentee is entitled to restitution or a contractant who abides by the contract is not entitled to restitution, but he/she may claim damages.”

[13] She seeks a declarator from this office declaring that she is entitled to be reinstated to the balanced portfolio with effect from January 2004 “to date”.

Responses

[14] This office received responses from the first respondent and the second respondent.

First Respondent's response

[15] Mr D Morris, the legal advisor of the first respondent, furnished a response on behalf of the first respondent.

[16] He confirms that initially the complainant's investments in the second respondent were in the “balanced” portfolio. He, however, submits that on 29 November 2001 she chose to switch her investments to the “conservative” portfolio with effect from 1 January 2002.

[17] He submits further that the first respondent denies that it has documents that reflect

any changes she might have made subsequent to 29 November 2001 regarding her investment options.

[18] He further submits that the benefit statement sent to her, which reflects her investment portfolio as being in the “balanced” portfolio as at 1 January 2004, is incorrect, a misprint as it should have reflected her investment portfolio as being invested in the “conservative” portfolio as this was her chosen portfolio. Further, he says that her benefit statements in respect of 2002, 2003 and 2005 reflect her investment portfolio as the “conservative” portfolio. Furthermore, he says her investments have always been invested in the “conservative” portfolio as *per* her instruction which was never changed. He submits that she should cease claiming that the mistake on the benefit statement gives her a right to an investment in the “balanced” portfolio.

[19] Moreover, he submits that the complainant never instructed the first respondent to vary her initial instruction of changing her investments from the “conservative” to the “balanced” portfolio.

[20] He further submits that the first respondent did not make any misrepresentation to her and that she has not suffered damages as her investments were always in her selected investment portfolio. Further, he says that she failed to present evidence that she had in fact elected to transfer her investments from the “conservative” to the “balanced” portfolio.

[21] Regarding the quantum of R50 000 that the complainant contends amount to the loss that she has suffered as a result of the first respondent's failure to implement her directive, he submits that this is a bald statement which she cannot verify.

[22] In the circumstances he seeks a dismissal of the complaint.

Second Respondent's response

[23] Mr L Frahm of Bell Dewar & Hall Inc, the legal representative of the second respondent, furnished a response on its behalf.

[24] The second respondent submitted that the complainant's membership terminated on 31 August 2007. It emphasized that it was unclear why it was a party to the proceedings as it was not cited as a party to the complaint by the complainant. It further submitted that if any relief were granted only the first respondent should be liable to the complainant.

[25] The second respondent submitted that it was not clear what the complainant's complaint was. Whether it was that the first respondent failed to effect the investment switch or whether the first respondent had made a misrepresentation to the complainant that her funds were invested in a particular portfolio.

[26] The second respondent denies that the complainant either completed or submitted an investment switch form at the end of 2003 in terms of which she sought to move

her funds from the “conservative” to the “balanced” portfolio. Thus it denies that the first or second respondent failed to give effect to the instruction.

[27] It further referred to a portion of rule 2.9 which provides:

“Subject to the provisions and limitations of the ACT the TRUSTEES shall have full power to:

f) make available to the MEMBERS of the FUND from time to time a selection of INVESTMENT POLICIES from which the MEMBERS may elect to invest their retirement benefits in and to allow the TRUSTEES to withdraw any INVESTMENT POLICY and to introduce new INVESTMENT POLICIES.”

[28] Reference was further made to rules 3.7 and 3.8, which provide:

3.7 Member Data

The TRUSTEES shall ensure that the Administrators are advised of all MEMBER personal details and the INVESTMENT POLICY elected by the MEMBER and approved by the TRUSTEES or the INVESTMENT POLICY selected by the TRUSTEES on behalf of the MEMBERS within 3 working days of the month end that such particulars are required. If a selection has not been received within the prescribed period the DEFAULT INVESTMENT POLICY will apply.

3.8 Member Investment Policy Election

The TRUSTEES shall inform the MEMBERS that they may change their previously selected INVESTMENT POLICY on the 30th September and 30th April of each year.”

[29] Lastly, reference is made to the definition of “INVESTMENT POLICIES”:

“Means any INVESTMENT POLICIES arranged with an INSURER from time to time by the TRUSTEES to allow MEMBERS a choice of INVESTMENT POLICIES under their MEMBER ACCOUNT from which a MEMBER may elect an INVESTMENT POLICY when joining the FUND and may on 30 days notice prior to the 30th September and 30th April in each year change his INVESTMENT POLICY with the agreement of the TRUSTEES.”

- [30] The second respondent submits that in 2003 the trustees did not receive notice from the complainant that she wished to make an investment switch.
- [31] Further it submits that the procedure that was applied to a member seeking to make an investment switch was as follows: She would request the employer’s Human Resources Department to provide her with an investment switch form, which she would complete and submit to them. A copy of the completed form would then be placed in the member’s employee personnel file and the original would be sent to the first respondent for purposes of effecting the change.
- [32] The second respondent submits that it enquired from the relevant persons in the employer’s Human Resources Department whether such forms were received from the complainant but they advised that they had not. It was, moreover, submitted that there was no investment switch form in the complainant’s personnel file.
- [33] The second respondent further submits that an error was made in the complainant’s benefit statement as early as 1 January 2003, which it contends preceded the complainant’s alleged request for an investment portfolio switch. Therefore, it submits, the 2004 benefit statement is not evidence of the requested investment

switch.

[34] The second respondent further submits that the complainant's claim that there was a misrepresentation is not supported by the facts of this matter. Further it submits to the extent that there may have been a misrepresentation and damages accrued to the complainant it cannot be held liable for such damages. It submits that the first respondent would be solely liable.

[35] In the circumstances, the complainant seeks that the complaint be dismissed with costs.

[36] The second respondent further submits that the relief prayed for by the complainant is not competent as an order reinstating the complainant on the "balanced" portfolio is impossible because as of 1 June 2005 the "balanced" portfolio was replaced.

[37] In conclusion the second respondent submits that if this tribunal were to award relief in the form of damages I should afford the parties an opportunity to address me on this question.

Determination and reasons therefor

[38] What falls to be determined is whether the complainant instructed the first respondent to switch investment portfolios with effect from 1 January 2004 and whether the first respondent complied with such instruction. The further issue which

falls for determination is whether or not the complainant suffered any loss. She contends that she instructed the first respondent to change her investment option pursuant to her instruction from investing her funds in the “conservative” portfolio to investing them in the “balanced” portfolio. She furnished this office with proof in the form of a benefit statement (as at 1 January 2004) issued by the first respondent, which reflects that her funds were in the “balanced” portfolio.

[39] The first respondent contends that initially the complainant’s funds were invested in the “balanced” portfolio. However, it contends that on 29 November 2001 she chose to switch such investments to the “conservative” portfolio with effect from 1 January 2002. Furthermore, the first respondent submits that the complainant’s benefit statements for 2002, 2003 and 2005 reflect her investment as being in the “conservative” portfolio. Therefore, it submits that the complainant’s investment portfolio in respect of 2004 could not have been in the “balanced” portfolio having regard to the 2002, 2003 and 2005 benefit statements. Moreover, the first respondent denied having any documents indicating the complainant’s instruction to switch her investment portfolio post 29 November 2001.

[40] It is therefore evident that there is a dispute of fact on the papers regarding whether the complainant gave instructions to the first respondent to invest in the “balanced” portfolio with effect from 1 January 2004 or at all.

[41] The first respondent’s denial that it received the complainant’s instructions to effect the investment switch with effect from 1 January 2004 falls to be rejected on the

papers. According to the complainant she submitted an investment switch form instructing the first respondent to switch portfolios from the “conservative” to the “balanced” portfolio at the end of 2003. The first respondent’s denial of receipt of these instructions flies in the face of the benefit statement, which it issued to the complainant on 1 January 2004, which indicated that her funds were indeed invested in the balanced portfolio.

- [42] The second respondent’s contention that the complainant neither completed nor submitted an investment switch form at the end of 2003 also falls to be rejected. The second respondent appears to rely on certain rules in support of this contention. It is unclear how these rules support the second respondent’s contention that the complainant did not instruct the first respondent to switch her investment from the “conservative” to the “balanced” portfolio. There is nothing in the rules that attaches certain conditions to an application for an investment change to be made that the complainant had not complied with. Similarly, the complainant’s complaint simply cannot be dismissed on the basis that she allegedly did not follow the procedure applicable during 2003 of submitting an investment switch form to the Human Resources Department of her employer and that no form requesting such investment switch was found on her employee personnel file. There is nothing in the rules that provide that the procedure applicable in 2003 was a *sine qua non* for an application for an investment switch. The complainant has submitted that she made the requisite application at the end of 2003 and there was evidence of this switch in her benefit statement as at 1 January 2004. Thus the only conclusion that can be drawn is that she indeed requested the investment switch as alleged.

[43] The second respondent's allegation that as early as 2003 the complainant's benefit statement reflected that she was in the "balanced" portfolio, which preceded on its version her alleged request for an investment switch, is not supported by any documentary evidence. The only benefit statement that I have before me is the 2004 one issued by the first respondent to the complainant, which indicates the complainant's investment portfolio as "balanced", which corroborates her version that she gave an instruction to switch her investment to the "balanced" portfolio at the end of 2003. The second respondent's contention that the relief sought by the complainant is not competent, as reinstating the complainant on the "balanced" portfolio is impossible because as of 1 June 2005 the "balanced" portfolio was replaced, cannot be sustained. I say so because if relief is awarded the portfolio which replaced the "balanced" portfolio would apply post 1 June 2005. Because of the decision to which I have come it is unnecessary to afford the second respondent an opportunity to address me on the question of damages.

[44] The first respondent baldly denies that the complainant's funds were in the "balanced" portfolio but contends that they were in the "conservative" portfolio. However, it failed to substantiate this evidence. Therefore, in the absence of the relevant evidence from the first respondent, the complainant's proof in the form of a benefit statement issued by the first respondent is the only documentary proof that this office can rely upon as proof that her funds were or ought to have been in the "balanced" portfolio as at 1 January 2004. In the circumstances I find that the complainant has shown on a balance of probabilities that not only did she convey

the instructions to the first respondent to make the investment switch with effect from 1 January 2004 but also that the instructions were received by the first respondent.

[45] The complainant submitted in her complaint that as a result of the first respondent's failure to carry out her instruction she suffered a loss in the amount of approximately R50 000. The first respondent questioned the computation of this amount. In reply the complainant submitted that the difference between the balanced and conservative portfolio as at 1 January 2004 was in the amount of R4 053.30. Further, the complainant submitted that the difference between the balanced and conservative portfolio as at 1 January 2005 was in the amount of R29 670.27. This suggests that had the complainant's instruction to switch investment portfolios been carried out she would have received a more favourable investment return. Thus the member suffered loss, which loss is quantifiable. In granting relief I take cognisance of the second respondent's submission that the complainant's membership terminated on 31 August 2007.

Relief

[46] In the result, the order of this tribunal is as follows:

[46.1] The first respondent is ordered to compute the complainant's investment returns had the complainant's funds been invested in the "balanced" portfolio over the period 1 January 2004 until 31 May 2005 and the portfolio that

replaced the “balanced” portfolio as of 1 June 2005 until 31 August 2007 within 7 days of the date of this determination.

[46.2] The first respondent is further ordered to credit and/or pay such investment returns for the benefit of the complainant, the amounts calculated in paragraph [6.1.1] above, less the amounts already credited and/or paid to the complainant within 7 days of such computation.

[46.3] The first respondent is further ordered to pay interest on the amounts to be paid to the complainant in terms of paragraph [6.1.2]) at the rate of 15.5% *per annum*, reckoned from when the amounts fell due until the date of final payment, within 21 days of the date of this determination.

SIGNED AT JOHANNESBURG ON THIS DAY OF 2008.

MAMODUPI MOHLALA
PENSION FUNDS ADJUDICATOR