IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR
JOHANNESBURG

CASE NO: PFA/WE/18086/2007/TD/TGT

In the complaint between:

GH KOHNE	Complainant
and	
PANNAR GROUP PENSION PLAN	First Respondent
SPECIALIST FUND ADMINISTRATORS CC	Second Respondent
NMG CONSULTANTS AND ACTUARIES (PTY) LTD	Third Respondent

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT NO. 24 OF 1956 ("the Act")

INTRODUCTION

[1] This complaint concerns the method used in the actuarial calculation of the complainant's retirement benefit.

[2] The complaint was received by this office on 5 September 2007. On 25 October 2007, a letter of acknowledging receipt of the complaint was a sent to the complainant. On 27 October 2007, a copy of the complaint was forwarded to the first and second respondents, affording them the opportunity to file responses to the complaint on or before 27 November 2007 respectively. A response was received by this office, from the second respondent on 5 November 2007. On the same date, a copy of the response was forwarded to the complainant. A reply thereto was received by this office, from the complainant, on 15 November 2007.

[3] After reviewing the written submissions, it is considered unnecessary to hold a hearing in this matter.

FACTUAL BACKGROUND

[4] The complainant was an employee of the Pannar Group of Companies from 1 May 1972, as a Technical Representative and Marketing Services Manager for Pannar (Pty) Ltd (formerly named Pioneer Seed Co (Pty) Ltd). In 1987, he was appointed as a Marketing and Managing Director of Starke Ayres (Pty) Ltd, being a wholly owned subsidiary of Pannar (Pty) Ltd.

[5] The complainant joined the Pannar Group Pension Plan (a defined benefit fund, formerly named Pioneer Seed Group Pension Plan) on 1 August 1972 and began contributing to the same. On 28 February 2007, the complainant retired. However, in September 2006, before his retirement, the complainant requested details from the second respondent about his retirement benefit, in an attempt

to plan his retirement which was due to begin within 5 months. In response to his enquiry, the complainant received a letter dated 20 September 2006 from the third respondent informing him that his capital "upliftment" figure would be R6 952 900.00, if he were not to commute one-third of his retirement benefit.

[6] Accordingly, with the assistance of his broker / financial adviser, the complainant proceeded with his retirement benefit claim. He commuted only R33 000.00 of his benefit in cash and directed that the remainder of his benefit be distributed equally between Old Mutual Galaxy Underwritten Life Annuity and the Old Mutual Max Income Plan ("Old Mutual").

[7] Early in March 2007, after his retirement date, the complainant was advised by his broker / financial adviser that the total amount transferred by the first respondent to Old Mutual totalled R6 658 400.00, being R261 500.00 less than the quoted capital upliftment figure.

COMPLAINT

[8] The complainant is concerned by the first respondent's transfer of a lesser retirement benefit amount, being less than the quoted figure. The complainant submitted that at no stage, neither in December 2006, nor in February and in March 2007, when frequent correspondence took place between the complainant and representatives of the second respondent, was he advisedthat the quoted upliftment figure had been reduced by the amount of R261 500.00.

[9] The complainant referred to the second respondent's response relating to the shortfall in the quoted and transferred amount, dated 8 March 2007, after he had queried it. The complainant submitted that he was still dissatisfied with their response, as it was merely suggested that he had to be content with the amount that had been transferred to Old Mutual. The complainant submitted that he expected a minor reduction from the quoted and the actual value paid, but

added that R261 500.00 was too large an amount not to raise some concern. In his reply, the complainant submitted that due to the fact that at retirement his final pension payable was not subject to market fluctuations, it was reasonable to expect the final amount not to be significantly different, in the 5 months between September 2006 and February 2007.

[10] In addition, the complainant submitted that he was severely prejudiced as he had based his financial retirement planning on incorrect information, which was provided by the second respondent. He further stated that the first, second and third respondents had made misrepresentations, due to the difference between the quoted amount and the amount actually paid.

[11] The complainant requests this tribunal to investigate the respondents' misrepresentation.

RESPONSE

The second respondent's response

[12] The second respondent confirmed the complainant had been a member of the first respondent from 1 August 1972 until he reached his retirement date on 28 February 2007.

[13] The second respondent submitted that the complainant was presented with a quote dated 20 September 2006, as calculated by the third respondent. The second respondent stated that the complainant had never requested a confirmation of the actual values to be paid at or near his actual retirement date and further that the complainant and his financial adviser had based the complainant's retirement planning on the original values presented in September 2006.

[14] The second respondent confirmed the retirement values paid to the complainant. The second respondent insisted that the complainant took it for granted that the values quoted to him in September 2006, would be finally calculated retirement values to be applied at his actual retirement date of 1 March 2007. The second respondent submitted that given the importance of retirement as a life event, it would be reasonable to expect a member or his advisers to enquire on the final amounts to be applied, at a time closer to payment. The second respondent included an illustration of the quoted and the actual values paid to have been as follows:

Quoted	20/09/06	R6 952 900.00
Paid	01/03/07	R6 691 400.00
		R 261 500.00

[15] The second respondent confirmed that the complainant queried the R261 500.00 difference in the quoted and the actual value paid, after the payment had been made and further that he was provided with feedback upon the enquiry thereof.

[16] The second respondent submitted that it is not unreasonable to have expected the complainant to double-check the actual value to be paid, instead of relying on a value quoted 5 months prior to the payment date. The response also referred to the complainant's acknowledgment that the quote given in September 2006, was subject to possible change. The second respondent submitted that neither of the respondents regard themselves as being guilty of any maladministration. The second respondent submitted further that the first and second respondents would not be in a position to check on the methodology and calculation basis applied by the third respondent, leading to the adjustment in the actual value.

[17] The second respondent admitted that the first respondent could have handled communication to the complainant in a better manner, by advising him of the

final amounts whilst processing the payment. The second respondent however, reiterated that the quoted value was intended to provide a mere guideline for the complainant's financial planning. In addition, the second respondent stated that the R261 500.00 difference in the quoted and the actual value of the complainant's retirement value, represented an amount to which the complainant was not entitled. Furthermore, that the complainant had not set out his loss adequately and as a result, could not have been prejudiced in any manner.

DETERMINATION AND REASONS THEREFOR

[18] The issue that falls for determination is whether or not the third respondent was justified in its applied method in calculating the complainant's retirement benefit.

[19] Rule B4.2.1 and B4.3.1 under conditions relating to Section B, Membership and Benefits of the first respondent's rules (as amended), pertaining to the payment of retirement benefits and pension options stipulate as follows:

> "**B4.2.0 Commutation of pension**
>
> B4.2.1 With the consent of the COMMITTEE, which may not be unreasonably withheld, a MEMBER may on his retirement commute up to one third of his pension for a lump sum. The amount of the lump sum shall be determined by the ACTUARY.
>
> B4.2.2 ....
>
> **B4.3.0 Pension options**
>
> B4.3.1 With the consent of the COMMITTEE a retiring MEMBER may substitute his pension with an alternative pension of equivalent value as determined by the ACTUARY. For purposes of this rule, "his pension" shall be deemed not to include any amounts

relating to a spouse's pension, payment of which spouse's pension shall not be affected hereby."

[20] The complainant substituted his pension with an alternative pension in transferring to the Old Mutual Galaxy Underwritten Life Annuity and the Old Mutual Max Income Plan ("Old Mutual"), respectively. The complainant attached a letter from the third respondent, marked as "Annexure D", which was intended to clarify the issue of the R261 500.00 difference in the final and quoted amount of his retirement benefit. The explanation given in the letter was that in September 2006, the actuary took the complainant's spouse's actual age into account, whereas the lesser value paid was based on valuation assumptions, being that the actuary assumed a 5 year age difference between the complainant and his spouse's age.

[21] It was further explained in the above mentioned letter that had the complainant opted not to uplift his capital and remain in the fund as a pensioner, the employer would have been ultimately responsible for ensuring that the complainant or his spouse (in the event that the complainant had passed on at the time), receives a monthly pension payable in terms of the first respondent's rules.

[22] In a defined benefit fund, the employer is responsible for paying in any amount resultant from a shortfall in members' benefits, thereby assuming the risk of the first respondent being underfunded. As explained in the letter, it is also correct that should the complainant have opted not to uplift his entire retirement benefit as a lump sum payment, the first respondent and ultimately the employer would have had to pay a higher amount to the complainant in the long run.

[23] After this tribunal had engaged the services of an independent actuary, his opinion revealed the following:

- Currently, the first respondent is underfunded as there is not much

surplus to cover a shortfall in members' benefits;

- There are only a few defined benefit category members left in the first respondent;
- If the actual age of the complainant's spouse was used, then the amount paid would differ from the valuation assumption amount applied by leading to more costs to the first respondent;
- If the complainant had purchased a pension within the first respondent, it would have led to a longer time period in which the employer could have funded the existing deficit in the first respondent; and
- the complainant's upliftment of the entire retirement benefit led to an immediate cost to the first respondent.

[24] In summary, it appears that when the quote was given, as at September 2006, the actuary applied actual data to the calculation of a retirement benefit. However, at the time of the actual calculation before the benefit was to be paid, the actuary used assumed data, resulting in a reduced benefit. In the opinion of the independent actuary consulted by this tribunal, this method of calculating the complainant's benefit is difficult to accept, notwithstanding his acknowledgment that different actuarial practices exist.

[25] Actuarial assumptions are used in order to calculate a fund's liability to all its members. However, despite the existence of different actuarial practices, the first respondent and ultimately the employer must make good on the shortfall experienced by the first respondent, in members' individual cases. This has the result that not all members will benefit from profits in their respective exit methods, as in the current case wherein the complainant decided to uplift his entire retirement benefit and transfer elsewhere.

[26] It is correct that the complainant had framed his complaint as misrepresentation leading to loss. On that construction, the loss would have to be quantified and proved. However, the facts that have since emerged from both the complainant and the response reveal a further possible cause of action relating to the permissibility of the use of an assumption to calculate an actuarial

reserve value (ARV) for transfer purposes when empirical data is readily available. As already stated, the complainant's spouse's actual age was used for purposes of the quotation, suggesting that such calculation is possible without too much inconvenience.

[27] In the matter of *Dutrieux v Agricultural Research Council Pension Fund and Another* [2006] 1 BPLR 72 (PFA), which addressed the use of actuarial assumptions concerning mortality rates for disabled members in calculating ARV's, it was held that the use of assumptions was unreasonable where actual information was available. Some of the factors relevant to the adjudicator's decision to direct the fund to recalculate the ARV on the basis of member-specific information do not have application *in casu*. However, the age of a spouse is empirical data and therefore has to be more accurate than an assumption.

[28] The definition of actuarial reserve in terms of Section B of the first respondent's rules reads as follows:

> "means a MEMBER'S actuarial reserve as determined by the ACTUARY provided that of the SCHEME'S funding requirements in terms of Section B of these rules are in deficit, the MEMBER'S actuarial reserve shall be reduced by the ratio of
>
> (a) the SCHEME'S assets underlying Section B of these rules, to
>
> (b) the SCHEME'S liabilities attributable to Section B of these rules"

[29] The definition and the general rules of the first respondent do not specify the manner in which the calculation of a retirement benefit is to be carried out. This tribunal appreciates the first respondent's financial deficit pertaining to its defined benefit section of the fund. However, the method applied by the third respondent in calculating the complainant's benefit, cannot be justified as it was

in possession of the necessary information enabling the calculation of the benefit to have been carried out using actual data which was available to the first and third respondent.

ORDER

[30] In the result, this tribunal makes the following order:

30.1 The first respondent is directed to liaise with the third respondent, in recalculating the complainant's retirement benefit, using the complainant's spouse's actual age, as at the complainant's retirement date and to provide notification of the amount calculated to the complainant and this tribunal **within 14 days** from the date of this determination.

30.2 The first respondent is also directed to transfer the difference between the amount recalculated in paragraph 6.1.1 above and the amount already paid to the complainant to Old Mutual Galaxy Underwritten Life Annuity and the Old Mutual Max Income Plan in equal portions, less any permissable deductions in terms of the first respondent's rules **within 30 days** from the date of this determination.

DATED AT JOHANNESBURG ON THIS 30TH DAY OF NOVEMBER 2010

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DR EM DE LA REY

ACTING PENSION FUNDS ADJUDICATOR

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Section 30M filing: **High Court**
Parties Unrepresented