Dear Madam,


[1] INTRODUCTION

1.1 The complaint concerns the failure of the second respondent to implement the complainant’s request for an investment portfolio switch from her existing portfolios to the Money Market Portfolio, which caused her to suffer financial loss.

1.2 The complaint was received by this tribunal on 5 June 2009. On 12 August 2009 a letter was dispatched to the second respondent giving it until 11 September 2009 to file a response to the complaint. A response, which was forwarded to the complainant, was received from the second respondent on 17 September 2009. This tribunal received further

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submissions from the complainant on 19 September 2009 and 1 October 2009.

1.3 Having considered the written submissions, it is considered unnecessary to hold a hearing in this matter. As the background facts are known to the parties, only those facts that are pertinent to the issues raised herein will be repeated. The determination and reasons therefor appear below.

[2] **FACTUAL BACKGROUND**

2.1 The complainant was employed by AECI Limited until she retired in February 1999. Upon her retirement, the complainant preserved her benefit in the first respondent. She commenced her membership of the first respondent from 22 February 2000 to date. The first respondent was initially administered by Mcubed Life Limited until its administration was taken by the second respondent.

2.2 The complainant’s benefit was invested in three portfolios, namely, Allan Gray Balanced Fund, Future Cash Fund and Mcubed International Equity Fund of Funds. On 4 November 2008 the complainant completed a portfolio switch form in terms of which she instructed the second respondent to switch all her investment portfolios to the Money Market Portfolio.

2.3 The second respondent subsequently switched the complainant’s portfolios to the Money Market Portfolio on the following dates:

- Allan Gray Balanced Fund – 10 November 2008;
- Future Cash Fund- 7 November 2008;
2.4 The complainant contends that she suffered financial loss as a result of the delay in switching her portfolios to the Money Market Portfolio. The complainant’s claim for financial loss against the second respondent now forms the subject matter of this complaint.

[3] COMPLAINT

3.1 The complainant states that she initiated proceedings in November 2007 to have her investment transferred to Discovery Preservation Pension Fund. Although the transfer was approved in August 2008 the second respondent delayed the transfer because of a tranche from the Global Moderate Hedge Fund.

3.2 On 4 November 2008 she instructed the second respondent to switch all her investment portfolios to the Money Market Portfolio while awaiting the transfer to Discovery Preservation Pension Fund. However, the switch had not been done by 13 November 2008 and there was no explanation for the delay. She states that her preservation policy amounted to R1, 955,173.76 at that time. She subsequently received an electronic mail on 21 November 2008 advising her that the switch was done and backdated to the date of her instruction.

3.3 She contends that the funds were released on 6 March 2009, but the Mcubed International Equity Fund of Funds was never switched. Her preservation policy was worth only R1, 784,388.55 at that stage. She contends that she would have transferred her policy to an international cash fund if she knew that there was going to be a delay in switching her portfolio. She states that she suffered financial loss in the amount of R170,000.00, which the second respondent should be ordered to pay with interest.
4.1 The second respondent confirms that it received instructions from the complainant to switch all her investment portfolios to the Money Market Portfolio on 4 November 2008. It states that the switch was done on the dates indicated in paragraph 2.3 above.

4.2 It contends that international funds have a set trading period in which to redeem and switch funds. In respect of the Mcubed International Equity Fund of Funds the fund trades weekly on Wednesdays and all instructions must reach it by close of business on the Monday prior to Wednesday. Once traded it takes approximately 10 working days for the asset manager to transfer the benefit into its account. Further, it also takes 3 workings days to convert and price the benefit into the fund.

4.3 The complainant’s instruction was received on 4 November 2008 and the cut off date for switch instructions was Monday the 3 November 2008. Therefore, the complainant’s instruction had to be traded the following Wednesday, which was on 12 November 2008. It acknowledges that if the above process was followed the Mcubed International Equity Fund of Funds would have been switched on 1 December 2008. It states that it cannot speculate as to the reasons why the switch was not done on 1 December 2008. However, it submits that the unit price as at 1 December 2008 was 1.115887, and the unit price on the day of the actual switch (29 January 2009) was 1.13917. Therefore, the complainant received the benefit of a better unit price and a slightly increased amount as result of the delay in effecting the switch.

4.4 In conclusion, it contends that although the switch was not done within the timelines of the procedure outlined above the complainant did not suffer any financial loss. Furthermore, it states that its investigation revealed that
the unit price that was used on 24 February 2009 to calculate the value of the complainant’s investment in the Global Moderate Hedge Fund was incorrect. The correct unit price was 1.057725 and the difference of the value that should have been paid out is R51, 404.78. The amount due to the complainant plus interest amounts to R53, 012.41, which was transferred to Discovery Preservation Pension Fund on 16 September 2009. It submits that further payment will be made to the complainant if it discovers that the unit prices used in the other portfolios was incorrect.

[5] DETERMINATION AND REASONS THEREFOR

Introduction

5.1 The essence of the complaint is that the second respondent failed to implement the complainant’s investment switch instruction within a reasonable time as a result of which she suffered financial losses. Thus, the issue is whether or not the second respondent failed to implement the switch instructions within a reasonable time and as a result caused her to suffer financial loss.

The first respondent’s rules

5.2 In terms of rule 5.5.2 of the first respondent’s rules active members are entitled to select an investment portfolio or portfolios, limited to the investment portfolios made available by the board. Rule 5.5.4 states that the board must ensure that the administrator sets a unit price from time to time in respect of each of the investment portfolios which are utilised. The unit price must take into account the investment returns on the assets in the investment portfolio underlying the investment policy and expenses.

5.3 The policy contract that was issued to the complainant states in clause 4
that a member may select any of the available portfolios which are offered for the preservation plans. The portfolios may be changed by the member at any time subject to thirty days written notice. Thus, a member may change his or her investment portfolio by giving thirty days written notice. However, international funds have specific trading period in which funds can be switched. Thus, the period it takes to effect any portfolio switch should take into account the policy contract and the trading rules of the particular investment portfolios.

5.4 Paragraph 4 of the switch form that was submitted by the complainant indicates that the time it takes to process a portfolio switch depends on the underlying portfolio selection and any restrictions that might apply to the portfolio. It also states that if the policy is invested in a market related portfolio, the administrator cannot take any responsibility for market movements between the time a member has requested a portfolio switch and the finalisation thereof, if actioned within the standard turnaround time.

5.5 It appears from the submissions that the complaint is directed against the delay in switching the International Equity Fund of Funds to the Money Market Portfolio. The facts indicate that the complainant is satisfied with the period the second respondent took to switch the other portfolios to the Money Market Portfolio. The complainant submitted her portfolio switch form to the second respondent on 4 November 2008. The Allan Gray Balanced Fund was switched to the Money Market Portfolio on 10 November 2008 and the Future Cash Fund was switched on 7 November 2008. Therefore, the switch with regard to the above portfolios was done within thirty days and the complainant does not claim any financial loss in this regard.

5.6 It is the delay in switching the International Equity Fund of Funds to the
Money Market Portfolio that forms the basis of the complaint. The second respondent acknowledged that the switch in this regard was not done within a reasonable time or within the standard turnaround time underlying the portfolio. The submissions indicate that the International Equity Fund of Funds trade weekly on Wednesdays and all switch instructions had to reach the second respondent by close of business on Monday prior to Wednesday. Once traded it takes approximately 10 working days for the asset manager to transfer the benefit into its account. It also takes 3 working days to convert and price the benefit into the fund.

5.7 According to the above procedure the International Equity Fund of Funds should have been switched to the Money Market Portfolio on 1 December 2008. However, it was only done on 29 January 2009. Thus, there was an unreasonable delay in switching the International Equity Fund of Funds to the Money Market Portfolio. The switch was not done within the time limit set out in the policy contract and the standard turnaround time underlying the portfolio.

5.8 However, the issue is whether the complainant suffered any financial loss as a result of the delay in effecting her switch instruction in respect of the International Equity Fund of Funds Portfolio. The complainant states that she suffered financial loss in the amount of R170, 000.00 as a result of the delay. However, the complainant did not explain how she computed her loss or how she arrived at the amount. The complainant’s complaint essentially amounts to a delictual claim for damages against the second respondent for the delay in effecting her portfolio switch instruction. As the complainant’s complaint is founded in delict all the elements of delictual liability must be proved in order for the complainant to succeed. The critical issue is whether the second respondent’s act or omission caused financial loss to the complainant. The facts indicate that the complainant failed to discharge her evidentiary burden to prove that she suffered any
financial loss.

5.9 The unit price of the International Equity Fund of Funds as at 1 December 2008 was 1.115887 and the unit price on the day of the actual switch (29 January 2009) was 1.13917. The complainant received the benefit of a better unit price and a slightly increased amount. The complainant also has to take into account that in terms of rule 5.5.4 of the first respondent’s rules the administrator sets a unit price from time to time in respect of each of the investment portfolios which are utilised. The unit price takes into account the investment returns on the assets in the investment portfolio underlying the investment policy and expenses. Thus, the ultimate value of any investment depends on the unit price allocated to a particular portfolio, which is also determined by the investment return of the assets underlying the portfolio.

5.10 The submissions indicate that the unit price allocated to her policy on the actual day of the switch was not less than the unit price as at 1 December 2008, which is the day the switch was supposed to be effected. The complainant also advanced no case that she suffered any financial loss.

[6] ORDER

6.1 In the result, the complaint cannot be upheld and is dismissed.

DATED AT JOHANNESBURG ON THIS 18th DAY OF OCTOBER 2011
Dr. E. M. DE LA REY
ACTING PENSION FUNDS ADJUDICATOR

Cc: PSG Futurewealth Ltd
    P O Box 41256
    CRAIGHALL
    2024

Ref: Nicole Roodt
Fax: 086 603 9564

Registered office of the Fund:
195 Jan Smuts Avenue
Rosebank
JOHANNESBURG

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