Dear Sir,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): J AUER (“complainant”) v CRANE PACKING PENSION FUND (“first respondent”) AND ALEXANDER FORBES FINANCIAL SERVICES (PTY) LTD (“second respondent”)

[1] INTRODUCTION

1.1 The complaint concerns the amount of the pension increase approved by the board of trustees of the first respondent.

1.2 The complaint was received by this Tribunal on 3 June 2011. A letter acknowledging receipt thereof was sent to the complainant on 28 June 2011. On the same date, the complaint was dispatched to the respondents requesting them to file their responses by 18 July 2011. A response, which was forwarded to the complainant, was received from the second respondent on 26 July 2011. The complainant’s reply was received on 5 August 2011.
1.3 After considering the written submissions, it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

[2] FACTUAL BACKGROUND

2.1 The complainant is a pensioner member of the first respondent, a registered pension fund in terms of the Act. He is also a pensioner appointed trustee of the first respondent. He has lodged this complaint in his capacity as a pensioner appointed trustee. The second respondent is the administrator of the first respondent. The board of trustees of the first respondent reviews the amount of pensions the first respondent pays every year in terms of its rules.

2.2 On 17 November 2010, the board of trustees of the first respondent, following pension increase recommendations presented to it by the actuary of the first respondent, passed a resolution that a pension increase of 2.5% would be implemented with effect from 1 January 2011. The complainant, in his capacity as a pensioner trustee, requested the board to increase the pension with a greater percentage than 2.5%. However, the board of trustees of the first respondent refused to accede to the complainant’s request.

[3] COMPLAINT

3.1 The complainant is aggrieved by the first respondent’s refusal to grant a pension increase greater than 2.5%. The complainant submitted that in order to give the pensioners the feeling that they are treated equal and fair against the active members, the first respondent needs to do the following:

- An additional 5% pension increase must be added to the 2.5% pension increase already approved by the board. The first
respondent can afford it and there is still a solvency rate of 5% available.

- The pension fund contributions paid by John Crane (Pty) Ltd (“the employer”) must be increased from 14% to 15% for better fund returns.
- He must be provided with information relating to the pensionable salaries of active members as they are the reason for the increase in liabilities. The liabilities increased by 33.8% in 2010 reducing the funding levels considerably.

[4] RESPONSE

4.1 The second respondent filed a response on behalf of the first respondent in its capacity as its administrator. The second respondent submitted that upon receipt of the complaint, the first respondent carried out detailed investigations to establish if the request for a greater pension increase by the complainant can be acceded to. Alternatively, the first respondent has investigated the matter with a view to ascertain if there is justification for retaining the pension increase at 2.5% as per the resolution passed by the trustees following the recommendation made by the actuary. The second respondent submitted that the board considered the rules of the first respondent, the pension increase policy and the recommendations made by the actuary as the basis for arriving at 2.5% pension increase for 2011.

4.2 The second respondent further submitted that Rule 9.1 of the respondent with regard to pension increases provides as follows:

“The Trustees shall review the level of Pensions being paid from the Fund and may direct that Pensions and deferred Pensions be increased. Any increase in Pensions and deferred Pensions shall be paid in terms of the pension increase policy adopted by the Trustees in consultation with the
Actuary from time to time, and shall be payable from the date set out in the pension increase policy and subject to minimum pension increase in terms of the Act.”

4.3 The second respondent further submitted that in terms of paragraph 2 of the pension increase policy, the first respondent does not guarantee any increase to pensions and pension increases are therefore, discretionary. Paragraph 3 of the pension increase policy states the following:

“The trustees must, in determining the targeted pension increases, consider the following:

• The Fund’s historical practice with regard to determination pension increases;
• The net post retirement discount rate that applied at the date of revision of this document;
• The expected long-term risk-free returns on the backing pensioner liabilities; and
• The expected long-term rate of future inflation.”

Taking account of the above, it was agreed that the Trustees will consider the awarding of pension increases each year. The trustees will aim to award pension increases of 45% of the year-on-year change in the Consumer Price Index over the most recently available calendar year preceding the pension increase date.”

Any pension increase granted will be subject to affordability and determined on the basis of the principles set out in section 2 above.”

4.4 The second respondent further submitted that the first respondent’s actuary made the following recommendations:

“I recommend that the Trustees maintain a solvency reserve of approximately 5% of the best estimate liabilities to act as a buffer against adverse future experience. I therefore recommend that the Trustees grant a pension increase of the order of 2.5% effective 1 January 2011 …”
4.5 According to the second respondent, in terms of section 2 of the pension increase policy, the discretion to review the level of pensions being paid and to direct that pensions be increased rests with the trustees, and the rules specifically provide that the amount of any increase they arrive at is to be determined by them in consultation with the actuary. However, the trustees are not bound by the recommendations made by the actuary. In exercising this discretionary power, they are obliged to exercise it for its purpose, giving proper consideration to relevant factors and excluding irrelevant factors. The trustees considered this matter properly by disregarding irrelevant considerations. In making a decision regarding pension increases, the trustees have addressed the relevant considerations of the needs and interests of pensioners as well as those of active members and the first respondent as a whole.

4.6 The second respondent further submitted that the trustees are obliged to take into consideration the first respondent’s overall financial position when exercising their discretion since it affects the interests of all members and not just the pensioners. It was clear from the actuary’s recommendations that granting an increase greater than 2.5% would have negative financial consequences to the first respondent in future. The trustees, therefore, acted within their powers to restrict the pension increase to 2.5%, notwithstanding the complainant’s view that a greater increase is affordable.

4.7 With regard to the increase of the employer contribution rate from the present 14% to 15%, the second respondent submitted that the first respondent’s actuary advised that it is important to note that the majority of defined benefit funds are closed to new entrants and the membership is aging (resulting in a higher required employer contribution rate). The first respondent is open to new entrants and it is, therefore, expected that the required contribution rate will be lower than the average. The employer is actually contributing to the first
respondent at a rate that is higher than the required rate. The employer
is one of the very few employers that actually do this.

4.8 With regard to liabilities of the active members, the second respondent
submitted that according to the actuary, the first respondent's liabilities
increased by 15.6% from 2009 to 2010 and not by 33.8% as the
complainant alleged in his complaint. The funding level improved from
100.6% to 104.3%. The increase in liabilities is attributable to a number
of factors like increase in service, increase in average annual salaries
(not total annual salaries) and change in valuation basis. The increase
in funding level as a whole is mostly due to better than expected fund
returns, and lower than expected salary increases. The active
member's liabilities were valued correctly, and that there is no bias
towards active members when calculating the funding level.

4.9 The second respondent further submitted that a decision taken by the
trustees of the first respondent is binding to all the trustees as well as
the members and pensioners of the first respondent. Rule 17.5.4 of the
rules of the first respondent with regard to the binding nature of the
decision by the trustees reads as follows:

“At all meetings of the Trustees the decision of the majority shall be binding
and if the votes are equal the matter shall be referred to the next meeting of
the Trustees …”

4.10 The second respondent confirmed that the complainant was present
when the majority of the trustees voted in favour of the 2.5% pension
increase to be implemented with effect from 1 January 2011, and that
the decision is binding.

4.11 The second respondent concluded by submitting that the complaint
against the first respondent should be dismissed on the basis that the
2.5% pension increase granted by the trustees is in accordance with
the recommendations made by the actuary and the pension increase
policy. The complainant has no legal or factual basis to claim a higher pension increase as the first respondent cannot afford it at this stage.

[5] DETERMINATION AND REASONS THEREFOR

5.1 The issues for determination are firstly, whether or not the 2.5% pension increase granted by the board of trustees of the first respondent is in accordance with its rules, secondly, whether or not the trustees should increase the employer contribution rate from the present 14% to 15% and finally, whether or not the first respondent is obliged to provide the complainant with the information he requested.

Whether or not the pension increase is in accordance with the fund’s rules

5.2 Section 13 of the Act provides that the rules of a registered fund are binding on the fund, its members, shareholders and officers, and on any person who claims under the rules or whose claim is derived from a person so claiming. Because of the binding effect of the rules of the fund, the fund may only pay out to its members those benefits provided for in its rules. That was emphasised by the Supreme Court of Appeal in Tek Corporation Provident Fund and Others v Lorentz [2003] 3 BPLR 227 (SCA), at 239D-E, where Marais JA stated as follows:

“What the trustees may do with the fund’s assets is set forth in the rules. If what they propose to do (or have been asked to do) is not within the powers conferred upon them by the rules, they may not do it.”

5.3 The provisions pertaining to minimum pension increases are contained in section 14B(3) of the Act, the relevant portions of which read as follows:

“14B(3)(a) The board shall establish and implement a policy with regard to increases to be granted to pensioners and deferred pensioners, which policy must –
(i) aim to award a percentage of the consumer price index, or some other measure of price inflation which is deemed suitable by the board; and

(ii) set the frequency with which increases will be considered in line with the policy: Provided that increases should be considered each year, with comparison to the minimum pension increase at least once every three years.

(b) The policy contemplated in paragraph (a) must be communicated to pensioners and deferred pensioners when it is established and whenever it is changed.

(c) The policy contemplated in paragraph (a) will not be required where-

   (i) pensioners on or after retirement in terms of the rules of a fund, purchased a policy from a long-term insurer registered in terms of section 7 of the Long-term Insurance Act, 1998 (Act No. 52 of 1998);

   (ii) pensioners on whose behalf a fund, on or after retirement in terms of the rules of the fund, purchased a policy of insurance from a long term insurer registered in terms of section 7 of the Long-term Insurance Act, 1998 (Act No. 52 of 1988);

   (iii) pensioners elected to receive a level pension, or a pension with fixed increases, or the pension the amount of which is elected by the pensioner from time to time, paid from the fund in terms of the rules of the fund."

5.4 This Tribunal perused the rules of the first respondent to ascertain what they particularly provide for with regard to pension increases. The abovementioned Rule 9.1 of the rules of the first respondent regulates increases in pensions. In essence, Rule 9.1 provides that the discretion to review the level of pensions being paid and to direct that pensions be increased rests solely with the trustees. Rule 9.1 further provides that the amount of any increase the trustees arrive at is to be determined by them in consultation with the actuary and the first
respondent’s pension increase policy. In terms of the pension increase policy, particularly paragraph 2, the first respondent does not guarantee any increase to the pensions and any pension increases are discretionary. Paragraph 3 of the pension increase policy outlines the factors that the board, in determining the targeted pension increases, should take into account as mentioned in the response in paragraph 4.3 above.

5.5 The facts show that the board before passing the 2.5% pension increase for the year 2011 took into consideration the first respondent’s overall financial position, i.e. affordability, solvency reserve, the prevailing market conditions and the previous years’ pension increases in accordance with the recommendations made by the first respondent’s actuary and the first respondent’s pension increase policy as provided in Rule 9.1. These factors affect the interests of all members of the first respondent and not only the pensioners.

5.6 The complainant seems to be biased towards the pensioners since he is first and foremost a pensioner himself. The complainant lodged this complaint in his capacity as a pensioner trustee and he was present when the majority of the trustees voted in favour of the 2.5% pension increase to be implemented with effect from 1 January 2011. The majority decision binds him as well in terms Rule 17.5.4 of the rules of the first respondent. The complainant has not alleged that there was any irregularity in the voting process, or the board failed to adhere to the recommendation of the actuary, or a blatant violation of the rules of the first respondent, except that he is of the view that the first respondent can afford a pension increase greater than 2.5%. In this regard, the complainant, as a trustee, has not demonstrated appreciation of the rules of the first respondent that he is there to protect the interest of all members and not just the interests of the pensioners.
5.7 After considering the available information, this Tribunal is satisfied that the board did not fetter its discretion. Put differently, the board acted properly and in compliance with Rule 9.1 when deciding to restrict the pension increase to 2.5% for the year 2011. Therefore, this Tribunal finds that there is no reason to set aside the board’s decision and refer the matter back to the board for re-consideration.

Employer’s contribution rate

5.8 The complainant submitted that the employer’s contribution rate must be increased from the present 14% to 15%. On the other hand, the second respondent submitted that the first respondent consulted with the actuary and it was advised that it is important to note that the majority of defined benefit funds are closed to new entrants and the membership is aging (resulting in a higher required employer contribution rate). However, the first respondent is open to new entrants and it is, therefore, expected that the required contribution rate will be lower than the average. The employer is actually contributing to the first respondent at a rate that is higher than the required rate.

5.9 Rule 4.2.1 of the rules of the first respondent regulates the payment of contributions by the employer and reads as follows:

“The Employers shall contribute to the Fund such amounts as are agreed upon from time to time between the Main Employer and the Trustees. Such amounts shall not be less than the amounts determined by the Actuary to be necessary to ensure that the Registrar’s requirements with regard to the financial soundness of pension funds are met.

5.10 On the facts of the present case, the board has been advised by the first respondent’s actuary that the employer is actually contributing at a rate that is higher than the required rate. It follows that the board is presently in compliance with Rule 4.2.1 above. Therefore, it is not
necessary for the board to request the employer to increase its contribution rate at this stage.

Provision of information

5.11 The complainant requested information relating to increases in average annual salaries. He submitted that these increases reduced the funding level considerably and increased the fund liabilities by 33.8% from 2009 to 2010. In essence, the complainant is requesting the chairman and principal officer of the first respondent to provide him with pensionable salaries of the active members to establish whether or not they contributed to the reduction of the funding level and increased liabilities of the first respondent. In Knight v Mitchell Cotts Pension Fund [2002] 8 BPLR 3765 (PFA) at 3772F, this Tribunal held that a trustee is entitled to the information relating to the active members’ pensionable emoluments in order to comply with his duties in terms of the rules of the fund.

5.12 In the present matter, the second respondent submitted that according to the actuary, the first respondent’s liabilities increased by 15.6% from 2009 to 2010 and not by 33.8% as the complainant alleged in his complaint. The funding level improved from 100.6% to 104.3%. The increase in liabilities is attributable to a number of factors like increase in service, increase in average annual salaries (not total annual salaries) and change in valuation basis. The increase in funding level as a whole is mostly due to better than expected fund returns, and lower than expected salary increases. The active member’s liabilities were valued correctly, and that there is no bias towards active members when calculating the funding level. This detailed explanation is contained in the response, which was forwarded to the complainant. The most important point for the purposes of the complaint is that increase in average annual salaries is one of the factors, not the sole
contributor, that leads to increase in fund liabilities and that the funding levels of the first respondent has improved from 100.6% to 104.3%.

5.13 In light of the submissions, this Tribunal is satisfied that the respondents have provided the complainant with the necessary information in their response.

[6] ORDER

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

DATED AT PRETORIA ON THIS 13TH DAY OF MAY 2013

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MA LUHKAIMANE
DEPUTY PENSION FUNDS ADJUDICATOR