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Dear Madam,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956: PY BROEKHUIS (“complainant”) v CORPORATE SELECTION PENSION FUND: PARTICIPATING EMPLOYER – TAFELBERG FURNITURE STORES LTD (“first respondent”); LIBERTY GROUP LIMITED (“second respondent”) AND TAFELBERG FURNITURE STORES LTD (“third respondent”)

[1] INTRODUCTION

- 1.1 The complaint concerns the alleged failure by the third respondent, as an employer to perform its duties of good faith towards the complainant as an employee, which allegedly resulted in her suffering financial loss on the benefit paid to her by the first respondent.

- 1.2 The complaint was received by this Tribunal from the office of the Ombudsman for Long-term Insurance on 31 May 2010. A letter acknowledging receipt thereof was sent to the complainant on 23 June 2010. On the same date, letters were dispatched to the first and second respondents requesting them to file their responses to the complaint by no later than 2 August 2010. Responses were received from

The Office of the Pension Funds Adjudicator was established in terms of Section 30B of the Pension Funds Act, 24 of 1956. The service offered by the Pension Funds Adjudicator is free to members of the public.

Centralised Complaints Helpline for All Financial Ombud Schemes 0860 OMBUDS (086 066 2837)

the second respondent on behalf of the first respondent on 11 August 2010 and 18 July 2012. On 17 September 2010, a letter was dispatched to the third respondent requesting it to file a response to the complaint by no later than 18 October 2010. The third respondent's response was received by this Tribunal on 8 October 2010. A reply to this response was received from the complainant on 29 October 2010. No further submissions were received from the parties.

- 1.3 After considering the written submissions in this matter, it is considered unnecessary to hold a hearing. The determination of this tribunal and its reasons therefor appear below.

[2] FACTUAL BACKGROUND

- 2.1 The complainant was employed by the third respondent and by virtue of her employment, she became a member of the first respondent. The second respondent is the administrator of the first respondent. On 31 December 2005, her employment was terminated by the third respondent and as a result thereof, she ceased to be a member of the first respondent.
- 2.2 Following the termination of the complainant's employment and exit from the fund, she became entitled to a retirement benefit from the first respondent in terms of its rules.
- 2.3 A gross retirement benefit of R280 733.84 became payable to the complainant by the first respondent. Two-thirds of this amount, i.e. R187 169.24 was transferred to Liberty Excelsior 300 Linked Life Annuity ("life annuity") to purchase an annuity for her and an amount of R92 865.94 was paid directly to the complainant on 21 April 2006.

[3] COMPLAINT

3.1 The complainant is aggrieved by the third respondent's failure to perform its duties of good faith towards her as its employee, which resulted in her suffering financial loss on the retirement benefit paid to her by the fund.

3.2 The breakdown of the complaint relates to the following:

The complainant's retirement date

- The complainant submits that she joined the first respondent on 1 January 1991. Her date of birth is 2 January 1941. She reached the retirement age of 65 years in terms of the first respondent's rules on 2 January 2006. Further, the benefit statement provided to her by the second respondent reflects her retirement date as 1 February 2006. However, the third respondent forced her to retire on 31 December 2005 (before the abovementioned dates, i.e. 2 January 2006 and 1 February 2006).

The complainant's membership of the fund

- The complainant states that she has since realised that she was never a member of the first respondent during her period of employment with the third respondent. She states that upon termination of employment, she was told by the third respondent to go to the bank to take out an annuity policy for herself.

The amount of the monthly pension that the complainant receives from her life annuity

- The complainant states that due to the third respondent's irregular conduct, she is now losing out on monthly pension after a period of 15 years' service with the third respondent. She states that she is only

receiving a monthly pension of R1256.58 (which has just increased from R1177.61) from the life annuity whereas she was earning a monthly salary of over R9000.00 during her period of employment with the third respondent.

The monthly contributions paid by the third respondent on behalf of the complainant to the fund.

- The complainant alleges that the deductions made by the third respondent from her salary were not in accordance with her salary. She states that if for instance, she got an increase in her salary during the month of November; the third respondent would only notify the fund about such an increase in the following year, around June. So, she suffered financial loss in the form of investment growth on the contributions paid to the fund by the third respondent.

[4] RESPONSES

First respondent's response

- 4.1 A response was submitted by the second respondent in its capacity as the administrator on behalf of itself and the first respondent. The second respondent confirms that the complainant retired from the fund on 1 January 2006. The gross amount due was R280 733.84 and tax in the amount of R698.66 was deducted from this amount according to the tax directive from SARS. An amount of R92 865.94 was paid directly to the complainant and the balance of R187 169.24 was transferred to a life annuity, as chosen by the complainant.
- 4.2 The fund is a defined contribution scheme, therefore the member was entitled to the full share of fund at retirement (i.e. total of member and employer contributions made during the member's employment, together with fund growth).

- 4.3 The second respondent states that the complainant can increase the monthly income from her life annuity. It states that it has requested the brokerage to contact the complainant in order to discuss the options that are available to her.
- 4.4 In a subsequent response, the second respondent confirmed that the third respondent paid all the contributions due for the complainant.

Third respondent's response

- 4.5 The third respondent confirmed that the complainant commenced employment with it during February 1991. She turned 50 years of age on the 2nd of January 1991 and in terms of the rules of the fund, she had already passed the point where she could enjoy the full benefits of the fund. The company, out of concern and out of a sense of responsibility towards the complainant, took it upon itself to negotiate with the fund to back date her joining date. The complainant agreed and also agreed to the back pay in contributions which would enable her to enjoy the benefits of the fund and which would also enable her to build up some sort of pension savings. This is something that the company had no legal or ethical obligation to do.
- 4.6 The company cannot be held responsible for the 30 years prior to her employment if the complainant did not make the necessary arrangements for pension fund savings, as any financial advisor would know that in order to have sufficient savings at retirement age a person should start contributing in their early twenties.
- 4.7 In respect of increase in salary and the increase to pension fund contributions, the company has over 500 employees. Every month different employees have their salaries reviewed and increased. For efficiency and effectiveness, it was agreed with the fund that in July of every year, all

pension fund contributions will be reviewed and adjusted accordingly. Therefore, there was no financial loss to the complainant whatsoever.

- 4.8 On approaching her retirement age, the complainant was advised in writing of her retirement date and what future employment options were available to her. She was also advised by the company that in terms of her pension planning and investment, she should consult preferably with the company's broker, Mr. John Hamman, or she could use a broker of her own. The complainant chose not to approach John Hamman but to rather use a broker of her own. The third respondent submits that it can therefore, in no way be held responsible for the investment choices made by the complainant.
- 4.9 The third respondent states further that every year throughout her employment with it, the complainant would receive a statement from the second respondent wherein the second respondent clearly showed what kind of annual pension she would receive on retirement. The amounts the complainant now refers to are in line with those figures quoted on the annual statement. Therefore, the complainant knew well in advance what to expect on retirement and along with the information detailed above. It is very unfair of her to now hold it responsible for her financial shortcomings.
- 4.10 With regards to the issue of her retirement date, the third respondent submits that as per company policy, an employee automatically retires on his/her 65th birthday. The complainant's 65th birthday was on the 2nd January 2006. The third respondent states that on 31 December 2005, it paid over to the fund both the complainant and its monthly pension fund contributions. Therefore, all pension fund contributions from it and the complainant were correct and up to date.

The complainant's reply

- 4.11 The complainant re-iterates that the third respondent forced her to retire on 31 December 2005 before her birthday on 2 January when she turned the retirement age of 65 years in terms of the rules of the fund and before 1 February 2006, being the normal retirement date reflected by the second respondent on the benefit statement it provided her.
- 4.12 Regarding the time of increases in salaries, the complainant disputes the third respondent's submissions with regards to increase in salaries and the increase to pension fund contributions. In this regard, the complainant submits that up until the time she left employment, the third respondent certainly did not have 500 employees. To say that increases are given at different times to different employees was certainly not the case during her period of employment. November month was an increase month. At no time was it customary to give increases to different employees at different times.
- 4.13 Further, the complainant submits that according to the third respondent, arrangements were made with the second respondent to only deduct from its employees' salaries and to pay to the fund the adjusted contributions eight months after the increase month. She states that if all pension fund deductions were correctly deducted by the third respondent and its contributions paid across, then surely her fund value would have achieved a better growth.
- 4.14 The complainant concludes by stating that after contributing to the fund for 15 years, she should be receiving a reasonable monthly income. She now does not have an income because the third respondent forced her to retire from the fund a month before her retirement date.

The third respondent's response to the complainant's reply

- 4.15 With regards to the complainant's retirement date, the third respondent states that the complainant was aware of her retirement date due to the fact that in September 2005 she forwarded a letter acknowledging her

retirement from the fund and requested that she be provided with a new temporary contract of employment post her retirement on 2 January 2006.

- 4.16 With regards to the complainant's dispute of the third respondent's submissions regarding the increase in salaries and the increase to pension fund contributions, the third respondent submits that the company has been in existence for over 50 years and over this period different strategies have been adopted and certain decisions have been taken by the board of directors to safeguard and ensure the continuous success the business. In terms of salary increases, at one point all remuneration packages were reviewed annually and subsequent to that, each employee's salary is reviewed on the annual anniversary of the commencement of employment.
- 4.17 There were times when the company was not in a position to afford increases in salaries, but when the business turned and the company could afford increases, the directors increased salary packages. This is why the month of increases changed from time to time. The complainant was part of a group whose salary was reviewed once per year and over a period of time this date moved to November of every year. For employees with many years of service, the increased date stayed at November month, whilst all other employees' remuneration packages would be reviewed on their anniversary month.
- 4.18 The third respondent confirms that the second respondent was responsible for the administration of the fund and it followed its instructions. Their representative or broker advised the company that pension increases would only happen once a year. This practice is still in place even today. The complainant had the benefit of the increased income prior to when the pension fund contributions increased and she failed to make the necessary investment provisions for her retirement.
- 4.19 The third respondent submits that every year the complainant received a benefit statement from the second respondent, which clearly reflects all

payments paid to the second respondent and all benefits of the fund. Most importantly, the benefit statements indicate under the normal retirement benefit heading that her gross annual pension payout would be in the region of R18 000.00 a year which equates to a gross payment of about R1500.00 per month. Therefore, the complainant was well aware many years prior to her retirement what her monthly pension payout would be. So, she cannot complain that her monthly pension is too little. The complainant only joined the company at the age of 50 years and 15 years of pension fund contributions today is definitely not going to provide a pension payout equal to her monthly salary. It is therefore unfair of the complainant to hold the company responsible as it seems she had not made the necessary provisions for retirement prior to joining the company.

4.20 In a subsequent response, the third respondent confirmed that on instruction from the second respondent, increases in pension fund contributions were only adjusted once a year. These adjustments were not back dated. All employees were and are aware of this and the complainant never questioned this or requested any change in her contributions to the fund. She enjoyed the increased portion of her salary for the period prior to the pension fund increases becoming effective.

[5] DETERMINATION AND REASONS THEREFOR

Introduction

5.1 The complainant is dissatisfied with the third respondent's failure as an employer to perform its duties of good faith towards her as an employee, which allegedly resulted in her suffering financial loss on the benefit paid to her by the first respondent. She raised several issues relating to the third respondent's failure to perform its duties of good faith towards her, which will be summarised individually below.

The complainant's retirement date

5.2 The complainant alleges that she was forced by the third respondent to retire from the first respondent on 31 December 2005, a date prior to her birthday on 2 January 2006, when she reached the retirement age of 65 years in terms of the first respondent's rules. Further, the benefit statement provided to her by the second respondent reflects that her retirement date is 1 February 2006.

The complainant's membership of the fund

5.3 The complainant alleges that the third respondent failed to perform its duty of faith towards her because she has since realised that she was never a member of the first respondent during her tenure of employment with the third respondent, i.e. from 1 January 1991 until 31 December 2005.

The amount of the monthly pension that the complainant receives from her life annuity

5.4 The complainant states that she is only receiving a monthly pension of R1256.58 from the life annuity whereas she was earning a monthly salary of over R9000.00 during her period of employment with the third respondent. The second respondent submitted that the complainant can increase the monthly income from her life annuity. It states that it has requested the brokerage to contact the complainant to discuss the options that are available to her. Thus, this part of the complaint is resolved.

Monthly contributions paid by the third respondent to the fund on behalf of the complainant

5.5 The complainant alleges that the deductions made by the third respondent from her salary were not in accordance with her salary because the third respondent's practise was to only notify the fund of her increase a few

months after her salary was increased or even the following year and this resulted in her suffering financial loss on her pension fund contributions deducted from her salary and paid on her behalf to the fund.

- 5.6 With regards to the complainant's complaint about her retirement date, her membership of the fund and the monthly contributions paid by the third respondent on her behalf, this Tribunal notes that the complainant became aware of the above issues at the latest on 31 December 2005 when her employment was terminated by the third respondent. She lodged her complaint regarding the above mentioned issues on 31 May 2010. Therefore, this Tribunal needs to establish whether or not the complaint is time-barred in terms of section 30I of the Act before determining the merits of the complaint.

Time-barring

- 5.7 Section 30I of the Act imposes certain time limits with regards to lodgement of complaints before the Adjudicator and states as follows:

“(1) The adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint is received by him or her in writing.

(2) The provisions of the Prescription Act, 1969 (Act No. 68 of 1969), relating to a debt apply in respect of the calculation of the three year period referred to in subsection (1).”

- 5.8 Thus, the provisions of section 30I preclude the Adjudicator from investigating and adjudicating any complaint if the act or omission to which it relates occurred more than three years prior to the receipt of the written complaint. Sub-section 30I(2) further provides that the provisions of the Prescription Act, 68 of 1969 relating to a debt apply in the calculation of the three-year period.

5.9 The act or omission to which this complaint relates occurred on 31 December 2005 when the complainant's employment with the third respondent was terminated. The complainant was aware of the details of the first respondent and the third respondent at all times. Any complaint regarding the issues she raised in her complaint (as summarised above) should have been pursued at that time or within three years, i.e. on or before 31 December 2008. However, the complaint was only lodged on 31 May 2010, so it was received out of the prescribed time-limit. Therefore, it is time-barred in terms of section 30I of the Act.

5.10 There is good reason for a limit to be imposed on the time during which litigation may be launched and the Constitutional Court has pronounced on this issue. In *Mohlomi v Minister of Defence* 1997 (1) SA 124 (CC) the Court said (at paragraph [11]):

“Rules that limit the time within which litigation may be launched are common in our legal system as well as many others. Inordinate delays in litigation damage the interests of justice. They protract the disputes over the rights and obligations sought to be enforced, prolonging the uncertainty of all concerned about their affairs. Nor in the end is it always possible to adjudicate satisfactorily on cases that have gone stale. By then witnesses may no longer be available to testify. The memories of ones whose testimony can be obtained may have faded and become unreliable. Documentary evidence may have disappeared. Such rules prevent procrastination and those harmful consequences of it. They serve a purpose to which no exception in principle can cogently be taken.”

5.11 In the light of the peremptory nature of the provisions of section 30I(1), this Tribunal has no authority to investigate and adjudicate any complaint that is time-barred. It must be borne in mind that the Adjudicator's erstwhile authority to, on good cause shown, condone the late lodging of complaints or extend the three-year time limit, has with effect from 13 September 2007 been removed by the deletion of sub-section 30I(3).

1. In the result, the complaint is dismissed due to being time-barred.

DATED AT JOHANNESBURG ON THIS 16th DAY OF AUGUST 2012

MA LUKHAIMANE
DEPUTY PENSION FUNDS ADJUDICATOR

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Section 30M filing: High Court

No legal representation