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Please quote our reference: **PFA/GA/2198/2010/EMD**

**REGISTERED POST**

Dear Sir,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT NO. 24 OF 1956 (“the Act”): KR MUTCH (“complainant”) v ESKOM PENSION AND PROVIDENT FUND (“respondent”)**

**[1] INTRODUCTION**

- 1.1 The complaint concerns the payment of late payment interest and the calculation of final average emoluments.
  
- 1.2 The complaint was received by this Tribunal on 13 September 2010. A letter acknowledging receipt was sent to the complainant on 15 February 2011. A copy of the complaint was sent to the respondent on 16 February 2011, giving it until 31 March 2011 to file its response to the complaint. The respondent submitted a response dated 21 April 2011, received on 29 April 2011. A copy was forwarded to the complainant on 16 May 2011, requesting a reply by 30 May 2011. The complainant replied in a letter dated 24 June 2011, to which the respondent replied in a letter dated 4 August 2011. The complainant made a further submission dated

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The Office of the Pension Funds Adjudicator was established in terms of Section 30B of the Pension Funds Act No. 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)

23 August 2011. No further submissions were received.

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

**[2] FACTUAL BACKGROUND**

- 2.1 The complainant became a member of the respondent on 1 February 1963 and contributed until his retirement on 30 June 2010, upon reaching the pensionable age of 65 years.

**[3] COMPLAINT**

- 3.1 The complainant submits that he submitted an application for retirement benefits to the employer's Human Resources Department on 4 March 2010 and couriered it to the respondent on 24 March 2010.
- 3.2 A telephonic enquiry to the respondent showed that all calculations would be done prior to the pension date of 30 June 2010 and that the first pension payment, plus the lump sum, would be paid on 1 July 2010. A small amount would be withheld for adjustment purposes. Once the June pension contribution was received from the employer on 7 July 2010, the adjustment amount would be paid on 16 July 2010.
- 3.3 The complainant's first pension and the lump sum, less an amount of R20 000, was paid to him on 21 July 2010.
- 3.4 The complainant requests payment of interest for the late payment of his lump sum, as well as details of the parameters used in the calculation of

his pension and lump sum pay-out, including additional and bonus service.

**[4] RESPONSE**

- 4.1 The respondent, after setting out the history of the complainant's membership, submitted that the complainant's retirement notification documents were received on 25 March 2010. As his retirement date was 30 June, his contributions up to and including the month of June had to be included in the calculation of the complainant's retirement benefit. Contributions were received on 9 July 2010. From 12 to 16 July 2010, the respondent reconciled all contributions and calculated the complainant's benefit. On 19 July 2010 the respondent applied for a tax directive from the South African revenue Service ("SARS"), which was received on 20 July 2010. Payment was effected on the same day.
- 4.2 In terms of Rule 45.2(1), the respondent had to pay within seven working days from the date on which all conditions had been satisfied. The last information that was needed, the tax directive from SARS, was received on 20 July 2010. Late payment interest would therefore be payable seven working days later, on 29 July 2010. The respondent would therefore only be liable for late payment interest if it paid out the complainant's benefit after 29 July 2010.
- 4.3 In addition to the normal retirement benefit payable, the complainant was also entitled to retirement benefits from the additional voluntary contributions he made. In the result, two benefits were paid to him.
- 4.4 The respondent set out the calculations for the computation of the complainant's total monthly pension of R40 163.27 and requested that the complaint be dismissed.

**[5] REPLY**

5.1 The complainant submitted that in the calculation of his total monthly pension, there was an error in the calculation of his final average emoluments.

**[6] RESPONDENT'S FURTHER SUBMISSIONS**

6.1 The respondent submitted that the complainant, in the calculation of his final average emoluments, included a performance bonus of R107 553.10 which had been paid out as a part of the complainant's additional voluntary contributions. This amount does not form part of the complainant's basic salary and should be excluded. An amount of R84 297.00 reflected on the complainant's list represented the amount for a thirteenth cheque which did not form part of basic salary for the calculation of his final average emoluments.

6.2 The correct calculation of the complainant's benefit is the calculation as explained in the initial response to the complaint.

**[7] COMPLAINANT'S REPLY TO THE FURTHER SUBMISSIONS**

7.1 The complainant submits that the amount of R107 553.10 represented a basic monthly salary of R39 576.00 plus a performance bonus of R67 977.10.

7.2 The complainant submits further that November 2009 amount of R84 297.00 as representing a thirteenth cheque. Only half of this amount, R42 148.50, was a thirteenth cheque and the complainant submitted that the annual bonus was pensionable.

- 7.3 The complainant submits that the final average emoluments as calculated in his reply, should be reduced by R39 576.00 to R638 041.60 and that the final average emoluments plus 25% COLA membership should read R797 552.00.
- 7.4 The complainant submits that the respondent's calculation is therefore not correct.

**[8] DETERMINATION AND REASONS THEREFOR**

- 8.1 The complainant requests payment of interest for the late payment of his lump sum, as well as details of the parameters used in the calculation of his pension and lump sum pay-out, including additional and bonus service.
- 8.2 A fund, its legal status, and the rights and obligations of its members, are governed by the rules of the fund, relevant legislation and the common law (*Tek Corporation Provident Fund and Others v Lorentz* 1999 (4) SA 884 (SCA) at 894 B-C ("Tek"); see also section 13 of the Act). Whether or not a benefit paid by a pension fund organisation is paid on time and is correct, must be determined with reference to the provisions of the rules.

*Late payment interest*

- 8.3 Rule 45.2 (1) of the respondent's rules provides that it shall effect payment of any lump sum benefit due to a member within seven working days of the date on which the conditions in sub-rule (3) are satisfied. The last requirement before payment could be effected was a tax directive from SARS, received on 20 July 2010, and payment was effected on the same day. Late payment interest would only be payable seven working days later, on 29 July 2010.

*Calculation of final average emoluments*

- 8.4 In terms of rule 22 of the respondent's rules, the annual pension payable to a retired member shall be  $1 \frac{085}{600}$  of his final average emoluments per month of pensionable service. Pensionable emoluments are defined as salary or wage, with certain exceptions. Thirteenth cheque is defined as the annual bonus paid by the employer to the member, as notified to the respondent, in respect of which the respondent agrees that rules 18(9) and 18(10) shall apply. A performance bonus or thirteenth cheque is deemed to be a voluntary contribution paid by the member (rule 18(11)). It is therefore not a part of salary or wage, but an additional payment.
- 8.5 The complainant calculates his final average emoluments (including thirteenth cheque and performance bonus) as R680 190.10, to which a further 25% has to be added. However, the correct calculation, including the thirteenth cheque and performance bonus, is R608 190.10 and not R680 190.10 as stated in his reply. When the performance bonus of R67 977.10 and thirteenth cheque are deducted from R608 190.10, this leaves a basic salary of R498 064.5. When 25% is added to this amount, the total is R622 580.58. This corresponds with the figure used by the respondent as the basis for calculation of the total retirement benefit.
- 8.6 There is no reason for this Tribunal to find that the respondent's calculation of the complainant's total retirement benefit was incorrect.

**[9] ORDER**

1. In the result, the complaint cannot succeed and is hereby dismissed.

**DATED AT JOHANNESBURG ON THIS 20<sup>TH</sup> DAY OF NOVEMBER 2012**

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**MA LUKHAIMANE**  
**DEPUTY PENSION FUNDS ADJUDICATOR**

**Section 30M filing: Magistrates Court**

*Parties Unrepresented*