
[1] INTRODUCTION

1.1 This complaint concerns the failure of the first respondent to pay the complainant a disability benefit, which is ascribed to the employer’s failure to pay all contributions to the first respondent on behalf of the complainant and to submit the complainant’s disability claim to the first respondent.

1.2 The complaint was received by this Tribunal on 3 November 2011. On 17 October 2012, the complaint was dispatched to the first and third respondents giving them until 15 November 2012 to forward their responses to the complaint. No responses were received from the first and third respondents. On 28 and 29 January 2013, follow-up letters were sent to the first and third respondents, respectively, seeking their responses to the complaint by 11 February 2013. The first respondent
submitted its response to the complaint on 29 January 2013. No response was received from the third respondent. No further submissions were received from the parties.

1.3 After reviewing the written submissions before this Tribunal, 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 was employed by the third respondent as a security officer from 7 December 1995 to 18 August 2010. He became a member of the first respondent by virtue of his employment. It appears that although the third respondent deducted provident fund contributions from the complainant’s salary as is evident from his payslip, which he annexed to the complaint, it did not remit all payments to the first respondent.

[3] COMPLAINT

3.1 The complainant submitted that following the termination of his employment, due to an assault in which he sustained a broken knee-cap whilst at work, he has not received payment of a disability benefit from the first respondent.

3.2 The complainant requests the assistance of this Tribunal to investigate the matter.

[4] RESPONSES

First respondent
4.1 The first respondent submitted that according to its records, the third respondent registered as its participating employer on 1 November 2002 and is non-compliant in terms of section 13A of the Act. Contributions were received up to January 2013 and have been allocated up to June 2008. The first respondent submitted that following the termination of the complainant’s employment he became entitled to a withdrawal benefit. It further submitted that he has a fund credit in the amount of R7 169.42, comprising contributions received from the third respondent for the period November 2002 to June 2008. It further submitted that the second respondent required the complainant’s mandatory claim documents in order to process his claim. The first respondent submitted that the third respondent had defaulted on contribution payments on behalf of the complainant for the period July 2008 to August 2010.

Third respondent

4.2 The third respondent was granted an opportunity to comment on the allegations made against it as is required in terms of section 30F of the Act. No response was received from the third respondent.

[5] DETERMINATION AND REASONS THEREFOR

5.1 The issue which falls for determination is whether or not the first respondent failed to pay the complainant a disability benefit, due to the third respondent’s failure to submit a disability claim and pay all contributions on his behalf to the first respondent.

5.2 The payment of any benefit that is due to a member of a fund is regulated by the fund’s rules (see Tek Corporation Provident Fund & Another v Lorentz [2000] 3 BPLR 227 (SCA) at 239D-E and section 13 of the Act).
5.3 Rule 6.2.1 of the first respondent’s rules, with regards to the payment of a disability benefit provides as follows:

“A Member will be classified as totally and permanently disabled in terms of this Rule if the Trustees receive notification from his Employer and satisfactory medical evidence that he has become totally and permanently incapable of engaging in his own normal occupation or in any other occupation for which, in the Trustees’ opinion, he could be reasonably considered capable of engaging by virtue of his training and general experience for remuneration or profit, provided that the Member shall, within a period of three months after the date of disablement, procure proper medical attention and carries out and follows in full the medical instructions and advice given.”

5.4 Rule 4 of the first respondent’s rules, with regards to the payment of contributions reads as follows:-

“4. Contributions

4.1 Contributions by the Member

4.1.1 Each Member shall make a monthly contribution to the Fund throughout his Service at the rate of 5.00 per cent of his Fund Salary towards his retirement benefits.

4.1.2 Each Member’s contributions shall be deducted by his Employer from his salary or wages and paid to the Fund within seven (7) days after the end of the month in respect of which the contributions were made.

4.2 Contributions by the Employer

4.2.1 The Employer shall make a monthly contribution in respect of each Member in its Service at the rate of 5.00 per cent of the Member’s Fund Salary.

...
4.2.4 Contributions by the Employer must be paid to the Fund within seven (7) days after the end of the month to which they relate."

5.5 The third respondent is non-compliant with rule 4 of the first respondent’s rules as it has failed to make contributions for the months enunciated in paragraph 4.1 above.

5.6 The second respondent has a duty placed on it by the provisions of section 13A(1)(a) of the Act and the rules of the first respondent to pay contributions and submit schedules to the first respondent indicating on whose behalf payment is being made, and the first respondent in turn has a duty to pay out benefits to the members. Section 13A(3)(a)(i) states that such contributions must be paid directly into the fund’s account and section 13A(3)(a)(ii) states that the contributions must be paid directly to the fund in such a manner as to have the fund receive the contributions not later than seven days after the end of that month for which such contributions are payable.

5.7 The complainant claims a disability benefit and the first respondent avers that following the termination of the complainant’s employment he became entitled to a withdrawal benefit. The failure to notify the first respondent of the reason for the complainant’s termination of employment was the fault of the third respondent. In Rwexwana v Idaho Spur Provident Fund and Others [2005] 7 BPLR 640 (PFA) it was held that it is essential for the employer to complete a notification form indicating the cause of the termination of employment in order for the fund to determine which benefit is payable. In Tek Corporation Provident Fund and Others v Lorentz [2000] 3 BPLR 227 (SCA) at 235 it was held that the employer in a pension fund at the very least owes a duty of good faith to its employees. As a result of this omission, the disability benefit, in the alternative a withdrawal benefit, has not been paid.
5.8 The issue of failure by an employer to effect payment of contributions to the fund, on behalf of its employees has been canvassed by the Cape High Court in *Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator and Others* [2002] 9 BPLR 3880 (C) at 3839 F-G. The Court held that the members were entitled to claim the loss of their benefits from the employer and the employer was ordered to effect payment thereof. In the circumstances, the complainant should be put in as good a position as if the wrong had not been committed (see *Samancor Group Pension Fund v Samancor Chrome and Others* [2011] 2 BPLR 144 (SCA)).

[6] **ORDER**

6.1 In the result, the order of this Tribunal is as follows:

6.1.1 The first respondent is ordered to exercise its discretion as to whether the complainant would have qualified for a disability benefit had all the contributions been paid and had the claim been submitted timeously, within six weeks of this determination;

6.1.2 In the event of the first respondent concluding that the complainant is disabled as defined in the rules, then the first respondent is ordered to calculate the amount of the disability benefit, that would have been payable to the complainant had all contributions been paid and the first respondent been properly notified of the cause of termination of the complainant’s employment, together with interest thereto at the rate of 15.5% *per annum* from 18 September 2010 to date of payment, within two weeks of the exercise of discretion in terms of paragraph 6.1.1 above;
6.1.3 The first respondent is ordered to inform the third respondent of the amount computed in paragraph 6.1.2 above within three days of computation thereof;

6.1.4 The third respondent is directed to pay the complainant, the amount due in terms of paragraph 6.1.2 within two weeks of receipt of the calculations by the first respondent in paragraph 6.1.3;

6.1.5 In the event of the first respondent concluding that the complainant is not disabled as defined in terms of the rules, the first respondent must inform this Tribunal and the complainant of such decision including the reasons thereof; within eight weeks of this determination.

6.1.6 In the event that the first respondent concludes that the complainant is not entitled to a disability benefit, then the third respondent is ordered to submit all outstanding contribution schedules to the first respondent in order to facilitate the computation of the complainant’s withdrawal benefit, within ten weeks of this determination;

6.1.7 Should the second respondent fail to comply with paragraph 6.1.6, the first respondent is ordered to reconstruct the complainant’s contribution schedules based on the information already in its possession, within twelve weeks of this determination;

6.1.8 The first respondent is ordered to compute the complainant’s outstanding withdrawal benefit, together with late payment interest owed by the third respondent in terms of section 13A(7) of the Act, within one week of receipt of the schedules referred to in paragraph 6.1.6 or 6.1.7 (whichever is applicable);
6.1.9 The first respondent is ordered to transmit to the third respondent its computations in paragraph 6.1.8, within three days of completing them;

6.1.10 The third respondent is ordered to pay the first respondent the complainant’s outstanding withdrawal benefit together with late payment interest as computed in paragraph 6.1.9, within one week of receiving the computations from the first respondent; and

6.1.11 The first respondent is ordered to pay the complainant his outstanding withdrawal benefit, less any deductions permitted in terms of the Act, within one week of receiving payment from the third respondent.

DATED AT PRETORIA ON THIS 8TH DAY OF APRIL 2013

MA LUKHAIMANE
DEPUTY PENSION FUNDS ADJUDICATOR

Section 30M Filing: Magistrate's Court
Complainant: Unrepresented
First respondent: Represented
Second and third respondents: Unrepresented