



4th Floor
Riverwalk Office Park
Block A, 41 Matroosberg Road
Ashlea Gardens, Extension 6
PRETORIA
SOUTH AFRICA
0081

P.O. Box 580, **MENLYN**, 0063
Tel: 012 346 1738, Fax: 086 693 7472
E-Mail: enquiries@pfa.org.za
Website: www.pfa.org.za

Please quote our reference: **PFA/GP/00002474/2013/SM**

REGISTERED POST

Dear Sir,

DETERMINATION IN TERMS OF SECTION 30A OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”): RI MOORE (“complainant”) v NAMPAK GROUP PENSION FUND (“first respondent”); OLD MUTUAL LIFE ASSURANCE COMPANY (SA) LIMITED (“second respondent”) AND NAMPAK PRODUCTS LIMITED (“third respondent”)

[1] INTRODUCTION

- 1.1 The complaint concerns the refusal by the third respondent to regard the complainant’s exit from service as early retirement.
- 1.2 The complaint was received by this Tribunal on 9 April 2013. A letter acknowledging receipt thereof was sent to the complainant on 22 April 2013. On the same date, a letter was sent to the first and second respondents giving them until 22 May 2013 to file their responses. Another letter was sent to the third respondent on 27 May 2013 giving it until 26 June 2013 to file a response. A response was received from the third respondent on 10 May 2013. This Tribunal also received a

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)

response on behalf of the first and second respondents on 4 October 2013. No further submissions were received from the parties.

- 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 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 the third respondent from 1 May 1985 until his exit on 31 October 2012. He was a member of the first respondent by virtue of his employment. The second respondent is the administrator of the first respondent.
- 2.2 On 28 September 2012, the complainant sent a letter to the third respondent giving it notice of his intention to take early retirement as at 31 October 2012. However, the third respondent subsequently informed the complainant that his exit from service is due to resignation and not early retirement. The refusal by the third respondent to regard the complainant's exit from service as early retirement as he had requested is the subject matter of this complaint.

[3] COMPLAINT

- 3.1 The complainant states that he requested early retirement on the basis of the first respondent's rules which entitles employees to retire early between the ages of 53 and 63. He contends that he wanted to take early retirement in order to receive a post-retirement medical aid benefit. However, the complainant asserts that his request to take early retirement, which was initially accepted, was declined by the third respondent in a letter dated 3 October 2012.

3.2 The complainant submits that he was offered a settlement agreement which he rejected because it contained a restraint of trade clause which was never part of his original employment contracts. He states that the first respondent's rules were revised to subject any request for early retirement to the consent of the third respondent. The complainant contends that the amendment to the rules was never communicated to existing members and is contrary to the information contained in the member booklet, which makes no reference to early retirement being subject to the consent of the employer. Thus, he asserts that the revised rules are prejudicial to him.

3.3 The complainant submits that he was unfairly treated by the third respondent in that he will not be entitled to a post-retirement medical aid. He requests an order that his exit from the service of the third respondent be treated as early retirement in terms of the first respondent's rules.

[4] **RESPONSES**

First and second respondents

4.1 The second respondent submits that the complaint is a labour issue between the complainant and the third respondent. Thus, it asserts that it forwarded the complaint to the third respondent to file a response.

Third respondent

Technical points

4.2 The third respondent acknowledges that the complaint is directed against itself and not the first respondent as it declined his request for early retirement. However, it contends that the complaint does not fall within the ambit of section 30A(1) of the Act as the complainant failed to lodge a written complaint with the first respondent for consideration. It also states that the complaint does not fall within the definition of a “complaint” as set out in section 1 of the Act for the following reasons:

- Rule A.2.1.1(b) of the first respondent’s rules states that an employee may take early retirement with the consent of his employer, provided that he is within 10 years of his normal retirement date;
- The complainant submitted a request for early retirement at the end of October 2012, which was declined on the basis that he did not intend to retire. In fact, the complainant took up full time employment as Chief Executive Officer of Astrapak Limited after the termination of his service;
- The decision to decline the request for early retirement does not fall within the definition of a “complaint” in the Act, which stipulates that a complaint must relate to the administration of a fund, the investment of its funds or the interpretation and application of its rules.

The merits

4.3 The third respondent submits that as stated in rule A.2.1.1(b) above, an employee may take early retirement with the consent of his employer provided that he is within 10 years of his normal retirement date. It denies the complainant’s submissions that the first respondent’s rules were amended to require the consent of an employer in order for an employee to take early retirement. It contends that rule A.2.1.1(b) has

been in the first respondent's rules since the defined contribution section of the fund was established in 1996. It states that the first respondent's rules have, at all times, been available for inspection by the members and they are also available electronically on its intranet.

- 4.4 The third respondent submits that the member booklet referred to by the complainant contains a clause on the front cover, which states the following:

“This Summary does not replace the official Rules of the Fund, which can be seen on request. In the event of any discrepancy between the information given in the Summary and the Rules of the Fund, the Rules take precedence.”

- 4.5 Thus, it submits that it was clear at all times that the complainant requires its consent to take early retirement. In fact, it avers that it had no objection to the complainant taking early retirement after the age of 53 provided that he intended to retire and did not intend to take up employment elsewhere. It states that the minutes of its remuneration committee dated 2 October 2012 states that the complainant's request for early retirement would be approved if he confirmed that he did not intend to take up employment elsewhere. It indicates that as recorded in the minutes of its remuneration committee, the purpose of early retirement is to allow an employee to retire with retirement benefits if he is either unable to continue working until normal retirement age or no longer wishes to work until normal retirement age. Early retirement is not intended to allow an employee who intends to take up employment elsewhere to avoid a resignation and receive full retirement benefits while employed elsewhere.

- 4.6 The third respondent submits that the complainant refused to confirm that he would not take up employment elsewhere. It states that the complainant, in fact, took up employment with Astrapak immediately after leaving its service. It concludes that the complainant wanted his

exit from service to be treated as early retirement in order for it to pay contributions to the medical scheme for him and his wife whilst he actively competes against it as a full time salaried employee and director of Astrapak. Therefore, it asserts that the rejection of the complainant's claim for early retirement was fair and reasonable.

[5] THE COMPLAINANT'S REPLY

5.1 The complainant states that the third respondent has been granting early retirement to employees who requested it for years. He submits that the third respondent intends to limit the cost of the post-retirement medical aid scheme and wants to stop funding it. Thus, the complainant avers that he is entitled to take early retirement like other employees.

5.2 The complainant contends that he lodged his complaint directly with this Tribunal in order to avoid a manipulative process by the third respondent. Further, he asserts that rule A.2.1.1(b) of the first respondent's rules was never published in the member booklet and he was not aware of it. Therefore, the complainant insists that he is being treated unfairly and is being used by the third respondent to avoid paying the post-retirement medical aid contributions.

[6] DETERMINATION AND REASONS THEREFOR

Technical issues

6.1 The third respondent's submission that this Tribunal has no jurisdiction to adjudicate this complaint because the complainant failed to lodge a written complaint with the first respondent falls to be dismissed. Section 30A(1) of the Act states that notwithstanding the rules of any fund, a complainant may lodge a written complaint with a fund for consideration by the board of the fund. However, the use of the word may in section

30A(1) of the Act indicates that a complainant is not obliged to first lodge a complaint with a fund before lodging his complaint with this Tribunal. Thus, the jurisdiction of this Tribunal cannot be excluded merely because a complainant did not lodge a complaint with a fund before approaching this Tribunal for relief.

- 6.2 Further, the fact that the decision to decline the complainant's request for early retirement was taken by the third respondent does not exclude the jurisdiction of this Tribunal. The third respondent is referred to the High Court judgment in *Hoffmann v Pension Funds Adjudicator & Others* [2012] 2 All SA 198. The court ruling confirms this Tribunal's jurisdiction to adjudicate complaints between an employer and employee in relation to a pension fund, which has a substantial bearing on the member's pension benefit. It is clear that the third respondent's decision whether or not to consent to the complainant's request for early retirement has an impact on his pension benefit in the first respondent. It is also important in determining whether or not his exit benefit is paid as a withdrawal or a retirement benefit. Therefore, this Tribunal has jurisdiction to adjudicate this complaint as it amounts to a "complaint" as defined in section 1 of the Act.

The merits

- 6.3 The complainant, as a person whose claim is derived from the first respondent's rules, is bound by the rules (see section 13 of the Act). His claim can only succeed if he can show that the third respondent did not act in terms of the first respondent's rules. The first respondent, as a registered fund, is also bound to pay benefits in terms of its rules (see *Tek Corporation Provident Fund and Others v Lorentz* [2000] 3 BPLR 227 (SCA)).
- 6.4 Rule A.2.1.1(b) of the first respondent's rules regulates early retirement and it reads as follows:

“A pension shall become payable to a MEMBER:

(a) ...

(b) On voluntary early retirement before NORMAL RETIREMENT DATE;

Subject to the consent of the EMPLOYER, a MEMBER who is within ten years of his NORMAL RETIREMENT DATE may retire.”

- 6.5 In terms of rule A.2.1.2 of the first respondent’s rules, a member who retires in terms of rule A.2.1.1 shall become entitled to a pension of such amount as can be purchased from a registered insurer with his accumulated credit at the date of retirement.
- 6.6 It is clear that in terms of rule A.2.1.1(b) above, a member may retire early if he is within ten years of his normal retirement benefit and will become entitled to a pension equal to his accumulated credit. However, a member’s request for early retirement is subject to the consent of the employer. The submissions and the first respondent’s rules indicate that rule A.2.1.1(b) above has been incorporated in the rules since the introduction of the defined contribution section on 1 September 1996. There is nothing which suggests that it was later incorporated into the rules by rule amendment as alleged by the complainant. The rules have, at all times, been available for inspection by members and as a result, the complainant should reasonably be aware of the existence of rule A.2.1.1(b) in the first respondent’s rules.
- 6.7 The complainant’s reliance on a member booklet cannot be accepted as the rules supersede the provisions in the member booklet as stated in the booklet. Further, the rules are binding on the members, the fund and the employer who participates in the fund.

- 6.8 However, the issue is whether or not the refusal by the third respondent to consent to the complainant's early retirement is reasonable. It is clear that rule A.2.1.1(b) of the first respondent's rules grants an employer a discretion whether or not to give consent to an employee's request for early retirement. The issue is whether or not the third respondent exercised its discretion reasonably and justifiably in refusing to consent to the complainant's early retirement. It is common cause that the complainant is within ten years of his normal retirement date and is entitled to take early retirement.
- 6.9 The third respondent states that the complainant did not intend to retire as he assumed employment with Astrapak Limited immediately after his exit from its service. It asserts that the complainant also failed to confirm that he will not take up employment with another employer after his exit from service as stated in the minutes of its remuneration committee dated 2 October 2012. Thus, the third respondent established that the complainant did not intend to retire and merely wanted to access the post-retirement medical aid scheme. The third respondent has provided legitimate reasons for its refusal to consent to the complainant's early retirement. There is nothing which suggests that it exercised its discretion unreasonably or arbitrarily.
- 6.10 In light of the submissions and the first respondent's rules, this Tribunal is satisfied that the third respondent exercised its discretion lawfully and reasonably by refusing to consent to the complainant's early retirement.

[7] ORDER

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

DATED AT PRETORIA ON THIS 14TH DAY OF OCTOBER 2013

MA LUKHAIMANE
PENSION FUNDS ADJUDICATOR

Section 30M filing: High Court
No legal representation