



4th Floor
Riverwalk Office Park
Block A, 41 Matroosberg Road
Ashlea Gardens, Extension 6
PRETORIA
SOUTH AFRICA
0181

P.O. Box 580, **MENLYN**, 0063
Tel: 012 346 1738 / 748 4000
Fax: 086 693 7472
E-Mail: enquiries@pfa.org.za
Website: www.pfa.org.za

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REGISTERED POST

Dear Sir,

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT,
24 OF 1956 (“the Act”): P KITZLER (“complainant”) v EDUPEN UMBRELLA
PENSION FUND (“fund”) AND MONDEOR HIGH SCHOOL (“employer”)**

[1] INTRODUCTION

1.1 This complaint concerns the non-payment of a disability benefit by the fund.

1.2 The complaint was received by the Adjudicator on 9 June 2021. On 14 June 2021, a notification of the complaint was sent to the complainant informing him that the matter was referred to the

respondents for possible resolution. On the same date, letters were sent to the respondents informing them about the complaint and giving them until 14 July 2021 to resolve the complaint. An acknowledgement of the complaint was sent to the complainant on 15 July 2021, following the lapse of the period afforded the respondents to resolve the complaint. On the same date, letters were sent to the respondents giving them until 13 August 2021 to file their responses. On 27 August

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 Other Financial Ombud Schemes 0860 OMBUDS (086 066 2837)

2021, a response was received from the fund. On 30 August 2021, a reply was received from the complainant. No further submissions were received.

- 1.3 Having considered the written submissions before the Adjudicator, 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's employment was terminated on 30 September 2019 due to ill-health. The complainant is registered as a member of the fund by virtue of his employment. The employer participates in the fund.

[3] COMPLAINT

- 3.1 The complainant is dissatisfied with the non-payment of a monthly disability income. He submitted that the employer stopped making payment on 30 September 2019 and is in the process of being boarded by the Gauteng Department of Education ("GDE"). The complainant submitted that the employer let his pension fund lapse when they stopped his salary and employment because he was permanently disabled. He submitted that he uses a walker and wheelchair.
- 3.2 The complainant submitted that he was told that there is no disability claim and his policy indicates that there is. He submitted that the fund stated that he is not a member while he is. The complainant submitted that he would like to receive his full benefits as the proper process was not followed by the employer. The complainant attached a benefit statement as at 30 June 2019, reflecting a benefit for permanent health Insurance where a monthly disability income in the amount of R5 859.00 would be payable.

3.3 Thus, the complainant requests the Adjudicator to investigate this matter.

[4] RESPONSES

Fund response

- 4.1 The fund submitted that the complainant became a member of the fund on 1 September 2004. The fund submitted that after the last contributions were received from the employer on 30 September 2019, it was informed by the employer that the complainant was on temporary absence and the contributions to the fund were suspended in terms of rule 8.
- 4.2 The fund submitted that as per rule 8, if a member is temporarily absent from service with the consent of the employer, and the payment of contributions are suspended, the maximum period of approved absence will be 24 month and no retirement benefits will accrue to the member in respect of such period of absence. The fund submitted that the 24 months period will elapse on 1 October 2021 and the complainant will automatically become entitled to his benefit under rule 5 or 7. The fund submitted that it will require a duly completed claim form and payment instruction from the complainant and the employer for payment of his fund benefit.
- 4.3 The fund submitted that at this stage, the complainant's membership to the fund has not been terminated. Neither the administrator or the fund has received a duly completed claim form from the employer or the complainant for payment of his benefit under rule 5 or 7. The fund submitted that should the complainant wish to claim his benefit in the fund, it requests that he completes the attached claim form as soon as possible. Further that, the complainant's current fund benefit amounts

to R288 450.15 as at 26 August 2021 and will continue to earn fund interest until such time that it can apply for a tax directive from SARS.

Complainant's further submissions

- 4.4 The complainant submitted that he does not understand why the fund wants to make a payment with no disability fund payment. The complainant submitted that the Edupen Policy clearly states that he is covered for disability, and he is permanently disabled. The complainant submitted that the employer terminated his job at the end of September 2019, and they made no mention of his Edupen policy and it completely slipped his mind until he looked up his policies months later when money became tight.
- 4.5 The complainant submitted that he is still trying to get boarded by the Gauteng Department of Education (GDE) which is so far behind in its paperwork that it only received a long leave confirmation for 2019 in July 2021. The complainant submitted that he is paid by the GDE, and he was paid by the employer as well - a salary top-up and his Edupen policy through the employer. The complainant submitted that the employer failed to remind him of this Edupen policy and just let payment lapse when it terminated his job at the end of September 2019. The complainant submitted that his employment was terminated because he was permanently disabled and can only walk with a walker for very short distances, and he make use of a wheelchair.

Further submissions

- 4.6 Further clarity was requested from the complainant regarding his status of being medically boarded by the GDE, however, no further submissions were received.

Fund's further submissions

- 4.7 The fund submitted that there is an unapproved permanent health insurance benefit, insured with Sanlam Life Insurance Limited under a long-term insurance contract. However, Sanlam only recently took over the insurance from Absa Life Limited on 1 March 2021. The fund submitted that when Sanlam took over the insurance on 1 March 2021, the complainant was not transferred to Sanlam as an “actively on duty” member and neither was the complainant transferred as an existing disability claimant. In fact, the insurer has no record of the complainant being an insured member under the scheme. The fund submitted that the employer’s underwriting report shows that the complainant does not have any risk benefits as he was indicated as Temporary Absence, no contributions and no cover.
- 4.8 The fund submitted that as to its records on its administration system, it shows that the employer indicated the member to be “temporary absent” after 30 September 2019. Further that Sanlam cannot comment as to what happened on the employer’s side and whether any claim for disability benefits were submitted to Absa Life Limited before Sanlam became the insurer on 1 March 2021.

[5] DETERMINATION AND REASONS THEREFOR

Jurisdiction

- 5.1 The complaint is about a payment from an Income disability policy. An Income Disability policy is a policy issued by the insurer to the

participating employer. Section 1 of the Act defines a “complaint” as follows:

“**complaint** means a complaint of a complainant relating to the administration of a fund, the investment of its funds or the interpretation and application of its rules, and alleging –

- (a) that a decision of the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person, or an improper exercise of its powers;
- (b) that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund by the fund or any person, whether by act or omission;
- (c) that a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant; or
- (d) that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund;

but shall not include a complaint which does not relate to a specific complainant.”

5.2 The Income Disability policy is not provided for in the rules of the fund. It is a Long-Term Insurance contract issued in terms of the Long-Term Insurance Act 52 of 1998. Accordingly, this aspect of the complaint does not constitute a complaint as defined in section 1 of the Act as it does not relate to pension benefits but to benefits payable in terms of an insurance policy. This aspect of the complaint will be referred to the Ombudsman for Long-Term Insurance whose details appear at the foot of this determination as the Adjudicator does not have jurisdiction to deal with complaints relating to insurance policies.

Merits

- 5.3 The issue that falls to be determined is whether or not the fund failed to pay the complainant's ill-health retirement benefit.
- 5.4 In the Supreme Court of Appeal ("SCA") matter of *Municipal Employees Pension Fund v Mongwaketse* (969/2019) [2020] ZASCA 181 (23 December 2020) at paragraphs [42] to [44], Wallis JA held that the rules of a fund are its constitution, and that the doctrine of ultra vires applies.

The complainant's disability benefit claim

- 5.5 The fund submitted that after the last contributions were received from the employer on 30 September 2019 it was informed by the employer that the complainant was on temporary absence and the contributions to the fund were suspended in terms of rule 8.
- 5.6 Rule 8.1 of the fund deal with temporary absence and provides as follows:

- 8.1 Subject to the provisions of Rule 8.3, if a member is temporarily absent from service with the consent of the PARTICIPATING EMPLOYER, and the payment of CONTRIBUTIONS are suspended, the maximum period of approved absence will be 24(twenty-four) months and no retirement benefits will accrue to the MEMBER in respect of such period of absence. The MEMBER will cease to be eligible for the benefits provided for in RULE 6 after a period of 30(thirty) days has expired and should such MEMBER die during the period of absence subsequent to the 30 (thirty)-day period, the provisions of RULE 5 or 7 will apply, as the case may be.

In turn rule 6 provides as follows:

- 6.1 If a MEMBER who has not yet retired in terms of the terms of the RULES dies, the death benefit will be payable, provided that satisfactory proof of the death of the MEMBER is submitted to the FUND and subject to the provisions of RULE 12.13.

5.7 In terms of the rule 8.1 above, after 24 months (which in this case the period lapsed on 1 October 2021), the complainant is entitled to claim for an ill-health early retirement or a withdrawal benefit. Rule 5.4 of the fund provides for ill-health early retirement and provides as follows:

5.4 Notwithstanding the provisions of RULE 5.3, if in the opinion of the PARTICIPATING EMPLOYER, subject to the agreement of the BOARD OF MANAGEMENT and subject to the submission of satisfactory medical proof, a MEMBER, who is not in receipt of a disability income benefit from the DISABILITY INCOME POLICY, is unable to perform such MEMBER'S duties as an EMPLOYEE on account of ill health, such MEMBER may retire at any time prior to NORMAL RETIREMENT DATE. In this event, the MEMBER will be entitled to a pension from an insurer that can be secured by the MEMBER'S EQUITABLE SHARE as at the REALISATION DATE.

5.8 The complainant submitted that he is permanently disabled and is entitled to an ill-health benefit. He submitted that he can only walk using a walker or a wheelchair. As the complainant was a member of the fund at the time of his disability, he should be assessed to determine whether he qualifies for an ill-health early retirement. Therefore, the complainant should provide the fund with medical proof of his disability and the fund should assess whether the complainant qualifies for an ill-health early retirement.

5.9 The complainant submitted that he does not understand why the fund wants to make a payment with no disability fund payment. As stated above in 5.1, the Adjudicator does not have jurisdiction to investigate this policy as it is not in terms of the fund rules, but a policy taken out by the employer. However, to provide clarity, the Adjudicator attempted to contact the previous insurer to find out if the claim for disability was received from the employer but could not obtain that information. However, the current insurer confirmed that when it took over, the complainant was not transferred as an existing disability claimant. It

would seem that when the employer stopped contribution payments in September 2019, it stopped paying for risk benefit and as a result, the permanent health insurance policy lapsed.

5.10 The appropriate remedy is for the complainant to be assessed for ill-health early retirement.

[6] ORDER

6.1 In the result, the order of the Adjudicator is as follows:

6.1.1 The fund is directed to assess whether the complainant qualifies for an early ill-health retirement benefit, within four weeks of this determination;

6.1.2 Should the assessment reveal that the complainant qualifies for an early ill-health retirement benefit in terms of the rules of the fund, the latter is ordered to pay the complainant's ill-health benefit, less the deductions permitted by the Act, within two weeks of completion of its assessment in paragraph 6.1.1;

6.1.3 Should the assessment reveal that the complainant does not qualify for an early ill-health retirement benefit, the fund is ordered to pay the complainant's fund credit that it is currently holding within two weeks of completion of its assessment in paragraph 6.1.1 above; and

6.1.4 The fund is ordered to provide the complainant with the breakdown of his payment within one week of effecting the payment in terms of either paragraph 6.1.2 or 6.1.3 above.

DATED AT PRETORIA ON THIS 17TH DAY OF MARCH 2022

**MA LUKHAIMANE
PENSION FUNDS ADJUDICATOR**

Section 30M Filing: High Court

Parties unrepresented