

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.:PFA/GA/122/98/LS

In the complaint between:

G D Wostman

Complainant

and

Johannesburg Municipal Pension Fund

First Respondent

Johannesburg City Council

Second Respondent

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT OF 1956

1. This is a complaint lodged with the Pension Funds Adjudicator relating to the calculation of the complainant's period of pensionable service. The complainant asserts that she is entitled to a longer period of pensionable service than the fund currently recognizes as being her period of pensionable service.

2. Benefits in the fund are defined with reference to the concept of pensionable service and defined in the rules to mean:

..... a period in years and complete months consisting of
 - (1) a member's contributory service;

 - (2) service purchased in terms of rule 14 by him and by his employer in respect of him and which will be taken into account in the calculation of a benefit in terms of these rules;

 - (2) any bonus service contemplated in rule 15; and

 - (3) any period of potential service contemplated in rule 18

3. Therefore the greater the complainant's period of pensionable service, the

Page 2

greater the benefits she will be entitled to on withdrawal from the fund or on her retirement.

4. No hearings were conducted and therefore in determining this matter, I have relied on the documentary evidence submitted by the parties and the report by my investigator, Lisa Shrosbree.
5. The complainant commenced employment with the Johannesburg City Council (“the employer”) as a permanent part-time internal auditor in 1979. At that time, the rules did not permit part-time employees to join the Johannesburg Municipal Pension Fund (“the fund”).
6. However on 1 July 1984, the definition of “eligible employee” in the rules was amended and part-time employees became members of the fund.
7. “Eligible employee” is defined in the rules to mean a person who
 - (a) is in the service;
 - (2) has attained the age of 17 years but not the age of 60 years;
 - (3) is not a casual or semi-fit labourer unless his employer declares him to be eligible; and
 - (4) is not an employee appointed under contract for a specific period unless his employer declares him to be eligible
8. Permanent part-time employees fell within the ambit of eligibility in terms of this rule. Paragraph (c) and (d) exclude temporary employees.
9. The complainant accordingly became a member of the fund on 1 July 1984.

Page 3

10. It is common cause that no contributions were paid to the fund on the complainant's behalf by the employer prior to 1992.
11. The complainant asserts that she was never informed of the rule amendment in 1984 and only discovered the change when in 1992 her colleague, also a part-time employee, told her that she had been a member of the fund since 1982.
12. On learning this, the complainant immediately approached the employer concerning her membership. The result was that the employer commenced paying contributions on the complainant's behalf from 1 December 1992.
13. In terms of rule 14 of the fund's rules, a member is permitted to purchase pensionable service up to a maximum of 10 years. Rule 14 reads in part:
 - (1) Subject to the provisions of Rule 21(6), a member may at any time purchase a period or further period, such periods not to exceed ten years in the aggregate, of pensionable service
 - (2) In respect of the first three years or lesser period of pensionable service purchased by the member in terms of subrule (1), his employer shall forthwith purchase an equal period, which shall be added to his pensionable service.
14. On 1 February 1993, on the advice of her director, the complainant purchased three years pensionable service in terms of rule 14(1) and the council also purchased three years on the complainant's behalf in terms of rule 14(2). This appears to have been done as an attempted solution to the fact that no contributions had been paid to the fund on her behalf for the period 1984 until 1992.
15. After purchasing the additional service, the complainant then made enquiries as to the possibility of backdating her pensionable service to 1 July 1984, the date

Page 4

upon which, in law, she became a member.

16. The complainant states that after numerous attempts to obtain a favourable response, she finally wrote to the fund in a letter dated 20 December 1993 requesting that the fund permit her to pay arrear contributions in respect of her service with the council for the period 1 July 1984 to 1 December 1992.
17. The fund responded in a letter dated 18 March 1994 that the rules of the fund did not provide for the backdating of service and that it was therefore not possible to accede to her request.
18. It appears that no consideration was given to the fact that the complainant was indeed a member in terms of the rules and that in terms of rule 12 the employer was obliged to deduct and pay contributions to the fund on her behalf for the period 1 July 1984 to 1 December 1992. Rule 12 reads:
 - 12 (1) (a) Every member shall contribute to the Fund 9,5 per cent of his pensionable emoluments: Provided that a female member who was a member on 30 June 1983 and who, on or before 30 September 1983, by written notice to the Fund, so elected, shall contribute 8,5 per cent of such emoluments
 - (2) Every such contribution shall be deducted from a member's salary by his employer, monthly or at such other intervals as the Committee, in its discretion, may determine, and paid forthwith by the employer to the Fund.
- 12 (2) Each employer shall contribute to the Fund on the last day of each month 20 percent of the pensionable emoluments during that month of those of its employees who are members: Provided that the employer shall contribute 18 per cent of the pensionable emoluments of those of its employees who made an election in terms of the proviso to subrule (1)(a).
19. The Executive Committee of the Committee of Management of the fund also considered the complainant's application to backdate pensionable service at

their meeting of 9 June 1994. The minutes of that meeting read in part:

It should be borne in mind that granting this request would not only be setting a precedent but the cost to the Council, if all other part time employees were to make similar applications, could be considerable. Another factor to be taken into account is the time lapse between the date of the rule amendment and this application.

20. The Executive Committee accordingly recommended that the complainant's application be denied and referred the matter to a full meeting of the Committee of Management.
21. The full meeting took place on 17 November 1994 wherein it was resolved that complainant's application to have her service as part-time employee recognized as pensionable service be denied.
22. It appears that although the complainant still pursued the matter after the above resolution had been passed, no further decision was taken by the fund in this regard.
23. The complainant argues that the fund had a duty to inform her that the rules had been amended in 1984 effectively making her a member of the fund. She asserts that its failure to do so and to pay contributions on her behalf constituted maladministration and that she has been prejudiced thereby.
24. According to the complainant the prejudice she has suffered is three-fold:
 - 24.1 Firstly, the fact that contributions were only paid on her behalf from 1 December 1992 means that she has missed out on an additional 8 years pensionable service years which she would have accumulated had contributions been paid from the date she became a member in 1984.
 - 24.2 Secondly, the complainant states that had she been regarded as a

Page 6

member of the fund in 1984, she would have become entitled to a greater period of bonus service in terms of rule 15 which grants one year additional service for each five-year period of pensionable service completed.

- 24.3 Finally the complainant refers to the provisions in the rules providing for early retirement (rule 20) where a member is over the age of 45 years and has completed 15 years or more pensionable service. She states that if for any reason she were to terminate her employment with the employer she would not qualify for early pension as, according to the fund, she has only accumulated 7 years and 3 months pensionable service to date. However if the fund recognized her full period of membership from 1984, she would have met the 15 year requirement on 1 July 1999 and thereby been entitled to take early pension as from that date.
25. The relief sought by the complainant is to have the period of her pensionable service backdated to the date on which she in fact and law became a member of the fund, that is, 1 July 1984.
26. The fund's response to the complaint is that notices were sent to all members of the fund and to all council departments in 1984 informing them of the rule amendment permitting part-time employees membership to the fund. Thus the complainant ought reasonably to have known that she was entitled to join the fund in 1984 and the fact that she only joined in 1992 to her prejudice is due to her own negligence and not attributable to any maladministration on the part of the fund.
27. The complainant's argument as originally formulated was, in a nutshell, that the fund did not fulfill its duty to her to inform that she was entitled to join the fund on

Page 7

1 July 1984 and that therefore she has a right to have her pensionable service backdated to that date so as to put her in the position she would have been had the fund complied with its obligations. Thus her claim was formulated as akin to a delictual claim with a prayer for restitution.

28. However neither the fund nor the employer have considered the fact that there was no obligation on the complainant to seek to join the fund. She became a member *ex lege* by operation of the rule amendment and it was incumbent on the fund and employer to ensure that contributions were paid on her behalf. Thus the complainant's remedy does not lie in a claim for restitution. Rather the complaint in substance is a dispute of law concerning the actual effective date of her membership and the relief she requires is a declarator.

29. The complainant was an eligible employee in terms of the definition contained in the rules as at 1 July 1984. Rule 9(2) states that

Every person who becomes an eligible employee on or after 1 July 1984 *shall become a member as from the date of becoming an eligible employee.....* [My italics]

30. Therefore in terms of rule 9(2) the complainant automatically became a member of the fund on 1 July 1984 and the fact that the fund failed to inform her of the rule amendment permitting part-time employees membership to the fund did not alter that fact. Similarly, the fact that the complainant only applied to join the fund on 1 December 1992 did not mean she only became a member on that date as in terms of rule 9(2), she had been a member since 1 July 1984. There was no obligation on her to apply for membership.

31. The implications of the above are two-fold:

- 31.1 Firstly if the complainant became a member of the fund on 1 July 1984, then in terms of rule 12, the employer became obliged to pay 20% of her salary each month to the fund and also to deduct 9,5% from her salary monthly from that date and pay it to the fund.

“Contributory service”, a component of pensionable service, is defined in the rules to mean the period in years and complete months in respect of which contributions have been made or are *payable* to the fund. We have stated that the employer became obliged to make contributions to the fund as from 1 July 1984. Thus the contributions became payable as from 1 July 1984 and accordingly in terms of the definition, the complainant’s contributory service commenced as from this date. Thus in terms of the rules the complainant’s contributory service is 15 years and 3 months to date.

- 31.2 Secondly, the complainant’s contingent right to bonus service is greater. Rule 15 is the applicable rule and reads:

..... if a member dies, or has his employment terminated or retires he shall be granted in respect of each completed period of five years of pensionable service contemplated in (a), (b) and (d) of the definition of “pensionable service” in rule 1 bonus service of one year, subject to a maximum period of bonus service of ten years

Section (a) of the definition of “pensionable service” refers to the period of contributory service completed by a member whereas section (b) refers to purchased service. We have established that the complainant has completed 15 years and 3 months contributory service and that she purchased 6 years service. Therefore she now has a contingent right to 4 years bonus service as opposed to the two years bonus service which

she would have had had she become a member in 1992.

32. Pensionable service is a factor used to calculate the majority of defined benefits offered in terms of the rules. Therefore the greater the period of pensionable service, the greater the benefits received by the complainant.
33. As discussed, both the complainant's contributory service and bonus service will be greater now that we have established that her membership commenced in 1984 as opposed to 1992. Since both contributory service and bonus service are components of pensionable service, this implies that the complainant's pensionable service is greater and she in turn is entitled to greater defined benefits.
34. In this instance, the complainant is still a member of the fund and the nature of the defined benefits to which she will become entitled in the future in terms of the rules are contingent on the manner in which she exits the fund. For example the benefit she will receive if she retires is different to that she will receive should the council retrench her.
35. In terms of section 30E(1)(a) of the Act, I am permitted to make any order which a court of law can make.
36. In legal proceedings, a court has the power to make a declaratory order, the nature of which is to declare upon rights, which although not yet infringed, are already in existence or will probably come into existence in the future.
37. Because we are, at this stage, uncertain as to the nature of benefit to which the complainant will become entitled, I consider a declarator to be the appropriate remedy and accordingly make the following order, defining the extent of her pensionable service as at the date of this determination.

38. It is hereby declared that:

38.1 The complainant became a member of the Johannesburg Municipal Pension Fund on 1 July 1984.

38.2 The complainant's pensionable service for the purpose of computing her defined benefits in terms of the rules as at the date of this determination is a total of 25 years and 3 months service made up as follows:

Contributory service: 15 years, 3 months

Purchased service: 6 years

Bonus service: 4 years

DATED at CAPE TOWN this 4th day of NOVEMBER 1999.

.....

JOHN MURPHY

PENSION FUNDS ADJUDICATOR