

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.:PFA/WE/374/99/LS

In the complaint between:

J J Roux Complainant

and

Cape Municipal Pension Fund Respondent

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

This is a complaint lodged with the Pension Funds Adjudicator relating to the fund's alleged failure to advise the complainant that a printout which he received reflecting the value of his benefit as at 31 December 1998 in the restructured Cape Municipal Pension Fund was only an estimate value.

No hearings were conducted and therefore in determining this matter, I have relied on the documentary evidence and the report by my investigator, Lisa Shrosbree.

The complainant joined the Cape Municipal Pension Fund ("the fund"), a defined benefit fund, on 30 March 1966. However in 1998 members of the fund were given the option to transfer to the defined contribution section in the Cape Municipal Pension Fund or to the SAMWU National Provident Fund or the IMATU Retirement Fund.

All members were sent an information folder called an "Options Pack" consisting of various documents including a detailed explanation of the differences between a defined benefit fund and a defined contribution fund and a personal benefit comparison for each member showing how his or her benefits in the two types of funds compared. Members were also sent a statement disclosing the transfer values in the event of transfer to one of the defined contribution funds. In addition to the Options Pack, members received various informative pamphlets and could also make use of the

information hotlines put into operation by the fund to answer any queries or problems.

On 13 October 1998, the complainant elected to transfer to the defined contribution section of the Cape Municipal Pension Fund. His membership commenced retrospectively on 1 July 1998. His transfer value at that time amounted to R1 245 710.

Shortly thereafter the complainant gave notice of his intention to resign on 31 December 1998. He has since received a resignation benefit of R 1 296 476.88 from the Cape Municipal Fund but states that he accepted the cheque "without prejudice to his rights". This withdrawal benefit is R50 766.88 more than his transfer value. Because the fund is a so-called paragraph (a) fund the entire benefit received before March 1999 will be tax free.

The complaint

The complainant asserts that at the time he took the decision to resign, he received a printout from the fund reflecting the value of his benefit in the defined contribution fund as at 30 June 1998 and monthly thereafter to February 1999. The printout indicated that the amount available for transfer as at 30 June 1998 was R1 245 710 and as at 31 December 1998, that value would realize an amount of R1 333 204.56.

However after giving notice of his resignation, the complainant learnt that he would receive the sum of R1 296 476.88 as a withdrawal benefit as opposed to the figure of R1 333 204.56 reflected on the printout. The complainant states that he decided on the resignation date of 31 December 1998 on the basis of the figure given in the printout and that there was nothing to suggest that the figure was only an approximation. He also argues that the printout contained no disclaimer to alert him to the fact that he could not rely on the values given.

The relief thus sought by the complainant is payment of the difference between the

amount indicated on the printout and the amount he actually received, that is, the sum of R36 727.70.

The fund's response is that although they are unable to confirm whether or not the complainant was specifically informed, it was their policy to advise members that the values on the printout were only estimate values. Further that the printout was not an official fund document on a fund letterhead or logo which shows that it was never intended to be an official communication or guarantee from the fund.

Rule B 3.1 of the fund's rules reads:

If a **Member** resigns or is dismissed prior to his **Normal Retirement Date**, the **Members Share Account** as at the date of such dismissal or resignation will be payable.

In terms of rule 3.2.3 , a 'Member's Share Account' consists of the member's transfer value as at the date of conversion, the contributions by the member and the employer, any voluntary contributions and transfer values from other funds and finally fund returns, that is, the returns declared by the trustees from time to time, acting on the advice of the actuary (as per the definition contained in rule 3.2.1).

The fund argues that the above rules provide confirmation that no guarantees were made and that the benefits which members received would depend on the investment performance of the fund. Further that in any event it would be unrealistic to expect the fund to know ahead of time what the fund would actually earn on its investment and therefore the probabilities are against the complainant that the fund represented to him that he would receive a specified benefit if he resigned on 31 December 1998. The information given to him was intended to be purely illustrative.

Analysis

The complaint is essentially a claim of misrepresentation, that is, that the fund misrepresented to the complainant that he would receive a greater benefit than he did if he resigned on 31 December 1998. According to the complaint, this misrepresentation induced him to resign on 31 December 1998 to his prejudice.

In order for the complainant to succeed on his claim of misrepresentation, he would have to show not only that the fund acted wrongfully in the sense that it breached a legal duty owed to the complainant to inform him that the value in the printout was only an estimate of the benefit he would receive on resignation but also that the fund acted negligently in failing to fulfill that duty. For if the fund in fact showed the necessary care in spite of non-fulfillment of its legal duty, it would not be liable in delict on account of the absence of fault attributable to it.

The fund concedes in its response that due to the numerous queries received at the time members had to vote, it is unable to trace the person who gave the printout and advice to the complainant or to investigate whether it was adequately stressed to the complainant that the printout contained estimate values only. The fund relies on the fact that it was general policy to inform members that this was the case. The complainant, on the other hand, states that the nature of the printout was never explained to him and that he never in fact requested it but that it was offered to him on one of his visits to the fund's offices.

We therefore have a dispute of fact as to whether or not the fund informed the complainant that the printout was not a guarantee and only an estimate. On the evidence available, this dispute of fact is difficult to resolve. However I find it unnecessary to make a finding in this regard. Assuming for present purposes that the fund did make a misrepresentation by failing to inform the complainant that the figure on the printout was only an estimate figure, in order for the complainant to succeed in his delictual claim, he would still have to show that the fund acted wrongfully and negligently, that is, acted differently from the way in which a reasonable fund would

have acted in similar circumstances.

The Options Pack sent to all members including the complainant was very informative as to what the nature of a defined contribution fund is and the risks associated with it. For example the Technical Guide contained in the Options Pack poses the following question:

Am I guaranteed a specific benefit at retirement from one of these [defined contribution] Funds?

which is answered as follows:

No, the benefit depends on investment returns. If the investment returns are outstanding, you could be significantly better off at retirement than under the defined benefit Cape Municipal Pension Fund. On the other hand, if investment returns are poor you may be worse off at retirement compared to your existing Fund.

Another example can be found under the heading *The Disadvantages* [of the defined contribution fund] of the same document. It reads:

You carry the investment risk, as your retirement benefit is not a promised amount.

And under the heading *Investment Returns* it reads:

Investment returns has a direct bearing on the amount of the final benefit you will receive. The investment opportunity or risk therefore rests with you, the member. Good or poor investment returns will impact directly on your benefits.

You reap the benefit on good investment returns, but carry the risk on poor returns on the money.

In other words, if the investment returns are poor, you will receive a lower benefit at retirement.

I think that the above clearly spells out that in a defined contribution fund, members are

subject to the investment performance of the fund and that no benefit is guaranteed. The above are just three examples of how the fund emphasized this fact to members at the time the complainant would have taken the decision to resign. Another example can be found in the Easy Guide also included in the Options Pack under the heading *Summary* wherein it states:

The key difference between a defined benefit and defined contribution fund is **who bears the investment return opportunity and risk**. In a defined benefit fund the employer bears the investment return opportunity and risk. In a defined contribution fund, you bear the investment opportunity and risk.

On the basis of this information it is safe to assume on the probabilities that the complainant had knowledge and appreciation of the risk involved and agreed to run that risk. As such he voluntarily assumed the risk when he elected to become a member of the defined contribution section and thus it cannot be said that the fund has acted wrongfully in any way.

I am also satisfied that the fund exercised the necessary care towards its members including the complainant by adequately informing them that benefits in the defined contribution fund were not guaranteed and that even if we were to accept that the fund failed to inform the complainant specifically that the printout contained estimate values only, the fund cannot be regarded as having been negligent on that account. The Options Pack, hotline service and information seminars conducted all point to a conscientious effort on the part of the fund to ensure that its members made informed decisions and were aware of the risks associated with a defined contribution fund which is difficult to reconcile with negligent conduct. It was also incumbent on the complainant to ensure that he understood the import of transferring to a defined contribution fund and he could have educated himself in this regard by familiarizing himself with the user-friendly Options Pack.

Thus I am satisfied that the fund did not act differently from the way in which the

reasonable fund would have acted in the particular circumstances and thus it cannot be said that it was negligent.

Therefore the element of wrongfulness and negligence required for the complainant to be successful in a delictual claim of misrepresentation are absent and he accordingly cannot succeed therein.

In any event it appears that the complainant did not fair too badly considering the market crash in 1998 which adversely affected all defined contribution funds.

I requested the fund to give me a breakdown of how the complainant's benefit was calculated. The statement shows clearly the interim interest rates which were declared by the fund for the period 1 July 1998 to 31 December 1998 as they were applied to the complainant's benefit. For the period 1 July 1998 to 30 September, the 12% interest rate declared by the fund earned for the complainant the sum of R35 869.06 as an investment return on his transfer value of R1 245 710. For the period 1 October 1998 to 30 November 1998 after the market crash, a nil interim interest rate was declared so as to reduce the amount which had been overcredited to members and the complainant received only the employer and employee contributions without interest. Finally for the period 1 December 1998 to 31 December, applying the interest rate of 0,5% which was declared for that period, the complainant earned R6 469.97. Thus the cumulative investment return for the entire period the complainant was a member of the Cape Municipal Pension Fund (6 months) was an amount of R54 753.88 which is not a bad return at all.

It should also be remembered that the complainant exited the fund with a withdrawal benefit which was totally tax-free. He has done very well indeed. Had he resigned from the defined benefit section in terms of the rules, he would have received only his contributions plus interest. It is disappointing that the complainant has not appreciated the favourable position in which the fund placed him by giving him the option to transfer

to the defined contribution section. In this regard, I wish to caution fund members in general that the time will come when I shall exercise my power in terms of section 30Q(g) to make a cost award against members who lodge trivial and/or unjustifiable complaints as such complaints are an unnecessary invasion upon the time and resources of this office.

The complaint is accordingly dismissed.

DATED at CAPE TOWN this 16th day of SEPTEMBER 1999.

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JOHN MURPHY
PENSION FUNDS ADJUDICATOR