IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.: PFA/KZN/199/99/NJ

In the complaint between:

D J PEGGS Complainant

and

HUDACO INDUSTRIES GROUP PROVIDENT FUND Respondent

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

Introduction:

This is a complaint lodged with the Pension Funds Adjudicator in terms of Section 30A(3) of the Pension Funds Act of 1956, concerning the computation of the complainant's withdrawal benefit.

After an exchange of correspondence between the Complainant and the Respondent, consisting of a number of letters and other documentation, the Complainant lodged his written complaint with my office on 7 April 1999. No hearing has been held in this matter. Accordingly, in determining this matter, I have relied exclusively on the documentary evidence and argument put to me in writing and the report place before me by my investigator, Naleen Jeram.

Having completed my investigation I have determined the complaint as follows. These are the reasons for my determination.

Background to the Complaint:

The Complainant is Dominique Jacques Peggs, currently residing in KwaZulu Natal.

The Respondent is the Hudaco Industries Group Provident Fund, a fund registered under the Pension Fund Acts of 1956, to carry on business as a provident fund, whose registered address is Hudaco Park, 190 Barbara Road, Elandsfontein.

The Complainant commenced employment with Swift Industrial Products, a member of the Hudaco Group of Companies, on 21st October 1996 as a Technical Sales Representative. The Complainant was retrenched from his employment at Swift Industrial Products on 31st August 1998.

Swift Industrial Products, a member of the Hudaco Group of Companies was a participating employer in the Respondent. It was a condition of employment that the Complainant became a member of the Respondent, which he did on the 1st November 1996. Throughout his employment the Complainant remained a member of the Respondent and made regular contributions thereto.

The complaint:

The complaint relates the interpretation and application of the rules of the Respondent and alleges that a dispute of law has arisen in relation to the Fund between the Respondent and the Complainant in respect of the withdrawal benefit.

The Complainant was retrenched from his employment on 31st August 1998 and the rules of the Respondent applicable to him read as follows:

7. TERMINATION OF SERVICE

7.1 Leaving Service

If a Member who is not qualified to retire in terms of Rule 5 leaves Service for any reason, he shall become entitled to a lump sum benefit equal to:

(1) his Member's Account at the date of leaving Service;
plus

(2) the following percentage of the Employer's Account, less the amounts referred to in parts (d) and (e) of the definition "Employer's Account" in Rule 2, at the date of leaving Service:

Years of Continuous Service	Percentage
Less than 3 years	0
3 years or more but less than 4	50
4 years or more but less than 5	75
5 years or more	100

For the purpose of the above table, "Years of Continuous Service" means the period during which the Member was a Member of the Fund increased by the period (if any) during which he was a member of the Pension Fund;
plus

(3) his Additional Special Benefits; provided that:

(1) the Member is 58 years or older; and

(2) the percentage of such benefit shall be 1.67 percent of the total so referred to for each month that the Member is older than 58 years.

7.2 Payment of Benefit

7.2.1 The benefit in terms of this Rule shall be paid to the Member as a lump sum. Payment shall be made as soon as possible after the date of his leaving Service.

7.2.2 Instead of receiving the benefit entirely as a lump sum, the Member may transfer part, or all, of the benefit to an Approved Provident Fund, an Approved Pension Fund or an Approved Retirement Annuity Fund.

7.2.3 When a benefit has been paid to the Member as a lump sum in terms 7.2.1 or transferred in terms of Rule 7.2.2, the Member shall have no further claim on the Fund.

The Respondent, in a letter dated 7th January 1999 addressed to the Complainant, sets out the amount due to the Complainant, as follows:

> Also attached the rules of the fund 7.1 which clearly indicates that if a person leaves for any reason, the percentages payable on the employers' contributions will be nil if years of service are less than 3 years.

June 1998	EE	ER	TOTAL
Total to date			
as per benefit certificate	4 959	3 542	8 501
July 1998	248	177	425
August 1998	248	177	425
	5 455	3 896	9 351

As per the rules, the member will only receive the EE contributions because his years of service are less than 3 years.

The amount of R5 455 (five thousand four hundred and fifty-five rands), represents the Complainants contributions plus interest thereon. The complainant does not dispute this amount.

However, the Complainant argues that he is also entitled to the amount of R3 896 (three thousand eight hundred and ninety six rands) representing the employer's contributions. In his complaint dated 30th March 1999 addressed to the Pension Funds Adjudicator and the Respondent, he argues as follows:

> It was a condition of employment that he becomes a member of the Respondent and that contributions would be made by him and his employer to the respondent.
>
> The Respondent is a defined contribution fund and contributions made by the employer on the Complainant's behalf formed part of his total remuneration package.
>
> In terms of Rule 7.1 if the complainant had completed three years or more of continuous service, he would on resignation have become entitled to 50% of the employers' contributions made to the respondent on his behalf rising to 100% after five years of continuous service or more.
>
> The complainant, however, was retrenched and has therefore been prevented from acquiring any share to the employers' contributions made on his behalf to the respondent as a result of the decision of the employer and the respondent's application of its rule.
>
> In failing to distinguish between resignation and retrenchment for the purposes of entitlement to the contributions made on his behalf by the complainant's former employer the fund rule is unreasonable and unfair.
>
> Furthermore, in the case of retrenchment, the requirement that the complainant would only be entitled to a percentage of employer contributions made on his behalf upon the completion of three years of continuous service or more is arbitrary and without any commercial rationale.
>
> The rule and its application have caused the complainant to be unfairly prejudiced, unfairly discriminate against him and are therefore an unfair labour practice and unconstitutional.

The Complainant seeks the following relief:

> That the respondent be directed to amend rule 7.1 to provide for a refund of contributions made by an

employer on an employee's behalf in the event of that employee's retrenchment and/or

An order directing the respondent to pay to the complainant an amount of R3 896 being contributions made by the complainant's former employer on his behalf to the respondent or
That the Pensions Fund Adjudicator grant the complainant such other alternative relief as he may deem fit.

The Respondent in a telefax dated 19th April 1999 addressed to the Pension Funds Adjudicator, responded as follows:

He (complainant) contends that the failure to distinguish between resignation and retrenchment for purposes of entitlement of employer retirement funding contributions is unreasonable, unfair, without commercial justification, unfairly discriminates against him and his therefore an unfair labour practice and unconstitutional.

This issue has been raised before and the trustees at the time gave very careful consideration to the issue of whether the cause of the member's withdrawal should affect the entitlement to employer retirement funding contributions. We concluded that the fund should be totally independent of the reason for the member's withdrawal and not become involved in the dispute regarding fault and no-fault dismissals, normal resignations and variations within. In the view of the trustees, this allows for member benefits to be determined without discrimination and for certainty on all three sides to prevail. This means that the member, the employer and the fund itself have certainty.

Some years ago the reporting actuary at Liberty Life, who were acting for a transferee fund in a section 14 transfer, took issue with this same rule and felt that it did not meet the "future benefit expectations" of transferring members. We arranged a meeting at the Financial Services Board to resolve the issue and the actuary and FSB agreed that there was no requirement for retrenched members to receive a benefit different to other forms of withdrawal.

We understand that some vast ranges of vesting scales exist for determining how a member's withdrawal benefit is to be computed in the thousands of funds registered in the country. The complainant appears to suggest that these should be subject to a series of tests viz. reasonableness, fairness, commercial justification and nondiscriminatory. While we are not aware of a legal or regulatory requirement in this regard, we believe that our fund rules would be met such a test.

Analysis of evidence and argument:

The sole enquiry is whether Rule 7.1 as it currently reads is unreasonable and arbitrary? The Complainant, in essence is attacking the Rule on two bases:

(i) the failure to distinguish between resignation and retrenchment for the purposes of entitlement to employer contributions; and

(ii) the requirement that the Complainant would only be entitled to employer contributions if he/she completed a minimum of 3 (three) years of continuous service is arbitrary and without commercial rationale.

In Probert v Malbak Group Pension Fund and Kohler Provident Fund (Case No. PFA/KZN/9/98 page 6) I discussed the test for unreasonableness in relation to pension fund rules.

> The test is essentially one of proportionality. First, the objective which the rule is designed to serve must be shown to be of sufficient importance to warrant overriding the right of the complainant to individual choice and should relate to concerns of social importance in a democratic society. Second, the means adopted should meet with the requirements of suitability, necessity and proportionality. (See Roman v Williams NO 1998 (1) SA 270 (C) 282; Kotze v Minister of Health and Another 1996 (3) BCLR 417 (T)).

The Complainant argues that his retrenchment has led to him not completing a period of at least 3 (three) year's continuous service to enjoy an entitlement to employer contributions. The Respondent argues that:

> The member's entitlement to such employer contributions is set out in the rules of the fund. The employer is not in a position to give the complainant any greater rights to the contributions made by

the employer than the rights contained in the fund rules.

In my view there can be little doubt that an employer's contributions to a pension fund on behalf of a member constitute remuneration. That in itself does not confer rights of ownership to such contributions. Ownership vest in the fund. The member's entitlement consists of a contractual right to receive certain benefits (deferred pay) once and if certain conditions are met. The inquiry in this matter is simply whether the rule making access to the employer contributions conditional upon the specified periods of service is fair and reasonable.

The objective of the rule is clearly aimed at protecting the employer and the fund. The rule allows for a sliding scale in respect of payment of employer contributions. If the continuous service is less than three years then there is no entitlement to employer contributions upon retrenchment, or three years (but less than four) then a member is entitled to 50% of employer contributions, of four years (but less than five) then a member is entitled to 75% of employer contributions and if more than five years of continuous service then a member would be entitled to 100% of employer contributions.

The employer's contribution generally also covers the cost of administration of the fund and other related costs. These costs tend to be greater in the first two years of the service of an employee. Hence, the rule aims at encouraging employees to remain in service and to provide a means of meeting the running costs of the fund. Further, the Complainant and members of the Respondent can be said to be aware or ought reasonably to be aware of this rule when joining the fund and could take the necessary steps through a process of negotiation to ensure its amendment, if they feel the rule is inherently unfair and arbitrary. The object of the rule thus can be seen as of sufficient importance to warrant overriding employee's (with less than three years continuous service) entitlement to employer contributions on retrenchment.

The sliding scale created by the rule only prejudices the employee in his first three years of

employment. The rule is designed in such a way that the longer the employee stays with the employer and the fund, the greater the benefits he/she will enjoy in terms of the rules of the fund. Further, the rule is not only applicable to persons who are retrenched but as well as to members who resigned for whatever reason.

While the rule works something of a hardship for the employee who is retrenched, one needs to recognise the general prescription that an employer's social obligation to employees with short service ought to be less exacting. Such an approach is in keeping with the approach of our labour courts which have consistently recognised that the employment relationship develops continuity, and with it certain expectations of security and additional benefits, only after an initial period of adaptation (see Mtshamba v Boland Houtnywerhede (1986) 7 ILJ 1100 (IC) @ 1104 D-F).

The proportionality test also requires that the means employed should impair the rights or reasonable benefit expectations of the member as little as is reasonably possible. The Complainant did receive a return of his own contributions plus interest (in the region of 10% p.a) thereon. The fact that the Complainant was fully aware of the rule at the time of the commencement of his employment, further supports a finding that his rights have been minimally impaired.

Were I to strike down rule 7.1 on the grounds of unreasonableness and arbitrariness this would negatively impact on all other members and on the administration, functioning and solvency of the fund itself. In the light of the benefits received by the Complainant in terms of the rules of the Respondent and other retrenchment benefits received from the employer, the effect of the restriction is not severe on the Complainant's rights. Hence, the legislative objective is not outweighed by the abridgement of the Complainants rights.

Accordingly, the complaint is dismissed.

However, in conclusion, it is necessary to add a word of caution. The finding in this matter

that the rule is not unreasonable nor an unfair labour practice does not lead to the conclusion that all such withdrawal rules, involving a progressive vesting, will be reasonable and constitutional. The fact that employees with short service can be justifiably excluded from entitlement to employer contributions in a defined contribution fund does not mean that all employees can be so excluded. Pension fund rules frequently do not come into existence in the same manner as contractual terms, accordingly one should avoid interpreting and applying them as if they are the embodiment of a real consensus between the parties in instances when they in fact are not. Members' constitutional rights to fair labour practices may very well justify the modification of early withdrawal rules in defined contribution funds, especially where members' with long service are unfairly penalised when their employment is terminated through no fault of their own. Much will depend on the circumstances, in particular the manner in which the rule came into existence, the role of collective bargaining in the workplace, the nature of the termination and the inherent requirements of justice and fairness.

DATED at CAPE TOWN this 29th DAY of APRIL 1999.

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John Murphy
PENSION FUNDS ADJUDICATOR