

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.:PFA/KZN/334/99/LS

In the complaint between:

R Jandruballi

Complainant

and

Tongaat-Hulett Pension Fund

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 trustees' discretion in terms of the rules to commute a pension at the request of a retiring member. The complainant was initially put onto temporary ill-health retirement as there existed the possibility of his returning to work at a later stage. However when the complainant's medical condition deteriorated, the trustees decided to retire him permanently. The complainant then requested commutation of his pension. However the trustees refused the request on the grounds that it was not possible for a person to commute his pension after his pension payments had already commenced. It is against this decision that the complaint is directed.
2. No hearings were conducted and therefore in determining this matter, I have relied on the documentary evidence, written submissions and the investigation conducted by my investigator, Lisa Shrosbree.
3. The complainant worked for Hulett Aluminum (Pty) Ltd ("the employer") from June 1973 to December 1997 in various capacities. The final position he held was that of Accounts Supervisor in the Profiles Accounts Department of the company.

4. For the duration of his employment with Hulett Aluminum the complainant was a member of the Tongaat-Hulett Pension Fund ("the fund").
5. On 1 January 1998, the employer put the complainant on temporary ill-health retirement on account of cancer rendering him unfit to work.
6. Rule 29 governs ill-health early retirement benefits and reads:

Ill-Health retirement

29 If a member who has not attained the pensionable age is retired from the service by his employer because the employer had decided, after taking medical advice at the expense of the employer, that he is incapable of efficiently discharging his duties in the service through infirmity of mind or body not caused deliberately by his own fault, he *shall be entitled as from the date of his retirement* and subject to the provisions of Rule 16, *to a pension equal to the pension to which he would have been entitled had he remained in the service and paid contributions to the pensionable age and his pensionable emoluments had remained unchanged;*

provided that

- (1) he shall be medically examined at the expense of the Fund, at intervals determined by the Trustees, by a medical practitioner appointed by the Trustees and, if the Trustees find that he is fit for employment, his pension shall be reduced or suspended as the Trustees decide and he may again become a member on terms decided by the Trustees after consulting the actuary; and
 - (ii) the pension payable after he attains the pensionable age shall not be less than that calculated in terms of Rule 24. [My italics]
7. The pension to which the complainant would have been entitled had he

remained in service was that calculated in terms of rule 24 which reads:

Subject to the provisions of these rules, the pension granted to a retiring member shall be equal to one forty-fifth of his final average emoluments per year of pensionable service.

8. In terms of rule 30, the trustees have a discretion to commute a pension for a lump sum. It reads:

Commutation of pension

- 30 (1) The Trustees, in their absolute discretion, may commute for a lump sum**
1. the whole of a pension that does not exceed the maximum amount that may be totally commuted in terms of the Income Tax Act, 1962 (No. 58 of 1962);
 2. at the request of a retiring member whose pension exceeds that maximum amount, not more than one-third of his pension;
 3. not more than one-third of the pension payable to an eligible widow, eligible widower or eligible child of a member who dies in the service that exceeds that maximum amount.

The amount of the lump sum shall be calculated by the actuary, and for this purpose the Trustees may, if the member is retired in terms of Rule 29 before attaining the pensionable age and his pension exceeds that maximum amount, require him to be medically examined at his employer's expense by a medical practitioner appointed by them...

9. The complainant was entitled to a pension in terms of rule 24 which reads:

.... the pension granted to a retiring member shall be equal to one forty-fifth of his final average emoluments per year of pensionable service

10. He received a monthly pension of R5 642.62 commencing 1 January 1998.

11. On paying his pension benefit, the fund informed the complainant that no commutation would be paid as the fund's Group Medical Consultant was of the opinion that he may be able to resume employment in the future if he responded well to treatment.

12. However in June 1999, some 18 months later, on the basis of medical evidence submitted by the complainant, the fund's Group Medical Consultant advised the fund that it was unlikely that the complainant would be able to return to full-time employment.

13. The fund accordingly informed the complainant that they were putting him on permanent retirement.

14. The complainant then made inquiries concerning the commutation of his pension as he was experiencing financial difficulties and wanted to settle some outstanding debts.

15. The fund consulted their actuaries in this regard who responded in a letter dated 28 July 1999 addressed to the secretary of the fund as follows:

"Despite what the rules of a fund may say it is not possible for a pensioner to commute his pension after his pension payments have commenced. The SARS would exercise its discretion to no longer approve a fund should it attempt to provide commutation after retirement. The only leniency is with regard to a

dependents / nominees' pension which may commuted within period of 6 months of the death of a member/ pensioner of definition of "pension fund" in section 1 of Income Tax Act.

The rules in this case in any event only permit the commutation of pension "at the Trustees' discretion, at the request of a *retiring* Member", which clearly implies it is only possible to commute at the date of retirement.

16. Pursuant to the actuaries' advice, the fund advised the complainant that they were unable to accede his request for commutation.
17. The complainant accordingly lodged a written complaint with the fund in terms of section 30 A(1) of the Pension Funds Act of 1956.
18. The fund responded in a letter dated 18 August 1998 as follows:

The granting of a commutation in your circumstances will not be condoned by the Receiver of Revenue. In practice the Receiver will decline to issue the tax directive on any lump sum and he could withdraw his recognition of the Fund if we persist in the payment.

In the circumstances, I regret that we cannot help you any further in this regard.

19. Thereafter the complainant lodged a complaint with my office to the effect that he had a right to the commutation of his pension in terms of the rules and that the trustees had wrongfully denied him that right.
20. The fund responded to the complaint in a letter dated 13 December 1999 as follows:

The Trustees are most sympathetic to Mr Jandruballi's situation and are agreeable to the payment of a commutation provided that, contrary to the advice from our actuary we can have the assurance from the SARS that such action will not

prejudice their approval of the Fund as a pension fund.

21. I understand this to mean that provided the fund will not be prejudiced from a tax perspective, the trustees are prepared to exercise their discretion in favour of the complainant and to grant him the commutation.
22. Before turning to the fund's exercise of discretion, some thought needs to be given to the legality of the fund's rules allowing for payment of what potentially could be a temporary disability benefit.
23. In terms of the Income Tax Act, the purpose of a pension fund must be to *bona fide* provide annuities for employees on their retirement. The definition of a pension fund in the Income Tax Act requires a fund in its rules to impose certain restrictions before it will qualify for tax approval.
24. The relevant part of paragraph (c) of the definition of a pension fund in the Income Tax Act provides:
 - (c) **[The] Commissioner may approve a fund subject to limitations or conditions as he may determine and shall not approve a fund in respect of any year of assessment unless he is in respect of that year of assessment satisfied —**
 - (i) **that the fund is a permanent fund *bona fide* established for the purpose of providing annuities for employees on retirement from employment or for widows, children, dependents or nominees of deceased employees or mainly for the said purpose and also for the purpose of providing benefits other than annuities for the persons aforesaid ...**
25. In so far as rule 29 providing for ill-health retirement benefits makes provision for *temporary* ill-health retirement in that the trustees are permitted to suspend or

reduce a member's pension should the member concerned recover from their illness, this is contrary to the requirements of the Income Tax.

26. The rule in its totality permits the trustees to accept an application for retirement and then some time later to change their mind in changed circumstances. This is akin to a temporary disability scheme which does not belong in a pension fund scheme arrangement.
27. The Act requires the purpose of the fund to be to provide annuities for members on their retirement years without contingencies and on an ongoing basis. Problems of temporary disability should be dealt with through insurance or income replacement schemes.
28. Thus rule 29 in so far as it may contravene the requirements of the definition of a pension fund in terms of the Income Tax Act may be illegal and contra bonos mores.
29. The appropriate remedy in this instance would be to sever that part of the rule which is inconsistent with the Income Tax Act, namely part one of the proviso to rule 29 in accordance with the approach adopted by the Constitutional Court in the case of *Coetzee v Government of the Republic of South Africa 1995 (4) SA 631 (CC)* wherein the following test for severance was formulated:

[If] the good is not dependent on the bad and can be separated from it, one gives effect to the good that remains after the separation if it still gives effect to the main objective of the statute The test has two parts: first, is it possible to sever the invalid provisions and , second, if so, is what remains giving effect to the purpose of the legislative scheme?
30. In the present case, the purpose of rule 29 is to provide retirement benefits to employees who are no longer able to work on account of ill-health. If one were

to sever the proviso to rule 29 whereby the trustees are permitted to suspend that benefit, one would in no way detract from that objective. The effect would simply be that the once an ill-health retirement benefit is granted, the fund will be obliged to continue paying the benefit whether or not the ailing employee recovers. In this way, rule 29 would serve the purpose of providing annuities for employees on retirement, albeit retirement on the grounds of ill health and thereby comply with the requirements of the Income Tax Act.

31. However, for reasons that will become apparent, it is not necessary to set the rule aside and I am prepared to proceed on the basis of the presumption of validity.
32. The trustees in this instance were called upon to exercise their discretion to commute the member's pension on two occasions in the period in question. The first was when the complainant was put onto ill-health retirement on a temporary basis and the trustees decided not to permit commutation. Now had the trustees awarded the complainant commutation at this stage, a situation could have arisen whereby the complainant returned to full-time employment having already been paid his retirement benefit - clearly an anomalous situation which the trustees no doubt wished to avoid.
33. Thus the trustees decision not to award commutation at this stage on the assumption that rule 29 is perfectly legal was rational and reasonable in the circumstances.
34. The second instance involving an exercise of discretion was in June 1999 when the trustees put the complainant onto ill-health retirement permanently and decided to refuse commutation on the basis of the fund's actuary's report that such action could possibly prejudice approval of the fund by the Receiver of Revenue as a pension fund.

35. Immediately it strikes me as somewhat puzzling that the fund did not take legal advice from a tax lawyer nor make any effort to communicate with the SARS directly to determine their attitude in this regard. Instead it appears to have relied solely on the advice of its actuary.
36. I have subsequently written to the SARS myself in a letter dated 18 February 2000 to determine its attitude to commutation after retirement in circumstances such as the complainant's.
37. The SARS has informed me that although commutation is usually not permitted after a member has already retired, it would be prepared to grant a concession to the complainant who is now seriously ill and who probably does not have much longer to live and to permit commutation. The circumstances and the application of an anachronistic rule of questionable validity justify a different approach.
38. Section 7C(2)(a) of the Act reads:

In pursuing its object the board shall -

- (1) take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of this Act are protected at all times especially in the event of an amalgamation or transfer of any business contemplated in section 14, splitting of a fund, termination or reduction of contributions to a fund by an employer, increase of contributions of members and withdrawal of an employer who participates in a fund...
39. Clearly the trustees, in failing to obtain proper legal advice and to approach the

SARS, did not take all reasonable steps to ensure that the complainant's interests were protected and thereby breached their duty in terms of section 7C(2)(a).

40. Therefore by failing to properly apply their minds to the question of commutation and to take all reasonable steps to ensure that the complainant's interests were protected, the trustees fettered their discretion **in that they believed that they were not permitted to commute the benefit when in fact and law, they were entitled to do so.**

41. One inference which could reasonably be drawn is that the fund may be attempting to take advantage of the mortality profit which would accrue on the complainant's death. If this were indeed the case, the trustees could be challenged for having exercised their discretion with an improper purpose. However in the absence of any clear evidence to this effect, I can make no adverse finding. Be that as it may, as explained, the trustees have fettered their discretion and their decision in August 1999 not to commute the complainant's pension should be set aside.

42. As a general principle of administrative law, a court will not attempt to substitute its own decision for that of the authority holding the discretionary power. Rather it will refer the matter back for a fresh decision. In exceptional circumstances however, this principle will be departed from. There exist four recognized situations in which it is considered justified for a court to correct a decision and substitute it for its own, namely:
 - 42.1 Where the end result is in any event a foregone conclusion and it would be merely a waste of time to order the tribunal or functionary to reconsider the matter.

42.2 Where further delay would cause unjustifiable prejudice to the applicant.

42.3 Where the court is in as good a position to make the decision itself.

42.4 Where the tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again.

43. The trustees have indicated in their response that they are prepared to pay the commutation provided they have assurance from the Receiver of Revenue that such action will not prejudice the approval of the Fund as a pension fund in terms of the Income Tax Act. Therefore it is clear that the trustees would now exercise their discretion in favour of commutation were I to refer the matter back to them since the SARS has indicated that it will grant a concession to the complainant and permit commutation.

44. Moreover, the complainant is seriously ill with cancer and probably does not have much longer to live. Therefore this is surely a case where referring the matter back would cause unjustifiable delay to the prejudice of the complaint.

45. This is clearly a case where I am in as good a position to exercise the discretion as the trustees. In fact it would appear that the trustees failed to ensure they had the necessary knowledge to make an informed decision and instead left this task to my office.

I accordingly order as follows:

1. The decision taken in August 1999 by the respondent refusing to commute the complainant's pension is hereby set aside.

2. The respondent is hereby directed to commute for a lump sum an amount of one-third of the complainant's pension within 6 weeks of the date of this determination.

DATED at CAPE TOWN this 21st day of FEBRUARY 2000.

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JOHN MURPHY

PENSION FUNDS ADJUDICATOR