

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.:PFA/GA/870/1999

In the complaint between:

G P Hunt

Complainant

and

Liebherr-Africa Managed Pension Plan

First respondent

Liebherr-Africa (Pty) Ltd

Second respondent

PRELIMINARY 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 refusal of the employer to award the complainant an enhanced benefit on resignation. No hearings were conducted and therefore in determining this matter, I have relied on the documentary evidence and the investigation conducted, under my supervision, by my investigator Lisa Shrosbree.
2. The complainant commenced employment with Liebherr-Africa (Pty) Ltd (“the employer”) as a sales manager on 1 May 1986 and simultaneously became a member of the Liebherr-Africa Managed Pension Plan (“the fund”).
3. The complainant resigned from the employer on 15 May 1997 to take up employment with Komatsu Southern Africa (Pty) Ltd. A withdrawal benefit accordingly became payable to the complainant in terms of rule 25 which reads:
 - (a) If a Member leaves Service before Normal Retirement Date (other than to retire) he may if he has been required to contribute to the Plan elect

- (i) to receive in cash the total of his own contributions and if provided in Rule 2, the interest payable thereon (provided that if the total is less than R200 only this option is available to him), or
- (ii) to receive from his Normal Retirement Date the pension that may be secured by the total of his own contributions and any interest payable thereon (provided that any assurance issued in terms of this option shall unless the Member requests otherwise be endorsed to the effect that it may not be surrendered other than on death or dealt with in any way prior to retirement and that on retirement not more than one third of the pension may be commuted for a cash lump sum), or
- (iii) to request the transfer of the total cash in (i) above to another approved retirement annuity fund to secure for the Member such benefits as may be determined by the Rules of that fund.

4. In terms of rule 26(b), the employer has a discretion to grant a member whose service has been terminated an additional pension. Rule 26(b) reads:

If a Member leaves Service of his own free will or is dismissed for fraud or misconduct (or leaves to avoid such dismissal) the employer may in its sole discretion and on such terms and conditions as it may determine grant to the member part or all of the additional pension (if any) described in clause (a).

5. Rule 26(a) referred to reads:

If a Member's service is terminated before Normal Retirement Date because he is retrenched or becomes redundant (of which the employer shall be the sole judge) he shall be entitled in addition to any benefit due to him under Rule 25(a) to a fully secured assurances of which the sum assured will on the basis of the Assurance Company's subsistence rate of bonus and the annuity rate then determined by the Assurance Company produce a pension from Normal Retirement Date equal to the difference between the pension based on his Final Pensionable Salary and Pensionable Service at the date of actual retirement and, if it is less, the pension described in clause (ii) of Rule 25(a).

6. The complainant elected the option in rule 25(a)(1). His benefit was calculated by Commercial Union, the administrators of the fund at the time, to be an amount of R75 621.93. The complainant was not however granted the additional benefit in terms of rule 26(b). This forms the basis of his complaint.
7. The complainant states that the employer has granted the additional benefit provided for in rule 26(b) on previous occasions; that two other employees who resigned at about the same time as him, namely, one Mr Jessop and Mr Dabner, were granted the additional pension. The complainant argues that the employer thereby created a legitimate expectation that on termination of his service, especially in view of his long service, he too would be granted the additional pension.
8. According to the complainant, after his resignation, he was advised verbally by the employer that it had decided not to grant him the additional pension because he had taken up employment with a competitor of the employer. The complainant contends that the employer has thereby acted arbitrarily and mala fide in the exercise of its discretion.
9. The question for determination is whether the employer exercised its discretion reasonably in terms of rule 26(b) and in accordance with its duty of good faith taking into account relevant considerations and excluding all irrelevant considerations in the decision-making process.
10. The employer states in its response to the complaint that payment of the additional pension is only made to employees whose service is especially meritorious and have thereby contributed to the operational requirements of the employer. Since 1 January 1996, the employer states that twelve employees who were members of the fund left the company of which only

four received the discretionary benefit for exceptional performance. The complainant, according to the employer, did not fit into this category.

11. Furthermore the employer states that invocation of the discretionary rule also takes into account the solvency ratio of the defined benefit fund since it represents a financial liability ultimately borne by the employer due to the funding method of the fund. I take this to mean that in the event of the fund experiencing a period of poor performance, employees can expect that the enhanced benefit will not be granted. At the time of the complainant's resignation, the funding level of the fund was 107% and it had a surplus of R501 878.
12. The employer denies that the complainant was not awarded the additional benefit because he joined a competitor.
13. In light of the above, it would appear as if the employer takes two main factors into account when deciding whether or not to grant an employee the enhanced benefit in terms of rule 26(b), namely, the performance of the employee during his employment with the company and the financial soundness of the fund on termination of employment. I shall deal with each of these considerations in turn.
14. The employer has failed to provide me with any detail regarding the complainant's performance, save to say, that the complainant did not provide exceptional performance.
15. By contrast, the complainant, in its reply to the response to the complaint, has provided me with evidence to support his contention that his performance was in fact exceptional. He states that during two of the ten years he was working for the company, he received the company's salesman of the year award for excellent sales performance. The

complainant has provided me with the certificate evidencing such award to him in 1993.

16. The complainant has also provided me with a letter dated 26 May 1997 addressed to himself from one Mr Lightfoot, the sales and joint managing director of the company to whom the complainant reported whilst working for the company. The letter is seemingly responding to a query from the complainant regarding the pension benefit he would be paid. The letter is cryptically written but Mr Lightfoot seems to be saying that he would be prepared to provide motivations to justify awarding the complainant the enhanced benefit. The letter reads:

With reference to the second paragraph of your letter dated 26 May 1997, I confirm having advised that the value to be paid out would be as per the pension fund rules.

If further motivation was required in order to enhance the amount, I would be willing to do so, but bear in mind that this does not automatically confirm that the total actuarial value will be paid out.

17. Thus the person to whom the complainant reported whilst working at the company, the person probably in the best position to make an assessment of the complainant's work performance, considers his track record at the company sufficiently excellent to qualify him for the additional benefit in terms of rule 26(b).
18. The complainant also points out that Mr Jessop and Mr Dabner who received the enhanced benefit worked for the company for approximately 5 years whereas he (the complainant) was with the company for a period of 10 years.

19. In light of the above it would appear as if the complainant did indeed perform exceptionally well at the company. Other than bald statements by the employer to the effect that the complainant's performance was not exceptional, it has failed to provide me with any evidence to contradict the complainant's evidence.

20. In addition to this, it is interesting to note that employer's initial response to the complaint read thus:

The Employer exercised its discretion in terms of Rule 26(b) of the registered rules of the Fund.

The reason for the Employer's decision not to pay Mr Hunt the additional discretionary benefit was the financial condition of the fund at the time.

21. Therefore initially the question of the complainant's work performance was not even canvassed. This is somewhat puzzling.

22. The above brings us to the second factor which the employer says it takes into account when exercising its discretion in terms of rule 26(b), that is, the financial soundness of the fund.

23. The first respondent has provided me with a copy of the fund's actuarial valuation report dated 1 April 1997 which confirms that at the time of the complainant's resignation the fund had a funding level of 107% and a surplus of R501 878. The employer seems to be saying that since the fund did not have an abundance of surplus funds from which to draw on to pay the enhanced benefit, this was a factor taken into account in deciding not to award the enhanced benefit to the complainant.

24. However, according to the complainant, Mr Jessop and Mr Dabner resigned at about the same time as he did. Yet the consideration of the financial

soundness of the fund on termination of their employment did not prevent the employer from awarding the additional benefit to them. Consistency would entitle the complainant to similar treatment.

25. The two factors upon which the employer normally relies to determine whether or not to exercise its discretion in an employee's favour support awarding the enhanced benefit to the complainant.
26. The unsubstantiated explanation from the employer as to why it refused the complainant the additional benefit is illogical and inconsistent and leads to the adverse inference that the decision was possibly based on irrelevant considerations not divulged in the pleadings.
27. The complainant has suggested that the employer refused him the additional benefit because he resigned to join a competitor of the company. However, on the limited evidence before me, I am unable to make a definitive finding in this regard, although the employer's inconsistent approach would seem to support such a conclusion.
28. For present purposes, I am not satisfied that the employer took all relevant considerations into account nor did it exclude irrelevant considerations in the exercise of its discretion. Therefore prima facie it would seem to have exercised its discretion unreasonably and the decision to refuse to award the complainant the enhanced benefit in terms of rule 26(b) should be set aside on that basis.
29. Normally one refers a failure of discretion of this kind back to the decision-maker for a fresh decision. However, where the end result is in any event a foregone conclusion it will be a waste of time to order the functionary to reconsider the matter. In this instance, it would appear as if the employer is determined not to award the enhanced benefit to the complainant and it

seems unlikely that the complainant would have the benefit of an unbiased decision. I therefore consider this to be a case where I would be justified in substituting the employer's decision with my own.

- 30. Taking into account the fact that the complainant has shown that he performed exceptionally well whilst at the company and the fact that other employees who seemingly performed no better than he did and who resigned at the same time as he did were awarded the additional benefit, as well as the fact that those same employees had five years less service with the company, I am of the prima facie view that the complainant should be awarded the additional benefit in terms of rule 26(b).

- 31. As stated at the outset, no hearing has been held in the matter. Therefore justice requires that the parties be afforded an opportunity to make additional submissions and submit additional evidence in relation to the findings in this preliminary determination.

- 32. I accordingly issue a rule nisi in terms of which the parties are called upon to show cause, if any, within 14 days of this determination why the following order should not be made:

The first respondent is directed pay the complainant the benefit in terms of rule 26(b) together with interest thereon at the rate prescribed by section 2 of the Prescribed Rate of Interest Act within six weeks of this determination.

DATED at CAPE TOWN this 11th day of APRIL 2001.

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JOHN MURPHY
PENSION FUNDS ADJUDICATOR