

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.:PFA/WE/308/99

In the complaint between:

J Hooley

Complainant

and

Haggie Pension Fund

First respondent

Waste Services (Pty) Ltd

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 non-performance of the fund's investment and its alleged failure to inform the complainant of the alternative investment options available to him as a member close to retirement age.
2. 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.
3. The complainant commenced employment with Waste Services (Pty) Ltd ("the company") as a branch manager for the Western Cape on 28 February 1988 and simultaneously became a member of the Haggie Pension Fund ("the fund").
4. In July 1996 the fund converted from a defined benefit fund to a defined contribution fund. The complainant's opening balance in the new defined contribution fund was a fund credit of R284 627.89.

5. At the time of the conversion, the fund sent members a booklet entitled "Haggie Pension Fund Member's Guide". Page 6 of the booklet reads:

The Trustees appoint professional investment managers to manage the Fund's investments and hence your Fund Credit. The Trustees closely monitor the performance of the Fund's assets to ensure that a good long-term return is achieved while also ensuring the investment managers do not take undue risks. The investment managers invest a range of equities, fixed interest securities, property and cash which they believe will give the Fund a good return. While these investments are expected to show a substantial increase in value over the long term, their value may fall in the short term. Accordingly, as you approach retirement you may wish to protect the value of your Fund Credit by exercising an option to convert some or all of your Fund Credit into cash for investment at the ruling call interest rate. You should contact a Trustee if you wish to exercise this option, which will normally be granted if you are within three years of retirement.

6. Thus in terms of the booklet, members close to retirement age had an option to convert some or all of their fund credit into cash to protect it from any possible fall in the market.
7. In or about 10 June 1998, a letter dated June 1998 was sent to members of the fund within 10 years of normal retirement age. The letter reads:

The Trustees of your Pension Fund have decided to introduce a lower risk investment portfolio for members who are within 10 years of their normal retirement.

Should you elect this option, your pension fund money will be invested in Sanlam's fully investing guaranteed fund. In terms of this portfolio your capital is guaranteed. The return you earn on your money is in the form of a bonus which is declared annually in arrears by Sanlam. The aim of this portfolio is therefore to smooth market fluctuations and declare bonuses each year which are stable and beat inflation.

8. On transfer to the new defined contribution arrangement, the complainant was within five years of retirement and therefore, according to the booklet and letter of June 1998, he had the option to convert his fund credit into cash for investment at the ruling call interest rate or to transfer to the Sanlam guaranteed fund.
9. On 1 August 1998, as part of a general company restructuring, all company employees, including the complainant, were transferred from the Haggie Pension Fund to the Chicks Reclam Pension Fund. The complainant transferred to the new fund with a transfer value of R313 425.46.
10. Therefore for the period of the complainant's membership of the Haggie Pension Fund, the net return on his investment was approximately 2.4%. This forms the basis of the first leg of his complaint.
11. The complainant argues that the fund's poor rate of return was due to bad investment on the part of the trustees and that they are liable to him on the basis of maladministration of the fund.
12. The second leg of the complaint is that, according to the complainant, the fund failed to advise him of his alternative investment options as a member close to retirement age. He states that he never received the letter of June 1998 informing members of their option to invest in the Sanlam guaranteed portfolio.
13. It is common cause that had the complainant transferred to the cash portfolio or the guaranteed portfolio at the *inception* of the new defined contribution fund on 1 August 1996 he would have transferred from the Haggie Pension Fund to the Chicks Reclam Pension Fund with a greater transfer value.

14. The complainant sets out his request for relief as follows:

An award of compensation, damages or any other amounts of money to off-set the effects and subsequent loss of fund earnings...

15. I shall deal with the first and second leg of the complaint in turn.

16. The fund sets out the details of its investment strategy adopted for the period of dispute as follows:

During the period 1 July 1997 to 30 June 1998, being the financial years of the first respondent-

50% of the assets of the first respondent were invested in the discretionary balanced portfolio managed by Liberty Life Asset Management (LIBAM). Approximately 65% of that portfolio comprised equities which was the asset class hardest hit by the market crash of 1998.

The other 50% of the assets were invested in an ABSA portfolio which tracked the JSE All Share Index until February 1998. After February 1998 90% of the assets managed by ABSA tracked the Industrial/Financial Index and the other 10% tracked the Mining/Financial Index. The exposure to equities in this portfolio was accordingly very high at the time of the market crash.

The first respondent did not direct its investment managers to invest any of the fund's assets off-shore at the time because the Haggie group was unbundling and it was thought that off-shore investments could make more difficult the transfer of members out of the first respondent as a consequence of the unbundling.

The first major correction which affected the first respondent's investment performance took place in or about August 1997. The All-Share Index declined until January and February 1998 when there was a sudden surge. From March 1998 onwards the All-Share Index was again in decline and it dropped by some 40% during the period May to August 1998. Funds, such as the first respondent, which had a significant exposure to equities (as, the first respondent believes,

most were) suffered a significant reduction in the value of their assets. The reduction in the value of the assets directly affected member of defined contribution funds as their benefits are determined in accordance with their contributions and the returns on the investment of those contributions.

It is for these reasons that the value of the complainant's fund credit did not increase as he clearly had expected.

17. In light of the above explanation, I am satisfied that the fund was not negligent in relation to the investment of its assets. As pointed out by the fund, it adopted a strategy pursuant to expert advice and which did not deviate to a significant extent from that adopted by numerous other funds which likewise were hit by the market crash of 1998. Furthermore the subsequent recovery of the equity market refutes the complainant's contention that the trustees' investment strategy was imprudent. Market statistics reveal that, over the long term, investments in equities out perform all other asset classes. The fund states that it is for this reason that it has not since changed its overall investment strategy despite the market crash.
18. It is in the nature of defined contribution funds that its members carry the investment risk. This means that members suffer the effects of poor investment returns but at the same time receive the benefits of favourable investment returns. This is illustrated by the fact that although the fund did not perform well for the period of the complainant's membership, had he remained a member of the fund after 31 July 1998, the probabilities are that he would have benefited from the fund's chosen investment strategies.
19. For the foregoing reasons, the first leg of the complaint is dismissed.
20. I turn now to deal with the complainant's contention that the fund negligently failed to advise him of the alternative investment options available to him. This is a claim founded in delict and therefore all the elements of delictual

liability must be proved in order for the complainant to succeed. These elements are outlined below:

21. Firstly there must be an act or omission which causes damage or loss to another. Secondly the act or omission must be wrongful in the sense that there must be a factual infringement of a legally recognized interest. Thirdly there must be fault on the part of the wrongdoer, that is, blameworthiness in the form of intention or negligence. Fourthly the claimant must show that he has suffered loss. Finally, there must be a causal nexus between the wrongful act or omission and the loss.
22. The complainant's delictual claim is framed as follows: he contends that pursuant to the booklet and letter of June 1998 he had a right to the alternative investment options; that the fund negligently failed to advise him of the said alternative investment options; that he has suffered loss as a result of that failure in so far as, had he exercised one of these options (that is transferred his fund credit to the cash portfolio or guaranteed fund), he would have transferred to the Chicks Reclam Pension Fund with a greater transfer value.
23. For reasons which will become apparent, I turn firstly to examine whether or not the complainant has proven that a causal nexus exists between the fund's alleged omission and the loss.
24. The question is whether the fund's omission *caused* the complainant's loss in the sense of materially contributing to it. Assuming the fund's failure to inform him and the complainant's loss (which the complainant would have to go somewhat further in proving), the central question for determination then becomes whether or not the requirement of causation has been met.

25. The complainant argues that the fund failed to inform him of the alternative investment options available and that this *caused* him loss – loss in so far as his fund credit available for transfer to the Chicks Reclam Pension Fund was less than it otherwise would have been.
26. However this argument can only be sustained if the complainant can show firstly, that he would have disinvested his pension benefit to the cash portfolio or to the guaranteed fund had he been aware of his alternative investment options and secondly that, had he exercised the said options, the value of his fund credit transferred to the Chicks Reclam Pension Fund would have been significantly greater. If not, then there is not a sufficiently close connection between the fund's omission and the complainant's loss to found a claim in delict. Or to put it differently, the complainant's loss in respect of the fund's omission is then too remote to justify me holding that the fund has incurred any delictual liability.
27. Although the complainant states that he would indeed have disinvested his benefit into the cash portfolio or the guaranteed fund had he been informed of his option to do so, there is no evidence to support this contention. When the complainant transferred to the defined contribution fund arrangement in August 1996, there was no reason to suspect the pending downturn in the market. Not even the experts foresaw the market crash of 1998. The complainant was still within five years of retirement. The majority of members who were within three years of retirement and thus closer to retirement age than the complainant did not elect the cash option despite having received notice of it.
28. The probabilities are that the complainant would similarly not have elected the alternative investment options in view of the favourable market conditions at the time.

29. Regarding the question of whether the complainant's fund credit would have been greater had he elected to disinvest his benefit, it is significant that the complainant denies having received the letter of June 1998 but does not deny having received the booklet. According to the fund, during a telephone conversation with the fund's principal officer, Campbell McKie-Thomson, the complainant stated that he had received the booklet. On the basis of the evidence before me, the probabilities are that the complainant did indeed receive the booklet but either did not read it or decided against the option to invest in the cash portfolio.
30. The omission of the fund must therefore be taken to be its alleged failure to send the complainant the letter of June 1998 advising members of the option to invest in the guaranteed portfolio. The fund states that the letter was sent out in or about 10 June 1998. Assume on a best-case scenario for the complainant that he received the letter on that date and immediately gave notice to the fund of his election to disinvest and the fund acted upon his instruction immediately.
31. This would mean that, at best, the complainant's fund credit would have been disinvested from 10 June 1998 to 31 July 1998, a period of only 7 weeks - certainly not long enough to have had any significant effect on his fund credit in the long term.
32. In any event, the worst of the market crash was felt in August 1998 after the complainant had already transferred out of the fund. Therefore his fund credit would not have been invested in the guaranteed portfolio at the optimal time.
33. The probabilities are therefore that had the complainant exercised his election to invest in the guaranteed portfolio, the effect on his fund credit would have been negligible. Furthermore, as stated, this assumes a best-

case scenario in favour of the complainant and in all likelihood the complainant's election to have his fund credit disinvested would not have been implemented before he was transferred to the Chicks Reclam Pension Fund on 1 August 1998.

34. Therefore since the complainant has failed to show on a balance of probabilities that firstly he would have disinvested his fund credit to the cash portfolio or to the guaranteed fund even if he had received notice of it and secondly that, had he disinvested his benefit, the value of his fund credit would have been significantly greater, there is not a sufficiently close connection between the fund's omission and the complainant's loss to found a claim in delict, that is, the damages (if any) are too remote.
35. In my view, the principal cause of any loss was the complainant's own failure to consult the rules and to acquaint himself with the options available to him. One would have expected him, as a member relatively close to retirement age to have, at the very least, sought advice in this regard.
36. In my opinion, the complainant's failure to be pro-active in his retirement planning and to ensure that he was fully appraised of his options undermines the causal link between the fund's alleged failure to inform him and any damages suffered to the extent that I do not think it could be said that the fund's omission was the *sine qua non* of the complainant's loss. Or if it was, the complainant's failure to seek advice was an intervening omission in the sense of a *nova causa interveniens*.
37. Moreover, it should be noted that in terms of the rules, the complainant did not have a *right* to disinvest his benefit but, at most, to be considered for disinvestment in terms of rule 10.1 which reads:

The Trustees shall be entitled, at their sole discretion, to do anything not inconsistent with the Act or these Rules that, in their opinion, is for the benefit and protection of Members and beneficiaries; provided that any decision taken by the Trustees in terms of this Rule in general, or in terms of any other Rule in particular, which, in the opinion of the Actuary, would effect the determination of the Employer's contributions shall only be made with the prior approval of the Company.

38. This fact, although of a speculative nature, is an intervening factor which also operates to undermine the causal link between the fund's alleged failure to inform the complainant and any loss suffered.
39. Thus since the complainant has failed to prove a sufficiently close connection between the fund's omission and his alleged loss, he cannot succeed in his claim. It is furthermore unnecessary for me to canvass the question of whether the other elements of delictual liability have been proven.
40. For the foregoing reasons, the complaint is dismissed in its entirety.

Dated at **CAPE TOWN** this 5th day of September 2001.

John Murphy

Pension Funds Adjudicator