

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/GA/291/98

In the complaint between:

JACK NICHOLAS PHILLIPS

Complainant

and

JOHANNESBURG MUNICIPAL PENSION FUND

First Respondent

METROPOLITAN BUS COMPANY (PTY) LTD

Second Respondent

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

1. This is a complaint brought in terms of section 30A of the Pension Funds Act 24 of 1956 hereafter referred to as the “Act” concerning the categorisation of the complainant’s termination of employment as an early retirement and not a termination due to incapacity, with commensurately lesser benefits.
2. The complainant is John Nicholas Phillips, a pensioner of the respondent.
3. The first respondent is the Johannesburg Municipal Pension Fund (hereafter referred to as “the fund”), a defined benefit fund duly registered in terms of the Act.
4. The second respondent is the Metropolitan Bus Company (Pty) Ltd, previously a division of the Greater Johannesburg Metropolitan Council, the former employer of the complainant (hereafter referred to as “the employer”).

5. The complainant and the first respondent are representing themselves. The second respondent has not entered an appearance.
6. No hearing has been held in this matter. An investigation under my supervision was conducted by my senior investigator, Karin MacKenzie. Accordingly, in determining this matter, I have relied exclusively on the documentary evidence and written submissions gathered during the course of our investigations.
7. The complainant was employed by the second respondent from 19 July 1972 to 3 March 1995 and had reached the position of senior bus-driver at the time of his retirement. During February 1995 he approached his supervisor with a note from his doctor diagnosing chronic occipital and neck pain due to mild degenerative changes. The doctor recommended that he be given lighter duties as he was of the opinion that the complainant's present work situation was contributing to the condition. According to the complainant, he was advised by various representatives of his employer that he was not eligible for a disability benefit, but did qualify for early retirement. Pursuant to this advice the complainant resigned with effect from 3 March 1995 and presumably received the early retirement benefit to which he was entitled under the fund's rules.
8. The complainant alleges that he was never properly advised of his rights or informed of the choices that were open to him, specifically assessment by a medical board with a view to boarding him in terms of the rules. He apparently expressed dissatisfaction at the time and took the matter up with both his employer and the fund subsequently, although there is no indication in either the complaint or the response as to when this occurred. The complainant now approaches this tribunal for relief. Essentially he is asking that the status of his termination of employment be changed from early retirement to medical disability.
9. The complaint was lodged with this office on 28 August 1998. This office then

addressed a letter to the complainant on 17 September 1998 requesting that he reformulate his complaint, attaching a specimen example for his assistance. Nothing further was heard for a substantial period after which a further letter was addressed to the complainant on 20 January 2000 enclosing a more simplified example of a complaint and advising that if the complaint was not received within the next three months, the file would be closed. It appears that substantially the same complaint was then resubmitted. Standard letters were then sent by this office to the respondents in this matter on 15 March 2000 requiring them to respond to the complaint. No response was received from either the fund or the employer and a further letter was sent to both respondents on 30 October 2000.

10. A response was finally obtained from the fund. It is extremely short and can be quoted in full:

Your letter dated 30 October 2000 seemingly went astray and came to my notice only yesterday.

The member in question had previously taken early retirement and at a later date decided to question the fairness of his superior's who advised him to take early retirement instead of applying for a medical boarding. His appeal was noted and the matter was referred to the Medical Board for assessment.

The Medical Board resolved that the member does not qualify for a medical boarding. The Medical Board report is attached for your information.

It should be pointed out at this juncture that the medical board assessment referred to in the response only took place on 6 October 2000, more than two years after the complaint had been lodged. The complaint is therefore directed at the original failure of the employer to refer the complainant to the relevant medical board for an assessment and not at the finding of the present one, although for the reasons that appear below I do not consider that to be a validly constituted board in any event.

11. The reason for setting out the relative dates above is the fact that this complaint

may have become time-barred in terms of section 30I of the Act and I must therefore decide whether it is appropriate to exercise the discretion conferred on me under that section and condone the non-compliance with the time limits.

12. Section 30I of the Act deals with the time limit for lodging of complaints. It provides:

- “(1) The adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint is received by him or her in writing.
- (2) If the complainant was unaware of the occurrence of the act or omission contemplated in sub-section (1), the period of three years shall commence on the date on which the complainant became aware or ought reasonably to have become aware of such occurrence, whichever occurs first.
- (3) The adjudicator may on good cause shown or of his or her own motion-
 - (a) either before or after the expiry of any period prescribed by this Chapter, extend such period;
 - (b) condone non-compliance with any time limit prescribed by this Chapter.”

13. The event complained of, being the failure to be properly advised on his options at termination of employment, occurred at the time that he took early retirement, in other words in February 1995. The complainant first lodged his complaint with this tribunal on 28 August 1998, seven months later than the time limit prescribed by the Act.

14. As with many instances where an indulgence is sought, “good cause” devolves into its three interactive components: the length of the delay, the explanation for the non-compliance, and the prospects of success of the claim. These three components are elastic and complimentary in the sense that a weak case on the merits may be shored up by a very compelling reason for the delay, and vice versa. In the present case the delay has not been particularly lengthy, and although there

is no explanation for the delay, it is quite probably connected to the fact that the complainant is not legally represented and therefore unaware of the relevant time-limits. More importantly, I believe that there is merit in the claim, as evidenced by the preliminary ruling I am about to make, and this outweighs any notional prejudice that may have been suffered by the respondent in a mere seven month delay in the commencement of proceedings. It may also be mentioned in this regard that the response from the fund does not take the point of time-barring. For these reasons I am prepared to condone the complainant's non-compliance with the time limit imposed by section 30I of the Act.

15. I turn now to the merits of the complaint. The complainant's uncontroverted evidence is that when he approached his employer about work duties more compatible with his medical condition, he was told there were no "soft jobs" and that he would have to take early retirement. In order to decide whether that advice was properly given it is necessary to examine the relevant rules of the fund. Rule 21 regulates the benefit entitlements in the case of partial or total disability. It reads as follows:

21. TERMINATION OF EMPLOYMENT DUE TO INCAPACITY

- (1) If a member's employment is terminated before he attains the pensionable age because he has become, in the opinion of the medical board, either totally or partially incapable of efficiently discharging his duties by reason of infirmity of mind or body caused without his own default, he shall, subject to the provisions of subrule (3), be entitled to a retiring benefit calculated in terms of rule 16; **Provided that the** period of service to be taken into account in calculating such benefit shall be equal to the sum of his period of pensionable service and –
- (a) in the case of partial incapacity, a period equal to –
- (i) one-third of the period of such pensionable service; or
 - (ii) five years; or
 - (iii) the period from the date of termination of employment to the date on

which he would have attained the
age of 63 years,

whichever is the shortest,

any portion of a month in such sum being ignored; or

(b) in the case of total incapacity, a period equal to –

- (i) four fifths of the period from the date of termination of employment to the date on which he would have attained the age of 63 years; or
- (ii) the period contemplated in paragraph (a), whichever is the longer, any portion of a month in such sum being ignored.

(2) If a member's employment is terminated before he attains the pensionable age because he has become, in the opinion of the medical board, either totally or partially incapable of efficiently discharging his duties by reason of infirmity of mind or body caused through his own default, he shall, subject mutates mutandis to the provisions of subrule (3), be entitled to a benefit calculated in terms of rule 20.

(3) If the employment of a special class member is terminated for a reason specified in subrule (1) and the medical board is satisfied that the reason for certifying such member as a special class member is the cause of, or directly related to such member's incapacity, he shall be entitled to the following benefit:

- (a) if his pensionable service is less than 10 years, to an amount equal to 8 per cent of his final average emoluments per year of pensionable service; or
- (b) if his pensionable service is 10 years or more but less than 15 years, to an amount equal to 12 per cent of his final average emoluments per year of pensionable service; or
- (c) if his pensionable service is 15 years or more but less than 20 years, to an amount equal to 16 per cent of his final average emoluments per year of pensionable service; or
- (d) if his pensionable service is 20 years or more, to a retiring benefit calculated in terms of subrule (1).

(4) A pensioner who is in receipt of a pension in terms of subrule (1) or (3)(d) shall, if the Committee so decides be examined by the medical board at intervals determined by the Committee and if, in the opinion of the medical board, he is fit for employment, the pension

payable to him until he attains his pensionable age, may be reduced or suspended as the Committee, in its absolute discretion decides; **Provided that** any decision in terms of this subrule may be varied by the Committee as the result of a further examination by the medical board.

- (5) If a retiring benefit becomes payable to a member in terms of subrule (1) or (3)(d), his employer shall forthwith pay to the Fund an amount equal to the capital value as determined by an actuary, or according to tables furnished by an actuary, of the pension after his death in respect of the period contemplated in paragraph (a) or (b) of the proviso to subrule (1), as the case may be.
- (6) A member who becomes entitled to a benefit in terms of this rule shall not be entitled to purchase service in terms of Rule 14, except that he shall pay to the Fund amounts due in terms of Rule 14(3) in respect of service already purchased.

16. Rule 16 in turn provides:

RETIRING BENEFIT

16. The retiring benefit payable to a member shall consist of –

- (a) a lump-sum equal to 7 per cent of his final average emoluments per year of pensionable service; and
- (b) a pension equal to the percentage specified below and opposite the age at retirement of his final emoluments per year of pensionable service:

EXACT AGE AT RETIREMENT

(YEARS)	PERCENTAGE
60 or under	1,7516
61	1,8296
62	1,9160
63	2,0108
64	2,1140
65	2,2256

PROVIDED THAT-

- (a) if the member's age at retirement is not an exact number of years, a portion of a month shall be ignored and the percentage applicable shall be calculated on the basis of 12 months being equal to the difference between the percentages applicable to the ages in years, specified above, immediately preceding and succeeding the actual age at retirement.

17. Two things are immediately apparent from the rules set out above:

- If it could be shown that the termination of the complainant's employment was due to his total or partial inability to discharge his duties efficiently, he would be eligible for a medical boarding, and
- the benefits flowing from a medical boarding are more favourable than those following early retirement in that retirement on medical grounds is not subject to the early retirement reduction factor.

18. It was therefore clearly in the complainant's interests at the time of termination of his employment for him to have been advised of this option and for the necessary investigations to have been conducted with a view to ascertaining his eligibility for a medical boarding. The employer has a duty of good faith towards the complainant

flowing from the employment relationship, and the failure to advise the complainant of this more beneficial option potentially available to him constituted a breach of this duty and was possibly an unfair labour practice. The rule also by implication imposes a duty on the employer in instances of incapacity to facilitate a proper investigation by the fund into the benefit payable. In the normal course, the complainant could possibly be entitled to the appropriate delictual relief against the second respondent calculated with reference to the financial loss he proves. However, in the present proceedings the fund has been cited as first respondent and, for the reasons that are set out below, I am of the view that there is scope in the rules of the fund to afford the complainant direct relief against the fund entailing a revisiting of the original classification of the complainant's termination of employment. The mechanism for this is to be found in the rules relating to the establishment of a medical board and the procedures for holding enquiries of a medical nature.

19. The creation of the medical board and the procedures it must follow is clearly set out in rule 10. Rule 10 states:

1. The Committee shall appoint a medical practitioner as medical officer for such period as it may decide, to carry out the functions prescribed by these rules or required by the Committee.
2.(*Sub-sections 2, 3, 4, 5 and 6 deal with special class members and are accordingly irrelevant to the present enquiry*)
3.
4.
5.

6.

7. (a) With a view to terminating a member's employment for a reason specified in rule 21(1) and for the purposes of considering in terms of rule 21(4) the reduction or suspension of a pension and for any other purpose required by the Committee or Manager, a medical board consisting of the medical officer and a medical practitioner selected by the member or pensioner, shall examine and report to the Committee or the Manager on any member referred to it through the Manager or any pensioner referred to it by the Committee and such member or pensioner shall submit to such examination at such place and time as the medical board direct; **Provided that** if such member or pensioner fails to select a medical practitioner within a reasonable period after being requested to do so by the head of his department or the Committee, the Committee shall select a medical practitioner on his behalf; **Provided further** that if any employer fails or has failed to refer a member or pensioner who may be or might have been retired from its service due to ill health to the medical board for a decision on whether such member or pensioner should be or should have been boarded, the Committee in its discretion, may refer such person to such board, which shall thereupon follow the procedure for the possible boarding of such person in accordance with the rules; **Provided further** that if a member or pensioner fails to present himself for medical examination as required by the Committee, the Committee may act in terms of rule 21(4) on such other information as may be in its possession.
- (b) If the members of the medical board cannot agree, they may appoint a medical practitioner to act with them as a third member of the board and, should they fail to agree on a third medical practitioner within a reasonable period, the Committee shall appoint a medical practitioner to act as the third member of the board.
- (c) If, after the procedures in subrules (a) and (b) have been concluded, the Committee is not satisfied that a member is incapable of efficiently discharging his duties due to infirmity of mind or body caused without his own default, a further independent medical examination, paid for by the Fund, shall be carried out and reported on to the Committee: **Provided that** if a member fails to present himself for such medical examination as required by the Committee, the Committee may act on such other information as may be in its possession.

8. (a) A member, prospective member or pensioner examined in terms of this rule shall answer all questions truthfully and disclose all information requested by the medical officer, medical board and special medical board.
- b) Should it subsequently transpire that any information given by a member, prospective member or pensioner was materially incorrect or that any material information requested was not disclosed by him, the provisions of rule 43 shall apply, in addition to any disciplinary action that his employer may take.
9. Subject to the provisions of subrule (7)(c), any decision of the medical board or special medical board given in the exercise of its function under this rule shall be final and no appeal therefrom shall be permitted.
10. Fees payable to the medical officer or medical board in respect of a member or prospective member shall be paid by the Fund and recovered from his employer.
20. The import of the above is clear. In cases where employment has been terminated by means other than medical boarding, the committee of the fund has a discretion to review the situation at any later date by virtue of the second proviso to rule 10.7(a) and determine whether or not the member qualifies for a medical boarding due to disability. The procedure for this enquiry is equally well spelt out in the rules. The medical board consists of a medical practitioner appointed by the fund and one appointed by the member, both of whom must examine the member. In circumstances where agreement cannot be reached a third medical practitioner is appointed to break the deadlock. The medical board then reports back to the committee with a recommendation. If the committee is not persuaded that the member is eligible for a disability benefit, it must then refer the member to an independent medical practitioner for a further examination.
21. Reference has already been made to a purported investigation pursuant to this section by the fund. Attention must once again be drawn to the fact that this investigation was only conducted two years after the original complaint was lodged

with this office and absent a complaint regarding its decision I lack jurisdiction to consider its merits. However, in view of the order I intend to make, I consider it apposite to comment on the shortcomings of this so-called medical board enquiry in the interests of staving off further unnecessary litigation.

22. The “Medical Board report” that is annexed to the fund’s response leaves serious doubt as to whether the procedures set out in rule 10 have been followed properly, if at all. The “report” consists of two documents:

- a letter by the fund administrators, NBC Employee Benefits, to the complainant advising him that his request to be considered for a disability pension had not found favour with the Medical Board, and
- an assessment of the complainant’s condition prepared by two occupational therapists in the employ of the fund administrators.

23. The first document, which appears to summarise the findings of the medical board, reads as follows (my italics):

We refer to the above matter and advise that the Medical Board of the City of Johannesburg Pension Fund and the Johannesburg Municipal Pension Fund at a meeting held on 6 October 2000 resolved that there is no evidence that your medical condition had any impact on your functioning at work as Diabetes Mellitus is a controllable condition.

Mild Osteo- Arthritis is a common condition in people over the age of 55 years and with adequate medication and rehabilitation, is not expected to render anyone disabled. Although Mild Osteo-arthritis of the cervical spine was diagnosed three days before you resigned, and no medical treatment has commenced at that stage, *it could not have rendered you totally, permanently and continuously incapable of performing your own duties or any alternative occupation.*

We trust you will find the above in order but should you have any queries please do not hesitate to contact writer hereof.

24. It is evident from this that the criteria used to evaluate disability that appears from the phrase “it could not have rendered you totally, permanently and continuously incapable of performing your own duties or any alternative occupation” is inconsistent with the criteria set out in rule 21 governing disability, which allow for a situation of partial disability, and more importantly do not impose the disqualification of suitability for alternative employment.
25. Reference is made in the report by the occupational therapists to the information made available to them. The relevant paragraph reads as follows:

ASSESSMENT PROCEDURES

Perusal of available information:

1. Medical report by Dr. MJ JcKay (*sic*) dated 25/11/1999
2. Medical report by Dr. M Rahme dated 14/02/1995

26. The medical report by Dr Rahme is of course the one paragraph note that the complainant originally showed to his supervisor prior to taking early retirement. The contents read as follows:

To whom it may concern

This is to certify that Mr. J Phillips is suffering from chronic **occupational** (illegible) + neck pain. Most likely is **due** (illegible) to chronic tension in his daily work. The cervical x-ray showed mild **degenerative** (illegible) changes probably due to his age. I suggest a change his kind of work to a milder kind of job which will help Mr Phillips to overcome his daily pain.

27. I have not been placed in possession of a report by Dr MJ McKay dated the 25/11/1999, and suspect that it is in fact either the note of 24 January 1996 incorporated in the complainant’s original complaint or the note with an illegible date that was attached to his replying papers. In this regard my investigator spoke to the complainant who was adamant that he had not been consulted about

appointing a medical practitioner for purposes of the enquiry, and had no knowledge of this report purportedly from his own treating practitioner. In addition my investigator contacted the fund and the erstwhile administrators of the fund, NBC Employee Benefits, as well as Ms Murcott (one of the occupational therapists who prepared the assessment). To date the only information received has been from Ms Murcott, who indicated that to the best of her recollection no medical reports had been included other than those submitted by the complainant.

28. There is no information as to the constituents of the Medical Board who apparently reviewed the assessment by the occupational therapists on 6 October 2000, and whether included amongst their number were any medical practitioners as stipulated by the rules. What is clear from the wording of the covering letter by the fund administrators to the complainant (quoted in full above) is that no further medical investigations have been conducted pursuant to the diagnosis in February 1995 of an osteo-arthritic condition. This is consonant with the complainant's contention that the issue of medical assessments was never canvassed with him subsequent to termination of his employment in 1995.
29. From this it is quite plain that the procedures set out in rule 10 for referral to a medical board have, for all intents and purposes, been ignored. The complainant is entitled in terms of rule 10.7(a) to appoint a medical practitioner of his choice to form part of the investigation panel, and this quite obviously never happened.
30. It is trite law that a committee (or board of management) can only act in accordance with its rules. Any purported action *ultra vires* those powers is liable to be set aside. Having exercised its discretion in terms of rule 10 to review the circumstances of the complainant's termination of employment, the committee was obliged to follow the procedure set out in the rules. In the absence of such procedural adherence, any finding or recommendation by the "Medical Board" is by its very nature a nullity.
31. I am therefore of the opinion that the complainant is entitled to an order directing

the fund to exercise its discretion in terms of rule 10.7(c) with a view to establishing whether the complainant was entitled to a disability benefit in terms of rule 21 on termination of his employment.

32. I accordingly make the following order:

32.1 The first respondent is hereby directed to exercise its discretion in terms of rule 10.7(c) with regard to an investigation into the entitlement of the complainant to receive a disability benefit under rule 21 effective from the time of termination of his employment, having due regard to the procedures governing the enquiry as set out in its rules.

32.2 The first respondent is further directed to notify the complainant and this office in writing of the outcome of the investigation within 30 days of the date of this determination.

32.3 The complainant is hereby given permission to approach this tribunal on the same papers, as amplified if necessary, for further relief in the event that he is dissatisfied with the finding of the first respondent.

DATED at **Cape Town** this 21 day of JUNE 2001.

John Murphy

Pension Funds Adjudicator