

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.: PFA/GA/14/98/AS

In the complaint between:

John D Roberts

Complainant

and

H H Robertson Pension 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.

The complainant is a member of the respondent and former employee of Robdex Contract (Pty) Ltd a participating employer in the fund. The respondent is the H H Robertson Pension Fund, a pension fund duly registered in terms of the Pension Funds Act of 1956.

The complaint relates to the quantum of the withdrawal benefit paid to the complainant by the respondent on his retrenchment. The parties were unable to resolve the dispute and complainant duly lodged a written complaint with the Pension Funds Adjudicator under cover of a letter dated 3 February 1998. It is common cause between the parties that the complainant has complied with the provisions of section 30A(1) requiring him to lodge a written complaint with the Pension Fund or the employer participating in the fund before lodging it with the Pension Funds Adjudicator. It is also common cause that the respondent has properly considered the complaint and has replied to it in writing as required by section 30A(2). The parties have both supplied supporting documentary

evidence.

The complaint relates to the interpretation and application of the rules of the fund and contends that the complainant has sustained and will sustain prejudice in consequence of the maladministration of the fund by the fund or its trustees in that while he was granted retrenchment benefits strictly in terms of certain rules of respondent other employees who transferred to a newly created fund, the Dorbyl Pension Fund, at a similar time, and in many instances with shorter service with the employer, were granted benefits in excess of the benefits he received, being their actuarial reserve value, while he was specifically denied his actuarial reserve value.

The complaint raises two cardinal issues:

- (1) the complainant's entitlement to a share of the actuarial reserve as at the date of his retrenchment and;
- (2) an allegation that the actuarial value supplied to him has not been calculated in a fair manner.

No hearing was held in this matter but a report was placed before me by Senior Investigator, Antonia Simmons. Accordingly, in determining this matter I have relied on the documents and report placed before me and exchange of correspondence consisting of a number of letters and interrogatories. Having completed my investigation, the parties having agreed that I should determine the matter on this basis I have determined this complaint as follows and for the reasons set out herein.

Background to the complaint

In order properly to comprehend the complaint it is necessary to reiterate the somewhat complex background.

LTA Ltd is a subsidiary of the Anglo American Industrial Corporation Ltd. Steeledale Group Ltd is a subsidiary of LTA Ltd and controls and manages all of the companies within the "Steeledale Division" of LTA Ltd.

LTA Ltd purchased the company then known as H H Robertson (Africa) (Pty) Ltd with effect from the close of business on 13 March 1992. The name of H H Robertson (Africa) (Pty) Ltd was later changed to Robertson-Dekex (Pty) Ltd; but the name of the staff pension fund remained H H Robertson Staff Pension Fund.

According to the respondent LTA Ltd undertook in terms of the aforesaid agreement of purchase and sale of the 13 March 1992 to:

ensure that the company's (i.e. Robertson-Dekex (Pty) Ltd) current pension funds will continue in existence for all existing members as at the effective date and the purchaser (viz LTA Ltd) shall administer the company's pension fund in such a way to maintain its financial soundness and to guarantee past and future benefits to existing members. *The purchaser agrees that no new members will join the company's pension fund* (my italics) as from the effective date, and warrants and shall procure that the rules of the company's pension fund shall not be amended in such a way as to reduce or prejudice any past and or future benefits to the existing members.

The H H Robertson Staff Pension Fund, the respondent, therefore became a closed fund as from 13 March 1992.

A further relevant sale took place with effect from 1 July 1996 when LTA Ltd sold the manufacturing operations of Robertson Dekex (Pty) Ltd to Dorbyl Ltd but retained the contracting operations and the legal entities. The name of Robertson Dekex (Pty) Ltd was subsequently changed to Robdex Contract (Pty) Ltd, the complainant's final employer.

In terms of the agreement of purchase and sale on 1 July 1996 of the manufacturing operations of Robertson-Dekex (Pty) Ltd to Dorbyl Ltd, transferring employees were entitled to transfer their actuarial reserve in the H H Robertson Staff Pension Fund (the respondent) to :

- (a) a retirement fund nominated by the Purchaser (Dorbyl) or
- (b) another pension, provident or retirement annuity fund nominated by the purchaser

The complainant remained an employee of Robertson-Dekex (Pty) Ltd at the time of the sale of a portion of this company to Dorbyl (Pty) Ltd and was not one of the members who was transferred to Dorbyl (Pty) Ltd. The complainant had at all times been employed within the contracting operations of Robertson Dekex (Pty) Ltd and not within the manufacturing operations which was the portion which was sold to Dorbyl (Pty) Ltd.

The complainant continued to remain an employee of Robertson Dekex (Pty) Ltd after it changed its name to Robdex Contract (Pty) Ltd.

On 12 July 1996 a document entitled "Company Announcement" was made available to all employees by Robertson-Dekex notifying them of the acquisition of the manufacturing operation of Robertson-Dekex by Dorbyl.

A further notice to all employees of Robdex (Pty) Ltd dated 14 November 1996 indicated to employees that it had become necessary to restructure the company which restructuring might include a reduction in staff level.

Finally a notice was circulated to all employees of Robdex Contracts on 21 November 1996 notifying them that cuts in staffing were unavoidable.

In a letter dated 29 November 1996 from Steeledale Reinforcing and Engineering Industries, part of the Steeledale group, to the complainant, he was notified that he was to be retrenched with effect from 31 December 1996. Inter alia the letter stated that:

Pension Fund - You will, in due course , receive a refund of employer and employee contributions on a retrenchment basis from the LTA Pension Fund/H H Robertson Fund. Your membership with the fund and allied benefits will continue up until 31 December 1996.

A subsequent letter to the complainant from Robdex Contracts (Pty) Ltd informed the complainant inter alia that:

Your pension fund, H H Robertson, has been informed and they are busy calculating the following to which you are entitled as a cash refund. The processing takes approximately six weeks. Please refer to the attached extract from the rule book (rule 6.2.2.).

In addition the following options will also be considered apart from the cash refund -

- (a) transfer to an approved retirement fund;
- (b) take deferred pension

The rule of the respondent to which complainant was referred reads as follows:

Rule 6 : Withdrawal Benefit

6.1. Right to and amount of withdrawal benefit

If a MEMBER leaves the EMPLOYER'S service before retirement, he will have the following options:

1. PENSION

The MEMBER may elect to receive a deferred pension payable from his NORMAL RETIREMENT DATE. Such pension shall be equal to

- (i) the pension that can be provided by the amount in Rule 6.1.3. or
- (ii) the pension calculated in terms of Rule 4.1.2. in respect of PENSIONABLE SERVICE and FINAL PENSIONABLE SALARY as at the date of withdrawal, provided that such pension shall not be less than the pension in (i) above.

The provision of these Rules shall mutatis mutandis apply to the deferred pension.

OR

2. TRANSFER TO OTHER FUNDS

The MEMBER may direct that the amount in Rule 6.1.3. be transferred to an APPROVED RETIREMENT FUND or an APPROVED RETIREMENT ANNUITY FUND. Such MEMBER shall not be entitled to any other benefit in terms of this Rule.

OR

3. CASH

The MEMBER may, six months after leaving the EMPLOYER'S service or such shorter period as the BOARD OF TRUSTEES may decide, take in cash a refund of

- (1)
 - (i) in respect of a MEMBER who has completed 10 or more years of PENSIONABLE SERVICE twice his OWN CONTRIBUTIONS increased by one third in respect of contributions (if any) made by such MEMBER under the OLD FUND, or
 - (ii) in respect of a MEMBER, other than in (i) above, his OWN CONTRIBUTIONS plus 4 per centum thereof for each completed year in excess of two for which contributions were made hereunder.
- (2) where his withdrawal is due to retrenchment
 - (i) in respect of a MEMBER with one or more years' service, twice his OWN CONTRIBUTIONS plus 4 per centum thereof for each completed year in excess of one for which contributions were made hereunder, or
 - (ii) in respect of a MEMBER with less than one year's service, all his OWN CONTRIBUTIONS

PLUS

- (3) in respect of a MEMBER who has made past period contributions in terms of Rule 3.1.2.(ii) which is to be applied in terms of Rule 4.4.(b), all such contributions together with 6 per centum per annum compound interest thereon.

Any option elected in terms of this Rule shall be irrevocable.

It is clear from the documentation in my possession that the members of respondent, at the time of sale to Dorbyl and changes within Robertson-Dekex, were concerned about their status in the fund, their rights and value of their pensions. There were various communications between members and management including at least one recorded meeting. The members, amongst the requests and concerns raised, indicated that they wished to be informed of the total actuarial reserve value of the respondent. The members were finally supplied with certain answers to queries and were notified that:

- actuarial valuation figures had been sent to the principal officer on 22 October 1996
- there were 50 active members
- the total actuarial reserve value of all members was R8 042 278.00
- an amount of R9 020 935.86 was transferred to the Old Mutual Optiplus Fund in respect of the pensioners as at 1/1/96
- on winding up a member would be entitled to a share of the market value of the fund over the liabilities, while on transfer he would only become entitled to his actuarial reserve
- members who had transferred to the Dorbyl Provident Fund would become entitled to a share of the surplus on winding up of the fund, should this take place within twelve calendar months of transfer

The complainant was notified by Robertson-Dekex in a letter dated 14 January 1996 that he would be entitled to twice his own contributions as well as four per centum interest for each completed year of service in terms of the rules of the respondent. An indication was also given that options had been explained to the complainant by a

representative of Alexander Forbes.

On 20 May 1997 a letter was directed to complainant by the Steeledale Group enclosing a letter from Alexander Forbes which notified the principal officer of respondent that R105 204.09, being the complainant's retrenchment benefit less tax as calculated by Alexander Forbes, had been deposited in complainant's bank account by Alexander Forbes. The benefit was calculated in accordance with the rules of the respondent and in particular rule 6.1.3(1)(ii) and rule 6.1.3(3) the break down of the benefit paid was as follows:

Past Service Contributions	R 3 941.41
Own Contributions	<u>R 43 314.86</u>
	R 47 256.27
Plus twice Contributions	<u>R 47 256.27</u>
	R 94 512.54
Plus 4% for every year in excess of one	R 52 927.02
Total Retrenchment Benefit	R147 439.56
Less Taxation	R 42 235.47
TOTAL BENEFIT PAID	R105 204.09

On 2 June 1997 and as soon as he became aware of this deposit complainant notified Old Mutual that he had at no time given an instruction for this amount to be paid out to him in cash but that rather he was in the process of disputing the quantum and he requested that the transaction be reversed. After various negotiations the transaction was reversed and the aforesaid sum returned to the respondent.

Complainant repeatedly requested respondent to supply him with his actuarial reserve value but this was not forthcoming. However, as a result of a letter dated 21 August 1997 from the Financial Services Board to the respondent's brokers, Alexander Forbes, in which it was recommended that the complainant should be advised of the value of his

actuarial reserve as at 31 August 1996; complainant was notified in a letter dated 5 November 1997 from Alexander Forbes that his actuarial reserve value in the respondent as at 31 August 1996 amounted to R229 403.57. In respect of withdrawal due to retrenchment. Alexander Forbes, however, stressed that the rules of the respondent did not provide for actuarial reserve values to be paid to a member on retrenchment. No calculations were supplied regarding the quantum of the actuarial reserve and no explanation was given for the statement that the actuarial reserve value supplied to the complainant was "in respect of withdrawal due to retrenchment".

The complaint

As has been indicated above the complaint in this instance relates to the interpretation and application of the rules of the fund and contends that the complainant has sustained and will sustain prejudice in consequence of the maladministration of the fund by the fund or its trustees. More specifically the complainant objects to the quantum paid out to him by respondent on his retrenchment from his employer and alleges that he should be entitled to obtain his actuarial reserve value in line with other members leaving fund at the same time. The complainant further alleges that the actuarial value which was finally supplied to him has not been calculated in a fair manner.

The complainant therefore requests that the actuarial value as supplied to him be independently appraised as he does not accept the value as having been calculated in a fair manner and; once the actuarial value has been independently appraised and approved requests payment of the actuarial value together with interest accrued since the date of his retrenchment to him.

The complainant in effect argues that since the restructuring of the company, his employer, and various sales and purchases placed some employees and members of respondent in the invidious position of having to be retrenched through no fault of their own and further since this was entirely beyond their control they should, on leaving the respondent be placed in the same position as their colleagues and peers who were in

the fortunate position of being transferred to new employment and who were granted their actuarial reserve value on leaving the respondent and transferring to the Dorbyl Provident Fund.

Complainant stresses the fact that he had been employed by the same company (despite its various sales, purchases and name changes) for 23 years and that this was relevant in establishing a fair sum to be paid to him on his leaving the respondent as a result of retrenchment and through no fault of his own.

Complainant justifies his request that his actuarial reserve value be paid out to him on the basis that:

- (i) the employees leaving the respondent and transferring to the Dorbyl Provident Fund were granted their reserve values;
- (ii) an allegation that Mr Pat Thomas of Alexander Forbes, brokers to the respondent, had informed members at a public meeting that it was believed that members would receive their actuarial reserve; and
- (iii) fairness ought to play a part in determining the amount which would be allocated to members and that the dictates of fairness, with due regard to his length of dedicated service ought to dictate that the complainant should at least obtain the same value as other members leaving the fund despite the fact that the other members were to be transferred to new employment while complainant had been retrenched.

The respondent's case is simple. The respondent submits that a strict interpretation of the rules is required.

The respondent confirms that the complainant was retrenched at the end of 1996, and states that in terms of the rules of the fund complainant is entitled to a withdrawal benefit due to retrenchment which effectively amounts to twice his own contributions plus 4 (four) per centum thereof for each completed year in excess of one for which

contributions were paid. The complainant is further entitled in terms of Rule 6.1 to elect to receive a deferred pension, to transfer the benefit to an approved pension fund or an approved retirement annuity fund or to receive the benefit in cash. The respondent states categorically that in terms of the rules of respondent the complainant is not entitled to a share of the actuarial reserve.

With regard to complainant's allegation that his actuarial reserve was not calculated in a fair manner respondent refers me to a letter from Alexander Forbes in which it is confirmed that the actuarial reserve in respect of complainant was calculated in conjunction with the whole membership of the respondent by the actuary prior to the transfer of members to the Dorbyl Fund. The actuarial reserve was based on the actuarial assumptions used by the actuary at the last valuation of the fund. The respondent, however, indicates that in the event of complainant wishing to have the actuarial reserve "independently appraised" they were willing to arrange for this provided that the complainant is prepared to pay for any professional fees incurred in this regard.

The respondent confirms that members of the respondent who were transferred to Dorbyl Ltd were in the process of having their actuarial reserves transferred to Dorbyl Ltd Provident Fund of Preservation Fund, but indicates that the arrangements in this regard were in terms of the sale agreement with Dorbyl Ltd.

Determination

The complainant has failed to establish that the that the fund has improperly exercised its powers or to establish maladministration by the fund through discrimination or arbitrary deprivation of property. From the evidence before me I am unable to establish that there has been unfair and irrational exclusion of the complainant from benefits afforded to other members similarly situated. I am thus unable to establish that there exists any maladministration which can be considered a constitutional matter. There is no allegation that other retrenched members of staff were accorded different rights or that they were allocated their actuarial reserve value. It would appear, rather, that the respondent proceeded in terms of and according to the rules of the fund which applied

to all members. The complainant was, thus, not treated differently from his fellow employees but was as a result of an unfortunate retrenchment exercise dealt with strictly in terms of the rules of the fund. In so far as the complainant has required that his actuarial reserve value is to be paid to him I am not in a position to order such relief. The amount due to complainant is that stipulated in terms of Rule 6 of the respondent.

The transferring employees have greater rights than the complainant by virtue of both the sale agreement in terms of which a portion of the complainant's employer was sold to Dorbyl Limited and also by virtue of section 14 of the Pension Funds Act of 1956. In terms of clause 15.6 of the sale agreement to Dorbyl Limited it was specified that transferring members would be entitled to transfer their full actuarial benefit from the respondent either to a retirement fund nominated by the purchaser (Dorbyl Limited) or to pay the said accrued benefit to one or more retirement funds acceptable to the transferring member the transferor fund and the parties to the sale agreement. The rights of the transferring employees were also greater than the rights of the complainant by virtue of the provisions of section 14. Section 14 forms part of a regulatory scheme aimed at protecting the investment of members pension funds. Any transfer of business in terms of section 14 must be reasonable and equitable and must accord full rights to the members reasonable benefit expectations. As such it may be argued that the reasonable benefit expectations of transferring members subject to a section 14 scheme may include actuarial reserve values. This right is statutorily entrenched whereas no right to a specific level of pension benefits is entrenched by statute in respect of retrenched employees.

It is also necessary to assess the reasonableness of any rule and whether such rule as it stands and as it is applied is unconstitutional. As I have stated previously, rules or decisions which unjustifiably infringe the Bill of Rights normally will be considered unreasonable, *ultra vires* or an unlawful exercise of the fund's powers. Section 39(2) of the Constitution directs me when interpreting legislation (including pension fund rules) "to promote the spirit, purport and objects of the Bill of Rights" of the Constitution. I am therefore obliged to consider whether or not the rule applicable here should be struck down for constitutional invalidity. An enquiry into the reasonableness of the rule requires an interpretation of the rule's objective and the proportionality of its means and effects. The objective which rule 6 in this matter is designed to serve is part of the overall purpose of a defined benefit fund, that is to ensure that the defined benefits promised to its members are indeed available to them when they reach the age of retirement. Insofar, however, as reform to effect the socially desirable objective of greater equity in withdrawal benefits in defined benefits fund may be desirable, it would seem to me, that it is a matter for legislative intervention. Any attempt to achieve this

end exclusively through the process of adjudication is attendant with risks and potentially adverse consequences for the industry as a whole. Thus while it may be argued that it would be desirable for the complainant to obtain a higher value than that allocated in terms of rule 6, the rule as it stands is not per se unreasonable and it would be inadvisable for me to compel the fund to make payment of a higher amount than that stipulated by the rule.

In terms of rule 6 the complainant may elect to obtain a cash payment calculated in terms of rule 6.1.3, or to choose the option of a deferred pension. In this regard I have been supplied with information by Mr Jonathan Pitman of Old Mutual , actuary and valuator of the respondent that in terms of the rules of the fund the deferred pension will be

- i. that which can be provided by the lump sum amount determined in rule 6.1.3 (2);
or
- ii. the accrued pension based on pensionable service and final pensionable salary as at date of retrenchment provided that this is not less than the pension calculated in 1 above.

Mr Pitman informs that the lump sum benefit in terms of rule 6.1.3 (2) is R147,440.00 being twice his own contributions plus interest. This total does not include the necessary deduction for tax. I am further informed that the complainant's accrued annual pension is R31,529.00 which would be payable at normal retirement date and would be subject to increases granted by the trustees, between the date of retrenchment and normal retirement dated. Mr Pitman informs me that the actual pension payable from normal retirement date is not known since future pension increases are not known. The actuarial value which Mr Pitman would place on the deferred pension as at the date of retrenchment in terms of 2 above is R137,008.00 using the valuation basis applicable at the date of retrenchment. It is clear, therefore, that the actuarial reserve value would not be utilised in respect of the benefit due to the complainant either in terms of rule 6.1.3.

It is to be noted, however, that a retrenchment benefit of R105,204.09 was transferred to the complainants bank account without complainant's instruction and was, thus,

returned to the respondent by the complainant. The respondent is therefore in possession of the complainants benefit due to him in terms of rule 6.1.3 of the respondent.

Arising from the evidence placed before me it has become apparent that the complainant did not and still does not understand the implication of the options available to him. In so far as the complainant is not properly informed regarding his understanding of the three options available to him in terms of rule 6 it has been necessary for me to investigate whether the respondent did or did not provide adequate and appropriate information to the complainant.

The duties of the Board of Management of the Pension Fund are codified in section 7C and D of the Pension Funds Act of 1956. Section 7D(1)(c) includes among the duties of the board the duty to ensure that adequate and appropriate information is communicated to the members of the fund informing them of their rights, benefits and duties in terms of the rules of the fund. Section 7C(2)(b) and (d) require the board of a fund in pursuing its object to act with due care, diligence, good faith, and with impartiality in respect of members and beneficiaries.

In the spirit of ensuring adequate disclosure the Financial Services Board produced Circular PF No. 86 which details the disclosure requirements to be observed by funds. Inter alia funds are required to provide to their members a statement of the benefits that become payable at retirement, death, disability and ill health, early retirement and withdrawal. Regarding withdrawal the circular states:

Withdrawal from service

Preferably each member will have all options in terms of the rules explained before a cash payment is selected. As a final failsafe mechanism, the letter enclosing any cash payments must refer to any benefits which may be forfeited as a result of the cash payment, including the elimination of liability for tax on transfer to another pension fund as defined in the Income Tax Act of 1962, preservation fund or retirement annuity.

In this matter it is clear on the evidence before me that despite the fact that the complainant had access to the rules of the fund and more particularly to rule 6 thereof

relating to withdrawal benefits and further, despite the fact that a meeting was held at which a member of Alexander Forbes explained the options to the retrenched members adequate information has not yet been supplied to the complainant. It is necessary for the fund to ensure that each individual member fully comprehends the financial consequences of any option chosen by him. In order to ensure such comprehension, it is clearly necessary for the fund to supply the member with precise calculations pertaining to each option available to him and a full explanation of the financial and tax implications thereof. It is further necessary for the fund to ensure that the trustees explain such written calculations and make available to the complainant the option of an oral explanation in the event of the complainant failing to comprehend the details.

Therefore, while it is clear that the complainant in this instance is entitled to the amount as calculated in terms of section 6.1.3 (2)(i), the manner in which he may deal with this quantum has not been adequately explained to the complainant. I therefore find it is necessary for the respondent to supply the complainant with full and detailed calculations relating to all options available to him and furthermore to enable the complainant to avail himself of an oral explanation of same by a suitable member of respondent's administrator in order for him to be placed in a position in which he will best benefit from the amount available to him. In so doing, I require the respondent to be placed in the position that he would have been in at the time of his retrenchment had the options been properly explained to him at the time and had he chosen the option best suited to his needs financially.

The order of this tribunal is therefore as follows:

1. The complainant shall be entitled to the benefit due to him as stipulated and calculated in terms of rule 6 of respondent.
2. The respondent is directed to grant the complainant the right to elect the option of his choice as was available to him at the date of his retrenchment in terms of the rules then obtaining within 6 weeks of the date of this order.
3. The respondent shall supply to the complainant detailed calculations relating to

each of the options available to him and indicating the full financial and tax consequences thereof within 10 days of the date of this order and shall make available a suitable advisor to discuss the options with the complainant should he so require prior to the complainant making his choice.

4. The complainant shall notify the respondent of his choice option after having been informed of the financial consequences thereof, within the 6 week period referred to in 1 above.
5. The respondent shall effect the necessary calculations, reverse any transactions made to date in respect of the complainant, should his election so demand, and proceed in accordance with the option elected by the complainant within 10 days of the option having been communicated to the respondent and ensure that the complainant is placed in the financial position that he would have been in had he exercised such option on the date of his retrenchment.

DATED at CAPE TOWN this 10th day of June 1999.

JOHN MURPHY

THE PENSION FUNDS ADJUDICATOR