IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/KZN/86/98/SM

In the complaint between:

DAVID WILLIAM ATKINSON First Complainant

& 7 Others Second to Eighth Complainants

and

SOUTHERN FIELD STAFF DEFINED CONTRIBUTION 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 in terms of section 30A (3) of the Pension Funds Act of 1956 ("the Act"), concerning alleged unfair withdrawal benefits on retrenchment, the issue being whether the relevant rule is unfair, unreasonable and/or inconsistent with the Constitution.

2. The first complainant is David William Atkinson, who was employed for seven years by Southern Life Association Ltd and was a member of the respondent until his retrenchment as of 1July 1998, at which time he was branch manager of the Durban Suburbs branch. He lodged his claim on 29 June 1998.

3. The second to eighth complainants, also former members of the same fund, are listed in the following table, indicating the respective periods of their employment and the dates of their retrenchments:

Name	Date employment commenced	Date of retrenchment	No of years service
Gordon Knox	1/06/1993	1/07/98	5
Moses Abraham	1/12/1990	31/07/98	7.5
J B David	1/02/1991	30/09/98	7.5
G M Isaac	1/06/1991	30/09/98	7.25
N Lopez	1/06/1996	1/07/98	2
L Zondo	1/02/1990	15/08/98	8.5
S Moodley	1/09/1996	1/07/98	1.75

4. The second to eighth complainants lodged their complaints jointly on 14 January 1999 and since their complaints deal with essentially the same question as that of the first complainant I have decided to join the two matters.

5. The respondent is the Southern Field Staff Defined Contribution Pension Fund, registered under the Act; the principal officer of the fund is Mr Melvyn Hendrickse and the chairman of the fund's management committee is Mr P G M Truyens.

6. In essence, the complainants are aggrieved that, in calculating their withdrawal benefits on retrenchment after less than ten years service, the respondent has reduced their equishares by a percentage of the employer's contribution, in accordance with the respondent's rule granting a refund of 20% of the employer's contribution for each year of service exceeding five years.

7. The first complainant alleges that, since he was retrenched after seven years service, the distribution of the portion of his equishare for which he does not qualify (60% of the employer's contribution) amongst the remaining members of the fund is discrimination against him as a retrenchee with short service not of his own volition

(in that those who survived the retrenchment exercise benefited at his expense), and that the rule allowing this is unfair, unreasonable and inconsistent with the Constitution. The complainant therefore alleges that a dispute of law has arisen between himself and the fund, relating to the interpretation and application of the fund's rules. Similar allegations are made by the other complainants.

8. No hearing was held in this matter and in determining the complaint I have relied on the documentary evidence and submissions and on the investigation of the complaint by my senior investigator, Sue Myrdal.

9. Having completed my investigation I have determined the complaint as follows. These are my reasons.

The complaint

10. I deal hereunder with the facts as they pertain to the first complainant, the general details of which apply to all the complainants. I have also set out (in paragraph 16) specific information relating to the extent of their >lost' equishares in respect of the other complainants.

11. The facts in this matter are straightforward. The first complainant, after seven years of service, was retrenched as part of the large-scale "operational downsizing" exercise which took place at Southern Life (and which also affected the other complainants). His cash withdrawal benefit was calculated in terms of the schedule to rule A8.0.0, as amended with effect from 1 December 1997. The schedule provides for the same benefit regardless of whether the member resigns or is dismissed or retrenched, as follows:

Benefit on resignation

(1) During the first 12 months' SERVICE, nil

(2) After the first 12 months' SERVICE:

(1) return of MEMBER'S contributions from 01 November 1991 together with 9 per cent per annum compound interest, plus

(ii) return of MEMBER'S contributions from the FIXED DATE to 31 October 1991 together with 7 per cent per annum compound interest up to 31 October 1991 and 9 per cent compound interest thereafter, plus

(iii) a percentage of the difference between the above benefit and the MEMBER'S EQUITABLE SHARE, depending on the number of completed years' SERVICE with the EMPLOYER as set out in the table below:

Number of completed years' SERVICE	Percentage
less than 6	Nil
6	20
7	40
8	60
9	80
10 or more	100

Benefit on dismissal

As for resignation

Benefit on retrenchment or redundancy

As for resignation

12. It may be noted that before 1 December 1997 the rule provided for an even longer

vesting period, whereby only ten percent of the employer's contribution vested each year after the first five years employment, meaning that a member would have to complete fifteen years service in order to obtain 100% of his/her equitable share on withdrawal.

13. "Equitable share" is defined as "the portion of the fund's assets which has been allocated to a MEMBER as described in section B of the rules". Section B, in summary, indicates that a member's equitable share is calculated by adding together the member's monetary portion of his equitable share at the most recent fund review date (his cumulative equitable share to that date), his contributions, the employer's net contributions (after deduction of any insurance premiums and administration fees) and any lump sum amount credited to his equitable share since the last fund review date, together with interest at a rate determined by the fund actuary.

14. The chairman of the fund's committee of management, Mr Paul Truyens, has explained this in more accessible terms in a letter to this office dated 22 February 1999. His explanation also highlights what happens to the surplus remaining when a member withdraws short of ten years. (It is to be noted that he has written this portion of his letter in the past tense, since the withdrawal benefit rule was amended with effect from 17 February 1999, to allow the payout of full equishare after membership of one year, regardless of subsequent length of service, and regardless of the reason for termination.)

> "The rules were such that all investment income and surpluses, management and risk benefit expenses, and other items of surplus, including any withdrawal surpluses, were allocated to all in force members at each annual scheme review date i.e. all the assets were allocated to members. Thus the "surplus" from paying out less than the full "equishare" to withdrawing members was distributed to all other members each year, and when some of those withdrew in later years they were paid out their share of these earlier withdrawal profits as part of their equishare."

15. The first complainant's withdrawal benefit was calculated and set out in a document furnished to him as follows:

Date of withdrawal	:	1 July 1998
Date of service entry	:	1 June 1991
Number of completed years service	:	7 years 1 month

A Return of member contributions plus 9% compound interest to 1 July 1998 : R100 010,16

B Equitable share as at 1 July 1998 : R196 193,11
Member qualifies for 40% of difference between equitable share (B) and A above.
40% of difference between A and B:
= 0,40 x (196 193,11 - 100 010,16)
= R38 473,18

C Value of member's additional voluntary contributions plus allocated fund interest (value in member's individual account) : R nil

Withdrawal benefit = A + B + C = R138 483,34

Plus deferral interest to 1 September 1998 = R2 077,25

Total withdrawal benefit (subject to tax) = R140 560,59

Note: All above values were based on book values rather than underlying asset values.

According to this calculation, the shortfall between the amount paid and the full equitable share is R55 632,52.

16. The shortfall in respect of the other complainants is as follows:

Gordon Knox	R 59 179,63
Moses Abraham	R 27 610,97
J B David	R113 999,13
G M Isaac	R 38 139, 31
N Lopez	R 4 950,82
L Zondo	R 58 347,81
S Moodley	R 6 725,68

17. The first complainant makes the following allegations in his complaint:

> "My financial interest in this fund is being prejudiced by Southern Life's rationalisation process. My length of service is being cut short by Southern Life and is not of my own volition ... the portion of my Equishare for which I do not qualify, due to short service, is distributed to the remaining members on an equitable basis. This is discriminatory behaviour against those persons who are being retrenched. It is unfair that the "Survivors" benefit by the "Retrenchees" misfortune.
>
> Furthermore it is my view that with Southern Life embarking on a fairly extensive retrenchment exercise it is unfair and unreasonable that both other persons with short service and myself are being discriminated against. This is an unfair labour practice.
>
> ...The spirit in which the rules are designed is to create stable employment with long serving members. The penalties incurred are for those members with short service. [I] complied with this spirit by remaining with Southern Life for 7 years. The only reason that [I am] no longer with the company is due to having been retrenched at Southern Life's volition. Clearly Southern Life went against the spirit and intention of the very rules it allowed to be put into place for the Fund."

18. The fund's principal officer, Mr Melvyn Hendrickse, furnished a response to the complaint; I quote the substantive portions below:

> "Mr Atkinson's contention is that, as he was retrenched, he should have qualified for his full equitable share as a withdrawal benefit, a condition not provided for in the rules of the fund. The fund's Committee of Management did address this matter and felt that it would be

> inequitable to allow certain members (managers) a different withdrawal benefit due to retrenchment as the majority of the members (field agents) who, by the nature of their employment contracts, would not be retrenched but dismissed should certain production targets not be met, a major consideration for continued employment with the employer. Retrenched members therefore, qualified for and were paid their withdrawal benefits in terms of the fund rules.
>
> An approach was made to the employer to pay an additional contribution to the fund, such contribution being equivalent to the difference between the withdrawal benefits and the equitable shares of all affected retrenched members, as well as a proposed change to the rules to allow all members their full equitable share on withdrawal, irrespective of the reason for withdrawal, but the employer turned down the requests."

19. This was in October 1998. As mentioned above, by 17 February 1999 the rule had been changed to allow for the payment of full equishare after membership of one year, regardless of subsequent length of service or reason for termination of employment.

20. I subsequently wrote to Mr Hendrickse requesting that he address himself more directly to the complaint that the rule in question was unconstitutional, unreasonable or unfair; I also asked him to furnish me with information concerning the history of the fund and its membership, so that I could take this into account when weighing up any ruling that might have an impact on other members.

21. I received a reply from Paul Truyens, chairman of the fund's committee of management, that provides some relevant background to the rule and its operation, although he does not comment directly on the allegations of unreasonableness or unconstitutionality. He indicates that prior to 1 March 1991 the field staff belonged to a defined benefit pension fund; when a defined contribution fund was set up at that date most of the members voluntarily transferred, and new members had no option but to join the defined contribution fund. He then explains how profits, including withdrawal profits, are distributed immediately to members in the defined

contribution scheme, as compared to the defined benefit situation where the withdrawal profits serve to reduce the employer's contribution rate. He asserts that the result of this is that the long term effects are not very different; in his view this was the logic applied when the defined contribution fund rules were drawn up:

> "Although the final retirement benefit [under the defined contribution scheme] was now a function of investment performance as well as contribution rates, the committee members would have been aware that if there were no withdrawal profits injected into the fund, the end benefits for those reaching retirement would not have been as good as those under a defined benefit arrangement with the same contribution rates. So the current withdrawal benefit was included in the rules. In any event this withdrawal benefit was similar to the previous withdrawal benefit under the defined benefit fund.
>
> Please bear in mind that traditionally field staffs have very high turnover rates, of the order of magnitude of 30% per annum. The withdrawal profits have always been very significant. That is the background to this particular issue. At a recent committee of management meeting we decided to amend the withdrawal benefit to pay out the full equishare regardless of length of service. However we are unable to make that rule change retrospective, since, if we were to do that we would have to reduce current and previously resigned members' equishares to remove their share of the past withdrawal profits. Since it will be impossible to claim back monies from withdrawn members (the membership has declined by over 50% during the last year) the burden would fall doubly on current members. Since the employer's contribution is fixed and the issue is one of the distribution of benefits between different classes of members I cannot see the employer making up the difference."

22. On further requesting a more directed response to the complaint of unconstitutionality and unreasonableness of the rule, we finally received a submission from Mr Jonathan Barrett, of the Corporate Legal department, Momentum Employee Benefits. He commences by assessing the rule against the rights to equality, fair labour practices and just administrative action set out in the Bill of Rights. (He states his view in a footnote that in his understanding, section 25(1) which prohibits arbitrary deprivation of property, is applicable against organs of state only.)

23. Mr Barrett argues that the differentiated withdrawal benefit does not offend against the equality clause since it does not directly discriminate on any of the specified grounds, and neither does it impact indirectly on the fundamental dignity of persons as human beings. He argues further that it does not violate the right to fair labour practices, given substance by the Labour Relations Act, 1995 ("LRA") since it does not in his view discriminate on any arbitrary ground (arbitrary discrimination being outlawed as an unfair labour practice by Schedule 7 of the LRA): no discretion (which may have been exercised capriciously) was allowed, and the benefit was not distinguished on the basis of any discernible prejudice. With regard to the right to just administrative action, he argues that this applies only within the parameters of the rules of the fund, and submits that the board of management of the fund did apply their minds to the issues within the framework of the rules.

24. Having sought to demonstrate that the withdrawal benefit rule was not unconstitutional, Mr Barrett moves on to discuss whether it may be invalid on grounds other than unconstitutionality. He points out that such a rule, as a contractual arrangement, is not prohibited by statute, nor does it offend against any established precedent of the common law, or any of the recognised heads of public policy.

25. Mr Barrett, stating that he is mindful that the above may be considered to be a conservative approach, goes on to submit an argument that in his view the rule is compatible with contemporary legal as well as ethical norms. He bases this firstly on the submission that, if fund benefits are accepted to be deferred remuneration, then it is reasonable for a fund to be structured on a basis which promotes the employer's staff motivation and retention strategies. He states:

> "The differentiated withdrawal benefits was, as I understand it, not designed to prejudice any particular distinguishable group or individuals but simply to benefit in a way which was fair those employees who remained members of the fund longer: in this way it reasonably

> fostered long service."

26. Secondly Mr Barrett makes out an argument that a member's rights must be seen within the context of membership of a pension fund, not in abstraction; he points out that, in a pension fund, even a defined contribution fund, cross-subsidisation is not necessarily inherently discriminatory:

> "Just as with stokvels, burial societies, insurance and any form of pooling, there is inevitably cross-subsidisation within the participating group - and often an attempt to confer privilege on those who participate longest."

27. Finally Mr Barrett comments on the issue of retrospectivity, should the respondent's arguments not be accepted and this tribunal find that the 1999 rule amendment be made retrospective. He cites a recent Supreme Court of Appeal case, *National Director of Public Prosecutions of SA v Carolus & Others*, wherein Farlam AJA stated

> "An important legal rule forming part of what may be described as our legal culture provides that no statute is to be construed as having retrospective operation (in the sense of taking away or impairing a vested right acquired under existing laws) unless the legislature clearly intended the statute to have that effect."

and

> "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly."

Mr Barrett urges that should any order be made that the rule complained of is unlawful, such order should not be of retrospective effect, in order to avoid uncertainty concerning the validity of past actions and decisions taken in good faith.

28. In conclusion Mr Barrett argues that

> "The fact that the rules have been changed should not indicate a fault in the *status quo ante,* but rather that a mature process of consensus-seeking has been reached between the interested parties, and the benefits amended accordingly."

Analysis of the complaint

29. The complaint alleges a dispute of law related to the interpretation and application of the fund's rules. The question at issue is essentially: is the withdrawal benefit rule applicable to the complainants reasonable and constitutional?

30. It is necessary to bear in mind that the complaint before me deals specifically with the case of retrenchees. While the rule complained of does not distinguish between retrenchees and others, in a sense the complainants have built their case on the notion that their situation, that of retrenchment, should be distinguished from other members withdrawing from the fund. This amounts to an allegation that the rule's failure to so distinguish is in itself an instance of disproportionality, or irrationality.

31. It is therefore in the context of retrenchment, viz an involuntary termination of employment, that I shall evaluate the rule; I am not called upon to comment directly upon the application of the rule in a situation of voluntary resignation or dismissal.

32. As Mr Barrett has pointed out, the rule, as a contractual arrangement, is not prohibited by statute, nor does it offend against any established precedent of the common law. However I cannot agree with him that the rule cannot be considered contrary to public policy simply because it does not deal with a well-recognised category of harm established by judicial precedent. The fact is that public policy or the societal *boni mores* in our new dispensation are now enshrined in the supreme Constitution as the cornerstone of the legal order, and it is to the Constitution that I am obliged, in terms of section 39(2), to look for the applicable principles of public policy in interpreting legislation, including pension fund rules. Section 39(2)

provides:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

33. Section 30E(1)(a) of the Pension Funds Act empowers me to investigate any complaint and make any order which any court may make, including orders allowed under section 172 of the constitution in constitutional matters. According to the horizontal approach to interpreting the constitution, the prerequisites for constitutional review would be the presence of a clear rule of law, the engagement of a court as arbiter of the dispute and the existence of a cognizable constitutional issue (see Stuart Woolman >Chapter 10: >Application' in *Constitutional Law of South Africa*, Jutas 1996). These prerequisites are present in this case, since I am tasked to assess whether the rule complained of offends certain fundamental rights protected by the constitution; therefore the dispute of law in this case relates to a determination of the rule's consistency with the bill of rights.

34. Section 8 of the Constitution gives the Bill of Rights horizontal application by applying it to "all law" and by binding natural and juristic persons if it is capable of being so applied "taking into account the nature of the right and the nature of any duty imposed by the right." Section 8 reads:

> (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
>
> (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
>
> (3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court -

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

35. The first step in assessing the constitutionality of the rule is to decide whether the complainants' constitutional rights have been infringed. In my view there are three constitutional rights at issue here: the right not to be arbitrarily deprived of property (section 25 of the constitution), the right to equality (section 9), and the right to fair labour practices (section 23).

The right not to be arbitrarily deprived of property

36. Section 25(1) of the Constitution reads:

> "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property."

37. There is nothing in this clause, nor in the rest of the property section, that precludes its horizontal application, that is which would limit its applicability to protection against organs of state only. The safeguard is against arbitrary deprivation and the state is not the only potential culprit. Many large private institutions are repositories of social and economic power of a quasi-public nature and hence there should be no reason why the guarantee in section 25 cannot be applied to protect the individual from any arbitrary conduct by such bodies, including pension funds performing a public function.

38. Section 25(1) begs certain definitions, the most immediate being a clarification of

what constitutes property. The concept of property in the constitutional sense is not restricted to movable or immovable corporeals. It includes incorporeals, where one may have a right (such as a share in a company or a personal right arising from contract or delict) that is the object of another right such as ownership - a right in a right. This principle of Roman-Dutch law has been reaffirmed by our case law (see for example *Incledon (Welkom)(Pty) Ltd) v Qwaqwa Development Corporation Ltd* 1990 (4) SA 798 (A)).

39. The concept of property has been further developed by among others the American writer Charles Reich, whose seminal article >*The New Property'* (1964) 73 *Yale Law Journal* 773 argued that traditional notions of property did not accommodate the "new property", engendered by the social relations created by the modern state: access to state largesse in the form of benefits, jobs, pensions, housing, subsidies, contracts, licences etc. Subsequent US court decisions have extended constitutional recognition and protection to such forms of property.

40. In Germany the Federal Constitutional Court has held, in *BverfGE* 53, 257 (289), that the legal interests of members in their pension funds are protected by the constitutional property guarantee, since

> "In today's society the majority of citizens safeguard existence less by private property [as determined by private law] as by the yield of their work and the related collective insurance system, that historically was ever since linked with the idea of Right to Property."

The court pointed out that pension benefits are based on one's own work and deserve protection by the constitution

> "because their amount is determined by the own working performance of the insured individual as it is reflected in his income-related contributions. The pension claim is therefore intimately related to one's own efforts or achievements, points of view which are generally acknowledged as convincing reasons for the constitutional protection of property."

41. This point of view is taken further by the concept of pensions being “deferred pay”, a view which has common currency in the modern era, in contradistinction to the notion of discretionary *ex gratia* payments an employer might make to retiring workers of old. Pension fund benefits, as Mr Barrett states in his submission, are now “generally considered to be deferred remuneration”.

42. As the respondent’s position indicates, there is still debate as to the extent of the employer’s right to manage pension schemes: in the respondent’s view it is reasonable to have a rule such as the one at issue here because “it is reasonable for the fund to be structured on the basis which promotes the employer’s staff motivation and retention strategies”, in that the rule “reasonably fostered long service”. This point of view asserts that members should expect no more than a minimum legal entitlement to a pension benefit, and that it is the employer’s prerogative to control the funding, administration and amendment of schemes.

43. Looked at from the point of view of the member however, the claim that pensions are pay refers both to the benefits that employees have been promised and the contributions which the employer makes to fund those benefits (money that would otherwise be available to pay current wages). As Richard Nobles, in his book *Pensions, Employment and The Law* (Clarendon Press, Oxford, 1993) points out:

> “This is a double promise. The workforce expects to receive the promised benefits and its members expect all the money that is deducted from the payroll to be used in their interests.”

In seeing that this promise is met, employees therefore have an interest in the rules which govern the administration of the scheme. Richard Nobles put it thus:

> “Logically, accepting that pensions are deferred pay leads one to regard all of the rules of the scheme as part of the pay arrangement, and to interpret those rules as the means to implement some kind of promise...The strongest version of the deferred pay argument is an

> assertion that everything should be done to see that current members receive the fixed benefits **and enjoy the benefit of any money available to fund additional benefits.**" (p52) (my emphasis)

44. That these two perspectives operate to some extent in opposition is clear; they provide reasons to interpret schemes and their rules in the interests of the employer or the members respectively. However the fund's overriding concern, when considering the sometimes competing interests between employer and members, must be its fiduciary duty to act in the best interests of members, *inter alia* when it is engaged in devising rules for the fund. In my view and as I will explain more fully below, a rule providing for forfeiture of a portion of the employer's contribution while holding out as its purpose "staff motivation and retention" that does not distinguish between retrenchment and voluntary resignation (or dismissal) is not a rule that can reasonably be said to be in the best interests of members.

45. Pension benefits as well as additional benefits such as withdrawal benefits under a pension fund are deferred pay and therefore property. This is more so in the case of the defined contribution fund, which is a different animal from the defined benefit fund, as Marais JA succinctly explained in *Tek Corporation Provident Fund and Others v Lorentz* 1999 (4) SA 884 (SCA):

> "Unlike the position in a defined benefit fund, it is inherent in a defined contribution fund that no "surplus" can arise. That is because there are no predetermined benefits payable. Instead the members are entitled to whatever the fruits (be they sweet or bitter) of the investment of the defined contributions may prove to be."

46. A finding that a member's interest in a pension fund is of a proprietal nature deserving of constitutional protection does not necessarily mean that the member enjoys rights of ownership of the contributions made to the fund on his or her behalf. The property is of an incorporeal nature consisting of a complexity of contingent contractual rights, expectations and interests. The extent of entitlement or access

to the benefits of the resources of the fund is contingent and will be determined by the circumstances and the application of legitimate and rational rules regulating that access.

47. In the circumstances of this case one must therefore ask whether the rule allowing "deprivation" of the complainants' unvested equishares, in the context of their withdrawal from the fund for reasons of retrenchment, constitutes arbitrary deprivation of their constitutionally protected proprietal interests.

48. Webster's dictionary provides the following definition of the word "arbitrary":

> "not governed by principle; depending on volition; based on one's preference, notion or whim".

An arbitrary deprivation would therefore be one which was dependent simply on the will of the party effecting the deprivation. In *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC), the constitutional court stated that legislative measures are arbitrary when they bear no rational relationship to the legislative goal they are intended to achieve:

> "The requirement that the measures be justifiable in an open and democratic society based on freedom and equality means that there must be a rational connection between means and ends. Otherwise the measure is arbitrary and arbitrariness is incompatible with such a society."

49. Applying the rationality test one must first identity the legislative purpose and then determine whether the rule (legislation) devised is rationally connected to that purpose.

50. Discerning the purpose of the rule is not difficult in this instance since Mr Barrett has laid it out for us:

> "The differentiated withdrawal benefits was, as I understand it, not designed to prejudice any particular distinguishable group or individuals but simply to benefit in a way which was fair those employees who remained members of the fund longer: in this way it reasonably fostered long service...the fund [is] structured on the basis which promotes the employer's staff motivation and retention strategies."

51. Mr Barrett refers in passing to the fund's reason for its failure to distinguish between retrenchment and dismissal benefits, being the perception that this would be to the disadvantage of members who were not part of the management structure. This echoes Mr Hendrickse's earlier comment that

> it would be inequitable to allow certain members (managers) a different withdrawal benefit due to retrenchment as the majority of the members (field agents) who, by the nature of their employment contracts, would not be retrenched but dismissed should certain production targets not be met..."

52. In my view this is a red herring. If it was part of the employment contracts of the field agents that they would have to meet certain production targets, failing which they would not be retained in their employment, then this amounts to a termination for incapacity. Provided there was fairness in all the circumstances, this would be legitimate, and distinguishable from the case of genuine retrenchments. If Mr Hendrickse is saying that in fact these were disguised retrenchments there may be grounds for an allegation of an unfair labour practice, a matter outside my jurisdiction and certainly outside the scope of this complaint.

53. As mentioned, the promotion of long service is the purpose of the rule. In fact the respondent goes further by suggesting that it was deemed necessary to include a rule allowing for a forfeiture of equishare because without the withdrawal profits "the end benefits for those reaching retirement would not have been as good as those under a defined benefit arrangement with the same contribution rates" (see paragraph 21 above). To my mind this is an admission of an arbitrary and

illegitimate purpose, since it purports to arbitrarily advantage only those who reach retirement in the fund (usually a small percentage of members), over and above the growth attained by the investment of their own deferred pay.

54. Be that as it may, assuming that the stated purpose of the rule (to foster long service) is legitimate, the next step is to ask whether the rule is rationally connected to this purpose. I am convinced that, while the rule regarding resignees or dismissed employees may be rationally connected with this objective, the rule applied to retrenchees is not. There is a clear contradiction when a rule which is designed to foster long service penalises innocent members who wish to render long service. That the members were thwarted in doing so is because they were declared redundant to the employer's needs. The fund is not faithful to its duty to act in the best interests of members if it allows a rule to stand which is designed to promote long service (through penalising short service) in a situation where the employer now wishes to curtail long service and in fact to terminate service at its own instance. The rule over-reaches itself by irrationally including a species of employment termination beyond the scope of its stated purpose.

55. The rule regarding the withdrawal benefits payable to retrenchees therefore fails the rationality test and constitutes an arbitrary deprivation of property.

<u>The right to equality</u>

56. The equality clause (section 9) provides constitutional protection against unfair discrimination. Before one even asks whether differentiation amounts to discrimination the prior enquiry is, according to the constitutional court in *Harksen v Lane NO & Others* 1998 (1) SA 300 (CC),

"Does the provision differentiate between people or categories of people? If so, does the

> differentiation bear a rational connection to a legitimate government purpose? If not then there is a violation of [the equality clause]."

57. The withdrawal benefit is differentiated as regards the group of members withdrawing from the fund *inter se*, in that members who have been employed ten years or longer receive 100% of their equishare whereas members with less than ten years service receive only a portion of the employer's contribution on a sliding scale. The rule is the same regardless of whether the employee is retrenched, resigns or is dismissed.

58. In my view such differentiation between the two groups of employees (those with less than ten years service and those with ten years or more) may well be said to bear a rational connection to a legitimate purpose (that of staff motivation and retention) where it is applied against persons who voluntarily resign, but, as I have shown above, it does not bear a rational connection when the same rule is used in the case of persons who are retrenched, basically against their will, and who are therefore thwarted from rendering long service through no fault of their own. As regards retrenchees, therefore, the rule is in violation of the equality principles of the constitution.

59. I would note here that it is not appropriate to use the group of survivors of the retrenchment process as the comparator in alleging discrimination, as the first complainant has attempted to do, since this would be to allege that it is discrimination *per se* to retrench some employees and not others, a patently untenable proposition, and in any event not within the purview of my jurisdiction. (This is not to say that it is fair that the survivors benefit from the >lost= equishares of the retrenchees, merely that their benefit does not derive from unfair discrimination.)

<u>The right to fair labour practices</u>

60. It could also be argued that the rule infringes the right to fair labour practices. Section 23(1) of the constitution states:

> "Everyone has the right to fair labour practices."

Practically, the issues involved here are generally the same as those discussed in relation to property rights and equality.

61. Having concluded that the withdrawal rule relating to retrenchees infringes the exercise of certain fundamental rights, I am obliged, in assessing the constitutionality of the rule, to move onto the next stage, that is, to decide whether the limitation placed upon the right is justifiable. Section 36(1) of the constitution, the "limitation clause", outlines the enquiry:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –
>
> 1. the nature of the right;
> 2. the importance of the purpose of the limitation;
> 3. the nature and extent of the limitation;
> 4. the relation between the limitation and its purpose; and
> 5. less restrictive means to achieve the purpose."

62. The investigation here, to some extent, mirrors that in the enquiry into the arbitrary nature of the deprivation. The onus shifts to the party seeking to uphold the restriction to demonstrate this.

63. In my view the respondent has failed to advance any satisfactory argument that the nature of the right permits limitation in the way that the rule allows.

64. With regard to the importance of the limitation, Mr Barrett has advanced an argument, it seems to me by way of justification of the restrictive rule, that the ways in which members of a defined contribution fund cross-subsidise each other are "not necessarily different" from the situation in a defined benefit fund. I beg to differ. The essence of a defined contribution fund is that one's benefits are undefined but relate to one's contributions and those of the employer (both elements of deferred pay) - there is no inherent promise or expectation that these benefits will be enhanced by the forfeited deferred pay of fellow workers. Even if it is justifiable that members who give long service be rewarded over and above the benefits their own deferred pay would buy them by sharing in the profits of early withdrawals, it is still not justifiable that members whose services are spurned through no fault of their own should be penalised.

65. The claim that early withdrawal profits are necessary to enhance the retirement benefits in order to match retirement benefits under a defined benefit arrangement is a little puzzling. Generally the move to defined contribution funds is marketed to members along the lines that while they shall carry the investment performance risk, retirement benefits are roughly expected to be equal and early withdrawal benefits are better. In this instance retirement benefits are assumed to be worse, the investment risk is on the members and early withdrawal penalties (similar to those in defined benefits funds) are applied to subsidise reasonable retirement benefits for the handful of members who make it to retirement. In such circumstances one struggles to find any advantage which the defined contribution arrangement has over the defined benefit fund.

66. Both Mr Truyens and Mr Barrett have referred to the implications of retrospectivity and have submitted in argument that the 1999 amended rule (granting full equishare after one year regardless of years subsequently served or reason for termination) cannot be made retrospective because of the practical difficulty of reducing current

and previously withdrawn members' equishares to remove their share of the past withdrawal profits. Such evidence of practical difficulties, while relevant to a consideration of any relief awarded, is not however relevant to the question of the justifiability of the *prima facie* unconstitutional restriction contained in the rule regarding retrenchees: it does not justify the restriction.

67. I have considered the nature and extent of the limitation above, as well as the relation between the limitation and its purpose. Essentially the respondent has failed to persuade me that there is a rational connection between the rule and its purpose.

68. It is also clear to me that a less restrictive means to achieve the purpose of promoting long service would be to distinguish between withdrawals pursuant to retrenchments on the one hand and other withdrawals on the other hand, and not to penalise retrenchees by depriving them of their deferred pay. This less restrictive means would be achieved by excluding retrenchees from the ambit of the rule.

69. In my view therefore the rule complained of infringes the complainants' constitutional rights and the limitation placed on their rights does not satisfy the general limitations clause in section 36(1) of the constitution. Consequently the early withdrawal rule must be declared inconsistent with the Constitution and invalid to the extent of its inconsistency. Similar conclusions would pertain had one simply argued that the early withdrawal rule was unreasonable.

Relief

70. The advantage of categorising the dispute as a constitutional matter is that it permits application of the equitable remedy in section 172(1) of the Constitution. Section 30E of the Pension Funds Act grants me the power to make any order which a court of law may make and this includes an order contemplated in section 172(1) in

respect of constitutional matters. Section 172(1) reads as follows:

> 172 (1) When deciding a constitutional matter within its power, a court -
>
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (b) may make any order that is just and equitable, including -
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.

71. Remedies rectifying past unconstitutional rules and practices can have disturbing consequences for a range of existing and completed transactions. On the other hand, persons whose rights have been infringed may expect a measure of constitutional vindication.

72. Unfortunately, the question of constitutional remedies has not been adequately ventilated or argued before me. A declaration of unconstitutionality has implications far beyond this complaint and can impact on the proprietal interests of the participating employer and the remaining existing members of the fund who are not party to this complaint. It would be improper for me to uphold a complaint by striking down a rule in the fund and awarding constitutional or delictual damages when those whose proprietary interests could be adversely affected have not had a fair opportunity to make representations in defence of their interests. This requires me to join the other members of the fund and the employer before making any final award.

73. Moreover, the spectre of an award of constitutional damages for an infringement of

constitutional rights raises the question of who appropriately should bear liability. A claim of unconstitutionality within my jurisdiction, besides being a dispute of law, may amount to "maladministration of the fund *by the fund*", implying that the fund should bear the loss for the unconstitutional conduct. But in the context of a defined contribution fund without reserves, such an award may well punish the innocent members for the wayward conduct of the fiduciaries. Hence relief may be sought against the responsible fiduciaries contemplated in section 2 of the Financial Institutions (Investment of Funds) Act of 1984 in terms of section 9 of that statute.

74. Absent any clear claim or argument in relation to these issues it is difficult to fashion a final remedy.

75. Furthermore, it may be that all interested parties may be able to bring about a satisfactory solution correcting the constitutional defect by means of negotiation, mediation and ultimately an appropriate amendment of the offending rule for the period in question.

76. For these reasons, I shall rely on the provisions of section 172(1) to fashion interim relief of a just and equitable nature as follows:

76.1 Respondent's rule/s for the period 27 April 1994 to 17 February 1999 regarding withdrawal benefits, to the extent that they fail to exclude retrenchees from the ambit of the restrictive vesting scale, are declared to be inconsistent with the Constitution and are invalid as from 27 April 1994.

76.2 The following parties are joined in these proceedings in terms of section 30G of the Pension Funds Act of 1956:

76.2.1 The Southern Life Association Limited (the employer)

76.2.2 All persons who serve or who have served as members of the board

of management of the fund since 27 April 1994

76.2.3 All members of the fund as at the date of this order

76.3 The board of respondent shall notify all persons joined in these proceedings within 14 days of this order by means of a written notice advising them fully of the terms of this order and drawing their attention to the existence of this determination and its availability on the Internet at website www.fsb.co.za.

76.4 This matter is postponed until 30 June 2000 at which time this tribunal shall fashion an appropriate remedy, unless before that time the parties reach a mutually acceptable and appropriate settlement to address the complaint. Any such settlement shall be made an order of this tribunal.

75.5 The parties shall be entitled before 15 June 2000 to place additional evidence and to place written submissions before this tribunal for consideration in determining a final remedy.

76.6 The declaration of invalidity in paragraph 75.1 above is hereby suspended until a final order as contemplated in paragraph 75.4 is made by this tribunal.

76.7 Any party in these proceedings shall be entitled to apply to this tribunal on 14 days notice to all other parties for the resumption of these proceedings.

DATED at CAPE TOWN on 3 FEBRUARY 1999

_____

JOHN MURPHY

PENSION FUNDS ADJUDICATOR