

**IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR**

**CASE NO.:PFA/KZN/134/98/NJ**

**In the complaint between:**

**B.R. Ndlovu**

**Complainant**

**and**

**South African Local Authorities Pension Fund**

**Respondent**

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

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Introduction

This is a complaint lodged with the Pension Funds Adjudicator in terms of section 30A(3) of the Pension Funds Act of 1956 concerning an early withdrawal benefit.

After an exchange of correspondence between the complainant and the respondent, consisting of a number of letters and other documentation, the complainant lodged his written complaint with our office on 6 August 1998. The complainant has complied with the provision of section 30A(1) which requires the complainant to lodge a written complaint with the relevant pension fund or the employer who participated in the fund before lodging it with the Pension Funds Adjudicator. The respondent has properly considered the complaint and has replied to it in writing as required by section 30A(2). The complainant has also furnished me with a copy of the rules applicable to the aforesaid matter.

No hearing has been held in this matter. Accordingly, in determining this matter, I have relied exclusively on the documentary evidence and argument put to me in writing and on

the report placed before me by my investigator, Naleen Jeram who has also had a series of lengthy telephonic conversations with Mr Jacques De Klerk of Old Mutual Employee Benefits representing the respondent and Mr Majola representing the complainant.

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

The complainant is B.R. Ndlovu, an adult male, former member of the respondent, now residing in Kwa-zulu Natal. The complainant is herein represented by Durban Legal Services consultancy.

The respondent is South African local authorities pension fund, a pension fund duly registered under the Pension Funds Act of 1956. The respondent is herein represented by Old Mutual Employee Benefits, the administrators of the fund.

### Complaint

The complaint relates to the interpretation and application of the rules of the respondent and alleges that a dispute of law and fact has arisen in relation to the fund between the respondent and the complainant in respect of an early withdrawal benefit on 31 December 1997.

The complainant was initially a member of the Government Pension Fund from 3 May 1964. On 1 September 1992 the complainant was transferred from the Natal Provincial Administration to Ningizimu town committee at which point he became a member of the respondent. The complainant was transferred together with the following officials:

- (1) Mrs PJ Putter
- (2) Mrs E Estement
- (3) Mrs B.D. Radebe

In about 1994 the complainant and the aforesaid officials enquired about early withdrawal benefits in terms of the rules of the respondent.

The relevant rule applicable in this regard read as follows:

- 8.1 Any MEMBER who resigns from his employment or is discharged therefrom on account of misconduct or on account of ill-health which was occasioned by his own default, shall, subject to the provisions of Rule 1.27.2. (b), be entitled to payment of an amount which is calculated in accordance with the FORMULA.
- 8.2 Any amount paid by a MEMBER referred to in Rule 8.1.1. in respect of any period of PENSIONABLE SERVICE referred to in Rule 1.27.2. (b), shall be paid to him together with the amount referred to in the said Rule 8.1.1.
- 8.3 Any amount paid to the MEMBER in respect of Rule 8.1.1. shall be increased by an additional percentage of such amount in relation to the number of years of the MEMBER'S membership of the FUND. Such additional percentage shall be determined in accordance with the following scale:

Years of membership of the FUND	Additional Percentage
Less than 6	Nil
6	10%
7	20%
8	30%
9	40%
10	50%
11	60%
12	70%
13	80%
14	90%
15 and over	100%

Notwithstanding anything to the contrary contained in this Rule, "membership of the FUND", in respect of a MEMBER as at 30 September 1990, shall, wherever applicable, include membership of an OTHER FUND or a SIMILAR FUND.

Other fund is defined as:

Other Fund: The Associated Institutions Pension Fund and such other pension or provident fund or scheme which is administered by or under the control of the Minister of Finance under any law, and any pension fund or scheme for a local authority established in terms of the Black Local Authorities Act, 1982, the rules of which (in the opinion of the TRUSTEES) are consistent with the rules of the FUND in such respects as the TRUSTEES shall determine.

Similar fund is defined as:

A fund or scheme which the TRUSTEES may approve for the purposes of these Rules on such terms and conditions as they may determine, provided that in the case of a fund referred to in Rule 9.7.3., such fund is approved by the Commissioner for Inland Revenue as a pension fund.

The requirement relating to a member being member of the fund as of 30 September 1990 came into effect as a result of resolution passed by the board of trustees on 12 October 1990. The effect of the amendment was that the members who joined the respondent after 30 September 1990 would not have their memberships of an "other fund" or "similar fund" taken into account for the purposes of calculating the additional percentage of the enhanced benefit.

The respondent argues (in a letter dated 19 April 1999 addressed to the Pension Funds Adjudicator) that the reason for improving the withdrawal benefit was as follows:

There was surplus in the fund on that date. The trustees made a decision to purchase additional group assurance for existing members, as well as to improve the withdrawal benefit.

However, a decision was made that, in the case of the withdrawal benefit, those who joined after the

said date would not share in the surplus, as they did not contribute to it. There was also a tendency for members to join the fund and resign to obtain part of the surplus.

It is for those reasons that the rule is worded in the way that it distinguishes between members who joined the fund after that date.

The respondent in response to a request for a quote from the complainant (in a letter dated 20 October 1994 addressed to the complainant) sets out the benefit due to him in the event of early retirement, which was as follows:

18:	CONTRIBUTION RATE:	=	8%
14:	PENSIONABLE SERVICE	=	D.O.W. 01.11.94 Less PSDT 01.05.64
		=	30 years 6 months
	(Yrs X 12 + mths)	=	366
	(mths 12)	=	30.5
26:	Final Annual Salary	=	R47 970.00

ADDITIONAL WITHDRAWAL BENEFIT - REFER BBA 585/74

This additional Withdrawal Benefit applies only to members who have more than 6 years service:-

Less than 6 years	NIL
6	10%
7	20%
8	30%
9	40%
10	50%
11	60%

12	70%
13	80%
14	90%
15 and over	100%

CALCULATION OF SV FOR MEMBERS MORE THAN 6 YEARS

R: Contr. Rate XZ: Final annual Salary XN: Pensionable Service

$$SV = 8\% \times R47\,970 \times 30.5$$

$$SV = R117\,046.80$$

$$= SV \text{ plus additional percentage } 100\% = R117\,046.80$$

$$\text{TOTAL SV} = R234\,093.60$$

Despite the fact that the complainant commenced membership of respondent in 1992 his quotation included a 100% enhancement based on his membership of his previous pension fund.

Putter, Estement and Radebe were also quoted 100% enhancement of their early benefits.

During 1994, Mrs Putter, Mrs Estement and Mrs Radebe resigned from their Ningizimu Town Committee and they were paid out a 100% enhancement of their benefit by the respondent on the basis that their previous membership of an other fund was recognised for the purposes of rule 8.1.3 even though they do not strictly fall within the ambit of this rule. Subsequent to these resignations, the complainant voluntarily resigned on 31 December 1997. His benefit was calculated in terms of rule 8.1.3 and he received R173 788.10 (after a deduction of R21 400 for a prior claim). He did not receive an additional 100% enhancement. The complainant argued that he is entitled to:

GRATUITY

-R195 188.10

PLUS 100% ADDITIONAL PERCENTAGE IN TERMS OF SALA PENSION FUND RULE & THE LETTER ATTACHED TO THE PARTICULARS OF CLAIM MARKED "C"	= R195 188.10
	_____
	R390 376.20
LESS PRIOR CLAIM	21 400.00
TOTAL	_____
	R368 976.20

The respondent in a letter dated 8 April 1997 addressed to the complainant responds as follows:

In terms of the official Rules of the Fund a member who took up membership on or after 1 October 1990 must have actual SALA membership to qualify for the additional percentage payable on resignation.

Although Mr Ndlovu's pensionable service from the previous fund is recognised in terms of Rule 1.3 of the fund he only took up membership on 1 September 1992 and therefore (sic) do not qualify for the additional percentage of 100% as indicated in the letter dated 20 October 1994.

The complainant seeks an order from the Pension Funds Adjudicator directing the respondent to pay him a 100% enhancement of his benefit that is, R195 188.10, plus interest thereon at the rate of 15,5% from 10 March 1998 to the date of payment.

#### Analysis of evidence and argument

The key issue for determination, is whether the complainant has been unfairly discriminated against. Although he appears to have received that to which he is strictly speaking entitled in terms of the rules, he has been treated differently to his colleagues.

The complainant alleges discrimination on the following grounds:

- (i) The three employees who joined the employer on the same date and resigned under the same rule as the complainant received a 100% enhancement of their benefit and the complainant did not.
- (ii) The amendment of rule 8.1.3 on 12 October 1990, concerning the early withdrawal benefit rule, requiring an employer to be a member of the respondent as of 30 September 1990, in order to qualify for the enhanced benefit. That is, prior to this amendment, the complainant would have qualified for this benefit as his previous membership with the government pension fund would have been recognised. Hence, there is a distinction drawn between members who joined the fund before 30 September 1990 and those who joined afterwards in respect of the recognition of past pensionable service for the purposes of calculating the enhancement of the early withdrawal benefit.

With regard to the first ground, there is undisputed evidence that three of the complainant's colleagues (Putter, Estement, and Radebe) benefited from the rule amendment even though they did not qualify in terms of the provisions of the amended rule.

The favourable differential treatment afforded to Putter, Estement, and Radebe clearly reveals inconsistent application of rule 8.1.3 between the different members of the respondent. The rules of the respondent do not allow for such differential treatment of the members. Hence, the respondents conduct in this regard amounts *prima facie* to discrimination.

The respondent does not deny the discrimination but instead argues that these moneys were paid in error to the members and informs us that steps were being taken to recover

these amounts.

The partiality shown towards the three employees who were in exactly the same position as the complainant in respect of entitlement to an enhanced benefit to the exclusion of the complainant, is an improper exercise of its powers and/or maladministration by the fund. Further, it is also a breach of a trustee's duty set out in section 7C of the Pension Funds Act of 1956, especially the duty to act with impartiality in respect of all members and beneficiaries. The mistaken payments amounts to maladministration. However, it is questionable whether the complainant who has received his entitlement in terms of the rules has been prejudiced directly by the maladministration. In the absence of prejudice he is not entitled to relief.

The second ground of discrimination on which the complainant relies is a distinction between employees who are members of the respondent as of 30 September 1990 and those who subsequently became members of the respondent. Only the former were entitled to have their membership of another fund or similar fund taken into account when determining the enhancement of their benefit. The complainant's past pensionable service from the previous fund was recognised to fall within the definition of other fund or similar fund, however because he only took up membership on 1 September 1992 his previous membership could not be taken into account for the enhancement of his benefit.

The respondent argues that there was a surplus in the fund at this date and a decision was made to improve the withdrawal benefit only for those members who were already members of the respondent as of 30 September 1990 and not for members who subsequently joined as they did not contribute in the build up of the surplus within the fund. Further, there was a tendency amongst members prior to 1990 to simply join the fund and then resign to obtain a share in the surplus.

Trustees of pension funds have a duty to distribute pension fund surpluses reasonably and in accordance with their fiduciary duties. As a result of the amendment of the rule all

employees who were members as of 30 September 1990 with recognised past pensionable service from a previous fund were placed in a far more financially advantageous position than members who joined after the aforesaid date. For example, had the complainant joined the respondent two years earlier, in terms of the amended rule he would be entitled to a further R195 188.10, that is, a 100% increase in his withdrawal benefit.

The question in law is whether such discriminatory distinction amongst members pursues a legitimate object and whether the rule amendment was the most proportional means of giving effect to that object.

The object of the amendment was to ensure that only members who contributed to the surplus should be entitled to share in the surplus. This objective can be regarded as a legitimate purpose. The next question is whether the means used to achieve the purpose can be justified.

The selection of 30 September 1990 as a cut off date is *prima facie* arbitrary and without a proper rationale. It leads to the result that any member who joined the respondent one day prior to this date with recognised past pensionable service will share in the surplus in the event of an early withdrawal, even though such a member would have only contributed to the respondent for a day. Hence, such a member's contribution to the build up of a surplus within the respondent is minimal if not zero, yet he shares in the surplus.

However, any cut-off date, selected by the respondent will create differentiation amongst members of a pension fund. This discrimination is not *ipso facto* unfair. The respondent's decision to distribute the surplus invariably would have to be effective from a certain date, and no matter what cut-off date was selected, discrimination amongst members would result. The fact that the complainant joined the pension fund approximately two years after the cut-off date supports a finding that he has not been treated unfairly. The fact that his similarly situated colleagues benefited from a mistaken overpayment does not allow him to benefit likewise.

Hence I find that rule 8.1.3, does not unfairly discriminate against the complainant.

For the foregoing reasons, the complaint is dismissed.

DATED at CAPE TOWN this 18<sup>th</sup> DAY of JUNE 1999.

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JOHN MURPHY  
PENSION FUNDS ADJUDICATOR