

## IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.:PFA/GA/475/99/LS

In the complaint between:

J Appanna

Complainant

and

Kelvinator Group Services of S.A. Provident Fund

Respondent

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

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This is a complaint lodged with the Pension Funds Adjudicator in terms of section 30A of the Pension Funds Act of 1956 relating to the withholding of the complainant's withdrawal benefit by the fund pending the outcome of criminal proceedings.

The complainant was employed as a factory shop advisor by Barlows (Pty) Ltd for a period of 10 years. Barlows was then taken over by Kelvinator SA (Pty) Ltd ("the company") in 1997 and the complainant accordingly became a member of the Kelvinator Group Services of S.A Provident Fund ("the fund") with effect 1 March 1997.

On 19 December 1997 the complainant went on annual leave. Shortly thereafter, the company contacted her in connection with an alleged embezzlement and the complainant was requested to attend two disciplinary hearings in this regard.

The company found that the complainant had embezzled the sum of R77 373.74 and dismissed her summarily with effect 16 January 1998. The company also advised the complainant that they intended proceeding with criminal charges against her.

The criminal case against the complainant is still pending. In the meantime, the administrators of the fund have been requested to withhold the complainant's benefit so that in the event of the complainant being found guilty on the charges, the company

can offset the amount against her benefit.

In terms of the fund's rules, the complainant is entitled to a gross withdrawal benefit of R83 947.16 as at 31 August 1999.

The complainant argues that the company is not entitled to withhold her benefit. She states that the criminal case against her has dragged on for over a year now and since she is currently unemployed with a family to support, she desperately needs the money.

### **Analysis**

The question for determination in this matter is whether or not the fund is permitted to withhold the complainant's benefit pending finalization of the criminal proceedings against her.

The power to withhold a member's benefit can only be derived from statute or from the rules. Both the Act and the fund's rules permit the trustees to *deduct* from a benefit in certain circumstances. Rule 8.2.1 4 is modelled on section 37D(b) of the Act and reads:

In accordance with the provisions of sections 37D and 19(5)(a) of the ACT, and subject to the provisions of General Rule 8.2.2, the TRUSTEES may deduct any amount due by a MEMBER on the date of his retirement or on which he ceases to be a MEMBER of the SCHEME, in respect of

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8.2.1.4 compensation (including any legal cost recoverable from the MEMBER in a matter contemplated in General Rule 8.2.1.3) in respect of any damage caused to the EMPLOYER by reason of any theft, dishonesty, fraud or misconduct by the MEMBER, and in respect of which the MEMBER has in writing admitted liability to the EMPLOYER, or for which judgment has been obtained against the MEMBER in any court, including a Magistrate's court;

from any benefit payable to or in respect of the MEMBER in terms of the RULES, and pay such amount to the EMPLOYER or any third party referred to in General Rules 8.2.1.3 and 8.2.1.4.

Thus the fund is clearly entitled to *deduct* from a member's benefit. However the question for determination is whether the fund is entitled to *withhold* a member's benefit pending the determination by a court of her liability to compensate the company. In terms of rule 7.1.2 a general discretion is given to the trustees to withhold a member's benefit for a period not exceeding 6 months. However there is no express rule or provision in the Act giving the fund the authority to withhold a benefit pending the determination of liability for misconduct. As stated, the criminal proceedings against the complainant were instituted over a year ago and are still underway.

The purpose of rule 8.2.1.4 and section 37D(b) of the Act is to protect an employer's right to pursue recovery of misappropriated monies. In order to give effect to that purpose, the provision for deduction should be interpreted to impliedly include the power to withhold payment of the benefit pending the determination or acknowledgment of liability. Normally an employer will have to utilize the court process to establish an employee's liability. Court proceedings invariably take a few months and in some cases, years. If the fund were not permitted to withhold the employee's benefit in the interim, by the time proceedings were finalized, the employee may no longer be in a position to pay the employer's claim and the protection of the employer's property against an employee's misconduct envisaged by the provision for deduction in rule 8.2.1.4 would thereby be rendered ineffective.

The above accords with the purposive approach to statutory interpretation. Section 39(2) of the Constitution requires that in general, ordinary statutory interpretation should be based on a contextual and purposive method similar to that used in constitutional interpretation. The purposive approach requires the interpreter to attach a meaning to the words which will promote the aim of the provision. Or to put it

differently the purpose of the legislation must be determined and then given effect to.

The purpose of rule 8.2.1.4 and section 37D(b), as stated, is to protect the employer's patrimony from diminution by member misconduct and to allow an appropriate set-off against the pension benefits. Thus in order to give effect to the purpose of rule 8.2.1.4, we must extend the textual meaning of the words to include not only a power to deduct but also the power to withhold a benefit pending the determination of liability.

An interpretation of rule 8.2.1.4 along these lines is essentially an application of the *ex accessorio eius, de quo verba loquuntur* maxim applied by our courts usually in respect of enabling legislation. The maxim provides that if a statutory provision confers a power, it also by implication confers those powers reasonably necessary to achieve the principal aim.

In the present case, rule 8.2.1.4 clearly confers a power to deduct without an express power to withhold pending determination of liability. To give proper effect to the power, the fund *ex accessorio eius, de quo verba loquuntur* should also have the implied authority to withhold a benefit pending the determination of liability since this power is reasonably necessary to achieve the principal aim sought by conferring the power of deduction.

The implicit power to withhold the benefit must however be exercised reasonably. The concept of reasonableness as applied to a withholding provision was discussed in my determination in *Dakin v Southern Sun Retirement Fund PFA/KZN/158/98/LS* and is reiterated below.

A rule will be reasonable if it serves a legitimate objective and the means to achieve that objective are reasonable and rationally connected to it. The objective of the deduction provision contained in rule 8.2.1.4 and the power to withhold impliedly conferred thereby is to protect an employer's right to pursue recovery of

misappropriated monies. This is clearly a legitimate objective. The means to achieve that objective is the power to withhold a benefit pending resolution of proceedings and the power to deduct once liability has been established. The interests of the employer are thereby protected in that the ability of the member to pay any prospective compensation award is ensured.

However as I discussed in *Dakin* there is a competing principle brought into play by the nature of the circumstances covered by the rule, namely, the presumption of innocence founded in criminal law. The effect of the power to withhold a benefit pending the outcome of proceedings is to intrude on this presumption insofar as the complainant may be penalized whether she is found guilty of the misconduct or not. This was explained in *Dakin* as follows:

In the normal course of events, the complainant would be permitted to take the cash withdrawal benefit and put it in the investment vehicle or scheme most favourable to her. However, by withholding her benefit, the fund deprives her of that choice. Her benefit remains in the fund subject to the same fate as the fund's investments whereas she might have earned considerably more by investing it elsewhere.

As in *Dakin*, the power to withhold in the present case permits the fund to withhold the benefit without qualification and to that extent the means of implementing the legitimate objective are not carefully designed and rationally connected to that end. In withholding a benefit for legitimate reasons on behalf of a withdrawing member, the fund should afford the member some protection from suffering a decline in the value of the benefit during the period it is withheld. This can be achieved by giving the member the right to divest the benefit at an agreed rate of interest or to hedge the investment performance in some other way. In addition, the fund should only be permitted to withhold an amount up to the value of the employer's claim. Furthermore, the employer should not be allowed to withhold the benefit indefinitely. Should the complainant's liability not be determined within a reasonable period, she shall be entitled to seek further relief from this tribunal and these proceedings shall be postponed for that purpose.

I accordingly make the following order:

**Order**

1. The respondent is entitled to withhold the complainant's benefit for a reasonable period pending the determination of liability for compensation for her alleged misconduct.
2. The respondent is directed to take all necessary steps within six weeks of this determination to effect an appropriate rule amendment which expressly regulates the respondent's power to withhold a benefit pending the determination of a member's liability for misconduct.
3. The rule amendment referred to in clause 2 above shall permit a transfer, at the request of a member whose benefit is withheld, to disinvest the benefit of the member concerned and invest it at an agreed rate of interest or to hedge the investment performance of the assets concerned.
4. The rule amendment referred to in clause 2 above shall only permit the withholding of an amount up to the value of the claim and state that the balance of the benefit is to be paid to the member within 7 days of the benefit becoming due.
5. The complainant shall be entitled to exercise a choice consistent with the terms of the proposed rule amendment within 14 days of this determination and the respondent shall take all necessary steps to give effect to that choice.
6. The matter is postponed until 28 February 2000 at which time this tribunal will fashion an appropriate remedy if the proceedings against the complainant have not yet been finalized.

7. The parties are entitled to place further relevant evidence and submissions before this tribunal on 28 February 2000.
8. Any party is entitled to anticipate the resumption of these proceedings by giving the other party and this tribunal 14 days notice.

DATED at CAPE TOWN this 31st day of AUGUST 1999.

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**JOHN MURPHY**

PENSION FUNDS ADJUDICATOR