

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

**CASE NO: PFA/WE/320/99/NJ**

**In the complaint between:**

L Von Reitzig

Complainant

and

Cape Printing Pension Fund

First Respondent

Cape Printing (Pty) Limited

Second 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. The complaint relates to whether the complainant's benefit should be determined in terms of the rule relating to an early withdrawal benefit or an early retirement benefit.

After an exchange of correspondence between the complainant and the respondent consisting of letters and a series of telephonic conversations, the complainant lodged his written complaint at my office on 26 January 1999. 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 a report placed before me by my investigator Naleen Jeram.

The complainant is Lionel Von Reitzig, an adult male, a former member of the first respondent, of Goodwood, Cape Town.

The first respondent is Cape Printing Pension Fund, a pension fund duly registered under the Pension Funds Act of 1956. The administrator of the fund is Momentum Employee Benefits, (hereinafter referred to as Momentum) represented by Des Rabé attorneys.

The second respondent is Cape Printing (Pty) Limited, a company duly incorporated with limited liability according to the company laws of the Republic of South Africa.

The complainant was employed by the second respondent on 1 April 1981 until the date of his retrenchment on 9 June 1998, at the age of 61. Upon his retrenchment the complainant received a severance package of R26 350.00 from the second respondent. Throughout his employment the complainant was a member of the first respondent.

### Complaint

The complaint relates to the interpretation and application of the rules of the first respondent and alleges that a dispute of law has arisen in relation to a fund between the fund and the complainant.

At the time of the complainant's termination of employment, Momentum, determined that the following rules of the first respondent were applicable to the complainant:

#### 5 WITHDRAWAL

##### 5.1 Amount payable and deferment period

Save where the following section is to apply a member who withdraws from service shall be paid the cash amount specified in the schedule.

The calculation of the cash amount specified in a schedule reads:

Lump sum benefit on withdrawal

- (a) directors in service on 1 March 1983 - at member's discretion, the then-current discounted value (as determined by the actuary) of the benefits to which he would have become entitled on his retirement by virtue of his service prior to withdrawal
- (b) others - member's contributions plus 4 per cent interest compounded annually in arrear

The benefit in terms of rule 5 was computed as follows:

Member contributions	4 573.67
Interest	1 540.81
Less tax	1 035.48
Benefit payable	<u>5 079.00</u>
	R6 114.48
	R6 114.48

The complainant was dissatisfied with this withdrawal benefit. He expressed his dissatisfaction by initially contacting Southern Life, the then administrators of the first respondent, who in turn referred him to Associated Insurance Brokers (Pty) Limited (A.I.B.), the brokers of the first respondent. A certain Mrs Gerda at A.I.B. informed the complainant that in terms of the rules of the first respondent he was entitled to a lump sum of approximately R10 500.00 and a monthly pension.

The complainant did not receive a copy of the rules of the pension fund and received his last benefit statement in 1995. Thus he was not in a position to determine whether his benefit was correctly determined. Hence, on 10 July 1998 he directly approached the offices of the first respondent and queried the calculation of his benefit and informed the wage clerk that he was not prepared to accept the amount of R5 079.00.

Nevertheless, the first respondent sent a cheque of R5 079.00 and a tax certificate via registered post to the complainant on about 23 July 1998. Hereafter the complainant again visited the offices of the first and second respondent and A.I.B. to express his dissatisfaction. After receiving no further responses, the complainant lodged his written complaint with my office and a copy of the complaint was served on the first and second respondent as well as the new administrators of the first respondent, Momentum.

Mr Rabé acting on behalf of Momentum, in his response to the complaint, dated 11 June 1999 acknowledged that the complainant's benefit was determined in terms of rule 5. However, he further refers to rule 4 which reads as follows:

4.1 Early retirement

- 4.1.1 If a member at any time prior to the normal retirement age becomes unable to perform adequately the duties of his normal occupation because of ill-health or injury he may with the consent of the principal employer retire in which event he shall be paid the monthly pension described in the schedule.
- 4.1.2 A member may, with the consent of the employer, (save that such consent shall not be required if the member has spent 15 years in service unless he is being dismissed for dishonesty) retire at any time within ten years of the normal retirement age in which event he shall be paid the monthly pension described in the schedule.

Monthly pension is defined as follows in the schedule:

Member's monthly pension on normal retirement

pension that can be purchased by the member's equitable share.

equitable share means a portion of the scheme's assets (less such amounts as are in the opinion of the actuary required to secure the benefits of members who remain in service after attaining the normal retirement age and any balance standing in the reserve account or an individual account) which has been allocated to a member who is in service and who has not yet attained the normal

retirement age and shall be determined

- (1) at any scheme review date, by applying thereto the ratio that the sum of the member=s equitable share, if any, at the previous scheme review date and his contributions and the corresponding balance of cost over the ensuing scheme year bears to the total of the corresponding sums for all members combined.
  
- (2) at any date other than a scheme review date, by adding to the member=s equitable share at the most recent scheme review date his subsequent contributions and the corresponding balance of cost together with such interest as is considered appropriate by the actuary.

Momentum subsequently have confirmed that the complainant's equitable share as at 9 June 1998 was R34 276.85 and his benefit in terms of rule 4.1.2 would be as follows:

Full pension:	R 5 618.52 p/a
OR	
1/3 commutation:	R11 425.62
plus	
Balance of pension	R 3 700.68 p/a

Mr Rabé, further, concedes:

The complainant being aged 61 at the time of his resignation/retrenchment (which-ever factually applied) in 1998, would in our opinion have fallen within the ambit of the above provisions and would have been eligible to such early retirement benefit free of any consent by the employer (he had completed 17 years of service with the employer).

In the premises it is clear that the complainant is eligible to such early retirement benefit from the fund in this regard.

The second respondent responds as follows:

Cape Printing's lease at our Observatory premises was expiring and alternative premises had been obtained in Atlantis.

A dispute was declared by the S.A. Typographical Union and after mediation the CCMA resolved the dispute on 22<sup>nd</sup> October 1997. Mr Von Reitzig was listed as one of those employees who had after individual consultation with the Commissioner elected to be paid out severance pay. At that time and several times subsequently Mr Von Reitzig was advised that payment of severance pay did not constitute retirement and that normal procedures of termination of employment would be applied.

When Mr Von Reitzig first phoned Gerda of A.I.B. he was given the figure of R31 631.00 in good faith on the assumption of retirement. Gerda was not advised or aware of Mr Von Reitzig's intention to take severance pay.

The payments made as a result were in accordance with the relevant pension fund rules and CCMA Settlement i.e.:-

Severance Pay                                   R26 350.00

Tax   Nil

R26 350.00

Pension contribution                          R 4 573.67

Interest    R 1 540.81

Tax paid    R (1 035.48)

R 5 079.00

Total cash received R31 429.00 after tax deduction.

The assumption of the second respondent appears to be that seeing the complainant had been retrenched he was not entitled to retire in terms of rule 4.1.2.

The complainant seeks an order directing the first respondent to determine his benefit in terms of rule 4.1.2

## Analysis

The sole issue for determination is whether the complainant's benefit should be determined under rule 5 (withdrawal benefit) or rule 4 (early retirement benefit).

From the evidence and on a proper interpretation of rule 4.1.2 it is clear that the complainant does fall within the ambit of this rule. As the complainant was 61 years of age (which was within 4 years of the normal retirement age being defined as 65 in the rules for the first respondent) as at 9 June 1998 and having completed more than 17 years of service with the second respondent, he did not require the consent of the second respondent to qualify for an early retirement benefit. The second respondent's argument that the complainant received a severance package and being advised that such receipt does not constitute retirement is erroneous and irrelevant. The payment of a severance package is solely a labour issue between the complainant and his employer and has no bearing on a determination of his pension benefit in terms of the rules of the first respondent. The complainant has a right to early retirement in terms of the rules of the fund and both respondents have a duty of good faith towards him to ensure that he is adequately informed of his rights and benefit expectations.

Hence, it is clear that the complainant's benefit may be determined either under rule 4.1.2 or rule 5.1. Adopting a purposive approach in interpreting the rules, where a complainant falls under the ambit of two separate rules, it is clear that the primary intention of the rules, like any other pension fund, is to make provision for the retirement of a particular member (including early retirement). Benefits upon early withdrawal, incapacity, late retirement etc. are secondary to the provision of a benefit upon normal retirement. These "secondary benefits" are based upon the assumption that a member may not reach the normal retirement age set out in the rules of any particular fund. Thus, where a benefit could either be determined under a rule relating to retirement or a rule relating to early withdrawal, bearing in mind the primary purpose of a pension fund and in the absence any other provisions, one is inclined to adopt the retirement benefit rule which is in line with the primary purpose of a pension fund.

In addition, on a literal reading of rule 4.1.2 and in particular, “a member may...” the use of the word “may” does indicate that the complainant has a right to make an election as regards to whether he intends to retire or not. However, as stated, the complainant was not in possession of a copy the rules of the pension fund nor did he receive a benefit statement for the last three years of service, thus he was not aware of the fact that he had an election to make. The issue in law is whether there was a duty on the trustees of the first respondent or its administrators to inform the complainant of his election.

Section 7C(2) of the Pension Funds Act of 1956 outlines the objects of the boards of management of the Pension Fund and includes *inter alia*:

- (2) In pursuing its object the board shall -
  - (a) take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of this Act are protected at all times especially in the event of an amalgamation or transfer of any business contemplated in section 14, splitting of a fund, termination or reduction of contributions to a fund by an employer, increase of contributions of members and withdrawal of an employer who participates in a fund;
  - (b) act with due care, diligence and good faith;...

Section 7D of the Act, when dealing with duties of the Board, *inter alia* includes:

- (c) 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;

Further, Pension Fund Circular 86 issued by the Registrar of Pension Funds dealing with the disclosure requirements to be observed by pension funds, *inter alia*, includes:

#### **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 fail safe mechanism, the letter enclosing any cash payment 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, 1962, preservation pension fund or retirement annuity.

#### RETIREMENT

A notification explaining the available options in terms of the rules should be sent to the member before the event.

From the above it is clear that there was a duty on the trustees of the first respondent or the administrators of the respondent to inform the complainant of his election. This duty, on the facts of this matter, becomes more compelling, when the complainant after speaking to the broker of the first respondent was aware of his benefit under rule 4.1.2, although not the legal basis for it, and enquired about his benefit from the first and second respondent as well as from Momentum. Surely, at this stage, the first respondent or Momentum should have played a more active role and informed the complainant of his election. However, the first respondent and Momentum failed to do this and stubbornly stood by its position that the complainant's benefit fell under rule 5. This amounts to a breach of duty by the first respondent or Momentum, as a result of which the complainant sustained financial prejudice.

Accordingly, I make the following order:

1. The complainant's benefit is declared to be that owing under rule 4.1.2, being a full pension of R 5 618.52 per annum or a 1/3 commutation of R11 425.62, plus a monthly pension of R 3 700.68 per annum, of which R5 079.00 has been received.
  
2. The first respondent is directed to pay within 6 weeks of the date of this determination the outstanding balance of the complainant's benefit owing in terms of rule 4.1.2 as follows:

(a) a sum of R6 346.62 (R11 425.62 - R5 079.00);

and

(b) the capitalized value of his monthly pension (subject to any increases) due to the complainant from 1 July 1998 to the date of payment.

3. The first respondent is further directed to pay the complainant his monthly pension (subject to any increase) set out in rule 4.1.2 from the month following the date of payment referred to in paragraph 2 of this order until the death of the complainant.

DATED at CAPE TOWN this 20<sup>th</sup> day of JULY 1999.

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**JOHN MURPHY**  
PENSION FUNDS ADJUDICATOR