

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/KZN/99/98/SM

In the complaint between:

S B REED

Complainant

and

FIRST NATIONAL BANK GROUP PENSION FUND

Respondent

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

1. This is a complaint concerning the prejudice allegedly suffered by the complainant when he resigned from his employment and withdrew from a defined benefit fund at a time when the fund was embarking on a process of conversion to a defined contribution fund, the complainant alleging that the fund failed to inform him of the considerably better withdrawal benefit he would have received if he had stayed on a few more months and withdrawn from the defined contribution fund.
2. The complaint was lodged on 30 July 1998 with the Pension Funds Adjudicator in terms of section 30A (3) of the Pension Funds Act of 1956.
3. The complainant is Stephen Bradley Reed, employed by First National Bank for twenty years, and a member of the respondent until his resignation effective from 31 January 1996.
4. The respondent is the First National Bank Group Pension Fund, now a defined contribution fund, registered under the Pension Funds Act of 1956 (Athe Act@). The fund is administered by the Pensions Department of the Group Human Resources division of First National Bank, and the respondent was represented

herein by Mr R N Lawson, Senior Manager - Pensions.

5. The complaint relates to the administration of the fund; the complainant essentially alleges that he sustained prejudice in consequence of maladministration by the fund or by an administrative official representing the fund in failing to disclose to him certain information that he alleges it had a duty to disclose.
6. 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.
7. Having completed my investigation I have determined the complaint as follows. These are my reasons.

The complaint and response

8. As stated, the complainant had worked for First National Bank for the past twenty years, his most recent position being as senior business development manager , in charge of Sandton corporate operations. He states that he was transferred from Kwazulu Natal to Gauteng three and a half years prior to his resignation and that he had been attempting to obtain a transfer back to his home province for some eight months before he resigned, which he did when it became clear that a position could not be found for him.
9. The complainant states that when he was contemplating resigning his divisional manager referred him to the pensions department of the group human resources office. During December 1995 he dealt telephonically with a Mr McGrath of this office, who advised him as to his pension options. In terms of the rules of the defined benefit fund, these were to receive a cash refund of his Accumulated contributions@ (defined as the sum of his own contributions plus 5% thereof for

each complete year of the period for which the member paid contributions); to take a deferred pension; or to transfer the capital value of the deferred pension to another recognised pension fund or retirement annuity fund.

10. The complainant wrote a letter of resignation dated 21 December 1995, providing a month's notice of his resignation, to run from 1 January 1996 to 31 January 1996. Subsequently he held at least three or four further lengthy telephonic discussions with Mr McGrath regarding the amounts he stood to receive under the various options, the tax implications, where to place his benefit, etc. On 15 January 1996 he signed a withdrawal notice indicating that he elected to transfer the capital value of the deferred pension to another fund.
11. In the meantime a circular entitled Key Information and dated 20 December 1995 was sent to all personnel. The circular gave the name of Mr Lawson as the contact person. It is common cause that the complainant did not receive this circular until some time in the first week of January as it was not actually distributed until then.
12. The circular read as follows:

Change: We are pleased to announce that the bank has opened negotiations with the union with the view of changing our pension fund from a defined benefit to a defined contribution pension fund effective 1 January 1996.

This change, which is in line with market trends, will also involve making an offer to existing staff to convert to the new defined contribution with greater transparency and flexibility, or remain on the existing defined benefit fund.

Objective: To inform staff of the formal discussions with SASBO and keep you in the picture regarding an extremely important issue

affecting our pension benefits.

Action: At present no action is required but we will keep you informed early in the new year regarding these negotiations and the choice available to staff.

13. The complainant states that he saw this circular but did not think to ask Mr McGrath or anyone else for more information as he had already tendered his resignation and also as the contents of the circular did not in any event alert to him to the fact that a salient feature of the proposed new dispensation would be much improved benefits. He points out that the only advantages mentioned in the circular are Agreater transparency and flexibility@.
14. My investigator questioned the complainant telephonically as to his understanding at that stage of the difference between defined benefit and defined contribution funds. He stated that at the time he had had no knowledge of the difference, or implications; he had not been aware of the Amarket trend@, which was then in its early stages, for funds to convert to the defined contribution arrangement. In the course of his work dealing with corporate credit business such issues did not arise, and Apersonnel@ functions in his section were handled by personnel staff.
15. The complainant has also stated that his dealings with Mr McGrath led him to believe that Mr McGrath was a senior representative of the pensions department, since his manner was authoritative and professional. The complainant accordingly saw no reason to question or check the information Mr McGrath gave him and he assumed that Mr McGrath had provided him with full information.
16. The complainant duly left his employment at the end of January 1996. For some months his post was forwarded to him, and in early March 1996, he received a letter outlining the new defined contribution scheme, together with a statement comparing his personal benefits as at 1 January 1996 under the defined benefit scheme with

the proposed defined contribution option. It appears that there were crossed lines of communication and the fact of his resignation had not yet been recorded before this document was sent out.

17. The benefits as reflected in this benefit statement under the proposed defined contribution scheme were significantly better with regard to the projected pension on retirement, as well as the withdrawal benefit as at 1 January 1996.
18. An amount of R409 808,23 was indicated as the Atotal conversion value@ applicable in the complainant=s case should he transfer to the defined contribution scheme, in itself a significantly higher amount than that of R179 110, being the Acapital value (as determined by the bank=s actuary) of [the] deferred pension@ which the complainant was able to transfer in terms of general rule 5.1 and Part XI of the defined benefit fund rules.
19. Mr Lawson has provided the following explanation for the difference in these two actuarially determined amounts: (my comments in italics)

AThe value of the benefit viz R179 110, transferred to SANLAM at Mr Reed=s request was equivalent to the capital value of his deferred pension benefit. This value is determined on an actuarial basis at date of termination in compliance with the rules of the fund and standard actuarial practice. *[note: there is a reference in rule 11.2 of the defined benefit fund rules to transfer value being the capital value of the pension expectation that has accrued as at the date of leaving service.]*

The AOpening Share Value@ shown on the statement as at 1 January 1996 is also calculated on an actuarial basis but includes the projected service to normal retirement age of 60 years. *[note: @opening balance@ is defined in the defined contribution rules as being the net actuarial liability at conversion date as calculated by actuary, plus conversion premium]* Hence the greater

value. In addition, and to ensure an improvement to benefits, the calculations included the salary increases due to all staff members on 1 January 1996 even though the actuarial valuations were effected at 31 December 1995. The 25% Conversion Premium (with guarantees of further premiums) was added to the actuarial value to encourage members to convert to the defined contribution scheme. The premium was, in essence, a distribution of part of the surplus in the fund at that date. Consequently, the value of a deferred pension benefit cannot be compared to the value available on conversion. @

20. Also evident from the statement was a large discrepancy between the cash withdrawal benefit under the defined benefit scheme, being Accumulated contributions @ (R83 650,00) and that under the defined contribution scheme, being (according to rule 7.1 (1) (b), in respect of a member with 10 or more years completed service) the member's share @ (R409 808,23), as at 1 January 1996. As is usual in a defined contribution scheme the calculation of the member's share @ commences with the opening balance, which in this case corresponds, as at 1 January 1996, to the conversion value.
21. It appears from further circulars dated February 1996 and June 1996 as well as from the responses to the complaint that it was a feature of the agreement between the bank and the union that only those staff members who were members of the fund on 31 December 1995 and who remained members until 1 April 1996 would be given the option to convert on 1 April 1996 (with the effective date of the conversion being 1 January 1996). The complainant clearly falls outside these parameters as his services terminated on 31 January 1996.
22. The essence of the complaint therefore is that, in the complainant's own words,

At no stage was any information given to me that I was going to lose out financially by not remaining in the bank's employ for a further few months

due to the change in benefits...Had I been made aware of the financial implications...I would have delayed my resignation in order to make my future pensionable benefits secure... given that I had been with them for twenty years I would have thought my service and loyalty was worth better treatment than this.@

He refers to his numerous telephone conversations with Mr McGrath and states

Athere is no doubt in my mind that in his position he would have been aware of the impact ... I have been prejudiced by their maladministration.@

23. In his initial response Mr Lawson pointed out the complainant's non-eligibility under the conversion rules as his service had terminated two months before the 1 April 1996 voting date, and added Ait should also be borne in mind that you tendered your resignation after all staff members were made aware that changes to the fund would have an impact on the benefits provided by the fund.@ Mr Lawson has subsequently conceded that the complainant could not have had sight of the 20 December 1995 circular at the time he wrote his letter of resignation, since it was only distributed to staff members in early January 1996.
24. In the formal response to the complaint, Mr Lawson notes that the complainant signed his withdrawal notice on 15 January 1996 and comments Ahe was therefore aware of the impending changes@ (since he would have read the 20 December 1995 circular by that time). He goes on to set out the various steps taken over the months until 1 April 1996 to ensure effective communication regarding the conversion, as the negotiations were concluded (a joint statement to this effect being released on 2 February 1996) and the actuarial valuation completed and used to prepare the benefit statements comparing benefits under the two schemes. The steps are impressive and, as he comments, Ait appeared that we had got the message across effectively as 95,5% of all members converted to the defined contribution scheme.@

25. As he also points out, however, all of this did not affect the complainant as his services had terminated on 31 January 1996. The only response Mr Lawson provides to the complainant's complaint that the fund failed to advise him of the detrimental effects of resigning when he did is the following statement:

The information and benefit details given to Mr Reed at the time of his resignation were correct and in terms of the Rules existing at that time. @

26. In a follow up response after the complainant had replied to this response, Mr Lawson essentially argues that at the time the complainant resigned details of the conversion option were not available as the actuarial valuation of the fund as at 1 January 1996 had not been completed. Therefore the 20 December 1995 circular did not contain any financial information @.

27. With regard to the status of Mr McGrath, Mr Lawson has the following to say:

[Mr McGrath] was not a senior manager in the pensions department. He was in fact a re-engaged pensioner in a junior clerical position in the department. Consequently, he would not have been privy to confidential information regarding the conversion and at the time referred to by Mr Reed, Mr McGrath would be no wiser with regard to the conversion than any member of the fund. @

28. Mr Lawson also refers to the determination handed down by this office in the matter of *McEwan v First National Bank Group Pension Fund* (PFA/KZN/13/98), dealing with the same respondent and the same restructuring process. On facts which appear to be similar, the complaint was dismissed. I shall discuss this case more fully below.

29. By way of relief, the complainant seeks payment of the balance between what he

was paid and the amount he feels he should have received, which he determines to be At least the R327 846,58 mentioned in the new option schedule.@ This refers to the actuarially determined opening share value he would have been entitled to if he had converted to the defined contribution fund, as at 1 January 1996, before the addition of the 25% conversion premium.

Analysis of the complaint

30. The central issue in this complaint is the extent of the duty placed on a fund to disclose information to a member, and to ensure that the interests of a member are protected at all times.
31. That such duties exist is by now trite, the common law fiduciary duty to act in good faith being, since 15 December 1998, codified in sections 7C and 7D of the Pension Funds Act. Section 7C (2) reads as follows:

In pursuing its object the board shall:-

- (1) 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
- (3) avoid conflicts of interest;
- (4) act with impartiality in respect of all members and beneficiaries.

Section 7D deals with the duties of the board of a fund, one of which is 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 7D(1)(c))

32. The constitutional right to access to information, while at present applicable only with regard to information held by the state or its organs, may nevertheless be relied upon to assist in the interpretation of the common law and statutory right of pension fund members to the disclosure of information, by indicating the reasonable standard. Section 32(1) provides that everyone has the right of access to information that is required for the exercise or protection of any rights. Furthermore s33(1)(b) of the administrative justice clause (inserted by clause 23 of schedule 6 of the Constitution) also offers protection of legitimate expectations in the name of procedural fairness, closely allied to the right to information:

Every person has the right to...procedurally fair administrative action where any of their rights or legitimate expectations is (sic) affected or threatened.

33. In the *McEwan* case mentioned above I held that

[A fund member's right to be adequately informed] relates to the protection or exercise of some antecedent right. The complainant, in this instance, is requiring that the respondent ought to have supplied him with information regarding a future right which he might have had should he not have resigned from his employer and moreover a right which was not yet fully defined or established. I cannot find that there is any obligation on respondent to disclose its business or financial plans and negotiations relating to the future running of its operation to a member who has already made a decision to resign and who at the time is subject to rules applicable to all members at the

time. If the complainant has suffered financial prejudice as a result of the timing of his resignation this is unfortunate. His rights, however, remain defined in terms of the rules.@

34. Is the present case distinguishable from the *McEwan* case? I believe it is, on the facts, for the reason that in Mr McEwan's case, he had decided on and tendered his resignation at some time in November 1995 or possibly earlier, at which time any business or financial plans or negotiations with which respondent may have been engaged were still in the realm of the confidential, and therefore for all intents and purposes did not exist. However by the time the complainant in the present case tendered his resignation the mooted restructuring was in the public domain, or at least in the domain of being Afor consumption@ by all personnel. The date of the circular of 20 December 1995 marks the date of the entry of the information into the no-longer-confidential arena (even if in practice it did not reach members until after the Christmas break). I would argue that as from that date the fund had a duty to disclose to its members, specifically those contemplating leaving the fund, that the restructured fund, if they elected to transfer to it, would provide them with improved benefits, *inter alia* and specifically, improved withdrawal benefits.
35. My reasoning here is as follows: while the Aright@ of which the complainant was not informed was indeed a future right and was not yet fully defined or established, it is clear from the 20 December 1995 circular that the right, whatever shape it eventually took, *would come into being*: AThis change...will also involve making an offer to existing staff to convert to the new defined contribution with greater transparency and flexibility, or remain on the existing defined benefit fund.@ The details remained to be negotiated, but the intention to allow members the right to elect to change funds is clearly put forth, albeit with no indication that concrete financial benefits would flow from this.
36. From 20 December 1995, then, the fund had officially embarked on a *process* of transition or conversion from one type of fund to another, in the course of which

members= rights would be affected and new rights would come into being. Section 7C(2)(a), a codification of the common law, is specific that such times of restructuring, which take place over an extended period rather than on one particular date, call for *special* protection of members= interests:

A...the board shall...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...@

Pension Fund Circular No 86, on ADisclosure Requirements to be observed by Funds@ also requires notification to members on specific events, listing fund restructuring such as a conversion from a defined benefit to a defined contribution fund as one such event.

37. The reason for this is obvious: the members= rights are the subject of the transition, and by completion of the transition process, they will be changed, for better or worse. The reference in section 7C(2) to members= Ainterests ... in terms of the rules of the fund@ must be taken to mean interests and rights in terms of the old and new rules, as the process of restructuring takes place. While (for the period that) their rights are affected or threatened, the members existing rights *and* their interest in accessing the new rights to be opened to them must be protected.
38. It may be useful to borrow from labour law for guidance as to when the duty to disclose arises and what it may entail. In the Appellate Division case of *Atlantis Diesel Engines (Pty) Ltd v National Union of Metalworkers of SA* (1994 15 ILJ 1247 (A)), it was held that the duty of prior consultation with employees before termination of employment on non-disciplinary grounds (usually considered because of a perceived need for some kind of restructuring) arises Aas a general rule, both in logic and in law, when an employer, having foreseen the need for it, contemplates retrenchment@ (1252E). The court also approved the principle that sufficient

relevant information must be disclosed to make the consultation meaningful. The employer is thus under a duty to consult once (from the time that) a possible need to retrench is identified; such a duty would involve disclosure of its contemplation of retrenchment, as well as the disclosure of sufficient relevant information, followed by meaningful consultation, before any decision to retrench is actually taken.

39. By analogy, one could argue that the duty imposed on a pension fund to disclose plans for restructuring arises at the time when such restructuring is seriously contemplated, certainly by the time it is considered no longer confidential, even if the process is not far advanced. In my view it is in this case not the actual timing of the respondent's disclosure of the pending conversion which is remiss; it announced the plan at an objectively early stage in the process. The problem lies in the content of the disclosure. Unfortunately the announcement did not provide sufficient detail to alert a member to the fact that it would not be wise to leave the fund without further careful consideration of the planned conversion; and it did not follow through on the initial disclosure by ensuring that its officials were fully able to execute the duty to protect members interests by giving them further information. Thus in my view it failed to implement fully its duty to disclose and communicate at the early stage of the conversion process, as well as to protect members' interests, specifically in this case the complainant's interests.

40. To expand on this: in my view, the announcement (in the 20 December 1995 circular) of the pending conversion, created a legitimate expectation that members contemplating any action after this date which could be to their financial detriment would be advised of any pending improvements to their rights so that they could take informed decisions. In fact the duty to inform at this early stage, could in my opinion have been satisfied by some unambivalent indication in the circular that the new scheme would translate into considerably improved benefits, *inter alia* withdrawal benefits, for members. This was generic information clearly within the knowledge of the fund, and was in fact used not long afterwards (also without specific financial details) in its glossy brochure distributed in early March 1996,

where enhanced withdrawal benefits and improved withdrawal benefits are several times held out as advantages of the defined contribution scheme.

41. Even though there was at this stage no guarantee that withdrawal benefits under the new fund would be more advantageous, there was a very strong likelihood that they would be, this being one of the selling points of defined contribution funds. The complainant was therefore entitled, in my view, to sufficient information to enable him to make a meaningful decision as to whether to stay on in the fund until the new benefits were in place.
42. The fact that such information was not contained in the 20 December 1995 circular, in my view rendered it all the more incumbent on the fund's officials to supplement the limited information then published when advising members contemplating resignation.
43. Mr Lawson has pointed out that Mr McGrath held a junior clerical position in the pensions department; hence he would not have been privy to confidential information regarding the conversion, and at the time referred to by Mr Reed ... would be no wiser with regard to the conversion than any member of the fund. I cannot accept this argument: at the time the complainant tendered his resignation (21 December 1995) and at the later time that he signed the notice of withdrawal from the pension fund (15 January 1996), the pending conversion was not confidential knowledge and it could reasonably be expected of any administrative official that he/she should know of it and be able to provide further information. If he did not the maladministration lies with his superiors who did not apprise him of the information necessary to carry out on the fund's behalf its duty to disclose information and act in good faith towards its members.
44. The fund chose to interpret its duties narrowly, adopting a strict rule-adherence approach. In my view this approach in the specific circumstances of this case falls short of the standard required by the statutory and common law fiduciary duties, and

amounts to maladministration. In the present circumstances the duty to disclose and to act with due care, diligence and good faith in protecting the interests of members must be interpreted more widely, for the reasons I have indicated.

45. As a result of the breach of the fund=s duty, the complainant has suffered prejudice in that he received a considerably lower withdrawal benefit for transfer to an approved fund than that he would have received if he had stayed in his employment for a mere three more months, which he would reasonably have done if he had been properly informed. The complainant is therefore entitled to compensation from the fund on a basis akin to that payable in terms of Aquilian liability, that is, compensation placing the aggrieved party in as good a position as if the wrong had not been committed.
46. I shall take into account, however, the element of uncertainty, however small, that the complainant could have died or elected not to join the defined contribution fund before the effective date of 1 April 1996, even if he had been given the required information, as well as an element of contributory negligence on the part of the complainant in not following up and asking more questions (offset to a large extent by the fact that without sufficient information being provided he was not able to recognise his need for further information).

Relief

47. The amount the complainant would have been entitled to on withdrawal after 1 April 1996 had he been in the employ of First National Bank at that date would be R409 808,23, the member=s share, in terms of rule 7.1 (1) (b). In terms of rule 7.1 (3) a member may preserve any amount of this entitlement that he does not take in cash by transferring such amount to an approved fund.
48. Given the factors mentioned in paragraph 46 above, and given further that the

complainant himself seeks the reduced amount of R327 846,58 (the amount of R409 808,23 less the 25% conversion premium of R81 961,65), in my view justice is served by payment of compensation in the amount of R148 736,58, this being the amount of R327 846,58 less the amount of R179 110 already paid in 1996.

49. Accordingly the order of this tribunal is as follows:

The respondent is directed to take all necessary steps to transfer the amount of R148 736,58, together with interest from 30 April 1996 to date of payment at the rate prescribed by section 2 of the Prescribed Rate of Interest Act, to the Sanlam Preservation Pension Fund in the complainant=s name, within six weeks of the date of this determination.

DATED at CAPE TOWN on 18th JANUARY 2000.

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JOHN MURPHY
PENSION FUNDS ADJUDICATOR