IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.: PFA/GA/435/98/NJ

In the complaint between:

M.S. Akbar **Complainant**

and

National Brands Limited **FirstRespondent**
National Brands Group Retirement Fund **Second Respondent**

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

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 concerns the complainant's entitlement to employer contributions upon early retirement.

After an exchange of correspondence between the complainant and the respondent's consisting of a number of letters and other documentation, the complainant has lodged a written complaint with my office on 30 October 1998. The complainant has complied with the provisions of section 30A(1) which require 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's have properly considered the complaint and have replied to it in writing as required by section 30A(2).

No hearing has been held in this matter. Accordingly, in determining this matter, I have

relied exclusively on the documentary evidence an argument put to me in writing and on the report placed before me by my investigator, Naleen Jeram.

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

Background to the complaint:

The complainant is Mohammed Sulaiman Akbar, a former member of the second respondent now residing in Gauteng. The complainant is herein represented by Yusuf Nagdee, attorneys.

The first respondent is National Brands Limited, a public company with its corporate office at 1 Mellis Court, Gauteng.

The second respondent is National Brands Group Retirement Fund, a pension fund duly registered in terms of the Pension Funds Act of 1956. The second respondent is represented by Momentum Broker Administration Services.

The complainant originally was a member of Packo Pension Fund, a pension fund duly registered in terms of the Pension Funds Act of 1956 herein represented by Southern Life Employee Benefits, the administrators of the fund. All members of this pension fund were transferred to the second respondent as at 1 September 1995.

Complaint

The complaint relates to the interpretation and application of the rules of Packo pension fund and alleges that a dispute of law has arisen in relation to the fund between the complainant and the employer in respect of an early withdrawal benefit.

The complainant was employed by the first respondent on 1 June 1984. However he only started contributing to Packo pension fund from November 1987. During August 1993 the complainant was required to relinquish his position as a sales manager within the first respondent in order to take up a position as a sales agent. Thus the complainant voluntarily resigned on 31 August 1993, and commenced working as a sales agent. His membership of the fund terminated on that date.

The relevant rule applicable to the complainant read as follows:

> Lump sum benefit on withdrawal
>
> Return of member's contributions with 8 per cent per annum compound interest
>
> or
>
> at the employer's sole discretion, a return of the member's actuarial reserve, as defined by the actuary

Packo Pension Fund in a telefacsimile dated 7 November 1997 sets out the benefit due to the complainant, which was as follows:

> On withdrawal at 31 August 1993 an amount of R17 366,79 was paid on 11 November 1993. Details are as follows:

Return of members' own contributions	R19 318,56
Plus interest accrued	R 4 102,23
Less PAYE tax deductable	R 6 054,00
Balance payable	R17 366,79

Despite having received his withdrawal benefit the complainant alleges that he was entitled to the employer's contribution but that it was agreed these would be paid once he gave up his position as a sales agent. The complainant avers that he was given

undertakings by an official of the first respondent and a certain Mr P. Naidoo (Human Resources Officer of the first respondent) that employer contributions would be refunded to him, once he finally left the service of the first respondent.

The complainant eventually resigned in October 1995 at which point he requested the employer contribution made on his behalf to be refunded to him as per the undertakings given by the officials of the first respondent.

The first respondent in a telefacsimile dated 7 May 1999 addressed to the Pension Funds Adjudicator responds as follows:

> First respondent denies that applicant was ever informed that the first respondent's contributions would be held as he was taking up the position as sales agent. Applicant (complainant) was advised that payment of the first respondent's contributions would be made as per rules of the fund.

Hence, the complainant seeks an order for the Pension Funds Adjudicator directing either the employer or the second respondent to pay him the employer's contributions from November 1987 to 31 August 1993.

Analysis of evidence and argument:

The respondents argue that the complainant has been fully paid in accordance with the rules of the Packo pension fund. Further, the first respondent did not indicate that the complainant was to receive his actuarial reserve value in terms of clause 9(b). At the outset let me re-iterate my view set out in the *Peggs* matter (PFA/KZN/199/9/NJ dated 29 April 1999), that there can be little doubt that an employer's contributions to a pension fund on behalf of a member constitutes remuneration. However, that in itself does not confer rights of ownership to such contributions. Ownership always vests in the fund. The member's entitlement consists of a contractual right to receive certain benefits once and if certain conditions are met. The enquiry in this matter *inter alia* is whether failure of the

rule to directly provide for entitlement to employment contributions is reasonable and fair.

The object of the rule is clearly aimed at protecting the employer and other members of the fund. However, the rule itself is not a complete bar to member's entitlement to employer contributions. As clause 9(b) does allow for a return of the members actuarial reserve, determined by the actuary, but such a decision lies within the sole discretion of the employer. The actuarial reserve value will usually take into account the employer's contributions. Hence, when this option is exercised the member would indirectly enjoy the return of the employer's contribution. This discretion was not exercised in favour of the complainant in this matter. The first respondent argues that this discretion is usually exercised when a member is retrenched or in exceptional circumstances where only a return of the member's contributions plus interest thereon is unfair and unjust. The complainant and members of the respondent can be said to be aware or ought reasonably to be aware of this rule when joining the fund and could take the necessary steps through a process of negotiation (for example, certain percentage of trustees must be appointed by the members) to ensure the amendment of the rule if they feel the rule is inherently unfair. Thus the object of a rule can be seen as of sufficient importance to warrant overriding an employee's claim to employer contributions upon voluntary resignation.

The rule is designed in such a way that it allows some flexibility to entitlement to employer contributions in an indirect sense even though such discretion may only be exercised by the employer only. Further, the rule is of general application in that it applies to any member whether he is retrenched or voluntarily resigns.

The complainant voluntarily resigned and did receive a return of his own contributions plus interest at the rate of 8% compounded. The fact that the complainant was fully aware of the rule at the time of joining the second respondent, further supports the finding that his rights have been minimally impaired.

However, as stated, Packo pension fund is no longer in existence. All remaining members

of the fund were transferred to the second respondent which came into being on 1 September 1995. In the light of the benefits received by the complainant in terms of the rules of Packo pension fund and the fact that he voluntarily resigned, the effect of the restriction is not severe on the complainant's rights. Thus, even were the rule to be considered unreasonable, it is not possible to grant relief.

Turning to the complainant's main argument there is a dispute of fact amongst the parties. The complainant argues, that Mr Naidoo, the human resources officer at the first respondent made oral representations to him that he would be entitled to 95% of the employer contributions made on his behalf to the now defunct pension fund. The first respondent denies that the complainant was ever informed that the employer contributions would be held for his benefit as he was taking up a position as sales agent. But in turn the complainant was advised that payment of employer contributions were made as per the rules of the fund. However, even if I were to assume that the aforesaid representations were made to the complainant, his argument fails for the following reasons. Firstly, Mr Naidoo is a human resources officer at the first respondent and as such cannot in law make any representations on behalf of the now defunct pension fund which was a separate legal entity from the first respondent. Secondly, any entitlement to employer contributions should be based on the rules of the pension fund and not on representations made by an official of the employer. Thirdly, the complainant's early withdrawal benefit was at 31 August 1993. Hence, if any liability existed under the Pension Funds Act as a consequence of the first respondent's conduct, the complainant's cause of action in that regard has prescribed in terms of section 30I of the Pension Funds Act of 1956. Further, due to the lapse of almost six years from the commencement of the complainant's cause of action, his limited prospect of success and his failure to issue summons against the first respondent, no good cause exists as contemplated by section 30I(3) to condone non-compliance with the time limits or extend the time period.

Further, even if the complainant received an undertaking from the first respondent, this in effect would amount to contractual dispute or unfair labour practice, which would fall

outside the jurisdiction of this office, because it would not relate to administration of a fund, the investment of its funds or the interpretation and application of its rules as set out in the definition of a complaint in section one of the Pension Funds Act of 1956.

Accordingly, for the aforegoing reasons the complaint is dismissed.

DATED at CAPE TOWN this 9th DAY of JUNE 1999.

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JOHN MURPHY
PENSION FUNDS ADJUDICATOR