

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

CASE NO: PFA/WE/665/99/CN

In the complaint between:

**Joyce van Dyk**

**Complainant**

and

**Fedsure Life Assurance Ltd**

**First Respondent**

**The Governing Body, Heathfield  
Pre-school Centre**

**Second Respondent**

**Heathfield Pre-school Group Life  
and Pension Scheme**

**Third Respondent**

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

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1. On 10 September 2001, I handed down a Preliminary Ruling in this matter, in which I handed down the following order:
  - 1.1. The Heathfield Pre-school Group Life and Pension Scheme is joined as the third respondent to these proceedings.
  - 1.2. The first respondent is ordered to serve a copy of the complaint, its response, and this order on the third respondent, within seven days of the date of this order.

- 1.3. The second and third respondents are directed to inform this Tribunal, and the complainant, in writing, by no later than Tuesday 25 September 2001, of the factors that they took into account in deciding not to pay the complainant a further amount as provided for in General Rule 10 (iii).
2. The Preliminary Ruling was served by facsimile transmission on the second respondent, as well as on Mr. Darryl Morris of the Legal and Contracts Section of Fedsure Group Benefits, on 14 September 2001.
3. No response was received from any of the respondents on the 25 September 2001. Consequent thereupon, my Assistant Adjudicator, Cikizwa Nkuhlu, telephoned Mr. Daryl Morris to enquire as to whether the order had been served on the fund. The latter informed her that since the first respondent is no longer the administrator and underwriter of the fund, he had handed the order to Mr. Achmat Sassman, who is employed by Glenrand-MIB, the brokers for the fund, on 19 September 2001, for onward transmission to the fund.
4. A telephonic enquiry from Mr. Sassman, made by Miss Nkuhlu on 28 September 2001, revealed that although he had received the order and Fedsure's response from Mr. Morris, he had not yet forwarded the same to the fund. On 11 October 2001, Miss Nkuhlu sent a fax to the Governing Body, reminding it to respond to the Preliminary Ruling. On 18 October 2001, Mr. Sassman confirmed that he had handed the documents to the Principal of the Heathfield Pre-School Centre, Mrs. Blankenberg, for onward transmission to the board of trustees of the fund and the Governing Body of the Pre-school Centre.
5. On 2 November 2001, Mrs. Blankenberg confirmed to Miss Nkuhlu that she had indeed received the documents from Mr. Sassman on 18 October 2001, and had handed them to the Chairman of the board of trustees a few days thereafter.

6. To date, no response has been forthcoming from the second and third respondents, in spite of the fact that they have been given more than a sufficient opportunity to comply with the order granted on 10 September 2001.
7. The factual background to this complaint has already been comprehensively dealt with in the Preliminary Ruling, and will thus not be repeated here.
8. The complainant, through her erstwhile legal representative, had requested the Chairperson of the Governing Body of her ex-employer, the Heathfield Pre-school Centre, to exercise the discretion vested in the employer by General Rule 10 (iii) and award her the full balance of her allocated share of the fund. The rule reads as follows:

**10. WITHDRAWAL FROM SERVICE**

(iii) If a member does not receive the full benefit of his allocated share, the employer may nevertheless, at his sole discretion, grant the member a further amount up to the balance of his allocated share.

9. It is instructive to note that the erstwhile administrators of the fund had, in response to the complainant's request for the payment of the full balance of her allocated share, inter alia, stated as follows in their letter dated 2 June 2000:

The rules do make provision that if a member is not entitled to the full value of his allocated share, the board of trustees may nevertheless, at its sole discretion, grant the member a further amount up to the balance of his allocated share. In order for us to pay this additional amount, we require a written instruction from the board of trustees.

10. The "member's allocated share" is defined in the rules as:

"Member's allocated share" means an in-service member's pro rata share of the deposit account calculated as follows:

On the day before each scheme anniversary, the contributions payable by the member and by the employer on his behalf during the foregoing scheme year are added to his allocated share (if any) at the beginning of that scheme year. The balance in the deposit account is then allocated between members who have not yet retired in the ratio of these amounts.

The member's allocated share on any other date is his last calculated allocated share, if any, plus subsequent contributions payable by him and by the employer on his behalf in respect of his retirement benefits, all accumulated at the applicable interest or yield rate.

11. Boards of pension funds, as repositories of social power, are akin to administrative bodies. Thus, where a discretionary power has been vested in them, as is the case with the board *in casu*, it has to be exercised according to certain minimum standards. The South African courts have accepted the dictum of Lord Halsbury, in the English case of *Sharp v Wakefield (1891) AC 173, at 179*, to the following effect:

"Discretion" means when it is said that something must be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion:...according to law and not humour. It is to be, not arbitrary, vague and fanciful, but legal and regular.

12. The only reasonable explanation for the dilatoriness on the part of the board and the employer to comply with the terms of paragraph 20.3 of the preliminary ruling is that they did not exercise the discretion vested in them by General Rule 10(iii). Even though the power to grant the complainant a further amount is a discretionary power, the repository of the discretion may not blatantly refuse to exercise it, because the complainant, having requested it to exercise that discretion, is entitled to a decision one way or the other. Lawrence Baxter : *Administrative Law, Juta*, at page 414, states as follows:

Persons who are entitled to do so may call upon a public authority to exercise its powers. Where a power is discretionary, they are at least entitled to a decision one way or the other: a blatant refusal to exercise the discretion is unlawful.

13. Thus, the employer's and the board's failure to exercise the discretion amounts to an improper exercise of power. As a general principle, the courts are wary of assuming a discretion which has been entrusted to another tribunal or functionary, and will refer the matter back to that tribunal or functionary for a fresh decision. However, the principle may be departed from in exceptional circumstances, where for instance:
  - 12.1. The end result is in any event a foregone conclusion, and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter;
  - 12.2. Further delay would cause unjustifiable prejudice to the applicant;
  - 12.3. The tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again;
  - 12.4. The court is in as good a position to make the decision itself.
14. In the present case, the complainant resigned from employment during July 1998, and the present complaint was lodged during November 1999, after several letters to the fund and the employer had failed to achieve the desired result. Serious financial hardship that she had sustained as a result of the reduced payout is one of the factors that the complainant had listed in support of her request for the exercise of the discretion in her favour. Thus, the further delay that is attendant upon a referral-back of this matter to the trustees will probably cause her unjustifiable prejudice.

15. I also have serious misgivings about the resolve and competence of the employer and the board to exercise the discretion, especially in the light of their failure to comply with the Preliminary Ruling after the lapse of such a long period of time since it was handed down. Accordingly, I propose to substitute my own decision for their own as I am in as good a position to make the decision myself.
16. The complainant has served the employer for a period of almost twenty years, and had been a member of the fund since its inception in September 1986. She was compelled to resign from employment after charges of financial negligence had been laid against her, but the charges were later withdrawn. The balance of her allocated share of the fund amounted to R29 355-00 on her resignation. She only received an after-tax withdrawal benefit amounting to R9 217-04, which comprised of all her own contributions (R8 847-74), plus 3% compound interest, as well as 7,5% of her allocated share of the fund (R2 109-10).
17. I will not lose sight of the fact that although the charges against the complainant were withdrawn at the instance of the employer, the loss suffered by the employer through the complainant's (unproved) negligence amounted to R39 273-15. Although I have not been furnished with the membership profile of the fund, I am convinced that the fund is a relatively small fund, since it is only a pension fund for a Pre-school Centre. That factor is the most important one that I have taken into account in coming to my decision.
18. Having taken all the relevant factors into account, I am of the view that the complainant is entitled to a further amount representing 50% of her allocated share. She has already received an amount representing 7,5% of the balance of her allocated share, by virtue of the provisions of Special Rule 5(ii); accordingly the fund should now pay her 42,5% of the balance of her allocated share as at July 1998, which is an amount of R12 475-88.

19. The relief granted is, accordingly as follows:

The third respondent is ordered to pay to the complainant, within six weeks of the date of this order, the amount of R12 475-88, together with compound interest at the rate of 3% per annum, calculated from 1 December 1999 to the date of payment thereof.

DATED AT CAPE TOWN ON THIS 16TH DAY OF NOVEMBER 2001.

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**JOHN MURPHY**  
**PENSION FUNDS ADJUDICATOR**