IN THE TRIBUNAL OF THE
PENSION FUNDS ADJUDICATOR CASE NO. **PFA/GA/6/98/JM**

IN THE COMPLAINT BETWEEN

CEDRIC MEYER **Complainant**

AND

ISCOR PENSION FUND **Respondent**

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

Introduction

The Complainant, a former employee of Iscor Limited and a member of the Respondent, has lodged a complaint with the Pension Funds Adjudicator in terms of section 30A(3) of the Pension Funds Act of 1956.

The Complainant was employed as a senior designer in the electrical section of the drawing office at Iscor Limited in Pretoria. He commenced employment on 4 January 1960 and remained in employment continuously until 31 July 1993, when his services were terminated for operational reasons. Throughout his employment the Complainant was a member of the Respondent, a pension fund registered in terms of the Pension Funds Act of 1956.

In broad terms, the Complainant complains that the Respondent has unfairly discriminated against him by affording benefits to other retrenched employees similarly

situated to himself, far in excess of the benefits he received, but who left employment shortly after he did.

The complaint has been the subject of earlier proceedings described more fully below. A hearing into the substantive merits of the complaint was held on 25 January 1999 at the Arbitration Foundation of South Africa in Johannesburg. The Complainant was represented by Adv. J Grogan, instructed by Mr Bam of David Bam Attorneys, Pretoria. The Respondent was represented by Adv. C Loxton S.C and Adv. A Franklin, instructed by Mr G Hay of MacRobert, Devilliers, Lunnon and Tindal of Pretoria.

No evidence was led, and the parties relied solely on the documentary evidence submitted and their written and oral submissions.

Background

As already mentioned, the Complainant was dismissed from Iscor Limited for operational reasons on 31 July 1993. He received his pension benefits in terms of the applicable rules of the Respondent at that date. These amounted to a lump sum benefit of R152,019.16 and in addition thereto a monthly pension of R1,669.94. The benefit equals the pension the Complainant would have received at normal retirement age, reduced by an early retirement factor of 0.4% for each month between his then age and the pensionable age of 63.

On 20 September 1993 the trustees of the Respondent adopted a resolution, effective from 1 October 1993, in respect of employees who reached the age of 50 on or before 31 December 1993 and who during the period 1 October to 31 December 1993 elected to retire between 1 January 1994 and 31 March 1994. The general effect of the amendment was that employees within this category would not suffer the decrease of 0.4% in pension for each completed month prior to the retirement age of 63 and would be credited with one months pensionable service for each completed year of pensionable service up to a maximum which would take the employee concerned to his

normal retirement date.

On a restrictive reading of the rule amendment, the Complainant fell outside of its scope by virtue of his employment having terminated two months prior to the effective date of the amendment.

Some 3017 employees throughout the Iscor Group exercised the amended early retirement option. Had the Complainant been permitted to take early retirement in terms of the amended rule, he would have received a lump sum of R342,612,90 plus an annual pension of R47,269.32. In other words, had the Complainant been allowed to remain in employment for an additional six months until 1 January 1994, he would have received a pension worth almost three times that which he actually received. The Complainant puts the loss he suffered in consequence of not being afforded the benefits of the amended rule at R565,783.00.

After his retrenchment the Complainant launched proceedings in the Industrial Court under section 46(9) of the Labour Relations Act of 1956 against his employer, Iscor Limited. The Complainant was successful against his employer in the Industrial Court. However, the employer appealed to the Labour Appeal Court where the appeal was upheld. The decision of the Labour Appeal Court is reported as *Iscor (Bpk) v Meyer* [1995] 7 *BLLR* 28 [LAC].

The headnote of the Labour Appeal Court decision summarizes the finding of the Industrial Court as follows:

> The Respondent averred that he had only resigned when he did because he had been forced to do so by the prospect of retrenchment and that this loss of the additional pension benefits was unfair, particularly because other employees in like positions had received enhanced pension benefits. The Industrial Court found in his favour, holding in essence that the Appellant had played a role in effecting the amendments to the pension funds rule, and was accordingly responsible for the discriminatory effects thereof. The Appellant was ordered to pay the Respondent the sum of R450,000.00 being the difference between the payout received and that

which he would have received if he had remained in the Appellant's service until after the pension fund's rules were amended.

The Labour Appeal Court essentially upheld the employer's appeal on the ground that the amendment to the pension fund rules was made by the trustees of the Respondent and not by the employer; that the Industrial Court accordingly lacked jurisdiction to entertain the dispute, since there was no employment relationship between the pension fund and the Complainant, an essential jurisdictional ingredient for invoking the unfair labour practice jurisdiction; and the Complainant had not specifically pleaded what the Labour Appeal Court perceived to be the basis of the Industrial Court finding, namely, that the employer had influenced the pension fund to amend the rules and so perpetrated an unfair labour practice as defined.

In response to this judgement, the Complainant lodged his complaint against the Respondent in terms of section 30A of the Pension Funds Act, with the office of the Financial Services Board on 19 September 1996. At the time he lodged his complaint, no Pension Funds Adjudicator had been appointed by the Minister of Finance in terms of the Act. I took office as South Africa's first Pension Funds Adjudicator on 1 January 1998. By lodging a complaint at the time which he did, the Complainant effectively avoided prescription in terms of section 30H of the Act.

A hearing was held on 8 July 1998 at the offices of the Financial Services Board in Pretoria for the purposes of determining certain preliminary objections concerning jurisdiction. I handed down a preliminary ruling in this regard on 18 August 1998 in which I dismissed the Respondents objections to my jurisdiction. The preliminary ruling can be obtained on the Internet at the website address www.fsb.co.za .

The issues and the pleadings

In paragraphs 28 and 29 of his complaint lodged on 19 September 1996 the Complainant sets out the grounds of his complaint as follows:

29. I accordingly hereby lodge a complaint concerning the administration of the Fund

and/or the interpretation and application of its rules.

28. The grounds of my complaint are:

29.1 The special dispensation was an improper exercise of the powers of the Fund and/or the trustees because it was intended to benefit Iscor.

29.2 The special dispensation was an improper exercise of the powers of the Fund and/or the trustees because it benefitted Iscor to the prejudice of the beneficiaries of the Fund.

29.3 The disproportional and unequal division of the surplus between the group which received the voluntary retirement benefit and me constitutes an improper exercise of the Fund's and/or the trustees power.

29.4 The failure of the Fund to grant me the benefit of my due interest in the surplus constitutes an improper exercise of the powers of the Fund and/or the trustees.

29.5 The decisions

29.5.1 to pass the special dispensation,
29.5.2 to benefit Iscor,
29.5.3 to divide the surplus in a disproportionate and unequal way, and
29.5.4 not to grant me the benefit of my interest in the surplus

were in excess of the Fund's and/or the trustees powers as their fiduciary duties did not permit such decisions.

29.6 The conduct referred to above constitutes maladministration of the Fund and has caused me prejudice because:

29.6.1 my interest in the surplus has been forfeited or diminished, and
29.6.2 the benefits due to me from the Fund have been reduced.

29.7 There is a dispute of fact and law between the Fund and/or the trustees on the one hand and myself on the other relating to the actions of the Fund described in the sub-paragraphs above.

In paragraph 34 of the complaint the Complainant sets out his request for relief in the following terms:

> I would like this complaint to be resolved on the basis that I receive the same benefit that the special dispensation provided to those people who benefitted from it.

In anticipation of the need perhaps to reformulate his complaint, the Complainant in paragraph 30 of this complaint stated:

> I am not fully conversant with the facts relating to the financing and structure of the fund, and nor do I have the financial expertise to analyse the fund and the trustees. It may be that my complaints against the fund and/or the Trustees could be framed differently, but I believe that the above sets out the gist of my complaint.

Subsequent to my taking office in early 1998, the Complainant lodged a Notice of Complaint together with detailed submissions and documentation to supplement or substitute his earlier complaint. In terms of the Notice of Complaint the Complainant seeks a determination in the following terms:

1. Declaring that the Respondent unfairly discriminated against the undersigned (hereinafter "the Complainant") by according him pension benefits less favorable than other members who retired between 31 July 1993 and 31 March 1994;

1. declaring that in amending its rules for the period September to December 1993 the Respondent's trustees acted ultra vires it rules and/or on breach of their fiduciary duties towards the Complainant as a member;

2. ordering the Respondent to grant to the Complainant such benefits as he would have been entitled to receive had the amended rule been in force at the time of his retirement;

3. Further and/or alternative relief.

Shortly after I handed down my preliminary ruling the Complainant filed a Notice of

Amendment deleting paragraph 2 of the relief sought and substituting it with the following:

> Declaring that, by not applying the amendment to its rules effected on 20 September 1993 to the Complainant, the Respondent's trustees acted in breach of their fiduciary duties towards the Complainant as a member.

The gist of the amendment, is that the Complainant dropped his claim that the Respondent in amending its rules had acted *ultra vires.* Additionally, the new paragraph sets the platform for an argument that the Complainant fell within the purview of the amended rules.

The formulation of the issues and the relief sought in the amended notice have been cast narrowly. During argument it was contended that the Complainant would be entitled to compensation in the event of a finding of maladministration. This was part of the Complainant's complaint as it was originally formulated in September 1996, but the subsequent amendments appear to be more restrictive.

This raises general questions about the role of pleadings in proceedings before the Adjudicator.

The starting point is to recognize that although I have the same powers as a court of law (section 30E(1)(a)), the office of the Pension Funds Adjudicator is not a court of law, but is an administrative tribunal. Many of the provisions in Chapter VA of the Act setting the limits of my jurisdiction and powers are borrowed from part X of Pension Schemes Act 1993 in the United Kingdom and is formulated in virtually identical language. These in turn appear to be borrowed from the United Kingdom's Parliamentary Commissioner Act of 1967. The Commissioner occupies an office similar to our own Public Protector. The function of the Commissioner has always been an investigative one and he is considered to be an administrative functionary rather than a judicial officer.

By the same token, despite the office being designated as that of an Adjudicator, my role plainly is intended not to be that of a presiding officer in a court. It is clear from sections 30D, 30E(1)(a) and 30J(1) that my role is essentially that of *investigation*, rather than simply hearing and deciding a complaint. My investigative powers are exceptionally broad. Section 30J(1) allows for the investigation to be conducted in an inquisitorial manner.

Despite the investigative character of the institution, it remains a quasi judicial organ in that the Adjudicator is required to determine disputes and perform judicial acts upon consideration of facts and circumstances and I am able to impose liability and affect the rights of others.

Balanced against this, is the very clear intention in Chapter VA of the Act to establish an informal and alternative mechanism to dispose of complaints relating to pension funds in an economical and expeditious manner. In such a body pleadings play a less formal role. In his annual report of 1996/1997, the United Kingdom Pension Ombudsman refers to the decision of the Court of Appeal in *Hamar v Pension Ombudsman and French* [1997], reported in *The Times* of 24 March 1997, in which Lord Justice Millett commented on the role of pleadings before the Ombudsman in the following terms:

> In ordinary litigation the issues are defined by the pleadings. They cannot be amended after trial in order to raise new issues not open on the pleadings below. Investigations by the Pension Ombudsman are informal. There are no pleadings. The issues are defined by the complaint and the response to it. The jurisdiction of the Pensions Ombudsman is limited to the investigation of the complaint actually made to him. I do not doubt that he can invite the Complainant to add to his complaint, and may suggest new matters of defence to the other party, and so extend the scope of the inquiry. ... At the end of his investigation, his duty is to determine the matters then actually in dispute between the parties.

These observations are slightly at variance, but not entirely irreconcilable, with certain remarks made in a lower court in *Seiferts v Pension Ombudsman* [1997] 1. All.ER 214

(QBD). In this matter, after making reference to the principles of fairness and natural justice, Lightman J concluded:

> These require of him ... that he makes quite clear to the appellants the specific allegations made and the complaint to be investigated and of any amendment of the allegations for which he gives leave. It is not open to the Ombudsman to make a determination save in respect of the allegations in the complaint (or any authorised amendments) of which he has given notice to the appellants.

The learned judge went on to say that it was essential for the Ombudsman to disclose to respondents all potentially relevant information obtained by him in the exercise of his investigative powers, most particularly all evidence and representations received by him from the Complainant. He continues:

> The Respondents must know at least the gist of what he has learnt, so as to enable them to have a fair crack at the whip and a fair opportunity to provide any answer they may have. Whilst the procedure before the Ombudsman is intended to be quick, inexpensive and informal these are minimal requirements for fairness and accordingly for a decision which can be allowed to stand.

The pronouncements, in my view support the contention that provided all parties have had a fair opportunity to address the substance of the issues raised, the scope of my investigation ought not to be unduly restricted by technical and formalistic arguments based on the scope of pleadings as in traditional adversarial litigation.

In short, although the Complainant in the final version of his complaint may not have specifically requested compensation for maladministration, should he establish prejudice as a consequence of maladministration he shall be entitled to compensation despite his claim for relief not being formulated in such terms.

The application of pension fund surpluses to fund retrenchment packages

Before turning to the specifics of the Complainant's complaint, it may be prudent to make certain observations about the early retirement/retrenchment scheme in which the Respondent participated in conjunction with the participating employer, Iscor Limited.

Because the scheme involved the application of a surplus in a defined benefit fund to enhance early retirement benefits of retrenched employees, I feel compelled to pronounce generally about such arrangements to avoid any misconceptions in the media or by the general public concerning the legality of such schemes.

The key feature of this scheme is the rule amendment effected on 21 September 1993 which resulted in approximately 3000 employees receiving significantly enhanced benefits. So induced to retire, these employees were not dismissed on operational grounds, and thus reduced the employer's potential liability for severance benefits. The exact amount of the surplus applied to dramatically enhance the benefit of approximately 3000 employees is not entirely clear from the evidence. Nevertheless, as the Industrial Court found, it is common cause that the amendment to the pension fund rules benefitted Iscor financially as, among other things, it saved Iscor the expense of further rationalisation. Also the reduction in the monthly salary bill was a saving to the tune of R13 million per month.

Although Iscor did not draw a direct profit from the surplus in the fund, the Complainant submits that the indirect benefits were a material motivation behind the adoption of the amendments, and initially argued that this vitiated the decision to amend the rules, and presumably the amended rules themselves. As already discussed, the Complainant abandoned the request for relief on this ground in his amendment of the complaint in September 1998.

The Respondent, on the other hand, contends that the decision and the rule amendment were both lawful and reasonable. The factors which the trustees took into consideration included the solvency and strength of the fund, how a portion of the surplus could be utilised to provide better benefits to as many of the members as possible and also to pensioners, and how, having regard to the request from Iscor, increased benefits could be granted to persons taking voluntary retrenchment. To the extent that Iscor received any benefit in terms of the rule amendment and its application, the Respondent submits that there was no bar to Iscor benefitting in this way and neither was such benefit unlawful.

Whatever the merits of these respective submissions, because the Complainant has abandoned his claim to have the trustees decision set aside, I am prepared to proceed on the assumption that there is no legal objection in principle to the surplus being applied in this way. It does not follow that such schemes will always be sanctioned as lawful. Similar schemes in the United Kingdom have not survived judicial scrutiny. In *British Coal Corporation v British Coal Staff Super Annuation Scheme Trustees* [1995] 1 All. ER 912, the court held that allowing an employer to set off a surplus against a pre-existing liability was the equivalent of providing it with a refund. A provision in the law or in the rules which prohibits refunds must also prohibit set offs.

A different approach was followed by the High Court in *National Grid Company PLC v Laws* [1997] PLR 157. Here Walker J considered an appeal against a finding by the Pension Ombudsman that the employer should not have been able to fund the costs of its voluntary redundancy programme out of a pension scheme surplus. On facts quite similar to the present matter, the electricity supply pension scheme gave particularly generous pensions to employees who lost employment on operational requirement grounds. If the extra costs of such pensions could not be funded out of the surplus, the employer (as would have been the case in the present matter under rule 9.3) would have had to make extra contributions to the scheme, estimated at 34.2 million pounds. The power of amendment in the particular rules prohibited an amendment which had the effect of making any of the monies in the scheme payable to any of the employers. Relying on the *British Coal Corporation Case*, and the employer's duty of good faith, the Pensions Ombudsman ruled that the employer was prevented from seeking to make arrangements which benefitted itself through a refund or set off. He held *inter alia* that the surplus could not legitimately be used to offset contributions payable by the employer in terms of the rules to fund early retirement benefits owing because of reorganisation or redundancy.

Walker J disagreed with the Ombudsman holding that the clause was not fundamental and did not prohibit a set off. Walker J's reasoning has been criticized as "disingenuous" - see Richard Nobles: *The Death of Deferred Pay?* [1998] 27 ILJ (UK) 142. In an unreported judgment handed down on 10 February1999 the Court of Appeal in *Laws & Other v The National Grid Company plc* (Ch. 97/0941-4), reversed Walker J's ruling. The decision turns

very much on the provisions of the particular pension scheme, but basically upholds the determination of the Pensions Ombudsman. The appeal is decided on the basis that the provisions of the scheme as they stood at the time of the complaint did not give the employers a unilateral power to forgive themselves their liabilities to pay contributions which were due and payable.

As far as I am able to ascertain, there is nothing in the rules of the Respondent prohibiting a refund or set off. Nor has any clear argument been advanced in that regard. Nonetheless, it is well known that the Registrar of Pension Funds, pending amendments to the legislation which are currently before Parliament, is refusing to register rule amendments authorising repatriation of surplus. The Registrar does so on the basis of certain legal opinions which have been furnished to him advising that such refunds would be illegal.

In the present matter it remains doubtful whether any existing liability of the employer has in any event been set off against the surplus. The fact that the Complainant abandoned the point may be an indication that no set off did in fact occur. Nevertheless, pension funds and employers wishing to utilise surpluses to fund the costs of retrenchment programmes should proceed cautiously in full cognisance of the English position that the set off of any existing liability is equivalent to a refund, and that the Registrar in South Africa considers a refund to be illegal.

Moreover, the decision in *Sauls v Ford South Africa Pension Fund & Others (Case 1878/87; SECLD)* ought not to be relied on uncritically as authority for the proposition that employers can finance their liability for severance packages out of pension fund surpluses. In that matter, in 1985, the Ford Motor Company of South Africa (Pty) Limited decided to move the bulk of its operations from Port Elizabeth to Pretoria. This resulted in some 90% of its employees being retrenched. Negotiations between the employer and the union resulted in an arrangement with the unions which included a financial benefit taking the form of the payment of a package called a separation payment, which included a specified retrenchment allowance, the right to an early pension or a deferred pension in certain

circumstance, repayment of pension fund contributions, the right to purchase vehicles at a special price, and contractual benefits relating to payment in lieu of notice, leave pay and gratuity payments. The dispute before the court arose out of a decision of the pension fund's committee of management to use the fund's assets to pay the retrenchment allowance to some of their employees. As in the present complaint, the fund effected a rule amendment essentially to enhance benefits.

In concluding that the board of management was not in breach of its fiduciary duties, the court was much influenced by the fact that the applicant had not made out a case that his contract of employment with the employer obliged the employer to pay the enhanced retrenchment allowance. Nowhere in the programme or in the acceptance thereof by the unions or the employees was there an undertaking by the employer that it would be liable to make the payment of an enhanced package out of its own funds. Hence, the funds assets were not used to pay an employer liability, and there was no indirect refund or set off by utilisation of the surplus. Rather, the surplus was legitimately and reasonably applied by the pension fund to enhance the withdrawal benefits of members exiting the fund. These amounts were payable to employees in addition to their contractual benefits relating to payment in lieu of notice, payable by the employer.

To sum up, pension funds and employers should avoid the temptation to interpret my failure to set aside the trustees decision in this matter, and the consequent rule amendment as support for the unqualified proposition that the costs of retrenchment programmes can be funded out of pension fund surpluses. First of all, there is no evidence, nor has there been any argument to that effect, that the surplus has been applied to meet an employer liability. Secondly, the Complainant has abandoned his claim to have the decision and rule set aside.

I turn now to the specifics of the complaint.

The specifics of the complaint

When the Complainant left the services of Iscor on 31 July 1993 he received pension benefits in accordance with Rule 6.2 of the Respondent's rules as they then stood. Rule 6.2 then read as follows:

> 6.2 Early retirement
>
> A member who has already attained the age of 55 years and who has completed at least 10 years of Pensionable Service, or who leaves service in terms of the provisions of rule 9.3, may retire prior to his Normal Retirement Date and receive a pension. No further contributions shall be payable by or in respect of such a Member after his actual retirement. The Pension that is payable on such retirement shall be equal to his Scale Pension reduced by 0.4% in respect of each month by which his retirement precedes his Normal Retirement Date.

Because the Complainant had not reached retirement age he was heavily penalised in terms of the reduction factor of 0.4% in respect of each month until he would have reached his normal retirement date. As mentioned earlier, he received a lump sum of R152,019.16 (after tax) and a monthly pension with effect from 1 August 1993 of R1,669.94.

On 21 September 1993 the rules of the Respondent were amended to enable 3015 employees of Iscor to receive an improved pension benefit. The amended rule is contained in annexure 2 of the rules supplied to me. The annexure is headed as follows:

> *Special conditions applicable to members who attained aged 50 prior to or on 31 December 1993 and who, during the period 1 October 1993 to 31 December 1993 exercised the irrevocable choice to retire on or before 31 March 1994 prior to attaining the normal retirement age.*

Rule 6.2 was substituted by the following for the limited period for which it applied. It reads as follows:

> A Member in respect of whom the provisions of this appendix are applicable may retire before attaining his Normal Retirement Date on such date between 1 January 1994 and 31 March 1994 as mutually agreed upon between the Member and the Employer.
>
> No further contributions shall be paid by or in respect of such Member after the actual date of his

retirement and the pension payable on such retirement shall be equal to his Scale Pension.

When the Member retires his Pensionable Service, reckoned to the actual date of his retirement, shall be increased by 1 month in respect of every completed year of such Pensionable Service. The additional Pensionable Service granted in terms of this provision shall be limited to such an extent than the extended Pensionable Service upon which the Member's retirement benefit is based shall not be longer than the Pensionable Service that would have been applicable on the Member's Normal Retirement Date. The Employer shall make such additional contribution to the fund, in terms of the provisions of rule 5.2.4, as recommended by the Actuary, in respect of the granting of this benefit.

In a letter addressed to the Complainant's attorneys in 1994, Mr C F De Jager, an actuary in the employ of ABSA Consultants and Actuaries, calculated that had the Complainant been allowed to benefit under the amended rule, the lump sum would have been in the amount of R328,560.29 and his annual pension in the amount of R47,274,84. The difference in benefits would have been as follows; lump sum R188,866.13 and the annual pension R26,169.59. The value in the difference in benefits, before any tax was taken into account, as calculated by the Actuary in November 1994 amounted to R623,924.00.

After filing his Notice of Amendment the Complainant contended that he was entitled to benefit in terms of the amended rule and that the Respondent acted unlawfully, unfairly and contrary to its fiduciary duties by not permitting him to do so. The relief sought is aimed at correcting the results of this unlawful and unfair action by compelling the Respondent to place the Complainant in the same position as those who were permitted to benefit in terms of the amended rule.

In passing, it should be noted that rule 9.3, referred to in the body of the unamended rule 6.2, would have permitted the employer to decide that the 0.4% reduction for each month could be waived or that a lower percentage could be applied provided that the additional cost arising therefrom, as determined by the trustees in consultation with the actuary, would have to be paid to the fund by the employer. Iscor did not request the trustees to give consideration to a waiver or alteration of a percentage reduction provided for in rule 6.2.

The factual background and submissions

Since approximately 1983, Iscor has embarked on a rationalisation programme. In 1983 Iscor had approximately 58 000 workers employed at its various plants and mines situated inter alia at Pretoria, Newcastle, Van Der Bijl Park, Thabazimbi, Sishen, Saldanha Bay, Durnacol and Ellisras. As a result of the rationalisation process, the number of employees employed by Iscor Limited has been reduced since 1983 to approximately 38000. On or about 11 February 1993, Iscor set in motion a further retrenchment programme aimed at reducing the staff complement at the Pretoria works by some 2000 employees.

The Complainant has argued that his complaint should be construed within the context of the retrenchment programme undertaken at the Pretoria works where he was employed. As mentioned earlier, the Complainant was employed at the Pretoria works for 33 years and at the time of the termination of the services he was a senior designer in the electrical section of the drawing office. The existence of separate and specific negotiations with the trade unions, resulting in particular solutions and agreements pertaining to the 1993-4 rationalisation programme support this contention.

At a meeting between the employer and the unions on 7 April 1993 it was agreed that as part of the rationalisation programme a voluntary retirement scheme would commence on 1 May 1993 with an aim for completion by 31 December 1993.

On 15 April 1993 Iscor invited its employees to apply for voluntary rationalisation packages. These were offered on a one off basis. The cut off date being specified as 30 June 1993. Approximately 467 members opted for this early retirement/retrenchment option between February 1993 and 31 July 1993. The Complainant did not fall into this category as he did not apply for early retirement.

In a memorandum, seemingly for general distribution, dated 15 April 1993, Mr B J Venter, the Personnel Manager at the Pretoria works gave an express undertaking that if the package was adjusted during the rationalisation programme it would be applied retrospectively to any person who voluntarily accepted the package. The relevant portion of the letter reads;

> Indien samesprekings met die betrokke vakbonde die gevolg het dat die rasionalisasie pakket tydens hierdie rasionalisasie-aksie aangepas word, sal sodanige aanpasing ook terugwerkend van toepassing wees op elkeen wat vrywillig die rasionalisasie pakket aanvaar het.

No adjustment was made to the package prior to 30 June 1993.

In a memorandum from the general works manager at the Pretoria works, dated 21 April 1993 and addressed to all employees at the Pretoria works, further details of the proposed rationalisation were communicated to all employees. The memorandum makes it clear that the current economic reality made further rationalisation unavoidable and that approximately 1500 employees in all employment categories would be effected by the rationalisation action. The memorandum concludes as follows:

> It is envisaged that with effect from May 1993, discussions will be held on an individual basis with employees who, in accordance with the agreed selection criteria, have been identified as supernumerary and that the rationalisation programme will be finalised by 31 December 1993.

During negotiations with the trade unions, undertakings were given that if the voluntary retrenchment packages were increased that these would apply equally to all persons affected by the rationalisation.

The Complainant submits that the memorandum from the general works manager to all employees at the Pretoria works dated 21 April 1993 signalled the inauguration of a second rationalisation programme commencing on 1 May 1993 and terminating on 31 December 1993. In other words, the overall rationalisation programme consisted of two separate alternatives: a voluntary rationalisation, in which members sought early retirement up to 30 June 1993, resulting in 467 voluntary retirees; and a compulsory retrenchment programme commencing on 1 May 1993 and terminating on 31 December 1993. The total figure aimed at was a reduction of 1983 employees at the Pretoria works.

On 28 May 1993 the superintendent of the drawing office in which the Complainant worked,

Mr Goldberg, informed seven of the employees there that their services were to be terminated by the end of July or August 1993, depending upon the station in which they worked. The employees so identified included the Complainant, Mr Steenkamp, Mr Oosthuizen, Mr May, Mr Belka, Mr Lotter and Mr Bowles.

Although the Complainant applied for and received early retirement benefits from the Respondent, it is clear that his services with the employer were terminated on operational requirement grounds. He did not resign or retire, but was in fact dismissed. This is evident from the letter addressed to him by the personnel manager at the Pretoria works dated 29 June 1993. The body of the letter reads as follows:

> Met verwysing na die gesprek met u in bostaande verband, moet ek onglukkig bevestig dat daar nie in geslaag kon word om vir u 'n geskikte pos by Pretoria-Werke of elders in die maatskappy te vind nie.
>
> U diens word dus met ingang van die sluitingsuur op 1993-07-31 beeindig, maar u sal reeds op 1993-07-01 van verdere diens vrygestel word.
>
> Besonderhede van bedrae betaalbaar is soos reeds met u bespreek. Enige verdere navrae oor beleid met betrekking tot u diensbeeindiging kan met u personeelbeampte uitgeklaar word.
>
> Wees verseker dat daar onder die huidige omstandighede geen alternatief vir hierdie besluit gevind kon word nie. Ek vertrou dat u baie gou 'n ander werk sal bekom en u word alle sukses vir die toekoms toegewens.

Having been effectively retrenched, the Complainant completed a form with which he had been furnished by the personnel office, which he was told that he was required to complete in order to qualify for early retirement in terms of the rationalisation programme. Subsequent to this, he received the benefit as aforementioned.

The trustees adopted the resolution amending the rules to allow for significantly more advantageous early retirement benefits for employees who elected to retire during 1 October 1993 to 31 December 1993, on 20 September 1993. The amendment was approved on the following day, 21 September 1993, by the Registrar of Pensions.

On 14 October 1993 the Complainant and 36 other employees who had been compelled to take early retirement under the unamended rule wrote to the Iscor office to request a review of their position. The Complainant is the only one of this group who has persisted with his complaint.

The Respondent took the view that the package offered under the rule amendment was not a rationalisation exercise and argued that the Complainant fell into a different category in that he was rationalised and this was different from a favourable retirement package offered on a one off basis for a limited time.

The Complainant then launched the proceedings in the Industrial Court were he was awarded compensation in the amount of R450,000.00. As mentioned, the Industrial Court decision was overturned on appeal on the grounds principally that there had been insufficient evidence before the Industrial Court to prove that the employer had influenced the pension fund in its decision to amend the rules.

The Complainant submits that the overall rationalisation programme implemented by Iscor during 1993 consisted of two distinct programmes. The first was the voluntary scheme introduced on 19 April 1993 and concluding on 30 June 1993; and the second was the compulsory retrenchment programme which commenced on 1 May 1993. The difference between these two schemes was that in terms of the first the employees were free to choose retirement or remain in service; in terms of the second the employer identified employers as supernumerary and such employers were compelled either to elect to retire, if they qualified, or to be retrenched.

The Complainant contends that he fell under the compulsory programme implemented between May and December. Although he sought early retirement benefits, he did so only after he was informed that his services were to be terminated. He argues that the trustees and the employer had a duty to ensure that everybody who fell under this scheme should

have been treated equally. Additionally, while the Complainant was not permitted to benefit under the amended rule, there is evidence, however, that at least Messrs Steenkamp, Oosthuizen and May, colleagues similarly situated to himself, benefitted under the amended rule although they were retrenched under the 30 June to 31 December 1993 programme, i.e. they fell outside the 1 January 1994 - 31 March 1994 period, which was a precondition to qualify for the enhanced benefit. The Complainant argues that there is nothing, save the time of termination of employment, which distinguishes his position from that of his three colleagues.

Generally, the Complainant submits that the decision of the trustees to utilise the surplus to enhance benefits during the retrenchment programme of 30 June to 31 December 1993 effectively rendered the rule amendment an integral part of the retrenchment programme. The trustees were aware of the decisions of Iscor and were thus duty bound to see that decisions affecting members of the pension fund were not discriminatory. Moreover, the trustees at no stage gave serious and/or adequate attention to the Complainant's request to benefit under the amended rule.

On the basis of these facts and submissions the Complainant advances two principal arguments. Firstly, he argues that he was lawfully, alternatively, in fairness entitled to retire under the amended rule 6.2. Secondly, he argues he was unfairly discriminated against by being retired on benefits less advantageous than those employees who exercised their option to retire under the amended rule, and that such unfair discrimination by the trustees was a breach of the fiduciary duties, and thus an improper exercise of the fund's powers, or alternatively maladministration of the fund resulting in prejudice to the Complainant. I turn now to deal with these arguments and the Respondent's response to them.

The complainant's entitlement in terms of the rule

As discussed, the relief sought by the Complainant originally included a prayer that the amendment to the fund rules should be declared *ultra vires*. In the Notice of Amendment dated 10 September 1998, the Complainant abandoned that relief and gave notice that he

sought a declarator applying the amended rule to him.

The Complainant's argument that he falls within the amended rule, is with respect somewhat disingenuous. It is based on the fact that in terms of Rule 9.3 of the Respondent's rules, a member whose services are discontinued by his employer is entitled to make certain elections, within a period of 6 months from the date of termination of service, namely either to receive a lump sum benefit, to purchase single premium retirement annuity policy, or to become a deferred pensioner in terms of rule 9.8.

The Rule reads as follows:

> 9.3. **Retrenchment**
> Should a Member's service be discontinued by his Employer and the Employer is of the opinion that such discontinuance can be attributed to
>
> > a reduction or reorganisation of personnel; or
> > the abolition of the Member's position or office to improve efficiency or enhance the performance of the organisation; or
> > dismissal as a result of a general reduction in staff;
>
> He shall be entitled to elect, within a period of 6 months from the date of termination of his services, either of the benefits in rule 9.3.1 or 9.3.2.
>
> 9.3.1 Lump sum benefit

29. The refund of 2 times his own contributions to the Fund is accordance with rule 5.1.1, 5.1.2 and 5.1.3 plus his own contributions to the Fund in accordance with rule 5.1.4; plus

30. his Equitable share in the Fund, if any, at the date of leaving service; plus

31. a percent per annum until 31 December 1991; thereafter 4 percent per annum calculated on a simple basis of the amount in (a) for each year of Pensionable Service in excess of 2 years during which he contributed to the fund, or any other fund in respect of which his membership was transferred to the fund. Any period of additional Pensionable Service acquired in accordance with the provisions of rules 5.1.4 or 5.1.5 will not

be regarded as Pensionable Service for the purposes of this rule 9.3.1.

9.3.2 Transfer value

A transfer value determined in terms of rule 9.7.

Should such a Member die before having exercised his option in terms of rule 9.3, the benefit set out in rule 9.3, the benefit set out in rule 9.3.1 shall be paid in terms of rule 12.5.

In respect of a Member who has at the time of such retrenchment completed not less than 20 years Pensionable Service, and has attained age 50 years, or a Member who has attained age 55 years, the Employer may in its sole discretion decide that the Member be paid benefits in terms of rule 6.2. Notwithstanding the provisions of rule 6.2 the Employer may further decide that the 0.4% reduction for each month that the Member's retirement precedes his Normal Retirement Date shall be waived or that a lower percentage shall be applied provided that the additional cost arising therefrom, as determined by the Board of Trustees in consultation with the Actuary, shall be paid to the Fund by the Employer.

The Complainant argues that since his enforced retrenchment took place on 31 July 1993, the 6 month election period referred to in the rule expired on 31 January 1994. On 14 October and 13 November 1993 the Complainant, together with the other Iscor employees, sought in correspondence to exercise his choice to be paid the special early retirement benefit provided for by the amendment. He argues that members are defined in the rules as "any employee that has been admitted to the fund in terms of these rules", and these are to be distinguished from "pensioners" who are defined in the rules as a "former member of the fund who has retired and is entitled to a pension". Rule 9.3 refers only to members and it is upon members whom the right to make the election is conferred. It follows, according to the Complainant, that for as long as he retained the right to make his election, the Complainant remained a member and was, as such, entitled to elect to retire under rule 6.2, and that this right continued after the amendment of the rule.

The Complainant's argument is unconvincing and I find myself in agreement with the Respondent on this point. Firstly, it is apparent from the rules that the Complainant does not have the election claimed by him. The election given in rule 9.3.1 and 9.3.2 is not an

election to receive a particular benefit, but only a choice of the form in which the payment of some stipulated amount is to be paid. Thus a member can choose to have the benefit paid in cash or to have it transferred to another fund. While he may remain a member of the fund until he makes his election, normally, the benefit to which he would be entitled is that payable in terms of the rules at the time of retrenchment or resignation. In any event, the evidence shows that in August 1993 the Complainant made his election as to the form in which he wished to receive his benefit and he received a lump sum together with an annuity.

Unfair discrimination

The nub of the dispute, rather, is whether the Complainant has been unfairly discriminated against by being retired on benefits less advantageous than those employees who exercised their option to retire under the amended rule. The discrimination argument, however, must be considered within the broader context of the law governing trustee and employer duties in relation to the application and distribution of an actuarial surplus in a pension fund. The trustees' fiduciary duties, and the statutory duty not to maladminister the fund, broadly oblige them to act reasonably and fairly in the distribution of surpluses. The employer, although not a fiduciary, owes an implied obligation of good faith to the employees. *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 1 WLR 583.

The members' claim to share in surpluses are spelt out neatly by Lord Justice Brooke in *Laws & Others v the National Grid Company PLC (supra)* at para 43 of the opinion, as follows:

> It is also well settled that although the members of a pension scheme have no rights in the surplus revealed by an actuarial valuation ... they have a reasonable expectation that any dealings with that surplus, whether by the employers or by the trustees of the scheme acting within the powers vested in them by the scheme, will pay a fair regard to their interests, since the express purpose of the scheme is to provide benefits for their retirement.

The complaint essentially alleges that the trustees have not paid fair regard to the

Complainant's interest and that this amounts to maladministration.

Dr Grogan advanced the discrimination argument with reference to three comparators, namely:-

(i) those employees who were retrenched with the Complainant during the programme of 30 June to 31 December 1993;
those who, though not retrenched in that period, were able to benefit from the windfall offered by the September amendment; and
(iii) new members who were taken over from another fund in January 1993.

Regarding the first comparator, there is compelling evidence that three of the Complainant's colleagues, (May, Steenkamp and Oosthuizen) were permitted to benefit from the rule amendment, even though they did not strictly qualify in terms of the provisions of the amended rule. Thus, Steenkamp, signed his retrenchment termination form (designated retired) on 30 August 1993. His date of termination was changed from 31 August 1993 to 31 October 1993, but he was placed on leave in September 1993. Despite the fact that he was not in employment during the qualifying date, i.e. 1 January and 31 March 1994, he was permitted to retire in terms of the amended rule. Similar allegations have been made in relation to May and Oosthuizen, although their individual circumstances are different.

The Respondent was informed of the fact that these members had been unjustifiably treated favourably as early as 13 November 1993, when it was still in a position to correct the situation, either by depriving them of their enhanced benefit or by granting the Complainant's request to the enhanced package. Nevertheless, the Respondent went ahead and approved their being treated according to the amended rule in blatant contravention of the rule. And yet, it failed to favour the Complainant similarly.

The advantageous differential treatment afforded Steenkamp, Oosthuizen and May illustrates that the Respondent acted inconsistently as between the employees employed in

the electrical section of the drawing office at Iscor's Pretoria works and that there was no basis for such different treatment. That being so, the different treatment must be held to amount to unfair discrimination.

The Respondent does not deny these allegations or contest the claim that the Complainant has been treated differently to his colleagues. Instead it makes two points. Firstly, it argues that it does not help the Complainant to say that the fund has paid out benefits beyond the ambit of its rules. That complaint, according to Mr Loxton, could conceivably lead to a claim for damages against the trustees, or to a claim by the fund for recovery of monies incorrectly paid over to those other members. It does not follow, that because the fund paid out amounts unlawfully to certain persons that it should similarly make unlawful payments to the Complainant. Secondly, the Respondent shifts the responsibility for the differential manner in which the Complainant and his colleagues were treated to the employer.

The first argument proceeds partly on the following footing. The assumption underlying all discrimination cases is that it lies within the power of the fund to afford to the Complainant the same treatment it afforded to the others with whom he is compared. Thus, the Complainant has no entitlement to compensation for damages based on discrimination, since the fund had no power to remedy his complaint by paying him the benefits stipulated under the amended rule. Because it never lay within the power of the fund to apply the amended rule to the Complainant, the comparison with his other colleagues is irrelevant. Likewise, because the trustees owe their fiduciary duties to the general body of the members, an order requiring the fund to bestow a benefit upon a member to which he is not entitled would lead to the demise of the assets of the fund on the basis of past unlawful conduct.

To my mind, the argument fails to give sufficient emphasis to one important factor. The board of management of a pension fund, since the 1996 amendments to the Act, has a specific statutory duty not to prejudice individuals by maladministering the fund or by exercising powers improperly. To favour the Complainant's colleagues who worked in the

design office with him by improperly applying the rule to them, to the exclusion of the Complainant and others, is an improper exercise of power and/or maladministration. The Respondent has not offered an explanation as to why these employees were permitted to benefit under the amended rule when *prima facie* they did not fall within its scope. Conduct which is discriminatory in effect remains maladministration, whether or not the trustees of the fund had the power or discretion to extend benefits to those members. The question to be asked is what relief is the Complainant entitled to by virtue of that maladministration. It need not take the form of extending to him the benefit permitted by the rule. Rather, he is entitled to compensatory damages for his prospective loss of patrimony. Otherwise there is no remedy for the mischief Parliament sought to correct. I shall return to this matter more fully below.

As for the Respondent's contention that the Complainant more appropriately should have brought his complaint against the employer, one should not loose sight of the fact that he did in fact do so and that the Labour Appeal Court ruled that the claim lay rather against the fund. Moreover, I agree with Mr Grogen that such an argument is fallacious. There was a duty on the trustees of the fund to investigate the claims presented to it by the employer to ensure that the interests of the members were protected. Insofar as the fund granted benefits under the amended rule to members who were in virtually the exact same position as the Complainant, it has a duty to explain why it failed to afford similar benefits to the Complainant. This it has singularly failed to do.

Pension funds have a duty to distribute pension fund surpluses reasonably and in accordance with the fiduciary duties. The irrational and arbitrary distribution to three employees in the same position as the Complainant can not be considered to be a reasonable distribution of the surplus.

The second comparator to which the Complainant refers is the group of approximately 3000 other employees who benefitted from the September 1993 amendment. Although these beneficiaries purportedly volunteered to retire under the amended rule, they were in reality retrenched. A briefing document issued by the Managing Director, Mr H J Smith, on 27

September 1993 and addressed to all employees who were members of the Iscor Pension Fund, states the position quite accurately. The relevant part of the document reads:

> In order to ensure Iscor's long term existence, it has become necessary to reduce the number of employees. A package has been offered to employees who are 50 years old or older and who are members of the Iscor Pension Fund to take early retirement.
> This offer does not affect members of the Iscor Retirement Fund or members of the Iscor Employees Provident Fund.
>
> These early retirement packages will be funded by the Iscor Pension Fund which is currently over funded and will not come out of Iscor's operating capital. It will also not affect the pension benefits of those employees who remain in the Fund, or disadvantage existing pensioners.
>
> Those who qualify for this package, must exercise their option before 31 December 1993 and can retire finally between 1 January 1994 and 31 March 1994.
>
> The final decision on these applications for early retirement will rest with Management as the purpose of this action is to improve Iscor's effectiveness. Certain senior and key people who qualify for the package, may be retained to achieve this objective.

Although these persons chose to retire under a nominally different scheme it did not alter the fact that they were induced to do so to further the objectives of Iscor's general rationalisation exercise, without cost to Iscor, and at the obvious expense of the fund.

The beneficiaries under the amended rule were, according to the Complainant, placed in a position so disproportionately advantageous *vis a vis* other pensioners as to induce a sense of shock. The evidence shows that had the Complainant benefitted under the amended rule he would have received a lump sum and an annuity virtually three times the size that of which he actually received. One can safely assume, therefore, that the beneficiaries under the amended rule were equally disproportionately benefitted.

In effect, what the Respondent has done is to distribute a significant portion of the surplus in the fund for the benefit of 3000 retrenched employees to the exclusion of approximately 800 employees who were retrenched prior to the amendment as part of the same

retrenchment programme. While the Respondent has urged me to view the rationalisation programme over a 20 year period, the rationalisation programme assumed a particular intensity in 1993.

The question is whether such differential treatment pursues a legitimate purpose and whether the rule amendment was the most proportional means of giving effect to that purpose.

In its attempts to justify the differential treatment, the Respondent argues that there are many cases in which a distinction of benefits exist purely as a result of a cut off date. Every time an employer grants an increase in salary from a particular date some of his employees benefit while others may not. That is the result too, whenever there is an increase in benefits payable by a pension fund. The argument, in my view, misses the mark, because it fails to take account holistically of the 1993-4 rationalisation programme as a single scheme during which the pension fund decided to enhance the early retirement benefits of a category of employees through a distribution of the surplus. The question is whether it has maladministered the fund in doing so.

Many of the Respondent's arguments are directed at the nature of the appropriate relief for the alleged discrimination. Consequently, it would seem that it concedes that there is nothing to distinguish the Complainant from those employees who benefited from the rule amendment, including those who strictly speaking did not fall within its terms. The only distinction upon which the Respondent relies is that by chance the Complainant happened to have left the services of Iscor prior to the amendment which was enacted as an integral part of a retrenchment exercise during which the Complainant lost his employment and membership of the fund. Consequently, assuming that the rule amendment serves a legitimate purpose by enhancing member benefits on retrenchment, the Respondent's only justification for the means applied is that arbitrary cut off dates are necessary from a pragmatic point of view. This argument fails to address the proposition that more proportional means could have been found by enhancing the benefits by a lesser amount and distributing the surplus among a greater number of the retrenchees, including the

Complainant. There would have been no additional cost to the fund, only a fairer distribution of the same amount. The failure to have chosen a more proportional means amounts to maladministration. It is also contrary to the understanding reached with the trade unions.

The third comparator upon which the Complainant relies to prove discrimination is the former Usko Pension fund members. On 1 January 1993 the Respondent took over members of the Usko Pension Fund, together with their actuarial liabilities in the amount of R88.1 million. According to the actuarial report for the 1993 financial year 88 of these new members benefitted under the amended rule 6.2. That these new members, who had contributed almost nothing to creating the surplus in the fund should have been preferred to Iscor employees who, like the Complainant, had helped create the surplus over many years, is further symptomatic of the unreasonableness of the trustees decision to distribute the surplus in the manner in which it was.

Unfair discrimination and maladministration

As I have stated in other determinations (see *Low v BP Southern Africa Pension Fund* (PFA/WE/9/98); *Clarence v The Independent Schools Pension Fund* (PFA/WE/53/98)) complaints about discriminatory decisions or rules relate to the administration of the fund or the application of its rules, and will generally allege that the decision of the fund was an improper exercise of its powers or alternatively maladministration leading to prejudice.

In the Respondent's view maladministration means the administering of the fund otherwise than in accordance with its charter. If the trustees have acted in accordance with the rules (as is the present case), and the rules are not struck down on grounds of unconstitutionality or unreasonableness, no charge of maladministration can be brought against them.

Such an interpretation of maladministration does not accord with the meaning given to the expression by the Pensions Ombudsman or the Parliamentary Commissioner in the United Kingdom. Maladministration is not limited to situations in which the fund breaches its own

rules. The definition of a complaint in section 1 makes it more than evident that maladministration encompasses practices other than an improper exercise of powers or decisions in excess of powers. I agree with the Complainant that maladministration extends to situations where members of a fund are treated unequally on an arbitrary basis, even if such unequal treatment is meted out in terms of a rule.

In giving meaning to the concept of maladministration, section 39(2) of the Constitution obliges me to promote the spirit, purport and objects of the Bill of Rights.

Discriminatory decisions and conduct by pension fund managers and functionaries are in violation of section 9(4) of the Constitution, which reads:

> No person may unfairly directly or indirectly against anyone on one or more of the grounds in terms of subsection (3).

Section 9(3) reads:

> The State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, *including* race, gender, sex, pregnancy, marital status, ethnic or social original, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

As discussed earlier the jurisdiction to determine complaints alleging maladministration on the part of pension funds is modelled on the similar jurisdiction of the Pension Ombudsman of the United Kingdom, and that of the Parliamentary Commissioner. The following observations of Woolf & Jowell in *De Smith, Judicial Review of Administrative Action* (5th Edition) at page 50 are instructive:

> Of crucial importance is the meaning of "injustice in consequence of maladministration". "Injustice" has been widely interpreted so as to cover not merely injury redressable in a court of law, but also "the sense of outrage aroused by unfair or incompetent administration, even where the Complainant has suffered no actual loss." "Maladministration" was deliberately left undefined; the Parliamentary Commissioner was to work out its meaning in developing his own case law. The term includes corruption, bias and unfair discrimination...

While the Pension Funds Act of 1956 also does not define maladministration, it does require prejudice to be sustained by the Complainant, and to this extent may differ slightly from the British legislation. Nonetheless, assuming the distribution of the surplus effected by the amendment to rule 6.2 constituted maladministration, the Complainant was plainly prejudiced in that he was excluded from the distribution from which he would have benefitted had the distribution of the surplus been reasonable.

As evident from the preceding analysis, to my mind, the Respondent has not offered adequate justification for its differential treatment of its members retrenched by Iscor. When making the decision to distribute the surplus to enhance the benefits of retrenched members, the fund ought properly to have considered the rationalisation programme embarked upon in 1993 as a whole and should have ensured that all retrenchees were equally treated. The amendment ought to have been carefully designed to achieve the objective of a reasonable distribution of the surplus. In this regard, it also was obliged to avoid disproportionate effects in the distribution. Despite allegations by the Complainant that it failed to act proportionately, the Respondent has singularly offered no justification for its conduct regarding Oosthuizen, May and Steenkamp. It has offered no justification as to why and how these employees were permitted to benefit under the amended rule, when prima facie they, did not fall within its scope. Nor does it offer any justification for favouring the former Usko members who had not contributed to the growth in the surplus. Finally, and perhaps most importantly, it offers no explanation as to why members benefitting under the amended rule should have received a pension three to four times greater than that granted to other members who took early retirement as part of the programme.

Accordingly, I find myself in respectful agreement with De Kock, SM when he summed up the matter in the unfair labour practice proceedings before the Industrial Court. At page 13-14 of the typed judgement he concludes as follows:

> The Applicant's position did not differ in any way from any of the other employees who had been notified that they would be retrenched as a result of the rationalisation programme....Those who were fortunate received what can justly be described as a bonanza. Namely, early retirement but at full

> pension. They received a substantial benefit which other employees in the same category of employees did not receive. Employees were clearly treated unequally. The trustees of the pension fund did consider whether the benefit of early retirement on full pension should not be extended to employees whose services had been terminated subsequent to January 1993, but decided against it for financial reasons. The additional cost would have been around R75 million. In the Pretoria works 124 employees whose services were terminated between 1 May 1993 and 30 September 1993 would have been entitled to retire in terms of the amended rules if they had been in employment after the 1 October 1993. The amendment could have been so structured that they received the same benefit as those who were by chance still in Iscor's employ on 1 October. Iscor did realise that they are receiving much less. The amendment could have been so structured, that they received an equal benefit. Employees of the same class, namely those affected by the rationalisation were not treated equally. That is unfair. Iscor, in my opinion, committed an unfair labour practice.

By the same token, in my view, the fund who is more directly responsible for the unfair discrimination, is guilty of maladministering the fund.

Appropriate relief for maladministration

Much of the Respondent's argument was taken up with a claim that the relief sought by the Complainant is incompetent. The difficulty identified is that implicit in the relief sought is the assumption that what he says ought to have been done by the fund could lawfully have been done by it in terms of the amended rule. In other words, the Respondent is restrained to pay out benefits in accordance with the rules which in terms of section 13 of the Pension Funds Act are binding upon it. Payments of benefits outside the rules would thus be contrary to section 13.

Moreover, according to Mr Loxton, every case of a successful discrimination claim is based upon the existence of a discretion, which in turn assumes a power. In the absence of such power, there can be no claim for positive relief. Thus, because it never lay within the power of the fund to apply the amended rule to the Complainant, any relief would be incompetent.

In my view, as I have already said, the argument misconstrues the relief sought by the Complainant. The Complainant does not only seek to benefit in terms of the rule, he also

seeks compensation for maladministration. The misapplication of discretionary power at issue in this matter is not the power of the fund to apply the amended rule to the Complainant. Rather it is the objectionable and selective use of the power of amendment to exclude the Complainant from the distribution of the surplus. Hence, I agree with Dr Grogan's argument that the trustees did in fact have the power to avoid the wrong before it was perpetrated. Firstly, they could have ensured that the amendment was formulated or timed in a manner that avoided discrimination. Secondly, they could have corrected the situation by passing a further amendment undoing the discriminatory effects of the October 1993 amendment, when called upon to do so by the Complainant in November 1993, prior to the implementation of the discriminatory scheme. Indeed, the effects of the amendment were in fact adjusted for certain members on 1 June 1994 by means of amendment 10 filed with the Registrar of Pension Funds on 1 June 1994. This amendment reduced the reduction factor from 0.4% to 0.25% retrospectively for a certain category of members effectively enabling them to benefit from the temporary rule amendments. The omission to similarly correct the effects of discrimination suffered by the Complainant also amounts to maladministration.

Additionally, the Respondent argues that even if one were to accept that the rule amendment itself was inherently arbitrary and discriminatory the proper course of action would be to strike down the rule as originally requested by the Complainant. I disagree. The request of the Complainant is that I should correct the effects of discrimination. The Complainant seeks compensatory relief for maladministration.

The Respondent maintains that it is not open to the Adjudicator to offer compensatory relief on the grounds of maladministration.

In granting relief for maladministration, section 30E(1)(a) permits me to make the order which any court of law may make. This includes, by virtue of section 172 of the Constitution, when deciding a constitutional matter, the power to make any order that is just and equitable. In non-constitutional matters my power to grant relief may perhaps be more restricted. Accordingly, one needs to enquire whether the discrimination of which the

Respondent is guilty can be considered to be a constitutional matter.

Unconstitutional conduct will invariably amount to maladministration. The ground for discrimination in the Complainant's case is the date of the termination of his employment. As such, it does not fall within the grounds expressly listed as prohibited by section 9 of the Constitution. Cachalia et al *Fundamental Rights in the New Constitution* 30, have suggested that the prohibition against discrimination is limited to the listed of grounds and others which are analogous to those specifically mentioned. The listed grounds all pertain to elements which are constitutive of human identity. As the Complainant's membership of the pension fund and its termination does not relate to a valuable aspect of human identity, it is not an analogous ground, and, so the argument goes, the constitutional protection ought not to apply.

The Constitutional Court did not follow this line of reasoning in *Harksen v Lane NO & Others* 1998 (1) SA 300 (CC), and held:

> There will be discrimination based on an unspecified ground if it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner.

To some extent, the court pronouncements are based on the fact that the listed grounds in the interim constitution were clearly not exhaustive by virtue of the section specifically providing that the listed grounds did not derogate from the generality of the provision. A similar result has been achieved in section 9 of the final constitution by use of the word "including".

Even if one were to accept that the Complainant fell outside the scope of protection afforded by the equality rights in the constitution, I am satisfied that the maladministration perpetrated by the Respondent amounted to an arbitrary deprivation of property prohibited by section 28 of the interim constitution and section 25 of the final constitution. The rights and expectations flowing from membership of a pension fund have been recognised as constituting property in the constitutional sense in other jurisdictions. See the decisions of

the German Federal Constitutional Court in *BverfG in EuGRZ* 1979, 58 and *BVerfG in EuGRZ* 1980, 118. Thus, the unfair and irrational exclusion of the Complainant from benefits afforded to other members similarly situated, constitutes an arbitrary deprivation of property contrary to section 25 of the final constitution or section 28 of the interim constitution. Hence the Respondent's maladministration can be considered a constitutional matter. Accordingly, I normally would be able to make an order which is just and equitable in accordance with section 172 of the Constitution.

Insofar as a just and equitable order directing the Respondent to compensate the Complainant for its discriminatory conduct might amount to an award of "constitutional damages", I would make such an award with due regard to the guidance offered in *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC). In that judgement Ackermann J, accepted the existence of constitutional damages but held that they should be approached with caution. The fact that courts have held that similar awards can be made to compensate persons who have suffered loss as a result of the breach of a statutory right, on a proper construction of the statute in question, it would be strange if similar damages could not be claimed for, at least, loss occasioned by the breach of a right vested in the claimant by the supreme law. Much will depend on the circumstances and the particular right infringed. However, the judgement is authority for the proposition that where other remedies exist for the vindication of the constitutional rights in question, there would generally be no need for vindication by way of an additional award of constitutional damages. In that case, the plaintiff was in a position to obtain vindication of his constitutional rights by means of ordinary delictual damages.

A just and equitable award of constitutional damages for maladministration in the form of discrimination or arbitrary deprivation of property, could not be in addition to any other claim, but rather would be *in lieu* of delictual damages or at least akin to them.

In this instance an award of "constitutional damages" may be neither competent nor necessary. Despite contrary indications in *Sv Mhlungu & Others* 1995 (3) SA 867 (CC), the decision in *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) appears to support the proposition

that as a general rule it is not ordinarily open to a litigant to rely on the new fundamental constitutions to found a cause of action in respect of events prior to 27 April 1994. The Complainant's cause of action arose before that date. However, I am satisfied that the Complainant is in any event entitled to damages akin to delictual damages for the maladministration of the fund, a form of breach of statutory duty.

The Complainant, on the other hand, has formulated his claim as a breach of fiduciary duties. He contends the trustees were bound to distribute the surplus of the fund in a reasonable manner and not to favour some similarly circumstanced members over others when it came to distributing that surplus. The obligation so to act flows from the trustees fiduciary duties. To discriminate against some members therefore is a breach of those fiduciary duties. The remedy for such a breach, he argues, is to remove the effects of the discrimination by an order placing the Complainant in the position that he would have been had he not been the victim of discrimination.

The problem with formulating the relief sought as relief for a breach of fiduciary duties is that normally where a person suffers a loss as a result of a breach of fiduciary duties, the claim lies against the individual trustees of a trust, the directors of a company, or in the case of a pension fund, presumably, the members of the board of management rather than the corporate entity itself. The fiduciary duties are most frequently spoken about in the context of the law of trusts. As a general rule, pension funds are not trusts in South African law. Nor has any argument has been advanced in this matter that the board members should be individually liable. Rather, the Complainant has lodged his complaint against the fund, and seemingly alleges maladministration of the fund *by the fund.*

The definition of a complaint in section 1 of the Act makes it plain that the fund will be liable for an improper exercise of its powers or maladministration. This is further borne out by the fact that section 30G anticipates that the fund itself may be a party to the complaint and thus will be liable for any maladministration perpetrated through its agents. Liability attaches to the fund for "*the maladministration of the fund by the fund*" - see paragraph (b) of the definition of a complaint in section 1.

In *Da Silva v Continho* 1971 (3) SA 123 (A), Jansen J A affirmed the requirements for an action for breach of statutory duty as follows:

32. the statute was intended to give a right of action;
33. the plaintiff was one of the persons for whose benefit the duty was imposed;
34. the damage was of the kind contemplated by the statute;
35. the defendant's conduct constituted a breach of the duty; and
36. the breach caused or materially contributed to the damage.

Plainly the Pension Funds Act aims to protect members like the Complainant from maladministration. The fund has breached its statutory duty by acting in a discriminatory fashion resulting in a reduction in the Complainant's prospective patrimony, contemplated by the statute and against which it intends to afford protection.

In line with the principles of Aquilian liability, any just and equitable order should aim at removing the effects of the maladministration by placing the Complainant in the position

which he would have been had he not been the victim of discrimination or arbitrary deprivation.

The Respondent has made much of the financial consequences which will inevitably follow if the Complainant is successful. There are 800 persons potentially similarly situated to the Complainant. However, one simply cannot deny the Complainant relief to which he is entitled, simply because others might be so entitled. Suffice it to say, that the Respondent may take some comfort from the fact that the claims of the other employees have prescribed and, given the length of the delay in prosecuting their claims, and the Respondent's legitimate concern for finality in organising its affairs, it is unlikely that good cause exists to extend the prescription period in terms of section 30I of the Pension Funds Act of 1956.

Unfortunately, I am not in a position on the evidence which has been presented to me to fashion an order sounding in money. Accordingly I shall follow the process ordered by Seady A J in *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Limited & Others* [1998] 19 *ILJ* 285 (LC). There the learned judge postponed the proceedings and gave the parties an opportunity to remedy their differences by means of negotiation. Should the parties not be able to reach an agreement by an appropriate date I shall finally determine the Respondent's liability and shall make an order directing payment to the Complainant.

Accordingly, I make the following order:

37. The decision of the Respondent not to grant enhanced early retirement benefits to the Complainant similar to those granted to other former members of the Respondent, in terms of the amendment to rule 6.2 on 20 September 1993, is declared to be unfair discrimination and thus maladministration of the fund by the fund as contemplated in paragraph (b) of the definition of a complaint in section 1 of the Pension Funds Act of 1956.

38. The Respondent is ordered to remove the effects of such discrimination by placing the Complainant in the position in which he would have been had he not been the victim of the discrimination.

39. The Respondent is directed to compute and determine the amount it believes to be owing to the Complainant in terms of paragraph 2 of this order and to serve a copy of its calculations on the Complainant within 10 days of the date of this order.

40. The Complainant is directed to inform the Respondent in writing within 14 days of receiving the Respondent's computation whether or not he agrees with the amount determined by the Respondent to be owing.

41. The matter is postponed until 17 May 1999 at which time this tribunal will fashion an appropriate remedy unless before that time the parties reach an acceptable and appropriate solution to address this complaint.

42. The parties are entitled to place further relevant evidence and submissions before this tribunal on 17 May 1999.

43. 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 day of 1999.

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JOHN MURPHY
PENSION FUNDS ADJUDICATOR