

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

CASE NO.:PFA/GA/81/98

In the complaint between:

Raymond George Moore

Complainant

and

Anglovaal Pension Fund

Respondent

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

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#### **Introduction**

This is a complaint lodged with the Pension Fund Adjudicator in terms of Section 30A(3) of the Pension Funds Act of 1956.

The complainant is Raymond George Moore a pensioner member of the respondent and former employee of Anglovaal Limited a participating employer in the fund. The respondent is the Anglovaal Pension Fund a fund duly registered under the Pension Funds Act 1956.

The parties are in dispute concerning the complainant's pension benefits. They were unable to resolve the dispute and the complainant duly lodged a written complaint with the Pension Funds Adjudicator dated 24 May 1998. The parties both supplied supporting documentary evidence.

The complaint relates to the administration of the fund and contends that the complainant has sustained prejudice in consequence of the maladministration of the fund by the fund or its trustees. There are two parts to the complaint the first relates to the fact that while certain members of the fund were granted a service bonus the complainant was not granted this bonus and the second part of the complaint relates to the fact that the complainant's actuarial reserve value was not enhanced while other members of the fund,

who were given the option of transferring to the defined contribution fund, did receive this benefit. The complainant submits that he has been unfairly discriminated against. He therefore seeks relief by requesting that the trustees be ordered to grant him and any other pensioners who have been affected the service bonus and further that an order be made that pensioners should receive an appropriate enhancement to their funds to the same extent as those members who transferred from the defined benefit fund to the defined contribution fund. An additional request from the complainant is that prior to granting the enhancement to the reserve value I determine whether it was legal for the reserve value to have been enhanced at all.

No hearing was held in this matter but a report was placed before me by investigator Antonia Simmons. Accordingly, in determining this matter I have relied on the documents and report placed before me and the exchange of correspondence. Having completed my investigation I have determined this complaint as follows and for the reasons set out herein.

## **Background**

The complainant commenced employment with Anglovaal Limited on 1 February 1974 and retired as Public Relations Manager on 30 April 1993.

For the duration of complainant's employment with Anglovaal he was a member of the respondent and made regular monthly payments to it.

At the date of his retirement the complainant elected to commute one third of his pension by way of a cash lump sum taking the balance of the retirement benefit as a monthly pension in accordance with the rules of the respondent and in terms of the Income Tax Act 1962.

In terms of the rules of the respondent then applicable the trustees were entitled to grant a bonus period of pensionable service alternatively to effect amendments to the rules for the purpose of improving benefits, were they to consider that there was a substantial surplus in

the fund after having considered the actuarial valuations.

The relevant rules and definitions of the respondent read as follows:

“Bonus service” shall mean pensionable service granted in terms of Rule 43(2).

“Member” shall mean a person who remains or has become a member of the Fund in terms of Rule 12 and who has not ceased to be a member under the provisions of these rules.

“Pensionable service” shall mean, for a member or deferred pensioner, and subject to the provisions of these rules, the sum of -

- (a) his continuous service before 1 January 1946;
- (b) his continuous service from 1 January 1946 to the end of the calendar month in respect of which his last contribution is paid;
- (c) any period made pensionable in terms of Rule 34 or any similar previous rule; and
- (d) 20% of the total period before 28 February 1990 included in paragraphs (a), (b) and (c);

“Pensioner” shall mean a former member of the Fund, the M.D. Fund, the Non-European Fund or the Supplementary Fund in receipt of a pension from the Fund or a former member or deferred pensioner payment of whose pension has been suspended in terms of Rule 30.

### **Cessation of Membership**

13...(ii) a member who for any reason leaves the service of the employers shall forthwith cease to be a member

**Actuarial Valuations**

- 43 (1) The Fund shall be valued by the actuary not later than as at 28 February 1985 and thereafter at intervals not exceeding three years, for the purpose of determining whether it can continue to provide the benefits laid down in these rules.
- (2) If, as a result of a valuation by the actuary, the Trustees consider that there is a substantial surplus in the Fund, bonus periods of pensionable service may be granted or the rules may be amended so that the benefits are improved or the contributions reduced, as the Trustees, with the consent of the Company on the advice of the actuary, decide.

**Amendments to rules**

- 51(1) The Trustees may, after consulting the actuary, from time to time agree to the reduction of the annual contribution to be made by the employers in terms of Rule 22 either for a definite or an indefinite period.
- (2) Subject to the provisions of section (1), the Trustees may, with the concurrence of the Company, amend the rules by making new rules and altering or rescinding any existing rule; provided that no such amendment shall be to the general disadvantage of members, deferred pensioners and persons entitled to or in receipt of pensions or annuities: and in particular the Trustees may, after consulting the actuary, apply any surplus disclosed by any valuation by the actuary in terms of Rule 43 to provide bonus additions to pensions or otherwise improve benefits.

The trustees, in terms of the rules, effected an amendment which was to take effect as from 20 April 1995 the date on which the amendment was effected. The amendment reads as follows:

In paragraph (d) of the definition of "Pensionable service" delete "28 February 1990" and substitute "28 February 1993"

I am informed by the respondent that the concept of bonus service had been applied before in the fund and it had always had two specific characteristics in that it had been an addition

of 20% of pensionable service since the date the previous bonus service was granted and further it had been granted only to members who were contributory members at the date of the trustee decision. Therefore the intention of the amendment was that "bonus service" was granted to members who were contributing members at the date of the trustees decision, being the 20 April 1995, and affected members who had been members and in the employ of Anglovaal as at 28 February 1993.

In terms of the rule amendment and the trustees decisions the complainant did not qualify to receive the bonus since, although he had been in service on 28 February 1993, he had retired on the 30 April 1993 and was no longer in service on 20 April 1995, the effective date of the amendment. Nevertheless, in terms of the rule then applicable the complainant did receive the bonus service for the period before 28 February 1990.

When the trustees decided to improve benefits members and pensioners were considered as a whole. Increases were granted to pensioners ensuring that the increase in their pensions kept pace with the increase in the CPI.

Of relevance to the second part of the complaint is the fact that as from 1 March 1997 members of the respondent were given the option to change from the defined benefit fund to a defined contribution fund which was to be registered. The relevant definition in the new rules of respondent reads as follows:

**Conversion date:** 1 March 1997, with effect from which date the funding method as described in the rules previously in force was converted from a "defined benefit" arrangement to a "defined contribution" arrangement or any other subsequent date with effect from which DEFINED BENEFIT MEMBERS as at 1 March 1997 elect to receive benefits in terms of the "defined contribution" structure;

Documentation was sent to contributing members explaining the new defined contribution option and supplying individual comparisons of benefits under the two schemes, pensioners were not sent this documentation and were not given the option of transferring to the

defined contribution scheme.

The actuarial values of members who elected to transfer from the defined benefit fund to the defined contribution fund were enhanced by twenty percent at the date of conversion. This twenty percent enhancement was not granted to pensioners or to remaining defined benefit members.

### **First complaint**

The complainant argues that since he was still in the full-time employ of the employer and a contributing member of the respondent on 28 February 1993 he should have been allowed to benefit by the service bonus which was declared available by the trustees. It was unfairly discriminatory that this bonus should only have been granted to those members who continued to be in the employ of the employer as at the date that the decision was made which was 20 April 1995.

He substantiates his allegation of financial prejudice, which arises from the what he describes as unfair discrimination, by annexing a letter from actuaries Ginsburg Malan & Carsons which evidences the fact that had the bonus service been granted to him he would have received an enhanced value. The monthly pension payable to the complainant on his retirement at 30 April 1993 was R3 037.84 after commutation which amount included the additional monthly pension of R220.65 arising from his voluntary contributions. If his bonus service had been calculated on pensionable service up to 28 February 1993 the monthly pension including that purchased from his voluntary contributions would have been R3162.13. The difference between the monthly payments to the complainant would therefore have been R124.29. The complainant's pension was increased for inflation on 1 July each year and he was granted a special increase of 2% with effect from 1 July 1995 in addition to the inflation rate increases. The monthly pension payable as at 30 June 1999 was R5,717.78 and the total received from date of retirement to 30 June 1999 was R292 639.72. If the pension of R3 162.13 had been increased for inflation the monthly pension

payable as at 30 June 1999 would have been R5,951.71. The total amount received by the complainant to 30 June 1999 would have been R302,723.31. Therefore, had the complainant received the bonus service in addition to the pensioner increases, he would have received approximately R10,000.00 more than he has received to date. The actuaries make reference to the fact that while extending the bonus service for active members pensions were also increased. They state that when the trustees decided to improve benefits members and pensioners were considered as a whole.

The “bonus service” was granted only to members who were contributory members at the date of the trustees decision. The respondent draws attention to the fact that there is always a problem in determining a date as some person or group of persons falling outside of the cut-off date could claim to have been disadvantaged.

It is further argued that the decisions taken by the trustees were equitable in that while the contributing members received service bonuses the trustees had granted special increases to ensure that pensions kept pace with the increase in CPI from the date of retirement. This resulted in pensioners who had been on pension for a longer period receiving higher increases than those who had already or recently retired. In determining the manner in which pensions were to be increased cognisance of the period the pensioner had been on pension was taken into account thus providing a greater increase to those pensioners whose pension had been eroded by inflation. The increase granted varied between 2% and 27% depending on the period the member had been on pension. The complainant in this instance had only recently gone on pension and was therefore granted an increase of 2%.

The 2% increase which was granted to and referred to by the complainant, was an additional special adjustment granted to pensions in 1995, which was the year in which the decision was taken to amend the rule to allow for the additional bonus service cost. Pension increases from the date of the complainant’s retirement until the date of his complaint were as follows:

1 July 1993	10%	
1 July 1994	7%	
1 July 1995	9%	
		plus a special adjustment of between 2% and 27% depending on date of retirement
1 July 1996	10%	
1 July 1997	9.5%	
		plus a special adjustment of between 2% and 21% depending on date of retirement
1 July 1998	8%	

(The minimum guaranteed annual increase provided in the Rules is 3%)

As mentioned, the service bonus was conditional upon two requirements being met:

1. That the member to whom such bonus would be granted was a contributing member as at 28 February 1993
2. That the member was still in service as at the date of the decision being 20 April 1995.

The amendment, thus, adjusts “pensionable service” for members and deferred pensioners. The complainant was not a deferred pensioner and could therefore not benefit from the amendment in this capacity. The complainant was also not a member as defined in the rules as the definition of member excludes persons who have ceased to be a member under the provision of the rules. In terms of rule 13 the complainant when he retired ceased to be a member for the purposes of the definition of member in terms of the rules. Pensioners became “former members” of the fund as appears clearly from the definition of pensioner in the rules. Pensioners therefore are not beneficiaries of the amendment. The complainant on retirement became eligible for the benefits due to him at the time of his retirement in April 1993. He was accordingly paid out in terms of the rules applicable at that time. The rule amendment only took effect two years later when he was no longer a member but had become a pensioner and hence “a former member” and he thus could not fall within the ambit of such amendment.

It is then necessary for me to consider whether the rule in itself is discriminatory or unreasonable as alleged by the complainant. In respect of the allegations of discrimination

there can be little argument that unfairly discriminatory decisions and rules will be an improper exercise of power or maladministration as contemplated in the definition of complaint in the Pension Fund's Act. However, it does not follow, that every decision or rule that differentiates amounts to unfair discrimination. Firstly the differentiation must amount to "discrimination". Secondly such discrimination must be unfair and thirdly there should be no justification for the unfair discrimination.

Before the complaint of discrimination can be upheld, it will have to be shown that the differential treatment introduced by the rule amendment was unfair and not justifiable on reasonable grounds. In keeping with the provisions of Section 9(5) of the Constitution the onus to establish the fairness and justifiability of the discrimination normally would rest upon the respondent.

In general terms differentiation may be illegitimate either because its objective is illegitimate or because it is an unduly onerous means of achieving a legitimate objective or because it is arbitrary - *Prinsloo vs Van der Linde*, 1997 (3) SA 1012 (CC).

The employer undertakes in the employment relationship, within the context of a defined benefit fund, to provide certain pension benefits to the employee. The employer's obligation in that relationship is to make such contributions that will ensure the defined benefits. These defined benefits can be adjusted on an ongoing basis for a variety of reasons. In this particular instance the trustees wished to increase the defined benefits as a result of the positive financial status of the respondent. The objective of the rule amendment in these circumstances is, in my view, legitimate. The adjustment in favour of the active members cannot be considered disproportionate or unduly onerous or arbitrary means of achieving this legitimate objective. It is true that the rule amendment catered only for the active members but the pensioners were also given increases and therefore also benefited from the financial status of the respondent at that time. As indicated, the complainant in addition to the annual increase granted was given a further 2% increase, his being at the lower end of the scale of increases allocated to pensioners as a result of his

only recently having become a pensioner.

The respondent has given full details of the pension increases allocated to the complainant from his retirement to the date of his submission of his complaint. These increases have been detailed earlier in this determination. It is quite clear from these increases that the complainant also derived benefit from the financial status of the respondent during the relevant period. Despite the fact that the complainant would have been in a slightly better position financially during the described period I do not find that unfair discrimination has been practised against the complainant. Firstly all other members in his position were treated in the same manner as he was. It was members of a different class who obtained a different benefit but they in turn did not obtain in the pension increases which were available to the pension members. It is to be noted that the increases granted to the pensioner's were consistently above what was promised in terms of the rules but in 1995, the year in which the decision relating to service bonus was made, there was an additional special adjustment of 2 to 27% depending on the date of retirement of the pensioner. Under the circumstances it would appear to me that the trustees have made every effort to abide by their fiduciary duties, taking all reasonable steps to ensure that the interests of all members are protected at all times and acting with impartiality in respect of all members in that they have ensured that all members and former members benefit from the improved financial status of the respondent during the relevant period. While there is differentiation it cannot be established that such differentiation is unfair or unreasonable. I therefore do not find that I am able to grant the relief sought by the complainant relating to his first complaint.

The first complaint is accordingly dismissed.

## **Second complaint**

With regard to the second complaint the complainant argues that by enhancing the transferring members actuarial reserve value by 20% the existing financial resources of the respondent were considerably weakened to the prejudice of those unable to transfer to the new scheme.

He submits that the enhancement of certain member's actuarial reserve values cannot be allowed or contemplated within the rules of the fund as, if it were allowed, the trustees could distribute the respondent's entire surplus, after having made allowance for the actuaries valuation for pensioners liabilities, to employee members without any recourse to pensioner members.

Additionally, the allegation is made that there has been unfair discrimination against the complainant and all pensioners, in that they have neither been allowed to transfer to the new scheme nor to benefit from the actuarial reserve enhancement as other members have.

In its response to the second complaint the respondent submits that the enhancement was granted because members transferring to the the defined contribution fund were assuming part of the investment risk and would no longer be entitled to a defined benefit upon retirement.

In the valuation of the fund as at 28 February 1997, at which time conversion was being considered, reserves were set aside for the pensioners and expected remaining defined benefit members. Thus pensioner benefit expectations were not affected in any way by the introduction of the defined contribution option and they continued to receive their guaranteed pensions together with annual pension increases.

The fund presently has substantial investment reserves to smooth the investment returns of members, to provide stability in granting investment bonuses, and to adequately ensure the benefit of all pensioners.

Taking into account the increases given to pensioners and the reserves held to protect their interests the pensioners have not been disadvantaged by the introduction of the defined contribution option. The trustees at all times acted in the accordance with the rules of the fund and took care to ensure that the interest of all parties were considered before any changes were made.

I have been requested to made an order as to whether it was legal for the trustees to distribute the surplus and enhance the actuarial values of the transferring members. The complainant's enquiry therefore relates to whether the distribution of the surplus in the form of an enhancement is ultra vires the rules. Rule 51, which rule is quoted above in this determination, makes provision for amendments to the rules. More specifically, however, section 51(2) includes a proviso that the trustees may after consulting with the actuary of the fund, apply any surplus disclosed by an evaluation by the actuary to provide bonus additions to pensions or otherwise to improve benefits. The rules thus clearly provide for the trustees to make such enhancement and therefore in doing so they have not acted outside of the rules of the fund. The important rider is, however, that the amendment of rules should not be to the disadvantage of any member, deferred pensioner or pensioner.

The proposition flowing from the *Tek* decision is that issues around surplus distribution are essentially issues of whether the trustees of the pension fund have properly applied their minds to the distribution and whether the discretion exercised has been exercised reasonably in the face of the competing legitimate expectations to benefit from the surplus. It has been established that members in an ongoing defined benefit fund cannot, therefore, be said to have any unconditional rights to the surplus.

It is the duty of the trustees in a defined benefit fund to ensure that the benefits promised to the members of the fund are available for the members. The respondent in this instance has confirmed that such benefits have indeed been provided for and all pensioners will obtain the benefits promised to them in terms of the respondent's rules. The pensioners

have obtained increased benefits and benefits over and above those promised, (being 3%), in the rules. Pensioners have also not been obliged to accept a transfer of investment risk which in effect transferring members have done.

I find, therefore, that despite the fact that pensioners were not granted a 20% enhancement of their actuarial reserve value they have been granted defined benefits in terms of the rules of the fund to which they had always belonged and these benefits are capable of payment and remain capable of payment by the respondent together with increases in excess of the promised sums. Moreover, in 1997, the year in which the enhancements were made available to transferring members pensioners were granted an additional special adjustment of between 2 and 21% over and above the annual increase depending on their date of retirement. The complainant was granted a 2% increase on this occasion. This once again reflects the fact that cognisance was taken of pensioner's interests by granting appropriate increases at a time when the financial affairs of the respondent were positive. I therefore find that despite the fact that there is differentiation between classes of members this does not amount to unfair discrimination in that the trustees have complied with the fiduciary duties of protecting the interests of all members and not discriminating unfairly and have further ensured that the promised benefits are and will remain available.

It is also important to note that those members who transferred to the defined contribution fund immediately assumed a risk which was not carried by the pensioners in the defined benefit fund. Thus enhancing the benefit of transferring members' benefits merely assisted those members who in transferring took on a risk not associated with a defined benefit fund. The pensioners and remaining defined benefit members were secure in the knowledge that their defined benefits would be met while the transferring members had no such security.

Under the circumstances I am not in a position to order that the trustees have acted illegally in granting the enhancement to transferring members nor am I in a position to require the respondent to enhance the benefit of the pensioners to any greater extent than they have

already done and are continuing to do by providing pensions increases on an annual basis related to the financial status of respondent.

The second complaint is accordingly dismissed.

Dated at CAPE TOWN this 13<sup>th</sup> day of JULY 1999.

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**JOHN MURPHY**

PENSION FUNDS ADJUDICATOR