

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/WE/505/99

In the complaint between:

Louise Claire Lewis

Complainant

and

First National Bank Group Pension Fund

First Respondent

**PRELIMINARY RULING IN TERMS OF SECTION 30J OF THE PENSION
FUNDS ACT OF 1956**

1. This complaint, lodged on 28 January 2000, relates to the option made by the complainant when the fund, of which she was a member, converted from a defined benefit fund to a defined contribution fund.
2. No hearing has been held in this matter. Accordingly, I have relied exclusively on documentary evidence and an investigation conducted under my supervision by my investigator Jacqui Smith.
3. The complainant is Louise Lewis, an adult female, originally of Milnerton, but who, subsequent to the lodging of her complaint, has emigrated to Canada.
4. The respondent is First National Bank Group Pension Fund, a pension fund registered in accordance with the Pension Funds Act of 1956.
5. The complainant started working for First National Bank on 2 January 1985. All the time that she worked at the bank she was a member of the defined

benefit section of the fund and made regular contributions to the fund, except for two periods when she was off on maternity leave.

6. In 1996 the rules of the fund were amended to include a defined contribution section and the complainant was given the option of transferring her benefit to the defined contribution section. According to the respondent it was made clear to members that that this was a once off, irrevocable option. The complainant was given an information booklet to read and attended a morning session where the defined contribution arrangement was explained to her.
7. The complainant says that she was informed that if she moved to the defined contribution section of the fund and she resigned before pensionable age with more than 10 years service, no portion of her benefit would be paid out in cash. Page 10 of the information booklet supplied at the time reads as follows:

“If you have more than 10 years’ service you will become entitled to a benefit equal to the full value of your share account (100 per cent of the member’s and employer’s share). You can transfer all or part of the benefit to another approved pension preservation fund or a retirement annuity fund or you may leave it to accrue in the Fund as a deferred pension. **No portion of the benefit is paid in cash.**”
8. According to the complainant, due to this she and many of her colleagues decided to remain in the defined benefit section of the fund as they felt that they would resign before pensionable age and at least get their portion of the pension out. As will appear more fully later the booklet actually misstated the true legal position.
9. On 26 December 1999 the complainant resigned and received a withdrawal benefit in the amount of R30 889, 00, paid to her in terms of rule 7.3, which reads as follows:

“WITHDRAWAL OF A DEFINED BENEFIT MEMBER

7.3 Notwithstanding anything to the contrary contained in these RULES, the benefits payable in respect of a DEFINED BENEFIT MEMBER who leaves the SERVICE prior to his NORMAL RETIREMENT DATE and is not entitled to benefits under any other Rule shall be determined in accordance with Annexure C to these RULES.”

The relevant rule in Annexure C is 5 of Part I, it reads:

“5. RESIGNATION:

5.1 Subject to the provisions of General Rules 7,10 and 28, if a Member resigns voluntarily from the Service and is not granted an immediate pension under any of the Rules he shall be entitled to a benefit equal to his Accumulated Contributions; provided that if he is qualified he may elect instead to become a Deferred pensioner in terms of Part XI of the Rules.

5.2 If Accumulated Contributions are payable they shall, subject to the provisions of General rule 29, be paid out 6 months after the end of the month following the date of leaving the Service, with, at the Trustees discretion, simple interest at the rate of up to 5/6ths of 1% for each completed month from the date of leaving the Service to the date of payment; provided that authority in terms of the provisions of the Income Tax Act has been received by that time; provided further that the Trustees may in their absolute discretion pay the benefit within 6 months of the end of the month following the date of leaving service.”

10. In January 1999, prior to the resignation of the complainant, she found out that the rule regarding the withdrawal of defined contribution members receiving their benefit in cash had changed in October 1998. Now members of the defined contribution section of the fund with more than 10 years service could take out their benefit in cash.

The relevant part of the old rule reads as follows:

“7. WITHDRAWAL

PRESERVATION BENEFIT

- 7.2 (1) If a MEMBER, other than a DEFINED BENEFIT MEMBER, whose SERVICE exceeds 10 years, leaves SERVICE under the conditions described in Rule 7.1(1), his MEMBERS' SHARE, at the time will be preserved:
- (a) in the FUND in terms of Rule 7.2(2); or
 - (b) in an APPROVED RETIREMENT ANNUITY FUND of his choice, or an APPROVED PRESERVATION PENSION FUND in which the PRINCIPAL EMPLOYER agreed to participate.
- (2) Where the whole of the MEMBERS entitlement is preserved in terms of (1)(a) above or part thereof in terms of Rule 7.1(3) such MEMBER will become a DEFERRED PENSIONER with benefits to be determined as follows:
- (a) the value of the MEMBER'S entitlement at the date of withdrawal, less any amount thereof that was paid in cash (if applicable), will form the opening balance of his Share Account at the date of withdrawal from SERVICE;
 - (b) no further contributions will be payable by or on behalf of the DEFERRED PENSIONER on or after the date of his withdrawal from SERVICE;
 - (c) investment earnings will be credited to his Share Account in terms of Rule 2.2(1)(a)(v);
 - (c) the DEFERRED PENSIONER shall not be entitled to benefits other than those provided for under this Rule 7.2.”

The relevant part of the new rule reads as follows:

“7. WITHDRAWAL

WITHDRAWAL BENEFIT

- 7.1 (1) (b) If a MEMBER leaves SERVICE after completing 10 years of SERVICE and is not entitled to benefits in terms of any other Rule, an amount equal to his total MEMBERS' SHARE, including premiums shall be due to him.”

11. According to the respondent the rule governing the withdrawal from the defined contribution section of the fund was changed following the decision handed down by this tribunal in the case of *Mgulwa and Another v First National Bank Group and Others* [1999] 12 BPLR 379 (PFA). In this case the fund's position on the single withdrawal was held to be inaccurate and it was found that the fund could not impose restrictions on the withdrawal of the member's benefits. In other words members in the defined contribution section of the fund, who transferred to a preservation fund, were legally entitled take their whole benefit in a single withdrawal from the preservation fund. Before the rule amendment members of the defined contribution scheme were entitled to preserve their benefit and then make a single withdrawal of their entire benefit from the preservation fund. After the amendment a member in a defined contribution scheme could withdraw their benefit without having to preserve it first. The finding in *Mgulwa* was not that the respondent should change their rules but that the rules did not permit a restriction on the rights of withdrawal from the preservation fund with the result that the members are allowed to make one single withdrawal of their benefit from the preservation fund. The respondents chose to amend the rules themselves to allow for the withdrawal of the whole benefit prior to the transfer to a preservation fund.

12. The complainant received her entitlement in terms of the rule governing the withdrawal from the defined benefit section of the fund, but she alleges maladministration. She feels that they should have been informed about this change and given an opportunity, when the rule was changed, to change to the defined contribution section of the fund.
13. Subsequent to the complainant finding out about the change of the rule, her husband wrote two letters on her behalf to Mr Lawson and Mr Moll of the First National Bank Pension Fund, to voice their discontent with the situation. The fund's final reply to their letters was that they were not prepared to take any further action on the matter and that the complainant was entitled to lodge a complaint with this tribunal if she felt that the actions of the trustees have prejudiced her.
14. The issue in the present case is not confined to whether the complainant should have the benefit of the rule amendment, but the fact that the complainant made a choice based on information that was misstated because the respondent interpreted the original rule incorrectly. The information booklet was incomplete, inaccurate and misstated the rule. The complainant has relied on it to make a choice to her prejudice. The question then becomes: Has the complainant suffered damage as a consequence of the maladministration of the fund causing prejudice? Liability depends on whether the complainant suffered loss as a result of the wrongful, negligent misstatement of the fund.
15. The fund has a duty to advise correctly about benefits especially in a restructuring situation. Section 7C(2) of the Act is relevant here, it reads:
 - (2) In pursuing its object the board shall –
 - (a) take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of this Act are protected at all times, especially in the event of an amalgamation or transfer of any business, contemplated in section 14, splitting of a fund, termination or

reduction of contributions to a fund by an employer, increase of contributions of members and withdrawal of an employer who participates in a fund;

- (b) act with care, diligence and good faith;
- (c) avoid conflicts of interest;
- (d) act with impartiality in respect of all members and beneficiaries.”

The fund’s misstatement in the booklet of the entitlement of a defined contribution member with 10 years service clearly is in breach of its duty to take reasonable steps to ensure that the interests of its members are protected, as well as the duty to act with care and diligence. When a pension fund communicates a benefit option to its members requiring them to make choices having significant financial consequences, it is obliged to state the financial and legal position correctly. Anything less will be in breach of the duties in section 7C(2) of the Act, and shall constitute maladministration.

16. The next question is whether the complainant suffered prejudice? Had the complainant moved to the defined contribution section of the fund on the correct advice, she would have received a greater benefit at the time of her withdrawal and thus there seems little doubt about the fact that she has suffered prejudice.
17. The final enquiry concerns causation i.e. whether the loss suffered by the complainant was caused by the wrongful, negligent misstatement of the fund? I am of the view that the complainant’s loss was caused by the respondent, as the complainant would not have made the choice but for the information supplied by the respondent.
18. In light of the above I am of the *prima facie* view that the fund has wrongfully and negligently, caused prejudice to the complainant.

19. The question of an appropriate remedy in this matter is somewhat difficult. The complainant has resigned and internal adjustments will be practically awkward. I believe the respondent also should be afforded a further opportunity to try and settle the matter and failing which, to advance additional submissions on the merits. Accordingly, I make the following preliminary ruling:

19.1. This matter is postponed until 28 February 2001 at which time this tribunal shall fashion an appropriate remedy, unless before that time the parties reach a mutually acceptable and appropriate settlement to address the complaint. Any such settlement shall be made an order of this tribunal.

19.2. The parties shall be entitled before 28 February 2001 to furnish additional evidence and to make submissions to this tribunal for consideration in determining a final remedy.

Dated at **CAPE TOWN** this 25th day of January 2001.

John Murphy

Pension Funds Adjudicator