

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/GA/1074/2000/NJ

In the complaint between:

A R Kipling

Complainant

and

Unilever SA Pension Fund

First Respondent

Karen Dettmer

Second Respondent

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

1. On 28 February 2001 I handed down an interim ruling and issued a rule *nisi* calling upon the parties to show cause why the following order should not be granted:
 - 1.1. The decision of the respondent fund to award 40% of the benefit to the minor children and 60% to Ms Karen Dettmer is hereby set aside.
 - 1.2. The fund is directed to pay R131,700.93 each to Fiona Kipling and Bronwyn Kipling, together with interest thereon at a rate prescribed in the Prescribed Rate of Interest Act for a judgement debt from 28 May 1999 to the date of payment, within 6 weeks of the date of this ruling.
 - 1.3. The amounts mentioned in paragraph 23.3.2 (paragraph 1.2 above) shall be paid into the respective trusts established for Fiona Kipling and Bronwyn Kipling.

In addition, Ms Karen Dettmer was joined as a second respondent to the complaint and the first respondent was directed to serve a copy of the complaint, its response, subsequent submissions and a copy of this ruling on Ms Dettmer. It has duly done so.

2. The factual background and the findings in this matter have been fully canvassed in the interim ruling and it is unnecessary to again repeat them in any detail. Suffice it to say that I set aside the death benefit distribution by the fund as a result of an irrelevant consideration considered by the board of management and the fettering of its discretion by its strict reliance on the nomination form completed by the deceased. I substituted my decision for that of the fund, in terms of which 90% (R488,667.67) of the benefit was awarded in equal shares to the minors (to be kept in trust) and 10% (R54,296.41) to Ms Dettmer. As stated above, all parties were called upon to show cause why this order should not be confirmed.

3. The respondent fund has submitted no further submissions. Ms Dettmer made the following written submissions:

Firstly, I would like to say that I am dissatisfied about being involved in this case/complaint towards the end as I can see that the correspondence has been going on for sometime. The timing could not have been more unappropriated (*sic*) as this is the second year anniversary of my sisters death, which if it matters to anyone, I am still struggling to deal with.

With this being said, it is clear to me that the relationship between Gail and myself is irrelevant. Because of our past, Gail and I promised to look after each other, a promise she saw through. Gail sometimes feared for her life as did I and the rest of our family, I moved from Pietermaritzburg in July 1998 to be with her through her separation to give her the necessary financial support and we then became financially dependant on each other.

I believe Gail would not have left me 100% beneficiary had she not made other provisions eg. life ins etc. for her children or believe that her estranged husband, Andrew Kipling was incapable of looking after them.

Furthermore, Andrew Kipling did not have to buy a house as he does not even reside there (they are living in the same flat that he is complaining about). This flat was good enough at the time for my sister, himself and two children to live in it for years while they were not separated. The other adult male he refers to (being his father), only stays there when Andrew Kipling is not there (working late etc.).

I would also like to state that Andrew Kipling was still employed at the time of the trustees decision, and even after the benefits were paid out. I have offered on numerous occasions to look after my nieces should he have to work shifts, weekends or overtime, I do not see this as a duty or a burden, but as a privilege to do so.

Lastly, with reference to my affidavit provided to the trustees prior to their decision, they then decided to pay the benefits out as they saw fit.

4. I deal in turn with the various arguments raised by Ms Dettmer. With regard to the failure by the complainant to cite Ms Dettmer as a respondent, I sympathize with her position in that the joinder coincided with the second anniversary of her sister's death. Be that as it may, she has suffered no prejudice in that the fund was directed to serve a copy of the complaint, its response, the interim ruling and further submissions on Ms Dettmer before a final ruling was made. Furthermore, she has been afforded an opportunity to deal with all the issues raised during our investigation as well as the findings set out in my interim ruling. Therefore, I am satisfied that the second respondent has been afforded adequate opportunity to deal with all the material issues raised in this matter.

5. With regard to the argument that the deceased would not have nominated Ms Dettmer as a sole beneficiary without providing for her minor children, Ms Dettmer has produced no evidence to substantiate this allegation. The argument advanced by her is that the minor children are well provided for and therefore the deceased did not deem it necessary to include her minor children in the nomination form completed by herself. Apart from the fact that the deceased's wish is only one of the relevant factors to be considered by the trustees, from the evidence considered by the trustees and that before me, there is no evidence to suggest that the minor children financially benefited from the death of the mother. On the contrary, no benefits were inherited by the minors and the pension benefit represented the only asset wherefrom they may benefit.

6. The other arguments advanced by Ms Dettmer all relate to the status of Mr Andrew Kipling, the father and guardian of the minor children. It is important to bear in mind, both in respect of the decision made by the fund and my proposed distribution, that no portion of the benefit was awarded to Mr Kipling. The fact that Mr Kipling is the guardian of the minor children and therefore entitled to receive monthly payments from the trusts established for the minor children does not imply that the money is awarded to him. He is merely receiving the money on behalf of his children in his capacity as their guardian.

7. As to whether Mr Kipling is capable of looking after the children's welfare, is not a matter for this tribunal. If he is incapable of maintaining the children, the second respondent may be within her rights to make an application to the High Court in respect of the custody and guardianship rights over the minor children. As the matter currently stands, Mr Kipling is the guardian of the children and therefore is entitled to receive the monies on their behalf until they attain the age of 25. Furthermore, the payment shall be made into a trust established for the children and not directly to Mr Kipling to ensure protection and preservation of the monies awarded to them.

8. Therefore, on the basis of the evidence obtained during our investigation and subsequent submissions received by Ms Dettmer, I am of the view that there is no new evidence to discharge the rule *nisi*. Accordingly, the rule *nisi* issued on 28 February 2001 is hereby confirmed.

Dated at **CAPE TOWN** this 6th day of April 2001.

John Murphy

Pension Funds Adjudicator