

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.:PFAWE/152/98/LS

In the complaint between:

B M Jenkinson

Complainant

and

Nedcor Pension Fund

Respondent

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

1. This is a complaint lodged with the Pension Funds Adjudicator relating to the distribution of the surplus in the Nedcor Pension Fund. The fund's trustees decided that only former members of the fund who were either still in the employ of the Nedcor Group on 31 December 1997 or who had retired would be entitled to a share in the surplus. The complainant transferred from the Nedcor Pension Fund to the Nedcor Defined Contribution Provident Fund in 1994. However since she was retrenched on 31 December 1996, she was no longer in the employ of the Nedcor Group on 31 December 1997 nor retired and accordingly did not qualify for a share in the surplus. She asserts that considering the fact that she contributed to the Nedcor Pension Fund for a period of over 20 years and only exited the fund a year before the cut-off date, she is entitled to a share in its surplus.
2. No hearings were conducted in this matter and I have therefore relied on the documentary evidence, written submissions, and the investigation conducted by my investigator, Lisa Shrosbree.
3. The complainant commenced employment with Syfrets Limited ("the company"), a member of the Nedcor Group of Companies as a secretary on 1 October

1974.

4. Initially the complainant was a member of the Syfrual Pension Fund. On its dissolution however, she joined the Nedcor Pension Fund.
5. With effect 1 January 1994, two new retirement funds were established within the Nedcor Group of Companies. These were the “Nedcor Defined Contribution Provident Fund” and the “Nedcor Defined Contribution Pension Fund” (hereinafter “the defined contribution funds”).
6. Members of the Nedcor Pension fund were offered the opportunity to move to one of the defined contribution funds. In the complainant’s case, the option had to be exercised by 28 February 1994.
7. The complainant elected to transfer to the Nedcor Defined Contribution Provident Fund.
8. Transfer arrangements at the time of transfer provided that the transfer value in respect of each member transferring would be equal to the value of each individual member’s past service actuarial reserve.
9. The complainant’ actuarial reserve value was calculated at R161 008. R41 905.97 of that was invested in the Multi-Rand Preservation Fund and the remaining R119 102.03 transferred to the Nedcor Defined Contribution Provident Fund.
10. During the course of 1997, the trustees decided to restructure the Nedcor Pension Fund. They consulted various actuaries and consultants in this regard and at a special meeting convened on 13 October 1997, a resolution accepting the restructuring proposal was adopted by the trustees.

11. As part of the restructuring, the trustees decided to distribute a portion of the fund' surplus to former members who had transferred to one of the defined contribution funds during 1994 and 1995 provided such former members were still employees of the Nedcor group or pensioners or their dependants. Rule 17BIS was accordingly amended to read as follows:

..... provided that the TRUSTEES shall with the prior written approval of the PRINCIPAL EMPLOYER be entitled in their discretion to allocate and transfer to such pension or provident fund for the benefit of any former MEMBER who has previously elected to become a MEMBER of such other FUND such proportion of any surplus in the FUND as determined by the VALUATOR to have, at the time of transfer of such former MEMBER to such other FUND, been in excess of the funding requirements of the FUND, as the TRUSTEES may in their absolute discretion determine, *provided that such former MEMBER is an active or retired MEMBER of such other FUND or the ELIGIBLE SPOUSE or DEPENDANT of such former MEMBER who, at the time of his death or retirement, was an active or retired MEMBER of such other FUND.....* [My italics]

12. Thus in terms of rule 17 BIS, former members who subsequent to transfer to the defined contribution funds had been retrenched or who had resigned were excluded from a share in the surplus. The trustees, in their discretion, decided to distribute the surplus by way of payment of an enhancement (hereinafter referred to as "he enhancement" equal to 18% of a former member's actuarial reserve value at the time of transfer together with interest thereon.
13. The complainant was retrenched by the company on 31 December 1996 and accordingly did not qualify for the 18% enhancement.
14. The complainant asserts that this is unfair. She argues that the enhancement was calculated on the basis of a member's actuarial reserve value at the time of transfer to the defined contribution funds at which time she was still a member of the Nedcor Pension Fund and that she is therefore also entitled to payment of

the enhancement. She also points out that she contributed to the fund for a period of 22 years and therefore it is only fair that she share in the distribution of its surplus.

15. The complainant seeks an order directing the fund to pay her the enhancement, that is, 18% of her actuarial reserve value at the time she transferred to the Nedcor Defined Contribution Provident Fund in 1994 plus interest.
16. It is clear that the complainant has no right to a share in the surplus in terms of the rules. Therefore the question for determination is whether the decision taken by the trustees to restrict the recipients of the enhancement to members of the Nedcor family and pensioners and the consequent rule is rational and reasonable.
17. The fund states that the restructuring of the Nedcor Pension Fund constituted a network of interdependent proposals in terms of which the market value surplus was distributed as equitably as was reasonably possible in the circumstances to those stakeholders who were identified as having a legitimate interest, expectation and entitlement thereto.
18. The fund relied on expert advice from professional advisors including Old Mutual Asset Managers and Alexander Forbes in formulating a proposal.
19. The fund states that since the recipients of the enhancement had to be restricted in some way, the trustees decided that it was fair and reasonable to limit it to those former members who were still part of the Nedcor family. This took into account the interests of the employer who would benefit from a motivated and contented workforce. It also took into account the fact that existing members of the Nedcor defined contribution funds now bore the investment risk.

20. I am satisfied that this constituted a rational basis to determine which category of former members of the fund should be paid the enhancement and thereby share in the surplus.
21. The test is not one of fairness but of proportionality. The concept of proportionality in administrative law expresses the idea that the extent to which the action of the public authority may infringe individual rights should not go beyond the degree necessary for serving the public interest. Or put another way, the administrative act must be proportionate to the advantages of the act to the public.
22. Applying this concept to the present case, whilst it may not have been ideally fair that the complainant was excluded from receiving the enhancement considering the fact that she was retrenched and that she had contributed to the fund for a period of 22 years, this was nevertheless proportional to the interests which the enhancement restriction served, that is, the interests of former members of the Nedcor Pension Fund who were now members of one of the defined contribution funds and thus carrying the investment risk. Had there been no such restriction, this would have had the effect of destroying the viability of the restructuring exercise including the distribution of a portion of the surplus to members in the defined contribution funds who pensions, without additional funding, could become severely depleted.
23. As it turns out, the investment risk materialized in the market crash of August 1998 and I doubt whether the 18% enhancement, in this instance, went far enough to protecting members' investments in the Nedcor defined contribution funds entirely.
24. Thus the rule limiting the recipients of the enhancement is reasonable in so far

as the unfairness or otherwise suffered by the complainant as a result were proportionate to the advantages to be had by members of the defined contribution funds.

25. The fund points out that at the time the complainant transferred, there was no expectation on the part of transferring members that they would participate in any surpluses arising in the Nedcor Pension Fund nor was there any expectation raised that on withdrawing from either fund, a member would be entitled to any more than his or her defined benefit in the case of the Nedcor Defined Benefit Pension Fund or accumulated credit in the case of the Nedcor defined contribution funds.

26. I am satisfied that the complainant received that to which she was entitled in terms of the rules and it would seem that she did not fare too badly on that account:

26.1 The complainant's opening balance in the Nedcor Provident Fund was the sum of R119 102.03.

26.2 In addition to this she received the sum of R41 905.97 which was invested in the Multi-Rand Preservation Fund. Thus the total amount received on transfer to the defined contribution fund in 1994 was R161 008.00.

26.3 The investment growth on her opening balance of R119 102.03 in a period of approximately 3 years was R73 030.27, constituting a return on investment of approximately 60%. To this was added employer and employee contributions and the complainant received a total withdrawal benefit of R 249 073 50 on retrenchment. This amount excludes the amount of R41 905.97 invested in the Multi-Rand Preservation Fund.

27. Had the complainant remained in the Nedcor Pension Fund, her actuarial reserve value at the time of her retrenchment (on a very generous estimation) would have been in the region of R250 000 whereas she received a total benefit in excess of R290 900. Her withdrawal benefit in the defined benefit fund would also have been considerably less.

27. The complaint is accordingly dismissed.

DATED at CAPE TOWN this 12th day of NOVEMBER 1999.

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JOHN MURPHY

PENSION FUNDS ADJUDICATOR