

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

**CASE NO: PFA/WE/264/98/SM**

In the complaint between:

**M M KRIEL**

Complainant

and

**CAPE MUNICIPAL 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 Funds Adjudicator on 20 November 1998 in terms of section 30A (3) of the Pension Funds Act of 1956 ("the Act"), concerning an alleged unfair withdrawal benefit.

The complainant is M M Kriel, who was employed for nineteen years by the Cape Town City Council (known as the "CCC") in the electrical engineering department. He was a member of the respondent until he resigned from his employment in February 1997. The respondent is the Cape Municipal Pension Fund, a fund having a defined benefit and a defined contribution section.

In essence, the complainant is aggrieved that, when he resigned, he was obliged to accept

a resignation benefit that was considerably less generous, in his view, than the withdrawal benefit now offered in the defined contribution fund established over a year after his resignation. The complainant alleges that, although (it subsequently emerged) plans for the new fund were afoot at the time of his resignation, the fund failed to inform him of these plans. The complaint therefore alleges that a dispute of law has arisen between the complainant and the fund, relating to the interpretation and application of the fund's rules, in that the complainant regards the rule under which he resigned as unfair and unreasonable; and furthermore alleges that the complainant has suffered prejudice through maladministration, being the failure of the fund to fully disclose information which would have had a bearing on his decision as to the timing of his resignation.

No hearing was held in this matter and in determining the complaint I have relied on the documentary evidence and submissions and on supplementary information obtained from telephone conversations conducted with the parties by my senior investigator, Sue Myrdal. Ms Myrdal has furnished me with a full report.

Having completed my investigation I have determined the complaint as follows. These are my reasons.

### **The complaint**

After almost nineteen years' service the complainant resigned from his employment on 7 February 1997. He elected not to become a deferred pensioner and was therefore obliged to accept the resignation benefit in terms of rule 10 of respondent's rules:

"If a member resigns from the service before attaining the pensionable age..., he shall be entitled to a return of the whole amount of his own contributions plus 4% of such amount for each complete year by which his contributory service exceeds five years, provided that if he has had at least ten years' contributory service with the council ... he may elect instead to become a deferred pensioner."

The complainant states that he objected to the amount he received, being R78 654, but was told that this was his full entitlement according to the rules. The complainant's view

however was that his reasonable entitlement was to receive the full amount paid into the fund by him or on his behalf together with any actual growth thereon. He regards the amount paid to him as unreasonable. This is the first leg of his complaint.

In the latter half of 1998 (a year and a half after he resigned) it came to the complainant's attention that a defined contribution section had been established by the fund, and that the resignation benefits available through this fund were far in excess of those paid to him when he resigned. (Basically a member could withdraw his/her equishare of the fund at the point of termination.)

The complainant maintains that, at the time he was considering resigning, he enquired of his senior colleagues in the electrical engineering department as well as the pension fund personnel and his trade union (South African Municipal Workers Union) whether any "future deals" were in the offing with regard to severance packages or the pension fund. He was told that there was nothing planned. The complainant states that:

"The Board [of the fund] failed, completely, to keep me informed of the changes they were negotiating whereas, had I known prior to resigning from the CCC, I could have accordingly approached my resignation differently."

This then is the second leg of his complaint: that the failure of the fund to inform him of the potential changes was an instance of maladministration, whereby he was prejudiced.

### **The response**

Mr Kevin Creasey, chief executive officer of the fund, responded in writing to the complainant, reiterating that the fund had paid him all the amounts to which he was lawfully entitled in terms of the rules and on the basis of the election he made.

With regard to the allegation of failure to provide information, Mr Creasey made the following comments:

“It was common knowledge, and in addition various circulars were placed in Team Talk, in our Annual Reports, etc, indicating that negotiations were underway to improve the benefits of the fund for those members who wished to avail themselves as an option. (sic)

For those members still in-service on 1 July 1998, after a duly constituted referendum of the members, such persons were offered the ability to transfer to the defined Contribution Fund and accept a completely new negotiated set of benefits.

At the time when you resigned from employment, namely February 1997, there was no certainty as to the outcome of the negotiations regarding the proposed restructure of the fund, nor indeed whether the parties would even reach agreement in this regard. We kept our members fully informed of the process, which in fact only reached an outcome during the course of 1998, more than twelve months after you had already elected to resign your employment. The fund certainly did not withhold any information from you at the time when you chose to resign and exercise your options in terms of the rules which were then applicable.”

My investigator then requested the fund to furnish evidence of information provided prior to the date of the complainant’s resignation.

Ms Liz Maggs, legal manager of the fund, indicated that the defined contribution section arose out of an expressed wish by a number of members to have the normal retirement age in the defined benefit fund reduced. According to Ms Maggs a campaign petitioning for this originated in the City Engineers Department (where the complainant was employed) during October 1996; the petition was signed by approximately 2300 members.

In response to the campaign an investigation was launched and a Pension Bulletin, dated 27 November 1996, was released by the fund office to all members. Ms Maggs furnished my investigator with a copy of this briefing: it briefly outlines the cost of reducing the retirement age and sets out the options which the Executive Committee (Exco) of the council was preparing to negotiate with unions. Included amongst these was the possibility of establishing a defined contribution section, since this would allow members to retire at any age after 55 with full benefits. This matter was discussed at the annual general meeting of members held on 5 December 1996 (minutes of which were supplied to my

investigator) and negotiations commenced in early 1997. These events took place before the complainant resigned; subsequently the process of negotiation continued for another year and a half, culminating in a member referendum, option period and the introduction of the defined contribution section in the latter part of 1998.

### **Analysis of the complaint**

With regard to the first leg of the complaint, that of the unreasonableness of the resignation benefit rule, I wish to refer to my previous determinations in *Wilson v Orion Fixed Benefit Pension Fund and Others* (PFA/WE/84/98), *Kransdorff v Sentrachim Pension Fund & Sentrachim Ltd* (PFA/GA/3/98) and *Verceuil v Eskom Pension and Provident Fund* (PFA/GA/178/98). In these cases I have indicated my attitude to the need for reform and greater equity regarding withdrawal benefits in defined benefit funds. This is an area of great concern to members, as evidenced *inter alia* by the number of complaints on this score received by my office.

However, as I have also pointed out in the abovementioned cases, I am constrained by the limitations of the adjudication process in dealing with disputes of interest such as this. Changes to the withdrawal benefits effectively constitute an aspect of wage setting, since a change in a rule making a higher amount payable in effect obliges an employer to pay higher wages. The appropriate arenas for remedial action therefore are those of collective bargaining and the legislative process. I shall intervene where possible (as I did in the *Wilson* case), but there is frequently no scope for me to do so.

In my view the cash resignation benefit allowed in terms of respondent's rule in this case is a *prima facie* abridgement of the reasonable benefit expectations of withdrawing members.

It falls right at the lower end of the spectrum of withdrawal benefits paid in the South African pension industry. (Offsetting this to some extent, it must be said, is the option available to the resigning member to take a deferred pension; this at least addresses the issue of preservation of retirement funding, although the member is restricted to leaving the

pension in the fund and has no choice to preserve his/her funding outside.)

However I am not prepared to strike down the rule as unreasonable, for the same reason I declined to do so in the *Wilson* case, where I said:

“The proper arena for resolution of a dispute affecting the collective rights of a group of employees, the “early leavers”, is that of negotiation, collective bargaining and the economic power play between the parties. The complainant and other members of the respondent could be said to have been aware or ought reasonably to have been aware of the fund’s rule when joining the fund and could have taken the necessary steps through a process of negotiation to ensure its amendment.”

That collective bargaining can be effective is demonstrated here; as has been shown above, bargaining within the Cape Town City Council resulted in a reduction in the fund’s early retirement age, as well as the introduction of a defined contribution section (which effectively, as the complainant has pointed out, addresses the issue of withdrawal benefits to the satisfaction of members).

In this regard it is interesting to note that in the latest valuation report of the fund, indicating the financial position of the fund as at 30 June 1998, the valuator, Mr Lester, makes the following comment:

“It is becoming increasingly clear that the Pension Funds Adjudicator is taking active steps to eliminate any form of discrimination in funds’ rules. There are several such areas that the trustees probably would need to address in the near future in relation to the **defined benefit section** of the fund, namely: the relatively poor cash resignation benefit that the fund provides may need to be improved...

These improvements will come at a cost to the fund and need to be agreed to by the council.”

Unfortunately any improvements that may come in the defined benefit fund withdrawal benefits will be too late to assist the complainant. Nevertheless, for the reasons outlined above, I am unable to order any relief in this regard.

This brings us to the second leg of the complaint, namely that the fund failed to inform the complainant of impending changes that, had he had knowledge of, would have induced him to defer his resignation in order to take advantage of the improved resignation benefits. There are two aspects of this issue that, in my view, overridingly favour the respondent.

The first is that the respondent did put out information on the mooted changes at an early date. The pension bulletin dated 27 November 1996 was disseminated some months before the complainant resigned. The complainant maintains that he never saw this or any other document. Be that as it may, information about the fund's AGM on 5 December 1996 and the minutes thereof were available for the asking. One might suppose the complainant would have asked for this information, given that he was actively contemplating resigning and had been devoting effort to asking individuals about any proposed improvements in benefits.

The second aspect is that, as Mr Creasey points out, the mooted changes were in a very early stage of development at the time the complainant resigned. This meant that there was, at that stage, little to say about them other than to note that proposals had been floated and that negotiations would be entered upon. This was done properly by the fund. Furthermore there was no certainty as to the eventual outcome of the negotiations or how long they would take to reach finality. The logical conclusion of this point is that, even if the complainant had been apprised to his own satisfaction of developments up to the date of his resignation, he would not necessarily have known enough to be able to judge whether it was in his interests to stay in his employment or to wait out further developments. The fund cannot be faulted for this.

My finding on this issue therefore is that there was no maladministration by the fund.

Accordingly, for the foregoing reasons, the complaint is dismissed.

DATED at CAPE TOWN on 17 SEPTEMBER 1999

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**JOHN MURPHY**  
PENSION FUNDS ADJUDICATOR