IN THE TRIBUNAL OF THE
PENSION FUNDS ADJUDICATOR **CASE NO.** PFA/GA/61/98/SM

IN THE COMPLAINT BETWEEN

JOHN ALBERT JARVIS **Complainant**

AND

THE AECI PENSION FUND **Respondent**

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

Introduction:

This is a complaint in terms of section 30A(3) of the Pension Funds Act of 1956.

The Respondent is a pension fund duly registered under the Pension Funds Act of 1956. The Complainant was a member of the fund from 1 April 1976 until he took early retirement on 31 March 1998, at the age of 61.

The thrust of the complaint is that the Respondent has calculated the Complainant's actuarial reserve on his transfer out of the fund using actual marital status and age of spouse data, whereas the actuarial reserve of members remaining in the fund is calculated using assumed marital data, the effect of this being, in the Complainant's specific case, that he received a lower transfer value than that quoted to him based upon the assumed data. The Complainant is aggrieved because he was not informed that the actual marital data would ultimately be factored in; he accordingly made certain investment plans and

decisions based on a written quotation from the Fund which had utilized his assumed marital data.. These plans were adversely affected when the complainant was presented with the corrected amount finally calculated as his transfer value, taking into account his actual marital data. In the complainant's view the difference was unacceptably great.

The Complainant therefore alleged that he had been unfairly discriminated against vis-a-vis the remaining members of the fund, and further, that he had been prejudiced as a result of an instance of maladministration by the fund. By extension the question of discrimination based on the practice of utilizing marital data and ages of spouses to calculate transfer values arises. This is essentially an issue relating to the interpretation and application of the rules of the fund.

The Complainant has submitted his complaint in writing to which the Respondent has replied in writing. A hearing was held at the offices of the Pension Funds Adjudicator on 17 March 1998 before a senior investigator, Sue Myrdal. The hearing was of an informal nature and neither party adduced oral evidence under oath. In determining this matter I have relied exclusively on documentary evidence and on the report placed before me by the senior investigator.

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

The complaint:

The Complainant was employed by SA Nylon Spinners (Pty) Ltd, a subsidiary of AECI, for 20 years as Manager - Internal Audit. In April 1996 he was transferred to AECI Johannesburg to a new position as Accounting Systems Advisor. In August 1997 AECI declared the Complainant's position redundant and offered him early retirement in terms of the company's redundancy policy. The Complainant's acceptance of this was confirmed in December 1997, with the effective retirement date to be 31 March 1998.

In November 1997 the Assistant Manager of the Respondent advised the Complainant of a new option available with effect from 1 January 1998 under the rules of the AECI Pension Fund. In terms of this option, recorded in an amendment to the rules, being the new Rule 23(d), instead of receiving the guaranteed pension from the Fund, retiring members could now elect to purchase an annuity from an insurer. In implementing this option retirees were allowed to transfer their actuarial reserve. I quote the rule in full below:

> Instead of granting a PENSION payable from the FUND, the actuarial value of the PENSION after communication (if any), in terms of this rule, which would have been applied to secure a PENSION for the BENEFICIARY from the FUND may, at the request of a BENEFICIARY, or at the request of a legal guardian of the BENEFICIARY (if the BENEFICIARY is a minor or under some legal disability) be applied to secure a pension for the BENEFICIARY from an INSURER of the BENEFICIARY'S choice approved by the TRUSTEES on such terms and conditions as the TRUSTEES after consultation with the ACTUARY, may determine."
>
> Such pension shall be a compulsory non-commutable pension payable for and based on the lifetime of the BENEFICIARY or in the case of an ELIGIBLE CHILD for as long as such ELIGIBLE CHILD qualifies as an ELIGIBLE CHILD in terms of the Rules and shall not be capable of being transferred, assigned, reduced, hypothecated or attained by creditors as contemplated by the provisions of Section 37A and 37B of the Act.
>
> Once payment of the actuarial value of the Pension has been made to an INSURER as contemplated above, the FUND shall have no further liability to or in respect of such BENEFICIARY.
>
> The reason for the amendment is to enable BENEFICIARIES the option to purchase a pension from an INSURER instead of receiving a Pension from the Fund.

Although the Complainant had not had sight of the actual rule he was advised of its terms and elected to take up the option. He obtained a quotation from the AECI Pension Fund indicating the value of his actuarial reserve and began obtaining quotations from brokers and fund administrators to compare the various benefits offered with those of the AECI Pension Fund. On 16 January 1998 he obtained a further written quotation, updated to

include his thirteenth cheque paid in November 1997 and his January 1998 salary increase. This quotation, based on certain actuarially assumed data, indicated that his transfer value was R1,070,360.00. The Complainant arranged to transfer approximately R965,000.00 (R1,070,360 less a tax free portion of R105,000.00) to Old Mutual Galaxy Fund at the end of March 1998. On 10 March 1998 however, the Complainant was advised that his transfer value had been revised to R1,008,557.95 - R61,802.05 less than quoted on 16 January 1998.

On querying this with a representative of the fund's actuary, the Complainant was informed that the decline was attributable to the final actuarial reserve value having been calculated using actual marital data as opposed to the actuarial presumption used for the earlier quotation, which was the presumption that all male contributing members were married and that their spouses were five years younger. The Complainant's wife was in fact only one year younger than he was.

The Complainant addressed a letter to the Deputy Manager of the Respondent, complaining about the reduced transfer value, and what the Complainant understood to be the new basis (utilizing actual marital data) which was being used since January 1998. He outlined his belief that the calculation of departee's reserves on a basis different to those remaining in the fund was discriminatory, and his view that actual spouses' ages should be used in every case when calculating actuarial reserve value, or alternatively that the assumed spouses ages should be used in all cases, for the sake of consistency. The Complainant also referred to prejudice suffered by himself, as "business/retirement decisions [which] would have been made differently if timeous advice had been received". The Complainant charged that the change in his transfer value was unacceptable and that the fund was obliged to honour its quotation of 16 January 1998, by recalculating his transfer value on a basis which would result in a value equal or close to that quoted in January 1998.

In response to the Complainant's letter the deputy manager of the Respondent addressed the following letter, dated 16 March 1998:

"Before 1 January 1998 retiring member's actuarial reserve values were relevant solely for purposes of enabling the Fund Actuary to value the liabilities of the Fund during the annual valuation exercise. For this purpose the assumptions employed by the actuary were that all members were married with spouses 5 years younger than themselves, a very conservative approach to ensure that the Fund's liability for the payment of future pensions was not perhaps understated.

As far as other departing members are concerned (i.e. members leaving the Fund under circumstances where they have an option to transfer their actuarial reserve values to another retirement vehicle) it has always been the practice of the Fund to obtain actuarial reserve values from the Fund Actuary in respect of members who are over 55. The actual marital data applicable to the individual would then be used instead of the general assumptions referred to above. This exercise invariably results in the final actuarial reserve values differing to a varying degree, depending on age, from the preliminary values given to members by Pension Fund staff. It is also standard practice for staff members to make it quite clear to members that such values are estimates, subject to the Actuary's final assessment.

With the introduction of Rule 23(d), with effect from 1 January 1998, this exercise was for the first time being done in respect of retiring members (i.e. members at or approaching the common retirement age of 62) and who wanted to make use of the option as per Rule 23(d). A fact, which was previously unknown to us, also become apparent, namely that the difference between the preliminary actuarial reserve values and the final values, as calculated by the Actuary, increased exponentially the closer one gets to 62.

Corrective steps were immediately taken to address the problem and we are now in a position to provide a much more accurate indication of actuarial reserve values, although it remains the prerogative of the fund Actuary to make the final assessment.

There is clearly nothing sinister about the aforesaid actuarial practice and I cannot share your sentiments that it is essentially discriminatory.

Paying out anything more than actuarial reserve value, under any circumstances, would constitute a breach of Financial Services Board regulations and the Fund rules and can therefore not be

considered. It should also be appreciated that you did not suffer any damages in the process, as the pension payable to you by the Fund remains unchanged."

In response to this letter the Complainant lodged his complaint with my office on 12 May 1998.

At the hearing the complainant elaborated on his reasons for feeling discriminated against. He was of the view that the surplus in the fund should be shared in by departing members and those staying in the fund. By being paid a lower amount based on his actual marital data than the actuarial reserve values of members staying in the fund (based on the assumed marital data) he felt hewas not sharing equally in the accumulated funds.

With regard to the quotation issue the complainant after questioning conceded that he knew the quotation he was given was provisional, and accepted that the final value could well differ from that in the quotation, since, for example, final salary details might affect the final figure, but he persisted in his view that the difference was so great that it amounted to an instance of maladministration, in that the fund should have realised that there was an unacceptable discrepancy between actual and assumed data and done something about this before it issued quotations.

The respondent's response to the complaint

The respondent's written response to the complainant's formal complaint sets out the position both before and after I January 1998 with relation to retirees. The Fund's deputy manager, Mr Louis van der Walt, begins by outlining the meaning of actuarial reserve value as applied since the inception of the defined benefit Fund in 1947, indicating that actuarial reserve values were relevant mainly for determining the overall liability of the Fund for the provision of the defined benefits due to retired members. The Fund actuaries always relied on certain underlying assumptions, which remained unaltered to ensure comparability of actuarial valuation exercises over different periods. Two fundamental underlying

assumptions were that all contributing members were married and that their spouses were five years younger. Actual marital data were never pursued "since such data is subject to unforeseen changes such as divorce, marriage, etc."

Mr van der Walt further outlined the additional applications of actuarial reserve values prior to 1 January 1998 as being for providing annual benefit statements to members purely for information purposes, and for calculating transfer values for members who resigned, were retrenched or dismissed. In this latter case the assumed marital data were used for members up to the age of 55. Members older than 55 who took early retirement were precluded by the Receiver of Revenue practice from transferring out of the fund, and had instead no option but to receive the pension provided by the Fund; for purposes of calculating the Fund's liability for such pensions, actual marital data of these members was utilised.

As a result of the amended Revenue practice permitting transfer out by retirees, reflected in South African Revenue Service General Notice 18, the Board of Trustees amended the pension fund rules by the addition of Rule 23(d) which, as we have seen, allowed a member as from 1 January 1998 to transfer his or her actuarial reserve on retirement to some other post-retirement funding vehicle approved by the Trustees.

The question then arises as to how the actuarial reserve value available for transfer is calculated, in the case of an individual who decides to avail himself or herself of this new option. The policy in use by the Respondent is that exact personal details at the date of retirement, including actual marital data, are used.

Mr Van der Walt then addressed at some length the issue of the quotations provided to the complainant, and why they differed so substantially from the final calculation of transfer value. He points out that quotations are always qualified as being estimates, as they are based on the assumed data and are subject to the use of actual data on the final salary,

marital status, dependants, etc. at the date of retirement. He also draws attention to the fact that the January quotation furnished to the complainant had the symbol "+-" before the transfer amount of R1 070 360.00 (although nowhere on the quotation is it specifically stated that the quotation is provisional).

Furthermore, according to Mr van der Walt, in the past members close to the normal retirement age of 62 almost never resigned or were dismissed, and never had the option to retire and transfer out of the fund, so the fund management was unaware of the fact that applying case specific marital data in the case of 60 or 61 year olds could have such a significant impact on the actuarial reserve value based on the actuarial assumptions. This only emerged in late January 1998 when certain members elected to retire in terms of the new rule 23(d), and corrective steps were immediately taken to prevent the "inconvenience" that affected the complainant and others from occurring in the future. According to Mr van der Walt, the fund actuaries were asked to develop a programme to apply case specific marital data when providing estimates to members over 55 qualifying for retirement or early retirement, and this has been in use since the beginning of March 1998.

A submission on this point written by Mr Henderson, Director of the fund's actuaries, Ginsburg Malan & Carsons, was handed in at the hearing in explanation of how this programme works. Basically the fund's liability calculations for members between 55 and 60 now include some account of actual marital data, which is obtained from the members. If the member is between 55 and 60 there is a phasing in of the difference between the actuarial reserve values and the value of the early retirement pension, so that when providing estimates the difference between the estimate and the final transfer value is not so great:

> "for example, for a member who retires at age 56, the amount transferred is calculated as 80% of the actuarial reserve value based on the collective assumptions and 20% of the value of the early retirement pension using the exact personal details. For a member who retires at 57, the value is 60%

> of the actuarial reserve value and 40% of the value of the pension. For members who retire after age 60 the amount transferred is equal to the value of the pension calculated taking into account the exact personal details of the member. This amount is the same as the liability the fund would hold if the member does not elect to purchase his pension from an insurer."

The Respondent's written case concluded with the assertion that the complainant had not been prejudiced, in that his retirement benefit from the fund was not affected at all. Had he elected to become a pensioner of the fund he would have received the same pension, regardless of how his actuarial reserve might be calculated. The Respondent further stated that the complainant had received the actuarial equivalent of such monthly pension, calculated in compliance with Rule 23(d), and that for the fund to pay more than this to the complainant would be prejudicial to the interest of other members, because "the actuarial reserves of the fund would be unduly eroded and such other members would not receive a similar "enhancement" when they eventually retire in terms of Rule 23(d)."

At the hearing the Respondent's Mr van der Walt responded to the complainant's allegation of discrimination by stating that the view that he had not shared equally in the surplus was not tenable, since the surplus was merely an actuarial concept, in his view only relevant practically on termination of the fund. The complainant had an option to remain in the fund and take advantage of any benefit improvements which might ensue in the years to come. Mr van der Walt reiterated his view that the payment made to the complainant was strictly in accordance with Rule 23(d), being the amount "which would have been applied to secure a pension". He conceded that the rule does not mention the practice of using actual marital data to calculate transfer value, but asserted that this practice was not a new one as the complainant had alleged; it had merely not been applied before for his age group, in the prior context of members not being permitted to tranfer out of the fund at retirement.

The issues for determination

The issue to be determined in this matter is whether the complainant suffered any

discrimination when his actual marital data were utilised to calculate his actuarial reserve value on transferring out of the pension fund, as compared with members remaining in the fund whose actuarial values were based on the assumed marital data. There is also a question mark over whether he suffered discrimination as against other male transferring members whose spouses may have been, for example, more than five years younger, and who would therefore have received a higher transfer value than the value calculated using assumed data of the spouse being five years younger. This is really an aspect of the broader question of whether it is fair for marital data to be used at all, which was touched on in *Clarence v The Independent Schools Pension Fund* (PFA/WE/53/98) - where the alleged discrimination was between married and unmarried persons, specifically in that case divorced persons. A further question requiring determination is whether the fund is obliged to honour its quotation to the complainant, in the light of the administrative 'oversight' which led to the estimate being substantially higher than the eventually calculated transfer value.

Before turning to address these issues I wish to refer to a previous determination, *Low v BP Southern Africa Pension Fund* (PFA/WE/9/98) in which I set out the basis upon which I am entitled to grant relief against unfair discrimination. I do not propose to cover this in detail here, and would merely state by way of summary that section 30E(1)(a) of the Pension Funds Act of 1956 empowers me to investigate any complaint and make any order which any court of law may make, including orders allowed under Section 172 of the Constitution in constitutional matters. A decision of a pension fund alleged to be unfairly discriminatory will generally be contrary to a management board's fiduciary duty to act with impartiality (as required by Section 7C(2)(c) of the Pension Funds Act), and therefore a complaint about this would fall under my jurisdiction, being a complaint relating to the admininstration of the fund or the application of its rules, alleging that the decision was in excess of the fund's powers or an improper exercise of its powers. Furthermore, discriminatory decisions by pension fund managers will be in violation of the non-discrimination clauses (the so-called equality clauses) of the Constitution, Section 9(4), which provides for horizontal application, and Section 9(3) which prohibits unfair discrimination on several grounds, inter alia on

grounds of marital status.

The enquiry concerning unfair discrimination has three legs: firstly, the differentiation must amount to discrimination; secondly (and this overlaps to some extent with the first) the discrimination must be unfair; and thirdly, there should be no justification for the unfair discrimination.

The complainant alleges that he was unfairly discriminated against by having his actuarial value on transfer out of the fund calculated using his actual marital data, whereas members remaining in the fund have their actuarial value calculated using assumed marital data, which in his case resulted in his actuarial value being lower than any member who remained in the fund. In the complainant's view any surplus in the fund should accrue to the benefit of those leaving the fund as much as those remaining in the fund, since all were involved in the accumulation of the funds over the years.

To my mind there is no discrimination here. Firstly the complainant appears to be experiencing some confusion as to the nature and role of the surplus, if any, in the fund. A surplus in a defined benefit fund is an actuarial notion which can vary on a daily basis. The only meaningful way in which the members may share in the surplus is in the form of improved benefits, which could only possibly be payable to members opting to stay in the fund and receive a monthly pension - and this would itself only be possible if there were a substantial surplus and the actuary were to advise that such improved benefits would be financially sound from the fund's point of view. Such an eventuality is provided for in Rule 45 (c) of the Fund's Rules:

> "...if the Actuary in his report on any valuation ... certifies that there is a substantial surplus the trustees may alter the provisions of these rules so that the benefits are improved or the contributions reduced as the trustees, with the consent of the company and on the advice of the actuary, decide; provided that the contributions payable by the employers shall not at any time be less than the contributions payable by the members; provided further that if there remains a substantial surplus when the contributions payable by the employers are the same as the contributions payable by the members, the trustees shall alter the provisions of these rules so that the benefits granted shall be increased as the company, the employers

and the members shall decide."

The complainant cannot have his cake and eat it. If he wishes to benefit from future benefit improvements deriving from any substantial surplus, he will have to stay in the fund; if he wishes to take advantage of the option to purchase his own post retirement funding vehicle, having weighed the benefits and advantages, then he cannot expect more than his actuarial reserve value out of the fund. It is, moreover, in general terms a well-established principle that a member of a defined benefit fund has no right to share in the actuarial surplus of an ongoing fund.

Furthermore, the fact that the actuary may differentiate between the complainant's actuarial value (by using actual marital data) and the actuarial value of members remaining in the fund (by using assumed marital data), does not amount to discrimination, since the actuarial reserve figure using assumed data is a mere construct on paper and has no meaning for any individual member who remains in the fund. Any such member will receive a defined pension based only on age and final salary at the date of retirement, and not on the actuarial reserve utilising marital status, assumed or actual. Marital status is not relevant for calculation of the pension, since the pensioner does not receive any part of the spousal pension; the spousal pension accrues to the spouse on the death of the pensioner.

This brings us to the question as to whether the use of marital data at all, i.e. data relating to whether or not someone is married, and if married, the age of the spouse, is discriminatory, either in terms of the constitution or in terms of the fiduciary duty on the fund to act with impartiality in respect of all members and beneficiaries.

The rationale for using marital data to calculate actuarial reserve value is to make provision for the fund's liability to pay a spousal pension, it being a common feature of defined benefit funds that a spouse's pension, usually somewhat less than the member's pension, is payable in the event of the member's death, whether before or after the member's retirement. The AECI Pension Fund, as has been shown, makes use of assumed marital data, to obviate having to update such changeable information on a regular basis. To ensure that provision is

conservatively estimated for the fund's liability, the assumption is a 'safe' one: that all males are married, and that their wives are four years younger.

Under the new dispensation allowed since 1 January 1998 by Rule 23(d), for the first time it has become necessary to calculate the actuarial value which will constitute the transfer value for a *retiring* member who opts to leave the Fund. The Fund in doing so applied the principle it had always used when calculating transfer values for members over the age of 55 who were transferring to another retirement funding vehicle on grounds of resignation, retrenchment or dismissal, that is, it recalculated their actuarial values using actual marital data. Members younger than 55 departed with their actuarial values calculated on the assumed marital data. (This in itself seems to be a discriminatory distinction, with no particular logical basis - see later.)

Is the complainant being discriminated against when the Respondent uses actual marital ages to calculate transfer values? To put the question differently, is it fair to allow a male member with a younger wife a higher transfer value than a member with an older wife? And to restate the question in gender-free terms, is it fair to differentiate between members with spouses of different ages? Is it in fact fair to discriminate between married and unmarried members?

In the *Clarence* case, I refer to the guidelines afforded by the Constitutional Court in *Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) to be followed in determining whether discrimination is unfair. A contextual approach is employed: apparently unfair discrimination may not be held to be unfair in certain contexts, if there is found to be justification for the discrimination. In the *Clarence* case, I found there was no justification for discrimination based on marital status when the unmarried member discriminated against was a divorced man; in particular I found the failure of the trustees to distinguish between divorced persons and other unmarried persons to be unreasonable and unfairly discriminatory, since a divorced member frequently has ongoing obligations to his or her former spouse and dependants.

However in this case apparently unfair discrimination in the amount of transfer values between unmarried and married members, and between members whose spouses were different ages, may quite satisfactorily be justified in the context of the desirable objective of providing spouses with a pension, and the different life expectancy of spouses at different ages, **provided it is a requirement of the respondent's rules that members transfer to funds where their transfer values are expected to finance the additional benefit of a spouse's pension.** For if this is not a requirement there is no logic in affording the married retiree transferring out of the fund a greater amount than the unmarried retiree, or affording the male retiree whose wife is younger than his fellow-retiree's wife a higher transfer value, or for that matter of affording the female retiree whose husband is younger than her a higher transfer value. If adequate provision for the spouse is an objective of the Fund (and this may be inferred by the provision of spouses pensions as outlined in the rules as well as the provision for the funding thereof), then it is appropriate to allow differentiation in payment of transfer values, based on marital status; but it is not appropriate if the Fund abdicates any concern for the spouse's pension once the member leaves the Fund.

The senior investigator asked Respondent's Mr van Der Walt directly at the hearing whether the fund imposes any such condition, or employs any such criterion in the process of approving the insurer to which the member is transferring, as it is obliged to do in terms of Rule 23(d). His response was that the fund, in his words, "does not approve it to that extent". Typically, according to him, the member purchases a living annuity, which has capital preservation, so that on the death of the annuity-holder, the balance of the capital will be paid out to a nominated beneficiary, which may or may not be the spouse, or failing a nomination, to the estate.

A purposive reading of the Rule would lead, in my view, to a stricter obligation on the trustees when they are involved in the process of approving the transfer. The relevant portion of the rule is:

> "instead of granting a pension payable from the fund, the actuarial value of the pension after commutation (if any)...which would have been applied to secure a pension for the beneficiary from the fund, may at the request of the beneficiary...be applied to secure a pension for the beneficiary from an insurer of the beneficiary's choice approved by the trustees on such terms and conditions as the trustees after consultation with the actuary, may determine".

It is clear that the trustee must approve the choice of insurer, and it is clear that the trustees may determine terms and conditions. I would argue that the intention of the phrase "an insurer ...approved by the trustees", read with Rule 22(a) of Respondent's Rules (the rule providing for a spouse's pension to be paid on the death of a pensioner) is that it is an objective of the Rules that members' spouses be provided for in some way.

Logic dictates that if a higher actuarial reserve transfer value is paid to a married departing member, then the application of that portion which may be identified as being earmarked to fund a spouse's pension to actually purchase such a pension for the spouse in the transferee funding vehicle is a term and condition that the trustees should insist upon. Stated differently, if the purpose of the policy of using marital data is to provide for funding for a spouse's pension, then that purpose must be given effect to consistently and rationally, including the point at which the member transfers out of the fund, taking with him/her an amount of money which includes an amount originally earmarked to fund a spouse's pension. For if it is not given effect to, a married transferring member may use the transfer capital for other purposes, for example to acquire a greater equitable share in a defined contribution fund, or to acquire an annuity where s/he nominates a lover rather than the spouse as beneficiary. Then there is discrimination: against unmarried members transferring out because they will get less money with which to purchase the retirement funding vehicle of their choice; and against married members whose spouses are older than spouses of their colleagues, and who will therefore also get less money with which to venture into the retirement funding market, **for no logical or justifiable reason**.

There is no evidence that the complainant was discriminated against in this way; that is, no

evidence was presented that any of his co-retirees had wives younger than his and therefore received a higher transfer value, and/or that they then failed to make provision for their wives when purchasing an alternative retirement funding vehicle. On the presumption then that a purposive restriction was imposed in the case of the complainant's cohort of retirees, I accordingly find that, insofar as the complainant received what he needed to fund a product which included spouse protection, the transfer value being based on, inter alia, the actual age of his wife, he was not discriminated against.

I do, however, have a concern that the potential for discrimination exists if the rule is not purposively interpreted and applied as outlined above. If differentiation in terms of marital status and age of spouse is allowed in pursuit of the desirable benefit of providing a spouse's pension, then it is also appropriate to expect a fund to apply an interpretation of its rules that follows through on this and insists on a married transferor out of the fund providing for a spouse's pension or some form of life insurance for the spouse out of the transfer value paid from the fund. In my view it is advisable that the rule is amended to ensure that this specific purpose appears more clearly.

I also have a concern that there is still some confusion around the use of assumed marital data, which might be removed by the recording of actual data for all members updated on an annual basis. While assumed marital data may still quite legitimately be used as a funding mechanism, having actual data on hand would assist in the provision of estimates that would be as close to the final figures as possible. Using the actual
marital data to calculate transfer values in all cases would also incidentally remove the anomaly of members under 55 being able to transfer an actuarial reserve based on their assumed marital data, while members over 55 had their transfer value based on actual marital data. The respondent's Mr van der Walt has indicated that he favours a move to the use of actual data in all cases, and I am disposed to leave this aspect to the fund and its actuaries to resolve.

The remaining issue is that of the enforceability of the quotation provided to the complainant.

While I sympathise with the complainant here, I can see no basis for awarding him the difference between the earlier and the final quotations. I accept the respondent's argument that such a difference was unforeseeable in theory, and had to be discovered in practice, in the context of a new untried situation. I accept that the respondent did what it could to preclude such a situation arising again, although I am of the opinion, as outlined above, that the use of actual marital data at all times will obviate this in the most effective way in the future. The estimate provided to the complainant did not entail contractual liability and the complainant has not suffered prejudice, other than inconvenience. However, I would recommend that this lack of liability and the provisional nature of the estimate should be clearly stated on the document (as it was not in this case) so that there can be no doubt in anyone's mind.

Relief

For the aforegoing reasons, the complainant's complaint is dismissed. With a view to pre-emption of any complainant having cause for complaint along similar lines, it is necessary to improve the specificity of the rule dealing with a member's transfer out of the fund on retirement. This will render the rule clearly consistent with section 9 of the Constitution.

Accordingly the order of this tribunal is as follows:

1. The complainant's complaint is dismissed.

2. The respondent is directed to amend its Rule 23(d) by the insertion of one of the following options in the second paragraph:

    2.1 "and where appropriate shall make adequate provision for the spouse in the event of the death of the member"

in order that the second paragraph shall read in its amended form as follows:

"Such pension shall be a compulsory non-commutable pension payable for and based on the lifetime of the BENEFICIARY or in the case of an ELIGIBLE CHILD for as long as such ELIGIBLE CHILD qualifies as an ELIGIBLE CHILD in terms of the Rules, and where appropriate shall make adequate provision for the spouse in the event of the death of the member. Such pension shall not be capable of being transferred, assigned, reduced, hypothecated or attained by creditors as contemplated by the provisions of Section 37A and 37B of the Act."; or alternatively

2.2 insert the following words: "or ELIGIBLE SPOUSE" so that it reads "such pension shall be...on the lifetime of the BENEFICIARY or in the case of an ELIGIBLE SPOUSE or ELIGIBLE CHILD for as long as such ELIGIBLE SPOUSE or ELIGIBLE CHILD qualifies as an ELIGIBLE SPOUSE or ELIGIBLE CHILD in terms of the rules..."

3. The respondent is directed to submit the amendment to the Registrar of Pension Funds for approval and registration in terms of section 12 (1) and (4) of the Pension Funds Act, 1956 and afford notice of same to this office within six weeks of the date of this determination, failing which I shall declare the rule invalid to the extent of its inconsistency with the Constitution.

DATED at CAPE TOWN this 30th day of MARCH 1999.

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JOHN MURPHY

PENSION FUND ADJUDICATOR