IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/WE/262/98/NJ

In the complaint between:

Aldridge Fisher Complainant

and

Basil Read Group Pension Fund First Respondent
Basil Read (Pty) Ltd Second Respondent
Alexander Forbes Third Respondent

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

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1. This is a complaint lodged with the Pension Funds Adjudicator in terms of section 30A(3) of the Pension Funds Act of 1956. The complaint concerns the interpretation of a rule providing for an early withdrawal benefit upon the retrenchment of a member.

2. No hearing was held in this matter. A thorough investigation was conducted by my investigator, Naleen Jeram, and in determining this matter I have relied exclusively on the documentary evidence and written submissions gathered during the course of Mr Jeram's investigation.

3. The complainant is Aldridge Mark Fisher, a former member of the first respondent, of Brackenfell, Western Cape.

4. The first respondent is Basil Read Group Pension Fund, a pension fund duly

registered under the Pension Funds Act of 1956 (hereinafter referred to as “the fund”).

5. The second respondent is Basil Read (Pty) Ltd, a company duly registered in terms of the Company laws of South Africa (hereinafter referred to as “the employer”). The fund and the employer were represented by Mr H J Power, the group legal manager of the employer.

6. The third respondent is Alexander Forbes Consultants and Actuaries, who are the administrators of the fund (hereinafter referred to as “the administrator”). The administrator was represented by Mr Rhys Dyer, senior director and Mr Jeremy Rogers.

7. The complaint relates to the interpretation and application of the rules of the fund and alleges that a decision of the fund was an improper exercise of its powers and that a dispute of law has arisen concerning the computation of the complainant=s withdrawal benefit.

8. On 1 February 1982, the complainant commenced employment with the employer as a civil engineer, and remained in employment until his retrenchment or 12 July 1998. Throughout his employment he was a member of the fund, a defined benefit fund.

9. During August 1997, all members of the fund including the complainant were given the option of transferring to the Basil Read Group Provident Fund effective at 1 December 1997. The fund agreed to transfer the actuarial reserve value to the provident fund in respect of each transferring member. During September 1997, the fund, using the services of its administrator, furnished the complainant with a benefit statement indicating his transfer value as at 1 September 1997. In this document his actuarial reserve value is stated at R147,417.00. However, the

complainant chose not to transfer.

10. The complainant's actuarial reserve value of R147,417.00 was calculated according to the following formula:

Normal retirement portion:

$$\text{Accrual Rate} \times \text{Past Service} \times \text{Averaging Factor} \times \text{Annuity Factor} \times \text{Final Average Salary} \times \frac{(;D_{nra} + {}^{S}M^{r}_{x})}{{}^{S}D_{x}}$$

Death and withdrawal portion:

$$\text{Accumulated Contributions} \times \frac{(\text{WithdrawalFactor} \times {}^{j}M^{d}_{x} + \text{Death Factor} \times {}^{j}M^{d}_{x})}{{}^{J}D_{x}}$$

11. In about June 1998, the complainant was called to a meeting with Mr Vos, a director of the employer, where he was informed that the employer had decided to terminate his employment with effect from 12 July 1998. The complainant alleges that Mr Vos promised him that his full actuarial reserve value in the fund would be paid to him as his withdrawal benefit. Both the employer and the administrator have denied that any such promises were made to the complainant. Mr Power argued that, in any event, the employer is not authorised to grant any benefit nor to amend the rules of the fund to allow for such a benefit. The complainant, he argued, was entitled only to the benefits specified in the rules of the fund.

This generally is the correct position, although, depending on the circumstances, an employer could incur liability for promises made in relation to pension benefits as an inducement to an employee to accept the terms of termination. For reasons which will become apparent, not much turns on the point in this matter.

12. At the time of the complainant=s retrenchment, the relevant rule applicable to him

read as follows:

> 38. RETRENCHMENT AND RE-ORGANISATION
>
> If a member who has not attained the pensionable age is retired from the service by his employer owing to a general scheme for the reduction or re-organisation of staff, or to retrenchment generally, he shall be entitled to payment, as soon as possible following exit from service, of a cash benefit equal to his interest in the fund, as determined by the actuary, according to a formula agreed from time to time between the actuary and the trustees; provided that
>
> 38.1.1 if he is qualified in terms of rule 31, he shall, at this option, be permitted instead to retire in terms of that Rule, or
>
> 38.2 he shall be permitted to become a deferred pensioner in terms of rule 40.

Rule 31 is the early retirement rule which is not applicable to the complainant.

14. The fund used a different formula to calculate the complainant=s retrenchment benefit to the one used to calculate his actuarial reserve value. The formula was:

Benefit = annuity factor @ normal retirement age x discount factor x proportionate benefit

where

Proportionate Benefit = accrual rate x past service x final average salary

The complainant's benefit was computed on the following information

Date of Birth:	61/08/18
Date of Pensionable Service	83/01/01
Final Average Salary:	R109,188.00 (average over 36 months to 31/07/1998)
Age @ withdrawal:	26.92

Past Service @ withdrawal:	15.583
Mode of Exit:	Retrenchment
Date of Exit:	98/07/31

Member's Interest in the Fund

Accrual Rate	2%
Past Service	15.583
Final Average Salary	109,188.00
Annuity Factor @ NRA	9.819
Discount Factor	0.436011 (assuming a real rate of return of 3% p.a.)
Proportionate Benefit	34,030.26 (accrual x past service x final average salary)

Preservation Benefit @

31/7/1998	*145,690.09*

(Annuity Factor @ NRA x Discount Factor x Proportionate)

The withdrawal benefit of R145,690.09 was about R2,000 less than the transfer value calculated almost a year earlier in September 1997, and R21,233 less than his actuarial reserve value at retrenchment. In terms of the formula used to calculate the actuarial reserve value of a member the complainant's actuarial reserve value was R166, 923 at the time of his retrenchment.

15. The complainant is dissatisfied with the computation of his benefit. As his actuarial reserve value at 1 September 1997 was R147,417.00, he cannot comprehend how his withdrawal benefit, 9 months later, can be less than his actuarial reserve value. He contends that he is entitled at the very least to an amount of R172,011.68, composed of R147,417.00 (actuarial reserve value as at 1 September 1997) plus R26,324.68 (representing his own and employer contributions from 1 September 1997 to 12 July 1998).

16. Mr Dyer argued that in terms of the rules of the fund, the complainant was not entitled to his actuarial reserve value, but only his "interest in the fund" (determined in accordance with the formula in paragraph 14 above). This is the same formula that has been applied to all previous retrenchees from the fund. Further, the calculation of any benefit in a defined benefit fund cannot simply be done by adding the member and employer contributions plus investment returns.

17. The determination of any pension benefit is governed by the rules of the particular pension fund subject to the Pension Funds Act. The mere fact that Mr Vos promised a benefit which is possibly not specified in the rules of the pension fund does not override the rules. By the same token, a defined benefit is normally not dependent on the extent of employer and employee contributions. The complainant was retrenched and accordingly his benefit must be determined in terms of rule 38.1.

18. The issue for determination is whether the complainant's benefit has been correctly determined and computed in terms of rule 38.1 and in particular whether this rule allows for the payment of the complainant's actuarial reserve value. In terms of the rule the complainant is entitled to a benefit "equal to his interest in the fund as determined by the actuary, according to a formula agreed from time to time between the actuary and trustees...".

19. My investigator specifically requested the fund and its administrator to provide my office with a copy of the resolution of the trustees of the fund adopting the formula as well as information about whether the formula has been reviewed from time to time. In his subsequent response Mr Rogers asserted:

> This rule has been present in the Rules of the Fund from inception (1985), there is no formal resolution or minute adopting the formula. The formula is consistent with the basis used in previous actuarial valuations of the fund. The rules of the fund allow the trustees to amend the formula with the agreement of the actuary. It is not standard practice in the industry to

> pass a resolution every time the trustees exercise a discretion.
>
> The valuation basis is reviewed at each valuation and the usual factors such as mortality withdrawal experience, benefit improvements, investment returns etc are taken into account. In a defined benefit fund such as this, the statutory valuation takes place every three years. After each valuation the trustees consider any recommendation the actuary may have regarding revising the formula. To date the actuary in his expert opinion, and the trustees have not deemed it necessary to revise the formula.

From this it is apparent that Mr Rogers and the fund fail to appreciate that rule 38 requires the trustees and the actuary to agree to a formula and to review it from time to time. His comments are an indication that this has not been done and the fund accordingly has failed to exercise its discretion. That is not to say that a resolution is necessary every time the trustees exercise a discretion. It is to say that the trustees may not exercise a discretion except in accordance with the rules which require a pre-determined formula, properly considered and adopted by the board, and preferably communicated to the members.

20. The term “interest in the fund” as used in rule 38.1 is not defined in the rules of the fund, and can have various meanings. It could refer to the actuarial reserve value calculated in accordance with the formula in paragraph 10 above in terms of which the complainant’s benefit would be R166,923.00, or it could refer to the formula used by the fund in terms of which the benefit is R145,690.09. It may also refer to the “share in the fund” in terms of which the member’s entitlement is not only his actuarial reserve value but also his proportionate share of the assets or the investment reserve. Moreover, “interest in the fund” in a defined contribution fund usually refers to the aggregate of a member’s contributions, the employer=s contributions and a portion of the investment return. However, since the fund in this matter is a defined benefit fund, this meaning may be safely discarded.

21. Nevertheless, the point remains that the term on its own is unacceptably vague and

requires greater certainty and precision by means of a formula lawfully and correctly adopted by the trustees. It is clear that the trustees have failed to adopt such a formula, with the practical consequence that it is left to the actuary or the fund administrator to determine a member's "interest in the fund" at the time of retrenchment. In the absence of an agreed, reasonable and lawfully adopted formula, the actuary or the fund administrator is left with a wide discretion to determine the amount without regard to pre-determined and objective decisional referents. In a constitutional state, rules or decisions which excessively delegate discretionary powers to functionaries and decision makers, by conferring uncontrolled and unrestricted discretion upon them, generally will be held to be unreasonable and in violation of the constitutional rights to property and equality - see in this regard the decision of the Supreme Court of India in *JFG Manufacturing Association v Union of India* [1970] AIR 1589 SC. Such rules or decisions should be set aside, unless as in the present matter they can be applied reasonably.

22. A member's withdrawal benefit is a significant part of his or her property, the quantum of which in this instance has to be determined by means of an agreed formula. One important purpose of a predetermined formula is to enable the member to determine whether he is receiving the correct amount with reference to an objective standard. The requirement of a resolution adopted in advance ensures that the member's patrimony is not subject to the arbitrary whim of a functionary who legitimately manages the fund for profit, but with possibly divergent interests to the members.

23. The formula applied by the fund was never formally ratified and accepted by the trustees of the fund, but rather it appears as if a *carte blanche* authority was given to the actuary. Mr Rogers contends that the formula has been in use since the fund=s inception in 1985. Yet he is unable to furnish a resolution in support of its adoption by the board. Moreover, rule 38.1 seems to suggest that the formula should be reviewed by the trustees together with the actuary "from time to time".

According to Mr Rogers, after each statutory valuation of the fund (every three years), the trustees consider any recommendations from the actuary in respect of revising the formula and to date the actuary in his expert opinion and the trustees have found it unnecessary to change the formula, or presumably to make any recommendation in that regard. It is not clear whether the formula has been subject to any discussion at all.

24. Be that as it may, the more important issue is whether the formula used by the fund actually yields the complainant's "interest in the fund" in terms of rule 38.1. As explained, "interest in the fund" is capable of more than one interpretation, some being more generous towards the complainant. In this regard, Mr Rogers submitted that the retirement benefit provided in rule 35 expressly specifies that a member will receive an annuity purchased with the actuarial value of his pension. On the other hand rule 38.1, relating to retrenchment, makes no mention of the actuarial value. If the member's "interest in the fund" was the same as his actuarial value, then, according to Mr Rogers, the rule in question would have been worded in a similar manner.

25. There may be some merit in this argument, but I am not sure that it advances the fund's cause. It does not follow from the fact that the rules interchangeably use the undefined expressions "interest in the fund" and "actuarial value" that the former is necessarily less than the latter. Indeed, the concept of an "interest in a fund" is applied usually in a defined contribution context and implies a share of the fund which could be considerably more than the actuarial value.

26. Mr Rogers further argued that in a defined benefit fund a retrenchment benefit is nothing more than a withdrawal benefit and funds traditionally pay a lesser value on retrenchment than on retirement. This unsubstantiated proposition may be true in general but not in all cases.

27. He also referred to my ruling of *BW Colledge v LTA Limited Pension Fund* (PFA/GA/192/98) where I held:

> The question of ungenerous withdrawal benefits is a vexed question which calls out for urgent reform by means of legislation. The ordinary rights adjudication process is neither capable nor suited to carry out reform of this nature.

I cannot see how this proposition impacts on the matter at hand as here we are not seeking to remedy the ungenerous level of a clearly determinable withdrawal benefit, but are seeking to determine the early withdrawal benefit where the rules are vague and the trustees have not adopted an agreed formula for its computation. We are not comparing the benefit provided by rule 38.1 with other benefits or determining whether the benefit is generous or not. Rather the inquiry is simply whether the complainant has received an early withdrawal benefit in the amount to which he is entitled. The complaint requires the adjudication of a rights dispute. It is not an interest dispute. Nor does the complainant require me to create new rights or grant relief setting wage levels.

28. As discussed, "interest in the fund" either can be interpreted to mean the actuarial reserve value of the member in terms of the formula set out in paragraph 10 above or the reduced value preferred by the actuary in his practice. It could also mean a share of the fund. Lawyers faced with such ambiguity are invariably drawn to the established principles and presumptions of statutory interpretation. Vagueness and obscurity of language or uncertainty of purpose justify the interpretation of a provision which favours individual justice and property rights above the collective interest. Ambiguities of this nature invite the application of the principle *semper in dubius benigniora praeferenda sunt* (in cases of doubt the most beneficial interpretation should be adopted). The Supreme Court of Appeal in *Principal Immigration Officer v Bhula* [1931] A.D @ 333, expressed the principle as follows:

> ... if two interpretations are possible, and the one leads to harshness and injustice while the

> other does not, the legislature must be held rather to have intended the meaning that would avoid harshness and injustice.

29. This principle was applied in the context of awarding pension benefits in *Hall v Military Pensions Appeal Tribunal* 1963 (4) SA 327 (T). The question to be decided by the court was whether the appellant, who was a coloured woman formerly married to a European volunteer, was entitled to a gratuity of R264.00 or R100.00 upon her remarriage in terms of the War Pensions Act 44 of 1942 as amended. The relevant sections of the Act read:

> The widow of a volunteer, who is killed or dies during military service performed outside the Union, or who dies as a result of a pensionable disability (whether or not such disability is due to the volunteer=s own serious misconduct) shall be awarded a pension at the rate and a gratuity in the amount specified...
>
> Any pension or supplementary pension granted to the widow of a volunteer shall cease on her remarriage, and she shall then be awarded a gratuity on the following scale
>
> 1. One hundred and thirty-two pounds in the case of a European;
> 2. Fifty pounds in the case of a non-European other than a Native; and
> 3. Twenty-five pounds in the case of a Native.

The issue was whether the words “European”, “non-European other than a Native” and “Native” qualified the word “widow” or “volunteer”. Galgut J (as he then was) came to the conclusion that the section was capable of two interpretations and applying the principle in the *Bhula* case, concluded that the appellant was entitled to the benefit of the more generous interpretation, that is a gratuity of R264.00.

30. The fund and the administrators in the present matter have failed to persuade me that the application of the unapproved formula resulting in an amount less than the actuarial reserve value is justifiable. More likely, the intended benefit was the actuarial reserve value or the accrued service liability in respect of the member,

being the amount held in reserve reflecting the present value of the benefits accumulated in respect of the member for completed service. Applying the principle *semper in dubius benigniora praeferenda sunt* the complainant is entitled to the more generous construction.

31. As I stated in *Kransdorff v Sentrachem Pension Fund* (PFA/GA/3/98/JM)

> ... The lesson to be learnt by actuaries and fund administrators is that the failure to define entitlements with greater certainty and in a predictable manner will lead to disputes and litigation and, more often than not, the costs are likely to be borne by the fund. Again, in the interests of predictability, certainty and fairness, the methods, assumptions and terminology relied upon to define benefits should be expressed in a precise and objectively determinable fashion. Not to do so, is to allow for subjective considerations to enter the equation leading potentially and ultimately to inconsistency.

32. Finally, I turn to a so-called point *in limine* raised by the fund and the administrator. Mr Rogers argued that the original complaint by the complainant related to whether the complainant was entitled to his actuarial reserve value upon retrenchment and not the validity of the formula used by the fund to calculate his benefit. In essence he objected to my investigator requesting information relating the formula, the variables within the formula and the ratification of the formula because these issues, he claimed, were not raised by the complainant in his original letter to the fund in terms of section 30A of the Pension Funds Act of 1956.

33. As I have stated in other determinations, my office is permitted to conduct investigations in an inquisitorial manner in terms of the Act and is not restricted by technical and formalistic arguments based on the scope of pleadings as in traditional adversarial litigation. The information sought by my investigator was relevant and necessary to ascertain whether the correct withdrawal benefit was paid, and that is the essence of the complaint. The validity of the formula is not in question. The issue is simply whether the formula was the appropriate means of calculating the benefit. The information sought by my investigator did not create a

new cause of action for the complainant. The formula, the variables and constants within the formula, and the ratification of the formula are directly relevant to the determination of this complaint. The fact that the complainant did not precisely raise the formula in his original letter to the fund in terms of section 30A of the Act is immaterial. The basis of his complaint is clear: he seeks payment of his actuarial reserve value. Further, no prejudice has been suffered by the fund or its administrator as they have been afforded an opportunity to respond to the queries raised by my investigator.

34. The complainant therefore is entitled to the difference between his actuarial reserve value and the amount paid being R166,923.00 less R145,690.09 together with interest at the rate earned by the fund.

35. The order of this tribunal is:

> The fund is directed to pay R21,232.91 plus interest thereon at rate earned by the fund for the period 31 July 1998 until date of payment within 6 weeks of this determination.

Dated at CAPE TOWN this 8th day of NOVEMBER 1999.

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John Murphy

Pension Funds Adjudicator