

## IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.:PFA/WE/266/98/LS

In the complaint between:

GRAHAM HIGGO

Complainant

and

RECKITT & COLEMAN 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

The complaint relates to the calculation of the transfer value of the complainant's pension and the distribution of the surplus as part of a restructuring including the conversion of the respondent from a defined benefit fund to a defined contribution fund. The complainant seeks an order compelling the respondent to pay him an additional R1 993 241.00 which he asserts he would have received had the transfer value of his pension been calculated correctly and/or the surplus distributed as it should have been.

No hearings were conducted and therefore in determining this matter, I have relied solely on the documentary evidence submitted by the parties and on the report by my investigator, Lisa Shrosbree.

The complainant and respondent are represented by Murphy Wallace attorneys and Bell Dewar & Hall Inc. attorneys respectively.

#### Factual background

The complainant was employed by the Reckitt & Colman (Pty) Ltd ("the company") as a senior executive until his retirement in 1991. His monthly pension which was calculated in terms of the fund's rules prior to its conversion commenced on 17 March 1991. As at 31

August 1998, the complainant was receiving a defined benefit pension of R30,544.62 per month.

As part of the restructuring the complainant became entitled to transfer an enhanced actuarial reserve value to a registered insurer to purchase a pension. The complainant disputes the amount determined as his transfer value.

On 20 March 1998, the complainant and a small group of other pensioners met with Mr Waddington, the chairman of the board of trustees of the fund, to discuss the proposed restructuring of the fund. During that meeting, the pensioners requested that they be given estimates of the transfer values of their pensions.

In a letter dated 28 April 1998, Alexander Forbes, the administrators of the fund, stated that the capital value of the complainant's pension as at 1 September 1998 was R5 400 076.00 excluding enhancements. Further that with the proposed 25% enhancement on restructuring, the value would increase to R6 750 095.00.

Early in June 1998, the fund's trustees distributed a circular setting out the logistics of the proposed restructuring of the fund. According to the fund, the objective was to bring the fund in line with developments in the retirement industry, to increase the security of members' and pensioners' benefits and to promote their rights to greater individual choice.

In terms of the proposed restructuring, pensioners would be given the choice of remaining in the fund or transferring their pensions out of the fund to another investment vehicle whereas active members and deferred pensioners would be given the option of remaining in the fund or transferring their benefits to a defined contribution arrangement. The following extract is taken from the circular which was distributed to members.

Proposal of restructure

- C The Company will attempt to recover a portion of the Reckitt & Colman Pension Fund's surplus, provided that it is legislatively permissible to do so. (The surplus is the amount in the Reckitt & Colman Pension Fund over and above what is required to pay the benefits promised in terms of the Rules.) The surplus will be shared between the Company and the Reckitt & Colman Pension Fund's members. The portion of the surplus allocated to the members will be distributed among pensioners, deferred pensioners and contributory members by way of benefit enhancements. Annexure E to this document provides a breakdown of the basis of distribution of the surplus between the Company, active members, deferred pensioners and pensioners.
- C You will receive an enhancement of 25% on your current level of pension if you decide to transfer your pension benefits to an insurance company. If you decide not to transfer your pension benefits, you will receive an enhancement of 12.5%.
- C Pensioners who retired prior to 1 January 1990 will receive a further enhancement of 10% on their pensions to compensate them for the relatively lower levels of retirement benefit prior to that date;
- C Active members and deferred pensioners electing to transfer to the defined contribution arrangement will receive an enhancement of 25% to the value of their benefits, with those remaining on the current arrangement receiving an enhancement of 12.5% to their current benefits.
- C **The enhancements are, however, conditional on the agreement by 67% of the total membership of the Reckitt & Colman Pension Fund to the Reckitt & Colman Pension Fund's restructure.**

The proposal regarding the surplus of the fund was attached to the main body of the circular in the form of an annexure. It proposed that the surplus would be allocated to the company, pensioners and active members in the following proportions: the company would be allocated approximately R71 million, pensioners approximately R48 million and active members about R52 million.

In addition to the circular, pensioners were also invited to attend presentations given by the trustees in cities and towns throughout the country during the first two weeks of June 1998. The purpose of the presentations was to inform pensioners regarding the proposals in detail.

Pensioners were required to inform the trustees of their decision either in favour of the proposed restructuring or against it by completing and returning a ballot (“the ballot”) that was enclosed with the circular by no later than 30 June 1998. The ballot also contained an indemnity in favour of the fund’s trustees against ‘any claim whatsoever arising’.

Based on the transfer value of R6 750 095.00 which the fund had quoted him in the letter of 28 April 1998, the complainant signed the ballot on 1 June 1998 indicating that he was in favour of the restructuring process and that he preferred to transfer his pension to a living annuity.

However on 30 June 1998, the complainant received a letter from the fund advising him that the transfer value of his pension which had been quoted previously was inflated. That letter reads in part:

It was stressed at the meeting that the allocation of surplus and the basis of calculation had not been finalised at that stage and that the values quoted were preliminary figures.

Unfortunately the actuarial valuations of the Reckitt & Colman Pension Fund place a value on pensions using a “real” rate of interest of 4.5% a year and not 3.5% as was used in the provisional calculation. Therefor the figure that you were advised of was inflated.

There were however, many other calls on the surplus; in particular the Trustees deemed it necessary to grant an additional increase of 20% to pensioners who retired before 1.1.82 and a 10% increase to pensioners who retired between 1.1.82 and 1.1.90. Furthermore, if the capital value to pensioners had been calculated using a rate of 3.5%, a corresponding adjustment would be required to calculate the values in respect of members in the service.

The result is that the amount available for transfer to a living annuity in respect of your pension , is less than the figure quoted to you previously. Our actuaries have recalculated the transfer amount and Alexander Forbes will be advising you of those shortly.

In the meantime Mr Waddington, on behalf of the trustees, sent a letter to all members of the fund to report the results of the ballot to restructure the fund. The scheme required a

67% “yes” vote whereas the overall vote in favour of the scheme was 81%. On that basis, members were advised that the process of conversion of the fund to a defined contribution fund and the outsourcing of pensioners and deferred pensioners would proceed according to plan with effect 1 September 1998.

During July 1998 the administrators of the fund, Alexander Forbes (Pty) Ltd, met with the complainant to discuss the possibility of utilising Alexander Forbes management services to manage his pension. Alexander Forbes confirmed at that meeting that the transfer value of the complainant’s pension was R6 094 759.00 and not the greater value of R6 750 095.00 quoted previously.

However, according to the complainant, he was still concerned that the figure of R6 094 759.00 was arbitrarily arrived at and on that account briefed independent actuaries, Human & Morris, to redo the calculations. Human & Morris calculated a transfer value of R8 088 000.00 which was R1 993 241.00 more than that the figure quoted by Alexander Forbes.

On the 23<sup>rd</sup> July 1998, Alexander Forbes sent the complainant a letter confirming that the reserve value of his pension (including all enhancements payable in terms of the proposed restructuring) was R6 094 759.00. Included in that figure was a provision for the complainant’s ex-wife who qualified as an “eligible spouse” in terms of the fund’s rules. The letter also advised that pensioners had the option of purchasing a living annuity which would provide alternative benefits on death to the member’s spouse and/or eligible children and that if members chose this option, an indemnity in favour of the trustees would have to be signed. An application form containing a release of obligation (“the release”) was enclosed with the letter for this purpose.

On 30 July 1998 the complainant addressed a letter to Alexander Forbes stating that the personal details in the letter of 23 July 1998 were incorrect as his ex-wife’s year of birth was in fact 1945 and not 1930 as reflected in the statement. He also advised Alexander

Forbes that the findings of Human & Morris were substantially different to that of the fund's actuaries.

Alexander Forbes responded to the complainant that even though the date of birth had been incorrectly reflected in the previous statement, the calculation had been based on the correct particulars and therefore the value of the complainant's pension remained the same. An amended statement containing the correct date of birth as well as another application form containing the release was sent to the complainant on 6 August 1998.

The fund's actuary, Arthur Els, responded to the second aspect of the complainant's letter regarding the calculations of Human & Morris in a letter dated 14 August 1998 as follows:

I note that Human & Morris have valued your pension using a net rate of interest of 2.5% a year, on the assumption that pension increases of 12.5% per annum are directly allowed for when valuing the Fund. However, for actuarial valuations of the Reckitt & Colman Pension Fund I have allowed for interest at 15% a year and post-retirement increased of 10.5% a year, implying a "real" rate of 4.5% a year. That is the basis underlying the liability figures for pensioners, as is shown on page 20 of my report on the actuarial valuation of the Fund at 31 December 1996. It is also the basis used for calculating the values to be transferred in respect of pensioners of the Fund. The Human and Morris assumption is thus incorrect.

For the valuation I also set up two reserves, namely an investment reserve and a further reserve based on pensioner liabilities. The purpose of those reserves is to protect the Fund against market volatility.

On the conversion of the fund, the two reserves and the surplus were apportioned and make up the 25% enhancement that has been offered to members and pensioners.

The complainant states that he found the above explanation unsatisfactory but that at this stage he was not in a position to forego his pension while disputing the figures. The effective date of transfer of funds was 1 September 1998 as contemplated in the circular and it was by now the end of August 1998.

On 28 August 1998 the fund contacted the complainant regarding his option to transfer to

a living annuity arrangement. According to the complainant, the fund advised him that his funds would be frozen if he did not sign the application containing the release. The complainant accordingly signed the application on 28 August 1998 specifying Momentum as his registered insurer and sent it to the fund the same day.

The fund offered the complainant the choice to transfer his value to an annuity in terms of rule 27(2). The rule reads:

(2) ..... a Pensioner may elect, in writing, in terms of an option afforded to him by the TRUSTEES that an amount determined by the ACTUARY shall be transferred to a registered INSURER to purchase a pension for the pensioner which shall be equal in value to the benefits payable by the FUND to and in respect of him. Thereafter there shall be no further claim upon the FUND by or in respect of him.

Relying upon the complainant's application, the trustees purchased a living annuity for the complainant from Momentum on 1 September 1998.

On 12 October 1998, the complainant's attorneys addressed a letter to Mr Waddington in his capacity as managing director of the company requesting payment of the sum of R1 993 241.00 plus interest within 14 days. The amount represented the difference between the complainant's actuary's calculation and the amount that was transferred to purchase the annuity from Momentum.

The company responded in a letter dated 21 October 1999 that the fund would not accommodate the complainant's request for a further payment.

On 15 March 1999, the complainant received a letter from the fund's actuaries informing him that the computer programme had not fully valued the lump sum death benefit and accordingly a further amount of R1 382.00 had been deposited into his living annuity.

On 4 May 1999, the complainant received a certificate of existence from the fund which

implied that the complainant remains a member of the fund pending finalization of this dispute.

### **Respondent's points in limine**

In its response to the complaint, the fund raises two points in limine.

The first is that the ballot sent to members requiring them to vote in respect of the proposed restructuring of the fund contained an indemnity in favour of the fund's trustees against any claims whatsoever arising. On that basis, the fund argues that the complainant has waived any claim that he may have had against the fund.

The relevant part of the ballot reads as follows:

A. Fund Restructure

I consent to the proposed restructuring of the Fund, including the proposed repatriation of a share of the surplus to the company

I do not consent to the proposed restructuring of the Fund, including the proposed repatriation of a share of the surplus to the company

I understand that any enhancement to my pension is dependant on at least 67% of the total membership of the Fund (i.e. pensioners, deferred pensioners and contributory members) consenting to the proposed restructuring of the Reckitt & Colman Pension Fund.

### Notes

1. I understand that the above election is final and cannot be changed.

2. I understand that this form must be completed and returned by 30 June 1998 to prevent my pension from being suspended.
3. I confirm that I have amended my particulars where necessary at the top of this form.
4. I confirm that I have read the documentation sent to me with this option form, that I have sought advice on my choice where appropriate, and that I understand the implications of my choice.
5. *I indemnify the Trustees and Principal Officer of the Fund, and Reckitt & Colman against any claim whatsoever arising from my choice.* [Emphasis supplied]

The first point in limine invokes the principle of *caveat subscriptor* which says that when a person signs a document, he is taken to be bound by the ordinary meaning and effect of the words which appear over his signature (*Burger v Central South African Railways 1903 TS 571 578*). The rationale is that a reasonable person is entitled to assume that a person who signs a contract intends to be bound by it.

The complainant however argues that the indemnity contained in the ballot did not cover claims relating to the fund's calculation of the transfer value of his pension. He states that the indemnity was not concerned with the amount to be transferred in respect of the complainant or anyone else and did not set out the amount which would be transferred.

I am prepared to accept the complainant's submission regarding the effect of the indemnity contained in the ballot. The complainant argues that, as he understood it, the clause simply drew the attention of members to the fact if they elected to leave the fund and this proved to their detriment, they would not be entitled to claim their loss from the fund or allege that the trustees of the fund erred in allowing them to leave. In other words the indemnity concerned the consequences of restructuring once a member's benefit had already been transferred out of the fund but did not protect the fund or its trustees against claims concerning the transfer value of pension benefits before transfer out of the fund had

taken place.

Section A of the ballot is headed "Fund Restructure" and requires a member to tick one of two boxes, one to indicate consent to the restructuring of the fund and the other to indicate a vote against it. Section B of the ballot deals with the manner of payment of pension benefits should the restructuring of the fund be successful. Thus both section A and B relate solely to the issue of the proposed restructuring of the fund and the indemnity in question should be read in this context.

In light of the above I am prepared to accept that the indemnity contained in the ballot was not intended by the complainant to cover claims relating to the value of his pension. It is more than doubtful that he consciously abandoned his rights to question his transfer value at this stage of the negotiations. It should also be remembered that when he signed the ballot, the complainant believed he would receive the higher transfer value.

The first point in limine is accordingly dismissed.

The fund's second point in limine is that by signing the application to purchase a living annuity on 28 August 1998 which application contained a release of obligation, the complainant waived any claims against the fund and/or indemnified the fund for loss suffered as a result of the purchase of the annuity with his pension as calculated by the trustees.

The application containing the release reads:

**APPLICATION FOR PURCHASE OF LIVING ANNUITY / RELEASE OF OBLIGATION**

I, Graham Higgo (PRINT NAME), the undersigned member of the Reckitt & Colman Pension Fund (the Fund), hereby request the Trustees/ principal officer, to utilise the portion of my retirement benefit (together with the enhancements communicated to me as part of the proposed restructure) as indicated below, to purchase a "living annuity" from the registered insurer named below.

I acknowledge and fully understand that I have, by this request, of my own free will, opted to take responsibility for my own and my ELIGIBLE SPOUSE's (defined in terms of the Rules of the Reckitt & Colman Pension Fund as "the divorced wife or husband of a deceased PENSIONER who was married to him when he went on PENSION") pension and that the consequences thereof, whether reflected herein or not, have been fully explained to me and are fully understood by me.

I confirm that I have received comparative annuity quotes from various registered insurers and am satisfied that the provision of my retirement pension benefit by the registered insurer mentioned below is in my own best interest.

I further confirm and understand that, on purchase of the annuity in accordance with this instruction, my membership of the Reckitt & Colman Pension Fund will cease with immediate effect, and that neither my ELIGIBLE SPOUSE Sonja Higgo..... nor I will have *any further claims of whatsoever nature against the Reckitt & Colman Pension Fund, whether now or in the future.*

Conditional on the purchase of my said benefit in accordance with my instruction below, my ELIGIBLE SPOUSE and I *hereby relinquish all and any rights we may have against the Reckitt & Colman Pension Fund, whether now or in the future. We further, hereby indemnify the Trustees and the Principal Officer of the Reckitt & Colman Pension Fund, Alexander Forbes and Reckitt & Colman, against any claim whatsoever arising and by whomsoever arising, in respect of any loss or reduction of benefits suffered by us as a result of this application, irrespective of the cause thereof.*

I hereby instruct that the value of my retirement benefits in terms of the rules of the Reckitt & Colman Pension Fund plus the enhancements communicated to me as part of the proposed restructure, be utilised to purchase an annuity from Momentum. [Emphasis supplied]

The complainant argues that he signed the application containing the release understanding that he was indemnifying the fund against the result of his election to have his funds transferred to a living annuity. However that he did not waive his right to revisit the question of the correct pension value and that he was entitled to accept payment of an amount the fund admitted was due on account.

It is significant to note that the application signed by the complainant is headed

**APPLICATION FOR PURCHASE OF LIVING ANNUITY / RELEASE OF OBLIGATION.** A

release is an agreement which extinguishes rights and duties. The release may be a partial one, that is, relating to only one aspect of the set of rights and duties created by the contract, or a total one which extinguishes the transaction as a whole. The complainant in effect argues that the release he signed was partial in that it related only to claims arising out of the purchase of an annuity but not to claims relating to the transfer value of his pension.

The ambit of the release must be determined with reference to the plain meaning of the language of the release and the context in which it appears.

The language of the release is clear. The signatory relinquished 'any further claims of whatsoever nature' against the fund. In addition he relinquished 'all and any rights' he had against the fund once the annuity was purchased and indemnified the trustees against 'any claim whatsoever arising'. These words are clear and unambiguous in the context and they are words of the widest connotation which were obviously consciously used.

The language of the release clearly was intended to cover all claims without exception and cannot be construed as a partial release. Therefore the complainant's claim relating to the transfer value of his pension falls within the ambit of the release. However, that is not the end of the enquiry. In order for a release to be effective, it must be established that the party who divested himself of the right had full knowledge of that right.

By signing the application for an annuity the complainant effectively instructed the fund to utilize the transfer value of his pension as determined by the actuary to purchase an annuity from Momentum. The complainant knew that value was the lesser value which the fund had quoted him consistently in the correspondence and negotiations between the parties and that the fund was not prepared to accede to his request for a greater transfer benefit or to distribute the surplus on a different basis.

The letter of 30 June 1998 informed the complainant of the transfer value of his pension. This value was then confirmed at the meeting with Alexander Forbes in July 1998 and in the letter of 23 July 1998. Again when the complainant queried the value in the letter of 30 July 1998, he received a reply from both Alexander Forbes and the fund's actuaries confirming that the value quoted to him was the correct value. Thus, he was left in no doubt about his transfer value when he exercised his option to transfer on 28 August 1998. He signed the release with full knowledge of the rights he was relinquishing as, in light of the above, he could have been under no misapprehension regarding the fund's position in this regard.

The transfer value of the complainant's pension was determined in accordance with rule 27(2) by the actuary and despite his protest concerning that value, the complainant went ahead and made an election to purchase a living annuity by signing the application.

The complainant had the alternative to remain as a member of the fund and to continue receiving his defined benefit. He could also have complained about the value determined by the actuary and sought relief from this tribunal requesting a determination of his transfer value and an order directing a transfer at that value. However, he cannot be allowed to accept the transfer value, sign an application instructing the fund to purchase a pension while simultaneously relinquishing all further claims against the fund and then go ahead and institute proceedings to increase the value once the pension has been purchased. He made his election in full knowledge, conscious of the consequences.

There has been some suggestion that undue influence was brought to bear upon the complainant by the fund compelling him to sign the release. In particular the complainant refers to a call from an employee of the fund telling him that if he did not sign the application and release by 28 August 1998, his funds would be frozen. This presumably meant he would continue to receive the defined benefit to which he was entitled in terms of the rules and lose the opportunity to transfer out.

The complainant was a senior executive in the employ of the company for many years. It can hardly be said that a relatively junior employee of a pension fund obtained undue influence over the complainant and that this influence weakened his powers of resistance and made his will pliable. Nor is there any evidence that influence was brought to bear in an unconscionable manner to the extent that he did not enjoy normal freedom of will. As stated, he could have reviewed the actuary's determination and sought an order compelling the application of rule 27(2) in his favour.

Therefore I am satisfied that the complainant signed the release with full knowledge of his rights and thus that the release was effective in relinquishing any claim or claims he may have had against the fund regarding the transfer value of his pension or otherwise.

The complainant does not seek an order setting aside the scheme for the transfer of business effected in terms of section 14 of the Pension Funds Act. His primary complaint is that his transfer value should be increased. Although the complaint contains general and largely unsubstantiated claims that the trustees have not properly applied their minds to the restructuring, it is difficult to ascertain from the complaint formulated by the complainant's attorney which decisions of the trustees are in issue and what relief is sought in that regard. Accordingly, in determining this complaint I have limited the enquiry to a determination of whether the complainant is entitled to a higher transfer value. This is justified by the fact that the relief sought by the complainant is formulated as a request for payment of what he describes as the "correct amount" as a transfer value.

As an afterthought, the complainant's attorney requests that the trustees be ordered to properly consider the reasonable benefit expectations of the pensioners generally and the complainant in particular and to ensure that those expectations are met. In his reply to the respondent's response, the complainant raises an additional complaint seeking access to information, presumably in support of this afterthought.

The trustees claim to have met the pensioners' reasonable expectations and there is no clear evidence that they have not done so. In any event, the release signed by the

complainant protects the trustees from such a challenge insofar as it effects the complainant's transfer value and his transfer out of the fund. Had he wanted to set aside the trustees' decision to effect a section 14 scheme or to challenge the reasonableness of such a scheme, he should have done so before signing a release and transferring out of the fund. As stated, there is no evidence to support any claim that his consent to the release was improperly or mistakenly obtained.

The complaint is accordingly dismissed.

The fund has requested an award of costs in this instance. However, in general, it is not the practice of this tribunal to make an award for costs unless the complaint is shown to have been frivolous, vexatious or unreasonable. Nevertheless, the fund is invited to make additional submissions to this tribunal on the question of costs within 14 days of this determination.

DATED at **CAPE TOWN** this **29<sup>th</sup>** day of **JUNE** 1999.

.....  
**JOHN MURPHY**  
PENSION FUNDS ADJUDICATOR