IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.: PFA/GA/4/98

In the complaint between:

Kenneth Vandeyar

Complainant

and

UTICO Staff Pension Fund

Respondent

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

Introduction

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

The complainant is Kenneth Vandeyar, an adult retired male, of Llandudno, Cape Town, who is a former member of the respondent. The respondent is UTICO Staff Pension Fund, a pension fund duly registered in terms of the Pension Funds Act of 1956.

After correspondence between the complainant and the respondent, the complainant lodged a written complaint with the office of the Pension Funds Adjudicator in February 1998. It is common cause between the parties that the complainant has complied with the provisions of section 30A(1) requiring him to lodge a written complainant with the pension fund or the employer participating in the fund before lodging it with the Pension

Funds Adjudicator. It is also common cause that the respondent has properly considered the complaint and has replied to it in writing as required by section 30A(2).

After an exchange of correspondence consisting of a number of letters and other documentation, I met with the son of the complainant, Mr Selwyn Vandeyar and Ms Hilary Thomson, the principal officer of the respondent at the Land Claims Court in Johannesburg on 23 April 1998. The respondent was also assisted herein by Mr Paul Nel of Consolidated Benefit Consultants, the administrators of the fund. The hearing was of an informal nature and neither party adduced oral evidence under oath. In determining this matter, therefore, I have relied exclusively on the documentary evidence and argument put to me in writing and orally.

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

The complaint

The complainant claims that the trustees of the respondent have failed properly to exercise their discretion to grant him a disability pension in terms of the rules. As such, the complainant's complaint relates to the interpretation and application of the respondent's rules and alleges that a decision of the fund purportedly taken in terms of the rules was an improper exercise of its powers. He seeks an order setting aside the decision and directing the respondent to pay him a disability pension.

The complainant joined the United Tobacco Company, the then principal employer in respondent, in December 1963 and was employed at a senior level until the age of 53 when he resigned for health reasons in September 1985.

During 1985, the complainant began to experience heart problems and was diagnosed as suffering from intermittent atrial fibrillation. In the first half of 1985, on the advice of his medical practitioners, the complainant applied for early retirement on the grounds of ill-health. Together with his application he submitted documentation from a cardiologist as well as his general practitioner.

On 16 August 1985, the committee of the respondent met in Johannesburg and finally considered the complainant's application for ill-health benefits. In addition to the two medical reports submitted by the complainant, the committee gave consideration to a report submitted by Dr Leonard Steingo, an independent specialist, physician and cardiologist, appointed by the committee.

Dr Steingo's report dated 24 July 1985 concludes with the following paragraph:

> On conclusion, I found that this patient's presyncopal episodes may well be related to his episodes of rapid atrial fibrillation. He does however, have no evidence for ischaemia and clinically a normal heart. He should have holter monitoring and possibly an electrophysiological study in the future. I also feel he should probably be on Warfarin because of his intermittent atrial fibrillation.
>
> This patient is not totally incapacitated owing to ill health.

The report of the complainant's cardiologist, Dr A R Moti dated 24 May 1985 comes to the following conclusion:

> My impression is that patient's syncopal episodes are related to his very rapid atrial fibrillation. Occasionally with ever run conduction. A bypass tract such as Lown-Ganon-Levine Syndrome cannot be excluded. In view of this I have advised him to rest. Not exert himself at all. We should try him on Isoptin 40 mg 3 times daily to control these episodes. He was on betablockers in the past but could not tolerate them. As you well know this condition can be very dangerous in that in some instances these episodes of very rapid atrial fibrillation can lead on to ventricular fibrillation.

The complainant's general practitioner, in his report of 28 July 1985, attempts to rebut Dr Steingo's report and concludes as follows:

> 4. This condition of Atrial fibrillation can lead to Ventricular fibrillation.
> If not treated immediately can result in very serious consequences.
>
> Above all and it must be clearly understood that a specialist sees a patient once in a life-time, whereas his house doctor sees him on innumerable occasions, re:

(a) His Medical Condition;
(b) His Social Problems;
(c) His Economic Status.

Thereby giving him adequate information to be a better judge.
On the basis of my earlier report and the above-listed points, and in addition to two cardiologists concurring in their findings, I once again very strongly recommend that the patient cease to work.
My opinion is based on 35 years of medical experience.

It is to be noted that neither Dr Abdulla nor Dr Moti make a conclusive finding on whether the complainant is totally incapacitated owing to ill-health. Dr Moti warns that the condition is dangerous, and Dr Abdulla strongly recommends that the patient ceases to work.

On the basis of these medical reports, the committee of the respondent (relying principally on the report received from Dr Steingo) came to the conclusion that the complainant was not permanently and totally incapacitated owing to ill-health and accordingly refused his application. Its decision is recorded in the minutes of the meeting of 16 August 1985 in the following terms:

Mr. Vandeyar's application for early retirement on the grounds of ill-health, together with medical reports obtained, was considered. On the medical evidence it appeared that Mr. Vandeyar was not totally incapacitated and accordingly the application was refused by the Committee.

In response to this decision, the complainant resigned his employment in September 1985. Shortly after his resignation, the complainant received his withdrawal benefit in terms of the rules of the fund.
Subsequently, the complainant's atrial fibrillation condition has worsened, resulting in the ablation of the arterial ventricular node, the implantation of a pacemaker and he has also suffered a stroke.

He argues that his application for early retirement on medical grounds was unfairly denied. He felt that due to the prevailing political climate at the time of his resignation in 1985, it would have been pointless to seek recourse through the legal system. Accordingly, shortly after his resignation, he left South Africa to live with his sons who were living in America.

In February 1997, almost twelve years after the complainant's resignation, he addressed a letter to the Registrar of Pension Funds, alleging that he had been unfairly treated and requesting the Registrar's intervention to remedy the situation. Throughout 1997, a series of meetings took place in an attempt to settle the dispute. These meetings came to nought.

The response of the respondent has always been that, at the time of his resignation, the complainant was neither permanently nor totally incapacitated. It has been submitted on their behalf that the members of the committee were uncomfortable with the medical evidence which the complainant had submitted and therefore had asked for an independent medical assessment from Dr Steingo. The further medical evidence, and the fact that the complainant went about his duties in the normal way, convinced the committee that the complainant was not incapacitated at the time. Furthermore, the respondent recommended to the complainant that he should remain in employment for a further two years, which would have allowed him to receive an early retirement benefit which would have been much more generous than the withdrawal benefit. This the complainant refused to do and instead chose to resign.

On this basis, the respondent submits that the trustees properly applied their minds to the complainant's application and that there has been no maladministration.

The relevant rule of the respondent which was applicable at the time, and on which the respondent relies, read as follows:

> "If a contributor shall be reason of <u>permanent and total incapacity owing to ill health</u> cease to be employed before the normal retirement date he or she shall be entitled to receive during the remainder of his or her life an annual pension."

Paragraph B of the rule states :

> "Every question as to permanent and total incapacity shall be decided by the Committee on receipt of a report by a medical officer approved by it and the decision of the Committee shall be conclusive and binding upon all parties concerned."

Compliance with the time limits

Before I can (or should) pronounce on the merits of this complaint, I am obliged to give consideration to whether the complainant has complied with the time limits for lodging of a complaint. Section 30I governs the matter. It reads:

> (1) The Adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint is received by him or her in writing.
>
> (2) If the complainant was unaware of the occurrence of the act or omission contemplated in subsection (1), the period of three years shall commence on the date on which the complainant became aware or ought reasonably to have become aware of such occurrence, whichever occurs first.
>
> (3) The Adjudicator may on good cause shown or of his or her own motion -
>
> (a) either before or after expiry of any period prescribed by this Chapter, extend such period;
> (b) condone non-compliance with any time limit prescribed by this Chapter.

The section enjoins me not to investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint was received by me in writing. As stated, I received the complaint in writing during February 1998, twelve and a half years after the Committee declined the complainant's application for a disability pension.

However, the provisions of section 30I(3) permit me to extend a period or condone non-compliance with the time limit provided there is good cause. This means, broadly speaking, that late complaints may be condoned depending on such factors as the degree of lateness, the explanation therefor, the prospects of success, the importance of the case, and the existence of good faith endeavours to settle the dispute - *MAWU v Filpro (Pty) Ltd* (1984) 5 *ILJ* 171 (IC); *Venter vs Renown Food Products* (1989) 10 *ILJ* 320 (IC).

Section 30I aims at ensuring finality and certainty in the affairs of pension funds and aims at promoting efficiency by providing an incentive for the expeditious enforcement of complaints. All legal systems accept that the operation of obligations should be limited by requiring enforcement within a reasonable period of time. For the following reasons, I do not believe that there is good cause for condoning non-compliance with the time limit or for extending such period.

Although there were good faith endeavours made by the complainant to settle the dispute after 1997, a delay of twelve years in enforcing the complaint makes it extremely difficult to investigate the factors and considerations taken into account by the committee at the time they exercised their discretion.

Moreover, the complainant's contention that he did not pursue his rights by reason of the prevailing political climate, with respect, is not entirely convincing. Undoubtedly, persons within the complainant's social category had every reason to question the legitimacy of the judicial process in South Africa prior to the adoption of our new Constitution in 1994. However, during the 1980's many persons similarly situated to the complainant were able to use the unfair labour practice remedy administered by the industrial court to protect their rights and advance their interests. Had the complainant taken proper legal advice at the time of his resignation, as could be expected from a man of his seniority, he would have learned that a remedy was at his disposal to protect him against unfair treatment by his employer or his pension fund. It is to be regretted that he did not investigate this route prior to his resignation.

More importantly, my decision not to condone the late lodging of this complaint is premised mainly on the fact that the complainant has little prospect of succeeding on the merits. Before the complainant would have been entitled to retirement on the grounds of ill-health in terms of the abovementioned rule, he would have to show that he was permanently and totally incapacitated owing to ill-health. The burden of proving an entitlement to the ill-health pension under the rules is clearly on the complainant, and the standard of proof required is the ordinary standard applicable in civil claims, namely, proof on the balance of probabilities. However, I hasten to add, a complainant who fails to produce sufficient evidence to discharge the burden of proving his or her claim on the balance of probabilities will not automatically have the complaint decided against him. In *Chammas v Harwood Nominees (Pty) Ltd* (1993) 7 ANZ Ins Cas 61, the court held that an insurer (or a pension fund) owes a duty of good faith and fair dealing, and that in discharging that duty the insurer should generally observe the requirements of natural justice. In particular, the fund can be expected to invite the member to put additional evidence forward to support his claim. I followed this approach in *San Giorgio v The Cape Town Municipal Pension Fund* (PFA/WE/8/98).

Whether the respondent in this matter should have followed such an approach and sought further evidence about the complainant's medical condition is difficult to determine by virtue of the lapse of time since the complainant's application for disability benefits.

Assuming that the committee had sufficient evidence at its disposal in the form of the three medical reports, before the complainant could have succeeded in his application, the evidence would have to show that he was both totally and permanently incapacitated. In giving meaning to these provisions, I have been guided by an opinion by R H Christie QC, prepared for the Ombudsman for Life Insurance, dated 24 February 1998. According to Prof Christie the test for determining *total* disability is that set in *Hooper v Accidental Death Insurance Co* (1860) 5 H & N 546 where a solicitor was held wholly disabled when he was "wholly incapable of performing a very considerable part of his usual business" although he "might and could have done something which he was in the habit of doing before". This test has been followed by our own courts in *Yorkshire*

Insurance Co Ltd v Garde 1996 (2) SA 176 (RA).

On the question of permanence of the disability, Prof Christie argues that an assured will discharge the burden of proving that his disability is permanent if he can prove that it will probably be permanent in the sense that it could probably continue for an indefinite period of time.

On the medical evidence available to the committee at the time it took its decision, Dr Steingo is the most unequivocal in finding that the patient is not totally incapacitated owing to ill-health in that the condition, in his view, was treatable. The other specialist, Dr Moti, recognises the danger of the complainant's condition and warns of a possible negative prognosis. Unfortunately, he makes no finding as to whether or not the disability is total or permanent. Dr Abdulla, is somewhat ambiguous. On the one hand he claims that if the condition was not treated immediately it could have led to serious consequences. He goes on to recommend that the complainant should cease to work. This ambiguity seems to suggest that the disease is treatable, and may account for his failure to state unequivocally that the complainant was permanently or totally incapacitated.

It was on this evidence that the committee exercised its discretion in terms of paragraph B of the rule, and it can hardly be said that in doing so it acted improperly. In terms of the rule the committee had a very wide discretion. I have not placed too much weight on this aspect in deciding that the complainant's prospects of success were limited. In this regard, it is instructive to refer to Prof Christie's discussion on the matter. He notes that many policies give insurers (and pension funds) the right to call for evidence at their sole discretion, or make the insurer or the pension fund's opinion decisive of disablement, or require proof of disablement merely to the satisfaction of the insurer or the pension fund. Prof Christie argues that the concept of reasonableness should be imported into such clauses or rules. In this regard he refers to a decision by McLelland J in *De Britt v Frew* (1992) 7 ANZ Ins Cas 61 -140 where the learned judge held:

> In my view, it is most unsatisfactory that the entitlement of any person to benefits of this

> kind should be made dependent on what, in effect, is the subjective opinion of the person or entity who is liable ultimately for the payment of those benefits. If the relevant instrument invests in such a person or entity what in substance is the capacity to conclusively determine for the purposes of the instrument whether the facts giving rise to the liability has been established, one is creating a situation where there is a clear conflict between duty and interest.

In *Edwoods v The Hunter Valley Co-op Dairy Co Ltd* (1992) 7 ANZ Ins Cas 61 - 113, the same judge applied this reasoning as follows:

> To say that an insurer must act reasonably in forming or declining to form an opinion is not to say that a court can substitute its own view for that of the insurer..... Unless the view can be taken by the insurer can be shown to have been unreasonable on the material then before the insurer the decision of the insurer cannot successfully be attacked on this ground.

Applying this line of thought to the present matter, it is clear that on the material before the committee of the respondent on 16 August 1985, the decision which it came to was reasonable. The decision is entirely justifiable in relation to the material upon which it was based and in relation to the reasons given for it.

For the aforegoing reasons, I am satisfied that there is not good cause for condoning the complainant's non-compliance with the time limit prescribed by section 30I(1) and accordingly I am not entitled to investigate or determine the complainant's complaint.

DATED AT CAPE TOWN THIS 18TH DAY OF JUNE 1998.

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Prof John Murphy
PENSION FUNDS ADJUDICATOR