

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

CASE NO.:PFA/KZN/201/99/NJ

In the complaint between:

**D.B. Joshua**

**Complainant**

and

**Dunlop Africa Pension Fund**

**Respondent**

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

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**Introduction**

This is a complaint lodged with the Pension Funds Adjudicator in terms of section 30A(3) of the Pension Funds Act of 1956. The complaint relates to the computation of the complainant's actuarial reserve value upon transfer to another fund.

After an exchange of correspondence between the complainant and the respondent, consisting of a number of letters and other documentation, the complainant lodged a complaint with my office on 10 February 1999. No hearing was held in this matter. Accordingly, in determining this matter, I have relied exclusively on the documentary evidence, arguments put to me in writing and a report placed before me by my investigator, Naleen Jeram.

The complainant is Duncan Barrington Joshua, a former pensioner of the respondent, of Austerville, Kwa-Zulu Natal.

The respondent is Dunlop Africa Pension Fund (hereinafter referred to as the fund), a

pension fund duly registered under the Pension Funds Act of 1956. The fund is represented by Mr Mike Hankinson, chairperson of the board of trustees and Mr Alan Baxter, the principal officer of the fund.

The complainant commenced employment on 22 June 1966 as an operator until he retired from his employment as a supervisor on 31 March 1990. Throughout his employment, the complainant was a member of the fund, a defined benefit fund and regularly contributed towards his pension benefit.

### **The complaint**

This complaint relates to the administration of the fund and the interpretation and application of its rules and alleges that the complainant has sustained prejudice in consequence of the maladministration of the fund by the fund and a decision taken by the fund was an improper exercise of its powers.

On 31 March 1990, the complainant having attained normal retirement age in terms of the rules of the fund retired and elected to receive his one third cash lump sum and the balance of his benefit was paid as a monthly pension. As at 1 September 1998 the trustees gave the complainant and other pensioners the option to either continue receiving a monthly pension from the fund or to purchase a pension from Old Mutual, Sanlam, or Liberty Life. Pensioners were also given the option of purchasing a life annuity from a registered insurer of their choice provided they obtained financial advice in this regard.

The proposed relevant rule (submitted to the Registrar of Pension Funds but not yet approved) allowing the aforesaid transfers reads as follows:

A new rule, Rule 30.7 is to be included

1. Each PENSIONER who is in receipt of a pension on 31 August 1998 may elect that

the PENSION shall no longer be payable by the Fund but that the full value thereof, as determined by the VALUATOR, shall be applied in the purchase of an annuity in his name from a REGISTERED INSURER with effect from 31 August 1998.

2. It is specifically provided for that the RETIREMENT PENSION of a PENSIONER that elects to receive his pension from a REGISTERED INSURER shall first be increased by 33%.
3. If the PENSIONER elects to take over the full liability for paying his or her medical aid contributions, that part of the pension relating to the will be increased by 10%.
4. After the annuity has been so purchased, the FUND shall have no further liability in respect of the PENSIONER, such liability resting with the REGISTERED INSURER from whom the annuity is purchased. The only exception is this provision is that if a PENSIONER who is unmarried as at 31 August 1998 subsequently marries and has been married to his spouse for at least 12 months, his surviving spouse shall be entitled to the spouse's pension provided for in terms of Rule 26.
5. The annuity so purchased shall be a compulsory, non-commutable, non-assignable annuity, payable at least for the PENSIONER's life.

Rule 26, in turn, reads:

26.1. BENEFITS PAYABLE

On the death of a PENSIONER the following benefits, whichever are applicable, will be payable:

1. Where a PENSIONER leaves a SPOUSE and/or a DEPENDENT CHILD or CHILDREN:

1. a lump sum equal, in the case of
  - a) an ILL-HEALTH PENSIONER, to three times his ANNUAL SALARY shall be applied to purchase a life pension for his SPOUSE and DEPENDENT CHILD or CHILDREN up to a maximum of three such DEPENDENT CHILDREN. In the event of the PENSIONER leaving no SPOUSE or DEPENDENT CHILDREN, the lump sum shall be paid in accordance with Rule 26.6.
  - b) a PENSIONER other than an ILL-HEALTH PENSIONER, to three-eighths of the PENSION and ANNUAL BONUS in Rule 26.1.1.2. shall be paid to the SPOUSE; or, if there be no SPOUSE, to a DEPENDENT CHILD or in equal shares to the DEPENDENT CHILDREN.

PLUS

2. A SPOUSE'S pension payable to the PENSIONER'S SPOUSE and, where applicable, a DEPENDENT CHILD'S pension payable to each of the PENSIONER'S DEPENDENT CHILDREN. (The SPOUSES' pension and DEPENDENT CHILDREN'S pension will be as set out in Rule 26.2. and Rule 26.3. respectively and will be payable as set out in Rule 26.5.).

## 26.2. AMOUNT OF SPOUSE'S PENSION

The SPOUSE'S pension in the event of death after retirement (Rule 26.1.2.2.)  
will be equal  
to two-thirds

of the  
PENSION  
payable in  
respect of the  
PENSIONER,  
other than an  
additional  
pension which  
has been  
purchased  
with the  
PENSIONER'  
S past period  
contributions,  
or if any  
portion of the  
PENSION  
was  
commuted,  
the PENSION  
that would  
have been  
payable had  
this option not  
been  
exercised;  
provided

1. that should a PENSIONER who retired in terms of Rule 22 on grounds of ill-health, die before attaining his NORMAL RETIREMENT AGE, the

SPOUSES' pension shall not be less than two-thirds of the PENSION which the PENSIONER would have been receiving if at the date of his death he had attained the NORMAL RETIREMENT AGE; and

2. if the SPOUSE is a widow, that if she married the PENSIONER after his retirement, the SPOUSES' pension in terms of this Rule will be reduced by one-sixth of one per cent for each month or part of a month in the period by which the age of the PENSIONER at the date of marriage exceeded her age at that date.

The complainant indicated that he was interested in purchasing a life annuity from Momentum Life and accordingly requested the actuarial reserve value of his pension. The fund's actuary initially calculated the reserve value to be R420,139.00. This calculation was based on a false assumption that the complainant was married. A few days prior to the transfer, the fund became aware of the correct marital status of the complainant and re-calculated the reserve value as follows:

Correct situation

Basic monthly pension	1 708.37
Increase - CPI catch up	25.63
Enhancement 30%	520.20
Medical Aid	215.42
Enhancement 10% medical aid	21.54

Total 2 491.16

Actuarial reserve value:

Including medical aid 295,054.00

Based on incorrect spouse assumption:

Actuarial reserve value:

Including medical aid 420 139.00

Excluding medical aid            380 175.00

Based upon the advice of his broker the complainant elected to transfer the aforesaid amount to Momentum Life and the following day lodged a complaint with Mr Mike Hankinson in respect of the computation of his reserve value. In about January 1999, in accordance with the complainant's instructions the fund transferred an amount of R283 357.48 to Momentum Life. Pension payments from September 1998 to January 1999 totalling R11 696.52 were deducted from the reserve value of R295 054.00. The complainant argues that he is entitled to the amount of R420,139.00 and the fund by not awarding him this amount was unfairly discriminating against him on the basis of marital status.

Mr Hankinson, responds as follows:

...the Trustees recognise that should Mr Joshua's marital status subsequently change, then in terms of Rule 26, the Fund would need to pay him an additional benefit (provided that he was married for at least 12 months).

From the outset, the Trustees decided to keep a reserve in the Fund against such a contingency for all unmarried pensioners. The Section 14 certificate to be submitted to the Financial Services Board will highlight that all pensioners that leave the Fund (e.g. to take a living annuity) and are currently unmarried, will retain the right to this spouse's benefit if they subsequently marry.

The Trustees consider that it is appropriate to hold such a contingency reserve rather than pay Mr Joshua R420 139 for the following reasons:

- (a) if the Fund were to pay Mr Joshua R420 139, he would be able to secure a pension that is some 42% higher than he is currently entitled to; and
- (b) if he were subsequently to marry, there would be less available for his spouse as he would have "consumed" some of the spouse's benefit prior to his marriage. The trustees reason that this lower provision for the spouse is not in the interests of fair social policy; and
- (c) the rules of the Fund are clear and cannot be breached in favour of the claimant. All

that was wrong is that Mr Joshua was given an incorrect illustrative value of the “reserve value” of his pension.

On the basis of the above, the Trustees strongly believe that they are not discriminating against Mr Joshua on the basis of his marital status. They consider that their approach is consistent with fair social policy.

The complainant was not informed that he was entitled to a spouse’s pension in terms of rule 26 if he exited the fund. Mr Baxter, has confirmed that the fund failed to inform him of this particular benefit.

During my investigation it has also come to light that the enhancement of the complainant’s actuarial reserve value was incorrectly computed. The pensioners were initially informed that their actuarial reserve values would be enhanced by 30%. Subsequently, the trustees agreed that their benefits should be enhanced by 33%. However, the complainant was not informed of this increase. Mr Baxter has confirmed that in line with this 3% increase the complainant’s actuarial reserve value will change from R295 000.54 to R301 863.00. No further payments were made to the complainant or Momentum Life to redress the shortage in payment. An amount of R6,862.46 is owing in this regard.

## **Analysis**

There are two issues for determination. The first is whether the complainant has been unfairly discriminated against as a result of which he has sustained prejudice. The second issue is whether all relevant information has been provided to the complainant in order for him to make an informed decision. I deal with the issues in turn.

In terms of rule 26, in the event of the complainant remarrying and remaining married for a period of at least 12 months prior to his death, then his spouse would be entitled to a pension in terms of the rules of the fund. Thus, the complainant’s transfer value does not

include a spouse's pension as it will be provided for, in terms of rule 26. Accordingly, there has been no discrimination against the complainant, in that should he marry he will have the benefit of a spouse's pension. However, one can understand why the complainant is concerned as he simply was not informed of the benefit under rule 26.

As a consequence, the complainant after transfer effectively remains virtually in exactly the same position as he would have been had he remained in the fund. He is essentially entitled to the same or a similar defined benefit. The amount necessary to fund his pension has been transferred to the insurer. At the same time an amount has been earmarked in the fund to finance the contingency of a spouse's pension should that become necessary.

The second issue is whether the fund has complied with its duty to provide relevant information to the complainant pending his decision to transfer. The failure by a pension fund to provide relevant information required by a member for the exercise of his or her rights constitutes a breach of a duty to act in good faith and amounts to an improper exercise of its powers and maladministration of a fund as contemplated in the definition of a complaint. Further, section 7D of the Pension Funds Act of 1956 requires the fund to ensure that adequate and appropriate information is communicated to members informing them of their benefits.

To some extent the fund can be criticised for falling short in its duty in this regard. Firstly, an incorrect reserve value was quoted. Secondly, the enhancement was incorrectly calculated. And thirdly, the fund failed to inform the complainant of his entitlement to a spouse's pension in terms of rule 26 in the event of his marrying subsequent to retirement. Nevertheless, the fund is more than willing to remedy any prejudice which may have arisen in this regard.

Mr Hankinson and Mr Baxter of the fund have acknowledged that material information was not provided to the complainant and have accordingly agreed to allow the complainant to reverse his decision if he so elects. In this regard the fund must be commended for its

conciliatory attitude and proposals made to resolve this matter.

Thus, I make the following order:

1. The respondent is ordered to provide the complainant with his correct actuarial reserve value prior to transfer and explain the full consequences of him transferring out of the fund, within 7 days of the date of this determination.
2. The complainant shall re-exercise his option whether to transfer out of the fund within 7 days of receipt of the information set out in paragraph 1 of this order.
3. The respondent shall take all necessary steps to give effect to the complainant's election set out in paragraph 2 of this order.
4. In the event of the complainant electing to uphold his earlier election to transfer his actuarial reserve value to Momentum Life, the respondent shall transfer an additional R6,862.46 to Momentum Life on behalf of the complainant within 6 weeks of the date of this determination.

Dated at Cape Town this 23<sup>rd</sup> day of August 1999.

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**John Murphy**

Pension Funds Adjudicator