

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/WE/186/98/AS

In the complaint between:

**CLIVE ROBERT ANDERSON**

**Complainant**

and

**PREMIER RETIREMENT 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 complainant is Clive Robert Anderson a member of the respondent.

The respondent is the Premier Retirement Fund, a pension fund duly registered in terms of the Pension Funds Act of 1956.

The parties are in dispute regarding the enhancement of the complainant's benefit in the respondent as at 1 July 1992. The parties were unable to resolve the dispute and the complainant lodged a written complaint with the office of the Pension Funds Adjudicator on 30 March 1999.

The complaint relates to the administration of the fund and to the interpretation and

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application of its rules and alleges that the complainant has sustained prejudice in consequence of the maladministration of the fund. The complainant submits that the respondent should have granted him an enhancement on the total value of his benefit to take account of previous service. He also alleges unfair discrimination in that he claims to have been differently treated from the other fund members who have benefited from enhancements.

No hearing was held in this matter but both parties have submitted written representations together with documentary annexures. A report was placed before me by investigator, Antonia Simmons. Accordingly, in determining this matter I have relied on the documents and report placed before me. Having completed my investigation I have determined this complaint as follows and for the reasons set out herein.

### **Background**

The complainant commenced employment with the employer on 1 February 1981 as a financial accountant, was promoted to general manager on 1 May 1981 and resigned from his employment on 31 December 1990. He recommenced employment on 1 October 1991 and remains in employment.

Throughout his employment, the complainant was a member of the Premier Group Pension Fund, a defined benefit fund and regularly contributed to it.

At the time of his resignation in December 1990 the complainant was paid out a withdrawal benefit in terms of the rules of the fund. He transferred his benefit to the Multirand Preservation Fund as he was entitled to do. The calculation of the benefit and the correct application of the fund rules in this regard are not in dispute. In terms of Rule 38(2) of the rules of the Premier Group Pension Fund, no person has any claim concerning the Premier Group Pension Fund upon the fund except in accordance with the rules. Accordingly, once payment of the withdrawal benefit had been made to the complainant,

the Premier Group Pension Fund had no further liability to or in respect of him.

As mentioned, the complainant again commenced employment with the employer on 1 October 1991 and became a new member of the Premier Group Pension Fund in accordance with the rules. When he rejoined the employer he was informed that he was entitled to transfer the benefit which he had previously received back to the Premier Group Pension Fund. A letter was forwarded to Mr Anderson in September 1992 notifying him of the precise manner in which his withdrawal benefit had been calculated and specifically advising him that he was entitled to transfer his Multi Rand Pension Fund value back into the Premier Group Pension Fund which would then earn the fund rate of interest. The complainant was offered the opportunity to contact the writer of the aforesaid letter should he require any further information with regard to the transfer back to the fund of his withdrawal benefit. The complainant did not elect this option.

The complainant remained a member of the Premier Group Pension Fund as at the date of the conversion of that fund from a defined benefit fund to a defined contribution fund, known thereafter as the Premier Retirement Fund, on 1 July 1992. A portion of the surplus assets was allocated to current members of the fund. The surplus allocation was made in accordance with the decision of the board of trustees and resulted in a 22.5% enhancement of the members' value in the fund at 1 July 1992, determined with reference to the member's pensionable service. Pensionable service is defined in the rules as a member's continuous service with the employer. The definition of continuous service reads as follows:

"Continuous Service" shall mean the period during which an employee has been continuously in the service of one or more of the employers, and shall include all authorised leave of absence with full pay, with pay less than full pay or without pay, and shall not be regarded as interrupted by breaks in service condoned by the Trustees for the purpose of membership of the Fund.

The trustees decisions regarding the allocation of surplus assets were made in general, with the result that the complainant's period of absence was not condoned. No resolution

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was taken relating to the complainant specifically.

The complainant therefore was allocated a portion of the surplus of the Premier Group Pension Fund based on his membership from 1 October 1991. His complaint is that the surplus allocation should have been based on his previous service as well.

In order to understand the complainant's claim of discrimination reference should be had to certain events involving other members of the fund which took place during the 1980's. Certain other members of the fund who were members of the Food and Allied Workers Union also withdrew from the fund during the 1980's and were paid out in terms of the rules in the same manner as the complainant. These withdrawals were related to the requirement for prescribed investments at the time and were motivated by political ideology. Following negotiations with the union a provident fund was set up in 1988. A number of employees joined this fund including former members of the pension fund who had withdrawn, new members and members who transferred from the pension fund over a period of time. The members of the Food and Allied Workers Union who withdrew from the Premier Group Pension Fund and later joined the newly established provident fund remained in the service of the Premier Group throughout the relevant period. As a result of protracted negotiations a settlement was reached regarding the provident fund in terms of which the transfer values of members who transferred from the pension fund to the provident fund in or about 1988 and or during the relevant period of time during which such transfers took place would be the actuarial reserve value plus an enhancement of 22.5% on each members' reserve value as at 1 July 1992.

### **Argument**

The complainant argues that cognisance ought to have been taken of his membership and contributions to the pension fund for the period of 1 February 1981 to December 1990, and that an enhancement should have been granted on his full value for that period as well as for the period of his new membership in the fund from 1 October 1991 to July 1992.

The claim of unfair discrimination relates to the fact that the union members who withdrew from the fund and were granted an enhancement on their total values and thus shared in the distribution of the surplus on conversion from a defined benefit to a defined contribution fund despite their not being members of the pension fund at the date of conversion.

Regarding the comparison between the complainant and the union members who withdrew the respondent distinguishes between these instances stating that:

1. Union member's withdrawals were as a result of the political situation obtaining the South Africa at that time and that it was common practice for such withdrawals to occur.
2. The union members remained in the service of the Premier Group throughout.
3. When the union members who had withdrawn joined the new provident fund they transferred their total values to the new fund and such values remained invested in the fund.

Having argued, therefore, that the complainant and the union members were not similarly situated, the respondent denies that any discrimination took place.

The respondent stresses that no one received an enhancement on any previous benefits, but that enhancements were only granted on amounts in the fund as at 1 July 1992. The complainant was paid his withdrawal benefit in accordance with the rules obtaining and relevant at the time of his withdrawal and having received such payment no further liability existed to or in respect of the complainant in relation to that amount.

The respondent, however, argues that in any event this complaint has prescribed in that

the subject matter of the complaint occurred more than three years before the complaint was lodged and the complainant has not established good cause as to why the period of three years should be extended.

### **Compliance with time limits**

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

#### Time limit for the lodging of complaints

- (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-
  - (1) either before or after expiry of any period prescribed by this chapter, extend such period;
  - (2) 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. As stated, I received the complaint in writing during March 1999, almost 7 years after the occurrence of the event forming the basis of the complaint.

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However, the provisions of section 30(1)(3) permit me to extend a period or condone non-compliance with a 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 therefore, 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 v Renown Food Products* (1989) 10 ILJ 320 (IC).

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 in this instance.

Firstly the complainant failed to prosecute his alleged claim with any significant measure of persistence. He did first query the manner in which the surplus had been calculated and who qualified to share in such distribution in August 1992. He made a number of oral enquiries through the human resources department but received no satisfactory answer. The next time he made any further effort to resolve his query/dispute was when he wrote to the fund on 27 November 1996. However, he took no formal steps to declare a grievance or to pursue the matter in the ordinary courts. It is true that the office of the Pension Funds Adjudicator had not yet been established at the time in order for a complaint to be brought before it. However, prior to the institution of this office it was open to complainants to proceed in the normal courts of law. It does not appear that the complainant made any effort between August 1992 and November 1996 to resolve the dispute or attempt to recover amounts which he felt to be due to him by the fund.

My decision not to condone the late lodging of this complaint is, however, premised primarily on the fact that the complainant has little prospect of succeeding on the merits. The complainant does not dispute the quantum of the withdrawal benefit or the correct application of the rules regarding his withdrawal. It is common cause between the parties that the complainant was paid out correctly in terms of the rules when he withdrew from the fund initially. It is also common cause that the complainant was offered the opportunity of returning his benefit to the fund when he returned to the fund, but that he elected not to

do so. The complainant's benefit remains with the Multirand Preservation Fund. The situation might have been different had the complainant sought to reinvest his value in the fund to acquire additional past service and the trustees unreasonably refused to grant his request.

The complainant seeks an enhancement of his investment value from surplus funds built up in the fund, even though he had withdrawn that value and was apparently not willing to reinvest it in the fund. The values of the FAWU members at all times remained invested in schemes in which the employer was a participating employer. Had the complainant transferred his funds back when he recommenced employment he would have acquired additional pensionable service and his value would have been enhanced accordingly at the time of the surplus distribution. Apparently he was not willing to take the investment risk by doing that and therefore it seems reasonable to limit his participation in the distribution to the extent of his current investment. In this regard his position differs from that of a retrenched employee whose services are terminated on involuntary grounds.

The complainant also has not satisfied me that he was similarly situated to the members of the union who withdrew and subsequently joined the provident fund. More particularly, it is to be noted that the union members who subsequently joined the provident fund and whose benefits were enhanced at 1 July 1992 had at all times remained employees of the group and their pension benefits remained within the group albeit in a separate fund. I am therefore not satisfied that the complainant has established his entitlement to an additional enhancement on a balance of probabilities.

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

Dated at CAPE TOWN this 11<sup>th</sup> day of AUGUST 1999.

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John Murphy

Pension Funds Adjudicator