

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/GA/596/99/NJ

In the complaint between:

R M Basson

Complainant

and

B & E Group Pension Fund

First Respondent

Richton Employee Benefit Consultants cc

GPHIB Umbrella Scheme

Second Respondent

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

1. This is a complaint lodged with the Pension Funds Adjudicator in terms of section 30A(3) of the Pension Funds Act of 1956 (hereinafter referred to as the "Act"). The complaint relates to the cessation of a disability benefit.
2. An investigation was conducted into this matter by my investigator, Mr Naleen Jeram. Accordingly, in determining this matter I have relied exclusively on documentary evidence and arguments gathered during the course of Mr Jeram's investigation.
3. The complainant is Ronnie Basson, 59 years of age and a member of the first and second respondent.
4. The first respondent is B&E Group Pension Fund, a pension fund duly registered under the Act (hereinafter referred to as "the fund").

5. The second respondent is Richton Employee Benefit Consultants CC Group Permanent Health Income Benefit Umbrella Scheme (hereinafter referred to as "the scheme"). The scheme is not registered as a pension fund under section 4 of the Act. Instead the scheme has been approved as a benefit fund by the Commissioner of Inland Revenue in terms of section 1 of the Income Tax Act 58 of 1962. The definition of a benefit fund contained in section 1 (paragraph C) of the Income Tax Act permits (for income tax purposes) the formation of a disability scheme other than a pension fund, provident fund or retirement annuity fund. The scheme is a non-contributory fund. The fund and the scheme are represented by Mr Sean O'Neill of Optima Group Consultants, the administrator of the scheme.
6. On 1 July 1986, the complainant commenced employment within the B&E Group and at the same time became a member of the fund and the scheme. Hereafter, the complainant regularly received information from the fund and the scheme showing his normal retirement age to be 65 years and also stating that disability benefits will cease at the age of 65.
7. On 1 August 1995, the trustees of the scheme decided to make several changes in respect of the benefits afforded by the scheme. The most important were as follows:
 - 7.1 both sexes had the same termination date, that is, 60 years of age. Prior to this, termination for disability benefits for males was 65 years;
 - 7.2 the waiting period was reduced from 6 to 3 months for payment of a disability benefit;
 - 7.3 there was a higher free cover limit and a greater agreed maximum benefit under the new proposed scheme; and

- 7.4 the benefit would escalate by 5% per annum (in the past there was no benefit escalation).
8. On 1 October 1996, the trustees of the fund decided to reduce the retirement age from 65 to 60. However, existing members retained the right to retire at the age of 65.
9. The aforesaid amendments within the fund and the scheme were not communicated to the members. Subsequent benefit statements issued to the members continued to show the retirement age at 65 and no mention was made of the age upon which disability benefits ceased.
10. Mr O'Neill conceded that the scheme failed to inform members of the changes and further stated:

I believe that, in retrospect, we should have communicated clearly with Members shortly after the installation of the new risk Benefit Schemes and explained the reasons behind the Trustee's decision. Unfortunately this was not done and the subsequent Member Benefit Statements which were produced on a standard basis by Old Mutual did not specify the Termination Age under the Disability Benefit. This is the mistake, which I attempted to convey to Mr Basson.

11. During 1998 the complainant suffered severe back problems and was unable to continue working. He applied for the disability benefits under the scheme. The scheme approved his disability claim with effect from 13 March 1998, subject to the following terms (set out in a letter dated 27 October 1998 addressed to the complainant):
1. You will be paid a Disability Benefit equal to 75% of your monthly salary i.e R6,600.00.
 2. You shall receive an annual increase of 5% per annum for each completed 12 month period.
 3. Your Medial Aid & Pension Fund contributions will continue as in the past

with the Company still contributing as previously.

4. On reaching 60 years of age, your disability cover is no longer applicable and you will automatically receive a monthly pension in terms of the B&E Pension Scheme.
 5. The insurance company, is entitled to call for medical evidence of health from time to time.
 6. You will still enjoy the benefits of Group Life Insurance up to the age of 60 years, which is life cover of 4 times your annual salary at the time of your disablement i.e. R422,400.00
12. Upon receipt of this letter the complainant for the first time became aware that his disability benefit would cease upon him attaining the age 60. The complainant was dissatisfied with this decision and in particular the failure of the scheme to inform him of the termination date of the benefits. Thus, his complaint relates to the administration of the scheme and alleges that there has been maladministration of the scheme by the scheme. He seeks an order directing the scheme to pay him the disability benefit until the age of 65.
13. As stated, Mr O'Neill acknowledged that the scheme failed to inform him of the new termination date in 1995 and only in October 1998 was the complainant informed hereof. However, he argued that the introduction of this new termination date and the new benefits was not to discriminate against any particular member or section of members but rather to re-structure disability income benefits, which was thought to be on balance an improvement on the previous disability income benefit scheme. Further, it was borne in mind that a member nearing retirement age (such as the complainant), who becomes disabled, should have built up a fair retirement provision by that time and the disability income cover should be focussed towards the younger or middle-aged members. Thus, Mr O'Neill concluded that by 1 March 2000 the complainant would have received R159,805.00 from the scheme. From this date onwards he would qualify for his retirement benefit from the fund. Old Mutual, the administrators of the fund estimated that his total pension value at this date will

be R291,096.00 giving him an estimated annual pension of R36,387.00.

14. An important issue ignored by the parties is whether I have jurisdiction to determine this matter. That is, the complaint relates to the alleged maladministration of the scheme. Section 1 of the Act requires the complaint to relate to the administration of a fund, the investment of its fund or the interpretation and application of its rules.
15. Fund is defined as “pension fund organisation”, which in turn is defined as:
 - (a) any association of persons established with the object of providing annuities or lump sum payments for members or former members of such association upon their reaching retirement dates, or for the dependants of such members or former members upon the death of such members or former members; or
 - (b) any business carried on under a scheme or arrangement established with the object of providing annuities or lump sum payments for persons who belong or belonged to the class of persons for whose benefit that scheme or arrangement has been established, when they reach their retirement dates or for dependants of such persons upon the death of those persons, and includes any such association or business which in addition to carrying on business in connection with any of the objects specified in paragraph (a) or (b) also carries on business in connection with any of the objects for which a friendly society may be established, as specified in section 2 of the Friendly Societies Act, 1956, or which is or may become liable for the payment of any benefits provided for in its rules, whether or not it continues to admit, or to collect contributions from or on behalf of, members;

The rules of the fund do not provide for a disability benefit nor does it incorporate (by reference or otherwise) the scheme. Thus, the complainant's entitlement to the disability benefits exclusively arises out of the scheme.

16. The scheme only provides benefits upon the disability of a member. Whilst the, above definition does allow for the inclusion of any association of business carrying on some of the business of friendly societies, such as providing income protection upon disability

(section 2 of the Friendly Societies Act), this is not sufficient. The provision of disability benefits must be “in addition to carrying on business in connection with any of the objects specified in paragraph (a) or paragraph (b)”, that is, the provision of retirement or death benefits.

17. However, the mere fact that the scheme does not strictly fall within section 1 does not necessarily exclude my jurisdiction. In *Thorne v Meihuizen Provident Fund* (PFA/WE/110/SM), the provident fund in question provided retirement and death benefits, however the disability benefits were provided by a different scheme known as the pension plan. Despite the provident fund and the plan being distinct legal entities, due to there being a clear link between the fund and the plan, I assumed jurisdiction over the plan. The link involved membership of the plan being conditional upon membership of the provident fund. In addition, the administration of the fund and the plan were exercised in such away as if there was one legal persona, such as receiving one benefit statement showing both your retirement and disability benefits. Thus, I concluded that the plan was in effect providing disability benefits under the guise of the provident fund and consequently fell within the definition of pension fund organisation. Likewise, I would have jurisdiction where the entitlement to a disability benefit arises as a consequence of the interpretation and application of the rules of a pension fund.
18. Turning to the facts of this matter, no such link exists. Membership of this scheme is open to all eligible employees of the principal employer, who are permanent employees in active employment of the employer and who have attained a minimum age 18 and a maximum age 60. Thus, eligibility is not directly linked to being a member of the fund. Further, the fund is administered by Old Mutual whereas the scheme is administered by Optima Group Consultants.
19. From the above, there is no evidence to suggest that the scheme and the fund are merely one *persona* performing different functions. In fact, the evidence suggests that the fund and

the scheme are identifiable separate legal personalities. Thus, the scheme does not fall within the definition of pension fund organisation and accordingly falls outside my jurisdiction.

20. Accordingly, the complaint is dismissed.

Dated at **CAPE TOWN** this 22nd day of December 1999.

John Murphy

Pension Funds Adjudicator