

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.:PFA/KZN/210/99/LS

In the complaint between:

E Wilson

Complainant

and

South African Mutual Life Assurance Society Pension Fund

First Respondent

South African Mutual Life Assurance Society

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 relating to the early retirement benefit which the complainant received from the fund on retrenchment. In terms of the rules, where a member retires early, the benefit is reduced proportionately. The complainant argues that since he did not retire voluntarily, he is entitled to a waiver of the reduction.
2. No hearings were conducted and therefore in determining this matter, I have relied on the documentary evidence, written submissions and the investigation conducted by my investigator, Lisa Shrosbree.
3. The complainant commenced employment with Old Mutual on 1 May 1954 and simultaneously became a member of the South African Mutual Life Assurance Society Pension Fund (SAMLAS), a defined benefit fund.
4. In 1997, SAMLAS gave its members the option of transferring to the Old Mutual Staff Retirement Fund, a defined contribution fund and advised that a 30% enhancement would be granted to members who elected to transfer.
5. The complainant however elected to remain in SAMLAS.

6. In 1998, the unit trusts division of Old Mutual for which the complainant worked undertook a restructuring exercise resulting in, amongst others, the complainant's retrenchment.
7. The rules of SAMLAS do not specifically provide for retrenchment benefits. However Section B 2 of rule XV reads:

Early Retirement

- (ii) Any Officer of the Society may retire or be retired by the Society at any time within the five-year period immediately preceding the Officer's Normal Retirement Date

8. The complainant was within 5 years of his normal retirement age in 1998 and Old Mutual accordingly decided to retire him early in terms of the above rule. This was, according to the fund, to the advantage of the complainant since it meant that as a pensioner, he remained a member of the fund and was therefore entitled to continue his membership of the Old Mutual Staff Medical Aid Fund.
9. Rule XVI 1 (a) governing early retirement benefits reads in part:

- 1 (a) the Pension of an Official who retires or is retired from the service of the Society
 - (i)
 - (ii) shall for each year of service be two per cent of the average annual pensionable earnings received by him during the last two years of such service.

10. Section 2(e) of rule XVI determines the reductions to be applied to members who retire early. It reads:

2 (e) The pension payable in the case of an Officer who retires or is retired in terms of either Subsection 2 or 4 of Section b of Rule XV shall be calculated in accordance with the formula:

$$P = B \times F\%$$

in which P is the pension to be determined

B is a pension determined in accordance with Subsection 1(a)(ii) or 2(b) according to whether the retiring Officer is an Official or a Whole Time Agent, respectively

F is a percentage determined by applying the formula

$$100 - \left(\frac{A \times 2.5}{12} + \frac{B \times 4}{12} \right)\%$$

where A is the number of completed months to a maximum of 60 between the Officer's actual date of retirement and his Normal Retirement Age, and

B is the number of completed months (if any) in excess of 60 in the aforesaid period,

Provided that where an Officer who is retired by the Society due to ill-health or incapacity,

(ii) is aged 60 and over and was in receipt of a disability income benefit immediately prior to his retirement, the value of Factor shall be zero;

- (iii) is aged 60 or over and would, had he been under age 60, have been eligible for a disability income benefit, the value of Factor A shall be zero;
 - (iv) is retired more than five years prior to his Normal Retirement Date, the Society may at its discretion direct that the value of Factor B shall be zero.
- 11. Old Mutual's retrenchment package provides for a cash lump sum payment depending on a member's years of service. However for members who elected to remain in SAMLAS and who qualify for early retirement in terms of the rules, their lump sum is applied to extend their period of service and thereby enhance their benefit. In this extended period they remain an employee of Old Mutual.
- 12. The complainant's severance package extended his pensionable service by 10 months from 1 October 1998 to 31 July 1999 and therefore although he stopped working on 1 October 1998, he officially retired on 1 August 1999.
- 13. The complainant's normal retirement date in terms of the rules was 1 April 2002. Therefore the reduction factor of 2,5% contained in the reduction formula ought, in terms of rule XV 2(e), to have been applied for a period of 2 years and 7 months. However the fund applied it to a shorter period of 2 years and 4 months, that is, up to the complainant's 65th birthday on 27 December 2001. The rules further state that the normal retirement date shall mean the first day of April coinciding with or immediately following the attainment of the Normal Retirement Age of 65. In the complainant's case, this was 1 April 2002 since his 65th birthday is on 27 December 2001. Therefore the fund in fact granted him more pensionable service than they were obliged to in terms of the rules.

14. The complainant's average salary over the last two years of service was R131 264 per annum (R10 938 per month) and the reduction factor of 2,5% applied to the period of 2 years and 4 months reduces his benefit by 0,0583%. A quote dated 26 January 1999 shows that on this basis, the complainant's monthly pension will be approximately R9 322.00 per month if he does not commute his pension.
15. The complainant's complaint is that the fund should not have reduced his pension by the 2,5% reduction factor since he was retrenched and therefore retired involuntarily; that he was prevented from completing service to normal retirement age through no fault of his own and on that account the fund should have calculated his pension as if he retired at his normal retirement age on 1 April 2002; he would thereby have 48 years pensionable service as opposed to 45 years and 5 months; that the rules do not specifically state that reduction factors should be applied in the case of a member who is retired early due to retrenchment. Therefore, according to the complainant, the rules should be interpreted in his favour such that where a member retires early due to retrenchment, no reductions are applicable. Finally, he claims the fund should not have used his average salary in the 2 years prior to retirement but his projected final salary as at 1 April 2002, that is, his salary as it would have been at the date of his normal retirement date.
16. The complaint is summed up by the complainant as follows:

Early retirement was imposed upon my by Old Mutual and was not voluntary. I am of the opinion that I should be put in a position equal to a pension calculated on a projected salary with years of service projected to my normal retirement date 1.4.2002 without penalties.
17. A quote from Old Mutual dated 10 February 1999 shows that had no reduction

factors been applied to the complainant's pension, his monthly pension will be approximately R9 899.00 per month. Thus he will receive approximately R500 per month more.

18. The complainant's contention is essentially that since the complainant was forced to terminate his employment with Old Mutual, he is entitled to a pension benefit as if he completed service to retirement age.
19. However this presupposes that the complainant had a right not to be retrenched. Since, according to the complainant, that right was infringed, his argument is that he is entitled to be placed in the position he would have been had the right not been so infringed, that is, if he had not been retrenched and continued working until retirement age.
20. The complainant's supposition is however incorrect for an employee does not have the right not to be retrenched. In any event, this aspect of the complaint is outside my jurisdiction since it does not relate to the administration of a fund or the investment of its fund or the application and interpretation of its rules.
21. My jurisdiction extends only to the question of whether or not the complainant is entitled to more than that which the fund says he is entitled to in terms of the rules.
22. I am satisfied that he is not for the following reasons:
 - 22.1 The rules do not provide for any special retrenchment benefits from the fund.
 - 22.2 There were consequently two choices in the complainant's case. Old Mutual could either put the complainant on early retirement in terms of

rule XV or the complainant could elect to withdraw from the fund and receive a withdrawal benefit in terms of rule X.

- 22.3 The early retirement benefit was clearly more advantageous to the complainant since it was a more generous benefit and in addition meant that he remained on the fund's medical aid scheme.
- 22.4 However the complainant cannot have his cake and eat it. If he wants the advantages of the early retirement benefit, he is also subject to the rules governing it. This includes the reduction factors applied to early retirement benefits to account for the fact that the pension is being purchased at a younger age and thus payable over a longer period of time and also the fact that the benefit has had less time to accumulate to ensure the defined benefit at retirement. The early retirement benefit option comes with the rules governing it irrespective of the reason for retiring early with the exception of members who retire early due to ill health. In that case, no reduction factors are applicable in terms of the rules. However the complainant does not fall into this latter category and the reductions therefore apply.
- 22.6 It should also be remembered that the complainant was compensated by virtue of Mutual's retrenchment policy to pay a lump sum severance package to retrenched employees and apply it to extend the member's period of pensionable service. The greater the period of service, the greater the pension received in terms of the defined benefit formula. The impact of the reduction factors is also thereby reduced.
- 22.6 Finally, the rules clearly state that average salary over the last two years of service is applicable in the calculation of the early retirement benefit. When the complainant elected to remain in SAMLAS in 1997, he was

informed that the basis of the fund would remain largely the same. There was therefore no reason for him to believe that the basis of the calculation of benefits in SAMLAS would change.

23. Therefore I am satisfied that the complainant is not entitled to more than the early retirement benefit calculated in terms of the rules, that is, with the applicable reduction factors and using average salary over the last two years of service.

24. The complaint is accordingly dismissed.

DATED at CAPE TOWN this 21st day of DECEMBER 1999.

.....
JOHN MURPHY
PENSION FUNDS ADJUDICATOR