

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.: PFA/GA/192/98/NJ

In the complaint between:

B W Colledge

Complainant

and

LTA Limited 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 complaint relates to an early withdrawal benefit and whether such benefit unfairly discriminates against the complainant.

The Complainant is B W Colledge, an erstwhile member of the respondent and an ex-employee of LTA Limited, a participating employer in the respondent.

The Respondent is the LTA Limited Pension Fund (hereinafter referred to as “the fund”), a pension fund duly registered in terms of the Pension Fund Act of 1956. The fund is represented by Mr J Nevin, the chairman of trustees of the fund.

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 resigned from his employer, LTA Limited, with effect from 30 September 1997 after 24 years of service and for reasons of career advancement. Throughout this period the complainant was a member of the fund.

Complaint

This complaint relates to the interpretation and application of the rules of the fund and alleges that a decision of the fund was an improper exercise of its powers and/or dispute of law has arisen between the parties.

At the time of the complainant's resignation, rule 27 was the relevant rule applicable to him, which reads:

27. PERSONS LEAVING SERVICE

(b) Resignation/Discharge

- (i) If a Member otherwise leaves or is discharged from his Employer's service except as provided in Rule 22, 23, 24 or 26, he shall be entitled to a lump sum equal to the Member's Accumulated Contributions, together with an amount equal to the surrender values as at the Fixed Date of his Employer of any policies on his life ceded to the Fund under Rule 28, plus Simple Interest at the rate of 3% (three per cent) per annum on the latter amount.
- (ii) The Member shall also be entitled to an amount equal to the following percentage of the Employer's contributions on the following scale:

Completed Years of Pensionable Service as defined herein-before

Proportion of Employer's contributions returned excluding Special Payments for Past Service

3 (minimum)	10%
4	20%

and so on, increasing by 10% each year of Pensionable Service to a maximum of

12 (or more)	100%
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Rule 22, 23, 24 and 26 respectively deals with benefits upon normal retirement, early retirement, death and ill-health.

Member's accumulated contributions is defined as:

the total contributions made by the Member to the Fund under Rule 20(a) increased by 1/25 (one twenty fifth) thereof for each completed year of pensionable service.

Rule 20(a) regulates the member's contribution to the fund. In accordance with rule 27, the complainant's benefit was computed as follows:

7
(
181 016.28
b
)
(
i) Members
Accumulated Contributions

354
173 775.63 791.91

Members' own contribution
Add: 4% thereof per year of service (96%)

27(b)(ii) Portion of Employer's contribution 231 377.17

Total Employer Contribution
Portion refundable : 10% of contributions
for third and each subsequent year of
service to maximum of 100%

231 377.17
100%

REFUND AMOUNT PAID

R586 169.08

As at 30 September 1997 the complainant's actuarial reserve value amounted to R1,406,511.00. However, he received his benefit in terms of rule 27 in the sum of R586,169.08.

The complainant was dissatisfied with his withdrawal benefit. He argues that the fund is obliged to act with impartiality and equity in respect of all its members and beneficiaries. The complainant states that the rules of the fund discriminate against the members who resign compared with other categories of members and that therefore such rules should be amended. He reasons that since many employers today are providing their employees with the option to transfer their actuarial reserve in defined benefit funds to defined contribution funds, thus ensuring that an employee actuarial reserve value is protected irrespective of his employers' identity then therefore the rules of the fund should be amended to ensure that on early withdrawal (and implicitly under any circumstances) a member should receive no less than the value of his actuarial reserve. By refunding an amount to members who have withdrawn early which is less than their actuarial value at the time of the withdrawal the respondent is building up a surplus in the fund, which the complainant states, is the "property of the employees who have withdrawn early".

Secondly, the complainant is unhappy that no interest is payable on the employer contributions. He argues that the rules of the fund are silent on this issue and it is only "equitable" that interest should be reimbursed. He asserts that an employee with more than 12 (twelves) years' service is progressively penalised if he withdraws from the fund before retiring age due to the erosion from inflation on the amount due to him in terms of the rules of the fund.

Thirdly, the complainant disputes the application of the interest factor on his own contributions. He argues that he is entitled to his own contributions plus interest thereon of the rate of 4% per annum.

Mr Nevin, responded to the complainant's arguments as follows:

...the rules do not unfairly discriminate between the members, the committee has in fact insisted that no distinctions be made between members eg. Senior executives, age at joining etc.

In any given circumstances one type of benefit may be superior to another. For instance a member's death in service benefit may be greater than if that member had retired or resigned on the day of his death - few would argue this as unfair discrimination. Similarly if a member on retrenchment is eligible to receive a greater benefit than if he had resigned this is reasonable in the circumstances as he has no effective control over his retrenchment and may well be unemployed for some time and/or not be eligible for an equivalent retirement fund.

Mr Colledge resigned his position with the stated objective of taking up a better offer (including retirement benefits and other employment related benefits). In resigning he had opportunity to assess the effect of resignation before hand - something he could not do if retrenched.

Mr Colledge's reference to Actuarial Reserve in the context of transferring from a defined benefit to defined contribution fund is not relevant. Conditions of transfer will vary from one offer of transfer to another, no change in employer occurs, restrictions may apply to subsequent withdrawal etc...

...Actuarial reserve is not necessarily relevant or suitable to a resignation refund. It represents a fund value based on actuarial and fund valuation assumptions and allows for the funds experience in respect of death in service, withdrawals, retirements, and pensioner life expectancy etc.

The actuarial reserve is the discounted value of the benefits which the fund is expected to pay out in the future on account of members withdrawing, dying or retirement from active service.

The calculation thus takes into account that at withdrawal, according to the probabilities of withdrawal, a member will receive the aggregate of his contributions with interest plus the aggregate of the employer's contributions; at death, according to the probabilities of death, he will receive the aggregate of his contributions with interest; and at retirement, according to the probabilities of survival to this age, he will receive a pension.

...Mr Colledge's contention that "the rules are silent on the matter of interest on the refund of the employers contributions, but it is only equitable that interest should be reimbursed..." was not an error of omission and this was verified with the fund's actuary. It is also clear from the fund's rules that where interest is applicable this is always stated clearly in the relevant rule...

...Mr Colledge is incorrect when he refers in his application to your that the refund allows for simple interest at 4 per cent per annum on member's contributions...

...the 4% derives from the definition of "member's accumulated contributions", and is calculated on the aggregate of the member's contribution. It is not an historical interest per annum.

The complainant seeks the following relief:

- < the rules of the fund should be amended retrospectively to ensure that, on early withdrawal, a member receives his actuarial reserve (the date of retrospectivity is not stipulated by the complainant but it is taken that this date is to be prior to his date of resignation), or
- < interest at an equitable rate should be refunded on the employer's contributions in terms of the current rules; or
- < an employee who has withdrawn early from the fund has a claim on the surplus of the fund which amount should be determined by calculating the difference between the amount refunded (presumably in terms of the rules as they exist) and his actuarial reserve, at the date of withdrawal, plus interest until the time of distribution.

Jurisdiction

The fund raised a point *in limine* relating to the jurisdiction of this tribunal to determine this matter. It is contended that the complaint does not constitute a complaint as defined in the Act in that the definition of complaint in the Act presupposes the applicability of the rules and allows only for an attack on their application. Since the relief sought by the

complainant constitutes an attack on the rules themselves and not the application of the rules, it is submitted I do not have jurisdiction to determine the matter.

Section 30E(1)(a) provides that in order to achieve his or her main object, the Adjudicator may make any order which any court of law may make. The binding nature of the rules of the pension fund is qualified by other provisions of legislation, including Chapter V(A) of the Pension Funds Act which grants me the power to strike down rules which are unreasonable or unconstitutional.

Any complaint that a rule is invalid on the grounds of public policy (*contra bonos mores*), unreasonableness or unconstitutionality is a complaint which relates to the interpretation and application of the rule and alleges a dispute of law. As such, this complaint falls within the definition of the complaint in section 1 of the Pension Funds Act. Such a complaint would require an interpretation of the rule's purpose and the proportionality of its means and effects.

Accordingly, I have jurisdiction to determine this matter.

Analysis of evidence and argument

Dealing with the complainant's first argument it is necessary to commence with a brief explanation of the principles a defined benefit fund. The underlying philosophy of the defined benefit fund is that the members benefits are specified. The fund bears the liability (underwritten by the employer) towards the members in respect of these specified benefits. A certain responsibility accompanies the benign paternalism inherent in the assumption of the risks. The tendency to move from defined benefit funds to defined contributions funds is rendering the paternalistic philosophy increasingly anachronistic. The fund, having being structured in this paternalistic mould, is required to ensure that expected benefits will be available for payment to members in terms of the rules. In order to ensure such asset availability actuaries effect calculations which are based on assumed data and result in reserve values being established which are in effect merely theoretical. The benefits are defined in the rules of such funds and an

actuarial calculation is performed to estimate the amounts that are required to be paid to the fund to enable it to meet the benefit when it becomes due. The actuarial assumptions for valuing the fund assume a level of resignations, debts, retirement etc. In view of the foregoing it is clear that there are no rights attaching to specific payments made into a defined benefit fund but rather rights to certain benefits quantified in terms of the rules of the fund. It cannot be said that a member of a defined benefit fund is, *per se*, entitled to his actuarial reserve value.

It is clear that members withdrawing early are subjected to differential treatment when leaving under different circumstances such as retrenchment or retirement in that latter members transferring to another pension fund or retirement annuity are credited with their actuarial reserve value. Does such differential treatment constitutes unfair discrimination?

In this instance the complainant has simply supplied me with details of the quantum paid to him in terms of the rules and the quantum of his actuarial reserve. Mr Nevin has sought to justify the differential treatment by having reference to prevailing actuarial practice, explanations of the asset base and overall structure and benefit entitlement of a defined benefit fund as well as an illustration that certain classes of member may well require a benefit structure superior to those of others based on their particular circumstances be that retrenchment or later retirement, by which stage the greater benefit granted towards the final years of active membership would have an impact upon the benefit available.

The objective which the rule in this matter is designed to serve is to ensure the availability of the benefits promised based on the actuarial assumptions utilised for the purposes of the specific defined benefit scheme. The primary purpose of the fund is to provide retirement benefits and members who voluntarily withdraw early forfeit certain rights as the intention is to provide for retirement. The objective is, therefore, consistent with the notion of the defined benefit scheme. As I have said in previous determinations, the question of ungenerous withdrawal benefits is a vexed question which calls out for urgent reform by means of legislation. The ordinary rights adjudication process is neither

capable nor suited to carry out reform of this nature.

Accordingly, I find that whilst there is differentiation, this in itself does not imply unfair discrimination. The complainant has been paid his benefit in terms of the rules of a defined benefit fund which while ungenerous are reasonable under the circumstances and may be justified in the context of the defined benefit fund and the manner of calculation applicable. Since there has been no unfair discrimination against the complainant I cannot grant him any relief based on his first argument.

Turning to the complainant's second argument, it is clear that rule 27 does not allow for any interest on employer contributions. The absence of any provision providing for interest on employer contributions does not mean that the fund is "silent" on this issue. Rather, it means that no interest is payable on the employer's contribution. Further, the complainant received a full return of his employer contribution even though part of the employer contribution was used for administration and other related costs. In the light of this and bearing in mind the nature of the fund I find no basis to award the complainant interest on employer contributions.

Dealing with the complainant's third argument, in terms of the definition of "members accumulated contributions", it is clear that the total contributions made by the member to the fund are increased by 1/25 (4%) thereof for each completed year of pensionable service. Thus, the members contributions are increased by a proportion of the contribution made by him on an annual basis. Hence, the 4% figure is not a reference to an interest rate as contended by the complainant. Thus, I find the complainant's accumulated contributions and increase thereon was correctly determined and computed.

Accordingly, for the foregoing reasons the complaint is dismissed.

DATED at CAPE TOWN this 7th day of SEPTEMBER 1999.

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John Murphy
PENSION FUNDS ADJUDICATOR