

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.: PFAWE/4/98

In the complaint between:

P Chambers

Complainant

and

Fedsure Group Staff Income Security Scheme

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 complainant is Mr Phillip Chambers, who commenced employment as a Senior Broker Consultant with Fedlife Assurance Limited, the principal participating employer in the respondent in February 1987.

The respondent is a Group Income Security Scheme permanently established for the benefit of its members with the object of providing benefits for its members in the event of their disablement. As such, it falls within the definition of a pension fund organisation as defined in section 1 of the Pension Funds Act of 1956.

The complainant lodged a written complaint with the office of the Pension Funds Adjudicator on 17 December 1997. As set out below, the complaint consists of two

separate causes of action. The complainant has complied with the provisions of section 30A(1) which requires a complainant to lodge a written complaint with the fund or the employer who participates in the fund before lodging it with the Pension Funds Adjudicator. The respondent has properly considered the complaint and has replied to it in writing as required by section 30A(2).

After an exchange of correspondence consisting of a number of letters and other documentation, I met with the representative of the respondent, Mr J Peters, at the Land Claims Court in Johannesburg on 12 March 1998. I met with the complainant at my offices in Cape Town on 3 April 1998. Neither party was legally represented. The complainant was assisted by Mr M Wakeham.

The hearings were of an informal nature and neither party adduced oral evidence under oath. In determining this matter therefore, I have relied exclusively on documentary evidence and arguments put to me in writing and orally.

Having completed my investigation I have determined the complaints as follows. These are my reasons.

Complaint I

This complaint relates to the interpretation and application of the rules of the respondent and alleges that a dispute of fact and law has arisen in relation to the complainant's entitlement to benefits provided for in the rules. The issue is whether the respondent is obliged to include the amount which the complainant received as a housing subsidy as part of his salary when calculating his disability benefit.

Sometime during 1991 the complainant contracted a viral infection which negatively affected his health. After consultation with various specialists and doctors, he was diagnosed as suffering from *Myalgia Encephalomyolitis*, also known as Chronic Fatigue Syndrome (ME). The illness is considered a modern one by virtue of its increased incidence in recent years. The initial illness may be caused by an infection, but other

events are often associated, such as traumatic surgery or various life crises. Additional stresses alter the immune system's response to the infection so that it functions incorrectly. Most ME sufferers recover eventually, though recovery is often very slow. There is no specific treatment for the illness but there are a number of steps that can be taken to alleviate the symptoms and to help expedite the recovery. Essentially patients are required to avoid stress and a combination of rest and stress management, as well as an improved diet will facilitate speedy recovery. Many ME sufferers are compelled by their circumstances to give up work.

As a consequence of his condition, the complainant's work performance deteriorated. Eventually on 7 August 1991, the employer convened a hearing to investigate the complainant's work performance. There, he was found "guilty" of not meeting his production targets. However, at this stage, he was suspended from duty, to afford him the opportunity to submit medical evidence in support of his claim that he was incapacitated by his illness. Before he was able to furnish the employer with sufficient medical evidence, the complainant was dismissed on 30 August 1991. Shortly thereafter the employer reinstated him to allow him to obtain the necessary evidence. At the same time he made application to the respondent for a disability benefit.

On 25 September 1991, Mr T Douglas, the Senior Manager: Industrial Relations of the employer, addressed a letter to the complainant advising him that the employer had agreed to extend his employment until 15 October 1991 in the hope that all medical information would be available before that date to make an informed decision.

On 17 October 1991 Mr Douglas again wrote to the complainant confirming that his employment had been extended to 31 October 1991 to enable a certain Dr Smith to provide the underwriters of the Income Security Scheme with further information.

Eventually on 29 October 1991, Mr Douglas addressed a letter to the complainant dismissing him from his employment effective from 30 November 1991. The letter reads as follows:

The review panel has considered all the evidence and available medical reports in

depth. Two aspects were considered; operational productivity requirements and clinical aspects.

From an operational point of view the empirical results show that you have fallen far short of the required level of production, not only this year but prior to that indicating clearly that management have been most considerate in past. Your appeal was based on ill-health/incapacity.

On the basis of the above the review panel found that your dismissal for operational requirements should be amended to termination for operational reasons due to unsuitability and incapacity. We hereby give you notice that your services will be terminated on 30 November 1991.

In the event that additional evidence be submitted to the insurer prior to 30 November 1991 and should this evidence be found to be sufficient to support the ISS application already submitted the benefit of ISS will be allowed.

Subsequent to his dismissal the applicant launched legal proceedings for his reinstatement. Negotiations in relation to the various disputes arising out of his employment endured for a period of almost 4 years after the termination of his employment. Eventually, on 24 August 1995, the respondent acknowledged liability and admitted the complainant's claim for a disability benefit. This agreement admitting the claim was facilitated by the Honourable G P C Kotze, the then Ombudsman for Life Assurance.

The agreement was concluded in Judge Kotze's offices at a meeting consisting of Mr Leon Steenberg of Fedlife Assurance Limited, the complainant, Mr Myles Wakeham (the complainant's representative) and Judge Kotze. At the end of the meeting, Mr Steenberg signed a document in the following terms:

On behalf of Fedlife Assurance Limited and duly authorised thereto, I, Leon Steenberg, confirm that it has been agreed that the claim of Mr P H L Chambers dealt with hitherto by the Ombudsman for Life Assurance has been settled in full in terms of the rules of the Fedsure Group Income Security Scheme commencing on the 1st day of August

1991.

DATED at CAPE TOWN this 24th day of AUGUST, 1995.

The document is signed by Mr Steenberg and witnessed by Judge Kotze and one other person whose signature is not entirely legible. The document was not signed by Mr Chambers or his representative Mr Wakeham.

On 5 September 1995 a "Claim Assessment Certificate" was sent to the complainant as proof of acceptance of the admission of his claim. The certificate describes the complainant's date of disablement as 31 July 1991. In terms of the rules a three month waiting period is stipulated. This means that the benefit became payable with effect from 1 November 1991. The complainant thereafter received a payment of the full amount of the benefit retrospective to 1 December 1991. The reason the complainant did not receive the benefit for the month of November 1991 was that he had received a salary for that month.

On 18 October 1995 the complainant addressed a letter to Mr Peters of Fedlife Assurance Limited contesting the correctness of the date of disability as stated in the Claim Assessment Certificate. He maintained that he was in the employer's employ and contributed towards the group benefits until 30 November 1991.

The complainant's concern about the inception date of his disability is of considerable importance to him as the rules of the respondent provide for a greater benefit by including any subsidy granted in terms of the Fedsure Staff Housing Scheme within the benefit with effect from 1 October 1991 - (the rule is set out below).

The respondent has consistently taken the view that the complainant's date of disablement was 31 July 1991. Furthermore, it maintains that the complainant agreed to this date of disablement at the meeting in the office of the Ombudsman for Life Assurance on 24 August 1995.

In response to the complainant's written complaint, Mr Peters states as follows:-

Mr Chambers' service was terminated at 31/07/91 as a result of his inability to perform functions reasonably expected of a sales consultant, his position immediately prior to the disciplinary hearings. There is no doubt that his inability to perform his job resulted in his dismissal.

Mr Chambers however contended that ill health prevented him from satisfactorily performing his duties. In fairness to Mr Chambers, the employer agreed to pay him a salary WHILST affording him the opportunity of obtaining the necessary ISS claim documentation for submission to the underwriter. The salary was NOT in lieu of services rendered but at the same time it would have been unreasonable to dismiss an employer (sic) for non-performance when the reason for the non-performance was, in his opinion, health related and a suitable policy existed to claim against.

The date he was last able to perform the duties associated with his job function was therefore prior to 31 July 1991 and the remuneration paid for the period 01/08/1991 to 30/11/1991 was not Earned Income but rather a conciliatory gesture on the part of the employer while Mr Chambers put together a case for possible ISS benefits.

In an earlier letter dated 6 November 1995 addressed to Mr Chambers, Mr Peters further elaborates on the issue concerning the date of disability and its impact on the payment of benefits. He states:

In terms of the rules of the Fedsure Income Security Scheme, the date of disability is determined in terms of rule 8.2.1 and I quote:

“A member shall be considered to be totally disabled if at the end of the waiting period, in the opinion of Fedlife acting on medical evidence or other advice, he is considered unable to perform the duties of his own occupation through illness or injury....”

The issues that arose (as with all ISS claims)

1. the end of the waiting period which in effect will work back to the start of the waiting period (date on which member is considered unable to

perform his duties) and,

2. whether the medical evidence justifies the admittance of a claim.

The medical evidence supported the admission of the claim but the date on which the member was not able to continue his contractual obligation as an employee i.e. his work output was determined unsuitable as a result of illness, was determined by Fedlife (as underwriter) as the last day the member was able to perform his duties satisfactorily - 31/07/1991 (a disciplinary process arose as a result).

Although you continued in Fedlife's employ until a later date, a disciplinary hearing concluded that you were last able to perform your contractual duties as a senior consultant on 31 July 1995 and the start of payment date is thus set at 01/12/1991.

As stated, and as shall become further evident presently, the date of the complainant's termination of service or his disablement will have a significant impact on the amount of benefits owing to the complainant. The crisp issue for determination in this complaint, therefore, is whether that date was 31 July 1991 or 30 November 1991. Moreover, it is necessary to decide whether the complainant at the meeting with the Ombudsman agreed to the relevant date being 31 July 1991. And, if so, the effect such an agreement would have upon his entitlement in terms of the rules.

Analysis of the evidence and the argument

Rule 8 of the respondent's rules govern a member of the scheme's entitlement to disability benefits. The relevant part of the rule reads:

DISABILITY BENEFIT

- 8.1 A member, as specified in part 2 of the Schedule, shall qualify in terms of clause 8.2 hereunder for the disability benefit, as set out in Part 4 of the Schedule, PROVIDED that the benefit shall only become due in respect of him after the expiry of the Waiting Period defined in Part 1 of the Schedule, unless such period falls after the Expiry Date when no benefit will become payable.

8.2 Subject to the provisions hereof:

8.2.1 A member shall be considered to be totally disabled if at the end of the Waiting Period, in the opinion of Fedlife acting on medical or other advice, he is totally unable to perform the duties of his own occupation through illness or injury and suffers a loss of earned income as a result thereof.

8.2.2 A member shall, after 24 months of continuous disablement in terms of 8.2.1. above, or 8.3 below (which period shall be further extended by any period of full recovery in terms of 8.5 below before the expiration thereof), continue to be considered totally disabled if in the opinion of Fedlife acting on medical or other advice, he, by reason of illness or injury, is rendered incapable of pursuing any occupation for which he is reasonably suited or may become suited by virtue of his experience, knowledge, training, status or ability.

The waiting period is defined in terms of the rules to mean the first three months of disablement commencing on the date on which the member becomes disabled and after which the benefit in terms of rule 8 shall become payable.

As stated in the rule, the amount of the disablement benefit is computed with reference to part 4 of the schedule. Amongst other things the schedule provides that the monthly disability income shall be an amount equal to the percentage of the member's monthly *salary* or portion thereof stated in the table at the date of disablement, but not exceeding the maximum monthly benefit. In the complainant's case, he was entitled to 100% of his monthly salary for the first 21 payments and 75% thereafter.

The term "*salary*" is defined in rule 1 of the rules to mean:

The annual rate of salary or wages paid to a member, plus, with effect from 1 October 1991 any subsidy granted to the member in terms of the Fedsure Staff Housing Scheme and, with effect from April 1992 his fixed annual bonus.

The complainant's pay advice of 20 November 1991 reflects that he received a housing subsidy to the value of R750.00 per month.

Part 4 of the schedule also provides that:

Provided further that should a member also qualify and be paid a disability benefit under the Fedsure Mortgage Protection Scheme his salary for the purposes of this part of the schedule shall be deemed not to include any amount granted as a subsidy in terms of the Fedsure Staff Housing Scheme.

Whilst the complainant contributed to the Fedsure Mortgage Protection Scheme, he has not been paid a disability benefit under the scheme. Accordingly, the proviso does not apply to him and thus the amount of his subsidy cannot be excluded from his salary on this basis.

It would appear from the definition of *salary* in the rules, therefore, that the only basis for excluding the housing subsidy from the computation of his benefit would be that he was not in receipt of a salary at 1 October 1991; those members in receipt of a salary on or after 1 October 1991 being the only ones entitled to have the subsidy included in the computation of their benefits.

Any argument that the complainant's services were terminated on the 31 July 1991 is not borne out by the evidence. The letters addressed to the complainant by Mr Douglas at the time of his dismissal make it abundantly clear that his "services will be terminated on 30 November 1991". Moreover, the date of termination of services is confirmed in a letter addressed by the respondent's attorneys to the complainant's attorneys dated 10 December 1991. The letter makes certain proposals in an attempt to settle the dispute.

In paragraph 1 of those proposals the attorney states:

Your client will until 31 January 1992 be afforded the opportunity of presenting further

medical evidence to the underwriters of the pension fund as to his medical condition as *at the date of the termination of his services (i.e. 30 November 1991)* in order to attempt to convince them that he is entitled to receive the benefits of ISS. (emphasis supplied)

Paragraph 5 of the proposals reads:

In the event of your client convincing the underwriters that he was, indeed, ill as he claimed, he will receive ISS benefits retrospective to the date when his services terminated.

When the claim was eventually admitted, the complainant received benefits retrospective to 1 December 1991 thereby confirming that the respondent viewed 30 November 1991 as the date on which the complainant's service terminated.

Accordingly, there can be little doubt that the true date upon which the complainant's services were terminated was indeed 30 November 1991, and, thus he was in receipt of a salary on 1 October 1991.

In his response to the complainant's complaint, Mr Peters attempts to explain away this fact by arguing that the salary paid to the complainant between 31 July and 30 November 1991 was not "in lieu of services rendered", essentially arguing that the date of the complainant's suspension was the last day the complainant earned an income in respect of the performance of his contractual obligations, that being the last day he actually rendered services - a fact the complainant denies.

Whatever the case, Mr Peters' interpretation is a misconstruction of an employee's principal obligation under the contract of employment. The employee's principal obligation is to make his or her services available to the employer for the duration of the contract. The employee's entitlement to remuneration is generally dependant on the availability of his or her services to the employer and not on the actual rendering of services. (See *Johannesburg Municipality v O'Sullivan* 1923 AD 201). The evidence in

this matter reveals that it was the decision of the employer to suspend the employee on full pay. As such, the employer waived its rights to demand the employee's services. Nor did the complainant make himself unavailable for service. At most, there was a *partial* supervening impossibility of performance. The employer's response to the partial impossibility of performance was to suspend the employee pending an investigation.

Insofar as it may be argued that the relevant date for determining the issue is the date of disablement, it should be noted that the rules of the respondent do not define the date of disablement. Rule 8 provides simply that the benefit will be payable at the end of the three month waiting period if the applicant is deemed on medical advice to be "*totally* unable to perform the duties of his own occupation through illness or injury **and** suffers a loss of earned income as a result thereof" (my emphasis).

It was only at the end of the investigation that the complainant was deemed totally disabled.

In other words, the date of disablement should be construed as the date on which the complainant began to suffer a loss of earned income as a result of being unable to perform his duties. His duty was to make his services available. He earned his income by making his services available until 30 November 1991. He suffered a loss of his income after that date because his employer determined then finally that he was totally unable to perform his duties. Such a construction is in keeping with the overall purpose of the scheme which, as its designation indicates, aims at *income security*. The insurable event is the loss of income by virtue of disability. In this case that event occurred on 30 November 1991.

Accordingly, I am satisfied that the true date of disablement was 1 December 1991 and that the benefit would in the ordinary course of events have been payable to the complainant after the completion of the three month waiting period. Consequently, in terms of rule 8,1 read with the definition of the waiting period the benefit should have become due on 1 March 1992.

Thus, even if we accept the date of disablement as the relevant date, that date was also after 1 October 1991, meaning that on this argument too the housing subsidy should have been included in the computation of the benefit.

This leads us to the question of the alleged agreement entered into on 24 August 1995. The only evidence of such an agreement is the document signed by Mr Steenberg and witnessed by Judge Kotze as set out above. The complainant and his representative, Mr Wakeham denied that there was an agreement to the effect that the date of disablement would be 31 July 1991.

Given that the complainant was in fact disabled in terms of the rules with effect from 30 November 1991, the evidentiary burden must surely rest on the respondent to prove an agreement to the contrary as well as the contents of that agreement.

Even were I to accept that the document constituted an agreement between the complainant and the respondent, its terms are not unambiguous. The "agreement" is to the effect that the claim of the complainant has been settled *in terms of the rules* of the scheme commencing *on the 1st day of August 1991*. This could mean either that the salary date or the date of disablement was agreed to be 1 August 1991 (and thus the subsidy would not be included); or alternatively it could mean that the date had to be determined in terms of the rules (i.e. 30 November 1991) and that the disability payments should commence with effect from 1st August 1991.

In other words the alleged agreement is problematic on two counts. First of all, there is insufficient evidence to support the respondent's contention that the complainant agreed to the relevant date being 31 July 1991. Secondly, the significance of the date mentioned in the document is not clear in its purpose or effect.

In regard to the former, it should be noted that when the complainant contested the date shortly after he received the Claims Assessment Certificate in October 1995 the respondent failed to take the point that the complainant had agreed to the earlier date. Indeed, Mr Peters, in his letter of 28 November 1995, directly in response to the

complainant contesting the date, argued that the claims assessor determined the date as being the date on which the complainant was last able to fulfil his contractual obligations as an employee. Which, contrary to Mr Peter's view, was in fact 30 November 1991. It was only some time later (June 1996) that Mr Peters began to assert that an agreement had been reached on the date of disability. One can reasonably assume that had there been genuine consensus and an unequivocal agreement, this would have been raised earlier in the correspondence and negotiations.

Accordingly, I find that the respondent has failed to prove on a balance of probabilities that the complainant agreed to a date of disablement earlier than the date on which he actually became disabled in terms of the rules of the fund. In view of the fact that no agreement has been proved it is unnecessary to examine the effect such an agreement would have had on the application of the rules of the fund.

Because the date of disablement was in fact and in law 30 November 1991, and further because the complainant was in receipt of a salary at that date, I find that the respondent was obliged to include the complainant's housing subsidy in his salary for the purpose of computing his disability benefit.

However, I have insufficient information at my disposal to determine the exact amount owing to the complainant as a consequence of the omission of this amount from the computation of the benefits from the date of disablement. The complainant furnished me with a computation indicating that he is entitled to an amount of R87 396,88 in respect of the subsidy, computed at a constant R750,00 per month with interest compounded at variable rates. Unfortunately, the complainant did not include this computation within his original complaint and the respondent has not had an opportunity to deal with it. It is necessary, therefore, for me to afford the respondent an appropriate opportunity to furnish me with its computation of the amount owing. My order takes account of this.

Complaint II

The complainant also complains that he has been denied certain benefits owing to him in terms of the medical aid scheme of which he is a member. After his disability claim was admitted in 1995, the employer reinstated the complainant as an employee with effect from 1 December 1991 and all arrear salaries and relevant deductions were calculated. He then received a net amount for all arrear salaries less the deductions. Subsequent to his reinstatement the complainant submitted his medical claims for the period 1 December 1991 until 30 December 1995. These amounted to more than R20000,00. The medical aid scheme has refused to pay him on the grounds that the medical claims exceeded the permissible four month period allowable to submit such claims.

Given the complainant's circumstances, the scheme's approach seems somewhat unfair and arbitrary. Unfortunately, however, I have no jurisdiction in respect of medical aid schemes. My jurisdiction is limited to the adjudication of complaints relating to the administration of pension funds as provided for in the Pension Funds Act. Accordingly, I grant no relief in respect of this complaint.

Relief

The order of this tribunal is as follows:-

1. It is declared that the complainant is entitled to have the amount paid to him as a housing subsidy included in the computation of his disability benefit payable in terms of the respondent's rules for the entire period of his disablement.
2. The respondent is ordered to compute the amount owing to the complainant by virtue of its failure to include the amount payable to him as a housing subsidy for the period 1 December 1991 until 30 April 1998 with interest compounded at the applicable prime rate.
3. The respondent is ordered to furnish the Pension Funds Adjudicator and the complainant with a copy of its computation together with a full explanation of its calculation within 7 days of the receipt of this order.

4. The complainant may object to the respondent's computation within 3 days of receiving it. In which event the Pension Funds Adjudicator shall determine the amount payable and the due date of payment.
5. In the event that the complainant does not object to the respondent's computation, the respondent is ordered to pay the amount calculated therein to the respondent on or before 31 May 1998.

DATED at CAPE TOWN this 11TH DAY of MAY 1998.

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Prof John Murphy
PENSION FUNDS ADJUDICATOR