IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.:PFA/EC/57/98/LS

In the complaint between:

M C Wagener Complainant

and

PG Group Provident Fund 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 alleged breach of duty by the fund to invest the complainant's pension benefit in a guaranteed fund as opposed to a market-linked portfolio. No hearings were conducted and therefore, in determining this matter, I have relied on the documentary evidence and the investigation conducted, under my supervision, by my investigator, Lisa Shrosbree.

2. The complainant became a member of the PG Group Pension Fund on 1 August 1969.

3. During 1997, the trustees of the said fund together with the employer, PG Group Plate Glass and Shatterprufe Industries (Pty) Ltd, decided to establish a defined contribution provident fund, namely, the PG Group Provident Fund ("the provident fund"), with effect 1 August 1997. All members of the pension fund were given the option of transferring to the new fund on that date.

4. The fund thereafter embarked upon what appears to have been an extensive communication exercise around the option to transfer to the provident fund which included the issuing of a comprehensive booklet, numerous question and answer pamphlets, a video, slide presentations and a telephone and fax hotline. Members

were also sent individual statements showing their benefits in the pension fund and the estimated amount that would be transferred to the provident fund if they elected to transfer.

5. For members who elected to transfer, they would receive an enhancement of 22% on their actuarial reserve value. Furthermore a retirement reserve would be calculated for each such member to target but not guarantee that his projected benefit as at normal retirement age in the provident fund would not be lower than his projected retirement benefit in the pension fund. This retirement reserve would be paid out in full to members on their retirement, death or retrenchment.

6. In the various communications members were advised that there would not be any investment choice on transfer. However an exception was made for members aged 55 years and over. At a meeting held on 28 May 1997, the trustees decided to permit such members the choice to invest their assets in a guaranteed fund to protect them from market movements.

7. The complainant elected to transfer to the provident fund in a letter dated 10 July 1997. He transferred with a benefit of R849 287.42 calculated as follows:

Actuarial reserve	R774 895.38
22% enhancement	R162 085.66
Retirement reserve	R132 930.00
Total Benefit	R1 069 911.04
Less member contributions transferred to a retirement annuity	R220 623.42
Total transferred to provident fund	**R849 287.42**

8. Since he was under the age of 55, the complainant did not have the choice to invest in the guaranteed fund and his assets would therefore automatically be invested in the market-linked portfolio.

9. However, according to the complainant, at the time he made his election, the principal officer of the pension fund informed him that he could request that his pension benefit be invested in the guaranteed fund and that although this was an option given only to members of 55 years and over, the trustees would in all likelihood grant him a concession in this regard.

10. The complainant accordingly requested the fund in the letter dated 10 July 1997 that his funds be invested in the guaranteed fund. The letter reads:

> With reference to the above, we enclose herewith the option form for the above client. Please also be informed as follows:
>
> A) Mr Wagener is opting for the provident fund, but has queried the values quoted to him on his transfer statement
> B) He has also requested us to approach you with the request of permitting him to transfer his funds into the guaranteed fund, notwithstanding his age of 54 (55 years in April 1998).
>
> We would appreciate your favourable response at your earliest convenience.

11. However it is common cause that the fund did not reply to the complainant's request in part B of the letter.

12. When the stock market crashed in October 1997, the complainant states that he and his financial advisor tried to contact the principal officer of the provident fund on several occasions for confirmation that his pension benefit had indeed been transferred to the guaranteed fund but to no avail.

13. The stock market crashed again in February 1998 and the complainant states that after renewed attempts to communicate with the fund, he learnt that his funds had not been invested in the guaranteed fund as requested by him.

14. In the meantime the trustees had taken a decision at a meeting held on 18 November 1997 to grant wider investment choice to all members by permitting them to switch between the market-linked and guaranteed fund portfolios. After the February 1998 stock market crash, the complainant accordingly elected to transfer his assets to the guaranteed fund effective 28 February 1998.

15. The complainant's complaint is that the fund had a duty to him to invest his assets in the guaranteed fund for the period 1 August 1997 to 28 February 1998 pursuant to his request; that its failure to do so constituted a breach of duty as a result of which he has suffered prejudice in that his pension benefit is lower than it otherwise would have been. (The complainant retired early on 30 June 1998 with a benefit of R1 052 545.43). The complainant accordingly claims an order of damages against the fund to the extent of his alleged loss.

16. In terms of section 7D of the Pension Funds Act a fund has a duty to ensure that adequate and proper information is communicated to the members of the fund, informing them of their rights, benefits, and duties in terms of the rules of the fund. There is also a correlative duty on pension fund members to actively seek information and clarify their position before making a significant decision. I turn to examine whether the fund and the complainant fulfilled their statutory duties and in turn whether the complainant has any basis for his claim.

17. At the time of making his election to transfer to the provident fund, the complainant states that he knew that only members over the age of 55 were permitted the option to invest in the guaranteed fund but that he wanted a concession in this regard.

18. According to the fund, several other members made the same request but after due consideration, the trustees decided not to grant it on the grounds that it would not

be fair to grant investment choice to only a few members of the fund. However it would appear as if the fund did not inform the complainant of its decision in this regard.

19. Having received no response to his request from the fund, the complainant nevertheless went ahead and transferred to the provident fund. One would have thought that at the very least, he would have made a note in the letter of 10 July 1997 that his election was subject to the fund acceding his request to invest in the guaranteed fund.

20. It was only after the stock market crash in October 1997, some 3 months later, that the complainant made any serious attempt to obtain confirmation from the fund that his funds had indeed been invested in the guaranteed fund.

21. In view of the above, I am unable to find that the complainant's loss was caused by his being uninformed. In fact, at the time that the complainant transferred, he knew that he did not qualify to invest in the guaranteed fund but chose to transfer regardless of the consequences. He is thus the author of any prejudice he might have suffered as a result thereof.

22. In any event I am satisfied that the fund took all reasonable steps to provide members with all necessary information to enable them to make informed choices and thereby fulfilled its statutory duties to the complainant in terms of section 7D.

23. The fund specifically brought it to the attention of all members that there would not be investment choice on transfer to the provident fund. For example section 2 of a question and answer pamphlet reads in part"

> **I have heard about other funds where you can choose where you want your money invested as a member – will this be allowed?**
> That is not on offer now at the start of the Provident Fund but could be introduced at a later

stage if there is demand for this. The new Provident Fund Trustees would have to discuss this and all the implications.

Why is member investment choice not offered now at the start of the fund?
The members are being given a lot of choice now in terms of which fund to belong to and whether to invest in a retirement annuity. There is also a lot of administration around moving the members and their money. Investment choice can be introduced at any time and the new Provident Fund Trustees need to discuss this. Members would nee a lot of communication on the investment choice before choosing.

24. The above clearly spelt it out that members would not be given any investment choice on transfer. The complainant therefore unreasonably assumed that his simple request in the letter of 10 July 1997 would entitle him to an amended package to meet his own personal circumstances.

25. Furthermore I do not think that the complainant fared too badly. He received an enhancement of 22 percent on his actuarial reserve value as well as R132 930 in respect of the retirement reserve. In the 11 months that he was a member of the provident fund, he received an investment return of approximately 23%.

26. For the foregoing reasons, I am satisfied that the complainant has no basis for his claim of damages against the fund and his complaint is accordingly dismissed.

Dated at **CAPE TOWN** this 21st day of November 2001.

_____

John Murphy
Pension Funds Adjudicator