

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.: PFA/WE/23/98/NJ

In the complaint between:

R A Bergman

Complainant

and

City of Cape Town

First Respondent

Cape Metropolitan Council

Second Respondent

Cape Joint Pension Fund

Third Respondent

Cape Joint Retirement Fund

Fourth 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 R A Bergman, an adult male, currently employed by the first respondent.

First respondent is the City of Cape Town. The second respondent is Cape Metropolitan Council (hereinafter referred to as CMC). The third respondent is the Cape Joint Pension Fund, a pension fund duly registered under the Pension Funds Act of 1956. The fourth respondent is the Cape Joint Retirement Fund, a pension fund duly registered under the Pension Funds Act of 1956.

After some initial correspondence between the complainant and the various

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respondents, the complainant lodged a written complaint with the Office of the Pension Funds Adjudicator on 3 February 1998.

After an exchange of correspondence, I met with the complainant, Mr Reis of CMC and Mr P Kantor representing the City of Cape Town, on 9 April 1998 at my office. I subsequently met with Mr C Franken representing the Cape Joint Pensions Fund and the Cape Join Retirement Fund. The meetings were of an informal nature and no party adduced oral evidence under oath. Subsequently the parties have furnished me with additional documentation relating to this matter. Therefore, in determining this matter, I have relied exclusively on the documentary evidence, argument put to me in writing and on a report prepared by my investigator, N Jeram.

Having completed my investigation I have determined the complaint as follows:

Background to the complaint:

The complainant was employed by the Cape Divisional Council on 1 April 1976 at which point he became a member of the Cape Divisional Council Pension Fund.

On 1 January 1981 the Cape Divisional Council Pension Fund amalgamated with the Cape Amalgamated Joint Pension Fund.

Prior to the amalgamation, the complainant being a member of the Cape Divisional Council Pension Fund enjoyed certain "preserved rights" . These "preserved rights" were highlighted in an undated letter from the Department of Local Government addressed to Cape Divisional Council Pension Fund.

In this letter the Director of the Local Government states:

1. Further to my letter dated 23 December 1980 in reply to yours (Mr Hobbs) dated 18 December 1980, I have to inform you that the Administrator has in terms of clause 4(3) of Schedule I to the Local Authorities (Pension Funds) Ordinance, 23 of 1969 approved the

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scheme dated 3 June 1980 for the proposed association of the Divisional Council of the Cape with the Cape Amalgamated Joint Pension Fund, Provided that -

- 1.1_ the scheme shall take effect from 1 January 1981;
- 1.2 the existing rights of employees who are members of the Pension Fund of the Divisional Council of the Cape on 31 December 1980 and who remain in the Council=s service without a break in their service until the date on which the pension benefit becomes due and payable, are safeguarded, as set out in the Actuary=s statement dated 27 November 1980, a copy of which is attached.
- 1.3 all employees entering the Council=s service on or after 1 January 1981 shall become members of the Amalgamated Fund and qualify for the benefits in force in the Fund subject to the provisions applicable thereto.

These "preserved rights" were contained in the Local Authority (Pension Funds) Ordinance of 1969 "annexure 3 to chapter 1 of schedule 1" which read as follows:

Special conditions applicable to persons who were members of annuitants of, or were widows or children in receipt of annuities from, the Pension Fund of the Divisional Council of the Cape on 31 December 1980.

2. Notwithstanding the provisions of Chapter 1 of this Schedule, the special conditions set out in this Annexure shall apply to a person who was a member or annuitant of, or was a widow or child in receipt of annuity from, the Pension Fund of the Divisional Council of the Cape (Athe D.C. fund@) on 31 December 1980.
3. In the definition of Apensionable emolument@ in clause 1 the maximum to item (c) of six hundred rands shall not apply.
4. In subparagraph (i) of clause 34(3)(b) the first day of January 1960, shall be substituted for the thirty-first day of October 1958. In subparagraph (ii) of that clause the first day of October, 1968, shall be substituted for the twentieth day of August, 1965 when it is applied to a male member.
5. The minimum period of ten years= continuous service in clause 34 shall not apply and the approval of the local authority shall not be required for retirement in terms of clause 34(3)(b).

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6. A male member who became a member of the D.C. fund on or after the twentieth day of August, 1965, but before the first day of October, 1968, and who retired voluntarily on or before attaining the age of 60 years may elect to receive a retiring benefit calculated at the following rates in lieu of the rates in clause 33(3):

<u>Exact age at retirement</u>	<u>Annuity</u>	<u>Gratuity</u>
58	1,05/81	4,55 %
59	1,05/77	4,75%
60	1,05/74	5,00 %

Where the age at retirement is not an exact number of years, allowance shall be made by interpolation for completed months of age.

7. If a member is retired in terms of clause 35(3) or 36, there shall be payable by the local authority out of its own revenue an additional annuity at the rate of 1,05/62, and an additional gratuity at the rate of 6%, of the annual average of his pensionable emoluments over the last three years of his continuous service, or over the whole of his continuous service, if shorter, for each year of the period which is,
- 1) if he is retired in terms of clause 35(3) and has had less than ten years= continuous service or if he is retired in terms of clause 36, one year for every three completed years of his continuous service, but not exceeding the period from the date of his retirement up to the date on which he would have attained the pension age; or
 - 2) if he is retired in terms of clause 35(3), and has had at least ten years= continuous service, the period in years and completed months from the date of his retirement up to the date on which he would have attained the pension age.
8. If a retiring member so elects, he shall be entitled, instead of an annuity and a gratuity, to a larger annuity and no gratuity. The amount of such larger annuity shall be determined by an actuary.
9. The gratuity in terms of clause 37 shall be double the amount of his contributions to the fund increased by two per cent for each complete year of his continuous service.
10. The gratuity in terms of clause 38(1) shall be the amount of his contributions to the fund together with two per cent of such amount for each complete year of his continuous

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service up to twenty years and three per cent of such amount for each complete year of his continuous service in excess of twenty years.

11. The benefit in terms of clause 41 shall be equal to that in terms of clause 38(1).
12. The annuity in terms of clause 42(2)(b) shall not be less than 1,05% of the annual average of the member=s pensionable emoluments over the last three years of his continuous service, over the whole of his continuous service, if shorter, for each year of the continuous service that he would have had at the pension age had he not died.
13. The gratuity in terms of clause 42(8) shall not be less than twice the total amount of the member=s contributions.
14. Each annuitant shall become a member of the fund and each annuity payable to an annuitant from the D.C. fund, or which would become payable by the D.C. fund when the annuitant attained the age of superannuation, shall, with effect from 1 January 1981, be increased by 10%. Each such annuity shall, with effect from 1 January 1981, be payable by the fund, unless the annuitant was retired in terms of Rule 22 of the D.C. fund in which case it shall be payable by the fund with effect from the date of which it would have been payable by the D.C. fund.
15. Each annuity payable by the D.C. fund to a widow or child shall, with effect from 1 January 1981, be payable by the fund.
16. The annuity in terms of clause 42(3) shall be 1,05% of the annual average of his pensionable emolument over the last three years of his continuous service, or over the whole of his continuous service, if shorter, for each year of the period which is the sum of
 - 1) his continuous service; and
 - 2) any period referred to in paragraph 6 of this Annexure; and

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- 3) if he retired on account of ill health and had not attained the pension age, the period in years and complete months from the date of his date up to the date on which he would have attained the pension age;

provided that the total period shall not exceed the continuous service that he would have had at the pension age had he not been retired; provided further that any annuity arising from the period in item (b) shall be payable by the local authority out of its own revenue.

17. An annuity payable to a widow, or an annuity which may become payable to the widow of a member, shall not cease on her remarriage before the date of her sixtieth birthday.

Section 2 of the summary of rules of the Cape Amalgamated Joint Pension Fund reads as follows:

Preserved Rights

On 1st January 1981 the Pension Fund of the Divisional Council became part of the Cape Amalgamated Joint Pension Fund. The rights preserved and listed below apply only to those who were members of the Pension Fund of the Divisional Council on the 31st of December 1980. Any break in service from the divisional Council after the 31st of December 1980 will result in the loss of any right preserved.

Anyone (i.e. member, widow, child) who was receiving a pension from the Divisional Council Fund on 31 December 1980 also has certain rights preserved.

As the rights preserved are complicated and difficult to summarise, only a broad outline will be given. However, it is very important for those to whom any preservations may apply that their family, heirs, executors, etc. are aware that their benefits may be different because the benefit may only become due in 20-30 years time.

Preserved benefits are generally better than those offered by the Cape Amalgamated Joint Pension Fund but should the respective benefits of the Amalgamated Fund be improved then the member will receive the better of the 2 benefits.

The complainant, in letters dated 3 February 1998 and 25 March 1999 addressed to the Pension Funds Adjudicator contends that the obligations created by these “preserved rights” attached to the employer. This is confirmed by the CMC in a letter dated 15 July 1997 addressed to the complainant and by the Cape Joint Pension Fund in a letter

dated 23 February 1998 addressed to the Pension Funds Adjudicator.

The Cape Divisional Council was succeeded by the Western Cape Regional Service Council which in turn was succeeded by the Cape Metropolitan Council in terms of the restructuring of the Western Cape Local Government. Consequently, the complainant employment was transferred from the Cape Divisional Council ultimately to the CMC. During the aforesaid period the Cape Amalgamated Joint Pension Fund was succeeded by the Cape Joint Pension Fund which came into operation on 1 July 1990. The CMC also established the Cape Joint Retirement Fund which came into operation on 1 May 1996.

However, the rules of the Cape Joint Pension Fund and Cape Joint Retirement Fund make no mention of the aforesaid “preserved rights”.

On 1 February 1998 the complainant was again transferred to the City of Cape Town as part of the recent restructuring of the Cape Local Government. The complainant argues that the obligations created by the “preserved rights” attach to his succeeding employers, and therefore the City of Cape Town, his current employer, is responsible in law for providing the benefits created by the “preserved rights”. The complainant refers to section 10(3)(f)(i) of the Local Government Transition Act 209 of 1993, which reads as follows:

Without derogating from the generality of the powers conferred by subsection (1), a proclamation contemplated in that subsection may provide for ...

the dissolution of any local government body, including -

- (1) the transfer or admission of persons to or in the service of any transitional council or transitional metropolitan substructure, subject to -
 - (aa) conditions not less favourable than those under which they serve; and
 - (bb) applicable labour law

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Hence the complainant argues (in his letter dated 25 March 1999 addressed to the Pension Funds Adjudicator) :

The obligation was inherited by the successors to the Cape Divisional Council namely the Western Cape Regional Service Council on 1 July 1987 and later the Cape Metropolitan Council whilst employees remained in the service of that employer with unbroken service. This fact is also acknowledged by the inclusion of these conditions in the documentation I was given on my transfer in terms of the Local Government Transition Act and by the fact that my former employer did in fact board and retrench certain former employees in terms of those preserved rights.

I am therefore of the opinion that the preserved rights are a contractual arrangement between myself and the CMC which the City of Cape Town must inherit as a consequence of the staff transfer in terms of the Local Government Transition Act as of 1 February 1998.

The CMC also contends that liability attaches with the current employer, City of Cape Town. In a letter dated 15 July 1997, addressed to the complainant the CMC states:

It is hereby confirmed that you will be transferred with your current conditions of service (contractual to incumbent), to the Cape Town Municipality. Your current conditions of service include the benefits accrued from the former Cape Divisional Council Pension Fund.

In a further letter dated 7 January 1999 addressed to the Pension Fund Adjudicator, CMC states:

It is correct that these rights have not been incorporated into the rules of the Cape Joint Pension Fund or the Cape Joint Retirement Fund. The extended benefit is in any event payable by the Local Authority out of its own revenue.

We are of the opinion that the Cape Municipality as the present employer of Mr R A Bergman, is the employer to which the obligation in terms of the preserved rights attach if Mr Bergman retires on ill-health or if he is retrenched.

The City of Cape Town's attitude is set out in a letter dated 24th April 1998 addressed to the Pension Fund Adjudicator:

It appears from the rules of the Cape Joint Pension Fund that the rights which Mr Bergman is seeking to have clarified are not contained in the rules. The question of the continuity in what

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appears to be a legal obligation attaching to the employer at the association of the Divisional Council of the Cape with the Cape Amalgamated Joint Pension Fund requires investigation. If there was a lack in continuity of these rights, then the current employer of Mr Bergman cannot be liable.

The Cape Joint Pension Fund and Cape Joint Retirement Fund, (in a letter dated 23 February 1998 addressed to the Pension Fund Adjudicator), acknowledge the complainant's entitlement to "preserved rights", but then state:

The obligation to pay this extra benefit is however entirely the responsibility of the employer and do not form part of rules or benefit structure of the Cape Joint Pension Fund.

The complainant now seeks a declaratory order as regards to who bears the liability for the "preserved rights".

Analysis of evidence and argument:

A preliminary issue needing to be addressed is whether the Pension Funds Adjudicator has jurisdiction to hear this matter. The relevant section of the Pension Funds Act of 1956 is section 30D which reads as follows:

The main object of the Adjudicator shall be to dispose of complaints lodged in terms of section 30A(3) of this Act in a procedurally fair, economical and expeditious manner.

Section 30A reads as follows:

- (1) Notwithstanding the provisions of the rules of any fund, a complainant shall have the right to lodge a written complaint with a fund or an employer who participates in a fund.
- (2) A complaint so lodged shall be properly considered and replied to in writing by the fund or the employer who participates in a fund within 30 days after the receipt thereof.
- (3) If the complainant is not satisfied with the reply contemplated in subsection (2), or if the fund or the employer who participates in a fund fails to reply within 30 days after the receipt of the complaint the complainant may lodge the complaint with the Adjudicator.

AComplaint@: means

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a complaint of a complainant relating to the administration of a fund, the investment of its funds or the interpretation and application of its rules, and alleging -

- (4) that a decision of the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person, or an improper exercise of its powers;
- (5) that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund by the fund or any person, whether by act or omission;
- (6) that a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant; or
- (7) that an employer who participates in a fund has not fulfilled its duties in terms of the rules of the fund;

but shall not include a complaint which does not relate to a specific complainant.

The question which arises is whether the complaint falls within the above definition.

In terms of the definition, the contractual arrangement between the complainant and CMC and the subsequent transfer of this arrangement would have to relate to the administration of a fund or the interpretation or application of its rules and make one of the four allegations set out in the definition.

“Fund” is defined as a pension fund organisation which in turn is defined as:

- (1) any association of person established with the object of providing annuities or lump sum payments or former members of such association upon their reaching their retirement dates, or for the dependant of such members or former members upon the death of such members or former members; or
- (2) 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 Society 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.

Does the contractual relationship between the complainant and the employer relate to the administration of a pension fund organisation or the interpretation and application of its rules.

Marx and Hanekom, (Manual on South African Retirement Funds and other Employee Benefits Volume 1 p 109-110) in their analysis of the definition of pension fund organisation argue that,

“a scheme or arrangement can be established, e.g. by way of an agreement between an employer and a underwriter for the benefit of a category of employees...”

In addition to the normal pension rights enjoyed by the complainant, the employer undertook to provide him with certain additional pension benefits and undertook responsibility for these benefits, namely the “preserved rights”. While these rights do not derive directly from the rules of a fund, they form part of a business carried on under a scheme of arrangement in connection with any of the objects for which a friendly society may be established. Section 2 of the Friendly Society’s Act of 1956 defined those objects to include the provision of relief during widowhood, sickness, infirmity and termination of service benefits. The scheme concerning the preserved rights envisaged that the benefits would be administered by the fund, but that the financing thereof would be the responsibility of the member’s employer. Accordingly, the complaint concerning the preserved rights relates to the administration of the fund, that is, the scheme or arrangement carrying on the business in connection with the objects specified in section 2 of the Friendly Society’s Act.

The second leg of the definition of a complaint requires the complainant to make one of four allegations. The complainant alleges that a dispute of law has arisen in relation to a fund between the fund and himself in respect of liability for the “preserved rights”.

From the above I am satisfied that the complainant's complaint falls within the definition of complaint as defined in the Pension Funds Act of 1956. Consequently, I have jurisdiction to hear this matter.

The complainant in essence is arguing that there was a contractual relationship between himself, the fund and his former employer, Cape Divisional Council, whereby the employer was liable for the "preserved rights" and this contractual arrangement was then inherited by the successive employers being the Western Cape Regional Services who in turn was succeeded by the CMC.

From the evidence it is clear that these "preserved rights" were in existence prior to 1981 and were highlighted in a letter from the Director of Local Government. It is also clear that the liability for these rights rested with the employer.

There is consensus amongst the parties that the "preserved rights" were the obligation of the Western Cape Regional Services Council and were in turn transferred to the CMC. The question is whether these rights were transferred to the City of Cape Town consequent upon the complainant's compulsory transfer on 1st February 1998.

The CMC has referred me to Proclamation No. 17/1995 published in the Provincial Gazette dated 31 January 1995, in particular to section 7(2)(c) which reads as follows:

All other rights, powers and privileges of whatsoever nature and all liabilities, duties and obligations of the Western Cape Regional Services Council shall vest in and devolve upon the Cape Metropolitan Council, which may continue to institute prosecutions or defend legal proceedings instituted by or against the Western Cape Regional Services Council, and may do all things necessary or expedient in connection with such proceedings.

Section 7(4)

Any right, power or duty which, on the date of which this Enactment comes into operation, has vested in or been imposed upon the Western Cape Regional Services Council shall be deemed to vest in or to be imposed upon the Cape Metropolitan Council, which in accordance with subsection (1), shall be the successor-in-law to the Western Cape Regional Services Council.

As well as Proclamation No. 18/1995 published in the Provincial Gazette dated 6

February 1995, in particular to section 17(1) which reads as follows:

Subject to the provisions of the Act, on the date when this Enactment comes into operation -

- (3) all employees of local government bodies, irrespective of the nature or condition of their employment referred to in column 1 of Annexure AG@ to the agreement, including all the employees of the Western Cape Regional Services Council wherever they may work in the Western Cape Region, shall be deemed to have been transferred to the service of the Cape Metropolitan Council or transitional metropolitan substructure referred to in column 2 of the aforesaid Annexure AG@.
- (4) the employment of the said employees by the Cape Metropolitan Council or a transitional metropolitan substructure shall be deemed to be in continuation of their employment by the local government body concerned, on the same terms and conditions which, on the date on which this Enactment comes into operation, applied to their employment by the said local government body.

The above indicates that the CMC succeeded the Western Cape Regional Services Council and acquired their obligation. Section 17(1)(b) in particular indicates, that any rights enjoyed by complainant who was employed under Western Cape Regional Services Council continued to remain in force.

The key question, as stated, is whether these rights were transferred on 1 February 1998 when the complainant was transferred to the City of Cape Town. The complainant argues that the contractual obligation in respect of Apreserved rights@ was transferred to the City of Cape Town, by virtue of section 10(3)(f)(i)(aa) of the Local Government Transition Act No. 209 of 1993, (read together with regulation 9 of proclamation no 27 of 1996 of 28th May 1996), referred to above.

On a proper interpretation of section 10(3)(f)(i)(aa), which requires the conditions of employment upon transfer to be not less favourable than current conditions and to be in accordance with applicable labour law, there is merit in the complainant=s argument and a legal basis for his entitlement to the Apreserved rights@. The benefits under the Cape Joint Retirement Fund and Cape Joint Pension Fund of themselves are less favourable than the Apreserved rights@ enjoyed by the complainant whilst employed at CMC. Thus, were the City of Cape Town not to assume liability for the Apreserved rights@ the complainant=s transfer would be on less favourable conditions and would probably constitute an unfair labour practice contrary to applicable labour law as embodied in the Labour Relations Act and the Constitution.

Consequently, I find that the liability for the Apreserved rights@ rests with the City of Cape Town.

Accordingly, I make the following declaratory order:

- (1) The Apreserved rights@ set out in the Local Authority (Pension Funds) Ordinance of 1969 annexure 3 chapter 1 of schedule 1 shall be applicable to the complainant.
- (2) The City of Cape Town shall bear liability for these Apreserved rights@.

DATED at CAPE TOWN this 26th DAY of APRIL 1999.

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JOHN MURPHY
PENSION FUNDS ADJUDICATOR

Preserved Rights - attaching to employer
Restructure of Cape Local Government