

**IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR**

**CASE NO.: PFAWE/53/98**

**In the complaint between:**

**Robert John Douglas Clarence**

**Complainant**

**and**

**The Independent Schools Pension Fund**

**First Respondent**

**DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT OF 1956**

**Introduction**

**This is a complaint in terms of Section 30A(3) of the Pension Funds Act of 1956.**

**The respondent is a pension fund duly registered under the Pension Funds Act of 1956. The complainant was a member of the fund from 1 January 1982 until he withdrew on 31 December 1997.**

**The thrust of the complaint is that the respondent has unfairly discriminated against the complainant on the grounds of his marital status. The question presented by the complaint is whether the Pension Funds Act and the Constitution prohibit a pension fund from paying an unmarried person a lower withdrawal benefit than a married person who has made the same contributions to the pension fund.**

**The complainant has submitted his complaint in writing to which the respondent**

has replied in writing and has supplemented its reply with a report from its actuary. I have also held telephonic discussions with both parties. As the issues appear quite crisply from the documentation submitted, I have deemed it unnecessary to hold a hearing in this matter. I am satisfied that both parties have had adequate opportunity to comment on the allegations contained in the complaint and response and that I have complied with the provisions of Section 30F which provides:

When the Adjudicator intends to conduct an investigation into a complaint he or she shall afford the fund or person against whom the allegations contained in the complaint are made, the opportunity to comment on the allegations.

Furthermore, the demands on my office necessitate that hearings should be held only in those cases where it is absolutely necessary. In this regard, it needs to be borne in mind that the purpose of the Office of the Pension Funds Adjudicator is to provide an alternative form of dispute resolution characterised by the qualities of informality, accessibility and expedition. Section 30P of the Act provides protection to parties who feel aggrieved by the informality of the proceedings. This provision provides that any party who feels aggrieved by the determination of the Adjudicator may apply to the High Court for relief and that the court shall have the power to consider the merits of the complaint afresh, to take evidence and make any order it deems fit.

Having completed my investigation by considering the written and telephonic submissions of the parties, I have determined the complaint as follows. These are my reasons.

### **The Complaint**

The complainant throughout his 16 years membership of the fund was employed by three different independent schools. At the time of his withdrawal from the fund, he was employed as Headmaster at St Johns College in Johannesburg.

The complainant gave notice of his withdrawal from the fund in September 1997. On 14th October 1997, Old Mutual Employee Benefits, the administrators of the fund, addressed a letter to the complainant on behalf of the fund advising him of his options. Broadly, he was advised that he could receive a surrender value in cash amounting to R135 299,57; or he could become a deferred pensioner, with the cash value of the deferred to pension at 31 December 1997 amounting R292 253,06; or thirdly he could elect to transfer the cash value of his deferred pension, as determined by the valuator of the fund in terms of rule 7.1.2.2, to another approved retirement annuity or pension scheme.

The complainant elected the third option, namely, to transfer the cash value of his deferred pension to another approved pension fund.

The letter from Old Mutual contains two caveats. These read as follows:

The above figures have been calculated assuming that you are married, should this not be the case the value quoted may reduce as allowance has been made for the provision of a spouse's pension.

The above figures are for quotation purposes only and should not be accepted as final figures. Old Mutual will not be liable if these preliminary figures are acted on to your detriment and no guarantees are given.

In order words, the quotation was prepared on the basis that the complainant was a married man. On 5 September 1997 the complainant divorced his spouse. Consequently, the transfer value paid over to the approved pension fund was in the amount of R258 824,89, that is, R33 428,17 less than the figure quoted in the letter of 14th October 1997.

Shortly thereafter the complainant wrote to the principal officer of the fund and alleged that the reduction of his transfer value was discriminatory. He submitted that although divorced he was still required to provide maintenance for both his wife and his children as well as in due course a pension for his ex-spouse.

**In a letter dated 16 March 1998, the principal officer, Mr Bruton, responded on behalf of the trustees of the fund as follows:**

**You have asked why the Trustees of the Pension Scheme took the decision that the benefits paid to you represent your total entitlement from the Fund.**

**The Trustees have a responsibility to both the members of the Fund and the participating school to ensure that the benefit and no less nor more is paid to a withdrawing member. This is particularly so where the member is guaranteed a specific benefit, such as you were, and the school is required to meet the balance of the cost over the amount paid by the member, for that promised benefit.**

**On your withdrawal from the fund, you were entitled to either a refund of your own contributions plus interest or a pension based on your period of membership of the fund and your final average salary. This pension benefit is deferred to be payable from the normal retirement date, age 63. You elected the deferred pension benefit.**

**As such your benefit has been calculated on the formula**

$$1/600 \times N \times AS$$

**Where N = the number of months of service from 1 Jan 1982 to 31 Dec 1997  
and AS = the average of your annual salary for 1996 and 1997**

**In addition allowance for a spouse's pension would be added for those members who qualify for such benefit. In this context spouse is defined as "The spouse of the Member at the time of the Member's death who was married to the Member at the date of retirement or withdrawal ..."**

**As you were not married at the date of withdrawal from the fund, you did not qualify for this additional benefit.**

**In response to this letter the complainant lodged his complaint with my office on 17 March 1998.**

**The respondent's response to the complaint**

**On 27 March 1998, I addressed a letter to Mr Bruton, the principal officer of the**

fund, requesting him to respond to the complainant's complaint. On 8 April 1998, Mr Bruton filed his response together with the rules of the fund. In the response, Mr Bruton makes the following points:

1. The fund is a defined benefit fund in which all members are required to contribute at the rate of 7% of pensionable earnings, with certain exceptions arising from historical arrangements. Each participating school is required to fund the balance of the cost to provide the benefits defined in the rules of the fund for members.
2. The complainant was not married at the time of withdrawal from the pension scheme, and as his wife no longer fell within the definition of a spouse in terms of the rule, no benefit, in the form of a spouse's pension, would be due to his former wife from the fund. Payment of maintenance to his ex-wife and dependant children could have no bearing in the computation of his withdrawal benefit, and would only have a bearing on whom benefits would be paid to in the event of the complainant's death during his membership of the fund.
3. The complainant has received his equitable benefit based on his pension entitlement in terms of the rules of the fund.

Because the principal officer had not addressed himself directly to the question of whether the calculation of the benefit was discriminatory, I telephoned him on 16 April 1998 to discuss that issue and requested him to submit further submissions in amplification of his response. I followed this up with a letter dated 17 April 1998 in which I stated:

As I mentioned in our telephone conversation, it shall be necessary for the actuary of the fund to advance some argument addressing the fairness of the rule. Mr Clarence's principal complaint is that the rule is discriminatory, and therefore unconstitutional. The actuary would therefore have to make out a case in support of the rules' legitimacy and proportionality.

Accordingly, I request you to supplement your response with such an actuarial report within 10 days from the date of this facsimile.

**On reflection, and after consideration of the evidence and submissions, it is not so much the rule as its application which is potentially discriminatory.**

**In response to this letter Mr Bruton addressed a further letter to me dated 30 April 1998 in which he sets out his justification for differential treatment on the grounds of marital status as follows:**

On the death of the retiree or at the end of the guarantee period, if later, a pension is paid to the surviving spouse and/or dependant children in terms of Rule 5.2. The pension benefit payable to the spouse is 50% of the member's pension before commutation. In order to qualify for the spouse's benefit, they must have been married in terms of South African Law at the date of retirement. No such qualification applies to the payment of child's pension. A child's pension is payable to dependant children, up to a maximum of three per member, regardless of whether the member is married or not. No allowance is normally made for the payment of children's pension after retirement as the incidence is low.

Although the benefit provided creates a greater liability on the Fund for a married member than an unmarried one, it does not confer a greater benefit to a member. The earlier death of the spouse does not affect the retiree's pension in any way.

We are of the opinion that this rule is fair to all members.

When a member withdraws from the Fund prior to retirement, such as has occurred with Mr Clarence, every effort is made to ensure that he retains the Fund benefits accrued for the period of membership of the Fund up to the date of withdrawal. The only qualification is that the member has at least five years' pensionable service in the Fund.

The benefits, as set out in Rule 7.1.2., provide that identical benefits as provided at retirement are available to the member and spouse. The only differing factor is that the marital status is determined as at the date of withdrawal from the Fund.

The deferred pension to which the member is entitled is payable from age 63 and is paid in terms of the Rules of the fund. The Rules provide for the payment of a spouse's pension,

where applicable. This would not apply if the member was unmarried at the date of withdrawal but is married at the date of retirement, unless the member makes his own provision for such a benefit.

In order to compensate the member for inflation, the deferred pension is increased by the net Fund earnings in excess of the valuation rate of 5% per annum.

Again we are of the opinion that such a benefit is fair to all members.

In order to give withdrawing members a further option, the Rules were amended to permit such a member to transfer the capital value of the deferred pension to his new employer's pension arrangement or to a retirement annuity fund. Once control of the funds is lost in such a way, we can no longer ensure that the member does in fact make provision for his spouse, although we do try to ensure that the benefit is paid in the form of a pension of which not more than one-third may be taken in cash.

The effect of this is that a larger capital sum is indeed transferred from the Fund for a married than for an unmarried person. However this is the value, as determined by the valuator, of the actual pension entitlement.

**Mr Bruton's response was further supplemented by a letter addressed to me by Mr C P Spencer, the valuator of the fund, dated 4 May 1998. The relevant part of this letter reads:**

In terms Rule 7.1.2.1 of the Rules of the Independent Schools Pension Scheme, a member may elect instead of receiving a cash sum on withdrawal to receive a deferred pension payable from his normal retirement date.

For a member who has completed 5 years of pensionable service, this pension is one six-hundredth of his average salary over the two years proceeding exit for each month of pensionable service.

On death before the normal retirement age the cash value of the pension is payable while on death after normal retirement age the balance of 60 months payments is made and thereafter a pension to the spouse and children.

In terms of Rule 7.1.2.2 a member may elect to transfer the cash value, as determined by the valuator, of his deferred pension to an approved retirement annuity fund or to an approved

pension or provident fund.

In making estimates for valuations or quotations, the valuator will make assumptions in order to put a value on benefits even though the information may actually be available at the date of calculation. It is therefore usual in these estimates to make assumptions concerning the marital status of a member, the age of his spouse and the number and ages of his children.

When a benefit does become payable the situation may well have changed and it is spurious accuracy to allow for each member's exact position when estimates are made. Changes in salaries can have a much greater effect on the eventual amount of a benefit.

In calculating estimates for prospective pensioners and deferred pensioners, it is common to assume that there is a spouse with the male being five years older than the female.

However when a benefit actually becomes payable the factual position in terms of the rules is taken into account in making the calculation. Since the definition of spouse is the widow/widower of a member who was married at the member's retirement or withdrawal, no amount is calculated in respect of a member who is unmarried at retirement or withdrawal.

If the capital paid in respect of a member at exit is based on a notional spouse's age, this would mean that an unmarried member will be able to purchase a larger pension with his capital than was intended in terms of the Rules. This can be seen as unfair to a married member who is providing for a spouse's pension and therefore will receive a lower pension whether or not the spouse survives to receive a pension. This would also be contrary to the concept of a Defined Benefit Scheme.

Furthermore, if a notional age is used this can also mean that the pension in respect of a member whose spouse's age is not the assumed age, will differ from the pension promised which is again contrary to the concept of a Defined Benefit Pension Scheme.

### **The issues for determination**

The issue to be determined in this matter is whether the pension fund is entitled to pay an unmarried person a lower withdrawal benefit than a married man who has made the same contributions to the fund. For reasons which I shall explain below, the issue can be narrowed by limiting the enquiry to whether the fund is entitled to

differentiate between divorced persons and married persons for the purpose of granting withdrawal benefits.

In *Low v BP Southern Africa Pension Fund (PFA/WE/9/98)* I fully set out the basis upon which I am entitled to grant relief against unfair discrimination. Briefly, section 30E(1)(a) of the Pension Funds Act of 1956 empowers me to investigate any complaint and make the order which any court of law may make, including orders allowed under section 172 of the Constitution in constitutional matters. The limitations upon my power are contained within the definition of the complaint as defined in Section 1 of the Act. Where a decision of a pension fund or one of its functionaries is alleged to be unfairly discriminatory, a complaint to that effect will be a complaint relating to the administration of the fund or the application of its rules and will allege that the decision of the fund was in excess of its powers, or an improper exercise of its powers, (which in most cases will take the form of a breach of one of the fiduciary duties). Alternatively, the complainant may allege that the discriminatory decision has led to prejudice as a consequence of the maladministration of the fund.

Unfair discrimination generally will be contrary to a management board's fiduciary duty to act with impartiality in respect of all members and beneficiaries as required by Section 7C(2)(c) of the Pension Funds Act entitling the complainant to compensatory relief, akin to damages in an Aquilian action, putting him in as good a position as if the board had carried out its duties properly.

Moreover, discriminatory decisions and conduct by pension fund managers and functionaries will be in violation of Section 9 (4) of the Constitution, which reads:

No person may unfairly discriminate directly or indirectly against anyone on one or more of the grounds in terms of subsection (3).

**Section 9(3) reads:**

The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin,

colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

**On the assumption that a discriminatory decision by a pension fund is a constitutional matter, I shall have the power to make any order that is just and equitable in accordance with the provisions of Section 172 (1) of the Constitution.**

**Nothing in rule 7.1.2, of the respondent's rules, governing withdrawal and transfer values, explicitly authorises the fund to discriminate between unmarried and married persons in calculating withdrawal benefits and transfer values. The relevant portion of the rule reads:**

**A member may, in lieu of the cash sum above.... elect to transfer to an approved retirement annuity fund or to an approved pension or provident fund of his new employer which he must join as a condition of service (other than a pension or provident fund established for the purpose of preserving benefits of members withdrawing from pension or provident funds) the cash value as determined by valuator of the applicable deferred pension payable in terms of Rule 7.1.2.1. above.**

**The valuator has a wide discretion in calculating withdrawal benefits. When exercising it, he or she, from time to time, undoubtedly will differentiate between different categories of members. The constitutional and statutory prohibitions on discrimination do not mean that every decision or rule that differentiates amounts to unfair discrimination. Firstly, the differentiation must amount to discrimination. Secondly, such discrimination must be unfair. Thirdly, there should be no justification for the unfair discrimination.**

**In *Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), the Constitutional Court made reference to the factors to be taken into account in determining whether discrimination is unfair. A contextual approach is apposite. The court stated:**

**We need ... to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all**

circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.

**O'Regan J elaborated on the approach as follows:**

There are least two factors relevant to the determination of unfairness: it is necessary to look at the group or groups which have suffered discrimination in the particular case and at the effect of the discrimination on the interests of those concerned. The more vulnerable the group adversely affected by this discrimination, the more likely the discrimination will be held to be unfair. Similarly, the more invasive the nature of the discrimination, the more likely it will be held to be unfair. In determining the effect of the discrimination, the reasons given by the agency responsible for the discrimination will be only of indirect relevance. However, should the discrimination in any particular case be held to be unfair, the reason for the discriminatory act may well be central to an investigation into whether the discrimination is nevertheless justified ....

In this case, the group discriminated against is unmarried persons. The group can be further sub-divided into persons who have never been married, divorcees and widowed persons. By relying on the definition of a spouse in Rule 5 of the rules, that is, the spouse of the member at the time of the member's death who was married to the member at the time of retirement or withdrawal, the actuary has drawn no distinction between the different kinds of unmarried persons for the purpose of computing withdrawal benefits. All three categories of unmarried persons will receive lower withdrawal and transfer benefits than married persons.

The complainant falls into the divorcee category of unmarried persons. Divorcees are not markedly more vulnerable than other groups. Much will depend on a divorcee's individual circumstances. Yet, generally, it is relatively safe to assume that most divorcees end up running two households and that a divorce has a negative effect on their lives and finances. The weakening of the structures of the nuclear family is a sad fact of modern life. Social security policy should offer material support, not adverse differential treatment, to those suffering the

aftermaths of divorce. At first blush, therefore, it seems somewhat unfair to diminish a divorcee's accumulated pension benefit simply because he or she has divorced. The question then is whether the reason for doing so is reasonable and justifiable in a democratic society.

It is evident from the valuator's letter that the rationale for awarding a higher amount to a married person is that his or her transfer value will be expected to fund a spouse's pension in the fund to which he or she transfers. Many defined benefit funds, if not most, provide for the payment of a spouse's pension in the event of death either before or after retirement. This arrangement probably had its origins in what is now an anachronistic, stereotypical assumption that the spouses of married men are entirely dependent on them. In the respondent fund the rule is gender free and spouses are entitled to pensions irrespective of gender, the only requirement being marital status.

A spouse's pension may not in every case amount to an added benefit for a married member. Thus, for example, the spouse may predecease the member; or the member may die shortly after retirement, leaving the fund with a lesser liability, and the deceased member's family with a lower income from the fund, because ordinarily the spouse's pension is less than the member's.

But what is in question here is not the value of the retirement benefit. It is the withdrawal or transfer benefit of a divorced member which is at issue.

The unmarried member's withdrawal benefit is discounted on the assumption that the fund to which he or she transfers will not have to fund the liability of a spouse's pension. In the case of the transferring married member, the fund is prepared to pick up the tab for the additional liability. It takes no account of the fact that the married transferring member soon may divorce or become widowed, or that the divorced or widowed member soon may marry. Admittedly, it can be argued that appropriate subsequent adjustments, taking account of the change in status, will

bring a rough equilibrium in the transferee funds, but this assumes such funds will be defined benefit funds which cater for spouses' pensions. In the present environment many members are transferring from defined benefit funds to defined contribution funds or hybrid arrangements, which do not provide for spouses' pension.

Hence, it cannot be said that married members transferring out of the respondent always will move into funds where their transfer values will be expected to finance the additional benefit of a spouse's pension or that the subsequent marriage of divorced or widowed members will guarantee them spouse's pensions. Often the case it will not be so. Nor is it a requirement of the respondent's rules that members transfer to such funds. In which event married members will be able to purchase better benefits in the new fund than their similarly situated, unmarried co-members.

Accepting, Mr Bruton's argument that the benefit of a spouse's pension may not directly grant a better benefit to the member, this does not mean the arrangement is not discriminatory. The benefit creates a greater actuarial liability for the fund and this is passed on as a greater withdrawal benefit to the married member, to allow him or her to provide for family dependants.

In any event, in his letter of 30 April 1998, Mr Bruton readily admits that the fund has no control over how the married withdrawing member might invest his transfer value in the new fund. The admission amounts to a concession that where the married member receives an additional benefit to provide for a spouse's pension, he may use it for other purposes, for example to acquire a greater equitable share in a defined contribution fund. The divorced member is denied this benefit, simply by reason of his marital status. Hence, the distinction seems irrational and without legitimacy.

The net outcome of this is that the unmarried members of the fund pay the same

rate of contribution as the married members and thereby indirectly cross-subsidise the liability of the benefit for spouses of the married members. This may be justified on grounds of social policy, but it is doubtful whether the justification applies equally between divorcees and married members.

The under-lying assumption, of course, is that the unmarried person generally can be presumed to be free of the concerns of supporting a partner and dependants subsequent to death. This assumption, in the modern world, is highly questionable. Many persons are divorced or live in relationships akin to marriage without formalising the relationship as a civil marriage, either because they choose not to, or the law disallows or has disallowed it. They too have ongoing obligations to their partners and dependants.

The US Supreme Court in *City of Los Angeles v Manhart* 435 US 700, ruled that it is discriminatory to base pension rights on a generalisation which, even if true on average, may not apply to a particular individual. In that case, it was held to be unlawful to require female employees to make larger contributions to a pension fund than male employees on the grounds that actuarial methods envision pension provision for women to be more expensive because women tend to live longer than men. A similar line of reasoning was followed in *Arizona v Norris* 462 US 1073 where it was held that it is discriminatory to pay lower benefits to women based on the same contributions.

However, in *Manhart*, the Supreme Court appears to have seen no difficulty in determining the overall funding requirements for a pension fund by consideration of the composition of the entire workforce. When one is dealing with a defined benefit fund, as long as employee contributions and employee benefits are the same, employer contributions may vary to reflect the gender and marital composition of the workforce and actuarial tables can be used to determine this contribution. In the present matter we are not concerned with the methods applied in calculating the rate of the employer's contribution. We are considering the methods for computing withdrawal and transfer benefits.

On this line of reasoning, the granting of preferential benefits to married members as compared to unmarried members, more often than not, will be discriminatory and unfair. Nevertheless, as already suggested, relevant social security policy considerations can be brought into the equation to justify the cross-subsidisation of spouses' benefits by unmarried members. These arguments will find easy currency when the issue relates to the provision of a spouse's pension and the archetypical spouse envisaged is the dependant housewife who has sacrificed her career in the interests of the family. The picture changes somewhat when the issue involves the calculation of a transfer value differentially on grounds of marital status, and the spouse of the transferring member is a successful neurosurgeon, while the subsidising unmarried member, receiving the lower withdrawal or transfer benefit, is the lowly paid cleaning lady and a sole breadwinner for five children born out of wedlock.

Such scenarios raise fundamental questions about whether married members should be entitled to additional benefits in the form of spouses pensions, incurring greater liabilities for the fund, without having to pay additional contributions. They also remind us that equality, like fairness, depends very much on the circumstances of each particular case.

Fortunately, in this case it is unnecessary to canvass these matters fully or to decide them. Before making such a decision, I would prefer to have the benefit of further evidence and argument. On the facts of this case, the question for determination is simply whether the actuary was justified in discriminating between married members and divorced members in calculating withdrawal benefits and transfer values.

The principle of equality is not simply about treating people in the same way. Janet Kentridge writing in Chaskalson: *Constitutional Law of South Africa* at p14-3 puts it like this:

Equality, said Aristotle, is a matter of treating like cases alike and unlike cases differently in proportion to their likeness or difference. Equality is not simply a matter of likeness. It is, equally, a matter of difference. That those who are different should be differently treated is as vital to equality as is the requirement that those who are like are treated alike. In certain cases it is the very essence of equality to make distinctions between groups and individuals in order to accommodate their different needs and interests.

The failure of the trustees to distinguish between divorced persons and other unmarried persons, in my view, is unreasonable and unfairly discriminatory. The trustees have failed to pay sufficient heed to the complainant's claim that a divorcee frequently has ongoing obligations to his or her former spouse and dependants. Unfortunately, the complainant has not furnished me with precise details of his divorce order. However, and most importantly, the trustees fail to recognise that Section 7 (7) of the Divorce Act of 1979 deems a divorced person's pension interest to be part of his or her assets in the determination of matrimonial assets in a divorce action. Section 7(8) permits the court granting a decree of divorce in respect of a member of a pension fund to order that a part of the pension interest of that member is due or assigned to the spouse in the divorce action. In addition, divorced persons frequently are obliged to pay maintenance for their spouse on an ongoing basis and the spouse may have in law a claim for maintenance against a member's deceased estate.

Hence, a comparison between a withdrawing divorced member and a withdrawing married member reveals that the divorced member, despite bearing similar family obligations to the married member, will receive a lower benefit.

While it is correct that the married member transferring into a new fund providing a spouse's pension will require a higher value to fund the liability, the rationale remains questionable because it views the member's need to fund his retirement in the isolated context of a single pension fund. Because the rules of the new fund are likely to exclude a divorcee from the benefit of a spouse's pension, he or she might be compelled, depending on the circumstances and the divorce order, to make alternative provision for the spouse through other investment vehicles, and this will make inroads on his or her net disposal income (an arrangement in itself

arguably discriminatory). This fact, therefore, would justify a divorced member receiving a better benefit (for example, a greater equitable share in a defined contribution fund) than a married member's in the transferee fund. This would be possible by virtue of the divorced member's equal transfer value being fully applied to his or her exclusive benefit in the new fund without any corresponding right or obligation to fund a spouse's pension.

Accordingly, I am satisfied that the respondent has failed to show any rational basis for permitting the actuary to discriminate between married members and divorced members when calculating a transfer value on withdrawal by a member. It's decision is contrary to it's fiduciary duty to act impartially and infringes Section 9(4) of the Constitution which applies horizontally.

## Relief

Section 172(1) of the Constitution permits me to make any order that is just and equitable, including an order limiting the retrospective effect of the declaration of invalidity.

Anti-discrimination law is in its infancy in South Africa. Pension fund administrators have organised their affairs and structured benefits without the advantage of extensive legal arguments about the modern doctrine of equality. The new Constitution is a map for the future and seeks to redress past injustice. Nevertheless, prudence dictates that we should proceed cautiously and without misplaced reformist zeal. A judicial finding that a commonly accepted pension fund practice is discriminatory, and hence unlawful, can have potentially crippling financial effects. For that reason, courts elsewhere, dealing with similar issues, have tended to resort to prospectivity or levelling down.

Normally, unlawful juridical acts are void *ab initio*. This leads to retroactive liability on the part of those responsible for the illegality, which runs the risk of a knock-on,

polycentric effect on associated innocent transactions. For these reasons, the prospective overruling of unlawful transactions is expressly permitted by section 172 of the Constitution with the aim of allowing courts to leave past transactions undisturbed where appropriate, and thereby proportionately minimising the possible disruptive effects of reform. Nor is prospectivity unusual as a remedy in eliminating discrimination in pension law elsewhere - see *Barber v Guardian Royal Exchange Assurance Group* [1990] IRLR 240; and *Arizona v Norris* 463 US 1073.

Levelling down is more controversial. This involves solving the problem of discrimination by equalising benefits by setting them at the less advantageous level. In this case it would mean eliminating the discrimination by affording all members the level of withdrawal benefits currently enjoyed by unmarried members.

The unilateral levelling down by an adjudicator would be undesirable from a policy perspective. Levelling down is best accomplished through the decision of a democratically elected board of management in consultation with the membership.

One suspects this was the thinking behind the finding of the European Court of Justice in *Coloroll Pension Trustees Ltd v Russell and others* [1994] IRLR 586. Accepting that benefits were pay for the purposes of Article 119 of the Treaty of Rome, the equal pay provision, the court held that members should receive equal pay without imposing any specific level of pay. All the same, once discrimination in pay has been found to exist, so long as measures for bringing about equal treatment have not been adopted by the scheme, in order to comply with Article 119 the persons in the disadvantaged class must be granted the same advantages as those enjoyed by the favoured class - levelling up. However, once rules to eliminate the discrimination are adopted by the fund, and have come into operation, Article 119 does not preclude measures to achieve equal treatment by reducing the advantages of the persons previously favoured - levelling down.

From a policy perspective there is much wisdom in the European approach which can be applied appropriately in South Africa. Consequently, the complainant should be entitled to the same transfer benefits as the favoured married members. This ruling could have dramatic effects for the respondent, if not limited in its

impact. However, no case has been made out in this regard by the respondent. Moreover, I am unaware of other similarly situated members of the fund having lodged complaints. In more formal proceedings it may have been necessary to join other parties. But the purpose of my office is to resolve complaints and to effect reform fairly, expeditiously and cheaply, by means of investigative and informal procedures. Accordingly, I shall restrict the retroactive effect of this ruling to complaints by divorced members about withdrawal and transfer benefits pending or lodged with the fund subsequent to the date on which the complainant lodged his complaint with my office.

Finally, the amount actually owing to the complainant is difficult to determine. The shortfall of R33 428,17 is based on the assumption of a five year difference between the age of the member and his spouse, and not the actual age difference. The suggestion has been made that in paying out the benefit this assumption is normally adjusted to reflect the true position. The impact of such an adjustment is not clear to me. Hence I shall direct the respondent to re-calculate the complainant's transfer benefit as if he remained married to his former spouse at the time he exited the fund.

The order of this tribunal is:

1. The determination by the respondent of the complainant's transfer value at 31 December 1997 is declared to be unlawful and unfairly discriminatory on grounds of marital status.
2. The respondent is directed to re-calculate the complainant's transfer value, relying on the same methods and assumptions as those applicable to the computation of a married member's transfer value. For this purpose the respondent shall assume the complainant remained married to his former spouse at the time he exited the fund.
3. The respondent shall furnish the Pension Funds Adjudicator and the

complainant with a written statement of the re-calculated transfer value, together with its reasons and calculations, within 7 days of the date it receives this determination.

4. Should the complainant have any objection to the respondent's re-calculation of his transfer value, he shall lodge his written objection with the Pension Funds Adjudicator within 3 days of receiving the respondent's statement. In which event the Adjudicator shall determine the amount owing to the complainant as a transfer value. If the complainant does not object to the respondent's calculation, the respondent's determination of the transfer value shall be final.

5. The difference between the amount transferred to the approved pension fund on behalf of the complainant (R258 824,89) and the final adjusted transfer value, determined by the respondent or the Adjudicator in terms of paragraph 4 of this order, shall be transferred within 6 weeks of the date of this determination by the respondent to the approved pension fund, of which the complainant is a member, together with interest at the same rate as the rate prescribed in respect of a judgement debt in terms of section 2 of the Prescribed Rate of Interest Act, 1975, calculated from 31 December 1997.

6. This ruling may not be relied upon by divorced members and former members of the respondent in proceedings before the Pension Funds Adjudicator in order to claim entitlement to an enhanced withdrawal or transfer benefit, except in the case of members or former members, or those claiming under them, who have on or after 17 March 1998 lodged a complaint with either the respondent or the Adjudicator as contemplated in section 30A of the Pension Funds Act of 1956.

**DATED AT CAPE TOWN THIS 22ND DAY OF JANUARY 1999.**

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**John Murphy**

**PENSION FUNDS ADJUDICATOR**