

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.: PFA/GA/56/98

In the complaint between:

A Pretorius

Complainant

and

Johannesburg Municipal Pension Fund

Respondent

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

Introduction

This is a complaint lodged with the Pension Funds Adjudicator in terms of section 30A(3) of the Pension Funds Act of 1956.

The complainant is Mr A Pretorius, a member of the respondent and a senior member of the legal staff of the greater Johannesburg Transitional Metropolitan Council, a participating employer in the respondent.

The respondent is the Johannesburg Municipal Pension Fund, a pension fund duly registered in terms of the Pension Funds Act of 1956.

It is common cause between the parties that the complainant has complied with the provisions of section 30A(1) of the Pension Funds Act of 1956 requiring him to lodge a written complaint with the pension fund or the employer participating in the fund before

lodging it with the Pension Funds Adjudicator. It is also common cause that the respondent has properly considered the complaint and has replied to it in writing as required by section 30A(2).

The complaint raises an issue of law arising from a decision of the governing committee of the respondent to interpret and apply the provisions of rule 20 and rule 14 of its rules in a manner contrary to the interpretation contended for by the complainant. As such, the complaint relates to the interpretation and application of the respondent's rules and alleges a dispute of law. The complainant seeks a declaratory order in relation to certain of his rights on withdrawal from the respondent.

A hearing was held at the offices of the respondent on 21 May 1998. The complainant presented his own case. The respondent was represented by Mr A L Jordaan.

The hearing was of an informal nature and neither party adduced additional evidence under oath. In determining this matter, therefore, I have relied exclusively on documentary evidence and the argument and submissions put to me in writing and orally.

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

Background to the complaint

The complainant has been a member of the respondent since 1 May 1990. At the time he originally queried his rights, on 18 August 1997, he had 7 years and 3 months of contributory service with the participating employer.

In the letter of 18 August 1997 addressed to the respondent, the complainant informed the manager of the respondent that he intended to purchase pensionable service in terms of rule 14 of the respondent's rules. However, before doing so, he sought clarification of how such purchased pensionable service would be taken into account

were he to resign or retire voluntarily from the respondent in terms of rule 20(1)(b) before reaching pensionable age.

The complainant's intention was to purchase 4 years and 9 months' service with the consequent effect that the participating employer would become obliged in terms of Rule 14(2) (see below) to purchase for him an additional 3 years, giving him a total of 7 years, 9 months' purchased service. The complainant's intention is to accumulate 15 years of pensionable or contributory service. Together with his actual contributory service, the purchased service would give him a total of 15 years of service, for the purpose of computing his benefits.

In his letter, the complainant indicated that once he had purchased the pensionable service, he intended to retire in terms of rule 20(1)(b). If his contributory service and purchased pensionable service were aggregated, he maintained that this would entitle him to have his lump sum benefit increased by 100% in accordance with the relevant table contained in rule 20(1)(b), set out fully below.

The complainant concludes his letter by requesting the respondent to advise him whether it agreed with his understanding of the operation of the rules and if not to provide him with the reasons for holding otherwise.

In response to the complainant's complaint, the respondent sought two legal opinions. One of the opinions concludes that the purchased pensionable service should not be taken into account for the purposes of calculating the benefit payable to the complainant in the event of his voluntary retirement or resignation. The other lends support to the complainant. Accordingly, the respondent has indicated that it too would appreciate having the benefit of a declarator setting out the complainant's rights.

The rules

Rule 20(1) governs voluntary retirement from the respondent and provides as follows:

Voluntary Retirement

- (1) A member who retires voluntary (sic) from the service before attaining the pensionable age shall, subject to the provisions of rule 36(b) and subrules (2) and (3), be entitled to one of the following benefits:
- (a) if he has less than ***one years'** contributory service, in addition to the benefit contemplated in rule (14)(3)(c), the return of his own contributions;
- (b) if he has one or more years' contributory service, in addition to the benefit contemplated in rule 14(3)(c), a lump-sum equal to the return of his own contributions plus an addition to such contributions of ****6** per cent for each completed year of contributory service, ****such lump sum to be increased by a further percentage according to the following table :-**

5	years	to	5 years and 11 months	10%
6	years	to	6 years and 11 months	20%
7	years	to	7 years and 11 months	30%
8	years	to	8 years and 11 months	40%
9	years	to	9 years and 11 months	50%
10	years	to	10 years and 11 months	60%
11	years	to	11 years and 11 months	70%
12	years	to	12 years and 11 months	80%
13	years	to	13 years and 11 months	90%
14	years or	more		100%

- (c) if he has attained the age of 45 years and has not less than ***15 years'** contributory service, at his option either -
- (i) in addition to the benefit contemplated in rule 14(3)(c), an amount equal to ***the higher of the return of his own contributions plus** an addition to such contributions of 4 per cent for each completed year of contributory service or twice his own contributions without interest; or
- (ii) a benefit equal to the percentage specified below and

opposite the age at retirement of a benefit consisting of a lump-sum equal to 7 per cent of his final average emoluments per year of pensionable service and a pension equal to 1,7516 per cent of the percentage specified in rule 16, if it is greater, of his final average emoluments per year of pensionable service: **Provided that** in calculating the lump-sum benefit and pension in terms of this rule for a member who has been a member continuously since 30th June 1956 and who has attained the age of 57 years, the percentage shall be 100.

EXACT AGE AT RETIREMENT (YEARS)	PERCENTAGE
60 or over	100
59	96
58	91
57	86
56	81
55	76
54	72
53	68
52	65
51	62
50	60
49	58
48	56
47	54
46	52
45	50

Provided further that if the member's age at retirement is not an exact number of years, a portion of a month shall be ignored and the percentage applicable shall be calculated on the basis of 12 months being equal to the difference between the percentages applicable to the

ages in years, specified above, immediately preceding and succeeding the actual age at retirement;

(d) if he attained the age of 55 years and the sum of -

(a) his period of contributory service; and

(b) if he has been a member continuously since 30 June 1984, the period contemplated in rule 14(1) actually paid for by him, amounts to ten or more years, a benefit calculated in terms of paragraph (c)(ii).

Rule 14 governs the purchase of pensionable service. It reads as follows:

Purchased service

14. (1) Subject to the provisions of Rule 21(6), a member may at any time purchase a period or a further period, such periods not to exceed ten years in the aggregate, of pensionable service:

Provided that -

(a) the total of the periods so purchased, together with the period purchased for him by his employer in terms of subrule (2), shall not exceed the period between the day on which he attained the age of 17 years and the day on which his contributory service commenced;

(b) the period of service purchased on any application, except for the purpose of making his period of contributory service commence on the day on which he attained the age of 17 years, shall be in complete months;

(c) any purchase of such service shall take effect from the date on which the application to purchase such service is accepted by the Fund;

(d) an application that has been accepted by the Fund shall not be withdrawn or varied without the approval of the Manager.

(e) If a member who has received a benefit that was based partly on pensionable service purchased by the member and the employer in terms

of this rule again becomes a member in terms of rule 9(2), such periods of pensionable service shall be deemed to be periods of pensionable service purchased for the purpose of determining any further periods of pensionable service that may be purchased in terms of this rule.

- (2) In respect of the first three years or lesser period of pensionable service purchased by the member in terms of subrule (1), his employer shall forthwith purchase an equal period, which shall be added to his pensionable service.
- (3)
 - (a) In respect of the total periods purchased by the member in terms of subrule (1), he shall pay to the Fund an amount calculated according to tables furnished by an actuary, less any amount paid by his employer in respect of him in terms of subrule (4)(a), in a cash payment or payments or in monthly instalments inclusive of interest at 9,5 per cent per year, compounded yearly, if the date of purchase is on or before 30 June 1991, 12 per cent per year, compounded yearly, if the date of purchase is after that date ***but before 7 October 1992, or 15 per cent a year, compounded yearly, if the date of purchase is after 7 October 1992**, from the date of purchase to the date of payment of the last instalment, such instalments to be deducted from his salary over a period not exceeding twenty years.
 - (b) If the member dies or retires as contemplated in subrule (2) before the amount contemplated in paragraph (a) is paid in full, the balance owing shall be deducted from any benefit due in terms of these rules.
 - *(c) If a member resigns and becomes entitled to a benefit in terms of rule 20(1)(a), (b) or (c)(i) or rule 23(1) or if he is dismissed, he shall be refunded the total amount that he has paid in terms of paragraph (a), plus interest equal to ****6** per cent for each completed year from the date of the first payment to the date of resignation or dismissal.

- (d) If a member resigns and his benefit is transferred to another fund in terms of any law or rule 37, only the period of purchased service actually paid for by him at the date of resignation shall form part of the benefit so transferred, and there shall be transferred to the other fund in respect of the amount paid by him in terms of this rule only that amount and the period of purchased service represented by such payment.
- (e) If a member dies or retires, there shall be added to his contributory service -
- (a) the period actually paid for by him at date of retirement;
and
- (b) the period of service purchased for him by his employer.
- (4) The employer concerned shall in respect of a maximum in the aggregate of three years of service purchased -
- (a) in terms of subrule (1) by a member who is at the date of purchase 47 years or older, pay forthwith to the Fund an amount equal to the percentage specified below and opposite the age at birthday nearest to the date of the capital cost of the period purchased:

Age at birthday nearest

To date of purchase

(Years)	Percentage
47	2.8
48	5.6
49	8.3
50	11.1
51	13.9
52	16.7

53	19.4
54	22.2
55 or older	25.0

- (b) in terms of subrule (2), pay forthwith to the Fund an amount calculated according to tables furnished by an actuary.

Three definitions contained in rule 1 are key to understanding the import of the abovementioned rules. These are:

“contributions”

in relation to a member, means the amounts exclusive of interest paid or payable by him to the Fund in terms of rule 12(1)(a), including that part of any amount paid to the Fund in terms of rule 13 that an actuary has determined to be a contribution paid by the member concerned;

“contributory service”

means the period in years and complete months in respect of which contributions have been made or are payable to the Fund by or in respect of a member, including any service with another local authority for which a transfer value has been received and any period of service contemplated in rule 13;

“Pensionable service”

means a period in years and complete months consisting of -

- (a) a member’s contributory service;
- (b) service purchased in terms of rule 14 by him and by his employer in respect of him and which will be taken into account in the calculation of a benefit in terms of these rules;
- (c) any bonus service contemplated in rule 15; and
- (d) any period of potential service contemplated in rule 18;

It is to be noted that pensionable service includes contributory service.

The complainant's argument

As mentioned, the complainant contends that should he voluntarily retire from service before attaining his pensionable age he should be entitled to an enhancement of his lump sum benefit by a percentage of 100% in terms of rule 20(1)(b) read with rule 14(3)(e). He maintains that the purpose of rule 14(3)(e) is to enhance a member's contributory service when the prescribed condition is satisfied, i.e. when a member who had purchased service in terms of rule 14 either dies or retires. A member's contributory service, as defined, then falls to be increased by the addition thereto of the purchased pensionable period. Essentially, he contends that the expression *retires* as used in rule 14(3)(e) refers not only to compulsory retirement, but also to voluntary retirement as contemplated in rule 20(1). Thus, he is entitled to the enhancement provided for in the progressive scale incorporated into rule 20(1)(b).

An overview of the respondent's benefit structure

In order to gain a fuller understanding of the issues at stake, it may be worthwhile to provide an overview of the respondent's benefit structure.

A member's benefits under the fund accrue to him or her by virtue of different possible credits to his or her account. Rule 12 regulates ordinary contributions. As a general rule, every member of the fund contributes to the fund 9.5% of his or her pensionable emoluments. These are deducted from the member's salary by his or her employer and are paid by the employer to the fund. In addition, each employer normally contributes to the fund 20% of the monthly pensionable emoluments of its employees who are members of the fund. Rule 52 of the rules permits the employer to take a contribution holiday in certain prescribed circumstances where the actuaries' valuation discloses a substantial surplus.

Besides these sources, a member can build up his or her credits by purchasing service under rule 14 set out fully above. Rule 14(1) imposes a number of conditions on the purchase of pensionable service. For example, such periods may not exceed 10 years in the aggregate. Rule 14(2) obliges the employer to purchase an equal period as that

purchased by the member up to a maximum of 3 years of pensionable service. Rule 14(4) obliges the employer to make a further contribution to the capital cost of periods purchased by members older than 47 at the date of purchase.

Additionally, rule 15 allows members to accumulate further credits by means of bonus service in respect of each completed period of 5 years of pensionable service. This, however, is subject to a number of stringent conditions.

Finally, it is possible to accumulate further credits in terms of rule 13 which permits the committee to regard a period before the date on which a member became a member to be reckoned as pensionable service. Such deemed contributory service differs from purchased service in that it does not qualify for the employer's obligatory award of pensionable service contemplated in rule 14(2) or the employer's subsidy contemplated in rule 14(4)(a) or any bonus service contemplated in rule 15.

These accumulated credits then form the basis of a member's entitlement to benefits in the event of his or her withdrawal from active service of the participating employer.

An examination of the rules of the respondent as a whole reveals that there are 10 possible forms of termination of membership which entitle the terminating member or his dependants to specified benefits. The most significant are:

1. Retirement at pensionable age - rule 17(1) read with rule 16.
2. Retirement after pensionable age - rule 17(2) read with rule 16.
3. Retirement for a special reason in terms of rule 19. This is the case where a member is retired from the service for a reason that his employer determines to be special and his employer applies the provisions of rule 19(2). In which event, he is entitled to a retiring benefit calculating in terms of rule 15 as if he would have contributed to the fund up to the age of 60. If this rule applies, the employer pays to the fund an amount equal to the capitalised value of the difference between the retiring benefit and that which he would have received on early retirement in terms of rule 20(1) (c).

4. Early retirement of a Head of Department in terms of rule 18. In terms of this rule, Heads of Department receive preferential retirement benefits and are entitled to retire early without penalty under specified conditions.
5. An ill-health retirement in terms of rule 21. This rule permits a member to obtain a pension if his employment is terminated before he reaches pensionable age because he has become either totally or partially incapable of officially discharging his duties by reason of infirmity of mind or body. The benefit is calculated in accordance with a formula specifically provided for in the rule.
6. Death benefits in terms of rule 25 are payable to a surviving spouse or eligible child in terms of the formula provided for in the rule.
7. A dismissal benefit in terms of either rule 22 or rule 24. The amount of the benefit depends on the reason for the dismissal.
8. A voluntary retirement benefit in terms of rule 20(1). The amount of the benefit varies depending on length of service, and basically distinguishes between what may be described as resignation and an early retirement.
9. A transfer benefit in terms of rule 37. Transfers to pension funds not associated with local authorities are treated in terms of the respondent's rules in more or less the same way as a voluntary retirement or a dismissal depending on the reason for termination. However, transfers to pension funds of associated local authorities attract favourable treatment in that a higher transfer value is possible, and the full actuarial reserve is taken over in terms of rule 37 of the rules. This too only applies in specified circumstances.

The treatment of purchased service on termination of membership

Rule 14(3)(c) - (e) regulates the treatment of purchased pensionable service in the event of a member's termination of membership. Every termination possibility provided for in

terms of the rules, with one exception, is accounted for in one way or another in the subrule. The exception not catered for in rule 14(3) is the case where a member opts for early retirement and instead of taking a lump sum benefit under rule 20(1)(c)(i), opts for a part lump sum and an early retirement pension in terms of rule 20(1)(c)(ii). The reason rule 14(3) fails to provide for the treatment of purchased pensionable service in the circumstances contemplated by rule 20(1)(c)(ii) is because the latter expressly regulates the situation itself. Consequently, the rules of the respondent expressly regulate the treatment of purchased service in each species of termination of membership. These situations and their regulation can be summarised as follows:

1. The member resigns and opts for a withdrawal benefit under rule 20(1). In such an event, the practice of the respondent seems to be that the member shall be refunded a total amount that he has paid in purchasing past service, plus interest equal to 6% for each completed year from the date of the first payment to the date of resignation. - (except under rule 20(1)(c)(ii)) or rule 23 - not relevant for present purposes)
2. The member resigns and opts for an early retirement pension in terms of rule 20(1)(c)(ii). Rule 14(3)(c) is silent on this situation. As stated, the reason for this seems to be that the matter is regulated by rule 20(1)(c)(ii) internally. Essentially, the rule provides that if a member has attained the age of 45 years and has not less than 15 years contributory service, instead of opting for the lump sum withdrawal benefit provided for in rule 20(1)(c)(i) he may opt for a partial lump sum and a pension calculated with reference to his period of pensionable service. Section 1 defines *pensionable service* as including service purchased in terms of rule 14.
3. Where a member is dismissed, rule 14(3)(c) provides that the dismissed employee, irrespective of the reason for dismissal, is in the same position as the member who has resigned insofar as the treatment of purchased pensionable service is concerned.
4. Members who resign and transfer their benefits to another fund are entitled to

have the period of purchased service actually paid for by them at the date of resignation to form part of the benefits so transferred. This is provided for in rule 14(3)(d).

5. Where a member dies, the member gets the full benefit of the purchased service including the period of service purchased for him by his employer added to his contributory service in terms of 14(3)(e).
6. Where a member *retires*, he is treated in the same way as a member who dies. The expression *retires* seemingly would include those instances of compulsory retirement at or after retirement age, retirement for special reasons or early retirement by Heads of Department. The controversial issue in this matter is whether such expression also includes voluntary retirements under rule 20(1).

Analysis of the complainant's argument

The complainant has advanced a lengthy, complex and detailed argument in support of his contention that the entire amount of any purchased pensionable service, including the period of service purchased by the employer compulsorily in terms of 14(2), should be added to his contributory service for the purpose of computing his benefit in the event of his resignation under rule 20(1)(b).

It is not my intention to traverse each and every aspect of the complainant's argument. In my view, with the greatest of respect, the complainant's argument proceeds entirely on the mistaken assumption that a resignation as contemplated in rule 14(3)(c) equates with a retirement as contemplated in rule 14(3)(e). In making this equation, the complainant gives insufficient weight to rule 14's express differentiation between the two different eventualities.

The complainant's argument stands or falls on the meaning given to the word *retires* in rule 14(3)(e). The respondent argues that the use of the expression *resigns* in rules

14(3)(c) and (d) signifies that the expression *retires* in the section is to be construed as having a narrower meaning than that contemplated in rule 20, and that in relation to the treatment of purchased pensionable service it means superannuation, including compulsory retirement, retirement for a special reason, ill-health retirement and retirement as a Head of Department. Accordingly, the term *retires* cannot mean resignation or transfer in the sense of those two instances of termination specifically catered for in rules (14)(3)(c) and (d).

In support of his contention that the term *retires* should be taken to include resignation for the purposes of rule 14(3)(e) the complainant advances the following submissions:

1. An investigation into the ordinary meaning of the words *retires* and *resigns* reveals that they do not denote two different modes of termination of membership leading to different sets of benefits in regard to purchased service.

The shorter Oxford Dictionary defines *retire* to mean:

“To withdraw from office or an official position.....”

This is synonymous with the principal meaning of the word *resign* given by the dictionary, which defines that terms as follows:

“To relinquish, to surrender, to give up or hand over something, especially an office, position, right, claim, etc”

Especially when the term *resign* is used intransitively, the expressions *retire* and *resign* are synonymous. The words have an equivalence in meaning and are used interchangeably in ordinary parlance.

2. In the rules the expression *retirement* has a wider meaning than *resignation* in that it includes instances of retirement which do not arise from any voluntary act on the part of the member, for example, compulsory retirement in terms of rule 17. Yet, the respondent argues for a narrow meaning of the expression in the context of rule 14 by excluding resignations. From this, he argues that certain

alleged anomalies flow in relation to persons who retire under subrule 20(1)(c)(ii) i.e. those persons who take early retirement after attaining 45 years of age with 15 or more years contributory service. Such persons by virtue of the respondent's practice and in terms of the subrule itself, benefit from their full pensionable service, whereas other persons who resign in terms of rule 20 forfeit such service purchased by the employer and obtain only a refund of their contributions.

This differential treatment, according to the complainant, flows from a practice of applying subrule 14(3)(e) to enhance the benefits of members who retire in terms of subrule 20(1)(c)(ii). These persons should be considered as resigning and a consistent application of rule 14(3)(c) and (e) would exclude them from the full benefit of pensionable service. In other words, to exclude such terminations from the category of resignations under rule 14 would be arbitrary.

While I agree with the complainant's linguistic analysis of the ordinary meaning of the terms *retire* and *resign*, the argument about the anomalous situation created by rule 20(1)(c)(ii) fails to take account of the fact that rule 14(3) does not in any way seek to regulate purchased pensionable service in relation to benefits payable to early retirees opting to retire under subrule 20(1)(c)(ii). Rule 14(3) specifically identifies resignation under rule 20(1)(a), (b) or (c)(i). The reasonable conclusion to be drawn is that subrule 20(1)(c)(ii) sets up its own self-regulatory, comprehensive provision which takes account of purchased pensionable service.

Thus, there is no need to regulate the treatment of purchased service in such instances under rule 14(3). In other words, the service to be taken into account for the purpose of computing an early retirement benefit under subrule 20(1)(c)(ii) is pensionable service and not contributory service. For that reason it falls outside of the purview of limited entitlement established by rule 14(3)(c) read with the appropriate subrule of rule 20(1). The consequence is that different categories of resignation are treated differently. Whether such differential treatment is arbitrary and unfair is an altogether different enquiry. I shall return to this matter in due course.

3. The respondent's interpretation of the word *retire*, equates the term with the meaning of the word *superannuation*. This, according to the complainant, is also fraught with difficulty. The shorter Oxford English Dictionary defines the term *superannuation* as:

1. the condition of being superannuated, impairment of powers or faculties by old age; senile infirmity or decay
2. the action of superannuating an official; also the allowance or pension granted to one who is discharged on account of age

The essential defining ingredient, applicable in the current context, is that to superannuate means to retire with a pension.

The first difficulty with the term *superannuation* is that it is open to different G23 shades of meaning as is evident from its dictionary definition. According to the complainant if we were to accept superannuation to mean retire on pension, in the sense that superannuation requires the payment of periodical lifetime payments, this too would lead to a further anomaly under rule 20(1)(c)(ii) in that such a person would fall outside the narrow concept of retirement by virtue of the retirement being voluntary, but would also fall within the concept on account of the resultant benefit containing a pension component. Again, in my view, this argument fails to take account of the fact that the subrule sets up its own self-regulatory provision which takes account of purchased pensionable service.

4. The complainant further argues that the consequence of applying the narrower meaning of the term *retires* in rule 14 to exclude resignations is at variance with the provisions of rule 14(1)(e). This rule deals with the case of a member who having received a benefit that was partly based on pensionable service purchased by the member and the employer, again and later becomes a member of the fund, before reaching the age of compulsory retirement, namely, 60 years of age.

The aim of this subrule is to prevent such a member from taking advantage of a

break in service to purchase more than 10 years of pensionable service, contrary to rule 14(1). In order to have received a benefit “based partly on pensionable service” at the time of termination, the service purchased obviously must have counted as pensionable service for computing the early withdrawal or retirement benefit. The subrule thus contemplates persons retiring or resigning in circumstances other than compulsory retirement having the full benefit (their own and employer’s contributions) of purchased service. This implies that the add on permitted by rule 14(3)(e) has been performed. From this the complainant argues that the rules clearly contemplate the full addition to contributory service under rule 14(3)(e) being applicable in cases of resignation.

The argument would be compelling were it not implicitly premised on the mistaken view that the rules draw a clear distinction between a single species of compulsory retirement and a single species of voluntary retirement. The rules do not do so. Instead, they provide for seven different species of voluntary retirement, namely:

retirement with less than one year’s contributory service (rule 20(1)(a));

retirement with more than one year’s contributory service (rule 20(1)(b));

retirement after attaining the age of 45 with more than 15 years’ service with a lump sum benefit, (rule 20(1)(c)(i));

retirement after attaining the age of 45 years with more than 15 years’ contributory service with a partial lump sum and a periodical pension payment, (rule 20(1)(c)(ii));

retirement after attaining the age of 55 years with a pensionable service of more than 10 years, (rule 20(1)(d));

retirement for a special reason in terms of rule 19;

retirement as a Head of Department in terms of rule 18.

In the last four instances such retirees could rejoin the fund before turning 60 years of age. In which event, rule 14(1)(e) would prevent such persons from obtaining more than the permitted 10 years of purchased service. It follows that rule 14(1)(e) does not necessarily contemplate the retirees in the first three instances above obtaining the addition to their contributory service provided for in rule 14(3)(e). Indeed, the clear reference to the more limited benefit provided for in rule 14(3)(c) in subrules 20(1)(a) - (c) is a clear indication of a contrary intention to the effect that such persons are entitled only to a refund of their own contributions towards purchased service, plus interest.

5. The complainant further submits that were I to opt for the narrower meaning of the word *retire* in rule 14(3)(e), i.e. excluding resignations, it would be the only instance in the rules where the narrower meaning applies. Voluntary retirements under subrules 20(1)(a), (b) and (c)(i) and certain categories of dismissal would be the only instances where the retirement benefit is not enhanced by the addition of the full period of purchased service. All other instances of termination result in the computation of a benefit based on the years of pensionable service which by definition will always exceed the years of contributory service. These other benefits are computed as follows:

The compulsory retirement benefit is computed with reference to the years of pensionable service and not contributory service by virtue of the provisions of rule 16 read with rule 14(3)(e).

Death benefits are computed in terms of rule 25 which also relies on the period of pensionable service and this is reinforced by the provisions of rule 14(3)(e).

Retirements of Heads of Department and retirements for a special reason under rules 18 and 19 are treated in the same way as compulsory retirement for the purpose of computing benefits.

Early retirements under rule 20(1)(c)(ii) and rule 20(1)(d) also compute the benefit with reference to pensionable service.

Dismissal on operational requirements grounds referred to in the rules as “termination of employment due to redundancy” are regulated by rule 22. This rule allows for a pension benefit computed using the same factors applied in cases of compulsory retirement, but rely on the existing period of pensionable service, thus including the employees purchased service and the employer’s contribution in that regard. Even temporary employees who have been retrenched have their benefit computed with reference to their pensionable service and not their contributory service but a different percentage factor is applied.

Persons dismissed on other grounds have their benefits computed with reference to their contributions paid or their contributory service, depending on the circumstances, in accordance with rule 24. Even here such persons under prescribed conditions have the right to retire under rule 20 (1)(c)(ii) or (d) in which event they will benefit from the full extent of their pensionable service, including purchased service.

Persons receiving an ill-health benefit consequent on the termination of their employment have their benefit computed on the basis of their pensionable service.

In other words, the only persons terminating membership of the fund who have their benefit computed with reference to the contributory service rather than their pensionable service are:

persons resigning who are younger than 45;

persons resigning who are older than 45 with less than 15 years contributory service; and

persons resigning who are older than 55 with less than 10 years pensionable service.

A critical issue for determination but regrettably not fully argued before me is whether such differential treatment amounts to unfair discrimination. To the extent that the differential treatment may be considered to be unfair, it needs to be borne in mind that such unfairness is mitigated in relation to those retirees who retire under rule 20(1)(b) in that they shall have their benefit augmented by the percentage increase provided for in the table contained in that rule. Additionally, retirees who transfer to associated funds under rule 37, retain the right to transfer the balance of their actuarial reserves within 12 months of their termination of employment.

6. A further difficulty with rule 14(3)(e) indicated by the complainant is that it appears to require the enhancement of contributory service by the purchased service rather than the pensionable service. The injunction of the rule is that the purchased service should be added to the contributory service. This creates its own ambiguities. As noted, pensionable service by definition includes contributory service, as well as the service purchased under rule 14. A literalistic interpretation of rule 14(3)(e) suggests that contributory service should be augmented by the purchased service in cases of death and retirement. This would result in the purchased service been taken into account twice for the purpose of determining pensionable service. Thus, taken literally, persons who retired or died would have their contributory service augmented by the amount of their purchased service. These two amounts together would constitute the member's contributory service. Thereafter, when it came to calculating pensionable service the augmented contributory service would be added again to the service purchased under rule 14. A further consequence, of most importance to the complainant, is that this augmented period of contributory service would be the period taken into consideration when computing the benefit under rule 20(1)(b).

In my view, common sense and a contextually sensitive reading of rule 14(3)(e), together with the definitions of pensionable service and contributory service lead one fairly easily to the conclusion that the intention of rule 14(3)(e) is to reinforce the obligation on the part of the fund to take purchased service into account as pensionable service on death or retirement. In other words, the purpose of rule 14(3)(e) is to quantify the period which will be added to contributory service for the purpose of computing pensionable service for a member who dies or retires in circumstances other than those contemplated in rule 20(1)(a), (b) and (c)(i). The latter category obtain a refund whereas the dying or retiring member has the purchased service added together with his or her contributory service for the purpose of computing the aggregate pensionable service.

The difficulty with this interpretation though is that rule 14(3)(c) also provides for a refund in cases of dismissal. As already mentioned, in some instances of dismissal the benefit is computed with reference to pensionable service. This would mean that some categories of dismissed employees would be entitled to a refund of the amounts paid for pensionable service and at the same time have their pension benefit computed with reference to those amounts purchased. Their purchased service hence would be taken into reckoning twice. However, this apparent inconsistency can be interpreted away by limiting the reference to members who have been dismissed in rule 14(3)(c) to those members who do not fall to have their benefit computed with reference to their pensionable service.

Only those dismissed members who have received a refund of their ordinary contributions, or who have had their benefit computed with reference to their contributory service shall be given a refund under rule 14(3)(c).

7. Finally, the complainant advances a number of compelling arguments to illustrate that the provisions limiting a resigning employee's rights to benefit from purchased service are unfair. The complainant argues that while purchased service is not a benefit in itself, it is one of the mechanisms by which the fund can achieve its fundamental purpose of bestowing benefits, in the sense of an advantage or gain for a member. For example, the early withdrawal arrangements for a member younger than 45 with between 1 and 15 years'

contributory service will result in him receiving:

repayment of the amount he paid for purchased service plus 6% interest per annum;

a refund of his ordinary contributions plus 6% per annum; and

a percentage increase in terms of rule 20(1)(b) depending on his period of contributory service.

In the complainant's view such an amount cannot be construed as a benefit within the proper meaning of the expression, in that it confirms no form of advantage or gain on the member. Indeed, the member suffers a loss due to inflationary depreciation of his investment over time. The balance of the monies invested by the employer on his behalf, either as contributions or as purchased service, and any investment yield over and above the 6% interest benefits the fund and its remaining membership rather than the retiring member. The actuarial surplus of the fund thus increases with every amount forfeited by the early leaver.

Moreover, with the constitutional restructuring of local government which has taken place over the last few years, and the consequent legitimate shift in employment policy towards affirmative action, the participating employer has an expressed preference for greater labour mobility which is at variance with a pension fund benefit structure which rewards lengthy service. Punitive early withdrawal rules have become anachronistic in the current context. The complainant contends that it would be fundamentally unjust to subject the members of the fund to an attritional employment policy aimed at a demographic restructuring of the labour force and at the same time to punish those employees who resign to make way for the implementation of the new policy by causing them to forfeit some of their retirement benefits.

Additionally, it is not only the fund that benefits from early leavers, the employer

too can benefit. Thus, rule 15(6) provides for the lapsing of bonus service for early leavers and other rules permit the employer in certain circumstances to benefit from a so-called contribution holiday.

At the same time rules 53 and 54 of the respondent's rules recognise that former members and early leavers have some equitable interest in the actuarial surplus and even the nett assets of the fund in the event of a dissolution. In instances where a member transfers to another associated fund within 12 months of termination of employment, that interest is concretized into a right to have the balance of his or her actuarial reserve transferred into the new fund in terms of rule 37.

From these facts and considerations, the complainant argues that as a matter of employment equity, derived from the constitutional right to fair labour practices, recognition should be given to the early leaver's equitable interest in the actuarial surplus by means of a beneficial interpretation of rule 20(1)(b) which ensures that the early leaver withdraws from the fund with a more equitable benefit. In sum, the word *retires* in rule 14(3)(e) should be interpreted to include a resignation contemplated in rule 20(1)(b), thus entitling the complainant through the purchase of service to augment the period of his contributory service in such a manner as to enable him to obtain a 100% enhancement in accordance with his proposed scheme.

Whilst I have much sympathy with the complainant's argument, on the narrow question of interpreting rule 14, I find myself in agreement with the author of the opinion submitted to me by the respondent, when he or she observes:

When endeavouring to interpret rule 14(3), it must be borne in mind that it deals with a specific type of benefit, i.e. the benefit derived from the purchase of pensionable service, and that the rule deals with what benefits shall accrue to a member in particular circumstances, i.e. if he dies, if he retires, if he resigns or is dismissed and becomes entitled to a benefit under, e.g. rule 20(1)(b), or if he resigns and transfers his pension rights in terms of rule 37 or in terms of any law. These significant words, **"dies"**, **"retires"**, **"resigns"** and **"dismissed"** have to be interpreted in the context of rule 14(3).

It appears to us that the intention of the fund, when framing this provision, was to deal with 4 totally different concepts, i.e. death, dismissal, retirement and resignation, and it is therefore our view that the rule should be implemented by giving effect to these different concepts. Thus **resignation** is a different concept to **retirement** for the purposes of this rule.

In accordance with my line of reasoning in response to the complainant's arguments, I feel that the broader concept of retirement as used throughout the rules is narrowed in the context of rule 14(3) by the exclusion of the categories of resignation, transfer and dismissal referred to in that rule.

Regarding the complainant's arguments touching upon the participating employer's affirmative action programme, there is no evidence before me that the employer's policy to adjust the demographic composition of its workforce aims at forcing the resignation of its existing employees. Indeed, the demographic policy may aim at striking a balance between retaining skills and seeking demographic adjustment through promotions and a different recruitment policy. Were I to provide existing staff with an incentive to retire by enhancing their entitlement to pension benefits through a strained interpretation of the rules, I might very well be defeating the employer's affirmative action policy. Accordingly, I cannot rely on this aspect of the complainant's argument without further evidence from the complainant and submissions and evidence from the employer.

Similarly, insofar as the early leavers from the fund might have an equitable interest to the surplus or the net assets of the fund on dissolution, this argument has as its premise the contention that the rules regulating early withdrawal are unfair and perhaps even unconstitutional by virtue of their discriminatory nature and effect.

From the discussion above it is more than apparent that early leavers are subject to differential treatment when it comes to the computation of their pension benefits in that unlike other terminating members they do not qualify to have their benefit computed on the basis of their pensionable service. Were I to be persuaded that such differential treatment constituted unfair discrimination within the meaning of section 9 of the Constitution of 1996, I daresay I could rely on the provisions of section 39(2) of the Constitution to strain the language of the rules in the manner requested by the

complainant to award enhanced benefits to early leavers. Section 39(2) obliges me to promote the spirit, purport and objects of the Bill of Rights. Alternatively, I could strike down the offending rules on the grounds of unreasonableness or unconstitutionality.

In essence, the complainant is asking for a reading down of two inter-related rules in order to interpret away their discriminatory and unreasonable purpose and effects.

Reading down is an interpretational activity applied normally as a device of constitutional interpretation. Where a statute (or a rule) will bear two interpretations, it should be read in line with the interpretation that does not offend fundamental human rights.

Reading down, however, must be approached with extreme caution as it can result in the imposition of substantial additional financial obligations, in this case, on the pension fund.

Hence, before I would be prepared to read the rules down in this case, I shall need to be convinced by evidence and argument that the rules unfairly discriminate on arbitrary grounds or are contrary to public policy in some other way. It does not follow from the fact that the rules allow for differential treatment that they are unfairly discriminatory or contrary to public policy. They may well be. In any event, the complainant has not lodged with me a complaint to that effect. Essentially, the complainant has sought a declarator upholding his interpretation of the rules. Nevertheless, were I to accede to his interpretation the effect would be a reading down, and I would be doing so without the benefit of necessary and appropriate evidence.

In *R v Big M Drug Mart Ltd*, the Canadian Supreme Court illuminates the nature of the enquiry involved. Dickson J explained the matter as follows:

Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realised through the impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and actual effects have often been

looked to for guidance in assessing the legislation's object and thus its validity.

Consequently, any determination into the constitutional validity of legislation, usually will require some evidence of the purpose and effect of the challenged law. The kind of evidence required will depend on the basis of the challenge in each case.

In a reading down situation, especially when dealing with a pension fund rule granting specific entitlements to benefits, evidence on the manner and effect of a particular interpretation is absolutely essential. Before I can engage in a reading down of a discriminatory early withdrawal rule in order to make it less discriminatory, I shall have to receive and consider evidence of the actuarial and financial consequences of such an interpretation.

Additionally, any enquiry into alleged discrimination or constitutional infringement involves some investigation of justification grounds. Discriminatory rules can be justified as fair and reasonable. The fact that constitutional infringement can be justified on the grounds of reasonableness and rationality renders relevant and admissible a wide range of evidence of every kind.

In other words, the validity of legislation or a pension fund rule challenged either under the Constitution or on the grounds of unreasonableness frequently depends on issues of fact and not law. In this case the facts are not before me.

Before I would be prepared to interpret away the discrimination or to strike down the rules, I would require a complaint pleading discrimination and requesting particular relief. The complaint would have to be supported by evidence demonstrating prejudicial financial consequences in the payment of benefits on a differential basis. Likewise, the respondent and the participating employer would need to be afforded an opportunity to adduce evidence and argument justifying the differential treatment with reference to prevailing actuarial practice which would give a clearer picture of the practical consequences of a ruling against the alleged unfair discrimination, if any.

In the absence of such actuarial evidence and argument measuring the probable

repercussions of the complainant's interpretation taken to its logical conclusion, I decline to interpret rule 20 and rule 14 of the respondent's rules to eliminate the *prima facie* discrimination.

Accordingly, I declare as follows:

That on his resignation in terms of rule 20(1)(b) of the rules, the complainant shall become entitled to:

- (i) a refund in terms of rule 14(3)(c) of any amount he may have paid for purchased service in terms of rule 14(1) plus interest at 6% for each completed year from the date of such payment to the date of resignation;
- (ii) a lump sum equal to the return of his own contributions plus an addition to such contributions of 6% for each completed year of contributory service; and
- (iii) an enhancement of the lump sum by a further percentage to be determined depending on his years of contributory service in accordance with the table contained in rule 20(1)(b).

DATED AT CAPE TOWN THIS 16TH DAY OF JULY 1998.

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Prof John Murphy
PENSION FUNDS ADJUDICATOR