

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

CASE NO.: PFA/GA/434/98

In the complaint between:

City Council of Pretoria

Complainant

and

Joint Municipal Pension Fund

First Respondent

Municipal Employees Gratuity Fund

Second Respondent

Municipal Employees Pension Funds

Third Respondent

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

**Introduction**

The complainant, an employer participating in the respondent funds, has lodged a complaint with the Pension Funds Adjudicator in the terms of Section 30A(3) of the Pension Funds Act of 1956 challenging the reasonableness of certain decisions taken by the boards of management of the respondents concerning the transfer of the employees of the complainant among various pension funds (including respondents) in which it participates.

The respondents are all pension funds registered in terms of the Pension Funds Act of 1956. The first respondent also acts as an administrator of pension funds and in this capacity administers the second and third respondents, each of which has its own management committee, separate from that of the first respondent.

The complainant lodged its complaint with my office under cover of a letter dated 6

November 1998. The first respondent replied to the complaint on behalf of the three respondents under cover of a letter dated 17 December 1998. A hearing into the matter was held on 5 February 1999 at the complainant's offices in Pretoria. Both parties have made submissions orally and in writing. No evidence was taken under oath.

The complainant was represented by its legal advisor, Mr M. Steyn and an official, Mr A. Crofford.

The respondents were represented by officials, Mr D. Crous and Ms H. Joubert.

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

### **Background to the Complaint**

Prior to 1997 the complainant participated in a number of pension funds of which its employees were members. These were;

- The Pretoria Municipal Pension Fund
- The Pretoria Municipal Provident Fund
- Transvaal Municipal Employees Pension Fund
- Transvaal Municipal Employees Provident Fund
- Transvaal Municipal Retirement Fund for Employees
- The Municipal Councillors Pension Fund
- South African Local Authorities Pension Fund
- South African Local Authorities Provident Fund

During 1996 the larger trade unions in local government, IMATU, SAMWU and MESHAWU established their own retirement funds. The funds are administered by Sanlam, Southern Life and Metropolitan Life, respectively.

Subsequent to the establishment of the union funds, negotiation took place within the Bargaining Council for the Pretoria Municipal Undertaking resulting in certain of these funds becoming "council approved funds".

On 30 October 1997 the City Council of Pretoria resolved at a council meeting that, subject to the reaching of an agreement in the Bargaining Council for the Pretoria Municipal Undertaking, new employees would be granted a choice in respect of membership of any one of the council approved pension funds; and further that existing employees be granted a one-off choice to transfer from one fund to another, in line with the rules of the funds concerned and as soon as agreements in this regard had been finalised.

An agreement to give effect to the council resolution was reached in the Bargaining Council for the Pretoria Municipal Undertaking on 11 November 1997.

In order for these arrangements to be effected, it was necessary for all of the funds involved to enter into agreements with each other and to make certain rule amendments allowing for the transfer of the member's actuarial values, rather than simply their withdrawal benefits.

Despite some initial reluctance on the part of the respondents, in recognition of the constitutional value of freedom of association, they eventually agreed to partake in the restructuring exercise. According to the rule amendments, a person who was a member of a fund on 1 March 1997, was given an irrevocable option to become a member of any other approved municipal retirement fund subject to the following terms and conditions:

- i) A member wishing to exercise the option would be required to give written notice to both funds involved during the period from 1 March 1997 to 30 June 1998.
- ii) Once the option was exercised, it could not be withdrawn.
- iii) If no option was exercised before or on 30 June 1998, the option would lapse and the member would remain a member of his original fund.
- iv) If a member exercised the option, membership of the fund from which he or she was transferring would terminate on the last day of the calendar month preceding

the calendar month during which his or her first contributions to the new fund would become payable. Membership of the new fund would commence with effect from the following day.

- v) Transfers would be effected in accordance with the provisions of Section 14 of the Pension Funds Act, and the provisions of the Income Tax Act, on a date not later than 3 months after the member had exercised his option and transfer values would be as determined by the fund's actuaries.
- vi) Any person who did not exercise the option to transfer will be given another opportunity to exercise an option on 1 March 2003.

Pursuant to these rule amendments the various funds entered into transfer agreements between themselves. These gave members of the funds the right to transfer their membership to the other funds. The agreements to which the respondents were party provided that the options to transfer had to be submitted between 1 March 1998 and 30 June 1998. Clause 3 of the standard agreement submitted to me in evidence provided, inter alia, as follows:

Should any unforeseen circumstances arise which prevent a specific local authority from granting its employees the opportunity to exercise their options before 30 June 1998, an extension of the transfer process beyond 30 June 1998 may be agreed upon between the parties.

Clause 4 of the agreement provides:

The respective fund shall provide members with relevant information in order for members to make an informed decision.

The balance of the agreement is concerned with the computation of actuarial values, the application of section 37D of the Pension Funds Act and various other related matters, not strictly speaking relevant to the issues at hand in this complaint.

Representatives of the pension funds approved by the City Council of Pretoria met on a number of occasions after November 1997 to supervise the transfer process. Brochures containing comparative table of benefits were prepared and made available to the complainant's employees.

During March and April 1998 more than 30 information sessions were held at various departments of the City Council of Pretoria where all the funds were represented. Approximately 11 000 employees were involved in the exercise.

Prior to this, in January 1998, it became clear that the Commissioner for the South African Revenue Services interpreted the Income Tax Act in a way that would cause members who transferred from one fund to another to forfeit the tax free portion of their benefits. Such an interpretation, obviously, was likely to have a dramatic impact on the decision by any member to transfer between funds, in that it could mean that a member's benefit could be decreased by more than 30%. Accordingly, the Local Government Retirement Funds Advisory Forum immediately took the matter up with the Minister of Finance and made certain representations in this regard. These representations culminated ultimately in an amendment to the Income Tax Act which put the matter beyond doubt that the tax free benefits accumulated by local government employees up to 28 February 1998 would not be affected by the transfer to another fund. This amendment became law on 27 June 1998, a mere three days before the cut-off date for the exercise of options.

Minutes of various meetings held between the City Council of Pretoria and the administrators of the Council approved funds between January 1998 and June 1998 reveal that the tax issue had a significant impact on the process. At a meeting on 6 March 1998, it was reported that a meeting scheduled with the Minister of Finance for 4 March 1998 did not take place. The Minister apparently was of the view that there was no need for discussion, as the issue only concerned a basic amendment to the legislation. It was also recorded that the Commissioner stood by his interpretation that any transfer between funds after 1 March 1998 would mean a forfeiture of a person's accumulated interest as far as the tax status of benefits was concerned.

It was then suggested that the information sessions with the members should go ahead as planned and that all members should be well briefed on the state of affairs on the tax implications of a transfer.

At a further meeting on 15 April 1998 it was stated that no further developments could be reported. Nevertheless, a suggestion was made for the funds to draft a letter to the Bargaining Council in order to pressurise the Commissioner. A request was made that option forms should be processed as and when received. However, it was explained that this would cause logistical problems to the employer if it was done in bits and pieces. Accordingly, it was agreed that, pending the resolution of the tax issue, options would only be processed for implementation on 1 July 1998.

On 5 May 1998, the meeting recorded that the last information session with the employees had been held on 30 April 1998. Nevertheless, it was suggested that a letter be sent to all members informing them that they could transfer from one fund to another but that they should keep in mind that the tax implications had not been sorted out. It was then agreed that a flyer would be sent to all the members dealing inter alia with the tax implications of a transfer. The suggestion seems to have been that members could transfer conditionally.

At a meeting on 21 May 1998, an official of the City Council's personnel office indicated that many complaints had been received regarding the lack of information on the tax issue. It was then suggested that the final date be postponed until clarity on the amending legislation was received. Mr Crous, of the first respondent, noted that there had been previous discussion at the meeting of 5 May 1998 and that members could make a qualified choice, with the actuarial values being kept by the transferring fund until such time as the tax matter was sorted out. Other persons present at the meeting, disagreed with this view. After further debate it was agreed that an opinion would be sought from the Registrar of Pension Funds. A meeting with the Registrar was scheduled for 22 May 1998.

At the meeting with the Registrar, it was confirmed that should the tax issue not be resolved, the members' transfer values could be retained in the transferor fund and if

necessary subsequent contributions made to the transferee fund after 30 June 1998 could simply be transferred back to the transferor fund in terms of a new section 14 certificate issued by the Registrar. In other words, the proposal was that members could go ahead and exercise their options and if the tax situation was later discovered by an individual member to be too onerous, he or she could be given the option to transfer back to the original fund.

In passing, it should be noted that such an arrangement may have been construed as being contrary to the rules of the respondents which provided that once an option was exercised, the exercise of the option could not be withdrawn. Consequently, had members transferred subject to unfavourable tax conditions, they might have been dependent on the fund agreeing to a rule amendment and a further section 14 transfer. No express or clear guarantees in this regard appear to have been given to the members.

On 25 May 1998, the Secretary of the Deputy Minister of Finance, in a letter addressed to the Bargaining Council, on her behalf, advised that she was aware of the problem and stated that as far as she understood the Act, it would appear that the vested rights of the members would not be protected on transfer. It was recorded that there were discussions under way on the matter and that a meeting was to be arranged between the Deputy Minister and the Commissioner. The letter concludes as follows:

Naturally, such a decision would have to be approved by the Cabinet and Parliament before it became law. However, in the circumstances your members should be advised to await the outcome of the deliberations before making any election or decision regarding the transfer of their pension fund rights.

As stated, the legislation was amended on 27 June 1998, three days before the expiry of the deadline.

No evidence was presented to me demonstrating that either the complainant or the respondents communicated the proposal of the Registrar or the advice of the Deputy Minister to the members of the fund, which at first glance seem to be contradictory. However, I am in possession of an undated circular issued by the Marketing and Communication Directorate of the City Council of Pretoria. The circular is headed:

*Deadline for choice between pension and provident funds postponed until 15 June 1998.*

In the circular, the City Council advises the members that there will be tax implications attached to their decision to transfer from one fund to another. The circular states:

However, there are tax implications when a person changes from one fund to another.

Since you have to make a choice in the midst of this uncertainty, the Personnel Services Department has made the following two arrangements to prevent such a change from adversely affecting you:

1. The deadline for making a choice have been postponed to 15 June 1998.
2. If you want to change from one fund to another, you have to make your choice before 15 June 1998 and start contributing to the new fund from 1 July 1998. However, your accumulated money (actuarial value) stays with your initial fund until the legislation concerning the tax implication has been finalised.

Should legislation determine that the full accumulated amount must be taxed when the person changes from one fund to another, you may change back to the initial fund. The money you contributed to the new fund from 1 July 1998 will then be transferred to the initial fund.

If legislation determines that only the money accumulated since 1 March 1998 must be taxed, the full accumulated amount (actuarial value) will be transferred to your new fund.

During June 1998, it also became apparent that the retrenchment benefits of the various funds were significantly at variance. Each fund provides for a withdrawal benefit on retrenchment. However, two of the funds contained the additional provision that in the event of an employee being declared redundant or being retrenched, such an employee becomes entitled to payment from the fund of an additional amount. This amount is calculated with reference to a specific formula and can, depending on the circumstances,

be a very large amount of money. The additional amount is payable to the member by the fund, but the same amount has to be paid by the employer to the fund. The result was that the benefits of these two funds were dramatically more advantageous than the other funds.

On 10 June 1998, the complainant consulted with senior counsel who rendered a written opinion on 17 June 1998. Counsel made a number of important recommendations concerning the variance in benefits. These needed to be considered by the Executive Committee, as well as a full meeting of the Council.

At a meeting between the City Council and the administrators of the approved funds on 18 June 1998, it was suggested that the deadline of 15 June 1998 be postponed due to the tax implications and the uncertainty about the retrenchment rules of the two funds. It was pointed out that it was necessary for the legal opinion to be studied and for the Council to take some decision in that regard. No clear decision appears to have been taken at this meeting, but it concluded with a statement that the City Council of Pretoria will study the legal opinion, discuss it with the funds concerned and then send out a flyer with all the necessary information. The flyer or circular would also be discussed with the funds before it was distributed. No copy of such circular has been handed to me as evidence.

On 28 July 1998, some four weeks after the lapse of the deadline, a further meeting was held. Clause 3.3 of the minutes read as follows:

Postponement of the deadline: Mr Stevens explained the Council's situation, and apologised for the delay. There was no intention to disadvantage any Fund. A flyer explaining the situation regarding

- a) retrenchment policy;
- b) tax implications;
- c) housing loans/-subsidies and
- d) option forms

will be distributed amongst all employees.

A final cut-off date was suggested by Mr Kruger of 14 August 1998 with implementation date 1 September 1998. After discussion the 14 August 1998 was accepted. Mr Du Plooy requested that the Funds be allowed to have a say in the contents of the flyer. The suggestion was accepted. Mr Letjane asked that 14 August 1998 be the final date, but late submissions be accepted. The meeting agreed that late submissions (up to 31 August 1998) will be accepted only in exceptional cases. Mr Henzen suggested if two forms are submitted by the same employee the form with the latest date be accepted. The meeting agreed that Section 14 approval must be arranged between the different Funds. It was also agreed that where transfer agreements did not make provision for extending the 30 June 1998 date, addendums be exchanged between Funds to extend the date.

On the next day, 29 July 1998, the Council approved the principle of equal treatment in retrenchment benefits.

On 31 July 1998, the Executive Director: Personnel Services of the City Council of Pretoria addressed a letter to various officials of the Council advising them that the deadline for submission of option forms had been extended to 14 August 1998. The relevant part of the letter reads as follows:

FINAL DEADLINE FOR SUBMISSION OF OPTION FORMS: CHOICE BETWEEN PENSION/PROVIDENT FUNDS: 14 AUGUST 1998

The initial deadline of 15 May 1998, for submission of option forms by employees, in respect of the exercising of a choice between "Council approved" Pension/Provident funds was postponed several times due to the following reasons:

- The Income Tax Amendment Act, 1997, which amongst others intended to tax lump sum benefits of employees as from 1 March 1998, but also to protect vested rights acquired before that date, seemed, on transfer between retirement funds not to protect such rights, which necessitated an amendment by Parliament (except transfer from a pension fund to any other fund).

- The Deputy Minister of Finance, Ms G. Marcus, in her letter to the South African Local Government Bargaining Council (dated 25 May 1998) advised that Local Government employees await such amendment before exercising a choice.
- Certain "Council approved" Pension/Provident funds offered higher benefits in the event of retrenchment of their members, at the expense of the Council. From the employer's point of view, this amounted to unequal treatment of employees which is an unfair labour practice. The Council has now approved equal treatment of employees in this regard, on 29 July 1998.

The aforementioned issues have now been resolved and a final deadline of 14 August 1998, for the exercising of a choice, has been agreed to by the Council and the Administrators of the funds.

Employees are hereby urged to submit their option forms (whether transferring or not) to their Departments'/Directorates' Support Services Division by no later than 14 August 1998 for implementation with effect from 1 September 1998.

Subsequent minutes of 7 August 1998 and 17 August 1998 reflect that the Bargaining Council shared the view that the City Council of Pretoria should be allowed to finalised the process with regard to the transfers by 14 August 1998. Posters to this effect were also prepared and put up at various workplaces of the Council.

The respondents dispute that they ever agreed to an extension of the deadline. They maintain that consistently during June and July they pointed out that before the deadline could be extended an official request would have to be addressed to the relevant funds to amend their rules and to agree to an addendum to the existing transfer agreements in order to extend the option date beyond the 30 June 1998.

According to Mr Crous, reports to this affect were submitted to the management committees of the three respondents. However, in late September 1998 the respondents decided not to agree to an extension of the option date. Mr Crous, the representative of the funds at the various meetings, claimed not to have had a mandate to extend the option date, nor the necessary authority in law, and accordingly he simply agreed to make

submissions to the boards advising them of the request to extend the date. The decision of the boards of management he justified as being taken in principle and on considerations of cost and administrative convenience.

Despite the evident confusion, the employees of the City Council of Pretoria continued to exercise their options until 14 August 1998. Consequently, the Personnel Services Directorate is in possession of those options which the respondents declines to process. The option forms reflect that approximately 500 members wish to transfer to the respondent funds and approximately 1120 wish to transfer out, leaving a net loss to the respondents of approximately 600 members.

On 25 September 1998, the first respondent addressed a letter to the Executive Director: Personnel Services of the City Council of Pretoria on behalf of the respondents. The letter reads as follows:

#### TRANSFERS BETWEEN RETIREMENT FUNDS

Pretoria City Council has associated with a number of retirement funds. Information sessions by all the Funds involved were held during March and April 1998 to inform employees of Pretoria City Council of their right to exercise an irrevocable option between these Funds before 30 June 1998.

The Funds entered into reciprocal transfer agreements and approval for the transfer of members was obtained from the Registrar of Pension Funds in terms of section 14 of the Pension Funds Act, 1956.

At a further meeting of the Funds held at your offices on 18 June 1998 it was indicated that your Council might consider an extension of the option date. It was also explained that the Board of Trustees of this Fund, would have to approve a postponement of the date.

At a further meeting held on 28 July 1998 the Funds were informed that your Council intended to extend the option date to 14 August 1998 with 31 August 1998 being the final date for late submissions. It was again indicated by us that an official request should be addressed to the Trustees of the Funds involved to agree to amend their Rules and to

make an addendum to the existing transfer agreements to provide for such an extended option date.

I regret to advise that the Joint Municipal Pension Fund has decided on 23 September 1998 not to extend the option date.

The Municipal Employees Gratuity Fund has taken the same decision and we expect the Municipal Employees Pension Fund to side with these funds when its Boards of Trustees meets on 30 September 1998.

We are therefore unable to process the option forms received from your offices and request that your Council continues to pay the contribution in respect of employees who were members of the above Funds as if no option has been exercised.

After further correspondence, a complaint was lodged with my office.

### **The issue for determination**

The complaint basically requires me to determine whether the decisions of the respondents not to extend the deadline for the employees of the complainant to exercise their options is unreasonable or contrary to the provisions of sections 7C and 7D of the Pension Funds Act of 1956.

With effect from 15 December 1998, all boards of management of pension funds are obliged to act in accordance with certain statutory fiduciary duties. Although these provisions were not in operation at the time the respondents took their decisions, their terms reflect the common law fiduciary duties and are also an indication of the standard of reasonableness to be observed by a board of management. A decision of a pension fund inconsistent with these duties, in terms of the definition of a complaint in section 1, will be a decision in excess of the powers of the fund, an improper exercise of the fund's powers or maladministration of the fund. In which event, the complainant shall be entitled to appropriate relief.

Section 7C(2)(a) of the Pension Funds Act provides that in pursuing its object the board

of a pension fund shall take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of the Act are protected at all times, especially in the event of an amalgamation or transfer of any business contemplated in section 14, splitting of a fund, termination or reduction of contributions to a fund by an employer, increase of contributions of members and withdrawal of an employer who participates in a fund. Additionally, section 7C(2) requires the fund to act with good faith and impartiality in respect of all members and beneficiaries. Moreover, section 7D(1)(c) imposes a duty on a board to ensure that adequate and appropriate information is communicated to the members of the fund informing them of their rights, benefits and duties in terms of the rules of the fund.

In short, the issue is whether the respondents have lived up to these duties and the standard of reasonableness in giving effect to the various agreements regulating the transfer of members employed by the complainant.

Furthermore, Clause 3 of the standard agreement allows for an extension of the transfer process beyond 30 June 1998 where unforeseen circumstances prevent a specific local authority from granting its employees the opportunity to exercise their options before 30 June 1998. This power should be exercised in good faith, and the question needs to be asked whether the respondents have acted in such a manner.

The complainant contends that its employees, by virtue of the confusion over the tax and retrenchment benefits issues, have not had an opportunity to make an informed choice and to exercise their option in accordance with all relevant information, and that the respondents' refusal to extend the deadline is unreasonable and in breach of their fiduciary duties.

The respondents contend that they have acted reasonably, in good faith and in accordance with their fiduciary duties for the following reasons:

1. There was no need to extend the option date due to the tax issue because the City Council of Pretoria employees could have exercised their options and could have started contributing to the fund of their choice from 1 July 1998, by virtue of the

arrangements discussed with the Registrar of Pension Funds on 22 May 1998. This arrangements would have allowed the actuarial value to have remained in the transferee fund until clarity was reached and for contributions to have been made to the transferor fund after that date. The actuarial value could then have been transferred after clarity on the tax issue had been obtained.

2. There was also no need to extend the option date because of the retrenchment benefit. The City Council of Pretoria should have accustomed itself with the rules of the funds with which they had decided to associate.
3. There was never any agreement by the respondents or by its representatives to extend the option dates.
4. The City Council of Pretoria employees who are members of the respondent funds and who opted to join other funds will not be detrimentally affected by remaining a member of their existing fund. According to the respondents, the newly established union funds in many instances will not provide benefits equal to the respondents.
5. In any event, the rules of the respondents allow members to exercise an option to transfer in 2003.
6. The costs involved in administering and affecting the bulk transfer of members between funds did not warrant an extension of the option date, as this would be detrimental to the members remaining in the existing funds.
7. Resolutions by the Bargaining Council in terms of a collective agreement cannot compel a board of trustees to amend its rules.

### **Analysis of evidence and arguments**

In my view, the respondents' arguments are flawed principally because they focus upon the relationship between the funds and the City Council of Pretoria. As such, they fail to give sufficient weight to the interests of the 1120 members of the respondent funds who

wish to transfer to other funds.

Section 7C(2) requires the respondents to take reasonable steps to protect the interests of their members at all times, but especially in the context of transfers. The protection of those interests, also requires the funds to act in good faith in ensuring that their members make informed choices concerning their future retirement provision.

While the City Council of Pretoria might have been able to improve upon its processing of the options in a complex transfer situation, the fact remains that in the two weeks prior to the deadline significant issues remained unresolved. Members had no clarity on whether the Council was able to eliminate the discrimination in retrenchment benefits and the law finally clarifying the tax position was only enacted on Saturday 27 June 1998, three days before the expiry of the deadline. In other words, neither the complainants nor the respondents were in a position to give an unequivocal assurance concerning the tax position or the retrenchment benefits until literally a few days before the expiry of the deadline. The taxation law became effective on a Saturday, leaving the employees the Monday and Tuesday to decide. Although I have no concrete evidence to that effect, it seems reasonable to assume that there was probably a fair amount of uncertainty and confusion among the 11 000 employees who were expected to exercise their options. Fairness dictates that they should have had more time to consider the new legislation and to take advice.

Regarding the arrangement proposed by the respondents, and confirmed by the Registrar, which would have allowed the option to be exercised conditionally, I am not satisfied that this in any way alleviated the situation. First of all, various rule amendments would have been required. Secondly, I do not accept that the flyer explaining this option does it sufficient justice. The duties of the board in such a situation are to ensure that adequate and appropriate information is communicated. The information contained in the flyer is hardly adequate and its appropriateness is questionable when one considers that many employees of the complainant are not possessed of a high standard of education. Members of a pension fund who are expected to make a decision likely to have an enduring impact on their lives and livelihood are entitled to be advised unequivocally of the tax and benefits consequences of their decision. The equivocating circular issued by

the Marketing and Communication Directorate in all probability added further confusion to an already confusing situation. In order to give effect to their obligation under section 7D(1)(c), further information sessions ideally should have been held in which the implications of the Registrar's a proposal were fully explored and clarified, especially in view of the fact that the rule amendments stated that the options were irrevocable once they had been exercised. What is more, the Deputy Minister appears to have recommended that the members ought not exercise their options until the legislation was finalised. Such contradictory advice could only add confusion. Far easier would it have been simply to postpone the deadline until clarity on the tax issue had been obtained, and adequately communicated.

The same applies in relation to the retrenchment benefits. The respondents' argument is not advanced by its submission that the City Council should have accustomed itself with the rules of the funds. That may be true. The issue, however, is whether the membership had been adequately informed of the comparative benefits available. It is common cause that the City Council of Pretoria was not in a position to consider its liability in relation to the differential benefits until after the expiry of the deadline.

Regarding the arguments about administrative convenience and cost, I'm not satisfied that these outweigh the rights of the employees to exercise an informed choice to transfer their membership. In any event, the employees have already exercised their options and all that is required is for the fund to give effect to them. Any inconvenience suffered by the respondents is outweighed by the rights of the membership (granted in terms of the various agreements) to exercise their choice to transfer in accordance with the precepts of freedom of association as prioritised by the process of collective bargaining in which all the parties engaged.

There is a dispute of fact about the existence of an agreement to extend the deadline. The minutes of the meeting of 28 July 1998 and the Council's letter of 31 July 1998 strongly indicate that the Council believed an agreement had been reached. On the other hand, there is little evidence of any agreement before the expiry date or that the representative of the respondents had authority to conclude an agreement. It is not necessary to determine this issue, because irrespective of whether there was an

agreement or not, the respondents in late September 1998 were still under a duty to act reasonably and in accordance with their fiduciary duties when giving consideration to the request to extend the deadline.

Accordingly, I am satisfied that the boards failed to take into consideration the possibility that the membership would have been inadequately informed about the tax position and the available retrenchment benefits. The boards appear to have been influenced by the irrelevant consideration that the City Council of Pretoria should have acquainted itself properly with the rules of the funds concerning retrenchment benefits and failed to give proper consideration to the actual level of awareness among the members. Moreover, the fact that an employee would not be detrimentally affected by remaining a member of the initial fund, is an irrelevant consideration. Members of funds were given the choice to transfer and their decision to transfer may very well have been influenced by considerations other than benefit levels. That choice has been denied to them by virtue of matters outside of their control.

Consequently, I am of the view that the respondents have not taken all reasonable steps to ensure that the interests of their members were protected during the transfers. Nor have they acted with the requisite degree of impartiality in respect of their members. Likewise, the board has not fulfilled its duty to ensure that adequate and appropriate information was communicated concerning the tax and benefit implications of a decision to transfer. As such, the decision of the board not to extend the option deadline was unreasonable and in breach of their fiduciary duties.

## **Relief**

I am satisfied that this is an occasion on which I should substitute my decision for that of the boards of management of the respondents. The respondents have taken up a position in relation to the issue and further delay would cause unjustifiable prejudice to the membership. Accordingly, the order of this tribunal is as follows:

1. The respondents are directed to take all necessary steps, including, if necessary, the amendment of their rules, to give effect to all options exercised by any employee of the complainant on or before 14 August 1998 to transfer into or out of

the respondents.

2. The effective date of transfer of the employees mentioned in clause 1 above shall be 1 September 1998. Hence, it is declared that a transferring member's membership of the transferor fund shall terminate on 31 August 1998 and his or her membership of the transferee fund shall commence on 1 September 1998.

DATED AT CAPE TOWN THIS 10TH DAY OF FEBRUARY 1999.

.....

**John Murphy**

PENSION FUNDS ADJUDICATOR