IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/GA/1357/00/NJ

In the complaint between:

J van Veenhuyzen **Complainant**

and

ABSA Group Pension Fund **Respondent**

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

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1. This is a complaint lodged with the Office of the Pension Funds Adjudicator in terms of section 30A(3) of the Pension Funds Act of 1956 (**"the Act"**). The complainant alleges that the fund made a misrepresentation to her, as a result of which, she suffered financial loss.

2. No hearing was held. An investigation under my supervision was conducted by my assistant, Mr Naleen Jeram. In determining this matter, I have relied exclusively on the documentary evidence and written submissions gathered during the course of our investigation.

3. The complainant is June van Veenhuyzen, a retired female, currently residing in Centurion, Gauteng. The complainant is represented by Mr J G Basson, a financial advisor.

4. The respondent is ABSA Group Pension Fund, a pension fund falling within in the definition of pension fund contained in section 1 of the Act (**"the fund"**). The fund is represented by its principal officer, Mr Cobus Strydom.

5. On 11 August 1969, the complainant commenced employment within a division of ABSA Bank and subsequently became a member of the fund. In about May 1998, the complainant sustained several injuries due to an accident at work. Hereafter, she underwent a hip operation and required substantial medical treatment. In December 1998, the complainant requested the fund to provide a quotation in respect of her early retirement benefit. The fund duly provided the quotation, the material provisions thereof read:

> Let asseblief daarop dat alhoewel daar gepoog is om akkuraatheid to verseker, vorm hierdie staat nie 'n reg op voordele nie, en word dit slegs vir illustratiewe doeleindes verskaf:
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> | | |
> |---|---|
> | NAAM: | J VAN VEENHUYZEN |
> | SALARISNOMMER: | 800090 (PF 137159) |
> | NORMALE AFTREE-OUDERDOM: | 60 JR |
> | DATUM VAN AFTREDE: | 1 FEBRUARIE 1999 |
> | OUDERDOM: | 54 JR 7 MNDE |
> | PENSIOENDRAENDE DIENSJARE: | 21 JR 10 MNDE |
> | PENSIOENDRAENDE SALARIS VANAF 01-04-98 | R130,786.32 |
>
> PENSIOENVOORDELE: VASTE BYDRAEBASIS
>
> *Aandeel in fonds op 1 Februarie 1999
> R729,811.23
>
> 1. STANDAARD PENSIOEN
>
> Aftreevoordele
>
> | | | |
> |---|---|---|
> | 1. | Maandelikse pensioen | R 3,805.54 OF |
> | 2. | Enkelbedrag (maksimum) | R243,270.41, PLUS |
> | | Maadelikse pensioen | R 2,537.03 |
>
> - Die pensioen is lewenslank betaalbaar
> - Pensioen staak by sterfte.

- Gadepensioen is gelyk aan 50% van u pensioen as u geen gedeelte in kontant geneem het nie of 75% indien een derde gekommuteer het.
- Pensioen word jaarliks op 1 April verhoog soos deur die Trustees bepaal.

2. ALTERNATIEWE PENSIOEN

U mag, met Trustees goedkeuring, verkies om 'n alternatiewe pensioen te neem in plaas van die standaard pensioen. Huidige perke is tans tussen 5% en 20% per jaar van u aandeel in die fonds.

Aandeel in die fonds	R729,811.23		R729,811.23
Enkelbedrag (1/3)	R243,270.41	Belastingvrye gedeelte:	R130,500.00
Balans	R486,540.82		R599,311.23
8%	R3,243.05p.m		R3,995.41p.m
10%	R4,054.51p.m		R4,994.26p.m

* In die berekening van die waarde van u voordele het ons aanvaar dat die bates van die fonds teen 'n koers van 7.5% per jaar sal groei. Ons het ook bydraes gebaseer op u huidige salaris.

Thus, in terms of the quote, had the complainant elected to retire on 1 February 1999, her fund credit would have amounted to R729,811.23 wherefrom a pension could have been purchased. On 15 January 1999 the complainant voluntarily resigned from service (with effect from 31 January 1999). Rule 13.1 regulated the withdrawal benefit and reads:

13.1 WITHDRAWAL BENEFIT

If a MEMBER'S membership of the FUND ceases because of the termination of his employment with the EMPLOYER a lump sum benefit equal to the MEMBER'S EQUITABLE SHARE in the FUND as at the date of termination of service shall become payable.

In lieu of the cash benefit in terms of the preceding paragraph, a MEMBER may request the FUND to transfer the whole or part of benefit to which he is entitled to a

registered pension fund or a retirement annuity fund of his choice on his behalf. In this event the FUND shall transfer the benefit, or part thereof as directed by the MEMBER, to such fund on his behalf and pay the balance of the benefit, if any, to the MEMBER.

Equitable share is defined in section 1 of the rules as follows:

In respect of a MEMBER to whom the provisions of part B of these rules apply,

- the MEMBER'S CONVERSION CREDIT, if any, plus
- the MEMBER'S contributions to the FUND in terms of section 9.1 from the CONVERSION DATE, plus
- the EMPLOYER'S net contributions to the FUND in respect of retirement benefits in terms of section 9.2 after the CONVERSION DATE.

all amounts inclusive of INTEREST.

6. Therefore, the withdrawal benefit consisted of the member's conversion credit, the member and employer's contributions made to the fund in terms of rules 9.1 and 9.2 respectively and interest on the aforesaid amounts. Interest is also specifically defined in section1 as:

Unless otherwise specified elsewhere in these rules,

(a) with regard to the provisions of part B of these rules, a rate determined in accordance with the provisions of section 9.4.5 and 9.4.6 of these rules, or

(b) with regard to the provisions of part C of these rules, compound interest at the rate of 8% per annum, compounded annually;

Rules 9.4.5 and 6 reads:

9.4.5 The TRUSTEES in consultation with the ACTUARY, shall determine INTEREST that is payable by the FUND in terms of these rules in respect of assets of the FUND that are invested in the guaranteed fund investment portfolio as well as the market value

investment portfolio. The TRUSTEES shall determine such INTEREST on such dates as they shall determine from time to time on the advice of the ACTUARY and in so doing shall take into account the effective net investment yields attained on the investment of the assets of the FUND in the guaranteed fund investment portfolio and in the market value investment portfolio respectively. Such interest, once determined, shall be applicable for such periods as the TRUSTEES shall determine.

9.4.6 The TRUSTEES in consultation with the ACTUARY, shall from time to time determine interim rates of INTEREST that are payable by the FUND in respect of assets of the FUND that are invested in the guaranteed fund investment portfolio as well as the market value investment portfolio. Such interim rates of INTEREST, once determined, shall be applicable for such periods as the TRUSTEES shall determine.

7. The fund computed the benefit as follows:

Equitable share as at 1 April 1997	R570,587
Employee contributions for 1 April 97 to 31 January 99	R 23,070
Employer contributions for 1 April 97 to 31 January 99	R 23,853
Investment growth for 1 April 97 to 31 January 99	R 70,073
TOTAL BENEFIT	R687,583

8. The complainant was dissatisfied with the withdrawal benefit of R687,583.00. She essentially contended that the quote provided by the fund in December 1998, which reflected her retirement benefit to be R729,811.23 as at 31 January 2000 was the basis upon which she resigned from service and the fund had made a positive representation to this effect. Therefore, she concluded that the fund had misled her and as result she suffered financial prejudice. Accordingly, she requested an order directing the fund to pay her R42,228.23 (the difference between the two values).

9. Mr Strydom on behalf of the fund submitted that the quote provided to the complainant in December 1998 was accurate and in no way misled her. That is, had the complainant retired as at 1 February 2000, her equitable share would have amounted to R729,811.23 as indicated in the quote. Furthermore, he

submitted that the fund made use of an interim/final bonus rate system as regulated by rules 9.4.5 and 9.4.6. However, in light of the worldwide "crashes" in financial markets in September/October 1998, on 12 October 1998, the board of management decided to adopt a two-tier bonus rate system, whereby, all members who voluntarily resigned from service received a bonus rate of 0% as opposed to all members who retired from service received a bonus rate of 7.5%, with effect from 1 April 1998. According to Mr Strydom, the difference between the complainant's potential early retirement benefit and withdrawal benefit was precisely due to the interim bonus rates applicable to the respective benefits. However, he argued that the complainant was well aware of the two-tier system by virtue of a notice sent to all members of the fund in October 1998. The material portions of the notice read:

> The bonus rate declared by the Board of Trustees and added to each member's share in the Fund is derived from the yield obtained by the Fund on the smoothed bonus portfolios. The bonus rate, once declared by the Board of Trustees, is applied to a member's share in the Fund for the fund's financial year under consideration. The Board of Trustees in consultation with the actuary shall form time to time determine interim bonus rates, that will be applied for the period immediately following the Fund anniversary up to the next declaration, in respect of those members that exit from the Fund before the next bonus declaration.
>
> Old Mutual has declared their final bonus for the year ending 30 June 1998 during September and the rates declared were as follows:
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> Income bonus: 0%
> Capital bonus: 7%
> Interim bonus for the period after 1 July 1998: 0%
>
> Subsequent discussions with Sanlam indicated that they also contemplate an interim bonus rate close to 0%.
>
> The Board of Trustees, in consultation with the actuary, has decided to set the current interim rate at 0% in respect of resignations and 7.5% in respect of retirements, to be calculated from 1 April 1998.

> The current market situation necessitates the use of a two-tier bonus rate and not a single rate. This means that a member's share in the Fund as at 1 April 1998 and as reported on the benefit statements, has not been negatively affected by the fall in investment markets.
>
> The only effect of the fall has been to curb the growth applied to a member's share from 1 April 1998 onwards.

Accordingly, he requested that the complaint be dismissed.

10. The board of management of any pension fund organisation owes various duties to members of the pension funds. Many of these duties formed part of the common law and have now been crystallised into statutory duties by virtue of the enactment of sections 7C and 7D of the Act. In terms of section 7C(2)(b), the board has to act with due care, diligence and good faith and furthermore in term of section 7D(1)(c), the board must ensure that adequate and appropriate information is communicated to the members of the fund informing them of their rights and obligations in terms of the rules of the fund. This duty becomes more compelling when a member has to make a decision, which may have adverse consequences for himself or herself. Put differently, the pension fund member needs to be placed in a position whereby he or she can make an informed decision regarding the consequences arising from the termination of his or her pension fund membership.

11. The payment of any pension benefit arising out of a pension fund organisation is regulated by the rules of that particular fund. The complainant elected to resign from service and therefore her withdrawal benefit was regulated by rule 13.1, in terms of which, she was entitled to her equitable share. This, in turn consisted of her conversion credit, her own contributions after this date, the employer contributions made on her behalf less amounts specified in rule 9.2 and interest on all of the above amounts. As stated, by virtue of the final/interim bonus rate system adopted by the fund, interest was added to the member's equitable share

on a monthly basis at a rate determined by the fund in consultation with the actuary. Due to the poor investment performance of the fund as a result of the markets “crashing” in September/October 1998, the fund decided to lower the interim rate for all members who voluntarily resigned from service. The complainant fell into this category and was therefore entitled to an interim rate of 0% to be applied to her equitable share from April 1998 until the date of her exit from the fund. The parties are *ad idem* in respect of the computation of the early withdrawal benefit.

12. However, the complainant is of the view that the fund made a misstatement to her and this misrepresentation was contained in the quote of December 1998. The complainant is essentially arguing that the fund misled her in someway as a result which, she suffered financial prejudice.

13. In order to succeed with the above cause of action, the complainant needs to establish the following on a balance of probabilities:

- the fund made a misstatement to her;
- in making the misstatement the person acted negligently and unlawfully;
- the misstatement caused her to sustain a loss; and
- damages claimed by her represents proper compensation for such loss.

14. From the evidence before me, it is plainly evident that the fund did not make a misstatement to the complainant. That is, the complainant requested a quote from the fund in the event of her retirement as at 1 February 2000. The fund duly provided the quote, wherein it indicated that were the complainant to retire at this particular date, she would receive a pension purchased with her equitable share, which potentially could have amounted to R729,811.00. Had the complainant retired from service, this is exactly the amount she would received, albeit in the form of a pension. The complainant did not specifically request a quotation in the event of her withdrawal from service. It was unreasonable of her to expect that a

benefit for retirement purposes would have been the same for a withdrawal from service. This assumption is even more unreasonable on the facts of this case, especially in light of the fund providing the complainant with a notice in October 1998, wherein it was clearly stated that members who voluntarily resigned from service would not enjoy a bonus interest rate and in fact receive a rate of 0% as opposed to persons who retired from the fund, who would receive a rate of 7.5%. Therefore, I am satisfied that the fund has not made any misstatement to the complainant and her withdrawal benefit was correctly determined in terms of the rules of the fund.

15. Thus, for the aforegoing reasons, the complaint is dismissed.

DATED at Cape Town this 15th day of November 2001.

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John Murphy

Pension Funds Adjudicator