

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO:PFA/EC/2/98/NJ

In the complaint between:

A.A. von Well

Complainant

and

Engineering Industries 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 complaint concerns the calculation of a retirement benefit.

After an exchange of correspondence between the complainant and the respondent, consisting of a number of letters and other documentation, the complainant lodged her written complaint at my office on 12 March 1998. No hearing has been held in this matter. Accordingly, in determining this matter, I have relied exclusively on the documentary evidence, and argument put to me in writing and a report placed before me by my investigator Naleen Jeram.

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

The complainant is A. A. von Well, an adult female, widow of Mr von Well, a former member of the respondent. The complainant is represented by Frank Giraudeau Brokers (Pty) Ltd. The respondent is Engineering Industries Pension Fund, a pension fund duly registered under the Pension Funds Act of 1956 and represented by the deputy manager, Mr E Jacobs.

Mr A. von Well was employed by Trek Tool & Dies (Pty) Limited on 12 February 1966 until the date of his death on 10 November 1995. (Although contributions were only paid to the respondent from 25 July 1966). Mr von Well attained his retirement age on 12 September 1995 at the age of 65, however, he elected not to retire at that stage but to continue in service with his employer, until his death.

Complaint

The complaint relates to the administration of a fund and / or interpretation and application of its rules and alleges that a dispute of law has arisen in relation to a fund between the fund and the complainant and that the complainant has sustained prejudice in consequence of the maladministration of the fund by the fund.

The respondent in a letter dated 29 March 1996, addressed to the complainant sets out the benefit due to the complainant, which was as follows:

We refer to your application for death benefits and advise that in addition to the lump sum death benefit payable, (sic) the funds rules provide that in the event of the death of a contributing member before attainment of age 65. There shall be payable to the spouse a widow's pension equal to 40% of the pension. To which the deceased would have been entitled had he remained a member of the fund to age 65 at the remuneration being received at time of death. Such pension is payable for the remainder of the spouse's lifetime or until re-marriage. The pension payable under this rule shall continue to be paid where the spouse re-marries on or after age 60.

Accordingly we advise that our cheque to the value of R 3 989.55 has been forwarded to your bank as requested, being the widow's monthly pension for the months of December 1995 to March 1996, where after our cheque for R 1 064.55 will be forwarded monthly.

The monthly widows pension is subject to tax which is R 4 258.20 less tax of R 268 totalling monthly pension of R 3 989.55.

Further, we confirm that the lump sum death benefit of R 192 235.38 is subject to tax and application has been made to the receiver of revenue at Port Elizabeth for issue of the relevant tax deduction directive.

Subsequently, the respondent in a letter dated 20 May 1996 addressed to the complainant states:

We refer to the above and advise that our cheque to the value of R99 273.57 has been forwarded to your banking/building society account No 083 915508 at Standard Bank, being the two year death benefit payable as a result of the death of Mr A F von Well.

The widows monthly pension will continue to be paid on the basis as previously outlined.

No explanation was given as to why the benefits were amended. As a result on 29 May 1996 the complainant addressed a letter to the respondent seeking clarity on the discrepancies:

I shall be obliged if you will explain the following discrepancies.

1. Monthly Pension: Second paragraph of your letter 29.3.96 states that the amount of R3989.55 cannot be 3 x R1064.55. Further the following paragraph of the same letter states that the monthly widow's pension is R4258.20 less tax of R268.65 totalling monthly pension of R3989.55. What exactly is the amount of the monthly widow's pension?

2. Lump sum death benefit: Your letter dated 29 March 1996 confirms that the lump sum death benefit is R192 235.38 which you state will be remitted to Mrs von Well upon receipt of tax directive (see paragraphs 4 and 5). However per your letter of 20 May 1996 the amount which you state has been forwarded to Mrs von Well's bank is R99 273.57. You make no mention of why this figure varies from the amount you quoted in the previous letter (ie R192 235.38). What is the position here?

The respondent in a telefacsimile dated 5 June 1996 addressed to the complainant stated that the amount of R192 235.38 was in fact incorrect but provided no explanation as to why such an error was made. The complainant then sought a breakdown of the amount. The respondent in a letter addressed to the complainant dated 21 June 1996 responds as follows:

We refer to your fax dated 6/4/96 and advise that the amount of R 99 273.57 was calculated as follows. Twice annual salary according to the Rules wages per week as per company R917.84 x 2 years (104 weeks) R95 455.36 plus 12% interest from date of death 10.11.95 to date of payment R3 818.21.

R95 455.36
+ 3 818.21
R99 273.57

As a result of the confusion I requested the respondent to provide me with a full specific computation of the complainant's benefit with reference to the rules to the fund.

The respondent's reply makes a reference to a series of rules which I quote fully hereunder to obtain clarity on this issue:

The relevant rule applicable is rule 4(k)(iii) which reads:

- (iii) In the event of the death of a contributing member whilst in service after attainment of age

65 he shall be deemed to have retired in terms of these Rules on the date of his death, subject to Rule 5(iii)(a).

Rule 5(iii)(a) in turn reads:

- (a) Notwithstanding the provisions of Rules 4(k)(ii) and 4(k)(iii) any member with at least fifteen (15) years' membership of this Fund who continues in service after attainment of age 65 and who has not taken the benefits to which he/she is entitled at retirement age in terms of these Rules shall in the event of death during such employment be entitled to the benefits set out in Rule 4(k)(i), and, where applicable, the spouse's pension under Rule 4(j)(i) or the pension benefits payable under Rule 4(e) - subject to Rule 4(i) - and the spouse's pension under Rule 4(j)(ii) or 4(j)(iii), whichever is deemed by the Actuaries to be the greater in value.

Therefore the complainant should receive her benefit calculated either under Rule 4(k)(i) plus where applicable rule 4(j)(i) or Rule 4(e) subject to rule 4(i) plus rule 4(j)(ii) or rule 4(j)(iii).

Rule 4(k)(i) & (ii) reads:

- (i) Subject to Rule 4(k)(ii), in the event of the death of a contributing member on date of attainment of or before age 65 whilst in service there shall be paid a death benefit equal to twice the deceased member's annual pensionable remuneration at the time of death or the value, as determined by the Actuaries, of the deceased member's pensionable credits at the time of death, whichever is the greater.
- (ii) Notwithstanding the provisions of Rule 4(k)(i), in the event of the death in service of a contributing member on date of attainment of or before age 65 who became a new member of this Fund after reaching age 55, there shall be payable a death benefit equal to 10% of twice the deceased member's annual pensionable remuneration at date of death during his first year of service, increasing by a similar amount for each year of service thereafter, provided that the benefit payable under this Rule shall not exceed the amount payable under Rule 4(k)(i).

Rule 4(j)(i) & (ii) reads

Spouse's Pension

- (j) (i) Spouse's pension on death in service of a contributing member
 Subject to Rule 4(j)(ii), in the event of the death of a contributing member on date of attainment of or before age 65 the spouse of such deceased member shall be entitled to receive until his/her death or re-marriage a pension equal to 40% of the pension to which the deceased member would have been entitled under Rule 4(e)(ii) had he/she remained a member of the Fund until retirement age 65 at the remuneration being received at the time of death: provided that the pension under this Rule shall continue to be paid where the spouse re-marries on or after age 60.
- (ii) Notwithstanding the provisions of Rule 4(j)(i), in the event of the death in service of a contributing member on date of attainment of or before age 65 who became a new member of the Fund after reaching age 55, the spouse of such deceased member shall be entitled to receive until his/her death or re-marriage a pension equal to the pension to which the deceased member would have been entitled had he/she retired at date of death. Such pension shall be payable for a period of five years after which the pension shall be reduced to a pension equal to 60% of the pension entitlement of such pensioner before any commutation under Rule 4(g). The pension payable under this Rule shall continue to be paid in the event of the re-marriage of the spouse on or after age 60.

Hence the benefit in terms of rule 4(k)(i) and (ii) plus 4(j)(i) and (ii) was computed as follows by the respondent:

A Lump Sum of R95 455,36 (salary per week R917,84 x 104 weeks) together with interest of 12% from date of death to date of applying for a tax directive from the S.A.R.S. in question, being R3 818.21, total of Lump Sum = R99 273.57, added to this Lump Sum is the 40% widows pension based on the same formulae as mentioned above and based on the same five years excluding future life span, is as follows: R1 064 x 12 months x 10 953.00 (actuarial value for five years on wife's age) - R139 920,19.

The Benefit under this Rule is thus, Lump Sum plus interest of	R 99 273.57
Monthly Pension capitalized	<u>R139 120.19</u>
	<u>R239 193.76</u>

Rule 4(e) reads:

The annual pension payable to a member on retirement at age 65 shall be as follows:

- (i) Such sum as the Board of Management in consultation with the actuary of the Fund shall determine in respect of the pensionable credits arising from the conversion of the member's credits established in terms of the Rules of Scheme 'A' and Scheme 'B', as defined in Rule 6(e) and (f), up-to-date of conversion; **plus**
- (ii) 2% of the member's average annual pensionable remuneration during the best three consecutive years within the last fifteen years of service, multiplied by the number of years of service (including fractions of a year) from date of conversion to date of retirement.
- (iii) Notwithstanding (i) and (ii) above, where a member who retires after date of conversion has continuous service from a date prior to date of conversion up to date of retirement, the annual pension payable shall be 2% of the member's average annual pensionable remuneration during the best three consecutive years within the last fifteen years of service, multiplied by the number of years of service (including fractions of a year) from date of commencement of such continuous service to date of retirement as a contributing member; provided that the annual pension relating to any service prior to the date of commencement of such continuous service shall be calculated in the manner laid down in Rule 4(e)(i).

If the Board of Management considers that a member's increases in pensionable remuneration during the last three years of service are abnormal it shall, in its absolute discretion, be entitled to base the member's pension on a lower amount than the actual pensionable remuneration having regard to:

- statutory wage increases.
- the level of wage increases related to similar occupations in the Industries.

In the event of the Board of Management so deciding, the member's and the employer's contributions relating to that part of the member's pensionable remuneration which is not taken into

account for the purposes of (ii) or (iii) above shall be applied to secure for the member an additional pension as calculated by the actuary.

The decision of the Board of Management in consultation with the actuary as to the amount payable under this Rule shall be final and binding. In the event of a deadlock, the view of the actuary shall prevail.

The amount of pension determined in terms of this Rule shall not be reduced during the life of any pensioner, or where a spouse's pension is payable during the life of the spouse, except as provided for in Rule 4(j).

Rule 4(e) is subject to rule 4(i) which reads:

The pension shall be payable for the life of the pensioner. In the event of the death of a pensioner before he has drawn the pension for five years, the pension for the balance of the five years shall be paid to his spouse or dependants or estate as the Board of Management may decide in its absolute discretion, subject to Rule 4(j).

Rule 4(j)(iii) reads:

(iii) Spouse's pension on death of a pensioner

In the event of the death of a pensioner, the spouse of such pensioner shall be entitled to receive until his/her death or re-marriage a pension equal to 60% of the pension entitlement of such pensioner before any commutation under Rule 4(g), provided that in the event of death of a pensioner before he/she has drawn his/her pension for five years, such pension shall continue to be paid for the balance of the five years as provided for in Rule 4(i), whereafter, the spouse shall be entitled to receive the spouse's pension in terms of this Rule. The pension payable under this Rule shall continue to be paid where the spouse re-marries on or after age 60.

The benefit in terms of rule 4(e) plus rule 4(j)(iii) was computed by the respondent as follows:

No of shifts	545
No of contributions	R 4 977.93

Multiply by 16 667	R82 967.16		
			Last 3 years to determine average salary
No of shifts	235		
No of contributions	R 2 681.27		
Multiply by 15 152	R40 626.60		
R123 593.76 X 260			
	R41 197.92	per annum (average salary)	
		—	
Multiply by 2%	R 823.96		
A-Scheme 483 X 5 = 2415	-9 288	Service Bonus	
Shifts to 31/12/87 = 3060	<u>11 769</u>		
	21 057 X 10%		
	<u>2 105</u>		
	23 162		
Shifts to 31/12/88 = 270	<u>1 038</u>		
	24 200 X 6%		
	<u>1 453</u>		
	25 652		
Shifts to 31/12/90 = 501	1 926		
	27 578 X 5%		
	1 378		
	28 956		
			Pensionable service
Shifts to 31/12/91 = 255	980	(years)	
	29 936 X 5%		
	1 496		
	31 432		
Shifts to 28/02/94 = 551	<u>2 119</u>		
	33 551 X 10%		
	3 355		
	36 906		
Shifts to DOD = 457	<u>1 757</u>		Pensionable service
	38. 663	(Years)	

R823.96X 38.663 Pensionable service (years)	R31 856.77 (per annum - 12)
	R 2 654.73 (per month)

Adjust to age 65 years 1 month

100 1/12 (103 100)

R2 654.73 X 100.25%

R2 661.37 (per month)

Multiply by 40%

R1 064.55 (per month)

Rule 4(e) with it's Sub-sections plus 4(j)(iii):- A monthly pension of R1 934.68 for five years, whereafter it reduces to 60%. The 60% pension does not reflect in the final projection figure as the future life span of Mrs. Von Well is unpredictable. The capitalizing value is therefore: R1 934.68 x 12 months x 8.28024 (actuarial value for five years on members age) - R192 235.38 per tables 8.28024

Being the greater in value, the benefit paid to the complainant is that under rule 4(k)(i) and 4(j)(i).

Analysis

The issue for determination is whether the complainant's benefit was correctly determined and computed in terms of the rules of the respondent.

The respondent initially incorrectly informed the complainant that she was entitled to a lump sum of R192 235.38 plus a monthly pension of R1 064.55. Thereafter the respondent addressed a further letter to the complainant in which he stated that the amount due to the complainant was a lumpsum of R99 273.57 plus a monthly pension of R1 064.55.

The rule governing the complainant's unique circumstances is rule 4k(iii) which is subject to rule 5(iii)(a) in terms of which the complainant is entitled to the greater of the benefits set out in rule 4(k)(i) plus rule 4(j)(i) or pension benefits set out in rule 4(e) which is subject

to rule 4(i) plus rule 4(j)(iii).

Rule 4(k)(i) is normally subject to rule 4(k)(ii) however rule 5(iii)(a) creates a deeming provision in that the complainant is entitled to the benefit set out in rule 4 (k)(i) even though she strictly does not fall within the ambit of this rule. In terms of rule 4(k)(i) the complainant is entitled to twice the members annual pensionable remuneration at the time of the members death or the member's pensionable credit, whichever is greater. A lumpsum of R95 455.36 (salary per week - R917.84 X 104 weeks) plus R3 818.21 (interest at the rate of 12% from date of death to date of applying for a tax directive) giving a total sum of R99 273.57 representing double the members annual pensionable remuneration plus interest which exceeded the value of his pensionable credits. In terms of rule 5(iii)(a), in addition to this lumpsum the complainant is entitled to a spouse's pension set out in rule 4(j)(i) whereby the complainant will receive a pension equal to 40% of the benefit of the deceased member would have received under rule 4(e)(ii). The pension he would have received under rule 4(e)(ii) which is subject to rule 4(e)(iii) is R2 661.37 per month and 40% of this amount would be R1 064.55. Hence, the full benefit under rule 4(k)(i) plus rule 4(j)(i) is

lumpsum (including interest)	R 99 273.57
Monthly pension (R1064.55) capitalized	<u>R139 120.19</u>
Total	R239 193.76

The respondent argues that the benefit payable in terms of rule 4(e) is subject to rule 4(i) whereby there is no lump sum and the pension is payable for the life of the pensioner and upon his death to his spouse. However, rule 4(e) is subject to rule 4(j) and in particular rule 4(j)(iii) in terms of which the complainant is entitled to 60% of the pension entitlement of the deceased member. The respondent avers that this would amount to R1 934.68 a month and its capitalized value being R192 235.38, which represents the total benefit under this rule.

However, on a closer inspection of rule 4(e) and in particular rule 4(j)(iii), it is clear that the complainant is entitled to the full pension the deceased member would have received, for a period of five years, whereafter it reduces to 60% thereof. The respondent, incorrectly assumed that the complainant is only entitled to 60% of the deceased member's pension for the first five years (being R1,936.68 per month) whereafter it reduces by a further 60%. Hence, its capitalising value of

$$R1,934.68 \times 12 \text{ (months)} \times 8.28024 \text{ (actuarial factor)} = R192,235.38$$

is incorrect and should rather be calculated as follows:

$$R2,661.37 \times 12 \text{ (months)} \times 8.28024 \text{ (actuarial factor)} = R264,441.38$$

Hence, the complainant is entitled to the greater of the benefit under rule 4(k)(i) plus rule 4(j)(i) being R239,197.76 or rule 4(e) subject to rule 4(l) plus rule 4(j)(iii) being R264,441.38 (and not R192,235.38 as originally calculated by the respondent).

My investigator at this point, on 1 July 1999, informed Mr Jacobs of the respondent of the error in calculation. Mr Jacobs immediately consulted with the actuary of the respondent and acknowledged their error in interpretation of the rules of the pension fund.

The respondent in a letter dated 6 July 1999 addressed to my office sets out the benefits already paid to the complainant which were as follows:

Widows monthly pension:

R1,064.55 period December - June 96	R 7,451.85
9.75% increase R1,168.34 period July 96 - June 97	R 14,020.08
11.00% increase R1,296.86 period July 97 - June 98	R 15,562.32

10.00% increase R1,426.55 period July 98 - June 99	<u>R 17,118.60</u>
	R 54.152.85
Lump Sum Payment	<u>R 99,273.57</u>
	<u>R153,426.42</u>

The respondent further sets out the benefit that should have been paid to the complainant:

R2,661.37 period December 95 - June 96	R 18,629.59
9.75% increase R2,920.85 period July 96 - June 97	R 35,050.20
11.00% increase R3,242.14 period July 97 - June 98	R 38,905.68
10.00% increase R3,566.35 period July 98 - June 99	<u>R 42,796.20</u>
	<u>R135,381.67</u>

Therefore as there is an overpayment of R18,044.75 at this point in time, we propose that the amount of R1,061.46 be deducted monthly from the current pension of R3,566.35 for the balance of the 5 year guaranteed period which is seventeen months, whereafter the estimated 60% spouses pension of R2,139.81 (subject to the yearly increases) will become payable.

Hence, the respondent wishes to redress the incorrect payments by paying the complainant an amount of :

R2,504.89	(R3,566.35	minus	R1,061.46)
	correct currently monthly		monthly deductions for
	pension in terms of rule 4(e)	17 months to cover overpayment	of R18,044.82

After the lapse of 17 months, the 5 year period after the death of the member would be complete and the complainant would then, in terms of rule 4(j)(iii), be entitled to 60% of the deceased member's pension, that is 60% of R3,566.35 (subject to yearly increases).

The aforesaid increases in the complainant's monthly pension is in my opinion the best

way to redress this problem.

In conclusion, the respondent's conduct in these proceedings has been exemplary, and in particular Mr Jacobs must be commended, for its acknowledgement of the error in interpreting the rules and the immediate and expeditious active steps taken to resolve this problem.

Accordingly, I make the following order:

1. The complainant's benefit is declared to be that owing under rule 4(e) subject to rule 4(i) and rule 4(j)(iii), being R264,441.38, of which R153 426.42 has been received.
2. The respondent is directed to pay the balance of the complainant's benefit as follows:
 - (a) monthly pension of R2,504.89 (subject to annual increases) from July 1999 to November 2000 in terms of rule 4(e) plus 4(j)(iii);
 - (b) from 1 December 2000 the complainant shall receive a monthly pension of 60% of R2,504.89 (plus any annual increases) in terms of rule 4(j)(iii).

DATED at CAPE TOWN this 9th day of JULY 1999.

.....
JOHN MURPHY
PENSION FUNDS ADJUDICATOR