

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: **PFA/NP/117/00/KM**

In the complaint between:

C. SZALEK

Complainant

and

ISCOR PENSION FUND

Respondent

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

1. This is a complaint brought in terms of section 30A of the Pension Funds Act 24 of 1956 (hereafter referred to as the "Act") concerning the non-payment of the complainant's pension benefits on withdrawal from the respondent fund.
2. The complainant is Mr C. Szalek, a former member of the Iscor Pension Fund and a pensioner of the Iscor Retirement Fund.
3. The respondent is the Iscor Pension Fund, a defined benefit fund duly registered under the Act.
4. The complainant acts for himself in this matter. A response has been filed on behalf of the respondent by the Group Legal Advisor of the Iscor Selector Pension Fund, another fund in the same group as the respondent. This was presumably occasioned by the complainant having erroneously cited the Iscor Selector Pension Fund as the respondent in his reformulated complaint, although in his original submission he identified the Iscor Pension Fund as the respondent. It is clear from the nature of the complaint that the pension fund is the correct

respondent, and it is further apparent from the submissions filed on behalf of the pension fund that it is alert to the confusion and has dealt with it accordingly in its response. I am therefore satisfied that there is no prejudice in respect of the mis-citation and also no need to join further parties.

5. No hearing has been held in this matter, but an investigation under my supervision was conducted by my assistant adjudicator, Karin MacKenzie. Accordingly, in determining this matter, I have relied exclusively on the documentary evidence and written submissions gathered during the course of our investigations.
6. The complainant emigrated from Belgium and commenced employment with Iscor in January 1967. He left in March 1970, only to recommence employment with Iscor again in June 1970. In May 1976, he once more resigned from Iscor. During the period 1970 to 1976 he was a member of the Iscor Pension Fund (the respondent). He subsequently resumed employment with Iscor in 1989 until his retirement in 1994. During that period he became a member of the Iscor Retirement Fund, which is not a party to the present proceedings, and from which he is presently receiving a monthly pension. His complaint relates to the period that he was a member of the Iscor Pension Fund, during which time both he and his employer made contributions to the fund.
7. The complainant alleges that when he left the fund in 1976 he was advised by the Personnel Officer of his employer that he was not entitled to any pension benefits in terms of the rules as he was only 45 at the time. He accordingly failed to apply for any benefit which may have become due to him, believing that it would accrue to him on retirement. He alleges that he has not to date received any benefit in respect of the time period from 1970 to 1976.
8. The rules of the fund are quite clear on the entitlement of a member who voluntarily resigns prior to retirement. Rule 17(a)(I) states as follows:

- 17 (a) Except as provided for in Regulation 11 (a), if a member resigns voluntarily from the service before attaining the pensionable age, or leaves the service in circumstances for which no benefit is provided elsewhere in Part A of the Regulations
- (i) he shall be entitled to a gratuity equal to the sum of –
- (a) the contributions paid by him to the Fund; and
 - (b) two percent of such contributions for each complete year in excess of two for which he has paid contributions; and
 - (c) if he was a Class 60 or Class 63 member who has completed at least thirty years' qualifying service, subject to the provisions of Regulation 12 [c], one-half of one per cent of such final average emoluments for each year of such qualifying service, increased by seven and one-half per cent; and
- (ii) (not applicable)

Regulation 11(a) referred to in the above rule is also not applicable to the complainant. He is therefore *prima facie* entitled to a withdrawal benefit.

9. However, Rule 23(b) states:

- 23 (a)
- (b) If any member, or beneficiary or any dependant of a member or beneficiary shall fail to claim from the Fund any lump sum or gratuity within three years of the date upon which such member, beneficiary or dependant became entitled to claim payment of such lump sum or gratuity, the said sum or gratuity shall revert to the Fund to be dealt with in the discretion of the Trustees, and such member, beneficiary or dependant shall forfeit all right thereto.

10. It is obvious that the complainant received poor advice at the time of his departure from the fund. Moreover, he was only alerted to the fact that he had been deprived of his pension benefit when he made enquiries in 1993 with a view to his

impending retirement. He now seeks an order that the fund pay him the benefits which accrued to him in 1976.

11. The fund has raised a point *in limine* with regard to time-barring of the complaint. Section 30 I of the Act deals with the time limit for lodging of complaints. It provides:

- “(1) The adjudicator shall not investigate a complaint if the act or omission to which it relates occurred more than three years before the date on which the complaint is received by him or her in writing.
- (2) If the complainant was unaware of the occurrence of the act or omission contemplated in sub-section (1), the period of three years shall commence on the date on which the complainant became aware or ought reasonably to have become aware of such occurrence, whichever occurs first.
- (3) The adjudicator may on good cause shown or of his or her own motion-
 - (a) either before or after the expiry of any period prescribed by this Chapter, extend such period;
 - (b) condone non-compliance with any time limit prescribed by this Chapter.”

12. In the present case the event giving rise to the complaint (the non-payment of the benefit) occurred in 1976. In order to stop prescription of the claim, the complainant ought to have issued summons within three years, ie by 1979. I mention prescription because, given that this tribunal was only established in 1998, the question of lodging a timeous complaint with the Pension Funds Adjudicator is entirely academic. Bearing in mind that prescription only commences running from the time that the prospective litigant ought reasonably to be aware of his claim, it is relevant that the complainant knew at the latest by 1993 that he had a potential claim. Even on the most generous interpretation of the facts therefore he ought to have issued summons by 1996. This he failed to do. His complaint was lodged at this tribunal on 22 August 2000, some four

years or twenty-one years out of time, depending on when knowledge of his claim ought to be imputed to him.

12. In view of the extraordinary delay in bringing this complaint I am constrained to examine the prospects of success in order to ascertain whether there are exceptional circumstances that would allow this claim to survive such non-compliance with statutory time-limits.
13. The respondent admits that the complainant was a member of the fund at the relevant times and that contributions were duly received on his behalf from his employer. However, it has drawn attention to the provisions of rule 23(b) (set out above) which allow a three year time frame for the claiming of any benefits due under the rules, failing which such benefits revert to the fund. Notwithstanding the provisions of this rule, and notwithstanding the considerable elapse of time, the board of trustees nevertheless considered the complainant's case at a meeting on 29 November 1995. In its deliberations it had recourse to the various submissions addressed to it by and on behalf of the complainant as well as a memorandum prepared for circulation amongst the trustees dealing specifically with the problem of past unpaid benefits.
14. It is evident from the memorandum, attached to the response as annexure "E1", that all benefits payable to former members are recorded on the accounting system of the fund. Should the benefit of a member not reflect on the system, the benefit is considered to have been appropriated to the advantage of the member, either by direct payment to the member or by realising a deductible debt. The problem pertinently occurs where no monies are standing to the credit of the member's account under the fund's accounting system, but that member indicates that he received no benefits. The memorandum points out that the fund is unable to prove or disprove the payment of benefits in certain cases as payment records pertaining to the 1970's have been lost. This is hardly surprising given the passage of time. The memorandum specifically mentions the complainant and one other individual as being in this unfortunate category. The final recommendation is that the fund should continue to pay benefits to members in

respect of whom a credit is reflected on the accounting system, but not to those in respect of which the fund has no record of indebtedness.

15. The board followed the recommendations contained in the memorandum and turned down the complainant's request for payment of his withdrawal benefit. In considering his claim, it took into account the potentially negative impact of creating a precedent in terms of which the fund might be called on to pay benefits to former members who are not entitled to them, or who have already received them.
16. It seems to me that this is not an unreasonable attitude. By law, pension funds are only required to keep financial records for seven years. It would be unrealistic to expect a fund to rebut a claim arising some twenty years or more ago in the absence of the relevant documentation. That is one of the reasons that prescriptive periods are enacted, to achieve legal certainty and finality, and to ensure that the necessary documentary proof required to defeat a claim is still extant. Whilst I have sympathy for the complainant and am not suggesting for one moment that his claim is anything other than genuine, it cannot be said that the board of trustees has misdirected itself in attempting to protect the fund from an assortment of spurious claims which could well follow a precedent of this nature.
17. The complainant is bound by the rules of the fund which clearly bar him from recovering a benefit after the elapse of three years from its accrual. The board of trustees, exercising its general power of discretion under rule 14(d) to "*make any arrangements and to do anything not inconsistent with the provisions hereof....which in their opinion is for the benefit of members and persons entitled to benefits*" considered the complainant's claim to a benefit some nineteen years after it accrued. I am satisfied that the board had due regard to the factors that were relevant to the assessment of the claim and its reasons for rejecting it were rational and understandable in the circumstances. I am therefore not persuaded that the complainant has any prospects of success on the merits.

18. For that reason I am not prepared to condone the non-compliance with the time limits set out in section 30 I in terms of the powers conferred on me by subsection 30 I(3).

19. The complaint has become time barred and is accordingly dismissed.

Dated and signed at CAPE TOWN on the 18th of SEPTEMBER 2001

JOHN MURPHY

Pension Funds Adjudicator