

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

In the complaint between:

CASE NO:PFA/KZN/56/98/NJ

Mr A.J.C. Driescher

First Complainant

Mrs J.S.L. Driescher

Second Complainant

and

B.K.B. Group Pension Fund

First Respondent

B.K.B. Group Provident Fund

Second Respondent

B.K.B. Group Retirement Fund

Third Respondent

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

Introduction

1. These are complaints lodged with the Pension Funds Adjudicator in terms of Section 30A(3) of the Pension Funds Act of 1956. The complaints concerns the exclusion of the complainants in the distribution of a surplus.
2. Since both of the complaints require the determination of substantially the same questions of law and fact, it is convenient to consolidate the complaints and to proceed with them as one complaint. All parties were in agreement that I should exercise my powers in terms of section 30J to follow this procedure.
3. No hearing was held in this matter. Accordingly, in determining this matter, I have relied exclusively on the documentary evidence, arguments put to me in writing and a report compiled by my investigator, Naleen Jeram.

4. The first complainant is Albertus Johannes Christiaan Driescher, an adult male, a former member of the first and second respondent, now residing in Kwa Zulu Natal.

The second complainant is Johanna Sofia L. Driescher, an adult female, a former member of the first and second respondent, now residing in Kwa Zulu Natal.

The first and second complainants are represented by Mr A. Donald of Executive Financial Services.

5. The first respondent is BKB Group Pension Fund, a defined benefit fund, a pension fund duly registered under the Pension Funds Act of 1956 (hereinafter referred to as “the fund”). The second respondent is BKB Group Provident Fund, a defined contribution fund, a pension fund duly registered under the Pension Funds Act of 1956 (hereinafter referred to as the “provident fund”). The third respondent is BKB Group Retirement Fund, a pension fund duly registered under the Pension Funds Act of 1956 carrying on business as such. The respondents are represented by Mr A. Gouws, principal officer of the third respondent.
6. The first and second complainants were employed within the BKB Group for more than 20 years. They were both members of the pension fund. During 1994 all members of the pension fund were afforded an opportunity to voluntarily transfer to the newly created provident fund with effect from 1 July 1994. The first and second complainants elected to transfer to the provident fund. On 1 January 1998 the pension fund and provident merged to become the third respondent.

Complaint

7. These complaints relates to the administration of a fund or the interpretation and application of its rules and alleges that a decision of the fund was in excess of the powers of that fund or an improper exercise of its powers.

8. The first complainant voluntarily resigned from his employment on 31 March 1996 after being employed for 21 years within the BKB Group. The benefit due to the first complainant in terms of rule 7.1 (early withdrawal) was as follows:

Lid se Bydraes Oorgedra vanaf Pensioenfonds	R 47 065,36
Rente op die bydraes Oorgedra vanaf Pensioenfonds	R 12 129,81
Maatskappy se Bydraes oorgedra vanaf Pensioenfonds met Rente	R290 870,23
Lid se Bydraes	R 11 923,91
Rente op Lid se Bydraes	R 1 366,61
Plus 100% van die Maatskappy se Bydraes met Rente	R 13 290,52
Bruto Voordeel	R376 646,44
Belasting	<u>R 85 691,00</u>
Netto Voordeel	<u>R290 955,44</u>

9. The second complainant, after working within the BKB Group since August 1971, was declared medically unfit by the specialist Mr M Smith, who operated on her back three times. Consequently she filed a claim for disability on 20 April 1995. After the rejection of her disability claim the second complainant voluntarily resigned and requested her benefit to be paid to her. Her benefit was also computed in terms of rule 7.1 as follows:

Lid se Bydraes Oorgedra vanaf Pensioenfonds	R 25 231,96
Rente op die Bydraes Oorgedra vanaf Pensioenfonds	R 7 919,65
Maatskappy se Bydraes oorgedra vanaf Pensioenfonds met Rente	R343 392,35
Lid se Bydraes	R 7 378,25
Rente op Lid se Bydraes	R 1 059,08
Plus 100% van die Maatskappy se Bydraes met Rente	<u>R 8 437,33</u>
Bruto Voordeel	R393 418,62
Belasting	<u>R 96 464,90</u>
Netto Voordeel	<u>R296 953,72</u>

10. On 22 April 1997 the trustees of the pension fund agreed with effect from 1 January 1998 approximately 50% of the surplus of that fund would be distributed among certain fund members and former members. The following resolution by the trustees of the pension fund sets out the category of beneficiaries of the surplus distribution:

It was resolved that, with effect from 1 January 1998 the surplus in the BKB Group Pension Fund be distributed amongst the following categories once the BKB Group Pension Fund and BKB Group Provident Funds have amalgamated.

- i) All active BKB Group Pension Fund members.
- ii) All active BKB Group Provident Fund members who transferred from the BKB Group Pension Fund on 1 July 1994.
- iii) All BKB Group Pension Fund pensioners including pensions which ceased after 1 March 1996.
- iv) All members of the BKB Group Provident Fund as at 1 July 1994 who subsequently died or were retrenched.
- v) All members of the BKB Group Pension Fund who since 1 July 1994 have subsequently died or were retrenched.

11. The minutes of the trustees meeting of the pension fund sets out the rationale of the surplus distribution as follows:

The most equitable method of distribution of the surplus amongst present and former employees would be to apportion it in terms of the liabilities of each member participating in the distribution of surplus.

Therefore each eligible Provident Fund member would participate in the distribution according to his or her Fund Credit Value as at 1 July 1994.

The distribution of surplus will include the following categories of Provident Fund members:

- 1. Members who transferred from the BKB Group Pension Fund on 1 July 1994 who are still in active service

Allocation of Surplus:	R16 193 513
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2. Members in 1 above who subsequently

- retired
- died
- were retrenched

Allocation of Surplus as at 1 January 1998	<u>R 3 592 770</u>
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Total Allocation (1 January 1998)	<u>R19 786 283</u>
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On average the distribution of surplus represents an increase on in excess of 60% on the 1 July 1994 transfer values for active Provident Fund members.

12. The first and second complainants argued that the exclusion of former members who had resigned from the sharing in the surplus is unfair. The second complainant argues that due to her disability, she was in fact forced to resign which should be a factor taken into account in the distribution of the surplus.
13. Mr Gouws argued that former members who resigned voluntarily from the BKB Group irrespective of period of service, were not considered eligible for any distribution of surplus. Further, the first and second complainants resigned some 21 and 38 months respectively prior to the distribution of the surplus. The board of trustees of the BKB Group Pension Fund at the time of taking the resolution composed of equal numbers of employer and employee representatives. No payments were made out of the surplus to the operating company, BKB Limited, as such action would be in breach of the provisions of the Pension Funds Act. The distribution was not in contravention of the rules of either the pension fund or provident fund. Accordingly, he concludes that there has been no unfair discrimination against the complainants.

14. Members who left the service of the company out of their own free will were not included in the distribution as the trustees after applying their minds felt that they had less of an obligation towards them whereas in the event of existing members and members who retired, died or were retrenched, a greater obligation existed.
15. The first and second complainant seek an order entitling them to a share in the *ex-gratia* payments made in January 1998.

Analysis of evidence and argument

16. A member's entitlement to share in surpluses is aptly set out by Lord Justice Brooke in *Laws & Others v the National Grid Company plc (ch. 97/0941-4)*

It is also well settled that although the members of a pension scheme have no rights in the surplus revealed by an actuarial valuation ... they have a reasonable expectation that any dealings with that surplus, whether by the employers or by the trustees of the scheme acting within the powers vested in them by the scheme, will pay a fair regard to their interests, since the express purpose of the scheme is to provide benefits for their retirement.

17. As I have held in several determinations, the board of management of any pension fund has a duty to distribute pension fund surpluses reasonably and in accordance with the pension fund rules and the duties set out in section 7C of the Pension Funds Act of 1956.
18. The starting point in examining any surplus distribution is the rules of the fund. There is no specific rule governing surplus distribution in the pension fund. However, rule 20.5.2 reads:

If the valuation discloses that there is a substantial actuarial surplus or that there is a deficit that requires to be funded, the manner of dealing with the surplus or funding the deficit shall be considered by the trustees and recommendations made to the principal employer for a decision. The principal employer's decision shall be made within the limitations imposed by

the Act and the registrar's practice and shall be final. Where necessary, the trustees shall alter the rules to give effect to such decision.

19. The rule merely empowers the trustees to make a distribution but does not regulate the manner of distribution other than the said distribution must be in accordance with the Registrar of Pension Funds' practice and the Act. In this matter, the compelling relevant duty in terms of the Act is the duty to act with impartiality in respect of all members and beneficiaries.
20. The complainants in essence are arguing that the decision by the trustees of the pension fund to exclude members who voluntarily resigned from service sharing in the surplus and include members who were retrenched or died or retired amounts to unfair discrimination. Although this argument has not been fully pleaded, I want to again emphasize my investigative role as opposed to simply hearing and deciding a complaint. I am permitted to conduct my investigation in an inquisitorial manner in terms of the Pension Funds Act and I am not restricted by technical and formalistic arguments based on the scope of pleadings as is the case in traditional adversarial litigation. Therefore, should the evidence show that the complainants have sustained prejudice as a result of maladministration of the fund by the fund, then they are entitled to compensation despite their claim for relief not being formulated in such specific terms.
21. Awarding members who were retrenched, died, or retired and not members who voluntarily resigned does constitute differential treatment or discrimination. However, there is nothing inherently wrong with discrimination in itself. The problem arises where the discrimination is unfair. The discrimination can be found to be fair if the pension fund can show that the discrimination is justified and uses a rational means to achieve it. Hence the question in law is whether such a discriminatory distinction amongst former members of the first respondent is unfair and unreasonable.
22. I cannot accept Mr Gouws's argument that the complainants were excluded as they fell into

a category of beneficiaries to whom the pension fund owed no liability. Whilst it can be argued that when the complainants transferred out of the pension fund and subsequently voluntarily resigned and received their lump sum benefits from the provident fund, the respective fund's liability to the complainants ceased. However, the same can be said of members who transferred out of the pension fund into the provident fund and then were retrenched, died or retired. In terms of the rules of the pension fund or provident fund no liability is owed to this latter category of beneficiaries. Mr Gouws's argument can only stand if all former members were excluded on the basis of extinction of liability. Since, this is not the case, the exclusion of the complainants is at least *prima facie* unfair discrimination.

23. The issue in law is whether such unfair discrimination can be justified in an open and democratic society based on freedom and equity. The common thread amongst former members, who would share in the surplus was that there was some form of compulsion in their exits from the funds. Those members who were retrenched, were forced to resign in terms of the employer / employee relationship, thus, they could no longer be a member of the pension or provident fund. The members who retired, did so after attaining the normal retirement age set out in the rules of the pension fund and those who died, had their fate determined by a higher force. Hence, in all of the above scenarios the members were in one way or another forced to leave the fund. The members who voluntarily resigned (like the first and second complainant) are in essence, not being treated differently for their resignation but rather the voluntary nature of their resignation. They exercised their free will in making a choice to exit the fund.
24. The pension fund has also raised a fear of a runaway liability in the event of finding in favour of the complainants. This fear of runaway liability has often been overstated by our courts especially with regard to the law relating to pure economic loss. However, on the facts of this matter this fear can be easily discounted even ignored, as an amount of R3 592 770.00 was set aside for members who transferred from the first respondent to the second

respondent on 1 July 1994 but subsequently retired, died or were retrenched. Thus, by extending the category of beneficiaries to include members who voluntarily resigned would not require additional capital but merely redistribution of the aforesaid amount. In effect, the redistribution would amount to persons in the aforesaid class of beneficiaries remaining beneficiaries but sharing less in the surplus. Mr Gouws has indicated that currently there are 64 persons in this class. The distribution to these persons would be based upon the member's age, years of service and actuarial reserve value. There were 220 members (including complainants), who voluntarily resigned, who were excluded from this class. The inclusion of such a large number would drastically reduce the surplus benefit of each beneficiary in this category, thereby defeating the fund's aim to meaningfully reward persons whose membership was terminated due to circumstances beyond their control. Thus, the inclusion of the complainants and its legal consequences could render the surplus distribution meaningless.

25. The exclusion of members who voluntarily have left a pension fund from sharing in a surplus windfall years later is fairly common and reasonable practice (in this regard see *Horlock v Illovo Sugar Pension Fund & C G Smith Sugar Retirement Benefit Fund - PFA/KZN/14/98/NJ*). The pension fund is implicitly rewarding members who remained faithful to the fund, by staying with the fund and members who were forced to leave the fund due to circumstances beyond their personal control. There is nothing inherently wrong with only rewarding such persons. It may not be the fairest distribution but it cannot be said to be irrational or unreasonable to the extent requiring judicial intervention.
26. Therefore, in the light of the foregoing reasons, I find that even though the exclusion of the complainants *prima facie* amounts to discrimination, the exclusion falls within the range of reasonable surplus distribution practices.
27. Accordingly, the complaints are dismissed.

DATED at CAPE TOWN this 1st DAY of OCTOBER 1999.

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JOHN MURPHY

PENSION FUNDS ADJUDICATOR