IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NOS.: PFA/WE/14/98 &
PFA/WE/26/98

In the complaint between:

C Caffin — First Complainant
D Dooling — Second Complainant

and

African Oxygen Limited 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 first complainant lodged his written complaint filed under case number PFA/WE/14/98 on 27th January 1998. The second complainant's complaint was lodged on 30th January 1998 and filed under PFA/WE/26/98. Since both the complainants 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.

After an exchange of correspondence, consisting of a number of letters and

interrogatories, I met with the complainants at my offices in Cape Town on 11th March 1998, and then held a separate meeting with Mr Cameron and Mr Sweeney of the respondent at the offices of the Land Claims Court on 12th March 1998. Neither party was legally represented. The meetings were of an informal nature and neither party adduced oral evidence under oath. In determining this matter, therefore, I have relied exclusively on the documentary evidence and argument put to me in writing and orally.

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

Background to the complaint

The first complainant Mr C H Caffin, is a retired member of the respondent. He was employed by one of the participating employers in the fund, namely, African Oxygen Limited, for 27 years. He has worked within the group of companies of which African Oxygen Limited is a member all of his adult life. Nevertheless, it is only his service with African Oxygen Limited which is calculated as pensionable service for the purposes of his pension and this complaint. At the time of his retirement, he was employed as a product sales manager in the marketing department based in Cape Town. He took early retirement in March 1994 at the age of 55.

The second complainant Mr D E Dooling, is also a retired member of the respondent. He was employed by African Oxygen Limited for 26 years. At the time of his retirement he was an area manager running a branch of the company in Cape Town. He retired in March 1994 at the age of 60.

The respondent is a defined benefit fund, which was established with effect from 1 July 1937. The fund is duly registered under the Pension Funds Act of 1956 and in terms of its rules has as its object the provision of benefits for employees and former employees of the employers on their retirement through age or ill health, and for their dependants. The fund is managed by a board of trustees which consists of 50% member elected representatives, and 50% nominated by the employer.

With effect from 1 November 1996 the fund was closed to new employees. After that date all new employees of the employer were required to join a defined contribution provident fund.

Towards the end of 1995 the first complainant began raising a number of queries concerning the computation of his pensionable emoluments as well as other matters concerning the administration of the pension fund. He was joined in these queries and complaints by the second complainant sometime in early 1997. The respondent replied to these queries and complaints in writing. Unfortunately, the parties were not able to resolve their differences.

In the light of this history, it is common cause between the parties that the complainants have complied with the provisions of section 30A(1) which requires a complainant to lodge a written complaint with the pension fund or the employer who participates in the fund before lodging it with the Pension Funds Adjudicator. It is also common cause that the respondent has properly considered the complaint and has replied to it in writing as required by section 30A(2).

The Complaint

Section 1 of the Pension Funds Act defines a complaint to mean:

> "A complaint of a complainant relating to the administration of a fund, the investment of its funds or the interpretation and application of it rules, and alleging -
>
> (a) that a decision of the fund or any person purportedly taken in terms of the rules was in excess of the powers of that fund or person, or an improper exercise of its powers;
>
> (b) that the complainant has sustained or may sustain prejudice in consequence of the maladministration of the fund by the fund or any person, whether by act or omission;
>
> (c) that a dispute of fact or law has arisen in relation to a fund between the fund or any person and the complainant; or

(d) that any employer that participates in a fund has not fulfilled its duties in terms of the rules of the fund.

The complainants have made four complaints against the respondent. They relate to the administration of the fund and the interpretation and application of its rules and, although not expressly stated by the complainants, essentially allege maladministration on the part of the trustees and a dispute of law.

It is proposed to deal with each complaint separately hereunder.

Complaint I - Inclusion of the value of a company car within pensionable emoluments

At the time of their retirement both complainants enjoyed the use of a company car as part of their remuneration for services rendered. The first complainant alleges that he had the benefit of a company car throughout his employment within the group. The second complainant had use of a company car for the last 12 years of his employment.

The complainants argue that the value of the company car allocated to them represented remuneration and claim that the respondent failed to include that value in the calculation of their pension benefits, as it was, in their view, obliged to do.

They request me to rule that the value of a company car, as assessed by the Commissioner for Inland Revenue, be used as a basis to calculate the correction to their present pensions. They also request that this adjustment be applied retrospectively and pro-rata to their pensions from the date of retirement, and that interest on the outstanding amount be added to the retrospective adjustments.

The respondent argues that the rules applicable to the complainants at the time of their retirement did not provide for the inclusion of the value of a company car within their pensionable emoluments. It contends that the fund is a defined benefit fund, the rules

of which normally provide for pensions to be computed exclusively with reference to those elements of remuneration which were considered pensionable and in respect of which the member's contribution rate was calculated on an ongoing basis. No contributions were made by either the employer or the complainants on the value of a company car. If either the employer or the complainants wished the value of a company car to form part of the pensionable emoluments, appropriate deductions and contributions would have been affected. This did not happen.

The issue falls to be resolved with reference to rules 22, 18 and 2 of the rules of the fund.

Rule 22 of the rules of the pension fund provides:

> Subject to the provisions of these rules, the pension granted to a retiring member shall be equal to 1/540th of his final average emoluments for each month of pensionable service; provided that the pension shall not exceed the member's final emoluments.

The expression "final average emoluments" is defined in rule 2 of the rules to mean:

> The annual average of his pensionable emoluments over the last two years of his pensionable service, or over the whole of his pensionable service, if less than 2 years.

The expression "pensionable emoluments" is in turn defined to mean:

> The sum of
>
> (a) basic salary or wages;
> (b) 13th cheque;
> (c) an amount to be determined by his employer from time to time in lieu of other bonuses, regular contractual commission and all other remuneration of any nature whatsoever....

Rule 18 regulates the rate of contribution payable by members. The relevant part of the rule reads:

> Every member shall contribute to the fund from the date of becoming a member 7.5% of his pensionable emoluments. His contributions shall be deducted by his employer from his salary or wages and paid immediately to the fund;

The clause forming the main bone of contention in this complaint is clause (c) of the definition of pensionable emoluments. The complainants argue that the value of their company car falls within the category "all other remuneration of any nature whatsoever". Although the respondent concedes that the value of a company car does constitute remuneration, it stresses that the salient characteristic of clause (c) is that whether remuneration, other than the basic salary and the 13th cheque, falls within pensionable emoluments is a matter that has been left to be determined at the discretion of the employer.

According to the respondent, prior to July 1991, pensionable emoluments were calculated only with reference to basic salary. From 1 July 1991 the definition was amended to include the 13th cheque. At the same time the contribution rate was adjusted to finance the enhanced benefit. Similarly, since 1 September 1997, the employer has exercised its discretion to include the value of a company car within the definition of the pensionable emoluments for in service employee members of the fund and at the same time increased the member's contribution rates to take account of that adjustment.

As already mentioned, at the time of the complainants' retirement, no amount had been determined by the employer for inclusion within pensionable emoluments other than the basic salary and the 13th cheque. Consequently, the contribution rate at that time was based on providing a defined benefit taking only those elements of remuneration into account. This basis for calculating the pensionable emoluments had been disclosed to members in annual benefit statements since 1989. The complainants never raised the fact that the company vehicle was not included within the emoluments at any time prior to their retirement.

The complainants respond to this argument by claiming that clause (c) obligates the employer to determine a value for the company car (being "other remuneration of any

nature whatsoever") and to include that amount within their pensionable emoluments. The respondent's argument that such an amount has been determined at nil, in their view, amounts to a failure by the employer to properly exercise the discretion vested in it. In other words, all elements of an employee's remuneration have to be taken into account when determining pensionable emoluments and there is a positive duty on the employer to place a value on them. Such value would then have to bear a reasonable relationship to the value of the remuneration at the time of retirement.

Regarding the argument that no contributions were made in respect of such emoluments, the complainants contend that the failure of the trustees to ensure the implementation of one rule (the contribution rate) does not permit that another (the defined benefits) be ignored.

As appears from the above, the resolution of this issue depends on the proper interpretation of clause (c) of the definition of "pensionable emoluments" in the rules of the fund. The approach to the construction of documents relating to a pension fund should be practical and purposive rather than detached and literal. The provisions of the rules of the fund should whenever possible be construed to give reasonable and practical effect to the objects of the fund. (*See Re Mettoy Pensions Trustees Limited v Evans* [1991] 2 All ER 513 and *Re Courage Groups Pension Schemes* [1987] 1 All ER 528).

Looked at literally clause (c) is capable of the interpretation suggested by the complainants. The clause is ambiguous in that it could mean that besides the basic salary and 13th cheque pensionable emoluments will include:

- an amount to be determined by the employer from time to time in lieu of other bonuses;
- regular contractual commission; and
- all other remuneration of any nature whatsoever.

Such an interpretation would mean that the only amount in respect of which the

employer had a discretion would be the amount to be determined in respect of other bonuses. It would follow that all other remuneration would automatically form part of the pensionable emoluments.

The other interpretation of clause (c), being the one favoured by the respondent, maintains that the purpose of the clause is to permit the employer to add amounts to pensionable emoluments in respect of all the other elements of remuneration beyond the basic salary and 13th cheque. Further additions would be the consequence of negotiation with the employees through the process of collective bargaining or otherwise.

In the face of such ambiguity it is permissible to employ a more purposive and contextual approach. Such an approach requires clause (c) to be construed with reference to the rules of the fund as a whole. In *S v Looij* 1975 (4) SA 703 (RA) 705C-D the principle and its rationale were stated thus:

> "to determine the purpose of the Legislature, it is necessary to have regard to the Act as a whole and not to focus attention on a single provision to the exclusion of all others. To treat a single provision as decisive.... might obviously result in a wholly wrong conclusion."

Were I to accept the arguments of the complainants, I fear I would be focussing attention on clause (c) to the exclusion of the intention and application of the other rules of the fund. In particular, rule 18 sets the members' contributions at 7.5% of his pensionable emoluments. The complainants do not deny that prior to their retirement they contributed at a rate of 7.5% of their basic salary plus the 13th cheque. They argue simply that it was incumbent on the employer to include the value of the company car within their emoluments and to increase their contribution rate accordingly. To the respondent's contention that by virtue of the benefit statements, they were aware of the basis of the contribution rate, the complainants' only response is to argue that the benefit statements were not contractually binding.

No matter what the status of the benefit statements, the fact remains that the complainants did not contribute towards the financing of the inclusion of a company car

within their pensionable emoluments and they were aware of this prior to their retirement.

In a defined benefit pension fund, the benefits as defined in the rules constitute the goals and objectives of the financing arrangement. The actual cost of the benefits depends on a variety of financial and demographical assumptions. In order to meet its members' expected benefits, the fund has to rely on certain assumptions. Undoubtedly, the actuary has advised the fund to set its contribution rate to meet the anticipated benefits. The contribution rate is central to the financial viability of the scheme as a whole.

Hence, given that the complainants were aware that their contribution rate did not cover the value of the company vehicle, it was incumbent upon them while they were employees to have embarked upon negotiations or a process of collective bargaining to ensure that the value of the vehicle was included, if that indeed was their wish. Presumably the employer would have been willing to agree to such a demand only in exchange for an agreement to increase the contribution rate proportionately. Indeed, this seems to have happened subsequent to the complainants' retirement, and may have partly motivated their complaint.

Accordingly, reading the rules as a whole, and taking into account the financial assumptions underlying a defined benefit pension fund, I am satisfied that clause (c) should be construed to include within pensionable emoluments only those amounts determined by the employer in lieu of other bonuses, regular contractual commission and other remuneration in respect of which the member has contributed in accordance with rule 18. As the members have not contributed in respect of the company vehicle, the tax value of the vehicle shall not be included in their pensionable emoluments.

Accordingly, complaint I is dismissed.

Complaint II - Medical Aid Contributions

Consistent with their argument in relation to the company vehicle, the complainants complain that the component of their medical aid contributions paid on their behalf by the company directly to the medical aid scheme to which they belong represents a portion of their remuneration during their working years and becomes ongoing as pension in the event of their not contributing to the medical aid scheme for any reason whatsoever.

The motivation for this complaint arises from the fact that the first complainant is relocating to the United Kingdom where he shall have less need of the medical aid benefit.

In relation to this complaint, the complainants raised a number of issues about the increasing costs of medical aid and their inability to meet their own costs out of a pension of declining value. Although I have considerable sympathy with the complainants on this matter, I have no jurisdiction in this regard. The medical aid scheme is a matter between the employer and the pensioners and does not arise from the interpretation and application of the rules of the pension fund.

As for the claim that the employer's contribution to the medical aid scheme should form part of pensionable emoluments in the event of the complainants withdrawing from the scheme, it raises essentially the same issue as that raised by the complaint concerning the company vehicle. Such amounts were not determined by the employer as falling within pensionable emoluments and the complainants never contributed in respect of them in terms of rule 18.

The complainants entitlement to the contributions paid to the medical aid scheme by the employer in the event of their ceasing membership is a matter to be determined by the rules of the medical aid scheme. As stated, I have no jurisdiction in this regard.

Accordingly, Complaint II is also dismissed.

Complaint III - Disclosure of information

The complainants allege that they are entitled to the minutes of all trustee meetings and the failure to provide pensioners with trustee minutes is prejudicial as it excludes the members of the fund from constructive participation in the management of the fund.

The complainants request me to rule that the minutes of the trustee meetings and all the activities, deliberations and decisions of those to whom they delegate duties or functions concerning the pension fund, be open information to all members of the fund.

The complaint is cast in very general terms and does not specifically identify any particular document which the complainants seek to be disclosed.

In a letter dated 13th February 1998 in response to the first complainant's complaint, the respondent takes the following position:

> "You have indicated that members should be provided with copies of minutes of all trustee meetings. We must stress that the pension fund administrators comply with all legislation as provided for in the Pension Funds Act. The administrators also comply with the rules of the fund and we can confirm that all the requirements which have been set out by the Financial Services Board in the circulars PF86 (for members) and PF90 (for pensioners) are in place. We must add that our annual trustees' report reflects the statutory information that we are required to supply to members. You will have received copies of these reports (copies will be forwarded to the Adjudicator).
>
> The minutes of the trustees' meetings belong to the trustees and are not available for circulation to members."

The complaint therefore squarely raises the issue of the extent to which pension fund members are entitled to disclosure of information. Before turning to the rules of the fund and the circulars of the Registrar of Pension Funds, it will be instructive first to have regard to the Constitution, the Pension Funds Act and the common law fiduciary duties of the trustees.

Section 32 of the Constitution of 1996 grants everyone the right to access to information

in the following terms:

> (e) Everyone has the right of access to -
>
> > (a) any information held by the state; and
> > (b) any information that is held by another person and that is required for the exercise or protection of any rights.
>
> (f) National legislation must be enacted to give effect to this right and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

On the face of it this section of the Constitution gives private citizens rights of access to information held by other private citizens. However, item 23(2) of schedule 6 of the Constitution in effect has suspended the operation of section 32(1) until the enactment of the legislation contemplated in section 32(2). Item 23(2) reads:

> "Until the legislation in terms of sections 32(2) and 33(3) of the new Constitution is enacted -
>
> (a) section 32(1) must be regarded to read as follows:
>
> > (a) every person has the right of access to all information held by the state or any of its organs in any sphere of government insofar as that information is required for the exercise or protection of any of their rights."

Because the information held by a pension fund is not "information held by the state or any of its organs in any sphere of government", it follows that the complainants do not have any constitutional rights of access to the information that they seek. This will change when and if Parliament enacts the legislation required by section 32(2) of the Constitution of 1996.

Nevertheless, the Pension Funds Act of 1956 grants members of pension funds certain rights to information. Section 35 provides as follows:

> Right to obtain copies of or to inspect certain documents

(g) Every registered fund shall deliver to any member on demand by such member, and on payment of such sum as may be determined by the rules of the fund, a copy of any of the following documents, that is to say -

(a) the rules of the fund;
(b) the last revenue account and the last balance sheet prepared in terms of subsection (1) of section 15.

(h) Any member shall be entitled to inspect without charge at the registered office of a registered fund, a copy of any of the following documents and make extracts therefrom, that is to say -

(a) the documents referred to in subsection (1);
(b) the last report (if any) by a valuator prepared in terms of section 16;
(c) the last statement (if any) and report thereon prepared in terms of section 17;
(d) any scheme which is being carried out by the fund in accordance with the provisions of section 18.

From the complainants' complaint it is not clear whether they have specifically requested any of the documents referred to in section 35 or whether the respondent has refused to furnish them with it. However, it is clear that section 35 does not grant the members of a fund the right to the minutes of the meetings of the trustees.

Besides section 35, section 7D and 7C of the Pension Funds Act have some bearing upon the obligation of a pension fund to disclose information to its members. Section 7D(1)(c) includes among the duties of a board, the duty 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. Additionally, section 7(2)(b) and (d) require the board of a fund in pursuing its objects to act with due care, diligence, good faith and with impartiality in respect of members and beneficiaries. However, in terms of section 7E of the Act, section 7C and 7D (inserted by section 2 of Act No. 22 of 1996) only apply in respect of existing pension funds with effect from 15th December 1998 and in respect of funds registered after the amendment on or after 19th April 1997. The evidence shows that the respondent was registered before the amendment and therefore the provisions of section 7C and 7D shall only apply to it from

15th December 1998.

Be that as it may, in *Lorentz v Tek Corporation Fund and others* 1998 (1) SA 192 (W), the High Court held that trustees are obliged to conduct the affairs of a pension fund in accordance with the common law regarding the fiduciary duties of those who occupy positions of trust in the wide sense. Moreover, section 2 of the Financial Institutions (Investment of Funds) Act 39 of 1984 applies to pension funds. Section 2(a) imposes a duty on the managers of a fund to observe the utmost good faith and to exercise proper care and diligence in the safe custody, control or administration of the funds. In other words, despite section 7E of the Pension Funds Act, trustees remain under a duty to act in good faith.

In other areas of administrative and employment law, the courts have consistently held that the duty to act in good faith incorporates the duty to disclose adequate relevant information. This is particularly so when an individual faces an impending decision which may have adverse implications for him. Similarly, where the law envisages a process of consultation or negotiation, information ought to be disclosed in order to permit the parties to negotiate or consult effectively. (See for example *SA Commercial Catering and Allied Workers Union v Southern Sun Hotel Corporation (Pty) Ltd and others* (1992)13 *ILJ* 132(IC)).

It would seem to be just and equitable, therefore, that boards of trustees be obliged in terms of their duty to act in good faith to disclose such information as would reasonably enable members of pension funds to consider the consequences that the information held for them in the realisation of their rights, interests and expectations. The failure to furnish such information, without appropriate justification, will constitute an improper exercise of the board's powers and will amount to maladministration of the fund as contemplated in the definition of a complaint in section 1 of the Pension Funds Act.

It needs to be emphasised that the entitlement to information is limited to information which is relevant or appropriate. Legally privileged information, private personal information, confidential information the disclosure of which may cause harm, or

information the disclosure of which may be unlawful, shall arguably not be relevant information. Whether or not a member is entitled to certain information will depend on the circumstances, the nature of the information sought and the purposes for which it is being sought. Each case will have to be decided on its merits.

Furthermore, the rules of the fund may grant rights to information in excess of those required by the Constitution, statute law or the common law. In the present case, rule 17 grants members rights of access to information. However, the rule grants no rights beyond those granted by section 35 of the Act.

In addition, Circulars P.F. No. 86 and 90 oblige pension funds to furnish members with a variety of information. The information sought by the complainants goes beyond that which is provided for in the circulars.

The complainants wish to have access to the minutes of trustee meetings and all documentation concerning the activities, deliberations and decisions of those to whom they have delegated their duties or functions. The crisp issue for decision then is whether the legal framework sketched above grants the complainants any right to such information. As stated, the duty of the trustees to act in good faith carries with it the concomitant right of members to have access to sufficient relevant information to protect and advance their rights, interests and expectations arising under the fund. In certain cases such information might well include relevant minutes of trustee's meetings.

Unfortunately, the complainants have framed their complaint in an abstract and general manner. Before I am able to rule that they are entitled to the minutes of trustees' meetings, they shall have to make out a case that the minutes relate to any dispute or any matter in question which affects their rights, interests or expectations. The complainants have made out no case whatsoever in this regard. Instead they seek a general order that all minutes should be disclosed regardless of their relevance. Without proof of relevance, I decline to make such an order.

Accordingly, complaint III is dismissed.

Complaint IV - Pensioner Representation

The complainants' fourth complaint alleges that the pension fund administration is not "properly exercising the purpose of recent legislation and is preparing to create "voting wards" in which the elected members of the board of trustees will be drawn and that the administration proposes to discriminate between pensioners and the employed members of the fund".

The complainants request an order that there be no discrimination between members (pensioners and employees) and that the elected members of the board be freely elected from all ranks of the African Oxygen Limited Pension Fund.

The composition of the board of trustees is governed by rules 3-5 of the rules of the fund.

Rule 3 provides that the fund should be administered and controlled, subject to the provisions of the Act, by not less than 6 or more trustees as determined by the company from time to time. Half of the trustees (referred to as the company trustees) shall be members nominated by the company and the other half of the trustees (referred to as staff trustees) shall be members selected by the other trustees in terms of rule 5. Rule 4 provides that the company trustees are appointed by the company. Rule 5 permits the trustees with the consent of the company to make regulations as to the manner in which staff trustees shall be selected.

Relying on their discretion the trustees have provided for the direct election by in service members of 4 staff trustees to represent 4 different geographical constituencies across South Africa. The pensioners are entitled to directly elect one trustee from a single constituency made up of the entire country.

According to Mr Sweeney, the administration manager of the fund, there are approximately 700 pensioners and 1300 in service members of the fund. As the fund

has been closed to new employees with effect from 1 November 1996, it can be expected that the number of pensioners in the fund relative to the number of in service members will increase over time.

The complainants' complaint is essentially that the regulation governing the election of staff trustees is discriminatory because one third of the members (pensioners) have 20% representation whereas two thirds (the in service members) have 80% representation. Were one to allocate votes on a strictly arithmetical basis, the pensioners would be entitled to 1.6 votes and the in service members to 3.4 votes. The arithmetical calculation can be advanced as a justification for giving the pensioners two trustees and the active members three.

On the other hand, the respondent has divided up the in service members into four geographical constituencies to coincide with the operations of the participating employer. It feels that the interests of in service members will best be served by dividing them into such geographical regions and allowing for representation on that basis. Given that the pensioners are spread across the country, and given their smaller number, it feels justified in allocating a single pensioner trustee to the trustees on a national basis.

Section 7A of the Pension Funds Act of 1956, which comes into effect on 15th December 1998 provides as follows:

> (i) Notwithstanding the rules of the fund, every fund shall have a board consisting of at least four board members, at least 50% of whom the members of the fund shall have the right to elect.
>
> (ii) Subject to subsection (1), the constitution of a board, the election procedure of the members mentioned in that subsection, the appointment in terms of office of the members, the procedure at meetings, the voting rights of members, the quorum for a meeting, the breaking of deadlocks and the powers of the board shall be set out in the rules of the fund.

Although, as stated, this provision has yet to become operative, it does set a useful

yardstick. Clearly, the intention of the legislature is that the members (including the pensioners), should have the right to elect 50% of the board of trustees, and that the election procedure should be governed by the rules. To that extent the rules of the respondent are consistent with the legislation. The issue to be determined here, though, is whether the trustees properly exercised their discretion in allocating one seat to the pensioners as against four to the active members. In other words, is the allocation of seats on the board of trustees reasonable and justifiable.

In *Euijen v Nedcor Pension Fund* (case number PFA/GA/27/98 20 March 1998) I held that as a general rule unreasonable decisions by pension funds normally will constitute either an improper exercise of power or maladministration as contemplated in the definition of a complaint in Section 1 of the Pension Funds Act. At page 55 of my decision I comment:

> The primary purpose of an investigation into the reasonableness of trustee decisions will still be to test the soundness of the process of deciding which went into making the decision, The idea is to introduce an ethic of justification on the part of the trustees. The late Professor Mureinik in *"A Bridge to Where? Introducing the interim Bill of Rights"* (1994) *SAJHR* 31@ 41 summarises the correct approach to reviewing the reasonableness of administrative decisions. He suggests that an administrative (or trustees') decision cannot be taken to be justifiable or reasonable unless:
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> - the decision-maker has considered all serious objections to the decision taken and has answers that plausibly meet them;
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> - the decision-maker has considered all the various alternatives to the decision taken and have discarded them for plausible reasons; and
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> - there is a rational connection between premises and conclusions - between the information (evidence and arguments) for the decision maker and the decision taken.

On the facts placed before me, I am satisfied that the trustees' allocation of voting power is reasonable. Whilst it is correct that the pensioners may be under-represented in numerical terms, such under-representation is justified by the wish of the trustees to allow for representation of active members on a geographical basis. However, given that the number of in service members will

proportionally decrease over time, the trustees will be well advised to exercise their discretion under rule 5(1) to ensure that pensioners and in service members are represented on the board in proportion to their actual numbers. For the reasons stated, I am satisfied that the existing allocation is reasonable and that the fund is not guilty of maladministration in this regard.

Accordingly, complaint IV is also dismissed.

Relief

The Order of this Tribunal is:

The complaints of the complainants are dismissed.

No order is made for costs

DATED AT CAPE TOWN 30TH DAY OF MARCH 1998.

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PROF JOHN MURPHY
PENSION FUNDS ADJUDICATOR