IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/GA/91/98/JM

In the complaint between:

L M Seymour  Complainant

and

Clinic Holdings Executive Retirement Fund  Respondent

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

1. The complainant lodged a complaint in terms of section 30A of the Pension Funds Act against the respondent, a defined benefit pension fund registered in terms of the Act, on 20 April 1998.

2. The complaint relates to the payment of the complainant’s withdrawal benefit on her retrenchment from employment effective on 31 May 1998. The complainant was employed as an accountant by the Clinic Holdings group of companies at the Nedpark Clinic between 1978 and 1998. Her last day of employment was 4 May 1998, despite which she has yet to receive her benefit, either as a cash withdrawal or as a transfer to another fund. The circumstances pertaining to the non-payment of the benefit are explained more fully below.

3. During the course of 1997 the board of management of the fund amended the rules introducing a new rule, rule 7.19, into the rules of the fund. Rule 7.19 deals with the situation where the ultimate control of the principal employer passes from the
shareholders who controlled the principal employer at 1 January 1997. Shortly after the rule amendment the principal employer was taken over by the Netcare group. The rule reads as follows:

7.19 Change of Control

If any of the following situations eventuate subsequent to the ultimate control of the Principal Employer passing from those shareholders or their nominees who controlled the Principal Employer as at 1 January 1997, then the following provisions shall apply in respect of those Members who were Members as at 1 January 1997:

7.19.1 In the event of the death of a Member in service as described in Section 5, within 6 months of the effective date of such change of control, the person entitled to any benefit payable in terms of Section 5, except as far as already included therein, shall receive a benefit equal to the greater of

the member’s actuarial reserve

or

the member’s equitable share of the Fund’s assets.

7.19.2 In the event of the termination of such a Member’s Service in accordance with the provisions of section 6 and for any reason whatsoever, within 24 months of the effective date of such change of control, there shall be payable together with any benefit payable in terms of section 6, except in so far as already included therein, a benefit equal to the greater of

his actuarial reserve

or

his equitable share of the Fund’s assets.
7.19.3 In the event that the assets of the Fund are merged with the assets of any other approved Fund operated by any other employer to which control of the Principal Employer passes, or if the liabilities of any other approved Fund operated by any other employer to which control of the Principal Employer passes, are merged with the Fund, the assets of the Fund as at the effective date of such merge must be actuarially quantified by Liberty Life and vested in the members concerned as if the Fund had been terminated.

7.19.4 The provisions of Rules 7.19, 1.19.1, 7.19.2, 7.19.3 and 7.19.4 may only be modified with the written consent of 90% of the Members who were Members as at 1 January 1997.

4. At the time of the amendment there were approximately 27 members of the fund (including the complainant) and the rule applied to them equally without discrimination.

5. In terms of rule 7.19.2 a member who was a member on 1 January 1997, and whose employment was terminated within 24 months of ultimate control of the principal employer passing to other persons, shall be entitled to a withdrawal benefit equal to the greater of the member’s actuarial reserve or the member’s equitable share.

6. As stated, the complainant lodged her complaint on 20 April 1998 alleging that in view of her impending retrenchment in May 1998 she was entitled to benefit in terms of the amended rule, and essentially sought a directive to that effect.

7. Sometime in April 1998 other members of the fund also lodged a complaint concerning their entitlement in terms of rule 7.19. In which essentially the same issues were raised. These complainants were represented by Mr PAK Le Roux of Brink Cohen Le Roux and Roodt Inc.. The fund in its response in that matter was represented by Mr Des Williams of Werksmen’s attorneys.
8. On 28 July 1998 this office (after various telephonic discussions) received a letter from Mr Norman Weltman, the executive director of Netcare, being the company which took over Clinic Holdings the original principal employer in the fund. The letter reads:

   With reference to our various telephone conversations, the last of which was on 21 July 1998, I wish to confirm that you advised me that you would be considering the representations by the lawyers of both parties, namely, Werksmans and Brink Cohen Le Roux & Roodt.

   I confirm having advised you that as the issues relating to Mrs L M Seymour and that relating to the ex Clinic Holdings employees as represented by Brink Cohen Le Roux & Roodt are identical, you would consider both matters at the time.

   I look forward to meeting with you when you come up to Johannesburg to meet the relevant parties in this matter and await your advice as to dates, etc.

9. Subsequent to receiving this letter I held separate meetings with the parties’ representatives, and ultimately mediation was attempted at the offices of Brink Cohen Le Roux & Roodt Inc on 9 June 1999. The complainant was in attendance at the mediation and her interests were canvassed and considered as part of the negotiations. Regrettably, the mediation exercise failed and no settlement agreement was concluded.

10. Further correspondence ensued until eventually the matter was set down for a hearing on 2-3 March 2000.

11. Although Mr Williams acted on behalf of the fund throughout the process, at no stage did he submit a substantial written response to the complaints. Nevertheless, he has effectively communicated the fund’s position in correspondence, verbally and telephonically.
12. For reasons not entirely known to me, the hearing scheduled for March 2000 was postponed without finalizing another date. Thereafter there was further correspondence, dealing with matters of discovery and the like.

13. On 25 February 2000 I was advised that certain of the complainants had changed attorneys of record and that they would henceforth be represented by Routledge Modise.

14. Eventually, on 15 December 2000 I received a letter from Routledge Modise advising me that the complaint had been settled and that I should close file. I assumed this to be the position in relation to all the members of the fund, including the complainant. It has subsequently emerged that this assumption was incorrect, and for reasons unknown the complainant was not included in the settlement and has not been paid her withdrawal benefit in terms of the rules.

15. The question for determination therefore remains whether the complainant is entitled under rule 7.19 to receive her equitable share of the fund’s assets as at the date of the termination of her employment.

16. From the evidence available, it seems to be common cause that ultimate control of the original principal employer, being Clinic Holdings Limited, passed from its original shareholders to Network Healthcare Holdings Limited, or its shareholders, or other subsidiaries within or associated with the Netcare group during 1997. The services of the complainant were thereafter terminated in May 1998, being within 24 months of the effective date of such change of control. Accordingly, she falls within rule 7.19.2 and is thus entitled to her equitable share. As the fund was 210% funded at the time of her dismissal I assume the equitable share to be the greater benefit.

17. Although, Mr Williams has not put forward a substantive defence in writing, the
mediation process revealed that the new board of the fund challenges the validity of the amendment introducing rule 7.19. The suggestion was made that the previous board in adopting the amendment had acted in some way improperly or unreasonably. However, no proper case has been made out in support of this allegation.

18. Given the time lapse, it would be unlawful, unfair and unreasonable to further postpone payment to the complainant and thus it is necessary to compel the fund to process the benefit. Nevertheless, the confusion surrounding this matter justifies giving the fund a last opportunity to make submissions concerning the validity of the rule. Accordingly, I shall issue a rule nisi affording the respondent an additional opportunity to furnish evidence and to make any appropriate submissions. However, in view of the delays I shall insist on strict compliance with the time limits.

19. I accordingly issue a rule nisi in terms of which the parties are called upon to show cause, if any, within 14 days of this preliminary determination, why the following final order should not be granted:

19.1 The complainant is entitled to a withdrawal benefit in the amount of her equitable share of the fund’s assets as at 4 May 1998 as calculated by an independent actuary appointed for that purpose by this tribunal.

19.2 The respondent is directed to furnish the independent actuary appointed in terms of clause 19.1 above with all information which he reasonably requires for the purpose of determining the complainant’s equitable share within 7 days of this determination.

19.3 The respondent is directed to pay the complainant the amount of her equitable share as determined by the actuary, together with the interest at
the rate prescribed in section 2 of the Prescribed Rate of Interest Act, for the period commencing 4 May 1998 until date of payment, within 6 weeks of the date of the determination.

19.4 The respondent is directed to pay the costs of the actuary within 6 weeks of presentation of his account.

DATED at Cape Town this 23\textsuperscript{rd} day of July 2001.

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\underline{John Murphy}

Pension Funds Adjudicator
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