IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.: PFA/KZN/13/98

In the complaint between:

Henry George Stanley McEwan
Complainant

and

First National Bank 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 complainant is Henry George Stanley McEwan an erstwhile member of the respondent and ex employee of First National Bank, a participating employer in the respondent at the relevant time.

The respondent is The First National Bank Pension Fund, a pension fund duly registered in terms of the Pension Funds Act of 1956.

The complainant addressed the respondent raising his dissatisfaction relating to the quantum paid to him by the respondent on his resignation from the employer in terms of the rules of the fund and claims that he should have been given an opportunity to transfer to a new defined contribution fund which was yet to be established. The complaint resulted in correspondence between the parties including a written complaint to the respondent. The parties were unable to resolve the dispute and complainant duly lodged a written complaint with the Pension Funds Adjudicator under cover of a letter of the 28 April 1998. It is common cause between the parties that the complainant has complied with the provisions of section 30A(1) requiring him to lodge a written complaint with the
pension fund or the employer participating 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 parties have both supplied supporting documentary evidence.

The complaint relates to the administration of the respondent and alleges that the complainant has sustained prejudice in consequence of maladministration of the respondent. The complaint relates moreover to an alleged failure on the part of respondent to disclose relevant information to the complainant prior to his making a decision regarding his pension benefits on his resignation from the employer and further goes on to allege discrimination. In particular the complainant alleges that as a result of not having been informed by Respondent, at a time when he was intending to resign and enquiring regarding his allowed benefits, of its intention to register a defined contribution fund to which members of the earlier fund, a defined benefit fund, would be entitled to transfer benefits due to them; he made a decision to resign and to transfer existing benefits to a retirement annuity.

The complainant alleges that as a direct result of the failure of respondent to inform him of the impending registration of the defined contribution fund he suffered prejudice in that his situation would have been substantially improved had he been properly informed as he would have opted to remain in the employ of his employer for four months longer than he did and would then have been able to transfer his benefit to the new fund, which he submits he would have done. According to a statement issued by the respondent, those electing to convert were to be credited with their full actuarial capital as well as being offered an incentive being a minimum premium of 25% addition to the capital. The complainant was not granted this quantum but rather his benefit was calculated in accordance with the applicable rules of the defined benefit fund at the date of his resignation.

The relief sought by the complainant is that I should declare “certain practices” of the respondent discriminatory presumably in so far as the respondent enabled certain of its
members to transfer to the new fund while the complainant was not offered this option and to direct respondent to remedy such practices. I am further requested set aside the decision of the respondent denying the complainant the right to transfer his benefits to the defined contribution fund as the other members of the defined benefit fund had been entitled to do.

No hearing was held in this matter but a report was placed before me by senior investigator, Antonia Simmons. Accordingly, in determining this matter I have relied on the documents and the report placed before me and the exchange of correspondence. Having completed my investigation, I have determined this complaint as follows and for the reasons set out herein.

Background

The complainant commenced employment with First National Bank on the 1 January 1984, as a bank clerk. He resigned from his employment on the 31 December 1996 by which time he was employed as the Sales and Marketing Manager for the Natal Bank branch of First National Bank.

For the duration of his employment complainant was a member of respondent and made regular contributions to respondent.

The complainant directed a letter dated the 16 August 1995 to his employer requesting a transfer to the Life Broking Division of First Bowrings to take effect from the 1 February 1996. It was, however, subsequently agreed that the complainant be allowed to resign having his last working day as at 31 December 1995.

The complainant entered into numerous discussions with employees of respondent regarding the benefit which was available to him in terms of the rules of respondent and in order to assist him in making a final decision as to the manner in which such funds should
be dealt with. Complainant's first instruction was for his deferred pension to remain within the pension fund but, after having been given advice to the effect that if he were to die his benefit would remain within the fund and not be paid to his beneficiary, he elected to transfer his accrued benefit to a retirement annuity. Initially complainant had wished to transfer the benefit to a preservation fund, more particularly the Old Mutual pension preservation fund. Complainant was informed that in terms of the rules of respondent he was not entitled to transfer his benefit into a preservation fund hence his decision to transfer the benefit to the retirement annuity.

The rules of the respondent which were applicable to complainant and which are relevant for the purposes of a proper understanding of the issues under scrutiny in this determination read as follows:

5 Resignation:

5.1 Subject to the provisions of General Rules 7, 10 and 28, if a Member resigns voluntarily from the Service and is not granted an immediate pension under any of these Rules he shall be entitled to a benefit equal to his Accumulated Contributions; provided that if he is qualified he may elect instead to become a Deferred Pensioner in terms of Part XI of these Rules.

Part XI of the rule provides:

1. If a Member who leaves the Service on or after 1st July, 1963, without being entitled to a pension under the provisions of any of the preceding Rules has 10 years Qualifying Service immediately preceding such termination of Service and elects in terms of General Rule 5 to become a Deferred Pensioner, the Trustees shall (subject to the provisions of Rules 2 to 11 inclusive of this Part) grant him a Deferred Pension subject to the General Rules (except General Rule 16); provided that the Trustees may, in their absolute discretion, in place of granting a Deferred Pension or paying the capital value thereof to a pension fund or a retirement annuity fund in terms of Rule 10 of this part, pay the capital value thereof to a retirement annuity fund approved under the provisions of the Income Tax Act and registered under the Pension Funds Act, for his benefit. The calculation of the Deferred Pension shall
be based on Pensionable Service as provided for in Rule 2 of the Part...

11. A Deferred Pensioner, the capital value of whose Deferred Pension is paid to a pension fund or a retirement annuity fund in accordance with Rules 1 or 10 of this Part, shall thereupon cease to be entitled to any other benefit from the Fund.

The rules or definitions in terms of which the manner of calculation of the quantum is effected have not been supplied by either party but since these details are not required for the determination of the complaint and are not specifically in issue the omission is not fatal to the proper presentation of the matter.

Argument

The complainant's argument relies on the submission that the advice given him by the respondent was incomplete, inadequate and as a result discriminatory. It is his submission that there was a duty upon respondent to inform him that it intended to register a new defined contribution fund and to discuss with him the financial implications of transferring to such fund.

Since his resignation took effect from the 31 December 1995 and the option to transfer from the respondent to the new fund was available from the 1 January 1996, with a prerequisite that he be employed until April 1996 he should have been informed accordingly, as the date on which the option became available was only one day after his resignation and he could have delayed his resignation until after April 1996.

In addition since he was resigning from First National Bank to take up a position with the Life Broking Division of First Bowrings a division of his original employer, and thus to remain within the same group essentially he found it the more unreasonable that he had not been informed of the forthcoming registration of the new fund.
In support of his contention that he would have been in a better financial position had he been in a position to transfer to the fund which was to be established he annexes a personal comparison benefit under the defined benefit fund and the new defined contribution fund which was supplied to a colleague of his and member of the respondent, by the respondent, and which document illustrates the enhanced value of the benefit available for transfer. This document indicates that, in the instance of the particular individual for whom it was calculated, a conversion premium of R 30 150.90 was added to his existing benefit giving him a total of R150 754.48 and not RR120 603.66 to which he had been entitled under the old fund rules. This conversion premium was not granted to the complainant. The projected benefit on retirement in the illustrated instance was R57 590.27 per annum in terms of the rules of the existing defined benefit fund but R71 662.57 per annum for the proposed defined contribution fund.

The complainant submits that in offering such option to other members of the respondent and not to him he was not only being financially prejudiced but he was also discriminated against and treated in a manner different from those in his situation which was unfair.

The respondent replies to the complainant's arguments as follows:

1. Although First Bowrings is subsidiary of First National Bank it operates as an independent entity and as such has its own pension fund. If staff members wish to take up employment with First Bowrings it is therefore necessary for them to resign from the bank and to apply for a position with First Bowrings and vice versa.

2. The complainant could have transferred his benefits in respondent to the First Bowring Pension Fund if he had so wished.

3. Regarding the conversion of the First National Bank Group Pension Fund from a defined benefit scheme to a defined contribution scheme such conversion only occurred after
lengthy negotiations between the trustees of the fund, the board of directors of First National Bank, the actuary, attorneys and SASBO (South African Society of Bank Officials). At the time when the complainant initially intimated that he wished to join First Bowrings, being August 1995, only the preliminary investigations relating to the conversion had been completed and no agreement between any of the parties had been reached. Only once legal and actuarial problems had been resolved and approval from the board had been received was the respondent in a position to commence negotiations with SASBO.

4. The details of the conversion could only be finalised after the completion of an actuarial evaluation at 31 December 1995 and the final negotiated settlement with SASBO. The resultant agreed conversion process was explained to members in an internal notice dated 8 February 1996 by which date, the complainant had already left the employ of the Bank.

5. A salient feature of the final agreement of the parties was the fact that only those staff members who were members of the fund on 31 December 1995 and who remained members until 1 April 1996 would be given the option to convert on 1 April 1996. All communications with the Banks's staff regarding the conversion was developed by a team which included SASBO representatives and had the full support of the union.

6. In order to lend credence to the submissions regarding adequate disclosure respondent enumerates all efforts made to inform staff which included formal written notices dated 23 February 1996 and the 5 March 1996 (of which copies are annexed to Respondent's response); booklets; benefit statements; explanatory videos; articles in in-house magazine; presentations country wide by trained personnel and availability of three help-lines and a fax line. Everything possible was done to ensure an effective communication programme. However, none of these above affected the complainant as his services had terminated on 31 December 1995.

7. The essence of the respondent's defence to the complaint, however, is that the information
and benefit details given to the complainant at the time of his resignation were correct and in terms of the rules existing at that time and there was no obligation upon the respondent to supply him with any further or alternative information.

Issues for Determination

The crux of what is to be decided is whether the respondent has failed to supply the complainant with adequate information at a time which was relevant to the complainant and based on the respondent's knowledge at the relevant time and whether as a result of failure to disclose the respondent could be held to have discriminated unfairly against the complainant.

While the respondent gives a lengthy and detailed exposition of the efforts made by it to ensure full and proper disclosure to members, it does not directly deal with the complainant's submission that there was a duty upon it, in view of its knowledge at the time of his resignation, to disclose to him the fact that there existed an intention to convert to a defined contribution fund and to explain the financial consequences thereof.

The respondent also does not directly deal with the allegation of discrimination levelled against it save in so far as to dispute this by implication in stating that the availability of transfer did not exist for complainant due to the date of his resignation and also that therefore the complainant was treated in accordance with the rules which were applicable to him at the relevant time.

It is most certainly incumbent upon a fund to disclose adequate information to members. This issue has been canvassed and discussed by me in the previous determinations of Tatiya and others v The Liquor Catering Trade (Cape) Pension Scheme and others PFA/WE/17/98; Caffin and Dooling v African Oxygen Limited Pension Fund PFA/WE/14/98 and Euijen v The Nedcor Pension Fund PFA/GA/27/98.

Section 7D(1)(c) of the Pension Funds Act includes among the duties of a board, the duty to ensure
that adequate and appropriate information is communicated to the fund informing them of their rights, benefits and duties in terms of the rules of the fund. Section 7C(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.

It is possible to rely on the constitutional right to information as an aid for interpreting the common law and the statutory right. In Aquafund (Pty) Ltd v Premier of the Western Cape [1997] 2 ALL SA 608 Traverso J defined the constitutional entitlement to information as requiring the complainant to show that he reasonably requires the information to protect or exercise some antecedent right.

It is clear from the above that the right exists to be adequately informed. It is, however, important to note that this right relates to the protection or exercise of some antecedent right. The complainant, in this instance, is requiring that the respondent ought to have supplied him with information regarding a future right which he might have had should he not have resigned from his employer and moreover a right which was not yet fully defined or established. I cannot find that there is any obligation on respondent to disclose its business or financial plans and negotiations relating to the future running of its operation to a member who has already made a decision to resign and who at the time is subject to rules applicable to all members at the time. If the complainant has suffered financial prejudice as a result of the timing of his resignation this is unfortunate. His rights, however, remain defined in terms of the rules.

The complainant also avers that he has been discriminated against implying that while his colleagues and fellow members of respondent were informed of the registration of the new fund, were supplied with information regarding same and were given the option to transfer to such new fund he was not placed in this position. The complainant, however, fails to comprehend that at the time when the shift took place and the option to transfer was made available he was no longer an employee of the relevant employer nor a member of respondent. The complainant cannot therefore establish that he was treated differently from other members of the same class as himself or alternatively another class within the fund, as he was quite simply not a member and the rules of
respondent and any obligation towards him ceased to be applicable to him or of relevance to his situation. It is, therefore, not possible in these circumstances or on the evidence before me for me to find that the practices of the fund in relation to the complainant were discriminatory or that any such practices require to be remedied.

For the above reasons the complaint is dismissed.

DATED at CAPE TOWN this 14th day of June 1999.

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JOHN MURPHY
PENSION FUNDS ADJUDICATOR