IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/KZN/281/99/NJ

In the complaint between:

Nico De Bruyn  Complainant

and

Telkom Retirement Fund  Respondent

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

1. This is a complaint lodged with the Pension Funds Adjudicator in terms of section 30A(3) of the Pension Funds Act 24 of 1956 ("the Act"). The complaint relates to the computation and payment of an early retirement benefit, in particular, the use of an interim/final bonus rate system and the information provided by the fund to the complainant prior to his retirement.

2. No hearing was held in this matter. An investigation was conducted by my investigator, Naleen Jeram. In determining this matter, I have relied exclusively on the documentary evidence, written submissions and other information obtained via a series of telephonic conversations, all during the course of Mr Jeram’s investigation.

3. The complainant is Nico De Bruyn of Kelso, Kwa-Zulu Natal. The complainant was assisted by his advisor, Mr B J Phillips.

4. The respondent is Telkom Retirement Fund, a pension fund duly registered under the Act ("the fund"). The fund is represented by its principal officer, Mr W J Myburgh and Mr Opperman.
5. The fund is a defined contribution fund. In terms of rule 2.1, all assets of the fund are held in three accounts, namely, share account, pensions account and reserve account. Each account is maintained separately from the others and all transfers between accounts may only take place as specified in the rules of the fund. The financial year of the fund runs from 1 April - 31 March. In practice, the trustees of the fund declare a final effective bonus rate at the end of each financial year of the fund, which is credited to the member’s account, backdated to the beginning of the financial year. Simultaneously, they declare an interim bonus rate from time to time during the year, which is used to calculate benefits of members exiting the fund, for the period until the next final bonus rate is declared. In respect of the respondent fund, this was normally done on a quarterly basis on the recommendation of the fund’s actuary.

6. The complainant commenced employment with Telkom as a construction technician in about 1969 and subsequently became a member of the Telkom Pension Fund, a defined benefit fund. The respondent fund was established on 1 July 1995. All employees of Telkom at the time were given a voluntary option to join the fund. The complainant elected to join the fund with effect from 1 July 1995.

7. In 1998, the complainant having already attained the age of 55 qualified for an early retirement benefit from the fund. In about June 1998, he enquired from the fund what his retirement benefit would be as at December 1998. Miss A Viljoen, responded on behalf of the fund as follows:

We have recently been notified that you wish to retire on 12/1998. Your total member interest in the Fund as at 12/1998 will amount to R647,597.96 which may be applied as follows (please note that any amount owing in respect of a housing loan, will be deducted from your lump sum benefit). If you have outstanding past service debt or broker services resulting from study leave – your benefit will be reduced by the outstanding amount.

Please note: No divorce agreements were taken into account on calculating the benefit.

**BENEFITS PAYABLE BY THE TELKOM RETIREMENT FUND SHOULD YOU ELECT TO RECEIVE**
A PENSION FROM THE FUND

Option A
Pension without a lump sum benefit  R  4,175.63 p.m.

Option B
Should you elect to take a lump sum benefit in cash (maximum one-third of your member interest) and the remainder as a monthly pension, the benefit will be as follows:

Lump sum benefit (taxable if more than opening share s indicated above)  R215,865.99
Pension (taxable monthly)  R  2,783.30 p.m.

The actuarial basis of the Fund provides for adjustment to your pension in the future. Increases are determined annually by the trustees of the Fund having regard to the Fund’s investment earnings.

Should you be married at the date of retirement and pass away whilst you are a member of the Telkom Retirement Fund the Fund also makes provision for a spouse’s pension of 50% as well as a children’s pension of 9.375% (maximum 28,125%).

…This letter is for quote purposes only. In the event of a discrepancy between the benefit provided in terms of the rules of the Telkom Retirement Fund and that in this letter, the rules will prevail.

8. The quoted early retirement benefit of R647,597.96 was based on the assumption that the complainant would retire on 31 December 1998 and an interim bonus rate of 0,8% would be declared by the fund to the said date. In August 1998, the complainant again requested the fund to provide him with a quote for his retirement benefit as at 30 November 1998. The fund provided the complainant with a similar quoted statement as it had done in June, except that the early retirement benefit was now quoted at R646,941.32. This quote was based on the assumption that the complainant would retire on 30 November 1998 and the fund would declare an interim rate of 0.8% to the date of retirement. On the strength of the above two quotes and after consulting with his advisor, the complainant elected to go on early retirement with effect from 30 November 1998 and accordingly informed Telkom (the employer) of his decision.
9. On 30 November 1998 the complainant duly retired from service. The relevant rule regulating his early retirement was rule 4.2(2), which reads:

If a MEMBER, after having attained the age of 55 years, and before having attained the NORMAL RETIREMENT AGE retires from SERVICE or is dismissed from SERVICE by the EMPLOYER for a reason other than a reduction in or reorganization of staff, such MEMBER shall receive a PENSION vesting on the first day of the following month secured by his MEMBER’S SHARE at that date, less the amount of any lump sum benefit paid in terms of RULE 4.1.4, based on a conversion factor applicable to his age at the actual date of such early retirement, as decided by the TRUSTEES acting on the advice of the ACTUARY…

Rule 4.4 regulates the computation of a pension and the various options available in respect of the monthly pension.

10. Member’s share is defined in rule 1.5 as “an amount determined in accordance with rule 2.2(1)”. Rule 2.2, in turn, reads:

(1) Share Account

The Share Account shall comprise all the MEMBER’S SHARES. Each MEMBER’S SHARE shall comprise:

(a) Credits

(i) The MEMBER’S OPENING BALANCE;
(ii) the MEMBER’S subsequent contributions in terms of RULE 8.1
(iii) the EMPLOYER’S subsequent contributions on behalf of the MEMBER in terms of RULE 8.2(1)(a);
(iv) subsequent transfer values received in respect of a MEMBER in terms of RULE 9.8(1);
(v) investment earnings transferred from the Reserve Account from time to time at a rate to be determined by the TRUSTEES after consultation with the ACTUARY. Such investment earnings shall be based on the investment yield
achieved by the FUND during the period for which the said earnings are credited to the Share Account; provided that where the FUND has granted a loan to the MEMBER as contemplated in Section 19(5)(a) of the ACT quoted in Annexure A to the RULES, investment earnings on that part of the MEMBER’S SHARE represented by the outstanding amount of such loan from time to time shall be taken as being equal to the amount paid by way of interest to the FUND by the MEMBER in respect of such loan;

(vi) surplus bonuses as determined by the ACTUARY based upon distributable valuation profits in terms of RULE 10.8(4);

(vii) special transfers from the Reserve Account in terms of RULE 8.2(3).

(b) Debits

(i) if investment earnings are negative or if adjustments to investment earnings already declared are negative, transfers to the Reserve Account as determined by the TRUSTEES acting after consultation with the ACTUARY;

(ii) lump sum benefits paid to the MEMBER in terms of RULE 4.4(1);

(iii) transfers to the Pension Account of the balance of the MEMBER’S SHARE after payment of any retirement lump sum benefit.

(iv) Withdrawal payments in terms of RULE 7;

(v) Payment of the MEMBER’S SHARE in terms of RULES 5.1.(1) and 5.1(2);

(vi) Transfers to the Reserve Account of any balance of the MEMBER’S SHARE on termination of his SERVICE in terms of RULE 7;

(vii) Transfers to the Reserve Account of the MEMBER’S SHARE on retirement for reason of ill-health in terms of RULE 6.3;

(viii) Transfers to the Reserve account of the MEMBER’S SHARE on the death of a MEMBER in SERVICE prior to NORMAL RETIREMENT DATE;

(ix) Payment to an INSURER of the amount referred to in paragraph (iii) should the MEMBER exercise the option referred to in RULE 4.4(2).

(2) Pensions Account

The Pensions Account comprises an account in respect of all PENSIONS in the course of payment to BENEFIRICARIES who are entitled thereto in terms of the RULES.

(3) Reserve Account
The Reserve Account is established to provide for contingencies and obligations of the FUND not covered by the Share Account or the Pensions Account, and represents a record of all moneys of the FUND not allocated to those accounts. The Reserve Account comprises some or all of the following components, each of which is determined by the TRUSTEES on the advice of the ACTUARY:…

The following transactions shall be recorded in this account:

(aa) Credits

(i) EMPLOYER contributions in terms of RULES 8.2.(1)(b) and 8.2.(2);
(ii) All investment earnings earned by the FUND;
(iii) Amounts debited to the Share Account in terms of RULE 2.2(1)(b)(i);
(iv) Any reinsurance payments made to the FUND by an INSURER;
(v) Transfers from the Share Account in terms of RULES 2.2(1)(b)(vi) and (vii);
(vi) Transfers from the Pensions Account in terms of RULE 2.2(2)(b)(iii).

(bb) Debits

(i) Transfers to the Pensions Account in terms of RULES 2.2(2)(a)(iii), (iv) and (v);
(ii) All costs and expenses referred to in RULE 10.14;
(iii) Transfers to the Share Account in terms of RULES 2.2(1)(a)(v), (vi) and (vii);
(iv) The cost of any benefits reinsured in terms of RULE 9.3.(1);
(v) Payment of lump sum benefits in terms of RULES 5.1(1) and 6.3(2).

11. The fund’s assets are invested through outside portfolio managers and not directly by the trustees. The portfolio managers are Gensec, Investec, BOE, RMB and Southern Future Growth. The investments with these portfolio managers are mainly in balanced funds. In practice, the investment return(s) of the fund are credited to the reserve account in terms of rule 2.2(3)(aa)(ii). The members share in the return(s) by virtue of a transfer from the reserve account to the member’s share account in accordance with a rate declared by the trustees. Such a transfer would result in the reserve account being debited (rule 2.2(3)(bb)(iii)) and the member’s account being credited (rule
12. As at 30 November 1998, the fund computed the complainant’s benefit in terms of rule 2.2 which amounted R609,083.76. Therefore, the benefit was R37,857.56 less than the figure quoted on 19 August 1998. The reason for the decline in the benefit was the poor investment performance in the fund resulting in a lower interim bonus rate being declared. That is, on 10 June 1998, the trustees declared a final bonus rate of 16% for their financial year ending 31 March 1998 and simultaneously declared an interim bonus rate of 0.8% per month with effect from 1 April 1998. However, on 16 September 1998, the trustees revised the interim bonus rate to minus 1% backdated to 1 August 1998. Furthermore, at the next trustee meeting held on 17 November 1998, the interim bonus rate was adjusted to 0% per month retrospectively with effect from 1 November 1998. The interim rate of 0% was applicable till 17 March 1999. In summary, the declaration of the bonus rates were as follows:

<table>
<thead>
<tr>
<th>Rate</th>
<th>Effective period</th>
<th>Date on which decision was made</th>
</tr>
</thead>
<tbody>
<tr>
<td>Final effective bonus rate</td>
<td>1 April 1997 to 31 March 1998</td>
<td>10 June 1998</td>
</tr>
<tr>
<td>Interim bonus rate per month</td>
<td>1 April 1998 to 31 July 1998</td>
<td>10 June 1998</td>
</tr>
<tr>
<td>-1%</td>
<td>1 August 1998 to 31 October 1998</td>
<td>2 September 1998 by the Management Committee and ratified by the Trustees on 16 September 1998</td>
</tr>
<tr>
<td>0%</td>
<td>1 November 1998 to 31 May 1999</td>
<td>17 November 1998 and 17 March 1999</td>
</tr>
</tbody>
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13. The complainant was dissatisfied with his eventual pension benefit compared to the figures provided earlier. He argued that the letters dated 5 June 1998 and 19 August 1998 from the fund created the impression that his pension of R646,941.32 was guaranteed. On the strength of these quotes he elected to retire from service. In early November 1998, when it came to his knowledge that his pension as quoted in the previous letters was not guaranteed, he informed Telkom that he wished to continue in service. Telkom refused to accede to his re-election as the position had already been
advertised and filled. Therefore, the complainant concluded that he suffered loss as a result of the misstatement (quotes) by the fund. In the alternative, he contended that there was no basis upon which the fund may reduce his pension benefit as quoted in August 1998. No argument was advanced as to why the reduction was unlawful. The complainant seeks an order directing the fund to pay in the difference between his eventual pension benefit and the earlier quoted figures in the amount of R37,857.56 plus interest thereon.

14. Mr Myburgh, acting on behalf of the fund contended that all quotations provided to the complainant clearly stipulated the values given where only for quote purposes and in the event of a conflict between the quote and the benefit calculated in terms of the rules, the rules of the fund shall always prevail. Furthermore, the rules of the fund make ample provision whereby the trustees may adjust the interim bonus rate at any point in time and may retrospectively do so. Therefore, he concluded that that complainant’s benefit was correctly computed in terms of rule 2.2 and the complaint should be dismissed.

15. The complaint consists of two causes of action. The first relates to the alleged misstatement by the fund as a result of which the complainant sustained loss. The second relates to the legal authority in terms of which the fund may reduce a member's share. I deal with each action in turn.

16. The use of an interim/final bonus rate system is a fairly common practice amongst defined contribution funds. The declaration of the interest rate is primarily based on the investment performance(s) of the fund. The purpose of the system is to ensure that if a member exits the fund prior to the declaration of final rate, he would have interest applied to his member’s share at the rate of the interim interest rate. Put differently, the mere fact that a final interest rate has not been declared by the trustees does not mean that a member who has left the fund prior to this declaration is not entitled to interest on his member share in the period between the declarations.
17. As stated, the complainant’s early retirement benefit was computed in terms of rule 2.2. Member’s share as defined in this rule, sets out the transactions which may be credited or debited to his or her account. Rule 2.2.1(a)(v) allows as a credit “investment earnings transferred from the reserve account from time to time at a rate to be determined by the trustees after consultation with the actuary. Such investment earnings shall be based on the investment yield achieved by the fund during the period for which the said earnings are credited to the share account…” Rule 2.2(3)(bb)(iii) allows for transfers from the reserve account to the member’s share account in respect of the investment earnings of the fund at a rate determined by the trustees after consultation with the actuary.

18. On a proper interpretation and application of rule 2.2.1(a)(iv) (adopting either a literal or purposive approach to interpretation) the trustees of the fund are entitled to declare a final and interim bonus. The use of the words “… from time to time at the rate to be determined…” clearly allows the trustees to adjust the interim rate in accordance with the investment yield of the fund (compare Greenwood v Old Mutual Staff Retirement Fund – PFA/WE/337/99 and Ntshiliza v ICS Provident Fund – PFA/WE/498/99). In addition, rule 2.2(1)(b)(i) specifically empowers the trustees to negatively adjust a positive rate already declared and accordingly debit the member’s share account. Thus, the adjustment of the interim rate from 0.8% to –1% (1 August 1998 to 31 October 1998) was also in accordance with the rules of the fund. Therefore, I am satisfied that the rules of the fund allow the trustees to lower the interim interest rate, which unfortunately led to the decline in all members’ share of the fund.

19. Furthermore, the member’s right to a benefit is contingent upon the happening of a specified event (death, disability, retirement, withdrawal from service etc.). Thus, there is nothing inherently wrong with the retrospective reduction of an interim interest rate provided it is in terms of the rules and is a legitimate and rational retrospective decision. In casu, it is common cause that the Johannesburg Stock Exchange
“crashed” in August 1998 resulting in a very poor investment return for the fund. Due to this poor performance, the trustees were forced to retrospectively reduce the interim rate of all members. Therefore, the retrospective reduction was fully justified.

20. I now turn to the complaint in respect of the alleged misstatements in the quotes. Section 7D(1)(d) of the Act requires the board of management of any pension fund 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;…” Section 7C(2)(b) requires the said board to act with due care, diligence and good faith. Furthermore, Pension Fund Circular 86, issued by the Registrar of Pension Funds sets out the minimum disclosure requirements to be observed by pension funds. The circular in respect of retirement, reads:

WITHDRAWAL FROM SERVICE

Preferably, each member will have all options in terms of the rules explained before a cash payment is selected. As a final fail safe mechanism, the letter enclosing any cash payment must refer to any benefits which may be forfeited as a result of the cash payment, including the elimination of liability for tax on transfer to another pension fund as defined in the Income Tax Act, 1962, preservation pension fund or retirement annuity.

RETIREMENT

A notification explaining the available options in terms of the rules should be sent to the member before the event. If the benefit is an annuity, it must state that a certificate of existence will be required from time to time. Where the benefit is a lump sum payable from a provident fund, there must be a note indicating that this is the full and final benefit payable.

21. Thus, the board of management, in this instance the trustees of the fund, have a duty to provide the complainant with all material information prior to retirement in order for him to make an informed choice. This duty becomes more compelling when a member has to make a decision, which may have adverse consequences for him.
Pension Fund Circular 86 does not unequivocally compel a fund to specify precisely the exact amount of the benefit and thus would appear to allow for the issuing of an estimate. In which event, there will be a greater onus on the member to ensure that the estimate corresponds with the actual entitlement.

22. As stated, the quotes provided were based on an interim rate of 0.8%. In the quote dated 19 August 1998 (also used in the quoted dated 5 June 1998) the use of the words “…your total member interest in the fund will amount to R646,941.32…” *prima facie* indicate that the amount is guaranteed. However, the quotes like any other document must be read as a whole and in particular the clause stating that this letter is merely for quote purposes. The use of this clause is clearly indicated to the member that the benefit is merely an estimate. Furthermore, the fund is quite clear that “in the event of a discrepancy between the benefit provided in terms of the rules of the Telkom Retirement Fund and that in this letter (quote) the rules shall prevail.” Therefore, the information communicated by the fund is clear, in that in the event of a discrepancy between the quote and any other figure, the rules of the fund shall prevail. In effect the clause is shifting the onus on to the complainant to obtain a copy of the rules of the fund and calculate his benefit or seek a written admission from the fund that the figure provided is his benefit in terms of the rules of the fund. The complainant has done neither. The fund discharged its duty by providing the complainant with an estimate of his early retirement benefit, which was made subject to the rules of the fund. Therefore, there was no misstatement in either of the quotes. Accordingly, the complaint is dismissed.

23. However, in conclusion it is necessary to add a word of caution. In a strict legal sense, the fund has discharged its duty to disclose relevant information. Be that as it may, this complaint could potentially have been avoided by the fund by simply adding a clause to the effect that the quoted benefits are based on an interim rate of 0.8% which is subject to change depending on the investment performance of the fund. I urge all trustees and administrators of pension funds to go beyond the minimum
requirements of providing information, especially in respect of members exiting the fund. The provision of more material meaningful information will result in more informed choices being made by members and complaints of this nature being avoided.

Dated at CAPE TOWN this 10th day of August 2000.

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John Murphy
Pension Funds Adjudicator