

IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.: PFA/GA/24/98/LS

In the complaint between:

Dr Colin Vale

Complainant

and

University of Witwatersrand

First Respondent

Associated Institutions Pension Fund

Second Respondent

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

1. The complainant alleges that, as a pensioner, he has been unfairly discriminated against by the first respondent, his former employer, in relation to his pension benefit.
2. No hearings were conducted and therefore in determining this matter I have relied on the documentary evidence and the report by my investigator, Lisa Shrosbree.
3. The complainant was employed by the University of the Witwatersrand (“the University”) and on retirement received a pension from the Associated Institutions Pension Fund (AIPF).
4. In the course of 1994, the government took steps to bring about a new form of administration and funding for the associated institutions, the participating employer in the AIPF.
5. Pursuant to this end, the minister approved regulations promulgated in April 1994 which enabled associated institutions to offer their staff and retired

members the opportunity to move to private pension funds.

6. In terms of these regulations, the University decided to create three new funds, namely, the University of the Witwatersrand Retirement Fund, the Meshawu National Education Institutions Retirement Fund and the Nehawu Provident Fund.

7. A circular dated 25 October 1994 was then sent out to all staff and retired members of the University advising them of their option either to remain in the AIPF or to transfer to one of the new funds.

8. In respect of retired staff, the circular stated that

If you are already a pensioner and you transfer to one of the new funds, your pension and/or future increments may be substantially reduced.

9. It also stated that

There are no significant advantages in moving from the AIPF unless you want to have the capital value of your share of the fund in the hands of the private fund rather than in the Government - related AIPF. You will lose the first 38% on transfer, and of course that means your pension may be smaller.

10. In addition pensioners were also sent an advisory letter dated 14 November 1994 from Professor Asher of the University's Department of Statistics and Actuarial Science. The letter was titled 'Advice to Pensioners'.

11. Professor Asher advised in the letter that pensioners who transferred would probably lose about 40% of their pensions and that therefore, in his opinion, those who were already receiving pensions from the AIPF should not transfer. He also referred to the fact that a government guaranteed pension is most

secure. Further that the government had in any event given an undertaking that pensions in the AIPF would continue to be paid and it was virtually inconceivable that it should refuse to pay such pensions.

12. Members were initially required to exercise their option by 31 December 1994.
13. In spite of Professor's Asher's advice, the complainant opted to transfer out of the AIPF in December 1994.
14. On 9 December 1994, a meeting of the University Council was held wherein the University Senate recommended to the Council that it reconsider an earlier decision not to use University funds to make up the shortfall in the transfer value for those staff electing to transfer out of the AIPF to the newly created funds.
15. Pursuant to the Senate's recommendation, the Council decided that the University would either make a contribution towards reducing the shortfall in the transfer values of member of staff who elected to transfer out or else would provide a partial or complete guarantee of minimum of retirement benefits and that they would appoint consulting actuaries to advise them in this regard.
16. The deadline for exercising the option to transfer out of the AIPF was then extended to March 1995 and members were informed that, had they exercised their option in December 1994, they would be given opportunity to alter that choice.
17. The actuaries proposed that a Transitional Retirement Reserve (TRR) for current staff be set up by the University. The purpose of the TRR would be to ensure that staff who elected to transfer out of the AIPF would not be worse off on retirement than they would have been had they remained in the AIPF.

18. The Council accepted the actuaries' proposal and a TRR was set up in February 1995.
19. The University informed members about the TRR in a circular dated 2 February 1995.
20. The letter also advised that in respect of pensioners, the Council had agreed to establish a Reserve Fund with effect 1 April 1995 to address contingencies of AIPF pensions.
21. The purpose of the Reserve Fund was explained to pensioners in a notice from the University dated 13 February 1995. The notice stated that the fund would provide some protection for pensioners remaining in the AIPF should the AIPF experience any financial difficulties in future. For example should the AIPF cease to award reasonable annual adjustments, the University would draw on this fund to assist pensioners. Similarly if the state called on the University to assist the AIPF due to cash flow problems, the Reserve Fund would be used. In this way, AIPF pensioners would still receive their full pensions and annual adjustments.
22. The notice reiterated that pensioners should be wary of leaving the AIPF and that owing to the shortfall in the AIPF the transfer value of pensioners transferring out of the AIPF were not expected to be sufficient to fund current pensions and annual increments in one of the new funds.
23. The notice also informed pensioners that those who had elected to stay in the AIPF when they exercised their options in December 1994 were entitled to alter their decision and to transfer out of the AIPF. However that any member electing to transfer out of the AIPF would not be eligible for the benefit in the Reserve Fund nor be entitled to assistance from the University in the future.

24. On 3 March 1995, the complainant sent a letter addressed to the Registrar advising that he had elected to transfer out of the AIPF into the University of the Witwatersrand Retirement Fund. That letter reads in part:

Further to our earlier conversations on the above subject and by way of response to various communications from the University in respect of the above,.... it is the desire of the undersigned that the pension benefits accruing to Dr. COLIN ALFRED VALE be withdrawn from the AIPF and placed.....with the University of the Witwatersrand Retirement Fund...

25. However, the University informed the complainant that they could not accept his notification and that he was required to fill in the standard form in respect of pensioners electing to transfer out of the AIPF.

26. The reserve value of the complainant's pension was R944 075. Since the AIPF was 40% underfunded, the complainant received only 60% thereof as a transfer value, that is, R566 445. This amount was transferred into the University of the Witwatersrand Retirement Fund and then paid to the complainant as a lump sum benefit free of taxation.

27. The complainant signed the standard form on 22 April 1995.

28. The standard form contained a release which reads:

I understand that I have obtained independent financial advice about the consequences and implications of taking a cash lump sum out of the Retirement Fund. I acknowledge that I shall not receive a pension from the Fund from the date I received the lump sum and that neither I or my spouse will have any subsequent claim against the Retirement Fund, the University or the State.

29. The complainant states that it was only after he exercised his option to transfer out of the AIPF that he learnt that pensioners were excluded from the TRR.

30. The complainant along with other retired members of staff accordingly petitioned the Chairman of the University Council, Mr Bam, in a letter dated 20 June 1996. The petition stated that members of the University who spent their working lives at the University were being discriminated against in favour of persons who may have only spent a year or two at the University and requested that the matter be taken up with the University Council.
31. However the Vice Chancellor and Principal of the University, Mr R Charlton, rejected the petition in a letter dated 19 July 1996.
32. Approximately one and a half years later, the complainant lodged a complaint with the Pension Funds Adjudicator on 5 February 1998.
33. In his complaint, the complainant also appeals on behalf of other retired members of the University who similarly transferred out of the AIPF, namely, Professor Reuben Musiker, Professor Phyllis Lewsen, Dr Stuart Jones and Ms Joan Knox.
34. The complaint is not clearly formulated and it is also not apparent what precise relief the complainant seeks.
35. However on the documentary evidence before me, it appears that the complainant's main complaint is that active members of staff who decided to transfer out of the AIPF received a share in the TRR to account for the underfunding in the AIPF which had resulted in smaller transfer values whereas pensioners such as himself received no such additional benefit.
36. The complainant states that this constituted unfair discrimination against pensioners. For example a member who worked for many years at the

University and retired prior to 1995 was not entitled to a share in the TRR on transfer out of the AIPF whereas a member of staff who may only have worked at the University for a year was so entitled.

37. The complainant contends that the University should have permitted all transferring AIPF members to share in the TRR and not just current staff members. Pensioners, the majority of whom devoted many years of loyal service to the University, were the only group who bore the brunt of the underfunding in the AIPF on transfer.
38. The complainant also makes various other allegations against the University:
 - 38.1 The complainant states that the information given to pensioners at the time they had to make a decision whether or not to transfer out of the AIPF was *premature, flawed and incomplete*. For example he says that subsequent to exercising his option to transfer, the University altered its approach to resolving the problem of the underfunding in the AIPF. I assume that the complainant is referring to the University's decision to establish the TRR after the options had been exercised in December 1994 had been held.
 - 38.2 The complainant also asserts that he only learned that the TRR excluded pensioners after he had made his election in March 1995. The implication is that had he known prior to voting, he would possibly have elected to remain in the AIPF which as it turns out would have been the more prudent choice.
 - 38.3 The complainant also states that the University gave the impression that he would not be able to protect his pension if he stayed in the AIPF and that there would be no prospect of relief at any time from the necessity of

losing 40% of his transfer value. On that basis he decided to transfer.

39. These allegations are essentially allegations of misrepresentation, that is, that the University made false representations to the complainant at the time he had to make his decision whether or not to transfer and he has been prejudiced thereby.
40. The only indication as to the kind of relief being sought by the complainant is his assertion that on account of the unfair treatment suffered by pensioners who decided to transfer out of the AIPF, either the University or the AIPF should place pensioners in the same position as they were before they were obliged to make a decision based on what he terms an *incomplete knowledge of the full facts*. I interpret this to mean that the complainant considers the election he made in 1995 to transfer out of the AIPF voidable on the grounds of misrepresentation by the University and that he is therefore entitled to alter his choice.
41. The implications of making such an order would, for reasons I will not go into here, be problematic. However, I find it unnecessary to determine the appropriate relief in this instance as I do not think that the complainant is entitled to relief in any event.
42. Firstly, the evidence does not show that the University made any misrepresentations to the complainant. On the contrary it reveals that the University provided accurate information and good advice to members at the time they had to make their election.
 - 42.1 The circular of October 1994 warned pensioners specifically that should they elect to transfer, their pension and future increments might be substantially reduced. (Refer to paragraphs 8 and 9 above).

- 42.2 In addition Professor Asher's letter to pensioners advised that pensioners should rather stay in the AIPF. (Refer to paragraph 11 above).
- 42.3 In a letter to the Pension Funds Adjudicator dated 5 February 1998, the complainant himself concedes that the University advised pensioners that the AIPF was underfunded and that pensioners electing to transfer to one of the new funds would only receive 60% of the value of their pensions.
- 42.4 Had the complainant taken the advice offered by the University and Professor Asher, he would probably have been in better position today.
- 42.5 The complainant's allegation that the University changed its policy with respect to the problem of underfunding in the AIPF only after he had made his election to transfer is unfounded. Although the University decided to establish the TRR after options in December 1994 had already been exercised, pensioners were then informed in the notice of 13 February 1995 (refer to paragraph 23) that they were entitled to alter their earlier decision if they so wished. The deadline for altering a decision was 10 March 1995. The complainant only signed the release authorizing the AIPF to transfer his pension on 22 April 1995.
- 42.6 The complainant's allegation that the University gave the impression that he would not be able to protect his pension if he stayed in the AIPF is also unfounded.
- 42.7 The letter of 2 February 1995 to all members of staff and pensioners advised that the Council had agreed to establish a Reserve Fund in respect of pensioners. The purpose of this fund was then clearly explained in the notice of 13 February 1995. (Refer to paragraph 21).

- 42.8 Therefore on at least two occasions, the University informed members about the Reserve Fund for pensioners and that it had been set up to ensure that pensioners would receive their full benefits in the AIPF should they elect not to transfer.
43. Secondly, I do not think that the University's decision to establish the TRR for staff members who transferred out of the AIPF to the exclusion of pensioners who similarly transferred was unfairly discriminatory.
- 43.1 The University in its response states that it considered that the amount of capital required to provide incomes comparable to the AIPF pensions would have been too large to contemplate both for pensioners and for staff in the age group of 55 to 60 who received a lesser proportion of the TRR and for this reason, pensioners were excluded from the TRR.
- 43.2 Thus the rationale for excluding pensioners from the TRR was a financial consideration. The University was in a financial position to subsidize transferring staff members and AIPF pensioners but not transferring pensioners as well.
- 43.3 In addition to this, the University states that the decision to subsidize staff members was motivated by its belief that the most valuable resource of the University is its current staff. Its pensioners had guaranteed defined benefits in the AIPF.
- 43.4 In any event, the University was entitled to treat staff and pensioners differently. The same considerations do not apply to staff members and retired staff members. An important consideration for pensioners is the security of their pensions whereas young employees would rather look to

building up as large a retirement capital as possible and thus be prepared to take greater investment risks. The different arrangements made by the University in respect of pensioners should be understood in this light.

- 43.5 The University did consider the interests of pensioners by setting up the Reserve Fund to protect their defined benefits in the AIPF. As stated, the complainant was informed about this Reserve Fund prior to exercising his option. However contrary to all advice the complainant elected to transfer. I agree with the assertion of the University that this decision appears to have been based on a belief not supported by the information and advice provided by the university. In all likelihood he preferred to receive a reduced lump sum over which he had exclusive control rather than an ongoing defined benefit pension.
- 43.6 The evidence shows that the University made every effort to treat its members of staff, current and retired, fairly and the fact that the complainant made a bad investment choice by transferring out of the AIPF cannot be attributed to any fault on the part of the University.
44. It should also be remembered that the complainant signed an indemnity wherein he agreed that on the date of transfer, he would have no further claim against the Retirement Fund, the University or the State. Even if the University were guilty of discrimination or maladministration, it is more than probable that the release signed by the complainant would operate to indemnify it from any claims.
45. The complaint is accordingly dismissed.

DATED at CAPE TOWN this 27th day of OCTOBER 1999.

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JOHN MURPHY
PENSION FUNDS ADJUDICATOR