IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.: PFA/WE/226/98/NJ

In the complaint between:

M Q Doubell Complainant

and

Cape Municipal Pension Fund Respondent

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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 complaint concerns the calculation of a transfer value.

After an exchange of correspondence between the complainant and respondent, consisting of a number of letters and other documentation, the complainant lodged his written complaint at my office on the 30th March 1999. No hearing has been held in this matter. Accordingly, in determining this matter, I have relied exclusively on the documentary evidence, argument put to me in writing and the report placed before me by my investigator Naleen Jeram. The complainant has complied with the provisions of Section 30A(1) which requires the complainant to lodge a written complaint with the relevant pension fund or the employer who participated in the fund before lodging it with the Pension Funds Adjudicator. The respondent has properly considered a
complaint and have replied to it in writing as required by Section 30A(2). The respondent has also furnished me with the copy of the relevant rules applicable to the aforesaid matter.

Having completed my investigation, I have determined the complaint as follows. These are the reasons for my determination.

Background to the complaint

The complainant is Mark Quinton Doubell, an adult male, working at South Peninsula Municipality and a member of the respondent.

The respondent is the Cape Municipal Pension Fund, a pension fund duly registered under the Pension Funds Act of 1956. The object of the respondent is to provide benefits to members on retirement, benefits to the surviving dependants of deceased members who died in service or after retirement, and withdrawal or transfer benefits for members who cease to be contributing members of the fund. The complainant was a member of the respondent from the 1st August 1980 to the 31st March 1988 at which point he left his employer and terminated membership with the Respondent. The complainant was re-employed on the 1st April 1992 at which point he again became a member of the respondent. The complainant is currently a member of the respondent.

The respondent was originally, exclusively a defined benefit fund. In mid-1998, the respondent embarked on a process of introducing a defined contribution section in the fund. All the members of the respondent had to make an election as regards to whether they wanted their benefits transferred to the defined contribution fund. In about September 1998 the complainant elected to transfer his benefits to the new defined contribution section.

The basis on which the complainant’s transfer value was calculated is spelt out in the respondents response, as follows:

1. Members who elected to transfer from the Defined Benefit to the Defined
Contribution section of the Fund received their defined benefit transfer value according to the same actuarial reserve calculation and formula in terms of the Rules of the Fund. This is a factor of the member’s final average salary, their age and the length of service in the Fund, amongst other factors.

On this basis, the complainant’s transfer value as at 1st July 1998 (determined by the funds actuary) was R81 729,00.

The complaint relates to the interpretation and application of the rules of the respondent and alleges that the decision of the respondent was an improper exercise of its powers.

The complainant in essence is arguing that his transfer value of R81 729,00 is too low, mainly because he believes the fund should give him some benefit of his previous service.

Analysis of argument

The complainant is arguing that his transfer value is too low based upon four reasons. I intend to deal with each of these reasons in turn.

Firstly, when he left his employer on the 31st March 1998 he was not allowed to leave his benefit with the respondent and become a deferred pensioner.

The relevant rules applicable to the complainant in this regard are rule 10 and rule 10bis which reads as follows:

10. Resignation before reaching pensionable age

If a member resigns from the service before attaining the pensionable age, otherwise than provided in sub-section 8 (1)(b), he shall be entitled to a return of the whole amount of his own contributions plus 4% of such amount for each complete year by which his contributory service exceeds five years, provided that if he has had at least ten years contributory service with the council and the provisions of Section 37 do not apply, he may elect instead to become a deferred pensioner subject to the provisions of Section 10
Contributory service shall mean the period in years, months and a fraction of a month in respect of which contributions have been made or are payable to the fund, provided that such period shall not regarded as interrupted by authorised leave of absence, by breaks in service regarded as leave of absence without pay, or otherwise condoned by the board for the purpose of membership of the fund, or by periods of suspension followed by reinstatement in the same or another office or post; provide that any period of absence or employment without payment of contributions shall not be taken into account in calculating the period of contributory service.

“Council” shall mean the Council of the Municipality of the City of Cape Town

Deferred Pensioner shall mean a former member prospectively entitled to benefits in terms of Section 10 bis.

10bis. Benefits of deferred pensioners

If a member becomes a deferred pensioner, he shall be entitled to receive at his age at retirement a retiring benefit calculated in terms of Section 7(3) as at the date of leaving the service, subject to the following conditions:

(1) the retiring benefit shall be increased during the period of deferment by the increase that would have been granted by the fund in terms of section 9 to an annuity in payment;

(2) the retiring benefit may, in the absolute discretion of the board, be increased during the period of deferment by any increase granted in terms of section 36(3);

(3) he shall be entitled to receive his retiring benefit before attaining his age at retirement in terms of section 7(4) mutatis mutandis; provided that his optional retiring date shall be his age at retirement; and

(4) if he dies before receiving his retiring benefit, the provisions of sections 12, 13 and 14 shall apply mutatis mutandis, except that the benefits payable to his eligible widow shall be a lump sum equal to 7.0% of his final average emoluments at the date of leaving the service for each year of his contributory service and an
annuity equal to sixty percent (60%) of his deferred annuity calculated at the date of leaving the service, increased by the same percentage increases as granted in terms of paragraphs (a) and (b) above; and

(5) if a female member becomes a deferred pensioner on or after 1 July 1987 and dies before receiving her retiring benefit, the provisions of condition (d) shall apply to her eligible widower mutatis mutandis; and

(6) section 12(2)(a)(ii) shall not apply.

The respondent in a telefacsimile dated 21st April 1999 addressed to the complainant states:

In terms of Rule 10 and 10 bis (copies enclosed), as you had less than 10 years contributory service, you were not entitled to elect to become a deferred pensioner. This was in terms of the Rules at that stage and all members in the same situation were treated equally on the same basis.

The respondent argues that the rules of the fund do not make any provision for employees with less than ten years of contribution service to become deferred pensioners, hence they could not keep the benefit of the complainant within the fund. Rule 10, and in particular the proviso to rule 10, expressly prohibits a member with less than ten years of contributory service from becoming a deferred pensioner. Since the complainant at that point only completed seven years and seven months of service, he does not have the option to become a deferred pensioner.

Hence, the respondent correctly interpreted and applied rule 10 and I find that there is no basis in rule 10 entitling the complainant to become a deferred pensioner.

Secondly, when the complainant left the respondent in 1988, he was only entitled to his own contributions plus interest thereon. The complainant argues that he was entitled to the employer’s contributions as well. In an undated letter addressed to the respondent, he states:
I am getting no credit for previous years of service and my previous employer contributions are being used to enrich others. This is morally unacceptable.

The relevant rule applicable to the complainant, in this regard is rule 10, quoted above. The respondent argues that in terms of rule 10 the complainant was not entitled to employer contributions and further states: (in a letter dated 14th September 1998 addressed to the complainant).

When a member leaves the Defined Benefit Fund the resignation benefit is penal and the member forfeits council's contribution.

The member’s entitlement to employer contributions is set out in the rules of the fund. In my view there can be little doubt that an employer’s contributions to a pension fund on behalf of an employee/member constitute remuneration. However, that in itself does not confer rights of ownership to such contributions. Ownership vest in the fund. The member’s entitlement consists of a contractual right to receive certain benefits (deferred pay) once and if certain conditions are met.

Even if I were to find the complainant’s failure to receive employer contributions to be unfair and unreasonable, this conduct occurred in 1988. Hence, if any liability existed as a consequence of the respondent’s conduct or its rules, the complainant’s cause of action in that regard has prescribed in terms of section 30l of the Pension Funds Act of 1956. Further, due to the lapse of almost eleven years from the commencement of the complainant’s cause of action, the complainant’s limited prospect of success and his failure to issue summons against the respondent, no good cause exists as contemplated by section 30l(3) to condone non-compliance with the time limits or to extend the time period.

Hence, I find there is no basis in rule 10 allowing any claim to employer contributions.

Thirdly, the complainant argues that when he rejoined his employer on the 1st August 1992 and once again became a member of the respondent, he could not afford to repurchase his lost service as this was made too expensive by the respondent as the respondent required him to pay the full cost of past service including employer
contributions which he feels he left in the fund. He argues that the respondent requiring him to also pay the employer contributions, which he did not receive upon early resignation on 31 March 1998, is unfair.

The relevant rules applicable read as follows:

38(1) If a member leaves the service and is entitled to a benefit in terms of Section 10 and if, before the benefit is paid to him, he rejoins the service of the Council or enters the service of another local authority the benefit shall be cancelled.

(2) If a member leaves the service of the Council and is paid a benefit in terms of Section 8 or 10, and if he is re-employed by the Council within 12 months from the date of his leaving the service, and if he so elects within six months after the date of his re-admission to the fund, he shall refund any benefit received from the fund in one sum or by instalments approved by the board, together with interest at such rate as the board may determine from time to time, from the date he received such benefit to the date or dates of repayment, whereupon his previous contributory service, i.e. prior to the break in service, shall be reinstated for the purposes of calculation of benefits in terms of the Rules, and he shall continue to contribute to the fund at the rate applicable to his age at re-entry.

39 Subject to receipt of a satisfactory report following a stringent medical examination by a medical officer appointed by the board, the board may condone a break in service exceeding twelve months, and a break in service of twelve months or less where the member has not exercised his right in terms of Section 38 (2), provided written application is made by the member, on payment of such amount as is determined by the actuary or derived from tables supplied by him based on the member’s salary and age at the date of application for condonation of his break in service. Payment of this amount shall be made in one lump sum or by instalments approved by the board together with interest at such rate as the board may determine from time to time. The member shall continue to contribute the fund at the rate applicable to his age at re-entry.

The respondent in a letter dated 21st April 1999 addressed to the complainant responds
as follows:

Prior to the reconstruction of the Fund, you were entitled to re-purchase your years of service. As you had a break in service of longer than 12 months, in terms of Rule 39, (copy enclosed) you were entitled to re-purchase your past service. Payment was based on “such amounts determined by the actuary based on the member’s salary and age and at the date of application for condonation of his break in service”. This means that you would re-purchase your past service at your higher age and presumably higher salary which would mean that this would be more expensive as the actual costs required to purchase the same amount of service would be higher.

This was the actual cost to provide the same amount of service at the purchase date.

Further in a letter dated 14th September 1998 addressed to the complainant, the respondent states:

Should someone leave and then rejoin within 12 months, the rules make provision for the member to repurchase his service providing he pays back his own contributions and interest. After 12 months the full purchase price needs to be repaid including council’s share. This is in line with the practice of most Defined Benefit Funds that allow broken service.

While (we) would like to accommodate situations such as yourself, there are numerous people in council who have had broken service who have paid the full amount, and we would now need to go back to them and refund them the portion that they overpaid in respect of the employer’s contributions. Alternatively if we accommodated your request then the transfer values and liabilities of all members would need to be reduced appropriately by the Fund, for all members who had broken service of longer than 12 months.

We regret therefore that there appears to be little that the Fund could do for you without prejudicing the remaining members of the Fund, taking into account the choices you made when you left and re-joined the service.

Rule 39 itself does not make any reference to employer contributions. But rather makes provisions for an actuary to determine the amount payable for lost service and directs the actuary to take into account the member’s salary and age at the date of application for condonation of his broken service.

The complainant is only challenging one aspect of the actuary’s determination approved
by the board, namely the requirement that he pay the full cost of past service including employer contributions.

The respondent is correct in his contention that the re-purchase price of lost service would be high as the complainant would re-purchase his past service at his now higher age and higher salary.

The complainant’s contention also rests on the false premise that he has some entitlement to the employer’s contributions. In a defined benefit fund a member’s entitlement is to defined benefits, including a defined withdrawal benefit. Once that benefit is paid, the fund’s liability towards the member is extinguished. Moreover, the fund’s financial position and the contribution rates are determined on an ongoing basis by taking into account the number and effect of withdrawals. To impose unforeseen liabilities on a fund in respect of a member whose entitlements have been lawfully discharged, on the basis of a general concept of equity, could prove financially disruptive causing greater unfairness to the fund, the employer and the other members.

The respondent, further, correctly raises the fear of runaway liability in the event of accommodating the complainant’s requirements. Although the fear of runaway liability has often been overstated by our courts, especially in the law of delict relating to pure economic loss, on the facts of this matter this fear cannot be discounted. Allowing the complainant a deduction of his employer contributions would then require similar deductions for all other members who paid their employer contributions which could effect the solvency of the fund itself. Further, the transfer value of all members of the respondent would need to be reduced by the fund, for all members who had broken service of 12 months or more. Hence, taking into account of the following:

(i) the consistent application of Rule 39 by the respondent to all members including the complainant,
(ii) the fund’s ownership of employer contributions (discussed above),
(iii) the fear of runaway liability,

I find the decision of the respondent to require the complainant to payback his employer
contributions on re-purchase of his lost service to be in accordance with the rules of the respondent and fair.

Fourthly, the complainant argues that the performance of the respondent is far better than the returns used when calculating his transfer value in the amount of R81 729,00. The respondent in a letter dated 21\textsuperscript{st} April 1999 addressed to the complainant states:

Members who elected to transfer from the Defined Benefit to Defined Contribution section of the Fund received their defined benefit transfer value according the same actuarial reserve calculation and formula in terms of Rules of the Fund. This is a factor of the member’s final average salary, their age and the length of service in the fund, amongst other factors. All members were treated equally and members with long service did not receive artificially larger transfer values than members with short service.

You commented that your transfer value did not even match inflation, again this is a function of a Defined Benefit Fund where your transfer value is your value of your benefits in the Fund at the date of transfer.

The respondent in a letter dated 14\textsuperscript{th} September 1998 addressed to the complainant, further states:

As far as your comment that “the performance of the Fund has been far better than the returns that you are giving me” is concerned, we assume that this relates to the interest on withdrawal. The interest is determined by the benefit in terms of the Rules and has no relation to what the Fund has earned.

This is one of the major differences compared to a Defined Contribution Fund, where the actual returns are credited to each member.

I have to agree with the respondent’s contention that in a defined benefit fund the benefit is defined and predetermined in terms of the rules of the fund and not in accordance with the performance of the fund. Therefore, the complainant’s transfer value of R81 729,00 was the value due to the complainant in terms of the actuarial reserve calculation made in terms of the rules of the fund.

Hence, in the light of the above and especially the fact that no empirical evidence has
been presented to show that the actuarial reserve value could be otherwise, I find that
the complainant's transfer value of R81 729,00 was the amount due to him.
Accordingly, for the foregoing reasons, the complaint is dismissed.

DATED AT CAPE TOWN THIS 6th DAY OF MAY 1999.

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JOHN MURPHY
PENSION FUNDS ADJUDICATOR