IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.: PFA/WE/8/98

In the complaint between:

A B San Giorgio Complainant

and

The Cape Town Municipal 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.

After an exchange of correspondence, consisting of a number of letters and other documentation, I met with the parties at my offices in Cape Town on 1st April 1998. Neither party was legally represented. The complainant attended in person and presented his own case. The respondent was represented by Mr Littlefield, the manager of the fund and by Ms Liz Maggs, its legal manager.

The hearing was of an informal nature and neither party adduced oral evidence under oath. In determining this matter, therefore, I have relied exclusively on documentary evidence and arguments put to me in writing and orally.

Having completed my investigation I have determined the complaint as follows. These are my reasons therefor.
Background to the complaint

The complainant is Mr Anthony Bertram San Giorgio, a retired member of the respondent. He was employed by the Cape Town City Council since 1st July 1968. At the time of his retirement, he was employed as a principal administrative assistant in the Surveys and Land Information branch. He retired on 12th May 1996 at the age of 57.

The respondent is a pension fund established with effect from 1st January 1925 and is duly registered under the Pension Funds Act of 1956 having as its object the provision of benefits for employees and former employees of the Council of the Municipality of the City of Cape Town on their retirement through age or ill health, and for their dependants.

After some initial correspondence, the complainant lodged a written complaint with the Office of the Pension Funds Adjudicator on the 9th February 1998. It is common cause between the parties that the complainant has complied with the provisions of section 30A(1) which requires a complainant to lodge a written complaint with the pension fund or the employer who participates 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 Complaint

The complainant's complaint relates to the interpretation and application of the rules of the respondent and alleges that certain decisions of the respondent regarding his entitlement to a pension were an improper exercise of the fund's powers.

In the latter half of 1995 and in early 1996 the complainant was booked off work by a General Practitioner and two Psychiatrists for a period of almost eight months on the grounds of depression. Despite his depressed state, the complainant returned to work on 14th March 1996, but left work on the following day as a result of his depression. He was subsequently booked off again until 30th April 1996.
On 9th April 1996 the complainant addressed a letter to his employer stating the following:

“As a result of ill health, I hereby give notice that it is my intention to take early retirement and elect that my last day in the service will be 12 May 1996.”

On the next day, 10th April 1996, the complainant addressed an appeal to the Committee of Management of the pension fund in terms of rule 8(3)(b) which permits the Committee to retire a member if his employment is terminated owing to “the inefficiency or incompetency for the discharge of his duties from causes not solely within his own control”. He formulated his application under this rule because he believed he was not entitled to apply for retirement on the grounds of ill health under rule 8(2).

In the letter, the complainant makes reference to his mental condition and includes a medical certificate in support of it. He mentions that his psychiatrist had advised him of a new policy that staff could not be retired on the grounds of depression.

He concludes his letter of 10th April 1996 as follows:

“I have been taking prescribed medications since 20th September 1995 and at present I am required to continue prescribed medication. As I am unable to carry out my duties and functions in my work environment in a competent manner due to my ill health, I feel that I am being forced to take early retirement and to terminate my services with the Council.

I maintain I should have been retired in terms of section 8(2) of the pension fund rules regardless of the new policy as I feel my health should be the criteria. (sic) As I have been a loyal employee of the Council for the past 28 years I now appeal to your Committee to sympathetically review my circumstances and exercise its authority in terms of section 8(3)(b). A penalty of 17.4% would be extremely harsh.”
To understand the complainant's request it is necessary to have regard to rule 8 of the pension fund rules which regulate entitlement to retirement benefits. In terms of this rule a member may retire, or be retired before his normal retirement age in one of the following manners:-

by way of early retirement - in which event, the retiring member's pension can be reduced in accordance with a formula provided for in rule 7; (rule 8(1))
on the grounds of ill health (rule 8(2));
on the grounds of redundancy (rule 8(3)(a));
owing to the inefficiency or incompetence for the discharge of his duties from causes not solely within his own control, of which circumstances the Committee shall be the judge - (rule 8(3)(b)); or
owing to the transfer by the Council of any part of its operation as a going concern - (rule 8(3)(c)).

Where a member elects to retire before his age of retirement, his retiring benefits are reduced by 0.20% per month for each completed month of the period from the date of his actual retirement to the date of his age of retirement as defined. No such reduction is made when a member is retired on the grounds of ill health or for any of the reasons set out in rule 8(3). Where a member is retired in terms of rule 8(3), the participating employer is required to meet the cost of paying his annuity from the date of his retirement to his pensionable age, as well as meeting an actuarially calculated portion of his lump sum - (rule 8(5)).

In essence, the complainant's complaint is that he should have been retired either in terms of rule 8(2) on the grounds of ill health or in terms of rule 8(3)(b) on the grounds that he could not carry out his duties as a result of circumstances beyond his control. The attitude of the participating employer and the pension fund is that the complainant took early retirement in terms of rule 8(1). This was so despite the fact that his letters to the employer make it plain that he believes he was entitled to retire on grounds of ill health.
On retirement the complainant received a lump sum benefit of R102 566,92 and a monthly pension of R2 394,19. Both the lump sum and the monthly pension were reduced by 17,4% in view of the fact that he retired 7 years 3 months before his retirement age of 65. Had the complainant been retired on the grounds of ill health or on the grounds of inefficiency or incompetence due to circumstances beyond his control he would have received a lump sum of R124 173,02 and a monthly pension of R2 898,53. In effect the complainant is claiming that he has been unfairly prejudiced to the extent of R21 606,10 in respect of the lump sum and R505,34 per month in respect of the month pension.

In response to the complainant's letter of 10th April 1996, the respondent addressed a letter dated 16th April 1996 to Dr J Woolley of the Council's Health Department and the respondent's representative on the medical board established in terms of its rules and asked him for information concerning two matters. Firstly, it asked for his comments in response to the complainant's claim about the policy concerning depression. Secondly, it requested information which may be of assistance to the Committee in determining the complainant's application in terms of rule 8(3)(b) of the rules.

On 9th May 1996, Dr Woolley responded. On the question of the alleged policy he comments:

"Mr San Giorgio is incorrect when he states Council employees may not be retired on grounds of depression. Each individual case is assessed on its own merits and this normally follows a recommendation for boarding by the employee's own medical practitioner."

On the other matters, he refers the respondent to Mr du Plooy of the Human Resources Department and to three other doctors, Dr Katz, Dr Sanders and Dr Firman who he claimed were more informed of the complainant's medical condition. Finally, he comments that he had not received any letter from any of the specialists recommending a boarding.

Reacting to Dr Woolley's letter, Mr Littlefield, the manager of respondent, then
contacted Mr Andre du Plooy of the employer’s Human Resources Department. Among other things, Mr du Plooy advised Mr Littlefield that in his opinion the complainant was very unhappy in his work situation as a result of a variety of factors. Alternative employment had been suggested to the complainant but the complainant had declined the offer. Mr du Plooy was not prepared to offer any comment on the complainant’s request to be retired in terms of rule 8(3)(b), “as this possibility had not been canvassed at all in his discussions” with the complainant. Mr du Plooy agreed with Dr Woolley that in the absence of a medical boarding recommendation by the complainant’s medical adviser, the question had not been given serious consideration.

The Committee of Management of the respondent met on 24th May 1996.

The complainant’s letter of 10th April 1996, together with correspondence between the respondent and Dr Woolley were placed before the Committee. Mr Littlefield supplemented this correspondence with an oral precis of his discussions with Dr Woolley and Mr du Plooy. No other reports or medical evidence were tabled at the meeting.

The minutes of the meeting reflect that the Committee of Management came to the following decision:

“The Committee noted that it only had Mr San Giorgio’s version of the situation before it and in fairness it could not support his application without being furnished with the views of the other party involved, i.e. the City Council. If there was a dispute between the two parties the rules seem to give the Committee the power to adjudicate. It was thereupon agreed that Mr San Giorgio be advised that his application to be retired in terms of section 8(3)(b) of the rules could only be considered following receipt of a formal recommendation to that effect from the Council, which would then be required to meet all payments of Mr San Giorgio’s annuity until he reaches pensionable age, as well as part of the cost of his lump sum entitlement.”
The complainant was advised of the Committee’s decision in a letter dated 3rd June 1996.

The complainant responded in a letter dated 1st July 1996 in which he essentially asked for the decision to be reconsidered. He pointed out that both Dr Woolley and Mr du Plooy had suggested that he should consider electing to retire early and that he had not fully understood the financial implications of his decision to do so. Consistent with his earlier letter, he indicated that his decision to opt for early retirement was purely due to his ill health. He then requested the Committee to review his case sympathetically and to waive or reduce the 17.4% penalty which he had incurred as a result of his early retirement.

The complainant’s appeal, together with the earlier correspondence was placed before the Committee of Management at its meeting on 26th July 1996. In its submissions to this tribunal, the respondent sets out the considerations it took into account in rejecting his appeal as follows:

“Mr San Giorgio was not alone in wanting to retire early without incurring a penalty for doing so. For many years there had been pressure from the Fund’s members for the discount (or penalty) to be abolished and this had resulted in its progressive reduction from 0.4% per month to the current level of 0.2% per month.

Mr San Giorgio was also not unique in being unhappy in his work environment. Trustees were aware that the imminent restructuring of local government in the Cape Peninsula, with the concomitant redeployment of staff from one municipality to another, and the threat of redundancies and retrenchments, had created considerable confusion, concern and uncertainty in the minds of very many employees and it was the general consensus that morale was at a very low ebb. Any special consideration given to Mr San Giorgio’s application for relief from the penalty for early retirement would have to be fully warranted by special circumstances, otherwise a precedent would be created that the Fund was
financially unable to meet.

The Committee noted that while Mr San Giorgio averred that he had elected to retire early purely because of ill-health and on the advice of his doctors, he made no mention of any suggestion by his doctors that he was “incapable of efficiently discharging his duties by reason of infirmity of mind or body” and thus should be retired on the grounds of ill-health. Although Mr San Giorgio had come to the conclusion that he “would not have been able to carry out (his) duties in a competent manner because of the state of (his) health,” his doctors apparently did not share that view, as they had made no such report to the Medical Board on Mr San Giorgio’s behalf.

Mr San Giorgio’s statement that, at the time he decided to opt for early retirement (9 April 1996), he did not fully comprehend the financial implications of his decision, could not be accepted by the trustees. In his first letter to the Board (dated 10 April 1996) he made it clear that he was well aware of the financial consequences of his actions, which he was then trying to avoid! His letter ended with the statement that “a penalty of 17.4% would be extremely harsh.”

The Committee concluded that Mr San Giorgio was unhappy in his work situation and wished to retire on the most favourable terms available, that is without incurring a penalty for early retirement.

He was unable to be considered as a candidate for an ill-health retirement, as apparently neither of his doctors was prepared to state that he was incapable of carrying out his duties because of infirmity of mind or body.

Mr San Giorgio was thus forced to fall back on section 8(3)(b), claiming that he was incapable of performing his duties efficiently and competently due to his ill-health and that he therefore had no alternative but to retire.

When he was asked to obtain his employer’s view as to his eligibility for
retirement in terms of section 8(3)(b), he dropped further reference to this section and in his letter dated 1 July 1996, merely confined himself to a plea to the Committee to “review my case and consider wavering (sic) or reducing the penalty.”

The Committee could see no good reason why Mr San Giorgio should be given special consideration outside the provisions of the Rules and thus “resolved that Mr San Giorgio be advised that it was unable to accede to his request that the discount for early retirement be waived or reduced in his case”.

In response to this decision, the complainant lodged his complaint in terms of section 30A of the Act.

At the hearing, Mr Littlefield conceded that the complainant was never afforded an opportunity to appear before the Committee to put his case to them in person, nor was any attempt made by the Committee to solicit the opinion of any practitioner or specialist other than Dr Woolley.

Moreover, it is apparent from the submissions and oral testimony of the respondent that the respondent was much influenced by the fact that during early 1995 the complainant was involved in negotiations to reduce the optional retiring age and the pensionable age in such a manner as to ensure improvements in pension benefits in the event of early retirement.

Analysis of the evidence and argument

Trustees of a pension fund have a fiduciary duty to act impartially, with due care, diligence and good faith. Moreover, as repositories of social power the boards of pension funds are akin to administrative bodies. Pension funds, through the process of statutory registration, acquire significant powers, rights and privileges in exchange for the performance of public services. In some respects, therefore, they can be seen as an extension of the administration.
Chapter VA of the Pension Funds Act of 1956, read with the definition of a complaint in section 1, has subjected the actions of boards of trustees to an administrative law type review jurisdiction. Trustees are required to exercise their powers properly and may not make themselves guilty of maladministration. In giving meaning to these concepts, I am obliged to have regard to the system of constitutional values introduced through the adoption of a fundamental Bill of Rights in the Constitution of 1996. Section 8(1) of the Constitution states:

The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of the State.

In addition, section 7(2) of the Constitution provides that the State must respect, protect, promote and fulfil the rights in the Bill of Rights.

Section 33(1) of the Constitution grants everyone the right to administrative action that is lawful, reasonable and procedurally fair. However, by virtue of item 23(2)(b) of Schedule 6 of the Constitution, this provision is not effective. Instead item 23 grants every person the right to administrative action which is justifiable in relation to the reasons given for it where any of their rights is effected or threatened. This provision substitutes the right in Section 33 until such time as national legislation is adopted giving effect to the rights to just administrative action in the Constitution. In practical terms, whether one labels the right as a right to reasonable administrative action or a right to justifiable administrative action, the effect is likely to be the same (see Mureinik “A Bridge to Where? Introducing the Interim Bill of Rights” (1994) SAJHR 31 @ 40 fn 34.).

In Roman v Williams NO 1998 (1) SA 270 (c) @ 281 van Deventer J held that the constitutional test imports the requirement of proportionality between means and end and that the role of the courts in judicial reviews is no longer limited to the way in which an administrative decision was reached but now extends to its substance and merits.

On this basis, a decision by a pension fund which is unreasonable will either constitute
an improper exercise of power or maladministration as contemplated in the definition of a complainant in section 1 of the Pension Funds Act.

Hence, it is incumbent on the respondent in this matter to convince me that it has properly considered all the various alternatives to the decisions taken in relation to the complainant’s application and requests, and that it has discarded them for plausible reasons, taking into account relevant considerations and ignoring irrelevant considerations. There must be a rational connection between the information upon which it has relied to take the decision and the ultimate decision taken.

Looking at the respondent’s reasons (cited fully above) for rejecting the complainant’s appeal, it is more than apparent that the respondent has failed properly to apply its mind to his application for retirement benefits. The fact that the complainant was suffering from depression to the extent that he was on sick leave for a period of almost eight months prior to his application for retirement is a highly relevant consideration to which the respondent has attached little significance. The complainant’s correspondence directed at the respondent makes it more than plain that he was of the view that he was entitled to retire on the grounds of ill health, but that he was labouring under the mistaken supposition that depression did not constitute a sufficient ground for retirement.

Rule 8(2) plainly entitles a member to retirement on the grounds of ill mental health. It reads:

A member shall be retired if his employment be terminated owing to his having become, in the opinion of the medical board and on the recommendation of the committee, incapable of efficiently discharging his duties by reason of infirmity of mind or body, caused without his own default.......

For the trustees of the respondent to fail to give further consideration to a retirement on the grounds of ill health because the complainant, in a state of depression, has “made no mention of any suggestion by his doctors that he was incapable of efficiently
discharging his duties by reasons of infirmity of mind or body", is a dereliction of duty. The constitutional duty on the board of trustees to act reasonably when faced with an application for retirement includes the obligation to properly investigate the true reason for retirement. The complainant consistently maintained that he was suffering from ill health of the mind.

Nor does it serve the board of trustees to argue that the application before it was in terms of rule 8(3)(b). The only reason the application was in terms of that rule was because of the complainant's evident mistaken supposition about his entitlement. In my judgment, as soon as the board was faced with the allegation by the complainant that he was ill, it was incumbent upon it in terms of rule 8(2) to constitute a medical board for the purpose of investigating the complainant's state of health.

A medical board is defined in terms of rules of the respondent to mean:

The member's own medical adviser who shall be a medical practitioner as defined by section 96 of Act No. 13 of 1928 as amended from time to time and one medical officer appointed by the Committee and if the members of such medical board cannot agree in regard to any case, such members shall appoint a medical practitioner to act with them as a third member of the medical board in which case the decision of the majority shall be final.

It is common cause that no such medical board was constituted to investigate the complainant's state of health. For the trustees to come to the conclusion, at their meeting of 26th July 1996, that the complainant was not of ill health without first constituting such a board and considering the outcome of their investigation is an abuse of their discretion and unreasonable.

Insofar as the discretion vested in the trustees by rule 8(3)(b) is concerned, the trustees also failed to exercise their discretion properly. The minutes of the meeting held on 24th May 1996 reveal that the trustees' reasons for refusing the application were threefold:
(i) it had only the version of the complainant before it and could not support the application without being furnished with the view of the City Council:

(ii) that the Committee’s role in this matter was to adjudicate between the two parties;

(iii) that retirement in terms of this rule could only be considered following the receipt of a formal recommendation to that effect from the participating employer.

This is a total misconstruction by the Committee of its powers and duties in terms of the rule. As such it amounts to an abdication of its discretion and unreasonable conduct on its part.

Firstly, according to the evidence available, the Committee had at its disposal the written opinion of Dr Woolley and was presented with a precis of the discussion between the manager of the fund and Mr du Plooy of the Human Resources Department of the City Council. Insofar as that information may have been deficient, it was incumbent upon the trustees to gather additional information. Secondly, the Committee's abdication of responsibility, cannot be sustained by a proper interpretation of rule 8(3). The relevant part of the rule reads:

A member shall be retired if his employment be terminated owing to the inefficiency or incompetency for the discharge of his duties from causes not solely within his own control, of which circumstances the Committee shall be the judge.

The rule, therefore, unequivocally places an obligation on the Committee to investigate whether or not the member is entitled to be retired on the grounds of inefficiency or incompetency from causes not solely within his control. The Committee shall be the sole judge of whether those causes were beyond the control of the member. In making that decision, it shall be obliged to hear the complainant as well as the Council. After
having heard both parties, it is obliged to make its own independent decision taking into account all the relevant considerations.

The evidence further suggests that the Committee has taken up the attitude that it will only consider applications under rule 8(3)(b) if the Council makes a recommendation supporting retirement on these grounds. This is evident from the minutes and also the respondent's reply and submissions. At paragraph 4 of the reply the respondent comments:

“Retirements are seldom effected in terms of this provision (section 8(3)(b)). As far as can be established only one case, involving five members, has been brought before the board for determination in the past twenty five years and this was an agreed measure between the Council and the members concerned. The board was merely required to ratify such agreement, the additional cost of the early retirements being met by the Council in terms of section 8(5).

Rule 8(5) obliges the Council to meet the cost of any benefits payable under rule 8(3) up to the member reaching pensionable age. It reads:-

“When a retiring benefit is granted for any of the reasons mentioned in sub-section (3) of this section all payments of ANNUITY made before the PENSIONER has reached his PENSIONABLE AGE shall be paid from the ordinary revenue of the COUNCIL, and if a lump sum should also be payable the amount thereof shall be paid partly from the FUND and partly from the ordinary revenue of the COUNCIL in proportions calculated by the Actuary or derived from tables compiled by him.”

Nowhere does rule 8(5) provide that the Council is expected to agree to a retirement on these grounds. The trustees have to satisfy themselves of the true reason for the termination of employment. Accordingly, the Committee and the trustees have unreasonably fettered their discretion in considering the complainant's application.
For these reasons, the decision of the Committee of the 24th May 1996 and that of the 26th July 1996 should be set aside on the grounds of unreasonableness.

Relief

Section 30E(1)(a) grants me the power to make the order which any court of law may make. In ordinary review proceedings, the power of the courts includes the power to make an order to set aside or correct unreasonable decisions. (See Johannesburg Consolidated Investment Co v Johannesburg Town Council 1903 TS 111, 115) Normally, a judicial officer will only correct a decision where it considers itself able to do so. As a general principle, the courts are reluctant to substitute their own decisions for those of another authority even where the administrative decision is found to be ultra vires. The ordinary course is to refer the matter back to the body. (Johannesburg City Council v Administrator, Transvaal 1969 (2) SA 72 (T), 76). However, exceptional circumstances may justify a departure from this principle. Baxter, Administrative Law (682 - 684) identifies four situations in which judicial officers will be justified in correcting decisions of administrative bodies by substituting their own. These are:

- Where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter.

- Where further delay would cause unjustifiable prejudice to the applicant.

- Where the tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again.

- Where the court is in as good a position to make the decision itself.

In the present matter, two bodies ought properly to have exercised a discretion, namely, the Medical Board and the Committee of Management. The Medical Board has made no decision at all and the Committee has acted unreasonably.
To some extent, I am concerned that the Committee of Management has exhibited a measure of bias that would make it unfair to require the complainant to submit to the same jurisdiction again. Plainly, it has taken the attitude that the complainant is seeking optional early retirement and wishes to avoid the penalty which that entails. Such an attitude may lead to the end result before the Committee being a foregone conclusion if it is referred back.

On the other hand, without the necessary medical evidence, I am not in a position to take a decision in terms of rule 8(2) or rule 8(3)(b) myself. However, if provided with proper medical evidence, I shall be competent to do so.

For these reasons, the appropriate remedy is to constitute the Medical Board for the purpose of conducting an investigation and making a recommendation. Given that the participating employer shall have an interest in the final determination of the matter, I also rely on the discretion granted in terms of section 30G to join the participating employer as a party to this complaint. The report and recommendation of the Medical Board shall then be placed before me and the respondents and the complainant shall be given an opportunity, if they so desire, to supplement or rebut its contents. Thereafter, I shall take a decision on whether the complainant is entitled to retirement benefits in terms of either rule 8(2) or rule 8(3)(b).

Accordingly, I hereby make the following interlocutory order:

- The decisions of the Committee of Management of 24th May 1996 and 26th July 1996 relating to the complainant’s retirement benefits are hereby set aside.

- The respondent is ordered to constitute a Medical Board within 7 days of this determination, consisting of the complainant’s medical adviser of choice, a medical officer appointed by the Committee and a third medical practitioner appointed in the manner contemplated in the definition of a Medical Board in rule 1 of the respondent’s rules.
• The Medical Board shall investigate whether the complainant was incapable of efficiently discharging his duties by reason of infirmity of mind or body as contemplated in rule 8(2) of the rules of the fund as at the date when he applied for retirement. The Medical Board shall file its report and recommendation with the Office of the Pension Funds Adjudicator within 21 days of the date of this order or within such further period as the Pension Funds Adjudicator may allow on application showing good cause.

• The Municipality of the City of Cape Town is hereby joined as a party to the complainant's complaint. The Council of the Municipality is directed to file any submissions it may wish to make concerning the complaint with the Office of the Pension Funds Adjudicator within 21 days of this order.

• The Committee of Management of the respondent shall serve a copy of this determination on the Medical Board and the Council of the Municipality of the City of Cape Town.

DATED AT CAPE TOWN THIS 8TH DAY OF APRIL 1998.

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Prof John Murphy