IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.: PFA/KZN/1/98

In the complaint between:

J Hoogervorst                Complainant

and

BTR Dunlop 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 lodged his written complaint on 7 January 1998. After an exchange of correspondence, consisting of a number of letters and interrogatories, I held a hearing into the complaint at the offices of the participating employer in Durban on 20 April 1998. Neither party was legally represented. The respondent was represented by its chairman of the board of trustees Mr M Hankinson, and its principal officer Mr A Baxter. The hearing was of an informal nature and none of the parties adduced oral evidence under oath. In determining this matter, therefore, I have relied exclusively on the documentary evidence and argument put to me in writing and orally.

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

The complainant commenced employment with Dunlop South Africa Limited on 1 March 1983. During 1986 Dunlop South Africa Limited merged with BTR South Africa Limited to form BTR Dunlop Limited. At the time of his early retirement at the age of 49 in February 1997, the complainant was employed as the Group Information Systems Manager.

During 1994 the BTR South Africa Group Pension Fund and the Dunlop South Africa Pension Fund were merged to form the BTR Dunlop Pension Fund - the respondent.

During 1996, in-service members of the respondent were given the option to transfer to a defined contribution provident fund. At the time of transfer in October 1996 the in-service members' transfer values were defined to be the actuarial reserve value (or past service reserve) enhanced by 25%. However, an exception was made resulting in differential treatment for those male in-service members who had transferred to the respondent from the BTR South Africa Group Pension Fund in 1994 (the “ex-BTR males”). The rules of the BTR South Africa Group Pension Fund had provided for a normal retirement age of 65 for male members and 60 for female members. The normal retirement age in the Dunlop South Africa Pension Fund was 60 for males and females. These retirement conditions carried forward to the BTR South Africa Group Pension Fund. The consequence of this arrangement was that the males transferred from the BTR South Africa Group Pension Fund (the “ex-BTR males”) were the subject of discrimination when compared to their female counterparts and their male and female counterparts who transferred into the respondent from the Dunlop South Africa Pension Fund.

Because BTR Dunlop Limited, the participating employer in the respondent, is of the view that such discrimination is arbitrary and unfair and also unconstitutional, it believes it is necessary to calculate the actuarial reserve values for the ex-BTR males as if their normal retirement age was 60 and not 65. In order to accomplish this actuarially, the
actuarial reserve value would have to be increased by an amount of 42%. This is because the actuarial reserve value at age 60 is equivalent to the member's actuarial reserve value at age 65 increased by 42%.

In wishing to effect these adjustments, the trustees of the respondent failed to follow the correct procedure. Basically they attempted to effect the determination of fair transfer values and the adjustment to eliminate discrimination by means of one valuation exercise. According to the principal officer, the trustees erroneously rolled a benefit improvement and the 25% enhancement to a single figure making the transfer value for ex-BTR males the member's actuarial reserve value enhanced by 67% i.e. 42% plus 25%.

The trustees have recognised this error and are rectifying the position. The correct process is firstly to effect a rule amendment to the respondent's rules in order to allow the ex-BTR males to retire at the age of 60. Thereafter, the transfer basis to the defined contribution fund will be the members' actuarial reserve value enhanced by 25%. This arrangement will have an effective implementation date of 1 October 1996.

The complainant transferred into the respondent from the Dunlop South Africa Pension Fund. As such, he is not an ex-BTR male. On 12 March 1996 an offer was made to the complainant to transfer from the respondent to the newly established defined contribution provident fund. The terms of this offer are central to the determination of his complaint. They are contained in a letter addressed to the complainant by Mr M J Fraser a trustee of the respondent dated 12 March 1996. The body of the letter reads:

"Dear John

OFFER TO TRANSFER TO THE STAFF PROVIDENT FUND

You are hereby offered the option of to transfer (sic) to the BTR Dunlop Staff Provident Fund.

Attached is an illustrative transfer statement which reflects the amount of benefit to be
transferred from the BTR Dunlop Pension Fund to the BTR Dunlop Provident Fund on your behalf should you exercise your option.

I confirm that you have been provided with projections on benefits under each of the options, by a consultant from Alexander Forbes who are actuaries to both funds.

*Furthermore, I confirm that should any future offer to other members take place, and should these members receive a transfer enhancement in excess of the enhancement that was offered to you, then your transfer value will be adjusted accordingly.*

Please note that once you have made your decision, it cannot be changed at a later date."

Attached to this letter was a document headed “Illustrative Transfer Statement as at 1 April 1996". The transfer statement reveals that the transfer value was made up of the actuarial reserve value consisting of the members’ portion and the balance of the actuarial reserve with an additional 10% enhancement. The additional 10% enhancement was increased to 25% at the effective date of transfer, being 1 October 1996, in order to bring the complainant's transfer value into line with that offered subsequently to other members.

The respondent has also furnished me with an illustrative transfer statement as at 1 April 1996 in respect of an ex-BTR male member of the fund. The transfer value in this instance consists of the member’s portion plus the balance of the actuarial reserve value, plus the 25% enhancement, plus an enhancement for the lower retirement age.

**The Complaint**

The complainant argues that he is entitled to an additional 42% enhancement equal to that granted to the ex-BTR males who transferred to the defined contribution provident fund on 1 October 1996. He bases his complaint on the italicised fourth paragraph of the letter of the 12 March 1996 in which Mr Fraser confirms that should any future offer to other members take place, and should these members receive a transfer enhancement in excess of the enhancement that was offered to him, his transfer value
would be adjusted accordingly.

The respondent counters that it was never the intention to afford the complainant the benefit of the adjustment made to the ex-BTR male members for the purpose of removing the discrimination. The complainant did not fall into this category and, so the respondent contended, the intention was that he should only receive additional enhancements where these were granted to ex-Dunlop males or females and the ex-BTR females whose retirement age had always been 60.

As such the complainant’s complaint relates to the administration of the fund and alleges that a dispute of law has arisen in relation to the fund between the fund and the complainant. Accordingly, the complainant falls within the meaning of the term as contemplated by section 1 of the Pension Funds Act.

**Analysis of the evidence and the argument**

The determination of this complaint rests upon the correct and proper interpretation of the contractual rights of the complainant afforded by the letter addressed to him on 12 March 1996.

The complainant argues that he is entitled to *any* transfer enhancement in excess of the 25% (originally 10%) enhancement that was offered to him. Essentially, he maintains that the letter makes no distinction between former members of the BTR Fund and those of the Dunlop Fund. The respondent contends that the increase in transfer enhancement contemplated was that which in fact occurred namely an increase from 10% to 25%. The intention was not to afford to the complainant the adjustment or enhancement for the lower retirement age, as was evident from the different illustrative transfer statements which included the separate category for the non-discrimination adjustment for the ex-BTR males. The 25% transfer enhancement may still be adjusted in the future, in which event the complainant shall qualify for further benefits.

Looking at the fourth paragraph of the letter of 12 March 1996 in isolation and in a literal fashion, it does at first glance appear to grant the complainant an entitlement to the
additional enhancement. Yet the question remains as to what is meant by “a transfer enhancement” as contemplated in the offer made to the complainant. The second paragraph of the letter makes reference to and incorporates the illustrative transfer statement. That document makes it clear that the only transfer enhancement being offered is the percentage on the actuarial reserve. In this respect, as already mentioned, it differs from the illustrative transfer statements given to the ex-BTR males which includes two enhancements, one referred to as “the 25% enhancement” and the other referred to as “enhancement for low retirement age”. Accordingly, there is some merit in the respondent's interpretation that the intention of the offer to the complainant was to grant him rights to additional enhancements in respect of those enhancements which would be granted to all members of the fund but not to those afforded only to male employees who were victims of discrimination. In this regard, it should be noted that were the complainant to succeed in this complaint he would fall into a category of which he was the only member, in that as his retirement age was already computed at the age of 60, he would obtain an additional enhancement for the lower retirement age which no other similarly situated member would receive. Logic and the broader context of the restructuring dictates that this could never have been the intention of the respondent.

Accordingly, for these reasons the complainant’s complaint cannot succeed.

Order

The complainant's complaint is dismissed.

DATED AT CAPE TOWN THIS 30TH DAY OF APRIL 1998.
Prof John Murphy
PENSION FUNDS ADJUDICATOR