IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.: PFA/KZN/200/99/NJ

In the complaint between:

ANDRIES ANNANDALE Complainant

and

COMMERCIAL UNION OF SOUTH AFRICA STAFF PENSION FUND First Respondent

COMMERCIAL UNION Second 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 concerning the complainant’s entitlement to disability benefits.

After an exchange of correspondence between the complainant and the respondents consisting of a number of letters and other documentation, the complainant lodged his written complaint with our office on 4 January 1999. No hearing has been held in this matter. Accordingly, in determining this matter, I have relied exclusively on the documentary evidence and argument put to me in writing and on the report placed before me by my investigator, Naleen Jeram.

The complainant is Andries Annandale, an adult male, a former member of the first
respondent, now residing in Kwa Zulu Natal. The complainant is represented by Shepstone & Wylie Tomlinsons attorneys.

The first respondent is Commercial Union of South Africa Staff Pension Fund, a pension fund duly registered under the pension funds act of 1956. The second respondent is Commercial Union Group Services of South Africa (Pty) Limited, a company, duly incorporated with limited liability according to the company laws of the Republic of South Africa having its registered office at 26 Loveday Street, Johannesburg. The first and second respondents are herein represented by Perrot, Van Niekerk & Woodhouse Inc, attorneys.

Complaint

The complaint relates to the interpretation and application of the rules of the first respondent and alleges that a dispute of fact and / or law has arisen in relation to a fund between the fund and the complainant.

The complainant had been employed by Sentrasure Ltd from 1 December 1983 and subsequently became a member of Sentrasure Pension Fund. He retired from the fund and began to receive his retirement benefit from January 1996. On 1 December 1996 Sentrasure Ltd was taken over by the second respondent. All employees of Sentrasure Ltd were taken over by the second respondent on the same terms and conditions as those which they enjoyed at Sentrasure Ltd. All employees who were members of Sentrasure Pension Fund were transferred to the first respondent.

The respondents argue that as at 1 December 1996 the complainant was not a member of the Sentrasure Pension Fund, because he was already receiving a pension in terms of the rules of the Sentrasure Pension Fund. Thus, the complainant was taken over on the same terms and conditions as those which applied to him at Sentrasure Ltd, that is, a post-retirement employee, without membership of a pension fund. However, despite the above,
on 20 March 1998 the complainant received the following letter from the respondents, which read as follows:

BENEFIT STATEMENTS

We enclose your benefit statement as a member of the Commercial Union of South Africa Staff Pension Fund indicating the benefits payable to you upon retirement or death-in-service from the group defined benefit pension fund.

The information presented in the statement is based on the Human Resource records currently held by the group and hence you should examine the information carefully to ensure its accuracy. In particular, if you are entitled to any past service credit, either purchased or otherwise, you are asked to look closely at the date of pensionable service shown on the certificate and to verify its accuracy. The period from “dating pensionable service” to “date joined fund” should equal the period of past service granted. If no service was granted the two dates should be the same.

If you paid a lump sum into the fund to purchase past service when you joined, the amount should be shown next to “member's lump sum contribution”.

The enclosed certificate will be issued on an annual basis and will reflect the updated position relating to death benefits, disability benefits and anticipated pension at date of retirement.

If you have any queries with regards to the enclosed statement, please contact either Mr Fritz Jordaan or Mrs Lynn Bernhardt in the Human Resources department.

BENEFIT STATEMENT

<table>
<thead>
<tr>
<th>Member's Name</th>
<th>AJC ANNANDALE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date of Birth</td>
<td>07/09/1934</td>
</tr>
<tr>
<td>Date of pensionable service</td>
<td>01/01/1996</td>
</tr>
<tr>
<td>Monthly Pensionable Salary</td>
<td>R 5,952.00</td>
</tr>
<tr>
<td>Monthly member's contributions : R 178.56</td>
<td></td>
</tr>
<tr>
<td>Monthly employer contributions : R 892.80</td>
<td></td>
</tr>
<tr>
<td>Date of benefit statement</td>
<td>31/01/1998</td>
</tr>
<tr>
<td>Staff number</td>
<td>S5934</td>
</tr>
</tbody>
</table>
Date Joined Fund : 01/01/1996
Member’s Lump sum contribution : R 0.00

STATEMENT OF BENEFITS

Retirement
At normal retirement age of 60 your pension as a percentage of your then final pensionable salary will be 197.50%.
The percentage is based on your years of pensionable service and the accrual rate as shown in the fund’s rules.
A reduced benefit becomes payable upon early retirement.

Death benefit in service
a) Lump sum of ..............................................R 142,848.00

2) Plus (in the case of a contributing member who leaves a spouse or eligible children) Dependants pension : 50% of member=s pension payable at normal retirement date based on pensionable salary at date of death.

Disability benefits
100% of pensionable salary, subject to a maximum of R10 000 per month, reducing to 75% of pensionable salary after two years from date of disablement (this is subject to a waiting period of 6 months and escalating at the lesser of 10% per annum / annual increase in CPI).

Withdrawal benefits
a) Resignation within 10 years : Refund of member=s contributions plus interest at 8% per annum.

b) Resignation after 10 years: Deferred pension payable from member=s pensionable age and based upon continuous service or (a) above.

GENERAL

The rules, the financial returns and the most recent actuarial valuation report may be inspected at the registered office of the fund.
Members are reminded of the importance of nominating one or more beneficiaries of the benefits arising from the fund. Such nominations should be reviewed and updated on a periodic basis.

Upon the termination of membership from the fund members are urged to seek professional advice on the most appropriate selection of withdrawal benefit.

Where the details contained in this statement conflict with the rules of the fund, the rules of the fund will prevail.

Benefits payable in terms of the fund rules may be subject to income tax.

During August 1998 the complainant suffered a severe heart attack as a result of which he is disabled and consequently unable to work. Thereafter, the complainant requested the necessary forms to lodge a disability claim in terms of rule 22 of the first respondent's rules.

The relevant part of rule 22 reads:

**DISABLEMENT INCOME BENEFIT**

**22.1 Definition of Disablement**

22.1.1 If a member becomes totally incapacitated, by reason of sickness or accident which results in his being unable to perform the normal duties of his occupation whereby he suffers the loss of all earned income from such occupation, then he shall be classified as being disabled for the purposes of these rules....

**22.2 Disablement Income Benefit**

22.2.1 A member who has been disabled for the full waiting period shall become entitled to a disablement income benefit equal in amount to 100% of his pensionable salary, subject to a maximum of R10 000 per month, reducing to 75% after two years from date of disablement.
On 28 October 1998 the respondents informed the complainant that he was never a member of the first respondent and therefore was not entitled to any incapacity benefits. The complainant contends that at all times he was a member of the first respondent and accordingly insured in the event of disability. Consequently, he failed to make alternative arrangements. Thus, his attorney concludes:

The Fund, having acknowledged that the complainant is a member of the Pension fund and entitled to disability benefits, cannot repudiate the complainant's claim for disability benefits. In the event that the letter of 20 March 1998 (annexure “D”) was handed to the complainant in error, this amounts to maladministration of the Fund. Such maladministration has caused severe prejudice to the complainant in that he did not make alternative provisions for pension and in case of incapacity.

The respondents replied as follows:

...At no stage was the Complainant ever a member of the First Respondent. At the time of Sentrasure's takeover on 1 December 1996, the Complainant had retired in terms of the Sentrasure pension fund rules.

...He had been re-employed by Sentrasure without being a member of their pension fund. He was never capable of becoming a member of the first respondent. From the time that he was employed by the first respondent, i.e. after 1 December 1996, the complainant never made any payments to the first respondent, in terms of the first respondent's rules, or had any deductions made from his remuneration in lieu of membership payments to the first respondent. The complainant was at all times aware of this and never queried this.

...The complainant was at all material times hereto aware that he was never a member of the first respondent. This is quite evident from the fact that from 1 December 1996 to the time that the complainant ceased being employed by the second respondent, no pension fund deductions were ever made from his remuneration.

...The respondents deny that the first respondent ever acknowledged that the complainant was a member. The complainant relies on the letter dated 20 March 1998 which was sent to him in error to try and establish that he was a member of the first respondent. It must be pointed out that this letter was computer generated and was issued in error. In the circumstances, the complainant cannot claim
that he has been prejudice by the mal-administration. If this was so, it would have been incumbent on
the complainant to seek information from the respondents when he received his first remuneration
advice which indicated that pension fund deductions were not being made.

Despite this, the respondents, in a letter dated 14 June 1999 addressed to the Pension
Funds Adjudicator, admit that if the complainant qualifies for membership he will be entitled
to disability benefits.

**Relevant rules applicable**

Member is defined as:

“Member” shall mean an Employee who has been admitted to membership of the Fund in terms of
Rule 10 and has not ceased to be a Member under the provisions of these Rules.

Rule 10, in turn reads:

10.1 Every Employee who was a Member of the Fund immediately prior to 1 January 1987 shall
remain a Member of the Fund.

10.2 Every other Employee shall become a Member from the date of becoming an Eligible
Employee.

“Eligible Employee” shall mean a person who is on the permanent staff of an Employer and shall
include a full-time working director of an Employer.

“Employer” shall mean the company and any other company or organisation that, with the consent of
the Company and on such terms as may be agreed with the Company and the Trustees, is admitted
to the Fund. In relation to any particular Member, Employee, Pensioner or Deferred Pensioner
“Employer” shall mean the Employer by whom the person is or was last employed.

“Company” shall mean Commercial Union of South Africa Limited.
Argument in terms of rules

The issue for determination is whether the complainant was “on the permanent staff of an employer”. If he is, he is a member of the fund.

After the complainant lodged his written complaint with my office and the respondents replied thereto, my investigator requested the parties to make further written submissions on the issue of whether the complainant was a member of the first respondent.

The complainant’s attorney in a telefacsimile dated 22 June argued as follows:

Mr Annandale was employed by Sentrasure on 1 December 1983.

Mr Annandale’s original letter of appointment does not state that his employment with the Company is for either a fixed term or a fixed purpose. It is therefore evident that it was envisaged that Mr Annandale would be employed for an indefinite period. This is substantiated by the fact that he was employed by the Company for approximately fifteen years. The fact that Mr Annandale was employed for an indefinite period indicates that he was a permanent employee.

On 1 December 1996 Sentrasure was taken over by Commercial Union. Mr Annandale did not receive any documentation or correspondence to the effect that his terms and conditions of employment would change as a result of the take-over.

From the date on which Commercial Union took Sentrasure over until June 1998 Mr Annandale received pay slips from Commercial Union stating a value for retirement funding under the heading “statistical”.

A further indication that Mr Annandale was a permanent employee is the fact that he received a housing subsidy. It is highly unlikely that the Company would grant such a subsidy to a temporary employee.

In response the respondent’s attorney maintained that at the time Sentrasure Ltd was taken over by the second respondent, the complainant was receiving a pension from the
Sentrasure pension fund and had in fact retired in terms of the rules of that particular fund. Hence, he was employed as a retiree by Sentrasure. The respondents, although not expressly stating so in their written submissions, are in fact raising the argument that the complainant was a temporary employee. The suggestion seems to be that a retiree who continues in employment is almost by definition a temporary employee.

**Analysis of argument**

The parties to this determination are under the impression that the sole issue on which this determination hinges is whether the complainant was a member of the first respondent. As stated, in terms of the rules of the first respondent (quoted above), the complainant needs to show that he was a permanent employee of the second respondent to qualify as a member.

The Labour Relations Act does not define a permanent or temporary employee. The expectation of a temporary employee is that the employment is not permanent and will cease after a fixed period of time or the completion of a specific task required to be done by the employee. According to Le Roux & van Niekerk, *The South African Law of Unfair Dismissal*, page 69, the primary consideration in determining whether an employee is a temporary or permanent should be the intention of the parties. The intention of the parties must be gleaned from the contractual terms of employment.

When the complainant was employed by Sentrasure Ltd on 1 December 1983 he did not receive a specific contract of employment. However, his letter of appointment sets out the terms of his contract. There is consensus amongst the parties that all employees of Sentrasure Ltd were taken over by the second respondent on the same terms and conditions they enjoyed at the time of the take over. Further, section 197 of the Labour Relations Act 66 of 1995 reads:
(1) A contract of employment may not be transferred from one employer (referred to as “the old employer”) to another employer (referred to as “the new employer”) without the employee’s consent, unless -

(1) the whole or any part of a business, trade or undertaking is transferred by the old employer as a going concern; or
(2) the whole or a part of a business, trade or undertaking is transferred as a going concern -
   (i) if the old employer is insolvent and being would up or is being sequestrated; or
   (ii) because a scheme of arrangement or compromise is being entered into to avoid winding-up or sequestration for reasons of insolvency.

(2) (a) If a business, trade or undertaking is transferred in the circumstances referred to in subsection (1) (a), unless otherwise agreed, all the rights and obligations between the old employer and each employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and each employee and, anything done before the transfer by or in relation to the old employer will be considered to have been done by or in relation to the new employer.

In terms of section 197(2)(a) the complainant’s employment rights and obligations were transferred to the second respondent.

The complainant argues that the terms set out in his letter of appointment suggest that he was a permanent employee. No reference is made to any time period of employment nor is the complainant required to perform a specific task, whereafter his employment ceases. The complainant was appointed on a general basis as an area assessor. On the contrary, paragraph 1.3 of the letter of appointment reads:

Daar sal van ‘n beampte verwag word om na enige plek waar die Sentrale aktiwiteite bedryf verplaas te word of tydelik diens te doen indien nodig.

This provision required the complainant in addition to his normal full time duties to perform his duties wherever the employer’s activities are moved or work on a temporary basis when
required. Hence, if the complainant was a temporary employee then there would be no need for the above provision. The complainant was employed by Sentrasure Ltd and the second respondent for approximately 15 years. Throughout his employment, the complainant's legitimate expectation was that his employment was for an indefinite period of time.

Further support for the contention that he was permanent appear from his letter of appointment. Paragraph 2.6 reads:

2.6 **Verlof** -

2.6.1 Jaarlikse verlof-

Jaarlikse verlof van 26 werksdae (insluitende Saterdae) plus openbare vakansiedae was in hierdie tydperk val, sal na voltooiing van elde jaar teen volle besoldiging toegestaan word.

2.6.2 Siekteverlof-

Siekteverlof teen volbetaling word toegestaan soos deur die wet op Winkels en Kantore voorgeskryf en beloop.

14 Werksdae gedurende die eerste diensjaar (Met dien verstande dat geen betaalde siekverlof toegestaan word gedurende die eerste werksmaand nie).

2.6.3 Bonusverlof-

Na voltooiing van vyf jaar ononderbroke diens word vir elde daaropvolgende vyf jaar ononderbroke diens 'n tydperk van bonusverlof toegestaan, gelyk aan dieselfde tydperk as die jaarlikse vakansieverlof wat op daardie datum vir u van toepassing was. Sodanige bonusverlof kan geheel of gedeeltelik in kontant deur u geeis word gebaseer op u salaris ten tye van u aansoek om uitbetaling, of kan geheel of gedeeltelik onbeperk oploop tot by dood, uitlede
The leave (normal and sick) granted to the complainant is on par with leave granted to permanent employees. Further, the benefit relating to bonus leave only comes into effect after the completion of 5 years of unbroken service. This bonus leave may be claimed up until the death, retirement or resignation of the complainant. Due to the length in time it is unlikely that such a benefit will be inserted for the benefit of a temporary employee.

Paragraph 2.7 of the letter of appointment governing housing reads:

Behuising-

‘n Huiseienaarskema teen verlaagde rentekoers word deur die Sentrale aan blanke getroude manlike werdnemers toegestaan.

U word hartlik welkom geheet in die geledere van die personeel en dit word vertrou dat u baie gelukkig en suksesvol in u nuwe betrekking sal wees.

Onderteken asseblief die afskrif van hierdie brief as aanvaarding van die betrekking en voorwaardes en stuur so spoedig doenlik terug aan die Personeelbestuurder.

This favourable housing loan clause, although possibly unconstitutional today, does support the contention of permanence in that the employer is unlikely to grant a temporary employee a housing loan at a lower interest rate.

The fact that no pension deductions were made from his remuneration does not in itself resolve the question of whether the complainant was a member of the first respondent.

From the rules it is clear that the onus is on the employer to deduct the contributions from a member’s salary and pay its share of the contribution to the fund. The fact that the second respondent failed to do this is an internal matter between the first and second respondent and does not impact on the question of the complainant’s membership of the
first respondent. Membership is determined not with reference to the fact of contribution payments but with regard to the eligibility and membership provisions of the rules.

Despite the contractual terms of employment, there may be some merit in the respondent's contention that since the complainant was already receiving his pension benefit from Sentrasure pension fund and was no longer a member of that fund, his employment can be seen as temporary.

Whatever the merits, however, it is unnecessary to decide this issue. Both parties have ignored the following important consideration relating to the merits of the disability claim. The respondents accepted that had the complainant been a member of the pension fund he would have qualified for the disability benefit. However, a closer inspection of the rules of the first respondent shows otherwise.

Rule 22.2 regulates payment of the disablement income benefit, but rule 22.2.4 provides for the cessation of the benefit once granted.

Rule 22.2.4 reads as follows:

Payment of the Disablement Income Benefit shall cease at the first of the following dates:-

- (3) the date of the Member=s death;
- (4) the Member=s Pensionable Age or date of earlier retirement;
- (5) the Member=s date of recovery in terms of Rule 22.3.

The complainant is still alive, but unable to work. Hence on a proper interpretation and application of rule 22 any disability benefits payable to the complainant would have ceased on him reaching pensionable age, which in terms of the rules is 60 years. The complainant turned 60 on 7 September 1994. Hence, had he qualified under the rules payment would have ceased immediately because he was beyond pensionable age. This can be seen as just and reasonable because he is already in receipt of a pension.
Even though the second respondent incorrectly averred that the complainant was entitled to disability benefits, rule 22.2.4 clearly does not allow for this. Thus, the complainant is not entitled to any disability benefits set out in the rules.

In conclusion, it is necessary to add a word of caution. These proceedings highlight the need for representatives of parties to endeavour to properly and correctly interpret the rules of a pension fund in any given pension dispute. On the facts of this matter, had the parties and their representatives correctly perused the rules, this dispute could have been resolved immediately and economically.

For the aforesaid reasons the complaint is dismissed.

Dated at CAPE TOWN this 25th day of JUNE 1999.

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John Murphy
Pension Funds Adjudicator