IN THE TRIBUNAL OF THE
PENSION FUNDS ADJUDICATOR

CASE NO. PFA/WE/6/98/LS

IN THE COMPLAINT BETWEEN

Wanda Herring              Complainant

AND

Goscor Staff 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 is Wanda Herring, a retired member of the respondent.

The respondent is Goscor Staff Pension Fund, a fund registered under the Pension Funds Act of 1956.

The complainant lodged a written complaint with the Pension Funds Adjudicator on 10 February 1998. The complainant has complied with the provisions of section 30A(1) which requires the complainant to lodge a written complaint with the employer participating in the fund before lodging with the Pension Funds Adjudicator. The respondent has properly considered the complaint and has replied thereto in writing as required by section 30A(2) of the Pension Funds Act.
No hearings were conducted, and therefore in determining this matter I have relied exclusively on documentary evidence, argument in writing and on the report placed before me by my investigator, Lisa Shrosbree.

The complaint relates to the period and amount of interest to which the complainant was entitled on account of the delay in payment of her pension benefit. I have jurisdiction to consider the complaint in so far as it relates to the interpretation and application of the rules of a pension fund and involves a dispute of fact and law.

The complaint is determined as follows:

Factual background

The complainant was employed as a secretary for Arc Engineering (Pty) Ltd (“the company”) from 1 April 1966 to 30 April 1997.

On 26 March 1997, Brian Smuts, a director of the company, informed the complainant that due to the company’s poor financial position, they were terminating her employment and that she would proceed on early retirement effective 1 May 1997. On the 27 March 1997, the company wrote to the complainant itemising the retirement benefits which she could expect to receive. On 8 April 1997, the company wrote to the complainant confirming its decision to terminate the complainant’s employment on the basis of early retirement.

The respondent’s early retirement benefit was calculated in accordance with Rule 4.2 of the respondent’s rules and reads as follows:
Subject to the Employer's consent a Member may retire at any time within a period of ten years before his Normal Retirement Date, or earlier if retirement is due to ill-health. In this event he shall receive:

i. up to the 30th September 1989, a benefit as calculated in the Schedule using Final Fund Salary and Pensionable Service at the actual date of retirement, reduced by 0.5% for each month by which early retirement precedes Normal Retirement Date.

ii. from the 1st October 1989, a benefit as calculated in the Schedule using Final Fund Salary and Pensionable Service at the actual date of retirement, reduced by 0.25% for each month by which early retirement precedes Normal Retirement Date.

Provided that if the Member has attained age 63 the reduction factors as described in (i) and (ii) above, shall not apply.

The respondent agreed to enhance the complainant’s pension by including her unexpired years of service of two years. Her pensionable service was thereby deemed to be 65 years although she retired at 63 years.

On 30 April 1997, the complainant communicated to Glenrand MIB Employee Benefit Services (Pty) Ltd (“Glenrand”) who manage the fund on behalf of the company that she wanted to transfer her actuarial reserve value out of the respondent and to purchase a pension from Southern Life. This is permitted in terms of Rule 4.7 of the rules (as amended) which reads as follows:

The Employer may, before the payment of any retirement benefit to a Member has commenced, either pay the pension from the Fund or apply the proceeds of the Assurances to purchase a pension from a duly registered insurer, provided the Employer and Liberty Life are both satisfied that the purchase is to the advantage of the Member."

The complainant was then advised that before the transfer could be effected in terms of Rule 4.7, she had to submit certain documentation to Glenrand. The respondent’s trustees also had to give their permission to the outsourcing of the
funds.

In the meantime, a dispute arose between the complainant, represented by the Professional Employees Trade Union of South Africa (“the union”), and the company concerning the complainant’s retrenchment and much correspondence between the union and the company took place thereafter.

Glenrand, acting on behalf of the company in the dispute with the union, responded in a letter dated 17 April 1997 that the company was suffering severe losses due to a down turn in the market and that in the interest of the survival of the business, it had become necessary to restructure the company. Pursuant to that restructuring, various positions in the company’s Durban and Cape Town offices respectively were being made redundant, one of which was occupied by the complainant. Glenrand however went on to say that the complainant would not suffer prejudice as a result of the termination of her employment as she would receive a pension benefit calculated as if she were retiring at the age of 65 years.

The significance of the dispute between the union and the company is the delay which it caused in the payment of the complainant’s pension benefit. The union wanted the company to pay a severance package to the complainant as opposed to an early retirement benefit. The complainant did not want to submit the documentation required for payment of the retirement benefit as this would imply that she was accepting that benefit and thereby prejudice her rights to a severance package.

In the weeks that followed, attempts were made to set up a meeting between the company and the union to discuss the issue of the complainant’s retrenchment. However, the dispute was resolved before the meeting was finally scheduled. In a letter dated 2 June 1997, Glenrand advised the union that in an effort to resolve the
dispute, they would make two options available to the complainant. The first option was the early retirement benefit and the second, a severance package. The union replied in a letter dated 2 July 1997 that they would advise the complainant to accept the first option and that any further communications should be directed to the complainant's broker, Mr Sexton. It was in this letter of acceptance from the union that the first reference to interest was made. The letter reads as follows:

“We confirm the contents of our telephonic conversation with you on 30 June 1997, inter alia, that we intend to advise Mrs Herring to accept Option 1 as contained in your letter of 30 June 1997. We further confirm that accrued interest for the period beginning 30 April 1997 to date of release of the fund, monies would be added to said monies.”

The complainant confirmed her acceptance of the first option in a letter dated 9 July 1997. That letter reads:

“Please be advised that I have decided to select OPTION NO. 1 (ENHANCED PENSION BENEFITS) in full and final settlement in the abovementioned matter.”

On 16 July 1997, the complainant submitted the documentation required by the respondent to pay her pension benefit. The benefit was finally paid by Liberty Life (Pty) Ltd, the administrators of the respondents, on 8 August 1997.

The complainant’s actuarial reserve value as at 1 May 1997 was calculated at R442,000.00. This amount was accumulated with 8% per annum compound interest for the period 1 May 1997 until 30 July 1997. The result was a capitalized pension value of R450,805.07. The complainant elected to take a one-third cash withdrawal (R144,224.00) and the balance of the actuarial reserve (R306,581.00) was transferred to Southern Life.

The complainant contends that she was entitled to 15% interest on the actuarial
value of R442,000.00 for the period 1 May to 8 August 1997 (ie: interest in the amount of R17,871.00) by virtue of an agreement concluded in the final stages of negotiations between the union and the company. According to Glenrand, the complainant's retirement documentation was received on the 30 July 1997 and only at that date were the administrators able to process payment of the benefit. Interest therefore accrued for the period 1 May 1997 to 30 July 1997, a period of 91 days. The complainant thus received interest at a rate of 8% for 91 days on the actuarial value of R442,000.00. This amounted to R8,815.00.

The complainant asserts that in awarding only 8% interest over a period of 91 days, the respondent penalized her for entering into a dispute with the company concerning her retrenchment and that in any event, the delay was the fault of the respondent.

Analysis of Complaint

In order for the complainant to be entitled to interest, she must show that she is entitled to it in terms of the rules of the respondent or in terms of the law of contract. The rules are silent on the question of payment of interest in respect of transfers out of the fund in accordance with Rule 4.7. Therefore the question is whether there was any contractual agreement, express or implied, between the complainant and respondent that interest at the rate of 15% would accrue to the complainant's pension benefit for the period 1 May 1997 to 8 August 1997.

As mentioned, the question of interest was alluded to for the first time in the final letter of acceptance (dated 2 July 1997) from the union. The relevant part reads:

“We further confirm that accrued interest for the period beginning 30 April 1997 to date of release of the fund, interest would be added to said monies.”
Thus it would appear that there was an agreement to pay interest from 30 April 1997.

Rule 4.5.1 provides:

All pensions payable by the Fund shall be paid monthly in arrear beginning on the last day of the month next following the date the Member retires. Payment shall continue throughout the Pensioner’s life terminating with the payment due on the last day of the month immediately following the Pensioner’s death, subject to a minimum of 60 payments.

Pensions are thus due one month after termination of employment. However this rule only applies in respect of pensions payable by the respondent. There is no similar rule in respect of funds which are transferred out of the respondent to purchase pensions from other insurers in terms of Rule 4.7. Nevertheless, the agreement to pay interest would be in accordance with the spirit of rule 4.5.1. However, if the spirit of Rule 4.5.1 were applied in this instance, the period of payment of interest would be 31 May 1997 to 8 August 1997, a period of 69 days.

The respondent is willing to pay interest for a period of 91 days. Therefore it honoured the agreement concluded with the complainant and also abided by the spirit of the rules as interpreted in the above paragraph. In fact it overpaid interest by 22 days.

The complainant also disputes the rate of interest which was paid by the respondent. The agreement between the parties to pay interest is silent on the rate of interest payable. The rules also do not assist us in this regard. The rate of interest was determined on the basis of a decision taken by the respondent. Therefore, in the absence of an agreed specific rate, the applicable rate of interest should be a reasonable rate of interest. The complainant wants a market-related interest of 15%. The respondent paid 8% as this was consistent with the fund’s investment
performance at that time. The respondent wrote to the complainant in a letter dated 10 November 1997 explaining how the figure of 8% was arrived at. It reads:

“The assets of the fund are currently held in Liberty Life's guaranteed portfolio. The Pension Fund earns 7.25% immediately and a further 10.75% vests over 10 years. Therefore, when you requested interest, we decided to grant 8% rather than 7.25% p.a which is more than the fund earned immediately on your moneys.”

The question is therefore whether in the light of all relevant factors, the rate of 8% was reasonable. For the reasons that follow I am satisfied that it was.

Firstly, the funds were not invested in the money market and therefore there was no guaranteed rate of return. Secondly, the respondent awarded an enhanced pension benefit to the complainant by calculating her pension as if she retired at the age of 65 years when she was in fact retiring at 63 years. She thereby received a greater benefit. Thirdly, the respondent paid interest 22 days in excess of that payable under rule 4.7 had it been applicable. The complainant has therefore been sufficiently compensated for the delay in payment of her pension benefit.

Taking all the above considerations into account, I am satisfied that the rate of 8% was reasonable in the circumstances.

Accordingly, the complainant's complaint is dismissed.

DATED at CAPE TOWN this 1st day of April 1999.

........................................
JOHN MURPHY