

Pension Funds Adjudicator

Press Office Feature : **Employer was wrong in withholding pension payout, says PFA**

Company: Pension Funds Adjudicator
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An investigation was conducted which revealed that the complainant was grossly negligent

An employer who withheld an employee's pension pay out on grounds that his mismanagement of stocks had caused losses of more than R2,7-million has been ordered by the Pension Funds Adjudicator to pay the withdrawal benefit.

The employee lodged a complaint with the Office of the Pension Funds Adjudicator, denying that his actions as a project manager for the second respondent were negligent and the direct cause of the losses as submitted by the respondents.

The complainant was employed by the Compass Group (Pty) Ltd (second respondent) from 1 October 2008 until 13 February 2013 when his services were terminated.

During his employment he was a member of the Compass Group Southern Africa Pension Fund (first respondent) which was administered by NMG Consultants and Actuaries (Pty) Ltd (third respondent).

The respondents submitted that the complainant's duties as a project manager, among others, involved procuring, managing, securing and proper utilisation of the stock.

They said that in the execution of his duties, the complainant had, among others, failed or neglected to properly manage, record or accurately account for the stock.

The respondents submitted that as a result of the complainant's mismanagement, the second respondent suffered loss of cash and/or stock. An investigation was conducted which revealed that the complainant was grossly negligent and concealed the loss of R2 726 794.25.

They said the complainant's actions of dishonestly concealing the loss prevented the second respondent from taking action to improve profitability and prevent further losses.

They further said this dishonest concealment constituted misconduct in terms of section 37D(1)(b)(ii)(bb) of the Pension Funds Act.

The respondents added that as a result, the second respondent instituted a civil claim against the complainant in the North Gauteng High Court and also laid a criminal charge, at the Secunda Police Station, to recover these losses.

They submitted that the second respondent had requested the first respondent to withhold the benefit pending the finalisation of the civil claim as well as the criminal case.

The complainant said some of the duties that the respondents had indicated as his duties in fact belonged to other personnel such as the store manager, the storeman and the bookkeeper.

He submitted that as most of these people reported to the general manager, the general manager would have been aware of any losses and it would also have been impossible to conceal the losses as claimed by the respondents.

He submitted that his record with the second respondent showed that he had been an honest employee and the second respondent had during his employment in several instances acknowledged that. He said he was not aware of any civil claim against him, and summons were never served on him.

In her determination, the Pension Funds Adjudicator Ms Muvhango Lukhaimane said Section 37D(1)(b) of the Act provided that a registered fund may deduct any amount due by a member to his employer "in respect of any damage caused to the employer by reason of any theft, dishonesty, fraud or misconduct by the member".

In her analysis, the loss occurred because the employee had failed to meet certain managerial standards.

She said the respondents had submitted a detailed list of what the complainant was supposed to do in the course of his employment. They then submitted that he failed to carry out these duties which caused the loss.

"The respondents submit further that the complainant concealed this loss. They submit that as a result the first respondent is entitled to withhold the benefit pending the finalisation of the civil litigation."

"A simple interpretation of the subparagraph (ii) of section 37D(1)(b) does not lend itself to the respondents' interpretation.

"On a simple reading, the malicious or unlawful act must result in the damage or loss to the employer. In terms of the respondent's submissions, the loss resulted from an employer-employee contractual agreement, in which the complainant failed to meet the

required managerial standards.

"According to the respondents only after the damage was done, did the complainant try to fraudulently conceal it.

"This Tribunal is not convinced that the legislature intended the provision of the Act to extend to contractual disputes, including those of which the failure is concealed as submitted by the respondents.

"In the event, it is this Tribunal's finding that the damage suffered by the second respondent is not a damage as envisaged in section 37D(1)(b)(ii) of the Act and as a result, the first respondent can neither withhold nor deduct the complainant's withdrawal benefit."

"Therefore, the complainant is entitled to payment of his withdrawal benefit," said Ms Lukhaimane.