



In the matter between:

The Complainant

And

Pension Fund

1st Respondent

Employer

2nd Respondent

STATEMENT OF DETERMINATION OF COMPLAINT GIVEN IN TERMS OF SECTIONS 74 AND 75 OF THE FINANCIAL SERVICES REGULATORY AUTHORITY ACT NO. 2 OF 2010 (THE ACT)

1 BACKGROUND

1.1 Statutory provision for the resolution of disputes or complaints arising within the financial services industry in a manner alternative to the conventional court system began during the era of the Retirement Funds Adjudicator (the Adjudicator), provision for which was made in terms of the now repealed Part VIII of the Retirement Funds Act, 2005.

1.2 The repeal of this legislative provision came through section 83 (4) of the Act. Together with this repeal was the ushering in of the era of the Ombudsman of Financial Services in terms of Part XII of the Act.

1.3 Of note between the two periods is that the Adjudicator's mandate was, in terms of the said repealed Part VIII of the Retirement Funds Act and the repealed Part XVI of the Insurance Act, 2005, to determine complaints arising only under these two pieces of legislation and such was the scope of the Adjudicator. On the other hand, the scope of the Ombudsman is wider and covers all non-bank financial services complaints including those arising under the Retirement Funds and Insurance Acts.

1.4 Of necessity, to prevent an instance of disservice to financial services consumers and to afford transition from the era of the Adjudicator to that of the Ombudsman all the complaints lodged and remaining pending before the Adjudicator now stand to be determined by the Ombudsman.

2 INTRODUCTION

- 2.1 The Complainant is a former employee of the Employer (2nd Respondent) and a former member of the Pension Fund (the Fund or 1st Respondent).

- 2.2 The Scheme started as a defined benefit (DB) fund in 1995 before its conversion to a defined contribution (DC) fund on the 1st April 1999. The Complainant exited employment due to ill health yet his benefits were processed on the basis that he had resigned. This was due to wrong information transmitted to the Fund by the Employer.
- 2.3 The complaint was lodged with the office of the Adjudicator in October 2012. The Adjudicator allowed the matter to be considered, it can reasonably be supposed, in exercise of the discretion in terms of section 51 (3) of the Retirement funds Act, 2005, even though it was lodged after the statutory period of three years, in terms of section 51 (1) of the same legislation, had lapsed. In the same breadth and in fairness and reasonableness to the totality of the circumstances hereof this matter has been considered by the Ombudsman together with all others remaining pending before the Adjudicator.

3 THE COMPLAINT

- 3.1 The Complainant states that he was compelled to retire early without any other option after recommendation by a single medical practitioner, as opposed to a panel of doctors and he was denied the right to seek further medical assistance while still on payroll or under unpaid leave.
- 3.2 The Complainant states that in early 2002 he reluctantly revealed his ailment before a disciplinary committee during a disciplinary hearing over his inconsistent attendance at work. The Complainant states that he confessed that he had feared to disclose his health condition for fear of possible stigmatisation or victimisation.
- 3.3 The Complainant states that his employer promised to seek further information from his doctor in order to make a decision about his future. He further states that in response the doctor advised his employer to retire him early. The Complainant states that his employer gave him no option but advised that he retire early on medical grounds. The Complainant states that he was not aware which mode of exit his benefits would be calculated under until he received his payment by the NBC which was severely taxed.
- 3.4 The Complainant is unhappy that after serving his employer diligently for fifteen years, and then falling sick through no fault of his, that his pension benefits were not calculated as if he had reached retirement age of 60. His second grievance is that his

meagre benefits were severely taxed; and that he was denied a monthly pension on the grounds that his service years were insufficient to qualify for pension.

- 3.5 The Complainant's desired outcome is that his terminal benefits be paid as if he retired at 60 years; that he be refunded the excessive tax levied on his benefits contrary to tax applicable to retirement on medical grounds; that the office revisits the rules and regulations of the pension fund to confirm if indeed his service years disqualified him for monthly pension; and establish assessment of his physical and mental health by a panel of doctors, so that if he passes the assessment his former employer may reengage him.

4 THE RESPONSE/ DEFENCE

The Fund's response

- 4.1 On the 16th October 2012, the office of the Adjudicator received a letter from the Fund dated 12 October 2012 wherein it advised that the Complainant's benefits were made in accordance with rule 7 of the Fund rules. On further request to specify the relevant provision of rule 7, the Fund identified clause 7.2 providing for early retirement in its 24 May 2013 letter. The fund stated that this translated into the Complainant receiving both his and employer's contributions and interest thereon. Provisions of the rule 7.2 read:

"A MEMBER having at least 10 years of service may retire from SERVICE after having attained the age of 50 years or if a MEMBER is dismissed from SERVICE subject to 3 months written notice to the TRUSTEES of his intention to retire. In all other instances such withdrawal or dismissal shall be regarded as early retirement only if the EMPLOYER consents thereto. Such MEMBER shall receive a PENSION vesting on the first day of the following month secured by his MEMBER'S SHARE at that date and payable in terms of Rule 7.4." [Emphasis added]

- 4.2 The Fund asserted that it acted in accordance with the Employer's letter dated 4 October 2002 addressed to the Complainant wherein the Employer states in part, "*We acknowledge receipt of your letter dated 22 March 2002 in which you apply for early retirement. We are pleased to advise you that we have agreed to your request...*" The Fund enclosed copies of a medical recommendation dated 22-03-2002 addressed to Employer which partly states "*This is in full support of his initiative to request for early retirement...you can refer to my letter to you recommending him for early retirement.*" The Fund also attached a computation of the Complainant's benefits which show that

his benefits totalled E87, 377.36 with deduction to the Employer amounting to E19 230.20; Consultants fees E2999.20 and Taxes at E41 425.23 as follows:

<i>"SEQPAYEE..</i>	<i>AMOUNT</i>	<i>STATUS</i>
<i>001 THE EMPLOYER</i>	<i>19230.20</i>	<i>BANKED</i>
<i>002.....THE CONSULTANTS</i>	<i>2999.20</i>	<i>BANKED</i>
<i>003.....THE COMPLAINANT</i>	<i>87377.36</i>	<i>BANKED</i>
<i>004.....COMMISSIONER OF TAXES SWAZILAND</i>	<i>41,425.23</i>	<i>BANKED'</i>

- 4.3 The determination is to deal with the correctness or otherwise of these deductions made from the benefit in terms of the Retirement Funds Act, 2005 and/or rules of the Fund. The Fund enclosed a Fund Administrator form signed by the Complainant and stating that he would be refunded his contributions. There is a tick in the box in respect of refund of contributions. The Fund states in paragraph 1 of the said letter of 23 May that a member exiting the Fund requested resignation. Then proceeds in paragraph 2 of same letter to state that the Complainant received his contribution by choice per his election in the form.
- 4.4 It is noted that there was no indication of employer's contributions and returns. The Adjudicator enquired from the Fund why the Complainant was not granted disability benefits in terms of rule 9. The Fund states that an application for the Complainant to be considered for disability insurance benefit was submitted to the insurers, YYYY Employee Benefits. The prescribed process (which was not followed) involved the insurer's doctors monitoring the member for a defined period and then declaring the disability thereafter. The Fund states that this process could not be followed to the end as he subsequently applied for early retirement before the insurer's doctors could start the monitoring process.
- 4.5 The Fund goes on to state that the fund administrators were entrusted with the application of "tax clearances" [sic] from the Commissioner of Taxes. That the form sent to the administrators clearly specified that the withdrawal was due to ill health. The Employer expresses regret that it cannot respond or does not have answers as to why fund administrators stated that the termination was due to retirement on the "tax clearance" [sic].

Employer's response

- 4.6 From the documents on file it is apparent that the Employer took more than 7 (seven) months to respond to the letter of the Adjudicator inviting it to respond to the Complainant's complaint as attached to the Adjudicator's letter dated 03 October, 2012. It was not until after the Adjudicator sent 2 (two) reminders, one dated 20 March, 2013 and the other dated 08 May, 2013 (to the last of which the Adjudicator again attached a copy of the complaint, giving the Employer until 24 May failing which a determination to issue) that the Employer, by hand of the Managing Director, responded by letter dated 23rd May 2013 and received by the Adjudicator on the 24th May.
- 4.7 In its response the Employer is selective despite the fact that it was invited by the Adjudicator in the letter dated 03 October, 2012 to "In your response, please apply yourself to **all the allegations and submissions made in the complaint and reply to them fully.**" [Emphasis supplied]
- 4.8 Without the courtesy of an address on the occasioned delay, Employer "conveniently" responded to and referred to the Adjudicator's letter dated 12 April, 2013 in which the Adjudicator was responding to the Fund's email correspondence of the previous day (2013/04/11).
- 4.9 In its response the Employer summarises the events that, in its view, led to the Complainant's exit from employment in almost similar manner as laid down by the Principal Officer in a letter of the same date. It further confirms its approval of the Complainant's request for early retirement, and consequent forwarding of information to the fund administrators on 30 September 2002.
- 4.10 No response is addressed to the Complainant's allegation and /or submission that **he served the "entity" for 15 (fifteen) years**, which in his argument, if coupled with the fact of his ill-health, should entitle him to retirement as if he had reached 60 (sixty) years of age. No response is addressed to the Complainant's allegation and/or submission that he was denied "entry into the monthly pension category since I was **told that my service years were too small**". [Emphasis supplied]
- 4.11 Following probing from the Adjudicator, the Employer on 14 August 2013 submitted another response stating that the Complainant had disability insurance by virtue of his

employment. Also attached is an extract of what the "*policy on membership*" states in the following terms:

"4.1.1 Each disability income benefit in terms of this policy is subject to payment of the relevant premium.

4.1.2 The annual disability income benefit premium for each POLICY YEAR will be calculated on the POLICY ANNIVERSARY at the beginning of that year in accordance with Metropolitan's premium rates applicable under this policy at the time of calculation..."

(The extract is uninformative and selective to membership eligibility yet the Adjudicator requested a copy of the policy for full interrogation of relevant issues.)

- 4.12 The Employer admits that an application was made to the Benefits Consultants for payment of the Complainant's benefit stating that he exited employment due to illness. The Employer further advises that on consideration of what the Employer describes as "the cost benefit factor and inherent complications in claiming..." "the disability benefit was later disbanded by the Corporation."

5 COMPLAINANTS' REPLY TO 1ST AND 2ND RESPONDENTS' RESPONSES

- 5.1 The Complainant refutes the Fund's response dated 12 October 2012 and he states: that he never retired voluntarily but was pressurised to do so by the Employer, particularly following the medical report about his health. He refers to the Fund's conduct as unfair, accusing the Fund of failure to state correctly that he retired on medical grounds.
- 5.2 The Complainant further argued that he was not given options with regards to his manner of exit, that he was verbally informed that he was limited to a "*Withdrawal from Active-Service benefit*"; that he was actually instructed by the Employer's officials to apply for early retirement which would entitle him to receive a withdrawal benefit; that this was the only way he could receive his terminal benefits as he had not acquired the required service period qualifying him for other benefits. The Complainant states that he was never aware that he was entitled to a disability benefit nor did he ever have sight of the form that was faxed. He states that he was advised to surrender retirement and await outcome of the disability application. He states that it took over six months for Metropolitan Employee Benefits to consider. He asserts that his employer abandoned the disability option in favour of a withdrawal benefit despite the fact that

he had worked for it for almost fifteen years; that this amounted to a breach in its duties as employer and in terms of the law.

- 5.3 The Complainant further replied to the Employer questioning the authenticity of the claim that he requested payment of his benefits on medical grounds the day after dismissing him. The Complainant states he was strong armed into accepting a withdrawal benefit from the Fund; that the Employer's management lied to the Benefit Consultants about his number of years in service; maliciously abandoned his disability benefit option, that the purported fax was a fake; that it opted to obtain medical opinion from the single doctor thus ensuring his hasty exit; turned down doctor Rodgers Ndlangamandla's second letter pleading for tolerance, while efforts were made to assist the Complainant medically; failure to prove to the Commissioner of Taxes/Tax Directives through the Fund; and denied him his entitlement to receiving a monthly pension by citing that he had not acquired sufficient years of service.
- 5.4 Again, as happened with the response (s) to the complaint, in response to the Complainant's reply the Employer is highly selective in its responses, referring to its earlier response and totally ignores the much that the Complainant refuted in its response (s).
- 5.5 The Complainant thereafter asks that he be paid his due benefits.

6 DETERMINATION AND REASONS THEREOF

- 6.1 The questions for determination are twofold: the first relates to the quantum of benefits paid for retirement on medical grounds; and second, whether the Complainant was entitled under the rules to a pension or other benefit better than that which he received from the Fund in his peculiar circumstances, then the legality and justification of the decision to recommend that the Complainant be paid anything less than his disability benefits.

- 6.2 Rule 9 of the Fund's rules states the following:

"9.1 If at any time prior to his NORMAL RETIREMENT DATE a MEMBER becomes disabled, as a result of... illness, to the extent that he can no longer pursue his own or a similar occupation for which he would be qualified by his training and experience, the provisions of Rules 9.2 and 9.3 shall apply, as the case may be.

9.2 If the MEMBER is entitled to a disability income in terms of a separate group disability scheme provided by the employer, the following shall apply for as long as such disability income remains payable:

9.2.1 the MEMBER will remain a MEMBER of the fund, contributions by and on behalf of him will continue to be payable and he will remain entitled to rights and benefits in terms of the RULES;

9.2.2 the member's pensionable emoluments will, for the purposes of the rules, be the amount of the disability income that he receives from the said disability scheme;

9.2.3 the MEMBER will be deemed to have retired in terms of Rule 7.1.1 upon his attainment of his NORMAL RETIREMENT DATE; provided that the disability income has ceased at that date.

9.3 If the disability income referred to in Rule 9.2 ceases to be payable prior to the MEMBER'S NORMAL RETIREMENT DATE, one of the following shall apply, as the case may be:

9.3.1 the MEMBER shall remain a MEMBER of the FUND, subject to him returning to SERVICE; or

9.3.2 the MEMBER shall receive a withdrawal benefit in terms of Rule 10; or

9.3.4 benefits in terms of Rule 8.1 shall be payable, if applicable."

6.3 In the Employer's comment in 4.2.2 of its 14 August 2013 letter reference is made to the Complainant having disability insurance cover. The same letter further alludes to a "policy on membership," part 4 of which relates to payment of premiums. Unfortunately no further information is provided on this policy except for a letter dated 11 October 2005 where the Employer's Finance Director makes reference to a disability insurance cover and the fact that the Fund's members would not benefit from it despite premiums being paid to Metropolitan. Neither did the fund administrator give the Employer heads up about the status of the disability policy.

6.4 The Complainant is, in terms of Rule 9, entitled to receive a disability benefit payment. He therefore remains a member of the Fund and is entitled to have contributions made on his behalf and on reaching retirement age to receive his pension benefits.

Binding nature of rules

- 6.5 The fundamental rule is that fund rules are binding on the fund, members, the employer and any other stakeholders. This principle was expressed in the South African Supreme Court of Appeal judgment *Tek Corporation Provident Fund & others v Lorenz* (490/97) [1999] ZASCA 54; at paragraph 15 thus:

"The pension fund, the powers and duties of its trustees, and the rights and obligations of its members and the employer are governed by the rules of the fund, relevant legislation and the common law.... The rules of the fund spell out the circumstances in which the employer must contribute to the fund and how the quantum of the contribution is to be determined." [Emphasis supplied]

At paragraph 28 the court highlights the importance of fund rules thus:

"What the trustees may do with the fund's assets is set forth in the rules. If what they propose to do (or have been ordered to do) is not within the powers conferred upon them by the rules, they may not do it..." [Emphasis added]

- 6.6 The above quotations capture the essence of the supremacy of the rules of a retirement fund. The position made by the court in the decision is supported by the Income Tax Order, 1975 which states:

*"pension fund" means a pension, provident, ...fund established by ...Provided that the Commissioner may approve a fund subject to such limitations or conditions as he may determine, but shall not approve a fund unless, in respect of the year of assessment in question, he is satisfied that —
(c) the rules of the fund have been complied with, [Emphasis added]*

- 6.7 The above authorities, read together with the Fund's own Rule 12.8 titled "*Binding Power of Rules*" which states:

"The provisions of the RULES and any regulation made hereunder by the TRUSTEES shall be binding on the MEMBERS, the FUND and its officials, the PRINCIPAL EMPLOYER and any person who institutes a claim against the FUND" are very clear.

The 1st and 2nd Respondents could not deviate from the rules without incurring liability.

- 6.8 The Complainant rightly questions the veracity of the fax purportedly sent by the Employer to the fund administrator giving notice of his exit from employment on the grounds of illness a day after it resolved to terminate his employment. In any event, if the fax was sent, the Employer should have proceeded and followed through with it by ensuring that the Complainant received his disability benefits. However, since the Fund knew that for some reason or the other Metropolitan would not pay the benefit, it decided that he be recommended for early retirement. Rule 7.2 states the following:

"A MEMBER having at least 10 years service may retire from SERVICE after having attained the age of 50 years or if a MEMBER is dismissed from SERVICE subject to 3 months written notice to the TRUSTEES of his intention to retire. In all other instances such withdrawal or dismissal shall be regarded as early retirement only if the EMPLOYER consents thereto. Such MEMBER shall receive a PENSION vesting on the first day of the following month secured by his MEMBER'S SHARE at that date and payable in terms of Rule 7.4." [Emphasis added]

Rule 7.4 directs how the benefit is paid. The member has an option to receive up to a third of the lump sum benefit, with the balance used to pay for a pension which is payable to the member for his lifetime.

- 6.9 The Fund in its 12 October 2012 letter states that the Complainant was paid his contributions, employer's contributions plus interest. Later on the Fund changes tune stating that in fact the Complainant received only his contributions. Both the Respondents went on to try and avert all blame for the resultant repercussions to the fund administrator. The reality is due to some unknown reasons (the facts of which neither of the Respondents attempted to bring to light), the Complainant could not benefit from the disability benefit which he was entitled to. Thereafter the Respondents concocted a non-existent scenario about the Complainant not having the requisite employment period to qualify for early retirement, creating the misconception that he had resigned, consequently attracting exorbitant taxation.
- 6.10 The Respondents' conduct was unjust and unconscionable. The Complainant therefore is entitled to be put in the place which he would have been in had the Respondents not acted unlawfully, which is to receive his disability benefits in terms of Rule 9, failing which to receive all the benefits that would fall due to him if he retired in terms of Rule 7.1 of the Fund rules.
- 6.11 With regards to the deductions, such as that for the car loan extended to the Complainant on his pension benefits, these were not unlawful as the Retirement Funds Act, 2005 had not been promulgated at that time. Since the Act came into effect it has been acceptable in terms of section 19(4) of the Act for a member to obtain loans, but not for purposes of purchasing a motor vehicle.

Finding

1. The Employer failed to fulfil its duties in terms of fund Rule 9 to the prejudice of the Complainant.
2. The Fund was wrong to compute pension benefits of the Complainant on the basis of a resignation instead of disability benefit.
3. The breach of fund rules by the Respondents as stated in paragraphs 1 and 2 of this section give rise to liability by the said Respondents to compensate the Complainant for any reduction in the pension benefit pay-out that he received from the 1st Respondent.
4. The Respondents are jointly and severally liable to compensate the Complainant in the amount equal to the difference between what was paid to him and what he would have received had his benefits been correctly computed by correct application of the relevant rules, the one paying the other to be absolved.

Order

- a) The Fund is ordered to recalculate the pension benefit entitlement of the Complainant in accordance with the rules of the Fund, in particular Rule 9, otherwise in accordance with Rule 7.1 of the Fund Rules.
- b) The Respondents are jointly and severally ordered to pay to the Complainant any difference between the result of the re-calculated benefit and the amount of benefit already paid, the one paying the other to be absolved.
- c) The amount to be paid per paragraph b) shall be paid with interest thereon at the rate equal to interest earned on the investments of the Fund over the relevant period. If information on such interest is not available or is not readily available, then at the rate of nine per cent (9%) per annum. The interest shall run from the date when the Complainant's pension was paid in 2002 to the date of payment per this order.

THUS DONE AT MBABANE ON THIS 05 DAY OF AUGUST 2016 AND CERTIFIED A TRUE AND CORRECT DETERMINATION OF THE OMBUDSMAN OF FINANCIAL SERVICES IN TERMS OF SECTION 75(5) OF THE FINANCIAL SERVICES REGULATORY AUTHORITY ACT OF 2010.

OMBUDSMAN OF FINANCIAL SERVICES