



In the matter between:

**THE COMPLAINANT**

and

**FUND ADMINISTRATOR**

**1<sup>st</sup> Respondent**

**PENSION FUND**

**2<sup>nd</sup> Respondent**

**EMPLOYER**

**3<sup>rd</sup> Respondent**

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**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 FSRA ACT)**

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1. **INTRODUCTION**

1.1. This complaint relates to withdrawal benefits of the Complainant. The Complainant was a member of the 2<sup>nd</sup> Respondent Pension Fund ("the Fund"), due to his employment with the 3<sup>rd</sup> Respondent Employer ("the Employer").

2. **THE COMPLAINT**

2.1. The Complainant was a member of the Fund with effect from 01 March 2004, until he resigned in November 2014. Upon his resignation, he chose to have his withdrawal benefits paid to him directly.

2.2. In August 2017, the Complainant brought his complaint to the Ombudsman in order to get clarity as to whether all amounts due to him were paid to him. In particular, the Complainant seeks to know why he was not paid the bonus interest by the Fund in August 2016.

3. **RESPONSE/ DEFENCE**

**1<sup>st</sup> Respondent Fund Administrator**

3.1.1. The Fund Administrator made its first submission in response to the complaint on 22 November 2017.

3.1.2. In respect to the bonus interest allocation, the Fund Administrator referred to the Rules of the Fund.

“Rule 2.17

**FUND INTEREST:** The return on assets determined by the **TRUSTEES** at the **FINANCIAL YEAR-END**, in consultation with the **ACTUARY**, to be added to the **EMPLOYER’S PORTION** and the **MEMBERS’ PORTION** for the preceding financial period.

The **TRUSTEES** will determine an interim interest rate, from time to time, based on the expected financial performance of the assets of the **FUND** and in consultation with the **ACTUARY**, to be used for the calculation of benefits falling due to **MEMBERS** before the next rate of **FUND INTEREST** is determined. ”

3.1.3. The Fund Administrator explains that in terms of the Fund Rules, the actuarial valuation of the Fund took place every 3 (three) years. The last actuarial valuation that took place was in June 2015. After the valuation took place, the Trustees resolved how they would treat the members who had exited the Fund.

3.1.4. The Resolution made on 26 July 2016 was as follows:

- “a) A final bonus of 41.5558% be granted to active Member’s Shares of Fund as at 30<sup>th</sup> June 2015;
- b) An effective interest rate of 6% per annum be applied from the 1<sup>st</sup> July 2015;
- c) No top-up bonuses to be granted to Members who exited the Fund prior the 30<sup>th</sup> June 2015;
- d) Top-up bonuses be paid to Members who exited the Fund after 30<sup>th</sup> June 2015; ”

3.1.5. The Fund Administrator further explains that because the Complainant exited in November 2014, which meant that he would not receive the top-up bonus in accordance with paragraph c) of the Resolution. The Complainant was, however, afforded and apportioned a bonus at the interim 6% rate in terms of the Resolution made after the previous valuation period. A breakdown of the payments was also submitted by the Fund Administrator.

3.1.6. In a further submission, the Fund Administrator submitted a list of all the people who received bonuses after the 2012 and 2015 evaluations.

3.1.7. The Fund Administrator avers that the Complainant was paid in accordance with the Rules and that the complaint should be dismissed.

### **2<sup>nd</sup> Respondent Fund**

3.2. The Fund submitted confirmation in writing that their response was the same as that of the 1<sup>st</sup> Respondent.

### **3<sup>rd</sup> Respondent Employer**

3.3. The Employer firstly advised that it aligns itself with the position set out by the Fund Administrator. In addition to information provided by the Fund, the Employer further explained the following: -

3.3.1. The payments were made in accordance with Rule 8 and Rules 2.17.

3.3.2. Bonus payments after the 2012 valuation were paid out to active members in August 2016. The 2015 valuation bonus was also paid out in August 2016 and this may have been a cause of confusion amongst current and former members of the Fund.

3.4. The Employer holds that no further monies are owed to the Complainant.

## **4. DETERMINATION AND THE REASONS THEREOF**

4.1. It is the role of the Ombudsman to determine whether the Fund acted in accordance with the Rules of the Fund and the relevant laws of Swaziland.

### **Rules of the Fund**

4.2. In terms of Section 13(1) of the Retirement Funds Act, 2005 (the RFA), a fund is governed by a set of rules which should comply with the prescribed requirements in the Regulations. Fund rules provide guidelines to the Board of Trustees when executing its duties on behalf of the fund and its entire membership. Section 9 (g) of the RFA provides that a fund is managed in accordance with its registered Rules.

4.3. The Trustees' decisions and powers are not unfettered as they are not only bound by the Rules of the Fund but also the fiduciary duties included in Section 10 of the RFA. Section 10 states as follows:

"10. The management board shall ensure that the interest of members is protected at all times by —

- (a) acting with care, diligence and good faith;
- (b) avoiding conflict of interest; and
- (c) acting impartially."

4.4. Under the RFA, all licensed funds must appoint an actuary who's responsible for "valuing the fund's liabilities and the fund's assets for actuarial purposes according to generally accepted actuarial practice and producing a report thereon." The conducting of actuarial valuations forms part of the obligations placed on licensed funds under Section 23 of the RFA Section 23 states that:

*"Actuarial valuations.*

23. (1) After the commencement of this Act the management board shall ensure that an actuarial valuation of the fund is carried out by the fund's appointed valuator as at a date not later than the date of the fund's third financial year end since the commencement of this Act, and thereafter the management board shall ensure that an actuarial valuation of the fund is carried out at least once every three years."

4.5. It appears that the legislature considered the costs and length of time required to do a valuation annually and provided the Board a discretion as to the frequency that the valuations would take place. In the present case, the Board of the Fund complied with the provisions of Section 23 by completing the valuation every 3 (three) years.

4.6. In order to address the reality of members existing between the valuation years, the Fund Rules make provision for the Board of Trustees to determine an interim rate. On the date of the Complainant's exit of the Fund in November 2014, the interim rate had been set at 6%. It is only until the 2015 valuation was it decided that a 41.558% bonus would be granted to the current members.

4.7. One must firstly consider the purpose of the interim rate. It firstly affords exiting members a bonus allocation where a valuation does not occur in the financial year of their exit. The implication of the interim rate is that should the bonus approved before the valuation be lower than the interim rate, the members who exited who still retain the bonus amount calculated at the higher interest rate. Inversely, should a member exit the Fund at a lower

bonus interim rate, he will not be afforded the benefit of the actual interest distributed after the valuation.

4.8. The bonus interest of 41.558% was approved by way of a Trustee resolution dated 26 July 2016. This was after the results of the valuation of 30 June 2015. The right to such interest is further stated to accrue to the current members of the Fund after 30 June 2015. At both dates, the Complainant was no longer a member of the Fund. The result is that the Complainant requests a retrospective affording of the right to interest.

4.9. As stated above the valuation of fund assets less frequently than yearly, is not unusual in industry. The allocation of bonus interest varies from the performance of each fund and is largely dependent on the discretion of the Board of Trustees of each different fund. Such a discretion is inherent in fiduciary positions such as Trustees. In the present case, the Fund Rules specifically refer to the discretion afforded to a Board of Trustees.

“Rule 12.7

The TRUSTEES shall be entitled, at their discretion, to do anything not inconsistent with the **RULES**, income tax legislation and any other relevant legislation or rulings laid down by the **REGISTRAR** that, in their opinion, is for the benefit or protection of **MEMBERS** and beneficiaries; provided that any decision taken by the **TRUSTEES** in terms of this Rule in general, or in terms of any other Rule in particular, which, in the opinion of the **ACTUARY** would affect the determination of the **EMPLOYER'S** contribution, shall only be made with the prior approval of the **PRINCIPAL EMPLOYER.**”

4.10. The Rule provides that a discretion lies with the Board of Trustees who are in the best position to properly and fully evaluate the wide range of competing interests involved in the allocation of fund interest. In addition to the discretion, the Fund also appears to have been consistent in their approach in resolutions taken after 2012 and 2015 valuations.

4.11. As stated above, the Rules of the Fund are binding on its members, employer and officers and any person who happens to have a claim on the fund. They amount to the fund's constitution (*Abrahamse v Connock's Pension Fund 1963 (2) SA 76 (W) at 78 D-E*). The Fund Rules are also subject to the provisions of the RFA, which states at Section 13 (3) that “subject to the provisions of this Act the rules of a retirement fund shall be binding on the

fund, and its members, employer...". The Fund has shown that it complied not only with the Rules, but also with the RFA.

### **Findings**

The exercise by the Board of its inherent discretion on the Fund interest following the valuation of the Fund as at 30 June 2015 was not unfair or unreasonable. The decision was properly and rationally arrived at by the Board and the Ombudsman finds no reason to interfere with that decision.

### **Order**

The Complaint is not Upheld.

**THUS DONE AT MBABANE ON THIS 04 DAY OF MAY 2018 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.**

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**THE OMBUDSMAN OF FINANCIAL SERVICES**