

PENSION LAWYERS' ASSOCIATION, CAPE TOWN

11 FEBRUARY 2011

I was appointed as Acting Pension Funds Adjudicator on 15 October 2010, when it became clear that Mr Charles Pillai was seriously ill.

The previous year I assumed duty in the same position on 12 October.

This time around has been very different. Due to the listing of the OPFA as a separate entity in terms of section 3A of the PFMA, everything has to be done in a much more structured fashion, leading to a less flexible work environment. A myriad of policy documents had to be prepared. Some are still in progress. A Hay Group evaluation was done of the structure of the OPFA. Salary increases and bonus payments can no longer be allocated to all at the same percentage; there has to be differentiation in a prescribed manner. The formation of a Management Committee, as required by the PFMA, has been approved. The OPFA now employs more than 50 people, necessitating an Employment Equity Plan.

Mr Pillai was instrumental in implementing a substantial number of policies and structures in the OPFA. It is a pity that he did not have the chance to see his changes through. He was a wise person, with lots of experience. I miss him.

But let's get back to our point of focus: pension funds law.

In the first eight weeks in office, I signed off just over 400 determinations. The tempo has now slowed down a bit, but I would like to give you some idea of the average complaints determined by the PFA, so I summarised some of the determinations I have signed off during the past week:

I have grouped the determinations according to the type of complaint.

Unrealistic expectations

1. 39938/2010 Mathola

Complainant worked for 3 years in the Metal Industries.

Withdrawal benefit of R 7 715 paid.

Expected R 28 870 plus an additional R500.

Complainant contributed R 5 032.

Complaint dismissed

2. 36544/2009 Lethoba

Sister, nominee of late brother, having expectation to share in the death benefit with the deceased's minor child.

Dismissed

3. 33791/2009 Xiniwe

Complainant was retrenched in 1992 and claims that he never received his withdrawal benefit. A benefit of R2 783 was paid, but the administrator is unable to supply any further details. In September 2009 a surplus apportionment amount of R57.17 was paid.

Time-barred and dismissed.

4. 31442/2008 Dookoo

Discrepancy between transfer values and amount of withdrawal benefit. Complainant added the subtotals in a breakdown of benefits

with the total and was expecting to receive double what he had received.

Dismissed

5. 9154/2006 Faro

Benefit statement shows benefit summary for different types of events such as retirement, death and withdrawal. Withdrawal benefit of R1 946 incorrect? Misunderstood benefit statement.

Dismissed

Record keeping by funds

6. 12648/2007 Mathibe

Dispute whether complainant joined fund in 1992 or 1994.

Fund ordered to recalculate withdrawal benefit from 1992.

Relief

Death and withdrawal benefits

7. 8183/2006 Ras

7.1 Failure to pay death benefit where member dies four months after withdrawal.

Dismissed

7.2 Withdrawal benefit distributed in terms of section 37C instead of being paid into the estate.

Fund ordered to pay withdrawal benefit into estate.

RA Funds and causal event charges

8. 6808/2006 Nichol

Causal event charge on RA policy– within limits.

Dismissed.

9. 35084/2009 Siepman

Causal event charge that would have been charged had the complainant elected to continue with his proposed section 14 transfer from one RA fund to another.

Dismissed.

Labour issues

10. 24402/2008 Motsage

Withdrawal benefit or more generous retrenchment benefit?
Complainant insists that he was retrenched, notice to fund states it was a resignation. Fund has to rely on information given by employer. Labour issue – wrong forum.

Dismissed

Disability claims

11. 11135/2006 Moeng

11.1 Fund rules provide employer must submit disability claim within prescribed period.

11.2 Employer failed to do so, ordered to compensate employee with full amount of disability benefit (twice annual salary).

12. 34925/2009 Herdien

Repudiation of claim for disability benefit.

Complainant declared medically unfit for work on 13 May 2008. The last day on which he was able to perform his duties was 29 April 2005. He was on sick leave from 28 September 2006. The notification to the fund and the insurer was done after 13 May 2008, more than six months after the complainant became unable to perform his duties.

Dismissed.

What we see from this sample of determinations may be summarised as follows:

1. Often members of pension funds (and their dependants) have unrealistic expectations of the amount they are due to receive, especially upon withdrawal. This highlights the need for continuous good and clear communication with members.

This problem is highlighted where say a medium sized employer feels the need to provide for retirement benefits for employees, often after the persons concerned already have a number of years' service before the retirement plan is initiated. The complaint is then: I worked for my employer for 27 years. The amount I received is too little. And, sadly, it often is insufficient.

When an employer decides to provide for retirement benefits for the first time, a lot of planning, thought and good communication needs to go into the process to ensure that the good intentions do not create a battle ground instead.

2. Another source of disappointment, especially where a member withdraws after a relatively short period of time, is that “I only received my own contributions and not those of my employer.” The reason is that the employer portion is debited with administration costs and the cost of risk benefits, with only a small percentage being added to fund credit. This needs to be communicated clearly, especially the costs of risk benefits.

3. Record keeping by funds

Despite what the legal requirements would be for the retention of documents, it is often amazing to see how good the recordkeeping of some of the top administrators is. Where a complaint is that no withdrawal benefit was paid in say 1992, the complaint may be time-barred, but it also helps to give closure to the complainant where an administrator can still, after all these years, produce an image of the actual cheque, or a record of the EFT transaction.

4. Disability benefits

Claims for disability benefits or at least notice of a possible claim, must generally, in terms of the insurance policy entered into between the fund and its insurer, be lodged within three or six months after the event giving rise to the claim. Employers often feel sorry for their employees and try to retain them despite their incapacity, so that when the moment of truth arrives that the employee would not be able to assume his duties again, it could be too late to lodge a claim for disability benefits. Where the fund rules state that the employer has the duty to lodge such a claim, the employer could be held personally liable for the payment of disability benefits, as in the matter of *Moeng* referred to above.

This is only a small sample of the complaints dealt with at the OPFA.

On a broader scale, there is a fund that still is a major problem, despite remedial action being taken by the Registrar of Pension Funds and a change of administrators. Those problems will have to be addressed at a macro level rather our piecemeal contribution at present, trying to kill small fires instead of addressing the structural problems.

What I have noticed is that few complainants are represented by attorneys. We also try to discourage the lodging of complaints by third parties who are not practicing attorneys, such as unions or employee representatives or financial brokers, purporting to act on behalf of often unnamed groups of persons, and with no power of attorney or other indication that the *complainants* are aware that a complaint has been lodged on their behalf.

Our main challenge remains the turnaround time of complaints, from the moment a complaint reaches the OPFA until such time as the file is closed. We're working on it.