DISCRIMINATION AND PENSION FUNDS

Seven years ago the world of pension fund administration in South Africa was essentially a closed shop between employers, who established the funds, appointed the trustees and attended to their administration, and the actuaries who advised them. The prevailing stance was that the only interest that members and pensioners had in the fund was to receive that for which the rules provided. The origin of pension funds lay in a sense of benevolent paternalism on the part of employers and the pension fund was the last bastion of that attitude.

When the winds of change came they blew with a vengeance. Firstly there

were the 1996 amendments to the Act that restructured the management boards of pension funds ensuring that the employees who were the beneficiaries of the fund had an equal stake with the employer in its administration. The delays in establishing management boards in accordance with the amendments, with many funds seeking an extension of the deadline of the 15th December 1998, indicated the shock impact of the change brought about by these amendments. Even before the changes had been implemented by most funds a further blow to the established regime was struck by the judgment in the court below in the *Tek* case. Although eventually overturned on appeal the case and that judgment marked a profound shift in attitude towards pension funds. Rearguard actions were fought but benevolent paternalism had suffered its death knell. The *coup de grace* was delivered by the surplus distribution legislation that came into effect in December 2001.

There can be little doubt that these events wrought profound changes in the administration of pension funds. On the plus side the beneficiaries of those funds now have a real say in what is, after all, their principal hope for being able to live decently and with dignity in their retirement years. No longer are pensions a matter of employer benevolence. Instead they are recognised as being what employees have always seen them as, namely a form of deferred remuneration. On the negative side the changes have spawned litigation, pension fund lawyers and even a Pension Lawyers' Association.

It seems churlish against that background to suggest that while the pension war may be over the minefields have not yet been fully cleared. Unfortunately, however, that is

true. Probably because the wars were fought against the background of pension funds having accumulated vast surpluses so that the battlelines were drawn on either side of that potentially juicy bone, other areas of concern have received little attention. Of these the constitutional commitment to equality and the outlawing of discrimination has perhaps the greatest potential to cause headaches in the future for those responsible for administering pension funds.

The origin of this lies in section 9 of the Constitution and its provision that:

> "1. Everyone is equal before the law and has the right to equal protection of the law.
> 2. Equality includes the full and equal enjoyment of all rights and freedoms."

Not surprisingly, in view of the former regime's policy of institutionalised inequality, section 9(3) focuses on the State and provide that it:

> "....may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

It is a truism of constitutional law that there is no more far-reaching expression of the grounds of potential unfair discrimination in any constitutional instrument anywhere in the world.

All this becomes relevant to the administrators of pension funds because in

terms of section 9(4) no person may unfairly discriminate directly or indirectly against anyone on one or more of the grounds I have mentioned. There is provision for national legislation to be enacted to prevent or prohibit unfair discrimination and such legislation exists in the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. The object of that Act is to give effect to the letter and spirit of the Constitution and to promote the equal enjoyment of all rights and freedoms by every person, the promotion of equality and the prevention of unfair discrimination and protection of human dignity. The Act binds not only the State but all persons and contains a general statement in section 6 that:

> "Neither the State nor any person may unfairly discriminate against any person".

That is followed by express prohibitions of unfair discrimination on the ground of race, gender and disability.

It is not my purpose this morning to expound in any detail these legal provisions. Their broad purport must be apparent to anyone who is conscious of the profound political and social changes that have taken place in South Africa in the past nearly ten years. I would make only two general comments. The first is that what is prohibited is not differentiation but unfair discrimination. It is not every difference between people that will support a claim of unfair discrimination. Leaving aside the possibility that categories other than those enumerated in section 9(3) of the Constitution may emerge - although none immediately spring to mind - it is only differentiation on one or other of the enumerated

grounds that need concern us. Such differentiation is presumed to be unfair but that presumption can be rebutted. What is necessary to rebut it is a justification for the differentiation based on demonstrable factual grounds. The moral of the story is that if you are going to differentiate you must be prepared to defend that decision and to defend it on a basis of provable facts. That is the only way of showing that differentiation is not unfair discrimination.

The foundation for this approach to discrimination is to be found in both logic and justice. As Professor Ellis has written:

"Logic dictates that only relevant considerations be permissible

> in rational decision-making. Justice adds to this the principle that, especially when arriving at decisions with an important bearing on a person's life, irrelevant matters over which that person has no control should play no part.[1]"

The second important legal issue is that discrimination can be both direct and indirect. Janet Kentridge describes these two concepts in the following terms:

> "Direct discrimination occurs where a person is disadvantaged simply on the ground of his or her race, sex, ethnicity, religion, or whatever the distinguishing feature(s) may be, or on the basis of some characteristic(s) specific to members of that group. Neither motive nor intention is relevant to the question of whether the detrimental treatment constitutes direct discrimination. What is relevant is the application of, for

[1] Ellis, EC Sex Equality Law, 2nd Ed, 321

example, a race - or gender based - criterion....
Indirect discrimination occurs when policies are applied which appear to be neutral, but which adversely affect a dispproportionate number of a certain group. For example, a pension scheme may be open to full-time workers only. On its face there is nothing sexually discriminatory about a distinction between full - and part -time workers. It is frequently the case, however, that a disproportionate number of part-time workers are women who are attempting to combine formal employment with child care. Hence, a disproportionate number of women are eligible for pension benefits and these women are therefore victims of indirect discrimination. Like direct discrimination, indirect discrimination may be either intentional or unintentional. The facially neutral criterion may be adopted with the intention of screening out members of a particular group; or it may be adopted in good faith and nevertheless have

a disproportionate adverse affect on a particular group."[2]

Not only is intention irrelevant in considering whether discrimination has occurred, but one must also avoid the trap (into which the European Court of Justice originally fell) of linking direct discrimination with overt conduct and indirect discrimination with some form of disguise or concealment. As Professor Ellis points out:

> "...in practice, it is more often direct discrimination which is disguised by its perpetrator, whilst indirect discrimination is frequently quite overt. To take an example a employer will rarely openly admit to preferring to appoint a man, even if this is in fact the reality of the position. Conversely, where an employer is guilty of indirect discrimination, say through the

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[2]Chaskalson et al, Constitutional Law of South Africa, 14-24B to 14-25; Ellis, *supra,* 109-124.

> imposition of an unnecessary qualification for a particular job, the insistence on the qualification will often be quite overt."[3]

The example given by Janet Kentridge serves as a useful introduction to the first area of potential discrimination claims in relation to pension funds, namely access to membership of the fund itself. Of course, in the past, racially discriminatory exclusion from membership of a pension fund was widespread. Sometimes it was blatant and express. More often it was indirect discrimination based on job categorisation, such as the distinction between weekly paid and monthly paid staff. Where the staff complement was racially stratified, as was usually the case, the effect was that people were excluded from membership

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[3] Ellis, *supra,* 111.

on the grounds of race. Perhaps the most extreme example was the government which operated both a conventional pension fund and what it charmingly called a Temporary Employees Pension Fund. The temporary employees were of course nothing of the sort but government racial policies and the chimera of independent homelands resulted in virtually all black members of the civil service being categorised as temporary employees.

Those days are I trust by now past. Indeed I suspect that very few pension funds would now have provisions that could attract the charge of direct discrimination insofar as membership is concerned. There may, however, be provisions that give rise to indirect discrimination of the type identified by Janet Kentridge. Certainly provisions that exclude part-time workers from access to pension funds will be scrutinised to see if they conceal

gender discrimination. Many employers nowadays, perhaps predominantly in the retail trade although I am aware of it in other institutions, employ staff on what is described as a temporary basis, but which in reality approximates far more to permanent, albeit intermittent, employment. As with part-time work the people who take these jobs are predominantly women. Again the spectre of indirect discrimination on the grounds of gender raises its head.

Assuming that access to membership of a pension fund is permitted on a non-discriminatory basis that does not resolve the question of possible discrimination. Three other areas fall to be mentioned. They are the area of pension fund contributions, the area of pension fund benefits and the identification of pension fund beneficiaries. I will touch on each and seek to highlight the type of problem that can arise by way of example.

Let me start with pension fund contributions. With the modern trend towards defined contribution funds these are generally fixed on the part of both the employer and members as a percentage of remuneration. That means that the more a person earns the more their employer contributes to the pension fund on their behalf. Bearing in mind that, affirmative action notwithstanding, the vast majority of senior and managerial positions in South African business are still held by white males, that raises the intriguing possibility of a claim based on indirect discrimination being advanced on the grounds that women and blacks fill the majority of subordinate positions. I say "intriguing possibility" deliberately because I do not think that such a contention would succeed but it does highlight the need to be aware of how easy it is to identify a situation as being one of indirect discrimination.

Of more concern under this heading would be provisions in the rules of a pension fund that provided additional benefits if additional contributions are made. I suspect that this can only arise in a defined benefit fund as, in a defined contribution fund the underlying premise is that what is put in is what one gets out. However, if funds make additional benefits available to people, such as permitting them to buy back service or benefits by way of insurance cover I would counsel caution. Whilst on the face of it such benefits are available to all it is by and large only the better paid and therefore by and large the white male members of staff who are in a position to take advantage of them. Any special benefit needs to be scrutinised from the perspective of potential indirect discrimination.

Whilst I have been talking about discrimination in regard to contributions there may also be discrimination in regard to benefits. Let us take by way of example the treatment of a woman who is employed by a company for eight years and then resigns in order to have a family. Five years later when her children have started at pre-primary school she returns to work for the same employer. The treatment of her pension benefits raises a number of questions that can potentially carry with them the spectre of a discrimination claim. The most obvious is whether she re-joins the pension fund as a new employee or whether she can secure the benefit of her past service. Her situation is different from a man who has gone to work for someone else for five years or has spent the time roaming the world. The woman can properly be seen as resuming her career. It seems unfair that she should be treated as if

her pension fund was a game of snakes and ladders and her decision to have children was a snake that took her back to square one. The example becomes particularly ironic if one assumes that when she resigned her job was taken on promotion by a young man who has been able in the intervening five years to move through the ranks of administration and lower management to middle management. A situation where the same square is a snake for one and a ladder for the other smacks of unfair discrimination.

What will I think be apparent from this example is the close connection between the absence of discrimination in employment and the absence of discrimination in the administration of a pension fund. In relation to my same hypothetical female employee the question will arise whether she is credited with eight years of seniority or starts from

scratch. That may be highly relevant if two years later the company engages in retrenchments when the LIFO principle is applied to select those who are to be retrenched. It may also be relevant from the point of view of promotions, seniority, grade etc.

This close link may also mean that discrimination in employment is identified by the impact which a particular employment practice has on a person's pension entitlement. Take, for example, a policy that female employees retire at sixty and male employees at sixty-three or sixty-five. In those circumstances the male employee will hae five additional years in which to accrue a pension or at the least may be able to accrue a greater pension than female employees. That could be discriminatory and probably is. If the rules of the pension fund are adjusted so that the female employee can acquire a full pension retiring at sixty the

male employees may complain that they are discriminated against on the grounds of gender. Challenges of this character have been encountered in England and Europe. They have almost always been upheld. Curiously enough, and this is a point worth making, the end result has not usually been to bring an advantage to those complaining. Instead what has tended to happen is that the age related benefit is withdrawn or the retirement policy is adjusted so that the women have to work longer. A complaint of discrimination even if successful does not necessarily bring with it any benefit.

The last area on which I wish to touch this morning is the area of the identity of beneficiaries. Most pension funds provide for a person's dependants to enjoy the benefits of a pension after the member or pensioner dies. In other jurisdictions this has given rise to

claims by two classes of people. The one that has attracted the most publicity, although statistically probably less significant, is the claim by persons living in same-sex relationships to be treated as a dependant of their partner. Such a claim has already been successfully advanced in South Africa by a judge in relation to her partner and the benefits payable in terms of the Judges Remuneration and Conditions of Employment Act, 88 of 1989.[4]

The other possible area for complaint would be the case of a permanent relationship on a heterosexual basis where the parties had elected not to get married. I know that in the case of Judge Satchwell the Constitutional Court expressly said that:

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[4] *Satchwell v President of the Republic of South Africa and another* 2002 (9) BCLR 986 (CC).

> "Same-sex partners cannot be lumped together with unmarried heterosexual partners without further ado. The latter have chosen to stay as cohabiting partners for a variety of reasons, which are unnecessary to traverse here, without marrying, although generally there is no legal obstacle to their doing so. The former cannot enter into a valid marriage....It is quite inappropriate in these confirmation proceedings for this Court to decide on the rights of unmarried heterosexual life partners which raise quite different legal and factual issues."

However, one cannot avoid the fact that discrimination on the grounds of marital status is one of the prohibited grounds expressly mentioned in the Constitution. Clearly there is considerable potential for a complaint of discrimination to be made on the grounds that persons who are married enjoy benefits that are not available to people who choose, for

whatever reason, not to marry whilst enjoying a relationship that is otherwise indistinguishable from marriage. It is not for me to say whether such a claim would succeed, although there is a considerable body of case law in Canada that suggests that it might well do so.[5]

I trust that what I have said has not terrified you so much that you resolve to resign as trustee or actuary of a pension fund or abandon the field of pension law for the more mundane area of contractual dispute or administrative review. My aim has been to alert you

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[5] The leading case is *Miron v Trudel* (1995) 29 CRR 189 (SCC).

to the fact that the administration of pension funds is an area where there is considerable scope for claims to be advanced on the grounds of discrimination. All those engaged in the field should be alert to this possibility and in taking decision or giving advice they should be discriminating not discriminatory.

THANK YOU