



2010 ANNUAL PENSION LAWYERS ASSOCIATION CONFERENCE

The theme for this year's conference was "Goals for 2010 & beyond". The presentations of the various speakers covered quite a wide spectrum of retirement fund-related topics.

Herewith a summary of some of the noteworthy remarks made by some of the speakers:

REINSTATEMENT OF AN EMPLOYEE (*Tashia Jithoo from Hunter Law*)

Section 193 of the Labour Relation Act (the LRA)

Section 193 of the LRA provides that in a case of unfair dismissal from employment, an employee must either be reinstated or re-employed, or a court may order that such employee receives compensation not exceeding 12 months' salary.

Reinstatement order versus re-employment order

Reinstatement orders can be effective from the date of the employee's dismissal, or from a date after the dismissal, or from the date of the court or arbitrator's order. There is thus no limit on the reinstatement order's retrospectivity because the employee is being paid back-pay and not compensation as provided for in section 193 of the LRA.

The legal effect of a reinstatement order is that the employee's previous employment contract is restored on the same terms and conditions of employment. All the employment rights accrued under the employee's previous contract are preserved (eg. leave, seniority, years of service). The employee is also entitled to receive back-pay due from the date of his reinstatement. If an employee is reinstated from a date after his dismissal date, the legal effect will remain the same except for the fact that no service and benefits will accrue to such employee for the period between the employee's dismissal date and his reinstatement date.

The legal effect of a re-employment order is that a new employment contract is concluded so there is a break in service for the employee. Employment rights accrued in terms of the employee's previous employment period are forfeited. The employee is entitled to receive back-pay from the employee's date of re-employment. The employee's terms and conditions may be changed in terms of the new employment contract.



Implications for a retirement fund

There is an assumption (based on various case law in this regard) that if an employee is reinstated, such employee's dismissal is legally regarded never to have occurred. Thus, the employer and all other relevant third parties (for example, the retirement fund) must simply undo all the consequences of the dismissal regardless of how long ago it happened or the regulatory regime that governs them.

The speaker also referred to an alternate approach, namely that a finding of unfairness does not wipe out



We know that change is rarely a smooth process. It can be intimidating and chaotic. In fact, transition has the potential to either launch an organisation to the next level, or dump it into the deepest pit. That's why wise leaders look out for change, then manage it, and lead their people through it.

John Maxwell

INSIDE THIS ISSUE

General

page **4**

Question & Answer

page **4**

GENERAL

➡ the fact of a dismissal – it simply declares it unlawful. The result of this approach would be regulated by section 193 of the LRA which offers different ways to address consequences of the dismissal (as set out above).

For the purposes of this summary, we will only focus on the implications for a retirement fund if the dismissal is nullified.

Recovery and future benefit liability

The fund would have to recover any withdrawal benefit that was paid to the member, together with interest accrued on such benefit. This recovery claim will be based on an unjustified enrichment claim. It is usually a costly and time-consuming exercise to get such money back.

To provide for and regulate the scenario where a member is unable to refund the fund or the fund is unable to recover the withdrawal benefit, the speaker suggested the following three options available to a fund:

- a. Implement a fund rule providing that if a member is challenging the fairness of a dismissal, the fund will withhold such member's withdrawal benefit until the outcome of his dismissal challenge has been finally determined. But will such rule be fair towards the member in that the member is now forced to decide whether he wants to take the chance of getting his job back or receive compensation OR whether he wants to receive his withdrawal benefit to sustain himself and his family whilst he is unemployed?
- b. Conclude an agreement between the employer, the fund and the employee at the time of the dismissal stipulating that his reinstatement is conditional upon him paying back the withdrawal benefit. This option will save the fund the time and cost spent on litigation but it could put the employee in a difficult financial position if he cannot pay the benefit back.
- c. Pay a portion of the withdrawal benefit and thus regard it as an advance payment to the member. But this option could be regarded as a way to allow a set-off of a benefit (and is thus contrary to section 37A of the Pension Funds Act). SARS could also object to this option, as one needs to determine whether the tax adjustment must be made later when the full withdrawal benefit is paid to the member.

Where the member is reinstated and the withdrawal benefit is not repaid in full to the fund, the best solution according to the speaker would be if the provisions of section 37D of the Pension Funds Act are amended to allow a fund to deduct the amount equal to the withdrawal

benefit paid to the member from his benefit in the fund.

Fund Membership

Membership of the fund and the entitlement to the accrual of benefits are restored automatically as if the dismissal never occurred. The reinstated member is not a new member for purposes of insured benefits and thus the medical disclosure requirements do not apply.

Contributions

Arrear contributions will automatically be due from the date of reinstatement even if it is not specified as such in the reinstatement order because contributions form part of remuneration and all back-pay is contractually payable. With regards to the question whether late payment interest is due on these arrear contributions, the speaker referred to the legal argument that a purposive interpretation of the relevant legislation requires that late payment interest is only payable from the date that the back-pay is due (that is, the date of the court order) because no earlier obligation exists on the employer to pay the contributions.

Retrospective Benefits

If the dismissal is deemed to be null and void, a member could become entitled to benefits that accrue in the period between the date of the employee's reinstatement and the date of the court order. Although the "dismissed" employee was not a member during this period, the retrospective reinstatement of the employee as a member could create retrospective benefit entitlements for the member or his beneficiaries, for example, if the dismissed employee became disabled in this period, or passed away. This could create a problem where the fund offers insured risk benefits and the fund's liability for payment thereof is limited to the amount that the insurer pays. Despite the fact that the member's membership was reinstated with retrospective effect, the non-payment of premiums in respect of such member during this period may cause the risk cover to lapse. Also, prescribed waiting periods may already have expired at the end of this period.

The speaker suggested that a fund should try to negotiate upfront with insurers that in these special circumstances, as long as arrear premiums are brought up to date, the member will be covered for all the risk benefits provided by the fund, and also, that waiting periods be waived or adjusted.

MEMBER'S ENTITLEMENT TO LATE PAYMENT INTEREST

(Sandile Khumalo from Hunter Law)

Late payment interest payable by an employer to a fund



RECENT PENSION FUNDS ADJUDICATOR CASES

as a result of the employer's failure to pay contributions in full or on time, constitutes investment income for a fund. This interest is not compensation for "loss" suffered by a fund or a member as a result of the employer's failure to pay contributions to the fund.

Similar to the treatment of surplus monies in a fund, late payment interest forms part of a fund's assets and no individual member may automatically lay a claim to it or to a specific portion of it. A fund's rules must regulate how penalty interest will be treated. Thus, unless the fund's rules provides for it, late payment interest will not form part of a member's benefit in the fund.

ALLOCATION OF DEATH BENEFITS

(Karin MacKenzie from Herold Gie Attorneys)

Preliminary trustee decisions regarding death benefit allocations

Preliminary decisions by trustees regarding death benefit allocations (whereby trustees communicate their preliminary decision regarding the allocation before their decision is made final) are in principle not a bad tool as long as it is properly implemented. It could be used by trustees to identify death benefit disputes prior to making their final decision. It is also a way of eliciting further information and it can facilitate the exchange of information between death benefit claimants.

The most common problems arising from such preliminary decisions are that trustees tend to forget to finalise their decision; death benefit beneficiaries are unsure of their status; and complaints are referred to the Adjudicator based on these preliminary decisions. To minimise or avoid these types of problems, the speaker suggested that trustees must ensure that they have proper diary systems in place to remind them to convert their preliminary decisions into final decisions; that trustees clearly minute the preliminary decisions and communicate it as such to the death benefit beneficiaries; and when such preliminary decisions are referred to the Adjudicator, trustees notify the Adjudicator as soon as possible that the complaint is premature and that they undertake to make their final decision and that they will advise all parties and the Adjudicator of the outcome thereof.

Beneficiary renunciation forms

Trustees should be careful when engaging in the practice of sending death benefit renunciation forms to identified beneficiaries in an attempt to establish whether the beneficiary regards himself as being entitled to the death benefit, as it is questionable whether such practice is legitimate. Section 37C (as well as section 37A) of the

Pension Funds Act does not provide for it. Furthermore, should a beneficiary who signed such renunciation form afterwards dispute that it was indeed his intention to waive the death benefit in such a manner, the renunciation form will not be enforceable and thus will not be legally binding. A beneficiary can claim that the trustees' decision to send him the renunciation form amounted to inappropriate pressure and that he was intimidated into signing the form. The speaker concluded that whilst the obtaining of a beneficiary's view on a death benefit allocation by the trustees is probably a valid factor to consider in the distribution of death benefits, there must be other less formal ways for trustees to obtain this type of information.

Withholding payment of death benefit

Even after trustees have made a final decision regarding the allocation of the death benefit, they sometimes feel so intimidated by threats of legal action being imposed against the trustees or fund by aggrieved beneficiaries (based on their exclusion from the death benefit allocation or on the portion awarded to them), that they withhold payment of the death benefit.

Strictly speaking, trustees would require the consent of all the beneficiaries included in the final death benefit allocation, or an interdict from a court or the Adjudicator, for them to withhold the payment of a death benefit, as there exists no clear principle of law which requires or even allows trustees to withhold payment of a death benefit once they have made their final decision.

The speaker recommended that where an aggrieved beneficiary has already instituted a complaint against the trustees, it is usually in the fund's best interests to withhold payment of the death benefit. This may however lead to great financial hardship for the deceased member's beneficiaries and trustees should thus consider before deciding to withhold the benefit, whether the merits of the complaint as well as the amount of the death benefit involved, reasonably warrants the withholding of the benefit. Trustees should also consider the possibility of partial payouts to beneficiaries.

Where complaint proceedings have not yet been instituted by an aggrieved beneficiary, the speaker recommended that trustees should undertake to withhold payment of the benefit for a limited period pending the institution of complaint proceedings

FUNDS IN DISTRESS *(Jonathan Mort from Jonathan Mort Inc, Pension Fund Attorneys)*

Funds cannot anticipate every risk that they might be exposed to. The speaker remarked that far more funds are exposed to serious risks periodically than is realised.

RECENT PENSION FUNDS ADJUDICATOR CASES *continued*



The speaker cautioned trustees and service providers that they must at all times be conscious of the risks to a fund's viability, and be able to react quickly and flexibly should a fund's continued viability be under threat.

A fund can be categorised as being in distress when:

- there is a failure to deliver benefits as promised in terms of the fund's rules;
- the promised benefits are very poor, or are exposed to an inappropriate level of risk;
- the fund's management costs are excessive, alternatively cannot be justified; or
- the process of delivering the benefits is so untrustworthy to the fund's stakeholders (members, employer, sponsor) as to warrant intervention by the Registrar of Pension Funds.

Some of the sources that could cause fund failure are:

- inadequate fund governance, for example, a dysfunctional board of trustees, trustees lacking in skills, or the inadequate exercise of oversight responsibility or discretion by the trustees;
- inadequate or hostile service providers;
- legacy issues, for example poor membership data or unreconciled employer contributions;
- environmental factors, for example struggling to ensure employer compliance with section 13A of the Pension Funds Act; or
- a major change in the regulatory environment, for example the introduction of a new methodology for actuarial valuations.

Where does one start with the rehabilitation of a fund in distress? First of all, with an acceptance of failure. The speaker suggested that in every annual trustee appraisal there should be provision for acknowledgment of fund governance failure to some extent. A fund should involve the Registrar to stabilise and regularise the situation, for example, request the Registrar to undertake an inspection of the fund and its service providers. The trustees must, if they are of the view that the fund is in distress, be completely transparent, co-operative and must report regularly to the Registrar on the progress made in stabilising the fund's situation.



QUESTION AND ANSWER

Q: *If a member of a retirement fund resigns and subsequently dies before his withdrawal benefit is paid, must the fund distribute the withdrawal benefit to the deceased member's beneficiaries in terms of the provisions of section 37C of the Pension Funds Act?*

A: Information Circular PF 2/2010, which was issued by the FSB on 8 March 2010, confirms that the provisions of section 37C only apply to lump sum benefits which become payable by a fund in terms of its rules **as a result of the death of a member**. When a member exits the fund due to his resignation, dismissal, retrenchment or retirement, the relevant benefit accrues in terms of the fund's rules. Should the member die after accrual of the benefit but before the benefit is paid or transferred by the fund, the nature of the benefit does not change and the provisions of section 37C will thus not become applicable. The deceased member's benefit will have to be paid into his estate.

GENERAL

FAIS Circular regarding living annuities

FAIS Circular 3/2010 was issued by the Financial Services Board to clear up the position regarding how products classified as "living annuities" should be treated in relation to the relevant FAIS product categories. If a Financial Services Provider is not licensed for the relevant product categories, he has 90 days from 5 May 2010 to rectify the situation.

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