

Employment Law and Pension Benefits

by

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Typical Contract of Employment

- Required to join a fund
- Some may refer to the rules
- Some may refer to contributions

Rules

- Typical Rules
- (a) allow trustees and employer to amend benefits
- (b) permit employers to withdraw on notice
- (c) allow for amalgamation and transfer if:
 - employer chooses to participate in another fund;
 - reconstruction of business
- (d) permits liquidation

Typical Problems

Employer relies on rules and unilaterally

- reduces benefits

- creates a DC Fund and withdraws from DB Fund
- participate in another fund with reduced benefits and transfers

Do Employees Have Any Rights?

- If the benefits are part of the employment promise
- If the benefit is not part of the employment promise

If Part of Employment Promise

- Employer cannot unilaterally amend
- Must be negotiated and agreed

If Not Part of the Employment Promise

- Protected only by the duty of good faith
- Possibly protected by the unfair labour practice provision
- Possible Constitutional protection

Examination of Three Scenarios:

- (1) Employer initiates DC Fund and withdraws from DB Fund compelling employees to join DC
- (2) Employer and trustees agree to convert DB Fund to DC Fund
- (3) Employer transfers business in terms of Section 197 and changes pension benefits

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- (3) Employer transfers business in terms of Section 197 and changes pension benefits

If No Incorporation

- Pension Benefits discretionary
- Employer can act unilaterally in accordance with Rules subject to:
 - (a) The exercise of a duty of good faith
 - (b) The proper exercise of discretion
 - (c) The trustee's duties

If Benefits Incorporated

- Cannot act unilaterally
- Can agree to change the benefit or the remuneration package
- Can lock-out
- Can retrench (?)

THE INCORPORATION OF PENSION BENEFITS INTO THE CONTRACT OF EMPLOYMENT

Pension and Employment – Integrally Linked

- The concept of “remuneration”
- Pension rights as remuneration and as part of the quid pro quo
- *Younghusband v. Decca Contractors (SA) Pension Fund and its Trustees* (1999) 20 ILJ 1640 (PFA)

“Pension benefits are part and parcel of the costs of employing labour, they are part of the remuneration which labour receives for services rendered. They form an integral part of the industrial relations bargain.”

Pension and Employment – Integrally Linked cont

- Resa Pension Fund v. Pension Fund Adjudicator & Others 2000 (3) SA 313 (C)

“.. pension rights amount to deferred pay, rather than gratuities bestowed within the benevolence of the employer, and that members are entitled to have their investment value preserved where their employment relationship is modified as a consequence of a corporate restructuring over which they have no control.”

Pension and Employment – Integrally Linked cont

- Lorentz v Tek Corporation Provident Fund and Others 1998 (1) SA 192 (W) at 229H

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- In the UK
- Barber v The Guardian Royal Exchange Insurance Group [1990] 2 All ER 660 (ECJ) – in context of equality provisions only
- UNIFI v. Union Bank of Nigeria plc [2001] IRLR 712 – in context of collective agreements

Incorporation of Benefits

- SA Society of Bank Officials v. Bank of Lisbon International Limited 1994 ILJ 555 (LAC)

“the finding of the Court quo that pension fund matters or amendments to pension fund rules fall outside the ambit of the conventional terms and conditions of employment is in my view fundamentally misconceived. ... The conclusion is irresistible, given all the relevant circumstances, that the rules of the pension fund were indeed part and parcel of the employment relationship between the employees and the bank.”

Incorporation of Benefits

Staff Association for the Motor and Related Industries (SAMRI) v. Toyota of SA Motors (Pty) Ltd (1997) 18 ILJ 374 (LC)

Incorporation of Benefits

“The use of a motor vehicle by an employee granted by an employer is in my view a quid pro quo for work rendered and is a form of remuneration. It is, in fact, part of the employee’s salary, albeit on a somewhat different basis. One can well imagine that the motor vehicle benefit offered by the respondent was and still is a serious consideration for several prospective employees when deciding whether or not to take up employment with the respondent company Any changes to this benefit, has the result that the employee’s salary or remuneration package is potentially or in fact affected. Therefore it constitutes a change to the employee’s terms and conditions of employment.”

Incorporation of Benefits

- Partial Incorporation on what basis?
- Wallis:
 - Collective agreements analogy
 - *“The problem of appropriateness is combined with the fact that manifestly much of what is embodied in agreements of the type under consideration will not have any application to the individual employee or the individual contract of employment.”*

Incorporation of Benefits

Wallis cont

- Any claim to incorporation involves a “delicate process of excision”.
- Unusual process requiring careful examination

Incorporation of Benefits

IMPLIED TERMS

- Business Efficacy Test

a)“if it is necessary in the business sense to give efficacy to the contract”

b)“what will happen in such case? They would have replied ‘of course, so and so’. We did not trouble to say that, it is too clear.”

Incorporation of Benefits

- Innocent Bystander Test

a)“something so obvious that it goes without saying”

b)“an officious bystander were to suggest some express provision, reply could be ‘Oh, of course!’

Incorporation of Benefits

- Difficulty with Implying Terms Defining the Promise Precisely

- closed fund – pensioners only
- liquidated fund

No Incorporation

THE EXTENT OF THE CONNECTION BETWEEN THE EMPLOYMENT CONTRACT AND THE PENSION BENEFIT.

No Incorporation

Coetzee v. Moreesburgse Koringboere Kooperatief BPK (1997) 18 ILJ 1341 (LC)

“We are not dealing with a breach of contract. What we are dealing with in this case is a legitimate and valid change to pension fund rules which were effected by the board of trustees who, as it happened, were also directors of the Co-op. When Coetzee entered into employment with the Co-op, he agreed to become a member of the pension fund. There was a contract between him and the pension fund, inasmuch as there was a contract between him and the Co-op..... By becoming a member of the pension fund, Coetzee contracted to abide by the rules and regulations of the fund as at the date when he joined it, and to be bound by any future changes which could lawfully be made in terms of those rules and regulations.”

No Incorporation : The Duty of Good Faith

- Tek Corporation Provident Fund and Others v Lorentz 1999 (4) SA 884 (SCA)

“The trustees of the fund owe a fiduciary duty to the fund and to its members and other beneficiaries ... The employer is not similarly burdened but owes at least a duty of good faith to the fund and its members and beneficiaries.”

No Incorporation: The Duty of Good Faith cont

- Origin of the duty from UK : Imperial Group Pension Trust Ltd v. Imperial Tobacco Ltd [1991] 2 All ER 597

No Incorporation: The Duty of Good Faith cont

Duty of good faith means that *“employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee ... In my judgement, that obligation of an employer applies as much to the exercise of his rights and duties under a pension scheme as they do to the other rights and duties of any employer”*.

No Incorporation: The Duty of Good Faith cont

- Examples of the duty of good faith applied
Johannesburg Municipal Pension Fund and others v. The City of Johannesburg and others 02/3965 (unreported):

“any summary, abrupt or unreasonable termination would not only be in conflict with the Rules but also contrary to the demands of good faith. In so far as the Rules embody contractual undertakings between the parties thereto they are subject to the precept that contractual obligations must be performed in good faith.”

No Incorporation : Constitutional

- Protection and fair labour practices
 - Olivier v Mine Employees Pension Fund and Others (PFA/wt/296/98/SM)
 - Fedlife Assurance Ltd v Wolfaardt 2002(1) SA 49(SCA)

No Incorporation cont

- PFA'S approach
- Overturning benefit provisions
- Discrimination on marital status:
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- Sexual orientation:
 - Martin v Beka Provident Fund (PFA/GA/563/99) 8 June 1999
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No Incorporation cont

- Overturning collective agreements
 - Hospital Industry Provident Fund v Southern Sun Hotel [2000]8 BPLR 889 (PFA)
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 - Mellet v Orion Money Purchase Fund & Another [2001] 12 BPLR 2824

No Incorporation cont

- Phillips v Johannesburg Municipal Pension Fund & Another [2001] 11 BPLR 2745

No Incorporation cont

- The terrain within which pension benefits are located
- The introduction of the third actor
- Compare with medical aid benefits

No Incorporation cont

- The fiduciary duties of the trustees
- Knight v Mitchell Cotts Pension Fund [2000]8 BPLR3765(PFA)
- Role of fund as an independent actor

Full Incorporation v Partial Incorporation

Full incorporation would relate not just to the amendment of pension benefits themselves but to the amendment of all those rules that give meaning and content to the pension promise;

Full Incorporation v Partial Incorporation

Incorporating these rules into the employment contract as implied terms and conditions may also lead to the absurd conclusion that the amendment of any of these rules would require the consent of all the members.

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