



Ground & 1st Floors
23 FREDMAN
Cnr. Fredman Drive & Sandown Valley Crescent
Sandown
SANDTON
2196

P.O. Box 651826, **BENMORE**, 2010
Tel: 087 942 2700 □ Fax: 087 942 2644
E-Mail: enquiries-ihb@pfa.org.za
Website: www.pfa.org.za

Please quote our reference: **PFA/GA/39685/2010/CMS**

BY REGISTERED MAIL

Fax: (011) 462 7382

Mr. C. Walsh
C/o Execucor Life and Pensions C.C.
P.O. Box 751
FERNDALE
2160

Dear Sir,

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT NO. 24 OF 1956 (“the Act”): C WALSH (“complainant”) v MOMENTUM RETIREMENT ANNUITY FUND (“first respondent”) AND MOMENTUM GROUP LIMITED (“second respondent”)

[1] INTRODUCTION

- 1.1 The complaint concerns the complainant’s membership of the first respondent and the cash payment of the complainant’s fund value before he turns 55 years of age.
- 1.2 The complaint was received by this tribunal on 1 February 2010. A letter acknowledging receipt thereof was sent to the complainant on 22 April

The Office of the Pension Funds Adjudicator was established in terms of Section 30B of the Pension Funds Act No. 24 of 1956

-The service offered by the Pension Funds Adjudicator is free to members of the public-

2010. On the same date a letter was dispatched to the respondents seeking a response to the complaint by no later than 28 May 2010. A response dated 28 May 2010 was received from the respondents. No further submissions were received from the parties.

- 1.3 After reviewing the written submissions before this tribunal, it is considered unnecessary to hold a hearing in this matter. This tribunal's determination and its reasons therefor appear below.

[2] BACKGROUND FACTS

- 2.1 The complainant applied for and was admitted to the membership of the first respondent, which is a registered retirement annuity fund in terms of the Act, on 21 August 2008. The second respondent is the underwriting insurer and administrator of the first respondent.
- 2.2 An amount of R89 963.45 was transferred from the Optimum Pension Fund to the respondents on behalf of the complainant. The complainant is currently 34 years old.

[3] COMPLAINT

- 3.1 The complainant seeks cash payment of his fund value in the first respondent. On leaving his employment with Strategic Logistical Alliances (Pty) Ltd in May 2008, he decided to transfer his withdrawal benefit from Optimum Pension Fund to a preservation fund administered by the second respondent. A policy was issued to him by the second respondent. He did not read the policy document. During October 2009 he contacted the second respondent with the aim of withdrawing from the preservation fund. It was then that he learned that he is a member of the first respondent and not a preservation fund. He was advised that he cannot withdraw his funds from the first respondent at this stage. His intention was to be a member of a preservation fund and not the first respondent.

He omitted to indicate on the application form that he wanted to be a member of a preservation fund. Correspondence received from the second respondent makes reference to a preservation fund.

[4] RESPONSE

- 4.1 The respondents confirmed the background facts summarised above. They advised that initially no indication was given on the application form of the type of product the benefit should be invested in, although on the Recognition of Transfer Form received it indicated that the benefit should be invested in a pension preservation fund. The amount (R113 837.77) to be transferred from the Optimum Pension Fund, on the application form and the amount (R89 963.45) received by the second respondent differed. Upon querying the amount, on 20 August 2008 it was established that the difference was due to a cash withdrawal.
- 4.2 On numerous occasions queries were sent to the complainant's financial advisor regarding the type of fund the complainant wanted to transfer his withdrawal benefit. An application form dated 19 May 2009 was received indicating that the benefit should be invested in a retirement annuity fund. This was supported by a Recognition of Transfer form, indicating that the benefit should be invested in a retirement annuity fund. A contract was sent to the complainant indicating the product as a retirement annuity fund. The complainant also received quarterly statements indicating that his benefit was invested in a retirement annuity fund. On 7 January 2009, 5 March 2009 and 6 July 2009 he was informed that he can only take in cash a maximum of one-third of his benefit on retirement.
- 4.3 On 20 August 2009 they received a withdrawal instruction from the complainant's financial advisor. The financial advisor was informed that no withdrawal can be made until the complainant reaches the age of 55 years. Apart from the queries raised by the financial advisor, a copy of the Recognition of Transfer form was sent to the complainant's financial

advisor on 28 September 2009, indicating transfer into a retirement annuity fund. This was not queried by the financial advisor. Furthermore, Retirement Fund Practice Note 1/98 issued by the South African Revenue Services provides that a member cannot transfer to a preservation fund when a withdrawal had been taken before the transfer.

[5] DETERMINATION AND REASONS THEREFOR

Introduction

- 5.1 The issues for determination are whether or not the complainant is a member of the first respondent and whether or not he is entitled to receive a cash payment of his fund value at present.

Fund membership

- 5.2 The complainant contends that when he withdrew from the Optimum Pension fund he applied to be a member of a preservation fund administered by the second respondent. The second respondent submitted that the complainant applied for membership of a retirement annuity fund, hence he became a member of the first respondent. On the initial application form received by the second respondent dated 19 May 2008, the complainant did not indicate the kind of retirement fund he wanted to belong to. The Recognition of Transfer form indicated that the complainant applied for membership of a preservation pension fund, but this was dated 20 June 2007 and the amount indicated on it differed from the amount indicated on the application form.
- 5.3 Upon further enquiry it was discovered that the transfer amount had been reduced and a new application form dated 19 May 2008, signed by the complainant's financial advisor, was received indicating that the complainant was applying for membership of a retirement annuity fund. Similarly, the recognition of transfer form dated 25 July 2008 indicated

that the transfer was to a retirement annuity fund. Confirmation of the complainant's membership of the first respondent, dated 25 August 2008 was sent to him. Further, the complainant received quarterly statements indicating his fund value in the first respondent. At no stage since joining the first respondent did he question his membership until a cash withdrawal from the first respondent was refused. The complainant is a member of the first respondent and at all material times he was aware, or ought reasonably to have been aware, of his membership.

Withdrawal from first respondent

- 5.4 The rules of a fund are paramount and binding on all concerned when determining what benefit members are entitled to receive. The fund can only do what is set forth in the registered rules (see section 13 of the Act and *Tek Corporation Provident Fund and Others v Lorentz* [2000] 3 BPLR 227 (SCA) at 239D-F and *Mostert NO v Old Mutual Life Assurance Company (SA) Ltd* [2001] 8 BPLR 2307 (SCA) at paragraph 30).
- 5.5 Therefore, the complainant can only receive a benefit payment if the first respondent's rules, or the definition of a retirement annuity fund in the Income Tax Act No. 58 of 1962, permits such a payment. In terms of the definition of "retirement date" in the rules of the first respondent it means a date specified by the member in writing, provided a member is eligible to retire on that date in terms of the Income Tax Act. Further, a member's membership will only terminate in the event of the death, retirement or ill-health retirement of the member, the winding up of the first respondent, the payment of a benefit in commutation of the full annuity amount, the transfer of a member to another approved retirement annuity fund or the emigration of a member if recognised by the South African Reserve Bank.
- 5.6 The complainant has not yet reached 55 years of age, he has not applied for an ill-health benefit, he is still alive, the first respondent has not been wound-up and the complainant has not emigrated. Therefore, he is not entitled to a withdrawal benefit from the first respondent at this stage.

5.7 The Income Tax Act offers a further mode of exiting the first respondent before the complainant reaches 55 years of age. The relevant sub-section is sub-section *(b)(x)(cc)* of the definition of retirement annuity fund in section 1 of the Income Tax Act. Having regard to sub-section *(b)(x)(cc)*, the Minister of Finance set the maximum limit of a member's fund interest at R7 000 in terms of government notice 467, published in Government Gazette number 29913 of 1 June 2007. Thus, only if a retirement annuity fund member's total fund value of all his retirement annuity fund contracts with the respondents is less than R7 000.00 will a cash payout be permitted. In the present complaint the complainant's fund value was already R89 963.45 on 21 August 2008. Thus, the complainant's fund value exceeds the R7 000.00 limit contemplated by sub-section *(b)(x)(cc)*, so this sub-section does not assist him in receiving cash payment of his fund value from the respondents.

5.8 In summary, the complainant has not reached 55 years of age and does not fall within any of the exceptions stipulated in the Income Tax Act. Therefore, the respondents were correct in not acceding to the complainant's request for a cash payment of his fund value at present.

5.9 This tribunal also notes that the complainant took a cash amount before transferring his remaining benefit to the first respondent. As noted by the respondents, even if he had transferred to a preservation fund, the preservation fund would not have permitted a further cash withdrawal before he reaches his retirement age because he had already made a cash withdrawal when he transferred. Therefore, the complainant is not entitled to a cash withdrawal at present.

[6] **ORDER**

1. In the result, the complaint is dismissed.

DATED AT JOHANNESBURG ON THIS 25TH DAY OF MARCH 2011

DR. E. M. DE LA REY
ACTING PENSION FUNDS ADJUDICATOR

Cc: Attention: Isabel Rademan
Momentum Retirement Annuity Fund
C/o Momentum Group Limited
P. O Box 7400
CENTURION
0046

Fax: (012) 675 3911

Registered office of fund: 268 West Avenue
CENTURION
0046

Section 30m filing: High Court
Parties unrepresented