

# How pension fund disputes could be caught in a loop

Pension funds involved in disputes could find themselves caught in a 'perfect circle' if, aggrieved with a decision of the Pension Funds Adjudicator, they turn to the new Financial Services Tribunal.



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"The Tribunal has only two courses of action – to send a matter back to the Adjudicator to reconsider or to dismiss it. As we have recently seen, this could create a cycle where a matter goes back and forth between the two bodies," says Graham Damant, partner in the Employment and Benefits Practice at Bowmans.

The possibility of this happening was highlighted in a recent decision of the Tribunal, which disagreed with the Adjudicator's ruling in a dispute involving an actuary facing a claim that his actions had resulted in a R40 million loss to a major retirement fund.

"This is a very important case, both for its merits and the new process for funds that are unhappy with a decision of the Adjudicator," Damant says.

## Error results in overpayments

The retirement fund had initially referred the matter to the Adjudicator, which ruled that the actuary alone was responsible for R40 million in overpayments made to exiting members of the retirement fund. The overpayments, made over a number of years, stemmed from a 'hard-coding error' in the spreadsheet system the actuary had been using to calculate the credit balances of the fund's members.

The Adjudicator, who did not hold a hearing but decided the matter on paper, ruled that the error constituted maladministration on the part of the actuary, who should pay damages amounting to R40 million.

The actuary then approached the Financial Services Tribunal, which disagreed that the actuary had been performing administration for the retirement fund concerned. This meant his actions did not constitute maladministration but were rather a contractual matter over which the Adjudicator did not have jurisdiction.

The Tribunal also criticised the Adjudicator's ruling and process, including that the Adjudicator had decided the matter on paper when, owing to the damages claim, there should have been written affidavits or a trial process. Instead, the Adjudicator had relied on a written report from an independent actuary, whose conclusions the accused actuary had not been given the opportunity to refute.

Furthermore, the Tribunal said the Adjudicator had not taken into account that the fund had recovered part of the loss, or that the fund itself had failed to stop the overpayments to members once it became aware of the error.

Consequently, the Tribunal said the Adjudicator's damages order against the actuary should be set aside, and referred the matter back to the Adjudicator for reconsideration.

## **Tribunal's decisions not legally binding**

The operative word here is 'reconsideration', says Damant. "The Tribunal's decisions are not legally binding and the Adjudicator just has to reconsider, potentially creating a perfect circle."

A way out of such a situation would be a High Court appeal – a route Damant says is still open under Section 30P of the Pension Funds Act when parties to a dispute have materially different versions.

"Our view is that Section 30P still exists and applies, meaning that if you are unhappy with a decision of the Adjudicator, you can go directly to the High Court," he says.

The difficulty there is costs: unlike 'internal' dispute resolution through the Adjudicator and Tribunal, a High Court appeal is costly and often time-consuming. "A lot of wealthy funds would go the 30P route but it would be out of the reach of the less affluent funds."

This is where alternatives such as commercial mediation, private arbitration or expedited hearings could be considered, he says, adding that South Africans generally had yet to embrace the possibilities of alternative dispute resolution. "There are alternative ways to resolve disputes and there may be times when these are appropriate. There is a whole array of processes out there that the (retirement fund) industry could consider."