SESHEGO
BENEFIT CONSULTING

Legal Insights

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Section 37D of the Pension Funds Act ('the Act') – The Jeptha case and Determinations by the Pension Funds Adjudicator

In Seshego Legal Insights, Edition 1 of 2020, we drew attention to the decision of the High Court in the matter of SA Metal Group versus Deon Jeptha and Others ('the Jeptha case'). We commented that one of the principles established by this judgement was that when requested by the employer to withhold payment of a benefit, the Trustees must investigate the circumstance of each case themselves and not merely take the word of the employer before deciding to withhold payment of the benefit.

Why revisit the Jeptha case?

The case was held in the High Court at the end of 2019, and six months down the line, the principles set out in that case are now beginning to be applied in determinations by the Pension Funds Adjudicator ('the PFA'). In recent determinations, the PFA has applied the requirements for funds to legitimately withhold payment of a benefit, which are based on those specified by the High Court in the Jeptha case.

What are the new requirements?

The Trustees can no longer withhold payment of the benefit on the basis that the employer has presented a *prima facie* case to the fund, even if the employer has already opened a criminal case against the member. A *prima facie* case means that the employer must have presented a set of facts to the Trustees which if proven to be correct would result in a judgement against the member. Even if the rules of the fund specify the existence of a *prima facie* case as the main requirement for withholding payment of the benefit, the effect of the Jeptha case is that this is no longer sufficient.

At a recent Webinar held by the Institute of Retirement Funds Africa ('the IRFA'), Mr Nazeem Essop of the office of the PFA said that in making determinations, the PFA will now look at whether, before taking the decision to withhold payment of a benefit, the Trustees have weighed the competing interests at state - the damage or loss caused to the employer versus the financial prejudice that will be suffered by the member.

The Jeptha case also established that the Trustees must observe the principle of natural justice called the audi alteram partem rule. This means "let the other side be heard as well". It is the principle that no person should be judged without a fair hearing in which each party is given the opportunity to respond to the evidence against them.

Therefore, before making a decision to withhold payment of a benefit, the Trustees are required to advise the member of the allegations made by the employer and to provide the member with a meaningful opportunity to refute the allegations by presenting his point of view to the Trustees for their consideration.

The Trustees must then be able to demonstrate that they have taken a fair, impartial and unbiased decision on whether or not to withhold payment of the benefit. The PFA has ruled that such a decision can only be made after the Trustees have given due consideration to the allegations by the employer and if applicable, the refutation of the allegations by the member.

This is an onerous requirement as the majority of Trustees are not criminal lawyers.

To assist the Trustees to comply with these requirements and avoid determinations against the fund by the PFA, Seshego is currently engaged in reviewing current fund policies dealing with withholding of pension fund benefits and the correspondence issued by the fund to an affected member.

We recommend that the Trustees take the following factors into account when requested by the employer to withhold payment of a member's benefit:

a) Was the employer's request to withhold the member's benefit presented to the fund, in writing?
b) Does the fund have a procedure with regard to with-holding of benefits and is the employer aware of the procedure?
c) Did the actions of the member constitute fraud, theft or misconduct and if misconduct, did the misconduct contain an element of dishonesty? (In the Jephta case, the complainant, Deon Jephta had merely failed to comply with a company procedure and no dishonesty was involved);
d) Does the whole benefit need to be withheld?
e) Has the fund followed up with the employer to ensure there is no undue delay in bringing a criminal case against the member?
f) Is it reasonable that the benefit should be withheld?
g) What are the financial consequences for the member if the benefit is withheld?
h) Has the benefit in question already accrued to the member? (Note - a benefit accrues once the member has made an election with regard to payment of the benefit. Section 7C (1) (f) of the Act says that the Trustees have a particular fiduciary duty with regard to accrued benefits, so the Trustees need to take particular care in such cases).

Other steps funds should consider are the following:

a) When communicating with the member to inform the member of the details of the employer's allegations against him and invite the member to refute the allegations, it is advisable to set a time frame for the member to respond.
b) In order to demonstrate that the Trustees have taken a fair, impartial and unbiased decision, funds should be careful to document the various steps taken before a decision to withhold payment was made.
c) Once the Trustees have decided, after having heard the point of view of both parties that it is reasonable to withhold payment of the member's benefit, they should continuously review the decision to withhold payment, taking into account both the criteria that motivated the initial decision and any new information that may have come to light.

In the IRFA Webinar mentioned above, Mr Nazeem Essop stated that complaints related to the withholding of benefits were among the most frequent complaints received by the PFA. He added that due to the current economic circumstances it appears there has been an increase in workplace theft, which has led to a further increase in such cases.

Even if the employer has a strong case against the member, it is likely that the PFA will rule in favour of the member if the member was not given a chance to present his case to the fund. A determination against the fund is likely to result in the PFA ordering the fund to make immediate payment of the benefit and to pay statutory interest effective from the date on which the benefit was withheld. Funds should look carefully at their current procedures relating to withholding of benefits and ensure they are aligned with the principles discussed in this publication.