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irfa dispatch

THE RETIREMENT INDUSTRY NEWSLETTER

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LOCAL NEWS

Funds must be harder on employers who fail to pay contributions

An employer who deducted provident fund contributions monthly from an employee's salary but failed to pay it over to the fund has been ordered to pay the arrear contributions together with late payment interest. The complainant told the Pension Funds Adjudicator Muvhango Lukhaimane that his employer SA Transport and Allied Workers Union had failed to pay contributions on his behalf to the Satawu National Provident Fund. The complainant's fund credit was R37 897.47 as at 29 July 2022.

The fund submitted that a submission was made to the Financial Sector Conduct Authority (FSCA) for the suspension of contributions for the period February 2019 to August 2021 to allow the fund to recover from the errant activities of the fund's previous leadership. The submissions to the FSCA remain pending. The employer submitted that it has financial constraints and was negotiating with the fund to repay the outstanding contributions. It also undertook to revert within 30 days of 20 April 2022 which it failed to do.

In addition, the fund indicated that as at 3 August 2022, the employer had failed to pay the outstanding contributions, despite there being an agreement in place for repayment of same. Ms Lukhaimane ordered the employer to submit outstanding contribution schedules to the fund in respect of the complainant for the period November 2015 to July 2018, November 2018 to March 2021 and September 2021 to July 2022. The fund was ordered to compute the arrear contributions due by the employer, together with late payment interest. The employer was ordered to pay to the fund the complainant's arrear contributions together with late payment interest.

FA News | 8 November 2022

Greater certainty around working beyond retirement age

It is not unfair dismissal if an employee 'has reached' normal or agreed retirement age.

Most people consider retirement at the age of 60 or 65, but there may be instances where employees want to, or have to, continue working beyond retirement age. However, it is important to note that if they do, they are working on 'borrowed time'. The Labour Appeal Court recently gave clarity on the circumstances in which an employer can terminate the employment of someone who has reached the agreed or normal retirement age.

Chloë Loubser, lawyer in the dispute resolution department of law firm Bowmans, says retirement age is generally agreed upon in the worker's contract, the company's policy document or the retirement fund rules. In this case, the agreed upon retirement age was 60. The employee, a Mr Landman, remained in the employ of the company, Great South Autobody, for 10 months after he reached the agreed retirement age.

Fair versus unfair dismissal

Landman was eventually notified that he had to retire and was given one month's notice. He took the matter to the Labour Court, claiming he was unfairly dismissed. In terms of the Labour Relations Act, a dismissal based on age will be automatically unfair (and constitute unfair discrimination), unless it can be shown that the employee has reached the normal or agreed retirement age. The court found that a dismissal based on age is not automatically unfair in circumstances where the employee "has reached" the normal or agreed retirement age. In this case the employee had reached the agreed retirement age of 60, therefore his dismissal was fair.

The matter was taken on appeal before the Labour Appeal Court, where Landman argued that where an employee continues working after reaching the agreed retirement age and neither party relies on the fact that the retirement age was reached, a new (second) employment contract comes into existence. Landman argued that it would be impermissible to rely on the initial retirement age since there was now a new contract in place. The employee would be at the mercy of the employer if the employer relies indefinitely on the agreed age months or years after the age has been reached.

The appeal court disagreed with this argument and held that the act was clear and unambiguous – a dismissal is fair when the employee has reached the agreed or normal retirement age. "Accordingly, where an employee continues to work for an employer uninterrupted after reaching retirement age, the legal position is now clear: the employment relationship and employment contract continue, and the agreed or normal retirement age remains unchanged," explains Loubser.

The wording

Talita Laubscher, partner at Bowmans, says the act expressly uses the words "has reached" the agreed or normal retirement age. It does not say "reaches", which would imply that the employer can only bring the contract to an end on the particular date on which the employee reaches the agreed retirement age. In interpreting the words "has reached" the courts said the employer may at any time thereafter require the employee to retire. Laubscher adds that when the employer does this, it should provide a reasonable time period to the employee.

Landman was given one month whereas the Labour Court, in another case, thought a period of three months would be reasonable, remarks Laubscher. "Employees working beyond the agreed retirement age with no fixed-term contract in place or with no new retirement age agreed, can be required to retire at any time. This may come as a huge shock to the employee. Certainty is best for all concerned." Laubscher says if the employee is still able to properly perform their duties without complaint, it is advisable to explore either the conclusion of a fixed-term contract after reaching retirement age, or agreeing to a new retirement age with the employer.

Employment contract

Laubscher advises employees to check their employment contracts to ascertain whether the contract contains a retirement age. If so, they must engage with the employer sufficiently well in advance to agree on the way forward if they wish to continue working beyond the agreed retirement age. Allowing employees to work for a specified period after they have reached the agreed retirement age may give employers a good opportunity to ensure skills transfer which may serve important operational purposes.

"A transition phase between the agreed retirement age and the ultimate agreed retirement age or expiry of a fixed-term contract may accordingly be beneficial to both the employer and the employee," says Laubscher. If the employer wishes to bring the employment contract to an end because of a reason other than the fact that the employee has reached the agreed retirement age, the employer must comply with the principles of a fair dismissal, she adds.

Moneyweb | 8 November 2022

N-e-FG pension fund members fear for their savings

In 1991, after Robert Maxwell's suspected suicide on his luxury yacht Ghislaine (named after his equally infamous daughter), it came to light that the British media mogul had plundered the retirement savings of his employees to shore up his failing Mirror group. His theft from the staff pension fund was partly repaid from public funds, with the result that pensioners received about half of the pension benefits owing to them. There have been instances in South Africa of employers clinging on to surpluses produced by their staff pension funds, but no recent cases come to mind of a company raiding its own staff fund for its own purposes, to the detriment of the fund members.

This is because the Pension Funds Act, promulgated back in 1956 but amended frequently since then, provides strong protections for members of pension funds, effectively ring-fencing their savings from external interference, even from the employer sponsoring the fund. There are strict requirements pertaining to the governance of funds and the types of assets in which a fund can invest on behalf of its members. The board members of the fund, or trustees, must "act with due care, diligence and good faith". They "have a fiduciary duty to members and beneficiaries in respect of accrued benefits or any amount accrued to provide a benefit, as well as a fiduciary duty to the fund, to ensure that the fund is financially sound and responsibly managed…"

Regarding investments, the fund is restricted in its exposure to higher-risk assets. Regulation 28 of the Act's regulations states that a fund can be invested up to 75% in equity (shares), but the majority of this should be shares listed on an exchange. Only 10% of the fund's assets can be in private, or unlisted, equity, which carries a far higher investment risk. (This will increase to 15% from January next year.) Fund members have recourse to the Pension Funds Adjudicator if they have problems with their fund. The majority of complaints to the adjudicator concern processing issues: employers not paying over the contributions of their staff members or members waiting inordinately long to receive their benefits.

Rarely do funds in South Africa have problems on the investment side where retirement savings have, say, been overly invested in high-risk investments (in contravention of Regulation 28). But that has happened in the retirement funds administered by N-e-FG Administrators of Vanderbijlpark, part of the N-e-FG financial group, and it appears that the investments have failed. A few months ago I reported on N-e-FG Administrators (recently renamed Phahamisa Administrators) being placed under statutory management by the Financial Sector Conduct Authority (FSCA). I focused on non-retirement-fund investments that had gone awry. But I have since discovered that high-risk assets were also the destination of people's retirement savings, including those of the N-e-FG group's own staff. In all, savings of almost half a billion rands, including those in N-e-FG's two umbrella funds (one pension, one provident), are in the balance.

Statutory manager's report

According to a report issued on September 29 by Krishen Sukdev, the statutory manager, "assets were to be invested on behalf of retirement funds and other members as per investment mandates. The monies were paid from N-e-FG Administrators acting on the advice of N-e-FG Fund Management." Sukdev continues: "It has come to our attention that the assets were not invested as per the investment mandates but were rather invested in high-risk assets outside the given mandates and whose current status and value is unknown at this stage.

We also note that incorrect asset statements were continuously provided to members and stakeholders, effectively providing misleading information on where the assets were invested and the current values. "Currently there is uncertainty in respect of the value of residual assets and their recoverability. There is therefore a very serious risk of a substantial or total write-down of the assets. "In the interim we are quantifying the losses and embarking on a plan to recover monies, including examining other mechanisms such as professional indemnity claims, negligence claims and legal action against identified parties."

FSCA responds

Replying to my questions last week, the FSCA said it first became aware of challenges with the payment of benefits by the funds in question on August 29 during a meeting with the boards of the affected funds, and formally through the statutory manager on September 29 when the boards put a moratorium on the payment of benefits. On what proportion of the retirement fund assets were in high-risk alternative investments, the FSCA said: "We do not have the actual amounts as yet; the statutory manager and the business rescue practitioner are still investigating."

The FSCA said that once the statutory manager had quantified the actual losses to members, "he will undertake a recovery process together with the funds and the business rescue practitioner to see how much of the lost assets can be recovered. Unfortunately, members can therefore not access their savings at this stage while this process is underway." Umbrella funds are retirement funds which house a number of employers, in contrast to so-called stand-alone funds. The FSCA says there are 55 employers in the N-e-FG umbrella provident fund and 20 employers in the N-e-FG umbrella pension fund. Most of these appear to be in the Vanderbijlpark area. Let's hope that there is something left of their employees' savings.

Personal Finance| 8 November 2022

ADAM BULKIN: Alternative assets a rich hunting ground for effect and sustainability

The local asset management industry has far to go to catch up with the US and other developed markets

Asset managers keen to maximise the social effect of their investing activities are looking towards the plentiful opportunities in the alternative asset universe. However, the local asset management industry has a long way to go to catch up with the US and other developed markets insofar as allocating assets to alternatives vs traditional assets is concerned. Local pension funds' exposure to alternatives is restricted by law, while large pension funds in the US often allocate as much as 30% of their capital to this class. However, this restriction is expected to change in SA in the coming months, opening the door for greater investment in alternatives.

It is unlikely that you will find any local institutional or pension fund with a greater than 10% allocation to alternatives in SA now. However, we are seeing institutional and pension fund allocators migrating to private market opportunities in the debt, equity and property segments. In the search for uncorrelated sources of return, a review of the allowance for investment in alternative assets such as private markets should now be considered more seriously. Multimanagers rely on fund managers with specialist experience and expertise in alternative investment management when seeking to build exposure to this asset class.

Once they make an active decision to increase a fund's exposure to alternatives, they want each of the selected underlying managers they appoint to be a specialist and focused manager that caters for the niche they operate in. Alternatives comprise a broad set of financial instruments and opportunities, from hedge funds and their different subcomponents to private markets, which in turn include private debt, private equity, private property and unlisted infrastructure. Environmental, social & governance (ESG) factors are an important aspect of all investment decisions.

All managers should consider the ESG risks attached to every investment they make, whether in the alternative or traditional universe. This ensures that an appropriate price for the risk and return on offer from each opportunity is identified and allows fund managers to get an early start to engaging with investee companies on how to improve their management of ESG risks. With private markets investments multimanagers are able not only to incorporate ESG risks into their investment decisions but to ensure positive and effective outcomes on the physical and social environment.

Social effect

Asset managers that wish to maximise the environmental and social effect of investing will find a range of opportunities in private markets. Before choosing a private market fund manager we want evidence that the manager will invest in assets that will have a positive effect on the environment and society, as well as assurances that they can measure and report on those effects. This is done by requiring the managers with which we invest to report on the alignment of their investing activities with the UN sustainable development goals (SDGs). A consideration when choosing a private market fund manager is the potential social effect of the model used to finance the transaction, remaining wary of private equity managers that favour traditional leveraged buyout models, where value is derived by using leverage (debt) and driving bottom line improvement through job losses and pay cuts.

We need the manager to drive value through top-line growth, by increasing employment and by adding long-term economic and social benefit through the goods and services they produce.
The growing pressure on infrastructure in SA has created numerous opportunities for asset managers to make environmental and social improvements for the country and its citizens. However, in considering ESG broadly, in both traditional and alternative investments, the SA landscape requires a nuanced stance towards carbon emissions. Carbon reduction is a major focus among European countries, and while it is extremely important in the SA context too, there are other aspects that one has to balance against this goal.

For example, before closing mines or denying them capital, we must weigh up the negative social effect in terms of employment against the provision for infrastructure and energy countrywide. We need to factor in the improvements we can help to drive in public and private companies in managing ESG risks and improving their ESG credentials, rather than simply refusing to invest in companies that are considered to carry great ESG risk. One of the unintended consequences of ongoing efforts to improve ESG scorecards has been for public, listed companies to sell their “dirty” assets to private, unlisted firms, which then continue their operations without public scrutiny. We believe this is why asset managers must consider the intended and unintended consequences of denying capital, or negatively screening investments, based on ESG factors.

Business Day | 6 November 2022

Financial independence is important during anyone's lifetime, at all stages.

By starting to plan for your retirement early in your working life, you can maintain your standard of living in your retirement years. While life partners can provide many things, they should not be relied upon as part of your retirement plan. Women tend to live longer than men, and since research shows they generally earn less, this means they need to save more, for longer, than their male counterparts. It is important to familiarise yourself with how you were married and what the terms are should the marriage end in either divorce or death. If you are married in community of property, you and your spouse's assets will form part of your deceased estate and your spouse will automatically, by law, be entitled to 50% of the combined assets.

You can be married out of community of property with or without the accrual system. Being married without accrual is the easiest system to work with in terms of your will and estate; your assets remain your own and you may deal with your assets as you wish with no claim from your surviving spouse. Often, a home will be registered in one partner's name while the other contributes to the bond repayments. If you are not married or are married out of community of property, ensure that you have a written cohabitation agreement. These financial contributions can be difficult to prove if the relationship ends, leaving the one partner with no claim to the property.

Having sufficient planning in place for both parties is always advisable, and each party should have his/her own savings and investments. A tax-free savings account is a great place to start, allowing you to save up to R36 000 a year without paying tax on the growth. Increasing your contributions to your workplace retirement fund will help you accumulate larger savings for your retirement. To take advantage of the benefits of compound interest and avoid a hefty tax liability, it is also advised to keep your retirement savings invested when changing jobs.

When leaving your employer, a number of tax-free options are available to you, and one should seek financial advice in order to understand which of these is the best choice for you:

– transferring your savings to your new employer's fund;
– transferring your savings into a retirement annuity fund;
– transferring your savings into a preservation fund; or
– keeping your funds invested within your previous employer's retirement fund via a paid-up status (not contributing further to the fund).

Each of the options noted has varying implications, such as when you would be able to access the retirement funds either through resignation, dismissal or retirement and whether you are able to continue contributing towards the fund; therefore, each individual would need to seek financial advice from an accredited financial advisor so as to determine which option would best suit his/her needs.

IOL Business | 3 November 2022

INTERNATIONAL NEWS

Australia aims to cut tax breaks for pension funds of the super-rich

SYDNEY, Nov 8 (Reuters) - Australia's centre-left government on Tuesday said it plans to scale back tax concessions for pension funds of the super rich, as it looks to plug a budget deficit gap and ease its rising debt pile. Prime Minister Anthony Albanese's Labor government, which came to power in May, aims to debate the curtailment of tax concessions once it legislates on the future of superannuation -or retirement funds. Curtailment of tax concessions paid to people with multi-million-dollar superannuation accounts would raise billions of much-needed dollars annually for the government.

"We have 32 self-managed super funds with more than $100 million in assets - the largest self-managed super fund has over $400 million in assets," Assistant Treasurer and Minister for Financial Services Stephen Jones said at the AFR Super & Wealth Summit in Sydney. "The government celebrates success, but the concessional taxation of funds like these has a real cost to the budget," he said.The government said in its federal budget announcement last month that it sees its annual deficit widening to around A$50 billion ($32 billion) by the 2025/26 financial year, as commodity prices cool and spending pressures mount.

Debt is forecast to bulge to A$1.16 trillion by that year, equivalent to 43% of gross domestic product, due to the financial impact of the pandemic over the last two years. Pension fund managers have benefited from a system of compulsory employer contribution introduced in the early 1990s. That has left funds flush with money to invest, but with limited domestic assets in which to invest. Jones said providing a clear objective for super funds will enable the sector to identify opportunities where the national interest and member interests align. The government last month said it had discussions with super funds to look at investing in affordable housing projects, to help fix a housing crisis.

"Superannuation funds have endorsed our Housing Accord and will work with us to leverage more investment that delivers for their investors' and members' interests, and for the national interest," Jones said.

Reuters | **8 November 2022**

UK watchdog says regulating pension fund consultants would contain risks better

Regulating consultants who advise pension funds would ensure greater focus on managing risks which can emerge from the sector, such as recent difficulties with liability-driven investment (LDI) funds, the Financial Conduct Authority said on Monday.

LDI funds, which help pension funds meet future payouts, struggled to meet collateral calls on their holdings of UK government bonds in September, forcing the Bank of England to step in to buy gilts. "Perhaps if their advisers had been more sensitive to dealing with levels of stress like this, some of that risk would have been managed more effectively," FCA CEO Nikhil Rathi told parliament's Treasury Select Committee. (This story has not been edited by Devdiscourse staff and is auto-generated from a syndicated feed.)

Reuters | **7 November 2022**