BENJAMIN
on law

A look at the law *on Pension Funds*

Introduction

Most South African workers have not had a happy experience of pension funds. This is particularly true for workers employed in industries with industrial councils. They will have found that on dismissal or departure from the industry all they received from the fund was their contribution to the fund with interest as low as 2%.* The fund kept the employers' contribution. They would have been better off putting their money in the bank.

Background

In 1981 pensions were the hottest labour issue. Over 30 000 workers engaged in a total of 27 strikes to protest a proposal by the government to pass the Preservation of Pensions Bill which would have prevented workers withdrawing their benefits, however small, when leaving a job. This policy of "freezing" was meant to force workers to leave their benefits in pension funds until retirement when they would be able to receive a pension.

The response of unions and their members was that pensions were a luxury that poorly paid workers struggling to meet their immediate needs could not afford. This preference, to have money available at times of dismissal or immediate need, led to the unions formulating the demand for the development of more flexible provident funds and for the transformation of pension funds into provident funds.

There have been a number of significant developments in this area. In 1989 the Chamber of Mines and the National Union of Mineworkers established the Mineworkers Provident Fund which has almost 350 000 members. Another important initiative has been the creation of the Chemical Industry National Provident Fund by the Chemical Workers Industrial Union. Union members at many plants have struck in order to force the employers to join the fund.

Pensions and the Industrial Court

A more low-key development has been a series of cases in the industrial court that have challenged the most blatantly unfair practices of pension fund trustees. These cases have often been brought by executives but they contain

* *A survey in 1989 showed that half of the pension funds in the country paid interest at less than 6%. Only 12% of funds paid some portion of employers' contribution to workers on withdrawal.*

important precedents and lessons for the trade union movement.

The first issue that these cases had to address was whether the actions of pension fund trustees could be challenged in the industrial court which only has the power to resolve disputes between employers and workers or trade unions.

The very important case of *Van Coppenhagen versus Shell And BP* concerned a pension fund with rules providing that an employee who retired with more than 20 years' service could receive a deferred pensions provided that the employer consented. The employee retired after 27 years with the company but the employer refused to consent to payment of the pension. The employee challenged this in the industrial court as an unfair labour practice. The employer argued that as the dispute arose out of the pension fund rules and not the relationship between employer and employee the court could not hear the case. The court rejected this argument. It held that the employer, in refusing consent, was acting in its capacity as an employer and therefore its conduct could be an unfair labour practice.

An important reason for coming to this conclusion was that the employer's reason for refusing to consent related to its position as an employer. The industrial court therefore concluded that it had the power to rule whether the employer's refusal to agree to the early pension was an unfair labour practice or not.

Do workers get a good deal for their old age?

Photo: Cedric Nunn

Unreasonable rules

Some disputes around pension funds have been initiated by employers. The rules of a mining industry pension fund provided that only white workers could join. Any change to the rules had to be approved of by the employers and unions involved in the fund. The Council of Mining Unions refused to agree a change to the rule that would allow black employees to be admitted.

The Chamber of Mines challenged this in the industrial court. The court held that the refusal was an unfair labour practice because the rule was racially discriminatory. The court ordered the unions to take the steps necessary to ensure that the rules were changed to allow black workers to participate in the fund. The judgement opens a way for trade unions to press for changes to oppressive or discriminatory pension fund rules.

Unions could demand changes and if the employer refuses to do so they could proceed to the industrial court. If the court accepted that the operation of the rule amounted to an unfair labour practice, it could order the trustees to change the rule. What remains to be seen is what type of rules the court will feel free to change. Clearly, it will do so where the rule is overtly discriminatory. But what about a rule over the level of interest paid to employees? Two percent interest is unreasonable but could the court order the payment of a higher rate. It may well decide that issues of this nature should be left to collective bargaining and in that case employees would have to use industrial action for these disputes.

Another important case is

Ward v Sentrachem. Here the employee was transferred from one company to another on condition that his conditions of employment remained the same. When some years later he left the second company, he discovered that the pension fund pay-out was inferior to that he would have received from the previous employer. The court found that this was an unfair labour practice because the new employer had not honoured the undertaking that the employee's conditions of employment would remain the same. It ordered the employer to pay pension benefits to the employee equivalent to those he would have received from the previous company.

Pension Fund legislation

The Pension Fund Act sets out what the rules of a pension fund must contain. It deals with matters such as admission of members and the making and altering of rules but it does not regulate the benefits that members receive. It does not lay down minimum benefits and, in particular, does not set out the interest payments members should receive on their contributions. This is determined by the trustees. Membership of a pension fund is generally a condition of employment and has a major impact on workers' financial security. It is therefore a major gap in our labour legislation that there is no law that prevents employer abuses in this area. It would be appropriate for minimum benefits to be laid down in a law similar to the Basic Conditions of Employment Act.

It is the ability to make rules that provide the key aspect of control of a pension or provident fund. The trustees make and change the rules and in funds where the trustees are all employer representatives, this allows employers a free hand to change the rules. Worker participation on boards of trustees, provided they have equal representation with employers, would put an end to this situation but this demand would have to be achieved through collective bargaining or legislation.

Conclusion

Pension funds are enormously wealthy with assets of R100 billion. Workers are getting a raw deal in two ways: they receive poor benefits and are not able to influence the way in which their contributions are invested. Strategies involving use of the courts, collective bargaining and demands for improved legislation will have to be developed if these problems are to be tackled. ☆