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Allegations of maladministration, unfair treatment and prejudice against the Government Pensions Administration Agency (GPAA), and the South African Nuclear Energy Corporation (NECSA)

REPORT ON AN INVESTIGATION INTO THE ALLEGATIONS OF MALADMINISTRATION BY THE GOVERNMENT PENSIONS ADMINISTRATION AGENCY, NATIONAL TREASURY AND NUCLEAR ENERGY CORPORATION OF SOUTH AFRICA (NECSA) IN RESPECT OF THE PENSION BENEFITS OF MR J W A KING
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Executive Summary

(i) This is a report of the Public Protector issued in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996, and section 8(1) of the Public Protector Act No. 23 of 1994.

(ii) The report communicates the Public Protector’s findings and the appropriate remedial action taken following an investigation into a complaint of alleged maladministration by the Government Pensions Administration Agency (GPAA), National Treasury and South African Nuclear Energy Corporation (NECSA) in respect of the calculation of the pension benefits of Mr J W A King.

(iii) The Complainant initially approached the Public Protector in August 1998 through an attorney but the matter was closed following a preliminary investigation. It was reopened after new information emerged that was not considered at the time.

(iv) The Complainant initially submitted that NECSA and the GPAA (then the Chief Directorate: Pensions Administration) treated him unfairly when he retired at the end of July 1998 because his pension benefits were not calculated on the basis of his final remuneration package as on the date of his retirement.

(v) On analysis of the matter, the following issues were considered and investigated:

a) Did NECSA as the Complainant’s employer fail to honour an undertaking to address any possible prejudice to employees who were members of the Associated Institutions Pension Fund (AIPF) by adjusting the Complainant’s remuneration package immediately prior to his retrenchment?
b) Did the GPAA improperly or unfairly fail to provide the Complainant with his pension entitlement and reasonable pension expectation when he exited the AIPF?

c) Did NECSA or the GPAA improperly and in a prejudicial manner fail to adjust the Complainant's pensionable service to compensate for the fact that he was retrenched before he was able to complete the remaining 5 years before reaching the retirement age of 65?

(vi) The investigation process included consultations with the Complainant; scrutiny of written submissions by the GPAA and NECSA. Provisions of relevant legislation and policies were analysed and applied.

(vii) Key laws and policies taken into account to determine if there had been maladministration by the organs of state and prejudice to the Complainant were principally those imposing administrative standards that should have been complied with by the organs of state or its officials when processing pension fund benefits of the Complainant. Those are the following:

a) The Associated Institution Pension Fund Act No. 41 of 1963 and Rules thereto;

b) The Conditions of Service of the Complainant;

c) Relevant to the present case is sections 33 and 195 of the Constitution which govern the way officials in the public administration carry out their duties and perform their functions; and

(viii) Having considered the evidence uncovered during the investigation against the applicable law and related prescripts, the Public Protector makes the following findings:

a) Regarding whether NECSA as the Complainant’s employer failed to honour an undertaking to address any possible prejudice to employees who were members of the Associated Institutions Pension Fund (AIPF) by adjusting the Complainant’s remuneration package immediately prior to his retrenchment:

aa) The allegation that the Complainant’s remuneration package was specifically adjusted prior to the termination of his services as a result of an undertaking to address any possible prejudice to employees who were members of the Associated Institutions Pension Fund (AIPF) is not substantiated.

bb) The communication to the Complainant and his prevailing conditions of service confirmed that the salary adjustment in July 1998 was based on the normal annual cost-of-living increase according to the conditions of service.

cc) NECSA never accepted any liability for any perceived prejudice suffered by employees who remained members of the AIPF Fund, because of the different contribution options afforded to members of the NECSA Fund.

dd) NECSA would not have been entitled, by virtue of section 3(1) the APIF Act and Regulation 5(1) and (2), (as substituted by GNR1796 of 24 September 1993), to consider any changes to the conditions for
the composition of the remuneration packages, or the structuring of pensionable emoluments of the Complainant on the eve of his retrenchment to create an impression that a certain level of remuneration was taking place and contributions were proportionally invested in the pension fund by the employer over the period of the preceding year, when in fact it was not.

ee) There is no sufficient evidence, including supporting documentation to substantiate the Complainant’s allegation that NECSA as the employer undertook to adjust any part of his remuneration or employees who remained as members of the AIPF to counter the effect of limitations on the structuring of their pensionable salaries in terms of the Rules of the AIPF.

b) Regarding whether the GPAA improperly or unfairly failed to provide the Complainant with his pension entitlement and reasonable pension expectation when he exited the AIPF?

aa) The allegation by the Complainant that GPAA failed to provide him with the pension entitlement and reasonable pension expectation when he exited the AIPF is partially substantiated.

bb) Because the Complainant’s increased salary level as at his last day of service, was not taken into account in the calculation of the final salary on which the pension benefits were based, his gratuity was approximately R25 000.00 less, and his monthly annuity was approximately R500.00 per month less than expected in terms of the outcome of the negotiations with the employer prior to retrenchment, and his notice of termination of service.
cc) The submission by the Complainant that the GPAA erred by calculating his pension benefits in terms of the amended AIPF rules that applied on his last date of service when he exited the AIPF, instead of the previous version of the AIPF Rules that applied on the date on which he received notice of the termination of his service, is not supported by law.

dd) The allegation that the Complainant was never informed, by either the GPAA or NECSA, of changes to the AIPF Rules or provided with relevant information affecting the calculation of his pension benefits after the notice of termination of service was issued on 1 May 1998, is substantiated.

ee) The amendment of the definition of "final salary" a month before the Complainant's retirement or retrenchment had a significant impact on the calculation of the Complainant's withdrawal benefits from the AIPF and decreased the value of an established retrenchment benefit from the AIPF.

ff) The failure by NECSA and the GPAA to disclose the information timeously and accurately prior to the Complainant's termination of service was in breach of their legal and fiduciary duty to ensure that adequate and appropriate information was communicated to the Complainant on his rights, benefits and duties in terms of the Rules of the AIPF. The unfairness is manifest.

gg) The conduct of the fiduciaries (GPAA and NECSA) fell short of the general standards of good administration as envisaged in sections
33 and 195 of the Constitution and amounts to improper conduct as envisaged in section 182(1)(a) of the Constitution and maladministration as envisaged in sections 6(4)(a) and 6(5)(a) of the Public Protector Act, 1994.

d) Regarding whether NECSA or the GPAA improperly and in a prejudicial manner failed to adjust the Complainant’s pensionable service to compensate for the fact that he was retrenched before he was able to complete the remaining 5 years before reaching the retirement age of 65:

aa) The allegation that the remaining 4 years and 8 months of the Complainant’s pensionable service was not taken into account with the calculation of his pension benefits in terms of the AIPF Act and AIPF Rules to compensate for the fact that he was retrenched before reaching the retirement age of 65 provided in his contract of service, is substantiated.

bb) The complainant was retrenched at the vulnerable age of 60 and prevented from rendering long service until retirement age of 65 through no fault of his own.

c) As fiduciaries of the AIPF the GPAA and NECSA had an obligation to act with due care, diligence and good faith in all their functions, which required them, when performing the functions and exercising the powers bestowed on them in terms of the AIPF Act and Rules, to act in good faith in what they consider to be the member’s best interests and powers for the purposes for which the law and rules conferred on them.
dd) Section 3A of the AIPF Act provides for a process, in the case of a retrenchment such as this, to facilitate the recognition of the remainder of the Complainant’s pensionable service until the retirement age of 65.

e) The failure by NECSA and the GPAA to apply the provisions of the Section 3A of the AIPF Act in order to employ the process for the recognition of the remaining period of 4 years and 8 months until the Complainant would have attained the retirement age of 65, was unreasonable and in breach of their fiduciary duties to act with due care, diligence and good faith.

f) The conduct of NECSA and the GPAA was unfair and resulted in financial prejudice to the Complainant and constituted improper conduct as envisaged in section 182(1) (a) of the Constitution and maladministration as envisaged in sections 6(4)(a)(i), (ii) and (iv) of the Public Protector Act, 1994.

vi) The appropriate remedial action to be taken in terms of section 182(1)(c) of the Constitution is the following:

a) The Chief Executive Office of the GPAA must recalculate the Complainant’s pension benefits based on the salary scale of 31 July 1998, and take steps in consultation with the National Treasury to reimburse the Complainant with the difference between the recalculated benefits and the benefits that he received, including:

aa) an adjustment of the initial annuity as from 1 August 1998;
bb) an arrear amount based on the annual increases of the adjusted annuity amount since 1 August 1998 to date;

cc) interest on the arrear amount since 1 August 1998 to date;

dd) the difference in the amount of the gratuity; and

ee) interest on this amount backdated to 1 August 1998

b) The Chief Executive Officers of NECSA and of the GPAA must recalculate the Complainant’s gratuity and annuity he would have been entitled to had the remainder of his pensionable service until the age of 65 been duly recognised in terms of section 3A of the APIF Act, in order to:

aa) calculate the Complainant’s pension benefits in terms of the adjusted salary as directed above, as well as an additional 4 years and 8 months’ pensionable service;

bb) pay the arrear amount on the gratuity, as well as the arrears on the annuity since 1 August 1998 to date; and

cc) provide for interest on the arrear amounts since 1 August 1998 to date;

c) The Chief Executive Officers of NECSA and of the GPAA are jointly responsible for the interests in terms of the Prescribed Rates of Interest Act, 1975 on the arrear gratuity and annuity.
d) The Chief Executive Officer of the GPAA must take steps to ensure that the AIPF do not bear the loss for the improper conduct of the fiduciaries, and must take steps to ensure that the additional expenditure incurred by the AIPF to fund the recalculated benefits of the Complainant, be recovered from its own operational budget (in respect of the funding implications of the adjusted salary scale) and from NECSA (in respect of the funding implications of the added 5 years pensionable service).
REPORT ON AN INVESTIGATION INTO THE ALLEGATIONS OF MALADMINISTRATION BY THE GOVERNMENT PENSIONS ADMINISTRATION AGENCY, NATIONAL TREASURY AND NUCLEAR ENERGY CORPORATION OF SOUTH AFRICA (NECSA) IN RESPECT OF THE PENSION BENEFITS OF MR J W A KING

1. INTRODUCTION

1.1 This is the Public Protector’s report issued in terms of section 182(1) of the Constitution of the Republic of South Africa Act, 1996 (the Constitution) and section 8(1) of the Public Protector Act, 1994 (the Public Protector Act).

1.2 The report is submitted in terms of section 182(1)(b) of the Constitution of the Republic of South Africa, 1996 and section 8(1) of the Public Protector Act, 1994 to:

1.2.1 The Honourable M Gigaba, MP, Minister of Finance;

1.2.2 Mr K Sukdev, the Chief Executive Officer of the Government Pensions Administration Agency;

1.2.3 Mr P Tshelane, the Chief Executive Officer of the South African Nuclear Energy Corporation; and

1.2.4 Mr D Mogajane, the Acting Director General: Department of Finance

1.3 A copy of the report is also provided to Mr J W A King (the Complainant), in terms of section 8(3) of the Act.
1.4 The report relates to an investigation into allegations of maladministration by the Government Pensions Administration Agency (GPAA), National Treasury and Nuclear Energy Corporation of South Africa (NECSA) in respect of the calculation of the pension benefits of Mr J W A King.

2. THE COMPLAINT

2.1 The Complainant initially approached the Public Protector in August 1998 through an attorney but the matter was closed following a preliminary investigation. It was reopened after new information emerged that was not considered at the time.

2.2 The Complainant initially submitted that the NECSA and the GPAA treated him unfairly when he retired at the end of July 1998 because his pension benefits were not calculated on the basis of his final remuneration package as at the date of his retirement.

2.3 The Complainant alleged that:

2.3.1 He was employed by the Atomic Energy Corporation (now called NECSA) since November 1975 and "bought back" an extra 10 years of service. He was a member of the Associated Institutions Pension Fund (AIPF).

2.3.2 In March 1994 all employees at NECSA were given an opportunity to convert their pensions from the AIPF to the AEC Retirement Fund (NECSA Retirement Fund). He opted to remain with the AIPF.

2.3.3 The remaining members of the AIPF were prejudiced because of limitations to the structuring of their pensionable salaries. Employees who transferred to the NECSA Retirement Fund were reportedly allowed to restructure their income in
order to increase the ratio of their pensionable income to their total remuneration. According to the Complainant “the AIPF employees were denied this facility”.

2.3.4 He raised the matter with the NECSA management. As a result a letter was sent to the Chief Directorate: Pensions Administration at the National Treasury (now called the Government Pensions Administration Agency or GPAA) requesting guidance.

2.3.5 On 21 April 1998, he was notified by NECSA that his post was redundant, and that his services would be terminated on 31 July 1998, after a notice period of three months commencing on 1 May 1998. He was verbally informed that his retrenchment and retirement benefits would be adjusted in July before he would leave the company and would include an "opportunity to restructure" his package". According to the Complainant the adjustment was specifically aimed at improving his pension benefits to address past prejudice that he and other employees may have suffered because they did not transfer to the NECSA Retirement Fund. It was implied that his pension would be based on this final salary.

2.3.6 His increased salary was however, not taken into account in the calculation of the final salary on which the pension benefits were based, as a result of which his gratuity was approximately R25 000, 00 less, and his monthly annuity was approximately R500, 00 less than expected in terms of his notice of termination of service.

2.3.7 In addition, he is aggrieved by the fact that he was retrenched at the age of 60 while his contract of service provided for retirement at the age of 65. He alleged that he did not receive any additional benefits to compensate him for the fact
that he was retrenched before he was able to complete the remaining period of his pensionable service.

2.3.8 The Complainant alleged that he was severely prejudiced because he received a reduced annuity and gratuity as a result of the lower salary scale that was used to calculate his benefits, as well as the fact that there was no adjustment to the period of his pensionable service.

3. **POWERS AND JURISDICTION OF THE PUBLIC PROTECTOR**

3.1 The Public Protector is an independent constitutional body established under section 181(1)(a) of the Constitution to strengthen constitutional democracy through investigating and redressing improper conduct in state affairs.

3.2 Section 182(1) of the Constitution provides that:

> "The Public Protector has the power as regulated by national legislation —

(a) to investigate any conduct in state affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

(b) to report on that conduct; and

(c) to take appropriate remedial action."

3.3 In the matter of the *Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others*¹ the Constitutional Court per Mogoeng CJ held that the remedial action taken by the Public Protector has a binding effect. The Constitutional Court further

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¹ *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others (CCT 143/15, CCT 171/15) [2016] ZACC 11; 2016 (5) BCLR 618 (CC); 2016 (3) SA 580 (CC) (31 March 2016)
held that: "When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences."

3.4 Section 182(2) of the Constitution directs that the Public Protector has additional powers and functions prescribed by legislation.

3.5 The Public Protector is further mandated by the Public Protector Act to investigate and redress maladministration and related improprieties in the conduct of state affairs. The Public Protector is also given power to resolve disputes through conciliation, mediation, negotiation or any other appropriate alternative dispute resolution mechanism.

3.6 NECSA and the GPAA are organs of state and its conduct amounts to conduct in state affairs, as a result the matter falls within the ambit of the Public Protector's mandate.

3.7 The Public Protector's power and jurisdiction to investigate and take appropriate remedial action was not disputed by any of the parties.

4. THE INVESTIGATION

4.1 Methodology

4.1.1 The rationale of this report is to establish whether there was maladministration by NECSA and the GPAA, to determine whether the Complainant was prejudiced,
and to direct appropriate remedial action to remedy the identified maladministration and prejudice, if any is found.

4.1.2 The investigation was conducted in terms of section 182 of the Constitution and sections 6 and 7 of the Public Protector Act.

4.1.3 The Public Protector Act confers on the Public Protector the sole discretion to determine how to resolve a dispute of alleged improper conduct or maladministration.

4.2 Approach to the investigation

4.2.1 When the Public Protector conducts an investigation, the mandate given to her, requires of her to conduct an enquiry on the merits of the complaint that transcends lawfulness and include considerations of equity, good administration and proper conduct.

4.2.2 As with every Public Protector investigation, the investigation was approached using an enquiry process that seeks to find out:

4.2.2.1 What happened?
4.2.2.2 What should have happened?
4.2.2.3 Is there a discrepancy between what happened and what should have happened and does that deviation amount to maladministration? and
4.2.2.4 In the event of maladministration what would it take to remedy the wrong or place the Complainant as close as possible to where they would have been but for the maladministration or improper conduct?
4.2.3 The question regarding what happened is resolved through a factual enquiry relying on the evidence provided by the parties and independently sourced during the investigation. This includes-

4.2.3.1 verification of the facts by obtaining responses to the allegations as well as information and evidence on the events, conduct or decisions that led to the complaint; and

4.2.3.2 establishing proof on a balance of probabilities, achieved through document and explanation requests, interviews or hearings, forensic investigation and expert opinions, where appropriate.

4.2.4 The enquiry what should have happened focusses on the law or rules that regulate the standard that should have been met by the organ of state to prevent maladministration and prejudice.

4.2.5 The enquiry regarding the remedy or remedial action seeks to explore options for correcting maladministration and redressing its consequences. Where a Complainant suffered prejudice the idea is to place him or her as close as possible to where they would have been, had the organ of state complied with the regulatory framework setting the applicable standards for good administration.

4.3 On analysis of the matter, the following issues were considered and investigated:

4.3.1 Did NECSA as the Complainant's employer fail to honour an undertaking to address any possible prejudice to employees who were members of the Associated Institutions Pension Fund (AIPF) by adjusting the Complainant's remuneration package immediately prior to his retrenchment?
4.3.2 Did the GPAA improperly or unfairly fail to provide the Complainant with the pension entitlement and reasonable pension expectation when he exited the AIPF?

4.3.3 Did NECSA or the GPAA improperly and in a prejudicial manner fail to adjust the Complainant’s pensionable service to compensate the fact that he was retrenched before he was able to complete the remaining 5 years before reaching the retirement age of 65?

4.4 The key sources of information

4.4.1 Correspondence and interviews

4.4.1.1 Documentation and the information provided by the Complainant in 1998 and again recently;

4.4.1.2 Consultation and correspondence with officials of NECSA in December 1998 and April 2016; and

4.4.1.3 Consultation and correspondence with the (then): Chief Directorate Pensions Administration at the Department of Finance, as well as the GPAA in December 1998 and between December 2015 and August 2016.

4.4.2 Legislation and other prescripts

4.4.2.1 The Constitution;

4.4.2.2 The Public Protector Act no 23 of 1994 (the Public Protector Act) ;
4.4.2.3 The Associated Institutions Pension Fund Act No 41 of 1963 (AIPF Act);
4.4.2.4 Regulations of the Associated Institutions Pension Fund
4.4.2.5 Government Employees Pension Law, 1996 (Proclamation 21 Published in Government Gazette 17135 Of 19 A);
4.4.2.6 Rules of the Government Employees Pension Fund;
4.4.2.7 Policy and strategy for Staff Retrenchment (NECSA); and
4.4.2.8 Internal memoranda and consultation documents relating to the registration of the AEC Retirement Fund;

5. THE DETERMINATION OF ISSUES IN RELATION TO THE EVIDENCE OBTAINED AND CONCLUSIONS MADE WITH REGARD TO THE APPLICABLE LAW AND PRESCRIPTS

5.1 Regarding whether NECSA as employer failed to honour an undertaking to address any possible prejudice to employees who were members of the Associated Institutions Pension Fund (AIPF) by adjusting the Complainant’s remuneration package immediately prior to his retrenchment:

5.1.1 Common cause issues

5.1.1.1 It is common cause that the AIPF is a defined benefit pension scheme established in terms of section 2 of the AIPF Act. The scheme has been established for persons in the service of associated institutions as determined by the provisions of the AIPF Act. The scheme is not registered under the Pension Funds Act, 1956 since the Government is the participating employer. NECSA was an associated institution in terms of the AIPF Act and was thus a participating employer in the scheme.
5.1.1.2 In the course of 1994, the government took steps to bring about a new form of administration and funding for the associated institutions, the participating employers in the AIPF. Pursuant to this end, the Minister of Finance approved regulations promulgated in April 1994 which enabled associated institutions to offer their staff and retired members the opportunity to move to private pension funds.

5.1.1.3 In 1994 NECSA established defined contribution plans. These contribution plans were compulsory for every permanent employee employed in accordance with the conditions of employment, primarily by means of monthly contributions to the AEC (NECSA) Retirement Fund.

5.1.1.4 NECSA informed its employees in 1994 that it had decided to withdraw as a participating employer from the AIPF and PFTW. As a result of the withdrawal the employees had the following options to-

a) Remain as a contributing member of the AIPF and the Temporary Employees Pension Fund (TEPF)

b) Leave their accrued pension benefits in the AIPF and TEPF and become a contributing member of the AEC Retirement Fund;

c) Transfer their funding level of their accrued benefits in the AIPF and PFTW to a Preservation Fund and become a contributing member of the AEC Retirement Fund.

5.1.1.5 NECSA informed its employees that members who elect this option would continue with membership of the AIPF/PFTW and would be entitled to benefits in terms of the Pension Regulations known to them. The high contribution rate payable by the NECSA did not make this option unaffordable for the employer.
NECSA also raised the concern that it, as well as the members, would have no say in the rules and management of the AIPF/PFTW.

5.1.1.6 NECSA advised at the time that the NECSA (AEC) Retirement Fund would be registered as a Pension Fund but would have benefits similar to both Pension and Provident Funds. It would operate on a fixed contribution basis payable by both employer and employee and would, therefore, provide members with more flexibility on leaving service. In view of the fact that the NECSA Retirement Fund would be registered as a private fund, the members had to pay tax on lump sum payments in accordance with the provisions of the Income Tax Act, 1962.

5.1.1.7 Ten (10) NECSA employees (including the Complainant) elected to remain with the AIPF.

5.1.2 First issue in dispute: That employees who remained with the AIPF were prejudiced because of limitations to the structuring of their pensionable salaries.

5.1.2.1 The Complainant submitted that he and the other employees who remained with the AIPF, raised certain concerns about the structuring of their remuneration and pension benefits with NECSA where after the matter was raised with the then Chief Director: Pensions Administration. Messrs Ginsberg, Malan & Garsons Consultants & Actuaries was subsequently consulted by the Pensions Administration in September 1997 and advised as follows on the position of those employees who opted to remain with the AIPF:

a) "There are 10 employees who are still members of the Associated Institutions Pension Fund (AIPF). AEC feels these members are likely to lose out because of the way salary increases granted by the AEC as the
All allegations of maladministration, unfair treatment and prejudice against the Government Pensions Administration Agency (GPAA), and the South African Nuclear Energy Corporation, are translated into pensionable salaries under the AIPF. The definition of pensionable salaries under the AIPF excludes all allowances whereas the AEC own Scheme, pensionable salaries include some of the allowances.

b) When annual salary increases are granted, the overall remuneration including allowance is increased. This implies that for the 10 members only the increases on the basic salary become pensionable.

c) The AEC own Scheme allows members to contribute voluntarily up to 6% of pensionable salaries whereas the AIPF regulations do not have such a provision.

d) The total salary is almost double the pensionable salary. Clearly the members’ standard of living will almost certainly be lowered at retirement because their pensions will be calculated on a lower salary. This problem can be addressed by either changing the definition of pensionable salary under the AIPF to include some of the allowances or to get the members to contribute additional voluntary amounts.

e) I see no reason why the 10 members cannot be allowed to pay additional voluntary contributions of up to 6% of pensionable salaries to other pension funds. The fact that AIPF does not allow this should not prevent them making such contributions elsewhere.

f) In conclusion the AIPF has over 4 000 active members and it may not be convenient to amend its regulations because of the 10 AEC employees. It may be more convenient for the AEC to amend its remuneration structure or to allow the 10 members to make additional contributions to other pension funds.”

5.1.2.2 At the time, Messrs Ginsberg, Malan & Garsons also emphasised that the ten (10) members made a conscious decision to remain in the AIPF and their benefits and contribution must be as per the AIPF regulations. They requested
Pensions Administration to confirm "whether the changes to the way the remuneration is restructured came in before or after the transfer from the AIPF."
In this regard they stated that if "there were changes to their remuneration, as a result of negotiations with the unions, which prejudiced their eventual retirement benefit, then this must be addressed by the AEC as the employer."

5.1.2.3 While NECSA reportedly noted the disparity between the contribution rates between members of the AIPF and the AEC (NECSA) Retirement Fund, it is also on record that the resolution of the problem was in the hands of the administrators of the AIPF, and that problem had to addressed by either changing the definition of pensionable salary under the AIPF Rules to include some of the allowances or to get the members to contribute additional voluntary amounts.

5.1.2.4 NECSA reiterated that the AIPF did not offer a solution to this problem at any time before the Complainant's termination of service. As a result NECSA was not in a position to consider any changes to the conditions of service, including the conditions for the composition of the remuneration packages, of the Complainant or any of the employees who were still members of the AIPF with the view to improve their position in respect of this issue.

5.1.2.5 Employees were advised of the risks involved in the options that were available to them when the AEC (NECSA) Retirement Fund was established. In respect of the option to remain with the AIPF it was specifically explained to employees that because NECSA had withdrawn as a participating employer "it would have no say in the rules and management of the AIPF/PFTW".
5.1.2.6 According to NECSA, the Complainant and the other nine (9) members made a conscious decision to remain in the AIPF with the result that their benefits and contribution were determined as per the AIPF regulations and they accepted the risk of a disparity between the pension arrangements of employees belonging to the two different funds.

5.1.2.7 It was reiterated that the Complainant made a choice to stay in the defined benefit scheme which he knew did not provide for restructuring of remuneration in order to increase the ratio of pensionable income to total remuneration and did not afford him the opportunity to restructure his pensionable income like those employees who elected to transfer to a defined contribution scheme.

5.1.2.8 In NECSA’s view there would be no basis on which it could be held accountable or liable for any disadvantage that a member who chose to remain with the AIPF might have suffered.

5.1.2.9 It was also observed that while the Complainant alleged that he has been prejudiced, and that NECSA should compensate him for the loss because he was not able to “increase the ratio of his pensionable income to his total remuneration” this prejudice or loss has actually never been quantified.

5.1.3 Application of the law relevant to this dispute

5.1.3.1 The pension fund, the powers and duties of its trustees, and the rights and obligations of its members and the employer are governed by the rules of that fund, relevant legislation and the common law. The fund is a legal persona and owns its assets².

² Sec 5(1)(a) and (b) of the Pension Funds Act 24 of 1955.
5.1.3.2 A defined benefit (DB) scheme fixes the benefit in advance – mostly determined by the member’s final salary at retirement, the years of service, and an accrual rate (which indicates how the pension benefits increase due to additional years of service). Therefore, the benefits are determined in relation to a formula, whereas the rules of the fund require the employee and employer to make recurring fixed contributions over years, based on the pensionable income in that year.

5.1.3.3 The defined contribution fund, also known as the money purchase fund, provides for the accumulated contributions (both employee and employer contributions), plus the return on investment, to be credited to a specific account on behalf of the member. The final credit at retirement can be used either as a lump sum benefit or to purchase an annuity at retirement. In many respects, these funds resemble a savings scheme.3

5.1.3.4 The rules of the fund spell out the circumstances in which the employer must contribute to the fund and how the quantum of the contribution is to be determined. The rules of a retirement fund typically define ‘pensionable salary’ for the purposes of contributions made by the employer and the employee, as well as (where applicable) the value of the benefit payable in the case of fund-provided risk benefits.4

5.1.3.5 Where the retirement fund only has one contributing employer, the rules of the fund may define the actual determination of the ‘pensionable salary’ (being "retirement-funding employment"-income5), for example as only including fixed

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3 Kransdorff B v Sentrachem Pension Fund & Another 1999/9 BPLR 55 (PFA).
5 Income Tax Act, No. 58 of 1962
remuneration (e.g. salary or wages), and excluding variable amounts such as 
commissions, bonuses and overtime. In the case of an umbrella fund, the norm 
is for the rules to allow the contributing employer.

5.1.3.6 The rules of the fund, relevant legislation and the common law allows a fund to 
be structured on a basis which promotes the employer’s staff motivation and 
retention strategies. Where employees are offered a choice between an existing 
defined benefit arrangement and the new defined contribution arrangement, it 
would not therefor be inequitable for the rules of the schemes to determine 
different contribution structures. The distinction is critically important because 
each scheme gives rise to different legal rights and obligations. The 
differentiated contribution structures are not designed to prejudice any particular 
distinguishable group or individual members of the different schemes but simply 
to manage inherent advantages, disadvantages, obligations and risks carried 
by both employers and employees within the two types of schemes differently, 
but in a manner where the retirement benefits are roughly expected to be equal.

5.1.3.7 Employer and/or employer/employee contributions to a defined benefit pension 
plan are based on a formula that calculates the contributions needed to meet 
the defined benefit. These contributions are actuarially determined taking into 
consideration the employee’s life expectancy and normal retirement age, 
possible changes to interest rates, annual retirement benefit amount, and the 
potential for employee turnover.  

5.1.3.8 Defined contribution plans define how much the sponsor and the participant can 
or must contribute to an individual account created for each participant. 
Typically, the employee makes choices about how the money should be

6 "What is a Defined Benefit Pension Plan?". Channels Tax center. New York Life Precision Information, LLC. 2009. 
http://www.benefitnews.com/bda/0,3224,11545,00.html Retrieved 2009-05-09
invested and takes the risk of poor investment performance if his or her choices do not perform well. Generally the move to defined contribution funds is marketed to members along the lines that while they shall carry the investment performance risk, the advantages include a funding structure which they found easier to understand and the possibility of managing contributions more flexibly within a package approach to remuneration.

5.1.4 Second issue in dispute: That NECSA resolved or agreed to increase the Complainant’s remuneration on the eve of his retrenchment for the purpose of increasing his pension benefits from the AIPF.

5.1.4.1 In terms of the Complainant’s understanding he had an oral agreement with NECSA that his salary would be restructured – “this meant that … (the) pensionable salary would be made higher so that his retrenchment package would be a higher amount”. The Complainant’s legal representative submitted on his behalf that “this oral agreement is definitely not a figment of consultant’s (Mr King) imagination. Consultant (sic) did indeed receive a salary increase as from the 1st July 1998. Had there been no such oral agreement it would seem ludicrous that a person would receive a salary increase in his last month of service.”

5.1.4.2 NECSA confirmed that the Complainant’s remuneration package was revised on 1 July 1998 and that the package was increased with an amount of R21 187, 00 per annum. The Complainant was apparently informed in writing that his package was structured as follows “according to AEC-policy”:
<table>
<thead>
<tr>
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</thead>
<tbody>
<tr>
<td>Service Bonus (+STAB)</td>
<td>R164 988.00</td>
<td>R181 236.00</td>
</tr>
<tr>
<td>Pension Contribution (AIPF)</td>
<td>R16 636.29</td>
<td>R18 274.63</td>
</tr>
<tr>
<td>AEC-Medical Contribution</td>
<td>R36 275.40</td>
<td>R37 357.36</td>
</tr>
<tr>
<td>Housing Allowance</td>
<td>R8 112.00</td>
<td>R8 112.00</td>
</tr>
<tr>
<td>Motor Allowance</td>
<td>R29 697.84</td>
<td>R32 622.48</td>
</tr>
<tr>
<td>Allowance</td>
<td>R43 808.52</td>
<td>R43 798.58</td>
</tr>
<tr>
<td>Total Remuneration Package</td>
<td>R696.00</td>
<td>R0.00</td>
</tr>
<tr>
<td></td>
<td>R300 214.05</td>
<td>R321 401.05</td>
</tr>
</tbody>
</table>

5.1.4.3 NECSA denied categorically that employees, who had chosen to stay with the AIPF, were prejudiced in respect of the composition of their remuneration packages as opposed to employees who transferred to the AEC (NECSA) Retirement Fund. Further that as the employer it did not undertake to adjust any part of the remuneration of such employees to counter the effect of limitations on the structuring of their pensionable salaries in terms of the Rules of the AIPF.

5.1.4.4 Employees were reportedly advised in writing of the risks and consequences of the different dispensations involved in staying with the AIPF and transferring to the AEC (NECSA) Retirement Fund. It was reportedly emphasised that NECSA would not have any influence or control over the pension interests of members who stayed with the AIPF. As a result NECSA was not in a position to consider any changes to the conditions of service, including the conditions for the composition of the remuneration packages, or the structuring of pensionable emoluments of the Complainant or any of the employees who were still members of the AIPF, with the view to improve their position in respect of this issue.
5.1.5 Application of the law relevant to this dispute

5.1.5.1 An employees' remuneration is a material term of the employment contract and any resolution increasing or decreasing the agreed annual remuneration package would amount to a change to conditions of employment and has to be negotiated and agreed and may not be unilaterally amended by the employer\(^7\). Salaries, wages and terms and conditions of employment are primarily changed through a collective bargaining process in term so section (1)(c) of the Labour Relations Act 66 of 1995 (LRA).

5.1.5.2 Wage agreements generally provide for annual salary adjustments, including cost-of-living adjustments, annual pay progression and grade progression, intended to preserve the buying power of the employees, in order to ensure that their salaries are not eroded by inflation.

5.1.5.3 NECSA advised that the measures and prescripts on the remuneration and other conditions of service which determined the structure of its remuneration system and the composition of the remuneration packages, provided for the annual revision and restructuring of the remuneration packages, starting one year after the date of implementation, which was 1 July. As the Complainant was still in the employment of NECSA at the time when the revision and adjustment of his package was due, the normal remuneration arrangements and conditions applied.

5.1.5.4 The Complainant's package was therefore revised without having regard to the fact that he was serving a notice period, and was adjusted as described above.

\(^7\) SAMRI v Toyota of South Africa Motors (Pty) Ltd [1998] BCLR 616 (LC)
This was confirmed by the letter addressed to him under the heading: "Remuneration Revision: 1 July 1998" which served as written confirmation of the salary adjustment as envisaged in Chapter 3 and 4 Basic Conditions of Employment Act 75 of 1997 (BCEA).

5.1.5.5 NECSA further denies that the issue in question was or could have been the subject of negotiations with the Complainant on the possibility of improving his salary and his conditions of service on an individual basis. As such, it was NECSA’s contention that there would not have been any basis for it to accept any responsibility to ensure an improvement of retrenchment or retirement benefits of members of the AIPF upon termination of service, as suggested by the Complainant.

5.1.5.6 According to the "parol evidence rule" when a contract has been reduced to writing, the writing is in general regarded as the exclusive memorial of the transaction and no evidence to prove its terms may be given save the document or secondary evidence of its contents, nor may the contents of such documents be contradicted, altered, added to or varied.

5.1.6 Conclusion

5.1.6.1 It is not in dispute that NECSA offered its employees, including the Complainant, a choice between the AIPF as defined benefit and the NECSA Retirement Fund as a defined contribution schemes with different contribution structures.

5.1.6.2 The rule which allowed members of the defined contribution fund to manage contributions more flexibly by structuring ‘pensionable salary’ and the

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8 See Union Agreement v Vanini Pipas (Pty) Ltd 1041 AD 34 at 47.
retirement-funding employment - income component of their salary packages differently were not prohibited by statute, nor did it offend against any established precedent of the common law, or any of the recognised heads of public policy.

5.1.6.3 Both schemes had advantages and disadvantages - whereas defined benefits funds are designed to foster and reward long service and the final retirement benefit under the defined contribution scheme was a function of investment performance as well as contribution rates.

5.1.6.4 In the circumstances the choice afforded to members cannot be regarded as prejudicial or improper in violation of the right to fair labour practices, given substance by the LRA since it was not discriminatory on any arbitrary ground (arbitrary discrimination being outlawed as an unfair labour practice by Schedule 7 of the LRA). In fact, NECSA was not afforded any discretion (which may have been exercised capriciously), and the contribution structures of the two schemes were not distinguished on the basis of any discernible prejudice.

5.1.6.5 The communication to the Complainant and his prevailing conditions of service confirmed that the salary adjustment in July 1998 was based on the normal annual cost-of-living increase according to policy or collective agreements. There is nothing in writing, as required by the Basic Conditions of Employment Act, No 75 of 1997 (BCEA), that NECSA took or recorded a decision or concluded an individual agreement with the Complainant prior to the termination of his services, to change his conditions of service to allow an extraordinary adjustment of his remuneration package with the view to increase his pension benefits.
5.1.6.6 More specifically, the benefits of a defined benefit fund member upon retirement are mostly determined by the member's final salary at retirement. Therefore, the benefits are determined in relation to a formula, whereas the actual employee and employer contributions over years are based on the pensionable income in that year. NECSA is of the view that it would have not only been unfair but also unlawful to adjust the Complainant's remuneration on the eve of his retrenchment with the view to create the impression that a certain level of remuneration was taking place and contributions proportionally invested in the pension fund by the employer over the period of the preceding year when in fact it was not. In this regard the Minister of Finance warned in Parliament in 1998 during his budget review against what he described as "manipulation of the members' final salary upon retirement at cost to the fund and the State as sponsoring employer."

5.1.6.7 On the evidence presented the Public Protector is satisfied that the Complainant did not have a contractual entitlement to have his pensionable salary "inflated" shortly before retrenchment with the view of increasing his/her pension benefits, nor was there an agreement to adjust any part of the remuneration of the Complainant or employees who remained members of the AIPF to counter the effect of limitations on the structuring of their pensionable salaries in terms of the Rules of the AIPF.

5.1.6.8 The GPAA correctly averred that the purported agreement relied upon by the Complainant, namely that improved retrenchment benefits would be implemented with effect from 1 July 1998, was allegedly concluded by NECSA and not by the AIPF. In order to succeed in establishing liability on the part of the AIPF the Complainant did not only have to provide proof of the promise or undertaking by NECSA, but have to contend that the GPAA/AIPF was contractually bound to fulfill the employer's promise.
5.1.6.9 It was not suggested that NECSA was acting as an agent of the GPAA/AIPF, and the Courts have insisted in similar circumstances that a pension fund is separate legal entity and would act independently from a contributing employer.

5.1.6.10 As a result, it is not possible to resolve that NECSA concluded an agreement with the Complainant to improve his pension benefits by means of a salary adjustment on 1 July 1998, or that the GPAA was contractually bound by such an agreement to calculate Mr Kings benefits on a final salary of R181 236,00.

5.2 Regarding whether the GPAA improperly or unfairly failed to provide the Complainant with his pension entitlement and reasonable pension expectation when he exited the AIPF?

5.2.1 Common cause issues

5.2.1.1 According to the records of the (then) Department of Finance: Chief Directorate Pensions Administration (now GPAA) the Complainant was retrenched on 31 July 1998. He was sixty (60) years and four months of age on date of termination of service. GPAA received the Complainant’s withdrawal notification from NECSA on 8 May 1998.

5.2.1.2 At the time when the Complainant was notified of his retrenchment the AIPF Rules defined 'salary' as "the pensionable emoluments under any pension law of an officer or employee on the date of his death, retirement or discharge. (own emphasis)
5.2.1.3 The Rules of the AIPF where changed on 12 June 1998 with effect from 1 July 1998\(^9\) to amend the definition of "final salary" to mean "the average of a member's pensionable emoluments over the member's last 24 months before his or her retirement date"

5.2.1.4 The Complainant received an anticipated benefit statement (quote) when he received notice of his termination of service in May 1998. This benefit statement reflected the calculation of his pension benefits based on his (then current) salary scale of R164 998, 00.

5.2.1.5 On 1 July 1998 the Complainant’s salary was increased to R 181 236, 00 through the annual cost-of-living adjustments. At the time it was not disclosed to the Complainant that the AIPF Rules had in the meantime been amended before his final date of service and that his pension benefits were no longer going to be determined based on the (increased) final salary on his last date of service. In terms of the amended Rule applied by GPAA the Complainant’s benefits were accordingly not calculated on his salary scale of R181 236 as per his last date of service, but on R164 998, 00 as the average salary scale for the period 1 August 1996 to 31 July 1998.

5.2.1.6 GPAA indicated that the exit reason provided by NECSA was Rule 15(1) – namely retirement. However, that this was a mistake. Instead the exit reason should have been Rule 14(1)(b) as read with rule 14A – namely termination of employment relating to the abolition of the post, reduction, reorganization or restructuring of the activities of the employer. The formula provided for in both Rules were, however, the same and the Complainant’s benefits were calculated correctly.

\(^9\) (Government Gazette No. 6205)
5.2.2 Issues in dispute

5.2.2.1 Essentially, the Complainant contends that the withdrawal benefit paid to him on his retrenchment was neither fair nor in line with his expected entitlement in terms of the AIPF Rules.

5.2.2.2 According to the Complainant the parties involved (NECSA, the AIPF/GPAA and him) concluded an agreement before the amendment of the AIPF Rules and his application for the withdrawal of his pension funds was also submitted on 8 May 1998, before the amendment. He maintained that in terms of the Rules that applied on 8 May 1998, his pension benefits should have been calculated on the salary scale that applied on his last day of service (R181 236). If his increased pensionable salary was taken into account in the manner suggested by him, the Complainant calculated that his gratuity would have been approximately R25 000, 00 more than what he had received, and his monthly annuity (pension) would have increased by more than R500, 00 per month.

5.2.2.3 The Complainant is of the view that

a) NECSA was bound “by contract” to ensure that the terms of their agreement were complied with.

b) The AIPF/GPAA could not change its rules retrospectively unless the relevant legislation expressly states that it may be applied retrospectively. There is no reference to "retrospective application" in the new legislation. His application for retirement was received by the AIPF before the new rules were promulgated and therefore only the old rules should apply.
5.2.2.4 The GPAA confirmed that it was responsible for the management and control of the business of the AIPF.

5.2.2.5 In terms of the Fund Procedures for the GEPF, Temporary Employees Pension Fund and the AIPF, completed documentation should be submitted to the GPAA and certified by the employer before any pension benefit could be calculated. Employers were advised that Withdrawal from Pension Fund Transactions should be submitted at least 6 to 8 weeks before the last day of service of the member. Exceptions to the rule are resignations and cases of unpredictable death in service.

5.2.2.6 The withdrawal notification from an employer was requested in advance to prevent unnecessary delays in the payment of the pension benefits. The GPAA would, however, not action a withdrawal before the officer’s or employee’s last working day because of the following reasons:

a) An officer or employee may retract his/her resignation and subsequent withdrawal decision with the consent of the head of the department (Director-General or equivalent) at any time before or on the last day of service, and

b) The date of accrual of the member's pension benefits would be the date that such a member withdrew from service, and exit from the Pension Fund, in other words the date of service termination.

5.2.2.7 The GPAA stated that it was therefore obliged to calculate the pension benefits in accordance with the rules of the AIPF that applied on the date on which the Fund became liable for the benefits. That would be the date on which the member exited from the Fund, in other words the last working day (31 July
1998), and not the date on which they received the withdrawal notification (1 May 1998).

5.2.2.8 As the amended Rules of the AIPF were already in effect on 31 July 1998, the GPAA had to calculate the final salary in terms of the amended definition... "it is only then that the beneficiary becomes entitled to payment, it is only then that a right to the payment can come into being."\(^{10}\)

5.2.2.9 In terms of Regulation 14(2) the Complainant’s final salary could "not be less than his or her pensionable emoluments as on the day immediately before 1 July 1998". The Complainant’s pension benefits were therefore, not calculated on the average salary over the 24 months prior to his termination of service, but on his salary scale as on 30 June 1998 - which was R164 998, 00.

5.2.2.10 It is not in dispute that NECSA did not disclose to the Complainant that the Rules would change before his final date of service and that his benefits would not be affected by the his salary increase. NECSA reiterated that it acted as intermediary in the interface between the AIPF and employees such as the Complainant, channeling information to AIPF members as per directives of the GPAA.

5.2.2.11 According to the GPAA the National Treasury consulted with and advised all employers who were contributing to the AIPF about the proposed rule changes. However, NECSA denied that they were advised or consulted in this regard. NECSA did however note that the Complainant was according to his own admission later informed of the Rule change. This was however, after the fact.

\(^{10}\) The Joint Municipal Fund v LJ Grobler [2007] SCA 49 (RSA)
and NECSA did not submit any evidence showing that it had advised the Complainant of the changes in the calculation of his pension benefits prior to his final date of service.

5.2.3 Application of the relevant law

5.2.3.1 In terms of the Associated Institutions Pension Fund Act 41 of 1963 and Regulations as amended with effect from 1 July 1998, the definition of final salary for the purpose of the calculation of the pension benefits of a member of the AIPF, was amended as follows:

"final salary" means the average of a member's pensionable emoluments over the member's last 24 months before his or her retirement date;"

5.2.3.2 The law therefore, did not afford GPAA any discretion on the determination of the Complainant's final salary, and was bound by the AIPF Rules as applicable on the Complainant's last date of service. The GPAA would have acted ultra vires their powers if they calculated the Complainant's benefits in term of the repealed Rule.\(^{11}\)

5.2.3.3 However, in the public law realm within which the Public Protector operates, the test for "improper" conduct as envisaged in section 182(1)(a) of the Constitution is not equivalent to determining unlawfulness or legal compliance. This means that every conduct in state affairs can be judged from two different, slightly overlapping and most usually parallel systems; to determine if the organs of state and public institutions in South Africa act in accordance with the law and from the point of view of general standards of good administration. Parties may

\(^{11}\) Meyer v Iscor Pension Fund (391/01) [2002] ZASCA 146; [2003] 1 All SA 40 (SCA) (28 November 2002)
be able to demonstrate that every applicable rule had indeed been considered but the outcome may still be unfair, which is why it may be necessary to rely on fairness in order to do justice between the parties and to look beyond the letter of the law.

5.2.3.4 The Public Protector therefore also considers the action of the GPAA and NECSA in the light of unwritten legal principles and general principles of good governance, developed in case law and legal doctrine, which are equally relevant to a decision regarding the lawfulness of government conduct. These standards are summed up in a broad complex of requirements regarding government carefulness and other duties of care with regard to the administrative process and the conduct of public servants in relation to citizens. These standards (as envisaged in section 195 of the Constitution) particularly require administrative authorities and organs of State to act without undue delay, to actively supply the citizen with relevant information, to actively listen to his point of view, to actively gather relevant information, to treat people fairly, to respect human dignity, to be unbiased and helpful and so on.

5.2.3.5 Examples of these standards include the principles of equal treatment for equal cases, the norm of reasonableness, the norm of proportionality between means and end, the principle of legal certainty, the norm of legitimate expectations, the requirement to provide reasons for decisions, certain requirements regarding governmental carefulness and other duties of care.

5.2.3.6 Common law fiduciary duties of Boards of Trustees of pension funds have been developed over time by our courts. There are also fiduciary duties which have been established through legislation such as section 4.1.19 of the GEP Law, 1996 and Section 7C(2) of the Pensions Fund Act 24 of 1956. Fiduciary duties arise as a consequence of a fiduciary relationship existing between the board
and the fund. The board of trustees occupies a fiduciary position and holds the assets of the fund in a fiduciary capacity.

5.2.3.7 It is now trite law that, at common law and through legislation that a board of trustee of a pension fund owes at the very least, a duty of good faith towards the members and other stakeholders in the fund.\textsuperscript{12} The employer is not similarly burdened but owes at least a duty of good faith to the fund and its members and beneficiaries\textsuperscript{13}.

5.2.3.8 In order to discharge its duty of good faith to the members of the fund, the board of trustees might among other things be required to provide members with information which is necessary to safeguard their interests in the fund. In terms of the GEP law, 1996 the Board of Trustees is obliged to "\textit{ensure that adequate and appropriate information is communicated to the members informing them of their rights, benefits and duties in terms of the rules of the Fund}". In \textit{Caffin v African Oxygen Limited Pension Fund}\textsuperscript{14}, it was held that -

\begin{quote}
"...it would seem to be just and equitable; therefore, that boards of trustees be obliged in terms of their duty to act in good faith to disclose such information as would reasonably enable members of pension funds to consider the consequences that the information held for them in the realisation of their rights, interests and expectations. The failure to furnish such information, without appropriate justification, will constitute an improper exercise of the board's powers and will amount to maladministration of the fund ..."
\end{quote}

\textsuperscript{12} Ssa 2(a) and (b) of the Financial Institutions (Investment of Funds) Act 39 of 1994 and Rule 18.1.4.
\textsuperscript{13} CF Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd [1991] 2 All ER 597 (CH) at 604g - 606j.
\textsuperscript{14} No PFAVE/14/98 & PFAVE/20/98 para 14.
5.2.3.9 In some cases the Pension Fund Adjudicator\(^{15}\) and the Courts\(^{16}\) have found that the failure by the fund or its agent to provide members with adequate and appropriate information may amount to negligent misrepresentation. The Courts emphasised that in the context of negligent misrepresentation, wrongfulness is determined by establishing "whether or not the Defendant breached a legal duty to furnish the correct information to the person entitled to such information." The Court stressed that the same principles then apply as in regard to wrongfulness in a general delictual context. Similar guidelines exist as to whether or not a legal duty rests upon the defendant in a particular case\(^{17}\). For present purposes the following additional guidelines may be useful:

a) Whether the parties have a contractual or fiduciary relationship requiring them to furnish the correct information concerning any matter arising from such relationship;

b) whether the Defendant has certain exclusive information which is not readily accessible to the Plaintiff or other parties;

c) whether a Defendant furnishes information by dint of his or her professional knowledge and competence;\(^{18}\)

5.2.3.10 It is not necessary for the Complainant to show that he would have been able to act differently, had the non-disclosures been discovered and the actual situation realised. Where a fiduciary provides incorrect information or without good cause fails to provide relevant information, this would constitute a breach of fiduciary duty\(^{19}\)

\(^{15}\) Lukas Maree v Joint Municipal Pension Fund CASE NO: PFA/KZN/1544/04/KM; C P Spearman Complainant and Salt Rock Hotel Pension Fund and Others Case No. PFA/03/295/98/LS

\(^{16}\) Aucamp and Others v University of Stellenbosch (A19/01) [2002] ZAWHC 14 (15 March 2002)

\(^{17}\) Neethling 302-307; see also Standard Chartered Bank of Canada v Nedperm Bank Ltd 1994 (4) SA 747 (A) at 770A-771A

\(^{18}\) Jowell v Bramwell-Jones and Others 1998 (1) SA 836 (W) at 877l

5.2.3.11 The Courts and other forums have emphasized the importance of not only providing members of a pension fund sufficient and correct information about their pension benefits to make informed investment decisions, but also to know how these benefits are calculated. In the matter of *Aldridge Fisher vs Basil Read Group and others*²⁰, the Pension Fund Adjudicator observed as follows:

"Member's withdrawal benefit is a significant part of his or her property, the quantum of which in this instance has to be determined by means of an agreed formula. One important purpose of a predetermined formula is to enable the member to determine whether he is receiving the correct amount with reference to an objective standard"

5.2.4 Conclusion

5.2.4.1 The Public Protector is of the view that while the GPAA was legally obliged to apply the amended Rule in respect of the calculation of the Complainant's pension benefits based on his salary over the two years prior to his last date of service, the conduct of the fiduciaries (GPAA and NECSA) fell short of the general standards of good administration in terms of which the Public Protector endeavours to ascertain whether it is fair, reasonable and in accordance with the precepts of the constitution.

5.2.4.2 On a balance of probabilities the Public Protector is satisfied that it was not disclosed to the Complainant that the rules would change before his final date of service and that his benefits would not be increased by the his salary
increase. NECSA reiterated that it acted as intermediary in the interface between the AIPF and employees such as the Complainant, channeling information to AIPF members as per directives of the GPAA. As it did not receive any communication from the GPAA in respect of the Rule changes that affected the 10 members of the AIPF in its employment at the time, it was not in a position to disclose to the Complainant that the relevant Rule had changed since the notice of termination of services.

5.2.4.3 In terms of the principles laid down in the Aucamp matter\textsuperscript{21}, the GPAA was therefore in breach of a legal and fiduciary duty to ensure that adequate and appropriate information was communicated to the Complainant on his rights, benefits and duties in terms of the Rules of the AIPF.

5.3 Regarding whether NECSA or the GPAA improperly and in a prejudicial manner failed to adjust the Complainant’s pensionable service to compensate the fact that he was retrenched before he was able to complete the remaining 4 years and 8 months years before reaching the retirement age of 65:

5.3.1 Common cause issues

5.3.1.1 The Complainant was retrenched on 31 July 1998 because his position became redundant. He was sixty years and four months of age on date of termination of service. The Complainant’s contract of service provided for normal retirement at the age of 65. The remaining period pensionable service was 4 years and 8 months.

\textsuperscript{21} Aucamp and Others v University of Stellenbosch (A19/01) [2002] ZAWHC 14 (15 March 2002)
5.3.1.2 The Complainant received a severance package that was equal to 100% of his annual salary, plus service bonus and about 117.5 days in accrued leave as well as post-retirement medical aid benefits.

5.3.1.3 The Complainant was employed by the Atomic Energy Corporation (now called NECSA) since November 1975 and "bought back" an extra 10 years of service when he was allowed to do so. He was a member of the AIPF.

5.3.1.4 When the Complainant’s pension benefits were calculated by the GPAA his pensionable service used in terms of the applicable formula, amounted to 32, 75 years.

5.3.2 Issues in dispute

5.3.2.1 It is in dispute that the Complainant was entitled to additional pensionable service in respect of the calculation of his pension benefits on account of his services being terminated because of the abolition of his post or reduction of staff at NECSA or on the ground that this termination of service will promote efficiency or economy in the institution.

5.3.2.2 According to the Complainant he became aware of the fact that the Rules of the Government Employees Pension Fund (GEPF), which is also administered by the Pensions Administration, provided that where a member is discharged after 10 years' of service... in order to promote efficiency" (retrenched) his pensionable service is increased by "one third of the period of his or her pensionable service or by his or her unexpired period of service whichever period is the shorter, but not exceeding five years".22

22 Rule 14.2.3 of The Rules of the Government Employees Pension Fund
5.3.2.3 In terms of his conditions of service the Complainant’s retirement age was
determined at 65. He therefore, expected the period of his pensionable service
to have extended to the age of 65. As a result the remaining period that should
in his view have been added to his pensionable service should have been 4
years and 8 months, which would have resulted in an increase in the gratuity
and monthly pension.

5.3.2.4 NECSA confirmed that the Complainant’s contract of employment was
terminated on grounds of redundancy of his position and he was paid a
severance package of just over 100% of his annual remuneration which he
accepted and which exceeded the amount provided for in the BCEA. NECSA
furthermore advise that if the Complainant believed that his termination was
unfair, he could have challenged that in terms of the LRA, which he did not do.
NECSA stated that "the Complainant should not be allowed to have a double
bite of accepting a severance package on the one hand without challenging the
validity of his retrenchment, but at the same time complain to a different forum
about having been deprived of the opportunity to work until he reached the age
of 65".

5.3.3 Application of the relevant law

5.3.3.1 It is trite that an employee who is dismissed for operational requirements is
entitled to severance pay as provided for in s 41(2) of the BCEA:

"An employer must pay an employee who is dismissed for reasons based on
the employer's operational requirements ... severance pay equal to at least
one week’s remuneration for each completed year of continuous service with that employer”.

5.3.3.2 The law distinguishes between the payment of such as severance pay as “retrenchment benefit” payable by the employer in accordance with the provisions of the BCEA, as well as a different “withdrawal benefit” due to retrenchment payable by the pension fund in terms of the Rules of the Fund. (The calculation of retrenchment packages and the withdrawal of pension monies constituted two separate issues23 and the Complainant’s complaint relates to the latter).

5.3.3.3 The preamble to the BCEA and section 2 sets out as one of its primary objectives to comply with the obligations of the Republic as a member state of the International Labour Organisation (ILO). In this regard ILO Convention 158 provides that:

“…a worker whose employment has been terminated shall be entitled, in accordance with national law and practice, to:

“(a) a severance allowance or other separation benefits, the amount of which shall be based inter alia on length of service and the level of wages, and paid directly by the employer or by a fund constituted by employers”

5.3.3.4 Our courts24 have endorsed the view of some writers in this field such as D W De Villiers (2010)25 that the purpose of the severance pay envisaged in the

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BCEA is "tide the employee over" until he or she finds another job …or to reward the employee for long service.

5.3.3.5 The purpose of withdrawal or pension benefit on the other hand, according to the Pension Fund Adjudicator, is "to ensure that the defined benefits promised to its members are indeed available to them when they reach the age of retirement." (Own emphasis).

5.3.3.6 The rules of the fund (including the formulae therein) define and determine the withdrawal or pension benefits. It is practice amongst a number of Funds, including the GEPF and the AIPF to provide for an enhanced pension benefits in the case of persons who are retrenched, basically against their will, and who are therefore thwarted from rendering long service until retirement age through no fault of their own through. To compensate the employee for the loss or interruption of the remainder of his/ her pensionable service as a result of his/ her retrenchment, provision is sometimes made in the rules of these funds for the recognition of additional pensionable service periods in the case of retrenchment.

5.3.3.7 The GPAA confirmed that AIPF rule 14A (3) actually provides for additional pensionable service in the case of a retrenchment of a member by an Associated Institution Employer, including NECSA. It reads as follows:

"(3) For the purposes of the calculation of a gratuity and an annuity in terms of subregulation (1) (a) and (b) in respect of a member who has been
discharged for a reason referred to in regulation 14 (1) (a) (b), (c) or (e), this period of pensionable service of such member shall be increased by –

(a) a period equal to one third of the period of his or her pensionable service; or

(b) The unexpired period of his or her pensionable service, whichever period is the shorter, but not exceeding five years.” (own emphasis)

5.3.3.8 The AIPF Rules defined “unexpired period of service” as follows:

“… the period between the date on which a member ceases or would cease to be a member of the fund and the date he or she would have attained the age of 60 years.” (Own emphasis)

5.3.3.9 At the same time the AIPF Act distinguished between a pensionable age and an age of retirement. The AIPF Act defines “the age of retirement” as follows:

“…the age determined by the regulations, prescribed conditions of service or declared policy of the associated institution for retirement which shall not be earlier than the pensionable age.” 27 (Own emphasis)

5.3.3.10 In Cash Paymaster Services (Pty) Ltd v Browne 28 the Labour Appeal Court, Zondo JP pointed out that the retirement age dispensation provided for in the LRA is one that works on the basis that, if there is an agreed retirement age between an employer and employee, such agreed retirement age would govern the employee’s employment and would take precedence over any “normal retirement age”.

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27 Section 13 of the AIPF Act.
28 [2006] 2 BLLR 131 (LAC), Rubin Sportswear v SACTWU & others [2004] 10 BLLR 966 (LAC)
5.3.3.11 Apart from the AIPF Rules, the AIPF Act also seeks to regulate the calculation of withdrawal or pension benefits payable to employees who are retrenched. In this regard Section 3A of the AIPF Act provides as follows:

3A. **PAYMENT OF PENSION BENEFITS TO MEMBERS WHOSE SERVICE ARE TERMINATED**

If –

(a) the services of a member of the fund who has more than ten years’ pensionable service to his credit are terminated at an associated institution –

(i) on **account of the abolition of his post or reduction to staff at the institution**;

(ii) on the ground that this termination of service will promote efficiency or economy in the institution; or

(iii) on account of unfitness for his duties or incapacity to carry them out efficiently;

(b) the associated institution concerned undertakes in writing to compensate the fund for the prescribed annuity paid to the member up to the last day of the month in which he attains the age on which he would have had the right to retire on pension had his service not been so terminated; and

(c) the Minister deems it expedient that the prescribed annuity and gratuity and gratuity be paid to the member, the prescribed annuity and gratuity **shall be paid by the fund to such member.** (Own emphasis)
5.3.3.12 The Pensions Administration Business Rules further provided that-

"in cases of termination of service in accordance with section 3A of the Associated Institutions Pension Fund Act, 1963 (Act 41 of 1963) the employer must submit a certificate undertaking to pay the amount of the annuity payable until the last day of the month in which retirement age is attained." (Own emphasis)

5.3.3.13 The AIPF Act does not permit an employee of an associated institution who is retrenched as envisaged in Section 3A of the AIPF Act, to apply for the prescribed annuity and gratuity based on his/her full pensionable service until age of retirement (In this case 65 as opposed to pensionable age of 60), which means that the obligation to initiate the process was on the associated institution employer (NECSA) and the administrators of the AIPF (the GPAA).

5.3.3.14 The Court have found that the rules of a pension fund operate at several levels but primarily function as a contract between employer, employee and the Fund itself. A fund's contractual capacity is defined by the empowering legislation and its rules. In terms of the law as described earlier in the report, members of a pension fund can have a legitimate expectation that in exercising their powers in terms of the applicable laws and the rules of the fund, the fiduciaries must in good faith, disinterestedly exercise those powers only for the purposes for which they were conferred, diligently acting upon material considerations and not immaterial considerations.

29 Staff Circular No. 8 Of 1990 Instructions For The Completion Of Form Z102 Withdrawal From Fund And Documentation Required Withdrawal With Z102
From Fund Department of Agriculture and Environmental Affairs, KZN
30 De Beers Pension Fund v Pension Fund Adjudicator and Another (43222/13) [2014] ZAGPHC 839 (7 October 2014)
31 Hayton D "The Extent of Pension Trustees’ Obligation in South Africa” in PLA Annual Conference 15-17 February 2004
Cape Town 1-14
5.3.3.15 Even if it were to be argued that the process in terms of section 3A of the AIPF Act is discretionary, it does not mean that a decision not to enhance the Complainant’s pension benefits to compensate for the loss of his remaining years of his pensionable service until the age of 65, could have been taken arbitrarily. The obligation of the fiduciaries to "act with due care, diligence and good faith" in all their functions, requires them, when exercising a discretion to act in good faith in what they consider to be the member’s best interests, subject to exercising their powers for the purposes for which the conferred law and rules them.

5.3.3.16 Baxter Administrative Law 32 at page 89 elaborates on the social policy underlying the regulation of discretion as follows:

"...it is important that the decisional referents which actually do constrain the decision-maker are also those which have been provided or anticipated by the relevant empowering legislation."

5.3.3.17 In the matter of Kransdorff v Sentrachem Pension Fund & Sentrachem Ltd33 the Pension Fund Adjudicator highlighted some of the principles that would apply to discretionary powers affecting pension benefits in the case of early withdrawals, including retrenchments:

"Broadly speaking, the constitutional proscription of arbitrary rules aims to ensure that decision-makers pursue legitimate ends by proportional means. The objective of the early withdrawal rule, in a defined benefit fund, is to strike an appropriate balance between stability in funding and the requirements of individual justice. The measures and means adopted to
obtain that end should be proportional and carefully designed to achieve it. To start with … discretionary powers should impair the individual member's rights as little as reasonably possible… there must be guidelines and decisional referents to structure discretion in the interests of legitimacy and consistency.

5.3.3.18 The Pension Fund Adjudicator continued in the Kransdorff matter\textsuperscript{34} that –

"Management board, legislating rules granting discretion to … decision-makers, therefore will be well advised to spell out an appropriate policy and method of calculation in the rule or a resolution. This it must do with sufficient clearness and in a manner providing safeguards allowing members to check that the policy or applicable standards have been applied in their individual case. Failure to do so will render the rule open to challenge on the grounds of unreasonableness or unconstitutionality."

5.3.3.19 From a governance perspective it is fundamental that the conduct of NECSA and/or the GPAA was fair, reasonable and in accordance with the precepts of the Constitution. In assessing the conduct of NECSA and the GPAA against the rights to equality, fair labour practices and just administrative action the Public Protector is guided by the following principles:

5.3.3.20 In terms of the equality clause (section 9 of the Constitution) NECSA and the GPAA may not unfairly discriminate directly, or indirectly, against an employee in an employment policy or practice on one or more grounds including age.

\textsuperscript{34} Ibid
5.3.3.21 In terms of section 23(1) of the Constitution NECSA may not infringe on the Complainant’s right to fair labour practices.

5.3.3.22 In the matter of Harksen v Lane NO and Others\textsuperscript{35} the Constitutional Court stated that starting point for enquiries relating to unfair discrimination is to determine-

a) "Does the provision differentiate between people or categories of people?"

b) "If so, does the differentiation bear a rational connection to a legitimate government purpose?"

c) "If it does not, then there is a violation of [the equality clause]."

5.3.3.23 In Hospersa obo Venter v South African Nursing Council\textsuperscript{36} the Court held that when deciding whether the employer had discriminated against an employee on the basis of age, the question is not how the employer treated other employees of the same age but whether the sole reason for treating the employee differently to any other employees was because of his/ her age.

5.3.3.24 Colleagues of the Complainant who had converted to a defined contribution fund such as the NECSA Retirement Fund would, on retrenchment, also be entitled to a withdrawal benefit or a transfer value as defined in the rules. The Pension Fund Adjudicator has dealt at some length with the question of early withdrawers, including termination on the basis of retrenchment in Wilson v Orion Fixed Benefit Pension Fund & Others\textsuperscript{37} and Kransdorff v Sentrachem

\textsuperscript{35} 1998 (1) SA 300 (CC) 4

\textsuperscript{36} JS930/04) [2006] ZALC 29 (5 January 2006)

\textsuperscript{37} (PFASWE/84/98)
Pension Fund & Sentrachem Ltd.\textsuperscript{38} The Pension Fund Adjudicator held that “on proper investment at a reasonable rate of return that (the retrenchment) value should realise an amount equivalent to the same investment in the fund over the period remaining to the (member’s) retirement.” It is therefore likely that members of the NECSA Retirement Fund would, in case of a retrenchment, be entitled to a withdrawal benefit or a transfer value which would realise an amount equivalent to the same investment in the fund over the remaining period up to their retirement age of 65.

5.3.3.25 In the Hospersa\textsuperscript{39} matter the Courts dealt with a situation where there was a differentiation between the benefits received by members based on years of service. The Court noted that while

“... such differentiation between the two groups of employees ...may well be said to bear a rational connection to a legitimate purpose ... where it is applied against persons who voluntarily resign, but, it does not bear a rational connection when the same rule is used in the case of persons who are retrenched, basically against their will, and who are therefore thwarted from rendering long service through no fault of their own. As regards retrenchees, therefore, the rule is in violation of the equality principles of the Constitution...” (Emphasis added)

5.3.3.26 In the matter of the South African Airways (Pty) Ltd v V and Another\textsuperscript{40} the Court found that the reduction in service benefits of pilots over the age of 60 amounted to discrimination against them on the basis of their age. The Court held that

\textsuperscript{38} PFA/GA/3/98).
\textsuperscript{39} Hospersa obo Venter v South African Nursing Council JS930/04) [2006] ZALC 29 (5 January 2006)
Because the discrimination was on a specified ground … there is, in effect, a rebuttable presumption that it was unfair. … the Constitution, in section 9, assumes that discrimination on the grounds specified in the respective sections would negatively impact on the dignity of a person discriminated against to an extent that justified specific protection.”

5.3.3.27 The Court furthermore, held that even if the discriminatory practice arose from a situation where the employee has been presented with a choice and he/she is experiencing the consequences of his/her choice, it would not in itself make it fair—

“… either constitutionally or its discriminatory contents, because if it were to do so, it would undermine the Constitution in a fundamental respect… The fact that an individual has a choice to either not be, or to be unfairly discriminated against and had made the choice which causes the discrimination, can never as a factor on its own, render the discrimination fair. The very objects of the Constitution … to free society and the workplace of unfair discrimination would be seriously undermined to the point of being rendered nugatory.”

5.3.4 Conclusion

5.3.4.1 In the matter at hand the retirement age agreed to between NECSA and the Complainant in terms of his conditions of employment was 65. NECSA’s annual financial statements as reflected in its annual reports furthermore provide for financial commitment in terms of the employer’s contributions to employees
belonging to the NECSA Retirement Fund up to the “expected retirement age” of 65.

5.3.4.2 Even though the AIPF defines a minimum pensionable age of 60 years, there is no indication in the Act that it intended to prescribe a general retirement age of 60 years to all the associated institution employers. In the contrary, the AIPF specifically empowers the associated institution employers to determine their individual retirement ages by means of “regulations, prescribed conditions of service or declared policy” – as long as it is not earlier than the pensionable age of 60. In addition the AIF Act makes provision through section 3A for additional or enhanced pension benefits in the case of the retrenchment of a member who has the right to retire at an age older than 60 years - up to the agreed retirement age ("...to the last day of the month in which he attains the age on which he would have had the right to retire on pension had his service not been so terminated").

5.3.4.3 The Complainant’s therefore had a reasonable expectation of accumulating a pensionable service up to the agreed retirement age of 65. However, the failure by NECSA and/ or the GPPA to take the necessary steps in terms of section 3A of the AIPF Act to facilitate the recognition of the remainder of the Complainant’s pensionable service until he would have normally retired at the age of 65, have effectively reduced his retirement age to the pensionable age of 60.

5.3.4.4 It is not in dispute that the Complainant was retrenched as envisaged in section 3A of the AIPF Act but that no steps were taken in terms of sections 3A(b) and (c) to adjust his pension benefits (gratuity and annuity) to include the period up to the age of 65 – when in terms of his conditions of service, he would have had the right to retire on pension had his service not been so terminated.
5.3.4.5 As fiduciaries NECSA and the GPAA had an obligations to direct, control and oversee the operations of the AIPF in accordance with the applicable laws and the rules of the fund, and to take all reasonable steps to ensure that the interests of members in terms of the rules of the fund and the provisions of this Act are protected at all times. The Courts⁴¹ have confirmed that the rules of pension and provident funds and applicable legislation are paramount and take precedence:

"The legal principles that apply to pension and pension funds are clear and uncontroverted. The trustees of a fund are bound to observe and implement the rules of that fund. Their powers and responsibilities and the rights and obligations of members and participating employers are governed by the rules, applicable legislation and the common law. The rules of a fund form its constitution and must be interpreted in the same way as all documents."

5.3.4.6 In the circumstances of this matter it would be reasonable, if not compulsory, to expect NECSA and the GPAA to have considered and applied their minds to the provisions of section 3A of the AIPF Act given the age of the Complainant at the time. The Court and the Pension Fund adjudicator have in fact, held that employees who are retrenched close to retirement age require additional protection against the adverse effect of such retrenchment:

"It was perfectly reasonable to enhance the benefits of members nearing retirement as they would presumably have greater difficulty in finding alternative employment, and because the employer could presumably afford to do so. On the other hand It would not be reasonable or affordable,
to apply the same principles to a thirty year old member, for example... It is also commonly acknowledged in the general employment field that job opportunities reduce dramatically when one reaches the magic age of 50.

6. FINDINGS

6.1 Regarding whether NECSA as employer to the Complainant failed to honour an undertaking to address any possible prejudice to employees who were members of the Associated Institutions Pension Fund (AIPF) by adjusting the Complainant’s remuneration package immediately prior to his retrenchment:

6.1.1 The allegation that the Complainant’s remuneration package was specifically adjusted prior to the termination of his services as a result of an undertaking to address any possible prejudice to employees who were members of the Associated Institutions Pension Fund (AIPF) is not substantiated;

6.1.2 The communication to the Complainant and his prevailing conditions of service confirmed that the salary adjustment in July 1998 was based on the normal annual cost-of-living increase according to the conditions of service;

6.1.3 NECSA never accepted any liability for any perceived prejudice suffered by employees who remained members of the AIPF Fund, because of the different contribution options afforded to members of the NECSA Fund.

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42 The Tribunal Of The Pension Funds Adjudicator Case No: FAWvE/86/98/Im In The Complaint Between: Anthony David James Macnachie Complainant And Engen Petroleum Limited Respondent

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6.1.4 NECSA would not have been entitled, by virtue of section 3(1) the APIF Act and Regulation 5(1) and (2), (as substituted by GNR1796 of 24 September 1993), to consider any changes to the conditions for the composition of the remuneration packages, or the structuring of pensionable emoluments of the Complainant on the eve of his retrenchment to create an impression that a certain level of was taking place and contributions were proportionally invested in the pension fund by the employer over the period of the preceding year, when in fact it was not.

6.1.5 There is no sufficient evidence, including supporting documentation to substantiate the Complainant’s allegation that NECSA as the employer undertook to adjust any part of the remuneration of the Complainant or employees who remained as members of the AIPF to counter the effect of limitations on the structuring of their pensionable salaries in terms of the Rules of the AIPF.

6.2 Regarding whether the GPAA improperly or unfairly fail to provide the Complainant with his pension entitlement and reasonable pension expectation when he exited the AIPF?

6.2.1 The allegation by the Complainant that GPAA failed to provide the Complainant with the pension entitlement and reasonable pension expectation when he exited the AIPF is partially substantiated;

6.2.2 Because the Complainant’s increased salary level as on his last day of service, was not taken into account in the calculation of the final salary on which the pension benefits were based, his gratuity was approximately R25 000, 00 less, and his monthly annuity was approximately R500, 00 per month less than expected in terms of the outcome of the negotiations with the employer prior to retrenchment, and his notice of termination of service.
6.2.3 The submission by the Complainant that the GPAA erred by calculating his pension benefits in terms with the amended AIPF rules that applied on his last date of service when he exited the AIPF, instead of the previous version of the AIPF Rules that applied on the date on which he received notice of the termination of his service, is not supported by law.

6.2.4 The allegation that the complainant was never informed, by either the GPAA or NECSA, of changes to the AIPF Rules or provided with relevant information affecting the calculation of his pension benefits after the notice of termination of service was issued on 1 May 1998, is substantiated.

6.2.5 The amendment of the definition of "final salary" a month before the Complainant's retirement or retrenchment had a significant impact on the calculation of the Complainant's withdrawal benefits from the AIPF and decreased the value of an established retrenchment benefit from the AIPF.

6.2.6 The failure by NECSA and the GPAA to disclose the information timeously and accurately prior to the Complainant's termination of service was in breach of their legal and fiduciary duty to ensure that adequate and appropriate information was communicated to the Complainant on his rights, benefits and duties in terms of the Rules of the AIPF. The unfairness is manifest.

6.2.7 The conduct of the fiduciaries (GPAA and NECSA) fell short of the general standards of good administration as envisaged in sections 33 and 195 of the Constitution and amounts to maladministration and improper conduct as envisaged in section 182(1) (a) of the Constitution as well as sections 6(4) (a) and 6(5) (a) of the Public Protector Act, 1994.
6.3 Regarding whether NECSA or the GPAA improperly and in a prejudicial manner failed to adjust the Complainant’s pensionable service to compensate for the fact that he was retrenched before he was able to complete the remaining 5 years before reaching the retirement age of 65:

6.3.1 The allegation that the remaining 4 years and 8 months of the Complainant’s pensionable service was not taken into account with the calculation of his pension benefits in terms of the AIPF Act and AIPF Rules to compensate for the fact that he was retrenched before reaching the retirement age of 65 provided in his contract of service, is substantiated.

6.3.2 The complainant was retrenched at the vulnerable age of 60 and prevented from rendering long service until the retirement age of 65 [provided in his conditions of service through no fault of his own.

6.3.3 As fiduciaries of the AIPF the GPAA and NECSA had an obligation to act with due care, diligence and good faith in all their functions, which required them, when performing the functions and exercising the powers bestowed on them in terms of the AIPF Act and Rules, to act in good faith in what they consider to be the member’s best interests and exercising their powers for the purposes for which the law and rules conferred on them.

6.3.4 Section 3A of the AIPF Act provides for a process, in the case of a retrenchment such as this, to facilitate the recognition of the remainder of the Complainant’s pensionable service until the retirement age of 65.

6.3.5 The failure by NECSA and the GPAA to apply the provisions of the Section 3A of the AIPF Act in order to employ the process for the recognition of the remaining period of 4 years and 8 months until the Complainant would have attained the
retirement age of 65, was unreasonable and in breach of their fiduciary duties to act with due care, diligence and good faith.

6.3.6 The conduct NECSA and the GPAA was unfair and resulted in financial prejudice to the Complainant and constituted maladministration and improper conduct as envisaged in section 182(1) (a) of the Constitution read with sections 6(4)(a)(i)), (ii) and (iv) of the Public Protector Act, 1994.

7. REMEDIAL ACTION

The appropriate remedial action to be taken in terms of section 182(1)(c) of the Constitution is the following:

7.1 The Chief Executive Office of the GPAA must recalculate the Complainant's pension benefits based on the salary scale of 31 July 1998, and take steps in consultation with the National Treasury to reimburse the Complainant with the difference between the recalculated benefits and the benefits that he received, including –

7.1.1 an adjustment of the initial annuity as from 1 August 1998;
7.1.2 an arrear amount based on the annual increases of the adjusted annuity amount since 1 August 1998 to date;
7.1.3 interest on the arrear amount since 1 August 1998 to date;
7.1.4 the difference in the amount of the gratuity; and
7.1.5 interest on this amount backdated to 1 August 1998.

7.2 The Chief Executive Officers of NECSA and of the GPAA must recalculate the Complainant's gratuity and annuity what he would have been entitled to had the
remainder of his pensionable service until the age of 65 been duly recognised in terms of section 3A of the APIF Act, in order to -:

7.2.1 calculate the Complainant’s pension benefits in terms of the adjusted salary as directed above, as well as an additional 4 years and 8 months’ pensionable service;

7.2.2 pay the arrear amount on the gratuity, as well as the arrears on the annuity since 1 August 1998 to date; and

7.2.3 provide for interest on the arrear amounts since 1 August 1998 to date;

7.3 The Chief Executive Officers of NECSA and of the GPAA are jointly responsible for the interests in terms of the Prescribed Rates of Interest Act, 1975 on the arrear gratuity and annuity.

7.4 The Chief Executive office of the GPAA must take steps to ensure that the AIPF do not bear the loss for the improper conduct of the fiduciaries, and must take steps to ensure that the additional expenditure incurred by the AIPF to fund the recalculated benefits of the Complainant, be recovered from its own operational budget (in respect of the funding implications of the adjusted salary scale) and from NECSA (in respect of the funding implications of the added 5 years pensionable service).
8. MONITORING

8.1 Chief Executive Officers of NECSA and of the GPAA to submit to the Public Protector an action plan on the implementation of the remedial action contained in paragraph 7 above, within 30 days of the date of the report.

ADV BUSISIWE MKHWEBANE
PUBLIC PROTECTOR OF THE
REPUBLIC OF SOUTH AFRICA
DATE: 30 May 2017