

Annuity — annual increases dependent on declared bonuses – whether insurer used its discretion properly in declaring bonuses – applicability of Promotion of Access to Information Act, no 2 of 2000 - whether insurer may unilaterally change policy from one portfolio to another.

BACKGROUND

The complainant had been a member of a pension fund. When he retired in 1992, and in terms of the fund's rules, a pension was purchased for him with the insurer concerned. In 1995 the active members of the fund were transferred to another fund, but in the process existing pensioners (such as the complainant) were not transferred apparently because it had inadvertently been overlooked that such pensioners were still members of the fund. In due course the original fund became defunct, but in 2005 the insurer, with the approval of the FSB, issued annuity policies to the pensioners concerned in their own names.

It was in 2005 that the complainant learned of the transfer in 1995, and in 2008 he lodged a complaint with the office, claiming that the change had been unauthorised. At the same he contended that in declaring annual bonuses the insurer had done so inadequately, claiming in addition that the insurer's refusal to furnish him with financial detail in regard thereto prevented him from being able to confirm or refute this contention. In the latter regard he sought to rely on the Promotion of Access to Information Act of 2000.

DISCUSSION

(a) Was the transfer from one portfolio to another unauthorised?

There was no basis upon which to hold that the transfer by the insurer had been unauthorised. On the material available the transfer had not effected any change to the complainant's contractual rights. The complainant's contractual rights in terms of the relevant provisions of both policies were to receive annual pension increases that depended upon bonuses declared by the insurer, and the increases received by the complainant had been in accordance with them.

(b) Had the annual increases been sufficient?

A long-term insurer is obliged by section 29 of the Long-term Insurance Act to maintain its business in a financially sound condition. The insurer made available to the office its annual financial reports for the years between 1987 and 2007, an examination of which disclosed how the bonus rates were arrived at. They had taken account of the applicable purchase interest rate, inflation and its impact on pensioners, and the different smoothing requirements of a pensioner portfolio.

It was evident from the reports that at certain stages the insurer had changed its investment philosophy in accordance with prevailing economic conditions. At times, for example, when fixed investment rates were high but falling, decisions were made to build up reserves by retaining capital appreciation in a special reserve, rather than passing these on to the pensioners.

This was all clearly done in the legitimate exercise of the insurer's discretion. The insurer had the right to manage its assets as it saw fit, subject of course to legislative requirements. It was also bound by the principle requiring the exercise of any discretion to be an *arbitrium boni viri*, which simply means that it must be exercised reasonably, seen from the point of view both of the insurer and of, in this case, its annuitants.

The office was satisfied on all of the above matters that the insurer's bonus declarations had all been legitimate. In deciding on the rate in respect of annuity policies, the insurer had exercised its discretion reasonably, with due regard to the interests of both short and longer term annuitants. Changes to the asset structure also appeared to be reasonable and appropriate.

(c) Did the complainant have the right to the insurer's annual financial reports?

The complainant contended that in order to be able to satisfy himself that the annual increases had been sufficient, he should be given access to the annual reports on the insurer's financial position. The insurer was not prepared to disclose them, and it was solely for the purpose of allowing the office to satisfy itself that it had acted legitimately, that it nevertheless furnished these to the office for the years 1987 to 2007.

In refusing to allow the complainant access to the reports by the complainant, the insurer maintained that the information had to do in effect with its trade secrets, and the reports were in any event privileged and confidential. Although access to the information might otherwise have been justified, section 64(1)(a) of the Act excludes the furnishing of trade secrets, and the office considered the section to be applicable.

CONCLUSION

The office made a provisional determination whereby the complainant's complaints were dismissed. Although he did not agree entirely he accepted it and thanked the office for its "comprehensive thoroughness".

SM
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