

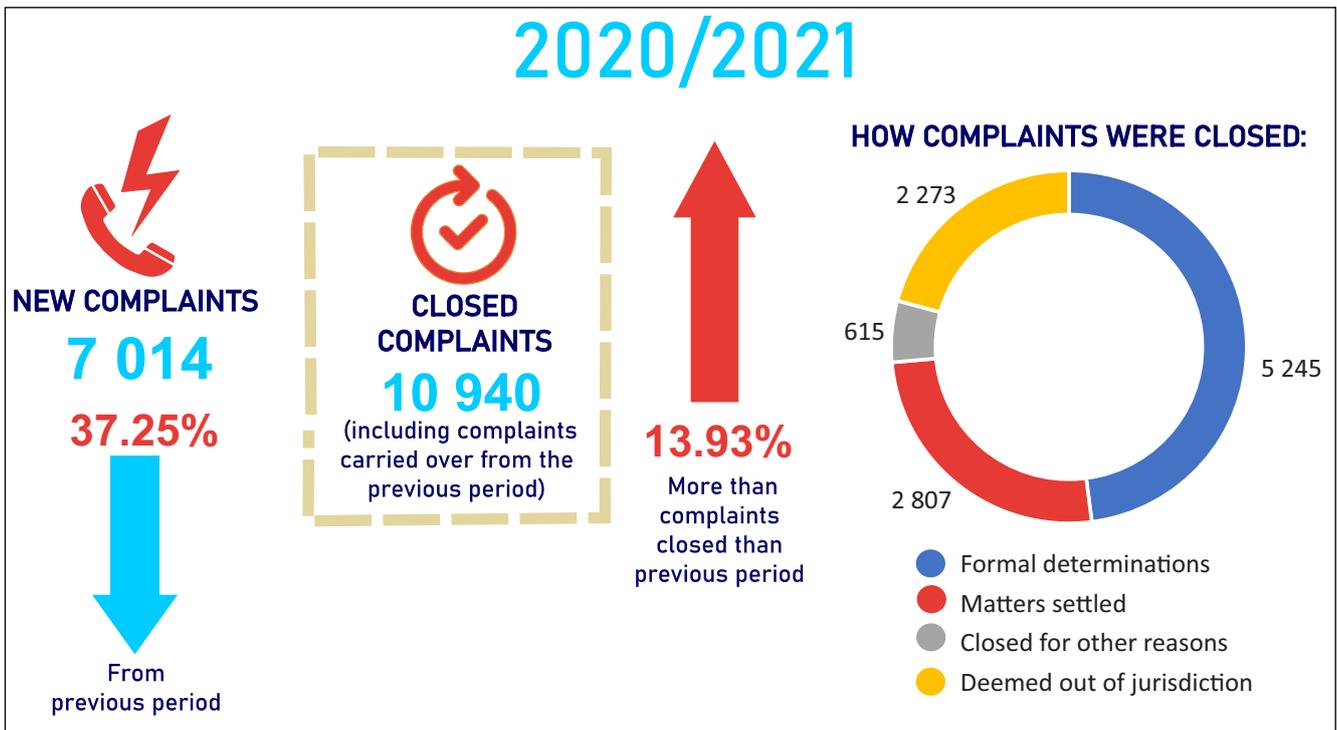


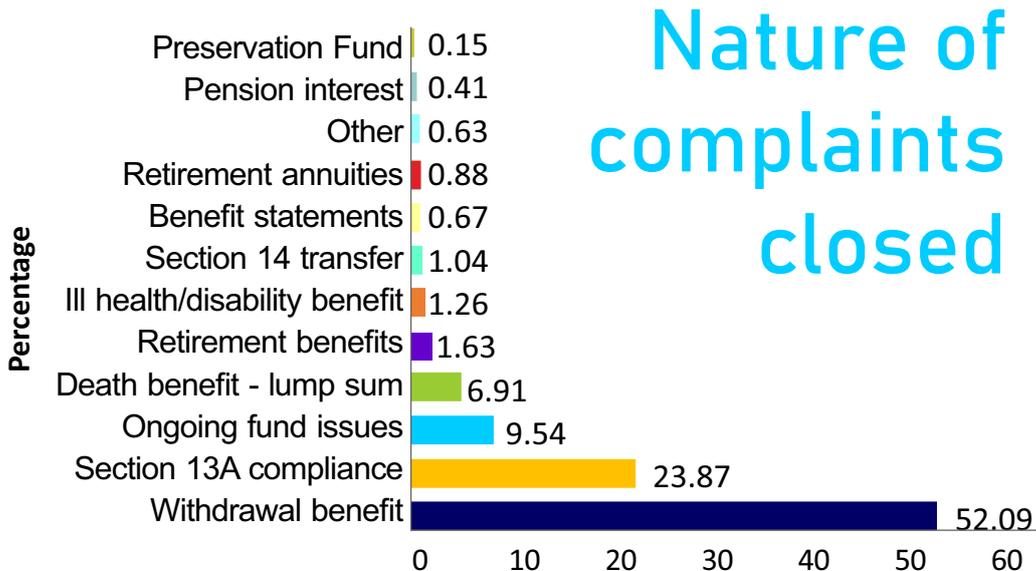
THE OFFICE OF THE PENSION FUNDS ADJUDICATOR (OPFA): ANNUAL REPORT FOR FINANCIAL YEAR 2020/2021

The OPFA has released its annual report for its financial year 2020/2021. We have included some of the relevant information from the report below.

THE OPFA'S OPERATIONS

Key operational figures from the OPFA include the following:





Graph courtesy of the 2020/20201 Annual Report of the OPFA

WHAT WERE THE COMPLAINTS ABOUT?

Arrear contributions: the non-payment of contributions was mentioned by the Financial Sector Conduct Authority's (FSCA) Commissioner, Mr Unathi Kamlana in his foreword. The FSCA Commissioner stated that "perennial non-compliance of employers with section 13A of the Pension Funds Act continues to be an issue of concern for the OPFA". He also stated that the FSCA is working on revised enforcement measures to bring about acceptable levels of compliance with section 13A of the Act.

Complaints relating to the withdrawals were the most prevalent reason to complain and non-payment of retirement fund contributions (section 13A compliance) came in as the second most prevalent cause of complaints and have increased over the period. These two causes of complaints are sometimes linked as withdrawal benefits cannot be paid (or paid in full) where there are contributions outstanding from the employer.

Delays in payment of withdrawal benefits also result from proper documents not having been submitted to the fund or the failure to register the complainant as a member of the fund but still deducting the contributions to the fund from the member's salary.

Lump sum death benefits (payable under section 37C of the Act): were the cause of 6.91% of complaints. The report states that:

" it is most prudent that funds/administrators invest in training initiatives within their boards of management or organisations to ensure that technical expertise or knowledge on how to deal with death benefit payments is shared and maintained. The lack thereof is apparently clear from the issues that get misinterpreted as these are often not complex at all nor do they raise novel issues".

DETERMINATIONS SINGLED OUT BY THE OPFA

We have included some of the determination singled out by the OPFA in the report.

Fund ordered to pay withdrawal benefit in terms of its rules

The complainant was employed at a Municipality (Municipality) from 2007 until August 2019 and was a member of the Municipality's pension fund (the Fund). Following his termination of service with the Municipality, the complainant commenced employment with a different Municipality (Municipality 2) on 1 September 2019 for a limited period of five years without a pension scheme.

The Fund did not pay the member's withdrawal benefit on the grounds that in terms of its rules "a member shall not cease to be a member while he remains in the service of a local authority". It confirmed that Municipality 2 is a participating employer in the Fund. The Fund further submitted that the complainant is not permitted to withdraw from it and that Municipality 2 is obliged to continue paying contributions on behalf of the complainant to the Fund.

The OPFA held that if the complainant had been re-employed, he would not be entitled to a withdrawal benefit when he left the service of the Municipality and joined Municipality 2:

"It is apparent that(t)he rule applies to a member who remains in service of a local authority participating in the fund; not one who has left and been re-employed."

"There does not appear to be any purpose behind not paying the withdrawal benefit to a member who has been re-employed by another participating employer on terms and conditions that do not require the member to continue being a contributory member of the first respondent."

The Fund was ordered to pay the complainant his withdrawal benefit with interest.

Fund ordered to pay for costs of a DNA test

The case concerned the fund's allocation of a death benefit where the deceased member left behind his permanent life partner who was pregnant at the time of his death and financially dependent on him. The life partner gave birth to the child after the member died. The status of the life partner as a spouse and the paternity of the child appeared to be supported by the family members of the deceased. The deceased's son (from another relationship) had assisted the life partner in submitting her claim to the fund. The fund did not contact the deceased's son directly during its investigations and eventually decided to exclude the child and the life partner from the distribution of the deceased's death benefit.

Upon making enquiries, the life partner was advised by the fund to communicate with the family of the deceased about a DNA test for her baby. In her complaint, the life partner submitted that she requested a full explanation from the fund and that this was met with threats by an employee of the fund that she would not receive anything without the paternity test. The life partner submitted that she did not object to a DNA test (and attached copies of correspondence exchanged with the fund as proof of this) but also pointed out that she was nominated by the deceased and, therefore, deserved to be treated with respect.

In its response to the complaint, the fund submitted that it was willing to redistribute the death benefit on condition that the child underwent a DNA test. The response from the fund was found by the OPFA to be grossly inadequate and, in some respects, misleading because the mother of the child had always indicated to the fund that she was willing to subject the child to a DNA test. Despite this, the fund requested the OPFA to dismiss the complaint on the basis of her refusing to agree to a DNA test. Alternatively, the fund requested that the OPFA order the complainant to subject the minor child to a paternity test.

The OPFA held that the fund's attempt to explain away its failure by relying on the absence of a DNA test conflated issues between that of the permanent life partner's dependency and the child's dependency. The board was found to have failed to comply with its fiduciary duties in terms of the Act. It was found that there was no dispute about the permanent life partner's status as a spouse of the deceased or the paternity of the child, and there was no need for a DNA test but that if the fund wanted to have one done, then it should be ordered to pay for it. The fund was ordered to pay for all costs associated with the DNA test including the costs of reasonable transport and accommodation where necessary.

Fund referred to the FSCA for failing to respond to enquiries from the OPFA

The complainant initially lodged a complaint with the OPFA that she had not been paid her divorce benefit by the fund. After the complaint was lodged, the fund paid her an amount of R55 938.78. She remained dissatisfied with the amount that she had been paid and advised the OPFA accordingly. The OPFA wrote to the fund on four separate occasions requesting information on how the benefit amount was calculated. All of the emails were ignored.

In the determination, it was held that it:

“is incumbent upon registered and licensed entities such as pension funds and administrators to ensure that enquiries from the Adjudicator are properly responded to. It impedes on the Adjudicator's ability to deliver on her mandate and if allowed to continue will render the Office ineffectual”.

It was further stated that there is a prerogative by the FSCA to ensure that all financial institutions treat their customers fairly and that the FSCA scrutinizes such conduct because, as the regulator, it is responsible for permitting these persons to operate in the retirement funds sector:

“The Act places a positive duty on a fund or employer to properly consider a complaint lodged in terms of section 30A(1) and to respond to same. There is no reason why such a duty would not extend to complaints lodged with the Adjudicator.”

It was held that the Adjudicator cannot follow the practice of granting default orders. Default orders granted based on one-sided facts, that may be incorrect, could result in financial detriment to the relevant pension fund, more especially so when it comes to defined contribution funds. In other instances, a default order may not be appropriate given the type of relief sought in the complaint. The conduct of both the fund and the administrator was referred to the FSCA.

Employer is entitled to a pension fund deduction after employee received double salary payments

A complaint by a member against his pension fund's decision to withhold his withdrawal benefit was dismissed and it was found that the employer was entitled to claim a deduction for double salary payments made to the complainant for over two years. It was found that the complainant was dishonest in not bringing the payments to the attention of his employer.

After an investigation by the employer, it was discovered that the complainant was receiving a second salary as a result of a processing error whereby he was not removed from the temporary payroll. This resulted in the complainant receiving almost double his salary for a period of just over two years. Despite admitting knowledge of the discrepancy, the member never brought it to the attention of the employer. In a written statement made to the employer after the investigation, the complainant admitted his liability to the employer and undertook to repay the money.

The complainant was subsequently dismissed for misconduct relating to dishonesty and criminal charges were laid against him for fraud. The complainant tried to access his pension fund after his dismissal and was informed that it was being withheld because of the employer's claim against him and pending the outcome of legal proceedings against him. The complainant lodged a complaint with the OPFA.

In the determination, it was found that the complainant had admitted his liability in writing to the employer and that the basis for such liability was his misconduct relating to dishonesty, as per the findings of the disciplinary enquiry. The complainant's argument that he should have been found negligent instead of dishonest was rejected. It was held that payments of almost double his expected salary should have raised alarm bells and the complainant ought to have queried same. Instead, he chose to stay silent.

It was found that there was a duty to speak on the part of the complainant and that his failure to do so constituted dishonesty. It was held that there is a distinction to be drawn between the 'withholding' of a benefit and the 'deduction' of compensation due to an employer on the grounds of fraud, theft, dishonesty, or misconduct. In circumstances where there is no dispute that the member admitted liability in writing, and such liability arises from dishonest conduct, a deduction may be made without awaiting the outcome of civil or criminal proceedings.

Fund is not entitled to withhold a benefit when no legal proceedings are pending

If an employee commits theft, fraud, dishonesty or misconduct against their employer then section 37D(1) (b)(ii) of the Act has been interpreted by the Supreme Court of Appeal to mean that a pension benefit may be withheld by a pension fund at the request of an employer. Once the employer has obtained judgment against the member for theft, fraud, dishonesty or misconduct, it can request the pension fund to deduct any amount granted in its favour from the member's pension benefit.

In this matter, the member exited the service of the employer in 2014. The employer requested the fund to withhold the pension benefit pending the outcome of criminal proceedings against the member for theft/ fraud. The member lodged a complaint with the OPFA in 2014 and the complaint was dismissed in early 2015 because the OPFA held that the fund was entitled to withhold the benefit.

In 2019, the member obtained confirmation from the Court that the criminal charges against her were withdrawn. She lodged another complaint with the Adjudicator in 2019 requiring payment of her pension benefit. In response to the complaint, the fund submitted that the charges were only provisionally withdrawn pending further investigations by the SAPS. Four years and eight months lapsed since the previous complaint was dismissed before the current complaint was lodged. As at July 2020, the criminal charges remained provisionally withdrawn.

It was held that an unreasonable amount of time had lapsed for the criminal proceedings against the member to be finalised. It was further held that once a decision to withdraw a criminal charge has been made, that decision is final. The fund owed the member a fiduciary duty and it ought to have interrogated the reasons why the charges were withdrawn. Instead, the fund too readily accepted the explanation given to it by the employer without the fund investigating the circumstances for itself. In the circumstances, the complaint was upheld and the fund was ordered to pay the complainant's withdrawal benefit.