



The Office of the Pension Funds Adjudicator: Communication 1 of 2021 – Arrear Contributions

Section 13A of the Pension Funds Act (“the Act”) deals with the payment of contributions by employers to retirement funds.



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Section 13A of the Pension Funds Act

Section 13A of the Pension Funds Act (“the Act”) deals with the payment of contributions by employers to retirement funds. It sets out when contributions are due, the manner in which payments are to be effected, prescribed formalities which should be followed and personal liability of persons involved in the management of participating employers.

Non-Compliance with section 13A

The Office of the Pension Funds Adjudicator (“OPFA”) receives many complaints from fund members whose benefits have not been fully paid as a result of the non-payment of contributions by the participating employer.

Historically, the OPFA has ordered the Fund and the employer to communicate about the amount of the arrear contributions and, following this communication, to establish an amount payable by the employer to the fund. Once the employer has then paid this amount, the complainant (member) is paid their benefit.

Employers not complying with the Adjudicator's rulings

In practice, some employers simply disregard the determinations by the OPFA, which forces complainants to approach the courts for relief. This is both costly and time-consuming as the fund then has to approach the court to enforce the OPFA's determination/order (including contempt of court proceedings). The purpose of Communication 1 of 2021 is to address this non-compliance.

Powers of the OPFA

Section 300 of the Act provides that –

- “(1) Any determination of the Adjudicator shall be deemed to be a civil judgment of any court of law had the matter in question been heard by such court, and shall be so noted by the clerk or the registrar of the court, as the case may be.
- (2) A writ or warrant of execution may be issued by the clerk or the registrar of the court in question and executed by the sheriff of such court after expiration of a period of six weeks after the date of the determination, on condition that no application contemplated in section 30P has been lodged.”

It is not possible for a court to issue a warrant of execution unless there is a judgment or order that directs payment of a *specific amount*. This is so because the sheriff, who executes the warrant, is directed to take possession of the judgment debtor's goods to satisfy the amount of the judgment or order.

Since it has been the practice of the OPFA to order the parties to converse on the arrear amount to be paid by the employer to the fund, a warrant of execution cannot be issued on the back of the Adjudicator's determination, as there is no order to pay a specific amount of money.

The Adjudicator's proposed solution to the problem

In Communication 1 of 2021, the OPFA proposes that it will, in relation to arrear contributions, conduct investigations that will allow it to issue determinations from 1 December 2021 that are “sounding in money”. “Sounding in money” means an order where a specific amount of money is ordered to be paid. These are determinations that order the employer to pay a specific amount to the fund in respect of arrear contributions. The OPFA has the power in terms of the Act to make an order directing payment of a specific amount by the employer to the fund.

This means that the fund may enforce the OPFA's determination/order by obtaining a writ of execution from a court if the employer does not comply with the determination and pay the arrear contributions as ordered by the OPFA. This will be less time-consuming and less costly for funds.

Note: the OPFA has cautioned that this new approach will not always be possible. For example, if the employer's non-compliance with section 13A is ongoing, the OPFA will have difficulty in establishing the amount due and would then issue a determination along the lines of its historical determinations, as discussed above.

Information to be provided by the fund to the OPFA in cases involving arrear contributions

From now on, if the OPFA receives a complaint regarding non-compliance with section 13A of the Act, the fund must provide the OPFA with the following information to allow the OPFA to conduct the necessary investigation and make an order that includes payment of a specific amount:

- The periods for which the employer is in arrears,
- A reconstruction of the complainant's contribution schedule based on the information already in the fund's possession, for the periods for which the employer is in arrears,
- A computation of the arrear contributions owed by the employer, based on the aforementioned reconstructed schedules,
- The value of the member's fund credit in the fund to date, and
- A calculation of the benefit due if payment of all contributions is up to date.

