



### Introduction

As Principal Executive Officer of the suite of Umbrella Funds, I have noted more frequent Determinations being issued by the Office of the Pension Funds Adjudicator against Participating Employers in respect of the non-payment of retirement fund contributions, and have therefore deemed it necessary to reiterate important aspects of the Pension Funds Act (PF Act) in this regard.

In the Determinations the Pension Funds Adjudicator has also stated that "By not providing .... their benefit statements, members are denied the opportunity to see if contributions are being paid (by the employer) or not." Therefore, it is essential that Participating Employers ensure that members are provided with their member benefit statements.

### The Basics of Section 13A

Section 13A of the PF Act makes it a statutory obligation for a Participating Employer to pay over any contributions which, in terms of the Rules of the Fund, are to be deducted from the member's salary or for which the employer is liable.

According to section 13A, a Participating Employer must pay its monthly contributions by no later than the 7th day of each month after the end of the month for which such a contribution is payable. (For example, contributions payable for January 2020 must be paid by 7 February 2020.)

In addition, a Participating Employer must also submit certain accompanying information (normally referred to as the "contribution schedule"), either together with the payment of contributions or by no later than 15 days after the end of the month in respect of which the deductions were made for the prior month. This information (contribution schedule), is designed to allow the Fund Administrator to determine whether the employer has paid its contributions in full; being the reconciliation between the Participating Employer's

current contribution statement and the contribution statement for the previous period, reflecting differences in member data, notably new members, terminations and changes in members' pensionable salaries.

It is the Participating Employer's responsibility to ensure that Liberty Corporate (the Fund Administrator) receives their contribution payment by not later than 7 days after the end of the month for which the contributions were payable. It is important to note that this is irrespective of the method of payment, whether by debit order or electronic funds transfer. This therefore means that the contributions must be cleared in Liberty's bank account by the 7th of the month, to enable Liberty Corporate to invest the money on behalf of Fund members. Thus, in the case of an electronic fund transfer, the Participating Employer must ensure that they "confirm" the contribution payment in advance so that the cleared funds reflect in Liberty's bank account by the latest the 7th day of the month.

### Late Payment Interest

The implication of not receiving contributions payable by the Participating Employer before the 7th, as referred to above, is that late payment interest (LPI) will be payable on the outstanding contributions from the 1st day of the month following the expiry of the 7-day period in respect of which the contributions had to be paid, up to the date that the contributions are in fact paid. For example, if contributions for 31 January were due by 7 February and not paid on time, LPI will be calculated from 1 February until the date actually paid. Section 13A (7) and Regulation 33 (7) deal with charging of LPI.

### Reporting Non-compliance

The PF Act contains stringent and specific reporting requirements where a Participating Employer is in breach of the payment of contribution requirements.

## STEP ONE

### Report to the Monitoring Person

If contributions are not paid, or if the required information (contribution schedule) is not provided, in accordance with the statutory deadlines, the Fund Administrator who is responsible for checking the receipt of contributions on behalf of the Umbrella Fund must, within 15 days of the relevant deadline, report to the Principal Executive Officer (referred to in the PF Act as the "Monitoring Person") the following:

- The failure of the Participating Employer to pay contributions in full (except if the shortfall is 2.5% or less, as this need not be reported); or
- Any of the following data-related issues:
  - If any of the matters raised in previous reports were not resolved;
  - If all of the relevant data was not transmitted by the deadline as required; or
  - Where the payment and data cannot be reconciled (subject to a 2.5% allowable limit).

## STEP TWO

### Report by the Monitoring Person to the Board of Trustees

The Monitoring Person must, within 7 days of receipt of the report from the Fund Administrator, report the compliance failures to the Board of Trustees.

## STEP THREE

### Report to Financial Sector Conduct Authority (FSCA) and members

The Board of Trustees must report the failure to pay contributions by a Participating Employer to the FSCA and ensure that the Monitoring Person reports the failure to those Fund members affected by the failure.

There is no deadline in the PF Act or Regulations for this, but the Board's statutory and fiduciary duties to members require this to be done promptly. The Board is, however, given discretion to defer reporting a data-related breach until the following month if presented with reasons that are acceptable to the Board. If the breach has been rectified by the following month, there is no need to report it.

## STEP FOUR

### Further report to the National Prosecuting Authority and FSCA

The Regulations require that where failure to pay contributions by the deadline has continued for 90 consecutive days, the Monitoring Person is required to report the matter to the National Prosecuting Authority (Commercial Crimes Unit) and also advise the FSCA accordingly. The FSCA has the discretion to report the matter to SARS.

## Criminal Offence

The Financial Services Law General Amendment Act amended the PF Act, which makes the failure to pay retirement fund contributions a criminal offence. In addition to criminalising the non-payment of contributions, **the PF Act attaches personal liability to the person responsible for not paying the contributions.**

## Who is Liable?

The PF Act provides for personal liability and stipulates that every director who is regularly involved with the management of a company's overall financial affairs; and every member who controls or is regularly involved in the financial management of a close corporation; and in respect of any other employer, those persons entrusted with controlling or managing the overall financial affairs of the employer, will be personally liable for the payment of fund contributions (section 13A (8)).

Furthermore, the PF Act obliges retirement funds to request that Participating Employers notify the Fund in writing of the identity of the person(s) who will be personally liable when contributions are not made by the employer to the fund (section 13A (9)(a)).

Should the employer fail to provide the Fund with the name of such person(s); all the directors of a company, members of a close corporation or persons comprising the management body of the employer shall be held personally liable (section 13A (9)(b) of the PF Act).

The Board of Trustees is required to report any non-compliance by the employers to the FSCA (section 13A (10)).

## The Sanction

Therefore, a person (or persons) who contravenes or fails to comply with the provisions of section 13A of the PF Act is guilty of an offence and is liable, on conviction, of a fine not exceeding R10 million; or to imprisonment for a period not exceeding ten years (or both such a fine and such imprisonment).

## Conclusion

The High Court and the Pension Funds Adjudicator have held in numerous cases that where the employer fails to pay the contributions and the Fund is then unable to invest the money in the financial markets, the member is entitled to the benefit they would have received had the contributions been made timeously and invested in the markets, plus interest on that amount. Put differently, the employer may also be held liable for any investment loss suffered by the member as a result of the non-payment or late payment of retirement fund contributions.

In terms of the Rules of the Umbrella Fund, an employer's participation in the Fund shall be terminated if the Participating Employer has failed to pay contributions for 3 consecutive months; or has failed to enter into a written payment arrangement with the Board of Trustees prior to being in arrears with contributions for a period of 90 days.

The last thing the Board of Trustees want is to have to report Participating Employers to the authorities. Therefore, Participating Employers are encouraged to work closely with their appointed Financial Advisers as well as Liberty Corporate Administration to ensure compliance with section 13A of the PF Act.

The Board as far as possible wants to avoid reporting employers, and therefore in order to achieve compliance, requests Financial Advisers to encourage employers to ensure that their contributions are paid to Liberty Corporate by the 5th day of the month, together with the submission of their contribution schedules by the 5th day of the month. This approach will enable Liberty Corporate to reconcile the contributions with the data submitted and to deposit the contributions within the prescribed period to ensure that such situations are avoided.

Temporary suspension as a possible solution: The Fund Rules allow a Participating Employer to terminate their participation in the Umbrella Fund. However, to terminate the participation should only be a final and drastic measure, especially if the Participating Employer believes that their cash flow constraints are only of a temporary nature and will be resolved in the short term. The Board is well aware that smaller Participating Employers are more often exposed to periods of cash flow constraints of a temporary nature, and has therefore introduced a temporary suspension of contributions arrangement for Participating Employers in the Umbrella Fund.

The temporary suspension is less final than termination and should therefore help the responsible person at the employer to manage the situation a little bit better. Such a temporary suspension of contributions will nevertheless have a significant direct impact on the members and will have to be clearly explained to and consented to by members, especially where insurance premiums for approved risk benefits are included in the contributions, as the non-payment means that employees will not be covered in the event of death or disability. In most instances, Fund members are unaware that their insurance cover has stopped.

It is unjustifiable that there are Participating Employers who continue to deduct retirement funding contributions from the salaries of their employees but fail to pay such amounts to the Umbrella Fund. The legislature provides the much-needed intervention as discussed in this article. Thus the Board of Trustees needs to ensure that non-compliant Participating Employers are effectively brought to book, as it is the duty of the Trustees to take all reasonable steps to ensure that the interests of members in terms of the Rules of the Fund and the provisions of the PF Act are at all times protected.



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