

Recoveries from Retirement Provision Funds

Strict process for companies wishing to recover stolen money from employee pension fund pay outs, cautions GTC

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Employers cannot automatically claim money from an employee's pension or provident fund when employees defraud them, in order to compensate for their loss. Even if a company wins the criminal case, employers need to apply for a court order to receive compensation for this loss.

Warwick Hamilton, senior employee benefits consultant at leading financial advisory and wealth management business GTC says: "In terms of Section 37D of the Pension Funds Act, compensation in respect of damages caused to the employer by reason of theft, dishonesty, fraud or misconduct by an employee, can only be deducted off the employee's pension or provident fund withdrawal benefit if the member has either admitted liability to the employer in writing, or if judgement has been obtained against the employee in any court."

Hamilton explains that when employers are dealing with an admission of liability by an employee, it is not enough to be in possession of the admission.

"In terms of past rulings by the Pension Funds Adjudicator the document signed by the member must contain an admission of the wrongful act and it must provide detail regarding the amount involved," Hamilton continues. "The employee's document also needs to grant permission to the employer that the amount in question may be deducted from the person's retirement fund. If not all these components are present the Adjudicator had ruled in the past that it was an invalid deduction."

Where such a comprehensive signed document does not exist, then the employer will need to resort to full legal action through a court of law. The employer may also lodge a criminal case against the person and request that the retirement fund withhold payment of the employee's benefit until the case has been resolved.

However, even when an employee is found guilty of theft it is not enough to deduct the misappropriated value from the person's value in the retirement fund. Once a guilty verdict has been given, employers then need to apply for a compensation order from the courts. Only once they have obtained such an order may a retirement fund be appropriately authorised to reimburse the employer.

Hamilton describes a recent example which reinforced this regulation in a recent ruling by the Adjudicator, Ms Muvhango Lukhaime.

"Even though an employee of a motor company had been found guilty of stealing money from his employer, the company was unable to claim compensation from that

employee's pension fund because the motor company failed to apply for the necessary compensation order. This slip-up meant that the ex-employee, who was convicted of theft, still received his full withdrawal benefit from the fund.

The Adjudicator issued a media release late last year concerning this case emphasising that her ruling was correct because the motor company had never applied for a compensation order, so a claim could not be made.

"It's worth noting that the Pension Funds Adjudicator's determinations have the same status as a civil court judgment," concludes Warwick Hamilton.