

FREQUENTLY ASKED QUESTIONS AND ANSWERS – DEPARTMENTAL DEBT

1. What is the basis of the GEPF's right to deduct departmental debt?

1.1 Section 21(3)(a) and (c) of the Government Employees Pension Law, Proclamation 21 of 1996 (GEP Law) provides for the deduction of departmental debt from an employee's pension benefit by the GEPF in certain circumstances. Section 21 is attached to this letter as **annexure "D"**.

2. Does the GEPF have a discretion to deduct departmental debt, or is it obliged to do deduct the debt if the employer so requests?

2.1 Sect 21(3) of the GEP Law provides the GEPF with a **discretion** to deduct the departmental debt. The GEPF is accordingly **not obligated** to deduct any departmental debt from an employee's pension benefit at the behest of the employer.

2.2 Before the GEPF can exercise the discretion to deduct the departmental debt, the GEPF must comply with the rules of fair administrative action (please see the discussion below at paragraph 3.). Specifically it must allow both parties (the employer and the employee) an opportunity to give reasons why the debt should, or should not, be deducted.

3. What are the requirements for procedurally fair administrative action that the GEPF must comply with before it can deduct departmental debt?

3.1 As stated, the GEPF is required to comply with the requirements of fair administrative action in the exercising of its discretion. This imperative is embodied in *among others* section 33 of the Constitution and section 3 of Promotion of Administrative Justice Act, 2000.

3.2 The following are the **main requirements for fair administrative action** in relation to the deduction of departmental debt:

- The **employee** must be informed **by the employer**, of the proposed deduction and the amount thereof;

- The **employee** must be afforded a reasonable opportunity to make representations to the employer and/or the GEPF regarding the deduction;
- The **employee** must be informed of his or her right to make representations directly to the GEPF;
- The **employer** must supply the GEPF with all relevant documents motivating its request for the deduction of the departmental debt;
- The **employer** must submit to the GEPF its representations and the employee's representations, if any; and
- The GEPF must apply its mind independently and decide whether or not to deduct the debt.

4. *May departmental debt be deducted from an employee who resigns?*

4.1 Yes.

4.2 Departmental debt may be deducted where an employee resigns, retires or is discharged, for whatever reason.

5. *What types of debt may be deducted under section 21(3)(a) of the GEP Law?*

5.1 Section 21(3)(a) deals with debts owing to an employer by an employee other than debts owed in terms of sections 21(3)(c) or (d) of the GEP Law. This would therefore include, but not be limited to, the following debts:

- Contractual debt – for example study loans, housing loans and personal loans.
- Amounts inadvertently or erroneously paid to an employee – for example overpaid salary where the employee resigns without working his or her full notice period.
- Any other debt **which is not** loss suffered by the employer due to the misconduct, intentional criminal conduct or negligent actions (delict) of the employee. (These forms of debt are covered by section 21(3)(c) - please see the discussion at paragraph 6 below.)

6. *What types of debt may be deducted under section 21(3)(c) of the GEP law?*

6.1 Any amount of loss suffered by the employer through theft, fraud, negligence or any misconduct on the part of the employee may be deducted as departmental debt under section 21(3)(c). However, before such debt can be deducted, this section requires that

the employee must have admitted/acknowledged the loss in writing, or alternatively, the loss must have been proved in a court of law.

6.2 This section is therefore limited to loss suffered by the intentional criminal conduct of the employee or by his or her negligent actions (delict). It also includes any loss suffered due to misconduct committed by the employee. Misconduct may relate to either criminal conduct or conduct which has an element of dishonesty (for example, theft) or negligence (for example, unintentional damage to employer property).

6.3 In practical terms this means the following:

- The debt must be in the nature of **loss** suffered by the employer;
- The **cause** of the loss must have been either theft, fraud, negligence or any misconduct on the part of the employee;
- The employee must have admitted/acknowledged the loss in writing or it must have been proved in a court of law.

6.4 It is extremely important to note that this section does not cover debt based on contract or amounts inadvertently or erroneously paid to an employee. The latter is covered by section 21(3)(a) - please see the discussion above in paragraph 5.

7. May an employer withhold the submission of the employees' exit documentation to force the employee to provide an acknowledgement of debt for purposes of section 21(3)(c)?

7.1 No.

7.2 Such actions are unlawful and in no way condoned by the GEPF. Exit documentation must be submitted without delay and as soon as reasonably practicable by the employer.

8. Will the GEPF suspend the payment of pension benefits pending a court case to prove the loss suffered by the employer for purposes of section 21(3)(c)?

8.1 No.

8.2 The GEPF is obliged to pay pension benefits on the exit of the employee. The employer will have to obtain a court order interdicting the GEPF from making payment pending conclusion of the main action to prove the loss and the liability of the employee.

9. When will the GEPF not deduct departmental debt?

9.1 When exercising its discretion in terms of section 21(3)(a) and (c) of the GEP law, the GEPF must apply its mind to all the facts before it and carefully consider the interests of both the employer and the employee.

9.2 The GEPF cannot provide an exhaustive list of instances when it will not deduct departmental debt. However, in the following instances it is recorded that the **GEPF will not deduct the departmental debt:**

- In the event of section 21(3)(a) debt (see paragraph 5 above), the employer has not provided sufficient documentary and/or other evidence to prove a clear and unambiguous contractual right to the payment of the debt;
- In the event of a section 21(3)(c) debt (see paragraph 6 above), the employer has not provided an acknowledgement of debt by the employee **or** a court order;
- Where the debt claimed is subject to any form of continuing litigation; and
- Where there are any factual disputes relating to the debt which require arbitration and/or adjudication.

9.3 In the following instances the GEPF **would in all probability also not** deduct the departmental debt:

- Where the employer has not provided a duly completed GEPF Departmental Debt Claim Form;
- Where the GEPF will possibly suffer prejudice by deducting the debt; and
- Where the debt amount claimed is excessive and there has been laxity on the part of the employer to recover the amount while the employee was still in service. The GEPF will not act as a debt collection agent for employer State departments.

10. What must the employer do if the employee refuses to make representations or to assist in the process?

10.1 The relevant official of the employer department must provide a detailed sworn affidavit to the GEPF, setting out the circumstances of the case.

10.2 Should the employee **refuse** to complete section E of the GEPF Departmental Debt Claim Form or to assist the employer otherwise, the employer must provide an **affidavit** by the relevant official explaining the process taken by the employer to request the employee to complete section **E** of the GEPF Departmental Debt Deduction Form or to assist otherwise and detailing the refusal of the employee.

11. What must the employer do if the employee cannot be contacted?

- 11.1 The relevant official of the employer must provide a **detailed sworn affidavit** setting out the circumstances of the case.
- 11.2 Should the employer be **unable to contact** the employee in order to complete section E of the GEPF Departmental Debt Claim Form, **the employer must provide an affidavit** by the relevant official explaining the process taken by the employer to contact the employee, inclusive of detailed reference to all the contact detail of the employee which the employer used to attempt to contact the employee.