FOR PUBLICATION

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

---o0o---

KATSUMI HONDA, Deceased, by HELEN S. HONDA,
Petitioner, Appellant-Appellee

vs.

BOARD OF TRUSTEES OF THE EMPLOYEES' RETIREMENT
SYSTEM OF THE STATE OF HAWAI'I, Appellee-Appellant

NO. 23625

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 99-3473)

JUNE 17, 2005

NAKAYAMA, ACOBA, JJ., AND CIRCUIT JUDGE
DEL ROSARIO, IN PLACE OF DUFFY, J., RECUSED;
AND LEVINSON, J., DISSENTING, WITH WHOM MOON, C.J., JOINS

OPINION OF THE COURT BY ACOBA, J.

We hold that Appellee-Appellant Board of Trustees of the Employees' Retirement System of the State of Hawai'i (the ERS Board) has a fiduciary duty to provide its members, including Appellant-Appellee Katsumi Honda (Katsumi), deceased, by Helen Honda (Helen), Petitioner, with clear, understandable information concerning retirement benefits. Its failure to do so in this case may have resulted in Katsumi's unilateral mistake with respect to his chosen mode of retirement and, additionally, constituted negligent misrepresentation. In that connection, the ERS Board's findings Nos. 18 and 19 regarding Katsumi's

understanding and intent as to his choice of a retirement option appear clearly erroneous in view of the reliable, probative and substantial evidence in the whole record. In any event, assuming arguendo the findings were supported by substantial evidence, we are left with a firm and definite conviction that a mistake was made. See Lanai Co., Inc. v. Land Use Comm'n, 105 Hawai'i 296, 314, 97 P.3d 372, 390 (2004) (asserting a "definite and firm conviction" that the Land Use Commission "made a 'mistake'" in its enforcement of an order). Helen did not raise these matters before the circuit court of the first circuit[1] (the court). However, in the exercise of our general superintendence of the trial courts, Hawai'i Revised Statutes (HRS) § 602-4 (1993),[2] and under our power to make such orders and mandates as necessary for the promotion of justice,[3] and based on the reasons stated herein, this case is remanded to the court with instructions to remand the case to the ERS for further proceedings. Consequently, the court's July 28, 2000 final judgment in favor of Appellant-Appellee is vacated and the case remanded as

---

[1] The Honorable Allene Suemori presided.

[2] HRS § 602-4 provides that "[t]he supreme court shall have the general superintendence of all courts of inferior jurisdiction to prevent and correct errors and abuses therein where no other remedy is expressly provided by law."

[3] HRS § 602-5(7) (1993) confers upon the supreme court jurisdiction

> [t]o make and award such judgments, decrees, orders and mandates, issue such executions and other processes, and do such other acts and take such other steps as may be necessary to carry into full effect the powers which are or shall be given to it by law or for the promotion of justice in matters pending before it.

aforesaid to enable the ERS Board to hold further proceedings in light of the matters discussed in this opinion.

I.

Katsumi was born on November 11, 1928 and obtained an eighth grade education. He began civil service employment in 1970 as a custodian at Kipapa Elementary School and had approximately twenty-three years of service at the time of his retirement.

In November 1993, upon reaching the age of 65, Katsumi requested estimates of his retirement benefits and a retirement application. On the request, Katsumi indicated that he would retire in June 1994. On December 10, 1993, Katsumi received a letter from the Branch Chief of the State of Hawai‘i Employees' Retirement System (ERS) providing him estimates of the monthly benefits for four "Methods of Retirement." The letter indicated that the "Normal Option" would yield Katsumi $239 in monthly benefits.[4]

It is not clear when Katsumi received the application for retirement form (application). However, it was notarized on January 3, 1994. The application indicated that he checked off

[4] Helen's November 17, 1998 Petition to the ERS Board for declaratory order, see infra, states that the monthly benefits would be $240 per month but the letter dated December 10, 1993 from the ERS states that the monthly benefits would be $239 per month. However, the amount of $239 on the letter is crossed out and replaced with what appears to be a figure of $234. Thus, it is not clear what amount Katsumi was to be paid under the "normal option."

the "Normal" "Mode of Retirement" and listed his wife, Helen, as beneficiary.

In an affidavit submitted to the court, Helen stated that "[Katsumi] was afraid of heights and would not go to the [ERS] offices because they were not located on the ground floor. Because of that, [Katsumi] completed the calculations and application process by mail, without the assistance of any ERS personnel."

In or about March 1994, Katsumi was diagnosed with cancer and was admitted to Kuakini Medical Center on March 3, 1994. On March 25, 1994, Katsumi was released but continued with radiation therapy.

Katsumi was readmitted on April 2, with increasing shortness of breath and he died on April 6, 1994, five days after his retirement, from complications resulting from cancer. Helen received a letter from the ERS retirement claims examiner dated May 24, 1994, informing her that she would not receive any benefits under her husband's retirement plan.

On November 15, 1998, Katsumi, by his wife Helen, filed a petition with the ERS Board for a declaratory order allowing Helen to select a new mode of retirement for Katsumi, retroactive to April 1, 1994. On August 16, 1999, the ERS Board issued its final decision denying Helen's request. The ERS Board concluded

that Helen was not entitled to relief.[5]

On September 15, 1999, Helen appealed to the court.[6]

---

[5] The ERS Board concluded inter alia as follows:

> III. CONCLUSIONS OF LAW
> . . . .
> 9. The statute regarding retirement of Class C employees and the ERS' method of administering the Class C employees' retirement is not vague, ambiguous, or confusing.
> 10. Katsumi Honda never changed his mode of retirement before he retired on April 1, 1994, and therefore, his election of "normal" is irrevocable in accordance with the plain and unequivocal language of HRS section 88-283(b). HRS section 88-283(b) states that "[a]ny election of a mode of retirement shall be irrevocable."
> 11. Accordingly, [Helen] is not entitled to adjust the retirement election of her husband, and his election of "normal" stands.

[6] She argued that (1) HRS § 88-282 does not provide a method of distribution for class C retirants participating in the ERS, (2) the parallel statute applicable to class A and class B retirants suggests that no "normal" distribution is authorized by § 88-282, (3) administrative rules cannot exceed statutory authority, (4) the statute regarding retirement of class C employees and the ERS's method of administering retirement for class C employees is vague, ambiguous, and confusing, and (5) Katsumi notified ERS of his anticipated passing and ERS breached its obligation to administer the ERS for the benefit of state employees.

With regard to her argument (5), Helen noted, as a point on appeal, that the ERS Board's finding no. 9 was erroneous. She stated that the

> ERS offered no evidence that [Katsumi] had not communicated to them regarding his being diagnosed with cancer. In fact, the only evidence offered on this topic was the Affidavit of Arlene Kamakana [(Katsumi's daughter)], . . . which stated that [Kamakana] advised Ms. Chow ([of] Kipapa Elementary School, where [Katsumi] was employed) and Ms. Corrine Kakuda (of the ERS), of [Katsumi's] anticipated passing. . . .

Helen contended that "[n]o other evidence contradicting this statement was offered by ERS in its [p]osition [m]emorandum." She argued that the ERS

> is charged with the responsibility for administering retirement plans and benefits for retired employees of the State. . . . The purpose of the ERS is to "provid[e] retirement allowances and other benefits for employees." See . . . [HRS § 88-22]. ERS was given knowledge of [Katsumi's] impending death yet allowed, without counseling[, Katsumi] to select a "normal" retirement payout and advance his retirement date. . . .
> . . . .
> It is [Helen's] contention that the ERS erred in finding that [Katsumi] did not notify ERS of his diagnosis with cancer and breached its obligation to effectively administer the retirement plan by failing to properly advise

(continued...)

On January 31, 2000, the court held a hearing on the appeal.

The court took the matter under advisement and on February 7, 2001, issued a minute order in favor of Helen. Helen filed a motion for clarification of the minute order and the court granted the motion, issuing findings of fact and an order on July 6, 2000. In essence, the court reversed the ERS Board.[7] The court ordered that Helen be authorized to revise Katsumi's "election of a mode of distribution of retirement allowance to one of the three statutorily authorized methods described in [HRS] §88-283." The court entered its final judgment on July 20, 2000. The ERS Board filed its notice of appeal on July 31, 2000.

II.

On appeal the ERS Board raised several matters to which Helen responded.[8] On appeal from an agency decision and order

---

[6](...continued)
[Katsumi] as to the effect of his election.

(Emphases added.)

[7] The court determined that:

> 1. The Statutes relating to the retirement benefits of Class C Employees of the State of Hawaii (H.R.S. § 88-251, et. seq.) are vague, ambiguous and confusing.
> 2. The [ERS Board's] interpretation of the statutes relating to the retirement benefits of Class C Employees of the State of Hawaii is stretched and the offering of a "normal" distribution of retirement benefits is in excess of the statutory authority or jurisdiction of the agency.
> 3. The [ERS Board] did not make any attempts to provide reasonable accommodations for Mr. Katsumi Honda's disabilities in counseling him with respect to his retirement options.

[8] On appeal, the ERS Board argues that (1) the court erred in concluding that HRS §§ 88-281(a) (1993), 88-282(a) (1993), and 88-283 (1993), relating to retirement benefits of non-contributory class C members of the ERS, were vague, ambiguous, and confusing; (2) the court erred in concluding
(continued...)

the circuit court may affirm or remand the case or it may revise or modify the agency's decision and order. HRS § 91-14(g). On appeal to this court, the "standard of review [for secondary appeals] is one in which this court must determine whether the [circuit] court was right or wrong in its decision[.]" Soderlund v. Admin. Dir. of Courts, 96 Hawai'i 114, 118, 26 P.3d 1214, 1218 (2001) (brackets and citation omitted).

It is axiomatic that findings of fact by an agency must be disregarded if clearly erroneous because of a lack of substantial evidence, or if we are "left with a definite and firm conviction in reviewing the entire evidence that a mistake has been committed[,]" despite evidence to support the finding. Bremer v. Weeks, 104 Hawai'i 43, 51, 85 P.3d 150, 158 (2004). Assuming, arguendo, there was substantial evidence to support the findings, we are left with a definite and firm conviction that a

[8](...continued)
that the ERS Board's interpretation of these statutes was incorrect and that the ERS Board exceeded its statutory authority or jurisdiction by offering "normal" as a method of distribution of retirement benefits for non-contributory class C members; (3) the court erred in concluding that the ERS Board did not make any attempts to provide reasonable accommodations for Katsumi's disabilities in counseling him with respect to his retirement options; and (4) the court exceeded its jurisdiction in authorizing Helen to retroactively revise an irrevocable method of distribution.

Helen responds that (1) the court was correct in determining that the ERS exceeded its statutory authority in offering a "normal" distribution option; (2) the court properly concluded that the ERS Board's interpretation of the statutes was incorrect; (3) the statutes and the ERS's method of administration are vague, ambiguous, and confusing; and (4) the court did not exceed its jurisdiction in authorizing Helen to retroactively revise an irrevocable method of distribution. In light of the disposition herein, we need not address these contentions. See Taylor-Rice v. State, 91 Hawai'i 60, 73, 979 P.2d 1086, 1099 (1999) ("[T]his court may affirm a judgment of the trial court on any ground in the record which supports affirmance.").

mistake has been made in view of the "entire evidence" as recounted herein.

III.

Findings Nos. 18 and 19 of the ERS Board stated as follows:

> 18. Upon review of the ERS forms and documents completed and submitted by Katsumi Honda, it does not appear that he had trouble understanding the forms or following instructions. There is no credible evidence in the record that Katsumi Honda did not understand.
>
> 19. The Board finds that [Helen] is speculating on what Katsumi Honda did or intended.

(Emphases added.) The statement in No. 18 that there was "no credible evidence in the record that Katsumi . . . did not understand" is unsupported by the record inasmuch as, from an objective standpoint, the retirement process and the forms themselves were not only confusing, but misleading. See discussion infra Parts V and VI. Indeed, Helen's affidavit to the Board stated that (1) Katsumi completed the application process by mail without the assistance of any ERS personnel, (2) Katsumi designated Helen as "beneficiary" on his retirement documents, (3) Katsumi selected "normal" retirement because he thought he would lose service credit, and (4) during his illness, Katsumi told Helen "'not to worry' because she would receive his pension."[9] Thus, substantial evidence existed to support an

---

[9] Helen's affidavit stated:

> 3. [Katsumi] was afraid of heights and would not go to the [ERS] offices because they were not located on the ground floor. Because of that, [Katsumi] completed the calculations and application process by mail, without the assistance of any ERS

(continued...)

inverse finding that Katsumi did not understand that by selecting "normal" retirement, Helen would not be entitled to survivor benefits. Accordingly, the Board's finding that "there [was] no credible evidence . . . that Katsumi . . . did not understand" (emphasis added) was not supported by substantial evidence or, assuming arguendo it was, the record gives rise to a definite and firm conviction that such a determination was a mistake.

Likewise, the record is bereft of any substantial evidence to support the statement in finding No. 19 that Helen was "speculating" on Katsumi's intent. The Board did not proffer a reason for questioning Helen's statements. Moreover, considering the record as a whole, the objectively misleading nature of the forms support Helen's contention that Katsumi believed she would receive his benefits upon his death. Katsumi designated her as "beneficiary" and, as discussed infra, no distinction between the meaning of "beneficiary" with respect to

---

[9](...continued)

personnel.

4. [Helen] is the person designated as beneficiary on [Katsumi's] [r]etirement documentation.

5. [Katsumi] was scheduled to retire on April 1, 1994.

6. [Katsumi] selected "normal" retirement because he thought any other selection would result in loss of service credit, including loss of his accumulated sick leave and military service and result in less pension benefits.

[7.] In March of 1994, [Katsumi] was diagnosed with [c]ancer and, from the time of his diagnosis to the time of his demise, was under medication and/or radiation therapy. A majority of that time was spent in the hospital.

[8.] During his illness and knowing of his impending demise, [Katsumi] told [Helen] "not to worry" because she would receive his pension.

(Emphases added.)

the "normal" option, and "beneficiary" with respect to options A, B, and C, was apparent on the face of the form.

IV.

Inasmuch as Helen was the prevailing party below, she does not have to raise points of error in accordance with Hawai'i Rules of Appellate Procedure Rule 28(b)(4)(D). Although she did not specifically label her arguments "unilateral mistake" or "negligent misrepresentation," she did represent to the Board that Katsumi indicated "she would receive his pension[,]" that the ERS was "alerted . . . that [Katsumi] was mistaken as to the effect of his election[,]" and that "the ERS breached its obligation to effectively administer the retirement plan by failing to properly advise [Katsumi]." (Emphases added.) Indeed, Helen asserted breach of duty on three occasions: in her petition to the ERS Board and in her opening and reply briefs to the circuit court. In her supplemental memorandum in support of her petition to the Board, Helen argued that

> [d]espite having knowledge of [Katsumi's] condition and his election of retirement, ERS did not take any action to counsel [him] or his family as to the likely effect of his election. It is [Helen's] contention that the ERS breached its obligation to effectively administer the retirement plan by failing to properly advise [Katsumi] and that such breach resulted in [Katsumi] "forfeiting" his pension benefits.

(Emphasis added.) In her opening brief to the court, Helen reiterated this argument:

> It is [Helen's] contention that the ERS erred in finding that [Katsumi] did not notify ERS of his diagnosis with cancer and breached its obligation to effectively

> administer the retirement plan by failing to properly advise [Katsumi] as to the effect of his election.

(Emphasis added.)

In her reply brief, Helen argued that the Board "owes a fiduciary duty to the members of the retirement system[,]" (emphasis added), citing to an opinion letter from the Department of the Attorney General. The opinion letter stated that "[a]s their titles indicate, the trustees of the [ERS] are, in both common and legal contemplation, trustees. They are entrusted with the duty and responsibility of administering the System for the benefit of the members of the System." Op. Att'y Gen. No. 64-25, at 8 (1964). The arguments in Helen's briefs recounted above serve to underscore the fact that, although not categorized under legal theories of mistake or fiduciary duty, such theories were essentially advanced by Helen and were contained in the record.

V.

In regard to the unilateral mistake theory, Helen argued in her petition to the ERS Board that "[i]n similar circumstances, the legislature has expressed its intent to allow, in equity, dependents and beneficiaries to overcome mistakes in the retirement process."[10] (Emphasis added.) Insofar as the

[10] Helen relies on the legislative history amending HRS §§ 88-84, "Ordinary death benefits," 88-283, "Retirement allowance options," and 88-286, "Death benefits." That history shows that the legislature intended to ensure that beneficiaries of employees who died during service would have additional death benefit options. The legislature indicated that "[f]ailure to fill out or update a form should not prevent eligibility under the Employees' Retirement System." Stand. Comm. Rep. No. 269, in 1993 Senate Journal, at

(continued...)

circumstances seem to indicate a mistake was made, a unilateral mistake by Katsumi would make his selection voidable.[11]

As to the doctrine of unilateral mistake:

> Where a mistake of one party at the time a contract was made as to a basic assumption on which he or she made the contract has a material effect on the agreed exchange of performances that is adverse to him or her, the contract is voidable by him or her if he or she does not bear the risk of the mistake under the rule stated in § 154, and (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or (b) the other party had reason to know of the mistake or his [or her] fault caused the mistake.

AIG Hawai'i Ins. Co. v. Bateman, 82 Hawai'i 453, 457, 923 P.2d 395, 399 (1996) (quoting Restatement (Second) of Contracts § 153 (1979)) (emphases added) (brackets omitted). Additionally,

> [a] party bears the risk of a mistake when (a) the risk is allocated to him or her by agreement of the parties, or (b) he or she is aware, at the time the contract is made, that he or she has only limited knowledge with respect to the facts to which the mistake relates but treats his or her limited knowledge as sufficient, or (c) the risk is allocated to him or her by the court on the ground that it is reasonable in the circumstances to do so.

Id. at 458, 923 P.2d at 400 (quoting Restatement (Second) of Contracts § 154 (1979)) (brackets omitted).

---

[10](...continued)
915. In effect, the bill would allow "spouses and dependents to receive benefits they should, in equity, receive." Id.

[11] Inasmuch as Helen, as appellee, would not raise points of error, this court may construe the arguments presented in her petition to the ERS Board and the opening brief to the circuit court. Cf. e.g. Mendes v. Hawaii Ins. Guar. Ass'n, 87 Hawai'i 14, 18, 950 P.2d 1214, 1218 (1998) (concluding that "[p]leadings should not be construed technically when determining what the pleader is attempting to set forth but should be construed liberally so as to do substantial justice" (quoting Henderson v. Prof'l Coatings Corp., 72 Haw. 387, 395, 819 P.2d 84, 92 (1991))); LeMay v. Leander, 92 Hawai'i 614, 619, 994 P.2d 546, 551 (2000) (construing pleading, pursuant to the District Court Rules of Civil Procedure Rule 8(f) liberally, and finding that the petitioner "had violated the [Injunction] and thus committed indirect acts of civil contempt pursuant to [HRS] § 710-1077[1](g)" (brackets in original)); Henderson, 72 Haw. at 399, 819 P.2d at 92 (holding that although plaintiff does not specifically argue "a theory under the 'general law of negligence,' [still] we will assume that [she] does for the purpose of the following discussion").

A.

The record supports a finding that at the time the contract for retirement benefits was made, Katsumi believed his wife would receive retirement benefits. Katsumi listed her as "beneficiary" on the application form. Katsumi told Helen during his illness "'not to worry' because she would receive his pension," thus indicating his intent was to give benefits to her.[12] No evidence was submitted to dispute this sworn testimony. This "assumption" was the "basic" one on which the agreement was made as between the ERS and Katsumi.

Additionally, Katsumi could have revised his mode of retirement prior to his actual retirement on April 1, 1994, but did not. Katsumi was diagnosed with cancer in or about the beginning of March 1994 and retired effective April 1, 1994. It is reasonable to conclude, in light of his statement to Helen, that had Katsumi known that she would not receive any survivor benefits, he would have modified his selection.

---

[12] No objection to Helen's affidavit is evident in the record. Indeed, the ERS Board relied on the affidavit for the fact that Katsumi was diagnosed with cancer in March 1994 and remained in the hospital for the majority of the time prior to his death. Inasmuch as the affidavit was submitted without objections, any objections are waived. Dairy Rd. Partners v. Island Ins. Co., 92 Hawai'i 398, 423 n.15, 992 P.2d 93, 118 n.15 (2000). Moreover, strict rules of evidence do not apply to administrative proceedings such as those before the ERS Board. See Desmond v. Admin. Dir. of the Courts, 91 Hawai'i 212, 220, 982 P.2d 346, 354 (App. 1998) ("Thus, the technical rules of evidence applicable to judicial proceedings generally do not govern agency proceedings." (quoting 2 Am. Jur. 2d Administrative Law § 345 (1994)) (brackets omitted), rev'd on other grounds, 90 Hawai'i 301, 978 P.2d 739 (1998); cf. Mortensen v. Bd. of Trs. of Employees' Ret. Sys., 52 Haw. 212, 219, 473 P.2d 866, 871 (1970) (clarifying that evidentiary rules applicable to the board hearings on retirement benefits are stated in HRS § 91-10 (1968)).

However, as mentioned previously, Helen was informed by the ERS that she would not receive any benefits. Hence, Katsumi's seeming mistake as to the assumption that Helen would receive benefits had a material effect on the agreement with the ERS that was adverse to him.

B.

Katsumi would not bear the risk of the mistake because it was not allocated to him by the agreement between the ERS and himself. The record supports a finding that Katsumi was not aware at the time the contract was made that he had "only limited knowledge with respect to the facts to which the mistake relates[.]" Bateman, 82 Hawai'i at 458, 923 P.2d at 400. He (1) sent in a request for retirement estimates, (2) asked two questions on the request form regarding early retirement and payment of vacation leave, (3) received a retirement estimate in the letter from ERS, (4) obtained the application, (5) was provided the "Service Retirement Facts" pamphlet (pamphlet),[13] and (6) signed the application.

[13] The ERS Board in its findings of fact no. 5 stated that:

> Along with the retirement estimates sent to Katsumi Honda, as is the usual practice of the ERS according to the affidavit of Karl Kaneshiro, the Enrollment, Claims, and Benefits Manager for ERS . . . , Katsumi Honda was also provided with an information pamphlet entitled "Service Retirement Facts." This pamphlet explains in lay terms the various retirement plans and sets out the advantages and disadvantages of each of the plans.

C.

1.

The circumstances indicate it would be reasonable to allocate the risk of the mistake to the ERS and that the ERS could have been at fault in causing the mistake. Restatement (Second) of Contracts § 153 (1979). First, the undifferentiated uses of the term "normal" and the dissimilar applications of the term "normal retirement" to describe a mode of retirement, and at the same time a category of eligibility for retirement, obfuscated the selection process.

The application indicated there are four modes of retirement fund distributions offered to class C members,[14] such as Katsumi: (1) "[n]ormal," (2) Option A, (3) Option B, and (4) Option C. The employee is required to choose one of the four options. The face of the application listed only the word "normal" to signify that retirement mode. On the reverse side of the application under the heading "Modes of Retirement," the application simply stated, "Normal retirement allowance payable for life," without any indication of a relationship between this designation and the word "normal" on the front of the application.

Also, on the reverse side of the application under a section titled "Eligibility Requirements" were the words "Normal

[14] Class C members are those members who did not contribute to the annuity savings fund for retirement. See HRS §§ 88-45, -46, and -47.

Retirement" again. But rather than a mode of retirement, in this instance the words "Normal Retirement" referred to "eligib[ility] to receive a normal retirement allowance if you are 62 years old and have 10 years of credit service - or if you are at least 55 years old and have 30 or more years of credited service[,]" "[n]ot including any additional service for unused sick leave." (Emphasis added.) In the pamphlet, the mode of retirement indicated simply as "normal" on the application form is also referred to as "Normal Retirement."

According to Helen's affidavit, Katsumi "selected 'normal' retirement because he thought any other selection would result in loss of service credit, including loss of his accumulated sick leave and military service and result in less pension benefits." This would indicate confusion caused by use of the same term "normal retirement" in two different ways.

Second, the application was seemingly misleading because it required the naming of a beneficiary under the normal mode of retirement when, in effect, no survivor benefits would be distributed. The four modes of retirement contained on the application form were correlated with spaces for entering a beneficiary's name. Hence, when an employee chose "normal" under "Mode of Retirement" on the application form, the employee was directed to name a beneficiary as to that option. Options A, B, and C contained identical spaces for entering a beneficiary's name. This would cause one to reasonably conclude that a normal

retirement beneficiary would occupy a status similar to the beneficiaries indicated in Options A, B, and C.

However, the ERS Board explained that a beneficiary of the normal retirement mode referred to a person entitled to the monthly payment owed a retirant who had died prior to the monthly payout. The ERS Board's finding of fact no. 16 explained that "[d]esignating a beneficiary for the 'normal' method of retirement is for purposes of informing ERS to whom to pay the balance of the member's pension if the member dies before payment is made to him or her." This explanation, however, is not found on the application.

Hence, the face of the application does not inform the employee that a normal option "beneficiary," unlike the beneficiaries designated in Options A, B, and C, would receive only the balance of a monthly payment owing at the time of the retirant's death. The reverse side of the application, as previously mentioned, states merely, "Normal retirement allowance payable for life" under "Mode of Retirement," without any mention of the qualifications set out by the ERS Board in its finding 16. There is no notice on the application, then, that the "normal" option beneficiary in effect receives no benefits.

Third, the pamphlet did not define the terms used or employ language understandable in everyday terms so as to reasonably inform the employee of the consequences of choosing the normal option. The pamphlet lists as a disadvantage of

"Normal Retirement," "No lifetime survivor benefit for beneficiary(ies)." This sentence is not explained. The terms "survivor benefit" and "beneficiary" are not defined. Again, in the pamphlet, "Normal Retirement" is used to describe a retirement option as well as a category of eligibility for retirement. One sentence - "The retirant receives a retirement allowance payable for life and in the event of death, there will be no further allowance payable[]" -- is ambiguous with respect to whether it states only what is obvious and is seemingly inconsistent with the application form. In any event, in the overall context of what was provided to him as enumerated above, this one sentence was plainly insufficient to reasonably convey to Katsumi the net effect of choosing a normal retirement option.

2.

The application and the pamphlet borrowed extensively from statutory language. The legislature, however, has conceded that HRS §§ 88-282 and -283 were confusing.[15] The House Standing

[15] HRS § 88-282 (1993) stated as follows:

> **Amount of Allowance.** (a) The amount of the annual normal retirement allowance payable to a retired member shall be one and one-fourth per cent of the average final compensation multiplied by the number of years of credited service.
>
> (b) The amount of the annual early retirement allowance payable to a retired member shall be equal to the annual normal retirement allowance reduced by one-half per cent for each month the member is less than age sixty-two at retirement.

HRS § 88-283 (1993) stated as follows:

(continued...)

Committee Report related that

> [y]our Committee notes that the [ERS] membership has experienced some confusion as to whether the normal retirement allowance in the Noncontributory Plan is an actual retirement option. Your Committee recognizes the need to clarify the retirement options since an option selection by an ERS member upon retirement is irrevocable, and each option has a different survivor benefit in the event of the retiree's death . . . .

Hse. Stand. Comm. Rep. No. 358, in 2001 House Journal, at 1264 (emphases added). Accordingly, the legislature amended HRS §§ 88-281(a), -282(a), and -283, to specify that normal retirement was one of the four modes of retirement available to ERS members. Were the statutes sufficiently comprehendible, the legislature would have no need to enact clarifications. Because the information conveyed by the ERS largely employs statutory language, see supra, obscurity in the statutory text was

---

[15](...continued)

> **Retirement allowance options.** (a) A member may elect to have the member's normal, early, or disability retirement allowance paid under one of the following actuarially equivalent amounts:
>
> (1) Option A: A reduced allowance payable to the member, then upon the member's death, one-half of the allowance, including fifty per cent of all cumulative post retirement allowances, to the member's beneficiary designated by the member at the time of retirement, for the life of the beneficiary;
>
> (2) Option B: A reduced allowance payable to the member, then upon the member's death, the same allowance, including cumulative post retirement allowances, paid to the member's beneficiary designated by the member at the time of retirement, for the life of the beneficiary; or
>
> (3) Option C: A reduced allowance payable to the member, and if the member dies within ten years of retirement, the same allowance, including cumulative post retirement allowances, paid to the member's beneficiary for the balance of the ten-year period.
>
> (b) Any election of a mode of retirement shall be irrevocable.

incorporated into the information distributed by the ERS.[16]

3.

Most significantly, the ERS Board occupies a fiduciary relationship to its members. The "board of trustees" of the ERS is vested with "[t]he general administration and the responsibility for the proper operation of the retirement system and for making effective the provisions of this part and part VII [(benefits relating to class C members)] of this chapter[.]" HRS § 88-23 (1993) (emphasis added). See Op. Att'y Gen. No. 64-25, at 8 (1964) (stating that "the trustees of the Employees' Retirement System are, in both common and legal contemplation, trustees" and that "[t]hey are entrusted with the duty and responsibility of administering the System for the benefit of the members of the System").

The fiduciary duties of the ERS Board include the duty to "provide retirees sufficient information to make an informed decision in electing a retirement option." Ricks v. Missouri Local Gov't Employees' Ret. Sys., 981 S.W.2d 585, 592 (Mo. Ct. App. 1998) (holding that retiree and his wife were given sufficient information to make an informed decision because "both a booklet and a memorandum explaining the retirement options was

[16] The amendments do not address the defects that seemingly resulted in Katsumi's unilateral mistake or caused negligent misrepresentation. Such defects stemmed from the confusing nature, as enunciated herein, of the retirement application, forms, and procedures. Hence, the amendments to the statute do not solve the essential problem posed by the failure to adequately ensure that the intricacies of the retirement process must be ordinarily understood and to mandate that the ERS maintain "user friendly" administrative practices and procedures for its members.

sent to all retirees").[17] The failure to provide understandable information would be a breach of the ERS Board's fiduciary duty "to provide sufficient information from which the retiree may make an informed decision." Id. at 592.

Here, the application and pamphlet did not contain unambiguous and understandable terms.[18] The text employed in the application and pamphlet should have conveyed a lucid description of the retirement options and the consequences of each choice. The application and pamphlet contained insufficient and seemingly inconsistent information. The pamphlet contained technical terms that were not defined or explained. The application and pamphlet should have been written in "user friendly," everyday language. See Ortelere v. Teachers' Ret. Bd., 250 N.E.2d 460, 466 (N.Y. 1969) (explaining that, "in the relationship between retirement system and member, and especially in a public system, there is not involved a commercial, let alone an ordinary commercial, transaction" and that "[i]nstead the nature of the system and its announced goal is the protection of its members and those in whom

---

[17] In Ricks, the widow of a city employee filed an appeal from the denial by the Missouri Local Government Employees' Retirement System (LAGERS) of her survivor's pension benefits. 981 S.W.2d at 588. The Missouri Court of Appeals held that the LAGERS did not violate its fiduciary duty to provide sufficient information from which the retiree may make an informed decision because the "information provided to the Ricks[es] satisfied LAGERS' fiduciary duty." Id. at 592. Ricks is distinguishable because the clarity of the information was not at issue as it is here.

[18] For example, in setting out disclosure guidelines for consumer credit transactions, 15 U.S.C. § 1604(b) mandates the Board of Governors of the Federal Reserve System to publish disclosure forms that "aid the borrower or lessee in understanding the transaction by utilizing readily understandable language." (Emphasis added.)

its members have an interest"). Ultimately, the language contained in the application and pamphlet must be comprehensible to the ordinary person and fitted to the members of the ERS, some of whom may have a limited level of education.

VI.

Under the circumstances, Helen's argument that the "ERS's method of administration of the statute is vague, ambiguous and confusing," also sounds as a claim of negligent misrepresentation. This court has held that

> [n]egligent misrepresentation requires that: (1) false information be supplied as a result of the failure to exercise reasonable care or competence in communicating the information; (2) the person for whose benefit the information is supplied suffered the loss; and (3) the recipient relies upon the misrepresentation.

Blair v. Ing, 95 Hawai'i 247, 269, 21 P.3d 452, 474 (2001).

Here, the ERS, through its application form and pamphlet, may have negligently misrepresented to Katsumi that his wife would receive survivor benefits. The ERS Board failed to reasonably communicate the information regarding the normal mode of retirement. As recounted supra, the information provided to Katsumi outwardly appears to have misled him into believing that his wife, as beneficiary, would be paid his remaining benefits. Katsumi apparently relied on this information when completing the application. Ostensibly, then, he cannot be said to have made an informed decision as to his retirement choice. Conceivably, then, Katsumi suffered a loss of retirement benefits as a result.

Ultimately, the negligent misrepresentation as described in detail above, plausibly led to Katsumi unknowingly forgoing survivor benefits he intended for his wife. Under such circumstances and inasmuch as pecuniary losses are recoverable under claims for negligent misrepresentation, Helen should be able to recover the amount which she would have had, had Katsumi chosen an option which entitled her to survivor benefits. See Bronster v. U.S. Steel Corp., 82 Hawai'i 32, 44-45, 919 P.2d 294, 306-07 (1996). In that context, selection of a different mode of retirement benefits would be an appropriate remedy for Helen.

VII.

The choice of retirement options is a pivotal decision that may substantially affect the retiree's quality of living for the remainder of his or her life and the provision for loved ones upon the retiree's death. Such decisions should be informed ones, which are possible only if the choices are readily understandable. The ERS administers retirement and survivor benefits for the great number of civil servants employed by the state and the counties. The administration of such benefits directly impacts incidents of public service and the duties of the ERS with respect thereto, matters vital to the operation of the state and county governments.

The Board's responsibility in this regard requires the legal confirmation of a fiduciary duty to the ERS members. Only such a duty will assure that ERS members will not encounter the

same or similar circumstances evident here. The recognition of that duty arises in the context of this case. But the duty owed affects not only this case, but the manner in which all future ERS cases should be decided.

Despite what appears manifest in the record, the ERS made no findings with respect to the specific nature and sufficiency of information provided to Katsumi, nor did it do so in light of the fiduciary duty confirmed here. Under the facts of this case, we believe it appropriate pursuant to HRS § 91-14(g) to vacate the July 28, 2000 final judgment of the court and to remand to the court with instructions to remand the case to the ERS for further proceedings to consider the matters enumerated herein, in the framework of the entire record and in view of the ERS's fiduciary duty to retirees.

On the briefs:

Diane Erickson and Kristin E. Izumi-Nitao, Deputy Attorneys General, for Appellee-Appellant.

Reid A. Nakamura and Guy C. Zukeran (Oliver, Lau, Lawhn, Ogawa & Nakamura), for Appellant-Appellee.