IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

(HELD IN JOHANNESBURG)

CASE NO: PFA/WE/441/2000/NVC

In the complaint between:

J M SMALLBERGER Complainant

and

SHELL SOUTHERN AFRICA PENSION FUND First Respondent

SHELL SOUTH AFRICA ENERGY (PTY) LTD Second Respondent

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 ("the Act")

Introduction

[1] On 15 April 2005 this tribunal made an order in the following terms:

"[26.1] It is declared that neither Shell nor the trustees of the fund have exercised their respective discretions.

[26.2] Shell is hereby ordered to exercise its discretion properly and in good faith in terms of rule 23(2) and take into account all relevant factors.

[26.3] Shell is ordered further to advise the complainant and this tribunal on sworn affidavit of:

[26.3.1] all the actions it has taken in the exercise of its discretion;

[26.3.2] all the factors it has taken into account in the exercise of that discretion

by no later than 12 noon on Friday 29 April 2005;

[26.4] The trustees of the respondent fund are ordered to exercise their discretion properly and in good faith in terms of rule 3(21(c) and take into account all relevant factors.

[26.5] The trustees of the respondent fund are ordered further to advise the complainant and this tribunal on sworn affidavit of:

[26.5.1] all the actions they have taken in the exercise of that discretion;

[26.5.2] all the factors they have taken into account in the exercise of that discretion

by no later than 12 noon on Friday 29 April 2005.

[26.6] The complainant may, if she considers it in her best interests to do so, submit a reply to the trustees' and Shell's submissions within 10 days of receiving same and in any event no later than 12 noon on Friday 13 May 2005."

[2] Both the fund and Shell made written representations (both received by this office on 10 May 2005 although the fund's affidavit is dated 29 April 2005). I shall deal with each in turn. The complainant also made written submissions in response thereto dated 10 and 12 May 2005.

[3] It now seems common cause that the correct name of the participating employer is Shell South Africa Energy (Pty) Ltd and not Shell Marketing and Energy (Pty) Ltd as previously indicated in the complainant's original complaint. Nevertheless, no legal

issue has been taken with this apart from the employer simply "pointing out" a "factual error". (For convenience, I shall refer to the second respondent, Shell South Africa Energy (Pty) Ltd, as "Shell".)

[4] The issues and factual background are clear from the determination of 15 April 2005 and will not be repeated here.

THE FUND'S RESPONSE

[5] The fund was required to exercise its discretion in terms of rule 3(21)(c). The rule, at the relevant time of the complainant's retirement on 30 November 1998, read as follows:

> "In the calculation of any benefit payable in terms of these Rules, a Member's Pensionable Salary may be adjusted, where appropriate, to allow for any period or periods during which the Member was employed in a part-time capacity. Such adjustments shall be decided on by the Committee and shall be final and binding if not inconsistent with the general tenor of these Rules."

[6] In its response the fund submitted that the rules were subsequently

amended with effect from 1 May 2000 and that the amended rules "do not contain an equivalent to rule 3(21)(c)". It says "[t]he trustees cannot now exercise a discretion in terms of rule 3(21)(c) because it no longer exists".

[7] I cannot accept this argument. The rules that must be applied in this case are those that existed at the time of the complainant's retirement in November 1998. That the rules have subsequently been amended is of no relevance as there is no suggestion that the amendment was to apply retrospectively. The fund's own submission is that the amendment took effect from 1 May 2000. In any event, the complainant raised the issue of the recognition of her past service in December 1998, more than a year prior to the amendment taking effect.

[8] The rule, as it read before amendment, has the following clear features. Firstly, the adjustment must be "appropriate". Second, the adjustment must relate to "any period or periods" during which the member was a part-time employee. Third, the adjustment must be decided upon by the trustees. Fourth, the adjustment must not be inconsistent with the general tenor of the rules. Fifth, if the adjustment is consistent with the general tenor of the rules, the

trustees' decision is final and binding. I shall examine each of these against the fund's submissions.

[9] But before doing so, I think it important to determine what the purpose of this rule is so that the analysis thereof is better appreciated. Rules of this kind are usually introduced to cater for members who had previously, for one reason or another, been prevented from joining the fund (for example, part-time employees, black employees, weekly-paid employees, and so on) so that their pensionable salary could, for purposes of retirement, be adjusted to compensate for the period they were prohibited from membership of the fund, thus bringing them up to relatively the same level as other members who had always been members. It is a restitutionary measure akin to the kind dealt with in *Minister of Finance and Another v Van Heerden* [2004] 9 BPLR 6007 (CC). Indeed, the complainant contends in her original complaint (and this submission is not disputed by the respondents) that she was forbidden from joining the fund during the period 1979 to 1987 on grounds of her being over 35 years of age at the time, and that she was forced to resign in June 1969 (she had been a member since April 1962) because it was company policy that pregnant women could not continue in employment and thus membership of the

fund.

[10] In my view, rule 3(21)(c) must necessarily be read in that context. Naturally, in a pure defined benefit scheme, the employer must make up the difference if there is a shortfall arising from the restitutionary measure as rule 23(1) envisages.

Appropriateness of the adjustment

[11] The fund says the adjustment would be inappropriate for a number of reasons.

[12] First, it says the claim for recognition of past service by the complainant "has long since prescribed" as the event about which she complains occurred some 30 years ago. But the period with which the fund seems to deal in this instance is the period 1962 to 1969. During that period the complainant was in full-time employment and so the period cannot be adjusted under rule 3(21)(c) which deals only with part-time employment periods. The relevant period here is 1979 to 1987 and in respect of that period the cause of complaint arose when the complainant sought to have

that period recognised for pension purposes in December 1998. The complaint was received by this tribunal within three years of that date on 27 March 2000.

[13] Second, it says the rule is intended to provide for instances where the part-time period of employment either follows full-time employment "as part of the process of [the member] winding down his or her employment prior to retirement" or falls between periods of full-time pensionable service. There is no merit in this argument. The rule talks of adjustment of "any period" and there is no basis for the constricted interpretation given by the fund. If that is what is intended then the rules must say so. Significantly, the fund has previously taken into account part-time service as pensionable service where the person concerned was about to be employed on full time basis, not at a time when she was "winding down" her employment prior to retirement.

[14] Third, it says only the employer "can direct a benefit enhancing the retirement benefit of the complainant". Although the employer should be consulted on decisions of this kind in balance of cost funds, rule 3(21)(c) says nothing of the final decision resting with the employer. It expressly leaves that decision to the trustees and

is, provided it is consonant with the general tenor of the rules, final and binding. Again, if the intention is that the employer should have a say in that decision, then rule 3(21)(c) must say so. It is no good referring to another rule which deals with a different discretionary power. In the final analysis, the rules are King.

[15] Fourth, it says such adjustment would be inappropriate because the pensionable salary adjustment claimed is not pre-funded and so would adversely affect the fund's financial soundness. I disagree. The complainant was unfairly discriminated against on grounds of her age so that she could not join the fund. A rule was introduced to address that past unfair discrimination. The employer must now make up the shortfall that has been determined by the actuary to be some R520 000 as at 31 December 2004 (translating into a 66,21% increase of the complainant's pensionable increase) and which the employer says it can afford. In any event, rule 23(1) provides that the solvency of the fund depends on "Each Employer" in the Shell group of companies making such further contributions as the actuary may from time to time determine. Thus the adjustment in this case is not dependant on whether or not it has been "pre-funded".

Adjustment must relate to any period

[16] I have already dealt with the fund's attempt to limit the application of the rule to those periods whether the member is either about to retire or periods which fall between full-time employment periods. The rule is not open to such a narrow interpretation.

It is the trustees' decision

[17] The trustees have a discretion to decide whether or not to adjust a member's pensionable salary. Because this is a balance of cost fund, the employer must obviously be consulted but the ultimate decision rests with the trustees.

Adjustment to be consistent with the general tenor of the rules

[18] What this means, according to the fund, is that the adjustment must not result in the fund's financial position being precarious. It says the adjustment of the complainant's pensionable salary to allow for

the recognition of the part-time employment period from 1979 to 1987 would, as I understand the fund, be inappropriate because that period is not funded. This result will not ensue if the employer makes up the 66,21% increase of the complainant's pensionable salary as determined by the actuary.

The trustees' decision is final and binding

[19] If the adjustment is consistent with the general tenor of the rules as described above, then the trustees' decision is final and binding. The general tenor of the rules dictates that for the trustees to make that decision, the employer must make up the shortfall as determined by the actuary (see rule 23(1)). The employer says it can afford to make up the shortfall.

Conclusion

[20] In all the circumstances of this case, taking into account the employer's *ipse dixit* that it has the resources to make up the shortfall, and considering also the duty of good faith that the

employer owes to the fund's members and beneficiaries (*Tek Corporation Provident Fund and Others v Lorentz* [2000] 3 BPLR 227 (SCA) at 235C), I can see no reason precluding the trustees from making the decision in line with the fiduciary duty they owe to the complainant (see *Tek Corporation* at 227B-C).

THE EMPLOYER'S RESPONSE

[21] The employer was required to exercise its discretion in terms of rule 23(2). The rule now reads:

> "Subject to the payment by the Employers of such additional contributions as are certified by the Actuary to be required, the Company may direct the Committee to increase all or any of the Pensions payable under these Rules, or to pay the Pension otherwise than in terms of the Rules and unless contrary to the original directive may at any time reduce or cancel such increase or Pension."

[22] This rule can be broken down into a number of component parts. Firstly, Shell has a discretion (which must be exercised properly and in good faith) to direct the trustees of the fund to increase any pension payable under the rules (in this case, the retirement

benefit). Secondly, this discretion also extends to Shell itself paying a pension outside the provisions of the rules. Thirdly, any direction by Shell to the trustees to increase pensions must be backed up by Shell's funding thereof to the extent certified by the actuary as being necessary. Fourthly, the pension increase by the fund or payment by Shell may be reduced or cancelled at any time.

[23] The rule thus affords two types of discretion to Shell. The one involves pension increases by the fund at Shell's direction and the funding of which is determined by the actuary. The actuary could well determine either that no additional contributions by Shell would be required to fund such pension increase or that Shell need only contribute a small amount. The other discretion involves payment of a pension by Shell itself without reference to the fund.

[24] In her response dated 10 May 2005 on Shell's behalf, Shell's employee services manager says she has been advised by the fund's actuary that, in order to ensure the funding level of the fund is sound, Shell would be required to make additional contributions if the complainant's pension were to be increased. In her submission that "if Shell were to increase the Complainant's pension payable in terms of the Rules to a pension equivalent to

what it might have been had the Complainant's temporary service . . . been regarded as pensionable service, Shell would be required to pay an additional amount exceeding R500 000.00", she appears to be guided by the fund's response in which the fund says:

> "[T]he complainant's final pensionable salary would have to be increased by 66,21% to have the effect of conferring pensionable service over this period of part-time employment [that is, 1979 to 1987]. The cost of this unfunded benefit enhancement to the fund as at 31 December 2004 would be approximately R520,000-00 . . ."

[25] She then says "*Shell does not dispute that it can afford this*" but that she nevertheless recommended to Shell's Human Resources General Manager that Shell should not direct the trustees to increase the complainant's pension under the rules for fear of opening floodgates for similar requests from some 144 temporary employees. She says she has taken all the factors mentioned in paragraph [24] of the determination of 15 April 2005 in making her recommendation.

[26] It is the nature of a discretionary power that its proper *bona fide* exercise is informed by the circumstances of each case. The

favourable exercise thereof in one case does not set a precedent for a similar exercise and outcome in another case. This much is trite, otherwise the exercise of the discretion would be fettered and thus susceptible on review to any decision reached thereby being set aside. Thus, the floodgates argument cannot be sustained. In any event, both the pension increase in terms of the rules and the payment of a pension by Shell outside the rule provisions may at any time be reduced or cancelled. I am thus not persuaded by the basis on which Shell decided not to direct the trustees to increase the complainant's pension or to pay the increase itself.

[27] I deal hereunder with each of the rule's component parts.

Shell has discretion to direct trustees to increase pension

[28] This discretion is rooted in the nature of the fund, a defined benefit fund, where the employer makes up the difference in the event of a shortfall arising upon the increase of pensions to members. Simply put, benefits for which the fund provides are funded by member contributions, on the one hand, and such employer contributions as may be determined by the actuary to be necessary, on the other. If

the fund is sufficiently well-resourced, the actuary may well determine that the employer need not make any additional contributions to fund pension increases. It is thus because an increase of the complainant's pension may (or may not, as the case may be) have financial implications for Shell that Shell is clothed with this discretion. The discretion must be exercised properly (taking into consideration all relevant factors – such as those set out in paragraph [24] of the determination of 15 April 2005 – and disregarding irrelevant factors). It must also be exercised in good faith.

[29] Shell says it has decided to exercise the discretion against directing the trustees to increase the complainant's pension. It says it did so having acknowledged the complainant's long service, the good working relationship it had with the complainant, the long service award it gave the complainant in recognition of her work, the funding level of the fund and Shell's own ability to make the additional contribution required. It gives essentially two reasons for deciding to follow that course. The first is that Shell has never before "paid any additional contributions to increase any member's pension payable under the Fund's Rules". The second is that Shell currently employs some 144 temporary employees none of whom

are entitled to any pension benefits. In my view, while the first of these reasons betrays a misconception of the nature of a discretionary power, the second misses the point completely.

[30] That Shell has never before been called upon in terms of rule 23(2) to make additional contributions for the increase of a member's pension is an irrelevant consideration because, as the fund itself points out (correctly with respect):

> "As a matter of law, a body which has a discretionary power conferred on it cannot be bound by decisions in which that same discretion was exercised, as the result would be that it is not or no longer a discretion."

Thus, that Shell has never before exercised its discretion under rule 23(2) to make additional contributions for increased pension does not mean that it is bound to exercise its discretion in the same manner. That would be an impermissible fettering of that discretionary power and subject, on review, to being set aside.

[31] In any event, Shell has previously agreed to the recognition of previous part time employment as pensionable service although it

was not called upon to make additional contributions. As the complainant correctly points out in her reply:

> "Possibly the reason Shell cannot recall ever paying additional contributions to fund a pension is because the Fund was so strong that the actuary indicated that it would not be necessary to provide separate funding for past temporary service . . ."

[32] Indeed, in the minutes of the trustees' meeting held on 4 February 1982, a decision was taken to recognise the past temporary service of an employee who was about to be employed permanently on full-time. The actuary indicated that it would not be necessary for Shell to make additional contributions. The relevant part of the minutes reads:

> "The meeting noted that Mrs [M S] (47) who had been employed on half-day basis for the past 14 years, was about to be engaged permanently on a full time basis. It was decided to buy back half of Mrs [S's] past service which would have the effect of crediting her with 18 year's service by the time she reached her [normal retirement age] of 58.
>
> The Actuary indicated that it would not be necessary for the Company

to provide separate funding for the service being credited to Mrs [S]."

[33] As regards the 144 "temporary employees" who are not entitled to any pension benefits I have this to say. The comparison is with respect misplaced. The rule applies to permanent employees because temporary employees are not, on the definition of "Employee" and "Member", eligible for membership. In any event, the complainant does not seek a pension benefit as a temporary employee. She seeks recognition of her past service as pensionable service for retirement benefit purposes now that she is a pensioner member of the fund.

[34] In the result, Shell's basis for its refusal to direct an increase of the complainant pension in terms of the rules cannot be sustained.

Shell has discretion to pay pension itself

[35] In my view, rule 23(2) not only gives Shell the discretion to direct the trustees to increase the complainant's pension in terms of the rules; it also gives it the discretion to pay the pension itself outside the provisions of the rules. I say so because Shell cannot validly

instruct the trustees to act outside the compass of the rules by paying pensions not provided for in the rules. If what the trustees have been ordered to do is not within the powers conferred on them by the rules, they may not do it (*Tek Corporation* at 239D-E; *Mostert NO v Old Mutual Life Assurance Company (SA) Ltd* [2001] 8 BPLR 2307 (SCA) at para. [30]). There is no provision in the rules of this fund empowering the trustees to pay pensions outside the purview of the rules. Such a rule would in any event be unenforceable and inconsistent with section 13 of the Act.

[36] Shell says it has considered all the factors in paragraph [24] of the determination of 15 April 2005 and decided not to pay the pension. Its reason is that it has never before "paid any additional contribution to fund a pension otherwise than in terms of the Rules". I have already dealt with this argument. Past practice does not bind Shell in the exercise of its discretionary power. Shell says, however, that it "does not dispute that it can afford" funding the complainant's pension otherwise than in terms of the rules. That acknowledgement, together with the others referred to in paragraph [29] above, in my view makes it difficult to avoid a conclusion that Shell's decision was made arbitrarily.

Additional contributions to be certified by the actuary

[37] Increase of the complainant's pension by the trustees upon the direction of Shell depends on payment of such additional contributions as the fund actuary may determine to ensure the funding levels of the fund are not adversely affected. On a proper reading of the rule, such additional contributions are payable not only by Shell (that is, the second respondent by whom the complainant was employed) but also by all the Shell group of companies participating in the fund. I say so because the rule requires payment of the additional contributions "by the Employers" and "Employer" is defined in the rules to mean not only "Shell South Africa (Pty) Limited" (which is not party to this complaint) but also "any company or organisation admitted to participation in the Fund . . .". Thus, the R520 000 to which the fund refers as being the amount required to fund the increase of the complainant's pension is not for the account of the second respondent alone.

[38] But that relates to the increase of pensions by the trustees. Payment

of pensions by Shell (the second respondent) itself in its own discretion, however, depends not on the fund's funding levels but on its affordability to Shell. It says it "does not dispute that it can afford" paying the complainant's pension otherwise than in terms of the rules. The fund actuary has determined the amount necessary as at 31 December 2004 to be R520 000. That is the amount Shell says it can afford. I have no reason to doubt its good faith in this regard.

Pension increase or payment may be reduced or cancelled

[39] Because of the nature of the fund (a defined benefit fund) any pension increase that the trustees may, upon Shell's direction, pay to the complainant may at any time be reduced. This will be dictated to by the funding levels of the fund. Any pension that Shell may itself pay to the complainant outside the rules may at any time be reduced or cancelled. Obviously, this may not be done arbitrarily.

[40] This part of the rule ensures that the fund does not overstretch its resources when, having agreed to a pension increase in times of

abundance, it can no longer sustain the amount of the increase. The fund will thus not be prejudiced by the employer directing that it increase the complainant's pension at this stage, particularly in light of the fact that Shell has indicated that it has no problem coming up with the necessary funds.

Relief

[41] In the circumstances, it is my view that the complainant's pension can be increased both under rule 3(21)(c) and rule 23(2). Nevertheless, since an increase under rule 3(21)(c) may or may not involve financial contribution by Shell, I consider it appropriate to make an order under that rule.

[42] The final order of this tribunal is as follows:

[42.1] The first respondent's actuary is ordered to determine, as at the date of this determination, the additional contribution that is necessary to increase the complainant's pension allowing for the recognition of the period 5 November 1979 until 31 August 1987 as

pensionable service.

[42.2] The second respondent is ordered to make such contribution as is determined by the first respondent's actuary to be necessary for increasing the complainant's pension as described in paragraph [42.1] above.

[42.3] The first respondent is ordered to adjust the complainant's pensionable salary in line with the actuary's determination and pay to the complainant a benefit commensurate therewith.

[42.4] The orders in paragraphs [42.1], [42.2] and [42.3] above must be complied with by no later than 2 September 2005.

Dated at JOHANNESBURG on this the day of JULY 2005.

VUYANI NGALWANA
PENSION FUNDS ADJUDICATOR

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