Dear Mr Elbourne

RE: DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT, 24 OF 1956 (“the Act”) – C B ELBOURNE (“the complainant”) v AUTO WORKERS PROVIDENT FUND (“the first respondent”) AND BRIDGING FINANCIAL CONSULTANTS (PTY) LTD T/A AIRTEK (“the second respondent”)

1. Introduction

1.1 The complaint concerns the failure of the second respondent to pay contributions to the first respondent, and the first respondent’s consequent inability to pay the complainant’s full benefit.

1.2 The complaint was received by this office on 30 June 2009. A letter acknowledging receipt thereof was sent to the complainant on 15 July 2009. On the same date letters were dispatched to the respondents giving them until 15 August 2009 to file their responses to the complaint. A response was received from the first respondent on 12 August 2009. No response was received from the second respondent. The first respondent’s response was forwarded to the complainant on 14 August 2009. The complainant failed to file further submissions.
1.3 After reviewing the written submissions, it is considered unnecessary to hold a hearing in this matter. The determination and reasons therefor appear below.

2. **Factual Background**

2.1 The complainant was employed by the second respondent from 1 August 1998 until 12 April 2009. At the same time he was a member of the first respondent by virtue of his employment.

2.2 Upon the termination of the complainant’s employment and exit from the fund, the first respondent was unable to pay the complainant’s full benefit due to the failure by the second respondent to pay contributions for his full membership period.

3. **Complaint**

3.1 The complainant is aggrieved by the second respondent’s failure to pay his contributions over to the first respondent, and is consequently requesting this Tribunal to order the second respondent to pay all the outstanding contributions.

4. **Response**

4.1 The first respondent states that its records indicate that a withdrawal benefit payment in the amount of R34 283.30 was made to the complainant on 3 June 2009. The first respondent further states that according to the records of the Motor Industry Bargaining Council, this benefit was based on the contributions received on behalf of the complainant from the second respondent for the period 28 June 2004 to 29 July 2007.

4.2 According to the first respondent, the Motor Industry Bargaining Council has confirmed that they have accepted a proposal by the employer to pay all outstanding contributions to the fund by means of post dated cheques, and the final cheque to be deposited on 20 August 2009 upon which outstanding contributions will be loaded in order to bring the second respondent up to date on the council’s records. The first respondent advised this Tribunal on 22 January 2010 that the second respondent has failed to honour its proposal and the fund is in the process of taking legal action against the employer.

4.3 The first respondent concludes by stating that a further withdrawal benefit in respect of the complainant will only be paid to him upon receipt of all the outstanding contributions from the second respondent.
5. **Determination and reasons therefor**

5.1 The second respondent has a duty placed on it by the rules of the first respondent and the provisions of section 13A(1)(a) of the Act to pay contributions to the first respondent, and the first respondent in turn has a duty to pay out benefits to the members. Section 13A(3)(a)(i) states that such contributions must be paid directly into the fund’s account and section 13A(3)(a)(ii) states that the contributions must be paid directly to the fund in such a manner as to have the fund receive the contribution not later than seven days after the end of that month for which such a contribution is payable.

5.2 The extent of the first respondent’s liability is limited to the amount by which the benefit in question has been funded. Thus, if no contributions have been paid to the first respondent, it cannot be held liable to pay any benefit to the complainant. The complainant is entitled to recover the loss of his benefits from the second respondent (see Orion Money Purchase Pension Fund (SA) v Pension Funds Adjudicator and Others [2002] 9 BPLR 3830 (C), at paragraph 3839 F-G).

5.3 Thus, the appropriate relief is that which has the effect of placing the complainant in the position he would have been had the second respondent regularly and timeously paid the contributions. It is not clear at this stage what the value of the complainant’s benefit would have been had the second respondent timeously and fully paid its contributions to the first respondent. However, the administrator of the first respondent is in a position to calculate the said amount.

6. **Relief**

6.1 In the result, the order of this Tribunal is as follows:

6.1.1 The first respondent is directed to compute the value of the withdrawal benefit that the complainant would have been entitled to had the second respondent timeously made the contributions due in terms of the rules, less the amount of R34 283.30 which represents the first withdrawal payment, and less any deductions permitted by the Act, together with interest calculated at 15.5% per annum from 3 June 2009 until date of payment, and to inform this Tribunal and the second respondent of such amount, within three weeks upon receipt of this determination;

6.1.2 The second respondent is directed to pay to the complainant the amount of the benefit computed in paragraph 6.1.1 above, within one week of receiving the calculations from the first respondent;
together with interest calculated at 15.5% per annum from 3 June
2009 until the date of payment.

6.1.3 The first respondent is ordered to pay the complainant as and
when it receives the outstanding contributions from the second
respondent.

DATED AT JOHANNESBURG ON THIS            DAY OF                             2010.

Yours faithfully

DR E.M. DE LA REY
Pension Funds Adjudicator

Cc: AUTO WORKERS PROVIDENT FUND
C/o Motor Industry Fund Administrators (Pty) Ltd
Attention: Mr A Schoeman

Fax: (086) 504 1692

Cc Attention: Mr P Maimonis
Bridging Financial Consultants (Pty) Ltd t/a Airtek

Fax: (011) 826 2446

Registered office of the fund

275 Kent Avenue
Ferndale
Randburg
2125

Section 30M filing: Magistrate’s Court