IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO: PFA/FS/37/98/SM

In the complaint between:

SHADRACH MOROE AND 9 OTHERS
Complainant

and

AECI EMPLOYEES PENSION FUND **First Respondent**

AECI EXPLOSIVES LTD **Second Respondent**

CHEMICAL WORKERS INDUSTRIAL UNION **Third Respondent**

PRELIMINARY DETERMINATION

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1. This is a complaint lodged with the Pension Funds Adjudicator on 19 August 1998 concerning the complainants' claim that they be paid their withdrawal benefits on the basis of retrenchment rather than dismissal, following a settlement agreement concluded on 18 September 1996, pursuant to their dismissal, in terms of which they were each paid an amount based on a severance benefit.

2. The complainants are Shadrack Moroe, T P Mile, S Rantsoele, M E Phukuntsi, G Motloung, M Leepo, S Maleema, S Motloung, T S Matsepe and A Potsane, who were all employed by the second respondent, AECI Explosives Ltd (AEL), a subsidiary company of AECI, until their dismissal for misconduct in April 1994 during a strike. The first respondent is the defined benefit fund to which the complainants belonged until the date of their dismissal.

3. The complaint relates to the administration of the fund and the interpretation and application of its rules, the complainants essentially alleging that the employer has

not fulfilled its duties in informing the fund of the correct reason for their termination, that the fund has maladminstered the fund in not paying out the retrenchment benefits to which they claim they are entitled, and that there is a dispute of fact between the complainants and the fund/employer regarding the circumstances of their termination.

4. No hearing was held in this matter and in making this preliminary determination I have relied on the documentary evidence and submissions and on the investigation of the complaint by my senior investigator, Sue Myrdal. However because there has been no hearing, in the interests of procedural fairness, I have chosen to issue a *rule nisi*.

5. The facts of this matter are the following: on 12 April 1994 the complainants, together with some other fellow employees, were dismissed from AEL during a strike, on the grounds of misconduct. On dismissal they received their withdrawal benefits from the fund. According to rule 7.2 the cash benefit on dismissal is the same as that for resignation, which is set out in rule 7.1:

> If a member resigns voluntarily from the employer's service, or if he ceases to be a member in circumstances for which no provision is made elsewhere in these rules
>
> (1.) he shall be entitled to a refund of
>
> (i) his own contributions plus interest thereon at a rate to be decided by the trustees from time to time
>
> PLUS
>
> (ii) an additional amount equal to 5 per centum of the amount in (i) above for each complete year of contributory pensionable service in excess of five years.

6. It appears that the fairness of the dismissal was challenged by the employees, and an agreement was eventually struck at a Conciliation Board meeting on 18 September 1996 between the employer and the union representing the dismissed employees, the Chemical Workers Industrial Union (CWIU). It is the terms of the

agreement which are in dispute and which lie at the core of this complaint. Unfortunately no minutes of the meeting were kept and the only documentary evidence of the settlement agreement lies in subsequent correspondence which is either vague or comprises the reconstruction of the agreement by one party without any verification by the other party.

7. The complainants assert that, as far as they are concerned, the agreement was based on a decision that they be considered as retrenched rather than as dismissed on other grounds, and that therefore they should be paid their pension fund retrenchment benefits. In this scenario, in terms of the rules operative at the time, rule 5.2 (ii) (b) would be applicable:

> "if a member is retired from the service of the Employer owing to a reduction in or reorganisation of staff or to the abolition of his office or post, or in order to facilitate improvements in organisation or to retrenchment generally, he shall be entitled to
>
> (i) in respect of a member who has less than one year of pensionable service, a benefit in terms of rule 7.
>
> (ii) in respect of a member other than in (i) above a gratuity equal to the amount of twice his contributions plus interest at a rate determined by the trustees, provided that, if the member has completed ten years of pensionable service and has attained age 40, he may instead elect to become a deferred pensioner in terms of rule 7.3"

The complainants therefore seek payment of the difference between the withdrawal benefits paid based on dismissal for misconduct (own contributions plus interest) and the benefit payable on retrenchment, (twice own contributions plus interest).

8. In his response Mr Martyn Carr, principal officer of the fund, has raised the issue of prescription, submitting that the three year time period since the act to which the complaint relates has passed. I do not agree, since the act in question is clearly

the settlement agreement, which took place on 18 September 1996. If in terms of the settlement agreement the complainants were held to have been retrenched, a retrenchment pension fund benefit would be payable to them, backdated to the date of their withdrawal from the fund but enforceable as from 18 September 1996. The settlement agreement is the act to which the complaint relates, since the complainants complain that they did not receive their entitlement which flowed from that agreement. The complaint was first lodged with my office on 19 August 1998, although it was only formally referred in writing to the respondents by way of letters dated 10 August 1999. This is still within the three year period contemplated in terms of section 30I and accordingly I have jurisdiction.

9. Mr Carr submits that the agreement negotiated between the employer and the CWIU involved paying the dismissed employees severance benefits, but specifically stated that this did not mean that the employees were to be considered as dismissed on operational requirement grounds. Therefore, he argues, the workers were not entitled to the payment of retrenchment benefits from the fund, and the employer would not have submitted the relevant documentation to the fund to process retrenchment benefits.

10. Mr Carr cites various documents as evidence for the terms of the agreement. The first two documents referred to are both written by the employer's Mr B B van Wyk, Industrial Relations Manager, one being a memorandum to a Mr G Matthewson (presumably a superior) dated 27 August 1999 (after lodgment of the complaint), and the other a letter to the complainants dated 30 August 1999. It appears that Mr Van Wyk was not himself present at the conciliation board meeting.

11. The memorandum states that a Mr Chris Killowan and a Mr Allan Ingham Brown represented the employer at the Conciliation Board hearing, and that

> "agreement was obtained to settle the matter on the basis that the dismissed employees would receive a settlement amount based on ex-gratia retrenchment calculations, not to be

confused with the fact that the employees services were terminated as a result of plant closure based on operational requirements. As a result thereof the employees would not receive pension benefits as the Pension Fund regarded the termination as being the result of misconduct and not retrenchment."

12. In the letter to the complainants Mr Van Wyk sets out the employer's version of the agreement, although it is not clear where he obtained the following fairly detailed information:

> "An agreement was obtained at the Conciliation Board hearing, entered into between AECI Explosives and CWIU, based on the following facts:
>
> - Retrenchment benefits would be made payable to dismissed employees based on the ex gratia retrenchment calculation.
> - The retrenchment benefits would be considered as a once off payment in order to settle the dispute.
> - Agreement was obtained on the basis that dismissed employees would remain dismissed, for misconduct during the strike.
> - The Agreement was entered into as a settlement offer to resolve the dispute, of which the payment of ex gratia retrenchment benefits was used as the formula for calculating the settlement amount.
> - In agreeing to the use of the ex-gratia retrenchment calculation, the Company was not agreeing to retrenchment based on operational requirements i.e. the closure of the plant.
> - As a result thereof pension benefits were not payable on the basis that the Pension Fund regarded the termination of the employees as being for misconduct and not for retrenchment purposes.
> - Dismissed employees were therefore not eligible for pension fund benefits."

13. The third document submitted by the respondent is a letter dated 19 March 1997, written by Mr C A Kilowan, one of the employer representatives actually present at the conciliation board hearing, to a Mr Molapo of Rossouw & Partners, apparently in response to a letter enquiring as to the terms of the agreement. The letter is short and sweet:

> "We must advise that no minutes were taken of discussions between the company and the union. However, the settlement proposal as well as acceptance thereof is in writing and we enclose copies of:
>
> 1. A letter from Mr B Fitzpatrick to Mr M Ravuku dated 20 September 1996.
> 2. A letter from Mr Ravuku to Mr Ingham Brown dated 16 January 1997.
>
> We trust that the contents are clear."

14. One would assume that an examination of these last two letters would finally confirm the edifice built upon them. However the first letter, purporting to contain the settlement proposal, merely reads as follows:

> "As agreed at the Conciliation Board meeting held on 18 September 1996 in Welkom, please find the retrenchment benefits applicable.
> *[there follows a list of twenty names, including the complainants, together with their work numbers and corresponding amounts in rands]*

The letter from Mr Ravuku in response reads:

> "This serves to confirm that the CWIU is mandated to accept the company's proposals as outlined in your telefax dated 20 September 1996 which is attached for ease of reference. Could you please advise us when the cheques will be ready for collection in order that I advise our members accordingly. I also request that each member be furnished with a payslip that outlines how the calculations were made."

15. There is thus no first-hand evidence in the documents before me that the terms of the settlement were as the respondent states them to be, although there is an as yet uncontroverted allegation that the agreement did not encompass the retrenchment of the workers or contemplate the payment of retrenchment pension fund benefits. Normally the onus is on the employer to establish the reason for a dismissal, but in this instance there is an alleged oral agreement as to the basis for dismissal, and the onus thus shifts to the complainants to prove the terms of the

agreement upon which they rely, in line with the maxim that “he who alleges must prove”.

16. In the absence of any clear indication of the agreed reasons for the dismissal one could speculate that the terms of the agreement may have been vaguer than represented here by the employer, and that the issue of pension benefits may not have been addressed, or left open-ended. It would not have been necessary for a plant closure to follow the agreement for the terms of the agreement to fall within the ambit of rule 5.2. Depending on the circumstances, termination of the employment of strikers can be considered to be an operational requirements dismissal. The evidence available to me is less than conclusive as to whether or not this is the case in this instance.

17. However one thing is clear – as part of the settlement the complainants did receive retrenchment benefits in the form of severance pay. While not conclusive, this is a strong indication that the dismissal was regarded as a retrenchment and in the absence of any countervailing evidence may indeed be decisive. On the evidence before me I am obliged to draw this *prima facie* conclusion.

18. The complainants were not themselves present at the conciliation board meeting. The missing party is the union. My investigator has had difficulty in obtaining the union’s version, partly because the main union negotiator involved in the settlement, Mr Ravuku, has since left the union, although it appears there were other union members present at the settlement negotiations. In order to short circuit this process, in terms of section 30G (d) of the Pension Funds Act of 1956 I hereby join the union, being the representative of the complainants at the hearing, and in terms of the rule *nisi* which follows, I afford the parties a further opportunity to present fuller evidence of the settlement, in the form of sworn submissions by persons who were actually present at the hearing.

19. Accordingly I hereby issue a rule *nisi* in terms of which the parties are called upon to show cause, if any, within 30 days of this preliminary determination, why the following order should not be made final:

That the first respondent pay to each of the complainants within six weeks of the date of the final order

(i) the difference between the withdrawal benefit paid to each of them in April 1994 and the amount payable on the basis of termination on the grounds of operational requirements in terms of rule 5.2 (ii) (b), this amount to be calculated as at 12 April 1994;

(ii) interest from 12 April 1994 to date of payment, at the rate prescribed in respect of a judgment debt in terms of section 2 of the Prescribed Rate of Interest Act, 1975.

DATED at CAPE TOWN this 9th day of NOVEMBER 2000.

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JOHN MURPHY

PENSION FUNDS ADJUDICATOR