IN THE TRIBUNAL OF THE
PENSION FUNDS ADJUDICATOR **CASE NO. PFA/GA/387/98/LS**

IN THE COMPLAINT BETWEEN

C G M Wilson	**Complainant**
AND	
First Bowring Staff Pension Fund	**First respondent**
First Bowring Insurance Brokers (Pty) Limited	**Second Respondent**

DETERMINATION IN TERMS OF SECTION 30M OF THE PENSION FUNDS ACT OF 1956

Introduction

This is a complaint lodged with the Pension Funds Adjudicator in terms of section 30A(3) of the Pension Funds Act of 1956.

The complainant is C G M Wilson, a retired member of the first respondent.

The first respondent is the First Bowring Staff Pension Fund, a fund registered under the Pension Funds Act of 1956.

The second respondent is First Bowring Insurance Brokers (Pty) Limited, a company incorporated in terms of the laws of South Africa and which employed the complainant for the period 1 November 1979 to 31 May 1998.

The complainant lodged a written complaint with the Pension Funds Adjudicator on 23 September 1998. The complainant has complied with the provisions of section 30A(1)

which requires the complainant to lodge a written complaint with the fund or the employer who participates in the fund before lodging with the Pension Funds Adjudicator. The respondent has properly considered the complaint and has replied thereto in writing as required by section 30A(2) of the Pension Funds Act.

No hearings were conducted and therefore in determining this matter, documentary evidence and argument in writing were relied on exclusively.

The complaint relates to the period of pensionable service to which the Complainant is entitled. It also relates to the application of the first respondent's rules in terms of which early retirement benefits are reduced for every month short of retirement.

The Pension Funds Adjudicator has jurisdiction to consider the complaint in so far as it relates to the application of the first respondent's rules and alleges that a decision of the second respondent taken in terms of the first respondent's rules constituted an improper exercise of its powers as well as alleging a dispute of fact and law regarding the period of pensionable service to which the complainant is entitled.

The complaint is determined as follows:

Factual background

From the 1 January 1961 to 1 January 1965, the complainant was employed by Muir Beddall (Pty) Ltd in Zimbabwe. On 1 January 1965 the latter was taken over by CT Bowring and Associates (Pty) Ltd for whom the complainant worked until the end of 1979. During this period, complainant was a member of the CT Bowring Pension Scheme in Zimbabwe. On 1 November 1979, the complainant accepted a new appointment with CT Bowring and Associates (Transvaal) (Pty) Ltd, the second respondent, in South Africa. The complainant avers that the question of his pension was not raised at this time because as far as he was concerned, he was being transferred from one office to another within the same group.

Shortly after the complainant had commenced his new employment, in 1980 the second respondent began promoting long service awards to its employees. During the course of the discussions on the matter, the complainant was advised that because he had only been employed with the company for a year, he did not qualify for such an award. However when the complainant queried this with Allan Wilson, the managing director of the second respondent's Durban office at the time, and after discussions with the head office of second respondent had taken place, the second respondent agreed to take account of the complainant's 19 years of service in Zimbabwe for the purpose of determining long service awards. The complainant was thereby credited with 20 years of service with the second respondent and received a long service award every five years thereafter.

In 1980 the complainant asked the provincial director of the second respondent in Johannesburg, Mr Rodney Maitland, if his 19 years of service in Zimbabwe would be taken into account in the calculation of his pension. Mr Maitland advised the complainant to speak to Mr Ron Nightingale who worked in the pension department of the second respondent in Johannesburg about the matter. Mr Nightingale indicated to the complainant that service in Zimbabwe could be taken into account but that the company might insist on charging a levy as the pension scheme in Zimbabwe had been on a non-contributory basis. Mr Nightingale further assured the complainant that he would approach directors of second respondent in this regard. After a few months Mr Nightingale reverted to the complainant, advising him that the second respondent could not make a decision as to his pension at that time. However, subsequent correspondence, discussed more fully later, indicated that the complainant understood that he had no right to have his previous employment taken into account.
In January 1994, the complainant approached Mr A H Wilson, a director of the second respondent, concerning the issue of his pension. According to the complainant, Mr Wilson assured him that if he was still working for the second respondent on retirement, the service which he had rendered in Zimbabwe would be taken into account in

determining his pension. He also indicated to the complainant that the question was a technical one and would only be decided on actual retirement.

However, complainant was dissatisfied with the uncertainty surrounding his pension and therefore on the 5 January 1995, he wrote a letter to Mr R A Latima, the pensions officer of the second respondent concerning the question of his pensionable service prior to employment with the second respondent. Mr Latima replied to the complainant in a letter dated 3 February 1995 stating that nothing could be done in the circumstances. That letter reads:

> "Further to your letter of 5th January 1995 regarding your pension, I confirm having investigated the background with Don Collie and regret to advise that nothing can be done relative to back pension.
> As a matter of interest, I do note that this message was conveyed to you as long ago as 1988."

Mr Latima's contention is confirmed by a letter written by the complainant addressed to second respondent dated 23 September 1988 in which he appears to concede that he had no right to have his Zimbabwean service included. Thus he concludes:

> I enquired of Rodney Maitland whether the service that I had rendered in Rhodesia would be recognised in South Africa... After a period of time I was advised that regretfully this would not be possible.

In May 1995, discussions regarding the complainant's possible retrenchment took place. However this never materialized and the complainant continued working for the second respondent for a further two years. In November 1997, however, the complainant was advised that he would be retrenched by the second respondent with effect from 31 December 1997. The complainant then requested that he be granted the leave which he had not taken which would extend his service with the second respondent by five months. The second respondent agreed to this and granted the complainant leave from 1 January 1998 to 31 May 1998. The complainant's retrenchment date thereby became effective on 1 June 1998.

In terms of Rule A9.3.0 of the first respondent, where a member is retrenched within five years of normal retirement date, the rules providing for pension benefits for persons taking early retirement become applicable to that member. Rule A9.3.0 provides as follows:

> A member who is retrenched shall be entitled to .....(c) the pension described in Rule A3.3.2 if the member is within five years of normal retirement date.

Rule A3.3.2 reads as follows:

> If a member is required by the principal employer to retire not more than five years prior to his normal retirement date, either through retrenchment or for any other reason not reflecting on the member's conduct, the member shall be paid the pension specified in the schedule, reduced by 0,25% for each complete month by which the date of actual retirement proceeds his normal retirement date. The principal employer may, in his discretion and after consulting the actuary grant the member the pension specified in the schedule with pensionable service increased to include the number of months between the actual date of retirement and normal retirement date.

Since the complainant was retrenched within five years of his normal retirement date, he received the pension benefit calculated in terms of Rule A 3.3.2. However the benefit which he received failed to take account of his period of service whilst employed in Zimbabwe. The complainant alleges that he is entitled to have this service taken into account for the purposes of calculating his pensionable service. He also seeks relief in relation to the early retirement reduction factor.

The Complaint

The complaint consists of two separate claims.

The complainant firstly contends that the move from CT Bowring and Associates (Pty)

Ltd in Zimbabwe to CT Bowring and Associates (Transvaal) (Pty) Limited in South Africa constituted a “transfer” and not a new appointment with a new company. The Complainant therefore seeks an order that his years of service in Zimbabwe be included as part of his pensionable service by the first respondent.

The second respondent however contends that when the Complainant commenced employment with it on 1 November 1979, he entered into a new contract of employment with a new employer, subject to new terms and conditions of employment. On that basis, the second respondent contends that the years of service in Zimbabwe could not be taken into account in determining the Complainant’s pensionable service, in terms of the first respondent’s rules.

The second complaint relates to the exercise of discretion granted to the second respondent in terms of the first respondent’s rules to waive the early retirement factor. In terms of Rule A 3.3.2, a penalty of 0,25% for every month short of normal retirement applies to members taking early retirement. However the rule also gives the second respondent a discretion to waive that penalty.

The complainant retired 60 months before the normal retirement date. The second respondent exercised its discretion in terms of Rule A3.3.2 and waived the said penalty in respect of 36 months. However the complainant claims that the second respondent exercised its discretion improperly and seeks an order waiving the penalty in respect of the full 60 months.

Analysis of the first complaint

Before the complainant can claim additional pensionable service, he is obliged to show that he is entitled to it by virtue of rights acquired in terms of the rules of the first respondent or in contract. The complainant does not allege that the respondent expressly agreed to take his previous service into account. Rather he relies on certain

conduct of the respondent which led him to believe that this would be the case.

It is common cause that CT Bowring and Associates (Pty) Ltd in Zimbabwe and CT Bowring and Associates (Transvaal) (Pty) Limited in South Africa were not in fact the same company. The two companies were registered separately and conducted business separately from each other and were thus in law two separate entities. However, the complainant suggests that the second respondent misrepresented to him that the move to South Africa was a transfer and would be done on a basis in which his service in Zimbabwe would be taken into account in determining his pension benefit in the first respondent.

The respondents acknowledge in their response to the complaint that there was indeed an association with the Complainant's previous employer in Zimbabwe and that this explains the mutual cooperation between the respective companies at the time of the Complainant's move to South Africa. The Complainant asserts that this mutual cooperation was indicative of a transfer within the same company rather than the commencement of a new job with a different employer. The Complainant also refers to the fact that the second respondent recognized his 19 years employment with the company in Zimbabwe in that it awarded him a long service award on termination of his employment and accounted for it in his severance pay. The question is whether during the course of the complainant's re-deployment either respondent made any misrepresentation concerning his pensionable service.

A representation is a statement made by one party to the other for or at the time of the contract or some matter or circumstance relating to it. If such a statement is incorrect, it is a misrepresentation.

In the law of contract, if the decision of a contractant to conclude a contract is brought about by a false representation by the other party to the negotiations, the innocent party has an election to rescind the contract or to abide by it and claim damages. In effect,

the false representation can be made part of the contract between the parties and as such becomes a term of the contract. If it transpires that the representation was in fact false, the contract will have been breached and the remedies for breach of contract become available to the aggrieved party.

In my opinion, the correspondence which took place at the time of the Complainant's move to South Africa reveals that no misrepresentation on the part of the second respondent in fact occurred.

After commencing employment with the second respondent, in a letter dated 6 May 1980, the complainant wrote to the then managing director of the second respondent, Rodney Maitland, seemingly to query whether his pensionable service in Zimbabwe would be taken into account for determining his ultimate pension benefits. The letter reads:

> "Referring to an earlier conversation I confirm that I was employed by Muir Beddall in Salisbury on 1 February 1961. On the 1 January 1965 Muir Beddall was taken over by C.T. Bowring.
>
> Now that I am employed by the South African Company I would appreciate learning from which date my pensionable salary is to start in South Africa. In addition, in Rhodesia my retirement age was 65 years and therefore I would appreciate receiving your confirmation as to the age limit in South Africa.
>
> I would appreciate hearing from you in this regard in due course."

In a second letter dated 17 July 1980 to Rodney Maitland, the complainant confirms that he was informed by the first respondent that his pensionable service would commence on 1 November 1979 (the commencement date of his employment with second respondent) and therefore did not take his previous years of service in Zimbabwe into account. This letter reads:

> "Following our recent discussions I confirm that I discussed with Ron Nightingale the date of my pensionable salary will commence in South Africa. I was informed that it would be from 1

> November 1979.
>
> Bearing in mind that my pension with the Rhodesian Company was on a non-contributory basis it is obvious that I will stand to loose a large percent of my pension and therefore, I wonder if you would consider it possible to credit me with 50% of past service in Rhodesia and on this point I would appreciate hearing from you as soon as possible."

The second paragraph of this letter suggests that the complainant was fully aware that his service would not be credited to his pensionable service in the first respondent. Plainly, he is seeking a concession to have it included. Accordingly, there is no evidence of misrepresentation, nor did he raise the possibility of a misrepresentation at this stage.

Eight years later in the letter dated 23 September 1988 to the second respondent (mentioned above), the complainant acknowledges that he was told by the latter that his employment in Zimbabwe would not be taken into account in determining his pensionable salary.

I am satisfied therefore that there was no misrepresentation on the part of the first or second respondent that the 19 years of service with the company in Zimbabwe would be taken into account in determining the complainant's pensionable service. In fact, the available evidence suggests that the opposite was true in that the second respondent made it quite clear on enquiry by the complainant that pensionable service would be calculated from 1 November 1979, the date on which the Complainant commenced his employment with the second respondent. In addition to this, whilst he was in the employ of second respondent, the complainant received regular benefit statements from the first respondent indicating that his entry date was 1 November 1979, the date he started making his contributions to the first respondent. It is common cause that at no stage did the complainant query these statements. Nor does it appear from the evidence available that prior to his move to South Africa the complainant sought to negotiate favourable treatment of his earlier service or that he was justified in presuming that his transfer was

effected on the basis that his service would be recognised. His letter of appointment dated 23 August 1979, in particular, made it abundantly clear that a new employment relationship was established involving a new pension fund. A person of the complainant's standing can be expected to have acquainted himself with his terms and conditions of employment and the pension fund rules.

In any event, as shall become apparent presently, even had the complainant proved a misrepresentation by either of the respondents, it is unlikely that such alone would have entitled him to benefit under the rules.

In passing it can be mentioned that the complainant will receive or is receiving a deferred pension from the Zimbabwean fund in terms of the rules of that fund calculated with reference to his period of service in Zimbabwe.

I turn to the complainant's contention that he had a right to be properly considered for additional service in terms of the rules of the first respondent.

The relevant part of the definition of pensionable service reads as follows:

> "Pensionable service includes.....any period of previous employment recognized by the principal employer as pensionable service and approved by the trustees in consultation with the actuary."

Accordingly, the employer has a discretion to recognize previous employment. The complainant contends that the second respondent failed to exercise its discretion properly in terms of the rules of the first respondent. However the rules restrict the discretion to the recognition of *previous employment* by an employer which participates in the fund. Employment should be understood in the context of the rules as a whole. "Employer" is defined to included only employers participating in the fund. As the Zimbabwean employer did not participate in the fund, neither the first nor second respondent had any discretion to recognise complainant's service in Zimbabwe as

pensionable service. Consequently, the discretion is limited to recognizing previous employment by participating employers in cases of broken service. Hence, it is not necessary to consider whether the discretion was exercised properly.

Accordingly the complainant's first complaint relating to pensionable service is dismissed.

Analysis of the second complainant

I turn now to deal with the second complaint which concerns the application of rule A 3.3.2 of the first respondent's rules. This rule grants the employer a discretion to reduce the application of the early retirement factor. The factor was waived in respect of 36 months in favour of the complainant

It is common cause that at the time of discussions regarding the complainant's retrenchment, the complainant requested the first respondent to grant him 102 days leave which was due to him, but which he had not taken. In this way, the complainant's retirement date was moved forward by 5 months and he thereby fell within the ambit of the above rule applying to only those members who retire not more than five years prior to the normal retirement date. The second respondent agreed to accommodate the complainant in this way allowing him to take leave from 1 January 1998 to 31 May 1998, his date of retirement thereby becoming effective on 1 June 1998. This reflects favourably on the second respondent by demonstrating a desire to accommodate the complainant and compensate him for the loss he would suffer on account of his retrenchment.

Be that as it may, the good faith shown by the second respondent did not relieve it of the duty to exercise the discretion conferred on it in a fair and reasonable manner. Once the complainant fell within the ambit of the Rule A3.3.2, the second respondent owed a duty to the complainant to consider all relevant factors and to exercise its

discretion properly. The exact nature and ambit of that discretion must be determined from the rule itself. Rule 3.3.2 reads as follows:

> "If a member is required by the principal employer to retire not more than five years prior to his normal retirement date, either through retrenchment or for any other reason not reflecting on the member's conduct, the member shall be paid the pension specified in the schedule, reduced by 0,25% for each complete month by which the date of actual retirement precedes his normal retirement date. The principal employer may, in his discretion and after consulting the actuary grant the member the pension specified in the schedule with pensionable service increased to include the number of months between the actual date of retirement and normal retirement date."

In terms of the above rule, the second respondent granted to the complainant pensionable service increased by 36 months. The total number of months between the complainant's actual date of retirement and normal retirement date was 60 months. The question is therefore whether the second respondent's failure to grant the complainant an increase in pensionable service of the full 60 months for the purposes of calculating his pension benefit (as it was permitted to do in terms of the rule), and thereby waiving the penalty entirely, constituted an improper exercise of its discretion. For the reasons that follow, I am of the opinion that it did not.

Firstly, the increase of 36 months is the most that the second respondent has ever awarded an employee taking early retirement. The increase of 36 months cost the second respondent an amount of R82 000,00 which it was not obliged to incur in terms of the rules. Secondly, the second respondent agreed to give the complainant a salary increase with effect from January 1998, only five months before the complainant was due to retire. The complainant's retrenchment package was calculated on the basis that the complainant received two weeks pay per year of service with the second respondent . Therefore the increase in salary in the final year of employment implied that the complainant's retrenchment package was calculated on a higher remuneration scale. Thirdly, the same salary increase in the final year of employment also increased the complainant's average salary. This in turn increased the complainant's pension benefit which was calculated on the basis of the complainant's average salary in his final year

of employment.

In my opinion, the second respondent acted fairly and reasonably towards the complainant and I cannot say that the failure to grant a waiver of the penalty in respect of the full 60 months was an improper exercise of discretion. The decision to grant an increase of 36 months out of the shortfall of 60 months to the complainant's pensionable service must be viewed in light of the other concessions granted to the complainant by the second respondent. In the absence of any agreement to such effect, I cannot conceive of any good reason why the complainant should have been awarded a greater increase than any employee has ever been awarded in the past. I therefore consider the second respondent's discretion in terms of Rule 3.3.2 to have been exercised properly. Accordingly, the complainant's second complaint is also dismissed.

DATED AT CAPE TOWN THIS 30th DAY OF MARCH 1999.

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JOHN MURPHY

PENSION FUND ADJUDICATOR