IN THE TRIBUNAL OF THE PENSION FUNDS ADJUDICATOR

CASE NO.:PFA/GA/295/98

In the complaint between:

Mark September                  Complainant

and

Edelweis Provident Fund           First respondent

Edelweiss Glass and Aluminium CC   Second respondent

Liberty Life Limited              Third respondent

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

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1. This is a complaint lodged with the Pension Funds Adjudicator in terms of section 30A of the Pension Funds Act relating to the withholding of the complainant’s withdrawal benefit. No hearings were conducted, and therefore in determining this matter, I have relied on the documentary evidence and the investigation conducted, under my supervision, by my investigator, Lisa Shrosbree.

2. The complainant commenced employment with the second respondent (“the employer”) in October 1994 as an estimator and simultaneously became a member of the Edelweiss Provident Fund, the first respondent in this matter. The third respondent is the administrator of the fund.

3. On 12 December 1997, the complainant resigned from the company and a withdrawal benefit accordingly became payable by the fund in terms of its rules.
4. On receipt of the withdrawal notification from the representative of the fund, Liberty Life set about obtaining a tax directive from the Receiver of Revenue (CIR). The directive was received on 7 May 1998 and on 3 June 1998 Liberty Life issued a cheque for R31 157.19 (after tax) in favour of the complainant. The cheque was sent to the employer pursuant to standard procedure. However the employer returned the cheque to Liberty Life with an instruction to withhold payment pending resolution of a dispute between the complainant and the employer. This forms the basis of the complaint.

5. After unsuccessful attempts to obtain payment of his withdrawal benefit, the complainant lodged a written complaint dated 27 November 1998 with the Pension Funds Adjudicator.

6. At that time, I had limited resources and there was roughly a 2-year backlog in the complaints process of my office. It would appear that the complainant, frustrated with the consequent delays, decided to approach the Financial Services Board (FSB) for assistance.

7. The complainant addressed a letter dated 15 January 1999 to the FSB complaining that the employer had failed to pay him his withdrawal benefit. The FSB responded by writing to the employer and requesting an explanation. The employer’s attorney responded to the FSB in a letter dated 16 February 1999 as follows:

   According to paragraph 5 of the Rules of the Edelweiss Provident Fund, any debt owing to the employer while a member may be deducted from any benefits due the member. Please note that because of the negligence of Mr September damages in the amount of R34 469.80 has been accrued by our client holding him responsible for the above damages.
It will therefore be noted that the amount of R31 157.19 will be held back in regards to the above damages and that further amount of R3 312.62 will be claimed from Mr September. [sic]

8. The FSB wrote to the employer’s attorneys again in a letter dated 16 February 1999 enquiring whether a court judgment had been obtained against the complainant as required by section 37 D of the Pension Funds Act. In a letter dated 20 February 1999, the employer’s attorney confirmed that no such judgment had been obtained.

9. In the meantime, my investigator wrote to the complainant in a letter dated 18 March 1999 requesting further information. The complainant only responded with the requested information on 10 April 2000, some 12 months later. It is not clear from the papers what transpired in the period between March 1999 and April 2000.

10. Nevertheless on 29 May 2000 my investigator wrote to the respondents requesting a written response to the complaint. Liberty Life responded in a letter dated 7 July 2000 stating that when the cheque was returned to it by the employer with the instruction to withhold payment, it advised the employer that this was unlawful in terms of the Act unless the requirements of section 37D had been met. Liberty therefore withheld payment pending further instructions. However no further instructions were forthcoming.

11. However no response to the letter of 29 May 2000 was received from the employer. On 28 July 2000, a member of my administrative staff, Ms Zerina Davis, telephoned the employer to make enquiries in this regard. Ms Davis was informed that Mrs van der Walt would be able to assist but that she was not available at that time. Ms Davis accordingly left a message for Mrs van der Walt to return her call.
12. On 2 August 2000, not having heard from Mrs van der Walt, Ms Davis called for a second time. Mrs van der Walt advised that she had never received the letter of 29 May 2000 which explained the failure to respond. Another copy of that letter was accordingly faxed through to Mrs van der Walt on the same day.

13. On 30 October 2000, when no response had been received, Ms Davis telephoned Mrs van der Walt for the third time. Mrs van der Walt made it clear over the telephone that she did not intend to cooperate. A further letter dated 30 October 2000 was accordingly sent to the employer for the attention of Mrs van der Walt which letter reads:

We refer to your letter dated 29 May 2000, which was also faxed to you on 2 August 2000, a copy of which is attached hereto.

Please let us have your response by close of business on Wednesday 1 November 2000, failing which we shall hand down a default determination in terms of section 30M of the Pension Funds Act of 1956. Kindly note that such a determination has the same status as a court order entitling the successful party to obtain a writ of execution.

14. In spite of the conscientious efforts to extract a response from the employer, nothing has been received to date.

15. Pursuant to my letter of 30 October 2000 quoted above, I accordingly make the following order by default:

15.1 The deduction from the complainant’s withdrawal benefit by the second respondent is hereby declared to be unlawful.

15.2 The third respondent is directed to pay directly to the complainant within 6 weeks of the date of this determination the sum of
R31,157.19 together with interest at the rate prescribed by section 2 of the Prescribed Rate of Interest Act from 28 May 1998 to date of payment.

DATED at CAPE TOWN this 26th day of JANUARY 2001.

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JOHN MURPHY
PENSION FUNDS ADJUDICATOR