

COURT CASES

Clear-cut decision on union trustees

They are independent of the union that elected them and are accountable only to the fund they serve, irrespective of what the union wants.



Unsung heroes are sometimes found in the unlikeliest places. Hardly can there be an unlikelier place than the retirement-fund industry. So sing praises for the union-elected trustees of a large union fund who stood up against union pressures, to do what they believed was right for their fund independently of the union, and won.

Are these the sort of trustees that implementation of National Treasury's proposals for fund reform might effectively eliminate? And is it desirable, in pursuit of industry consolidation under "expert" trustees, that they are eliminated? No, for surely this case shows trusteeship at its best.

Those who scornfully dismiss, as if it

were a universal truth, the competence of shop stewards to be trustees can eat their words. Were it only that more experienced trustees were as bloody-minded – unconstrained by employers, most notably – as members of the Chemical, Energy, Paper, Printing, Wood & Allied Workers' Union (Ceppawu) who serve on the board of the Paper, Printing, Wood & Allied Workers' Union (Ppwawu) national provident fund.

These trustees, as well as the fund's principal officer, had all been disciplined by their union for not taking its orders. One had even lost his job because, expelled from the union, he could no longer be employed as a shop steward. But in the Witwatersrand High Court, Acting Justice Freund ruled the expulsion was unlawful.

In a judgment that has powerful application to retirement funds generally, he also declared unlawful a Ceppawu resolution that shop-steward trustees "be accountable to" and "take mandates from" union members who'd elected them. The court rejected the union's argument that the resolution did not interfere with the trustees' fiduciary duties.

The conflict between the fund and the union began to boil in 2002 when the trustees decided to appoint different fund administrators. The union, opposed to this decision, passed the resolution that the court has now thrown out as being against statute, common law and public policy. But the conflict really came to a head last year when the trustees unanimously resolved to amend certain fund rules, so diluting the union's control over the appointment of fund-member trustees.

Finding in favour of the fund, the judge held: "The trustee's obligation to exercise an independent judgment, regardless of the views of the trade union (or employer) which appointed him, is analogous to the director's obligation to exercise an independent judgment, regardless of the views of any party which may have procured his or her services as a director."

In Freund's view, trustees "cannot lawfully acquiesce in an attempt by a trade union or other interested party to fetter their discretion by the imposition of a 'mandate'". He referred approvingly to an English decision concerning union-appointed trustees. They wouldn't endorse an investment plan for their fund unless it prohibited certain forms of investment considered against union interests.

These included investments abroad and in energy industries competing with coal. The union-appointed trustees wanted the investment plan to conform with union policy. By following the union's policy, the court held, the union-appointed trustees had acted in breach of their fiduciary duties to do the best they could for the fund's beneficiaries.

It all seems pretty straightforward. But the impact of these principles on fund investments for broader long-term benefits to society, at the expense of narrower short-term benefits to fund members, could make for heated contention. ■

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QUOTE FROM THE JUDGMENT

There is nothing unlawful or improper in the union expressing its views on issues to be decided by the fund's trustees or even in seeking to persuade the fund's trustees to accept its views. However, in my view it is unlawful for the union to seek to compel member trustees to "take mandates" which they are required to implement . . . (and) to threaten disciplinary steps against member trustees for refusing to accept that they are "accountable to" the union and its members, rather than to the fund and its members.

Whilst it is true that a union is entitled to require its employees to carry out its lawful instructions and is entitled to require its members to comply with its lawful resolutions, it is not entitled to do so where the instruction or resolution is contrary to public policy or otherwise unlawful.

-- Acting Justice Alec Freund