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## **DECISION NO. 2010-PBA-001(c)**

In the matter of an appeal under section 21 of the *Pension Benefits Standards Act*, R.S.B.C. 1996, c. 352 to the Financial Services Tribunal pursuant to section 242.2 of the *Financial Institutions Act*, R.S.B.C. 1996, c. 141

<b>BETWEEN:</b>	Brewers' Distributor Ltd.	<b>APPELLANT</b>
<b>AND:</b>	Superintendent of Pensions	<b>RESPONDENT</b>
<b>AND:</b>	Brewery, Winery, and Distillery Workers, Local 300	<b>RESPONDENT</b>
<b>BEFORE:</b>	Patrick F. Lewis, Member	
<b>DATE:</b>	Conducted by way of written submissions concluding on January 28, 2011	
<b>APPEARING:</b>	For the Appellant: Keith J. Murray, Counsel For the Respondent, Superintendent of Brokers: Sandra A. Wilkinson, Counsel For the Respondent, Brewery, Winery, and Distillery Workers, Local 300: Anthony Glavin, Counsel	

### **DECISION ON COSTS OF APPEAL**

[1] I will use the same descriptors of the parties below as I did in my Appeal Decision.

[2] The Respondents accepted the invitation at the end of the Appeal Decision to make a written submission for an award of costs. The Appellant provided a written submission in response and the Union (but not Staff) made a submission in reply.

#### *Legislative Setting*

[3] The Financial Services Tribunal ("FST") is continued under section 242.1 (as amended) of the *Financial Institutions Act*, R.S.B.C. 1996, c. 141. That section provides that a number of provisions of the *Administrative Tribunals Act*, R.S.B.C. 1996, c. 45 apply to the FST. One of those is section 47(1)(a) which permits an order that a party "... pay part of the costs of another party ..." in connection with an application, which by definition includes an appeal.

[4] By that same mechanism sections 12 and 13 of the *Administrative Tribunals Act* are applicable to the FST. Section 12(1) stipulates practice directives that the

tribunal must issue and section 13(1) practice directives that the tribunal may issue. The FST has published *Directives and Practice Guidelines* ("the *Guidelines*") which expressly state that they are issued pursuant to section 12 of the *Administrative Tribunals Act*. On consideration of the nature of the *Guidelines* and the language of sections 12 and 13 one might have thought they flowed more logically from section 13, but that is not important here. What is potentially important is to note that section 12(2), and for that matter section 13(2), state that the tribunal is not bound by its practice directives in the exercise of its powers or the performance of its duties.

[5] The *Guidelines* feature certain provisions on costs, including the following paragraph 3.22:

The criteria for awarding costs to the parties or interveners

In determining whether a party (or intervener) is liable to pay the costs of another party (or intervener), the FST will consider:

- whether the party (or intervener) engaged in conduct that is improper vexatious, frivolous or abusive;
- whether the party (or intervener) submitted a position that was manifestly unfounded;
- whether the party (or intervener) unreasonably delayed or prolonged the proceeding, including any failure to comply with an FST undertaking or order;
- whether the party (or intervener's) participation assisted the Tribunal in understanding the issues;
- whether the party (or intervener) unreasonably failed to cooperate with other parties during the appeal;
- whether the party (or intervener) failed to attend a hearing or other proceeding, or to send a representative, despite notice having been provided to the party (or intervener);
- the party's (or intervener's) degree of success in the proceeding; and
- any other matter the Tribunal considers relevant.

[6] Paragraph 3.24 of the *Guidelines* goes on to say, essentially, that if this tribunal sees fit to award costs it shall calculate them using "the B.C. Supreme Court Rules as a general guideline".

*Discussion*

[7] Staff is seeking costs of \$2,000 to \$3,000 (including \$622 in photocopying disbursements, at \$.25 per page). The Union requests an order in the amount of \$2,970 plus applicable taxes (and nothing for disbursements, which it indicates were minimal).

[8] The Appellant's position is that no costs should be awarded or alternatively that they should be nominal. In support of that position the Appellant makes a number of submissions relating to the merit of the appeal and the inapplicability of most of the factors set out in paragraph 3.22 of the *Guidelines*.

[9] The Appellant also submits that the Union is not entitled to costs as it was not required to be a party to the appeal, citing paragraph 3.14 of the *Guidelines*. I agree that it was not necessary for the Union to be a party to this appeal. That said, it was the Appellant in its Notice of Appeal that initially named the Union as a Respondent. In any case, the Appellant did not object to the Union's participating in or being treated as a party in this appeal (even after I had raised the issue of the Union's correct status in a letter to counsel of October 1, 2010), and indeed in its submissions replied substantively to those of the Union, just as it did to those of Staff. With the acquiescence of all parties the Union has been a full participant in this appeal proceeding, and I see no reason to deny its request for costs on the ground that it need not have been a party. By participating in the appeal, the Union also ran the risk of a costs award against it if the appeal had succeeded.

[10] On considering the parties' submissions, I have arrived at the following conclusions in relation to the factors set out in paragraph 3.22 of the *Guidelines*:

- (a) there has been no conduct exhibited or position taken by the Appellant that warrants an especially high award of costs against it;
- (b) there has been no conduct exhibited or position taken by either of the Respondents disentiing them to costs or suggesting the amount of any costs awarded them should be reduced;
- (c) the Respondents were entirely successful on the appeal;
- (d) the work required of the parties on this appeal was considerable;
- (e) the issues on the appeal were important;
- (f) the matter was at least moderately complex; and
- (g) as I stated in paragraph 166 of the Appeal Decision, there were some unique circumstances present in this case.

[11] Staff has helpfully tabulated summaries of past decisions of the FST dealing with costs. In many of those cases no costs were ordered, sometimes because of divided success, and where costs have been ordered the amounts have tended to be nominal except where a party's misconduct or manifestly unfounded position, factors I do not consider to be present here, have indicated a higher award.

[12] As Staff essentially submits, Appendix "B" to the Supreme Court Rules, setting out the tariff for a party/party costs, is ill-fitted to an appeal. That said, there are certain tariff items in Appendix "B" that can be applied, if somewhat loosely, to this matter. That is the exercise the Respondents have performed to arrive at the aggregate cost amounts they have each proposed. The Appellant did not comment on those calculations *per se*, but rather simply submitted that costs should not be awarded or should be nominal.

[13] Paragraph 3.24 of the *Guidelines* uses imperative language in providing that, where the FST has decided to award costs, it "will calculate" those costs using the B.C. Supreme Court Rules, albeit as a "general guideline". That said, as I have indicated above in reference to section 12(2) of the *Administrative Tribunals Act*, the FST is not bound to follow that (or any) practice guideline. Based on the case law referred to by Staff in its submission, it appears that it generally has not done

so. While one would normally expect the *Guidelines* to be applied where applicable, despite their non-binding status, it can equally be said that the assessment of costs, including as to quantum, is traditionally very much a matter for the decision-maker's discretion, and not one to be rigidly carried out.

*Award*

[14] I am satisfied in the present case that each of the Respondents is entitled to an award of costs. Considerable effort has been expended in a significant matter and those parties have been successful. While I sympathize to some extent with the Appellant's position given that the subject matter of the appeal has been somewhat unique and challenging, and I do not criticize the Appellant for its conduct or the positions it adopted, the fact is that the costs sought by the Respondents, even if high compared with most past FST awards, are still modest when considered against the effort occasioned by and the importance of this appeal.

[15] I therefore award costs as follows to be paid by the Appellant:

To Staff:                   \$2,500, plus \$622 in disbursements, and applicable taxes.

To the Union:             \$2,500, and applicable taxes.

"Patrick Lewis"

Patrick F. Lewis, Member  
Financial Services Tribunal  
February 21, 2011