

File No. 2010-PBA-001

FINANCIAL SERVICES TRIBUNAL

In the Matter of the *Pension Benefits Standards Act*

Appeal Pursuant to Section 21 of the
Pension Benefits Standards Act

Between:

Brewers' Distributor Ltd.

Appellant

And:

Brewery, Winery and Distillery Workers, Local 300 and
Superintendent of Pensions

Respondents

Before: Patrick F. Lewis, Member, Financial Services Tribunal

Keith J. Murray
Harris & Company LLP

Counsel for the Appellant

Anthony Glavin
Fiorillo Glavin Gordon

Counsel for the Respondent,
Brewery, Winery and Distillery Workers, Local 300

Sandra A. Wilkinson
Ministry of Attorney General
Legal Services Branch

Counsel for the Respondent, Superintendent of Pensions

Interim Decision Date: September 30, 2010

INTERIM DECISION

Introduction

In this proceeding Brewers' Distributor Ltd. appeals an April 27, 2010 decision of the Superintendent of Pensions ("Superintendent"), which confirmed a direction of December 9,

2009 to the Appellant to offer all affected employees membership in its pension plan by May 14, 2010.

While written submissions have been provided within this proceeding by each of the parties, the Appellant additionally requests the opportunity for oral submissions, to which each of the Respondents objects. This is the decision on that application.

The appeal is brought pursuant to section 21(1) of the *Pension Benefits Standards Act* ("PBSA"), which allows an administrator to appeal to this tribunal a decision of the Superintendent made under section 20(4) of the PBSA. It is implicitly accepted in the parties' written appeal submissions that the Appellant, as administrator of its pension plan, thereby has the right to appeal to this body from the decision made by the Superintendent on April 27, 2010.

An appeal to this tribunal engages certain provisions of the *Financial Institutions Act*, RSBC, 1996, c. 141 ("FSA"). One of those is section 242.2 of the FSA, which provides in part as follows:

"(5) Subject to subsection (8), an appeal is an appeal on the record and must be based on written submissions.

...

(8) On application by a party, the member considering the appeal may do the following:

(a) permit oral submissions;"

...

Positions of the Parties

The Appellant applied for the right to make oral submissions by letter of July 14, 2010 to the office of the Financial Services Tribunal, offering essentially the following reasons for why that request should be granted:

- (i) the history and documentation within the Appeal Record is lengthy and complex, and this tribunal would be assisted by oral submissions in understanding and adjudicating the appeal;
- (ii) the Appellant did not receive a fair hearing before the Superintendent due to the process of limited written submissions provided for in the PBSA, with the result that the Superintendent misapprehended facts and arrived at erroneous factual and legal conclusions; and
- (iii) fairness, accordingly, requires oral submissions.

The Respondent, Brewery, Winery and Distillery Workers' Union, Local 300 ("the Union"), submits that an oral hearing is not necessary and would add delay and expense to the process without benefit to the tribunal. It asserts that the Appellant did not request an oral hearing before the Superintendent, so cannot now rely on one not having occurred. Relying on *Trustees of the Interior Lumbermens' Pension Plan and The Superintendent of Pensions* (FST, 07-037), it points out that there would have been no requirement on the Superintendent to hold an oral hearing, even if one had been requested. As to the needs of this current appeal process, it says that the Appellant has provided extensive documents and lengthy submissions, and could have sought permission to make an even longer written submission, had it wished to do so. The Union submits that this tribunal is able to make a fully informed decision based on the record and the parties' thorough submissions made on the appeal.

The Respondent, Superintendent of Pensions ("Staff"), also resists the request for an oral hearing, arguing that the appeal does not involve issues of exceptional complexity nor a voluminous record such that oral representations are required. It also cites the prospect of increased expense should an oral hearing occur. In support of its position it relies on *Interior Lumbermens'*, *supra*, and this tribunal's decision in *Westergaard and GET Acceptance Corporation v. Registrar of Mortgage Brokers* (FST, 05-017).

In its general Reply submission on the appeal, the Appellant lists five areas of inquiry it says are engaged by the appeal and reiterates its position that, in various respects, the matter is a complex one calling for oral submissions to avoid repetition of alleged errors by the Superintendent. It submits that any delay occasioned by an oral hearing would cause no prejudice and that the prospect of additional expense is not significant given the amount of money at stake in the appeal.

Analysis

The record in this appeal is reasonably bulky, filling one large binder, and does reflect a significant factual history, primarily of the subject collective agreement and pension plan, which history is taken up in the Appellant's submission. The Appellant's written submission spans twenty five pages (being the maximum length recommended in the Practice Guidelines of the Financial Services Tribunal, unless approval is given for a longer submission), and expressly asks the reader to review its earlier submissions before the Superintendent, which are contained within the record. Staff has filed a written submission on the appeal also twenty five pages in length, while that of the Union spans nineteen pages. The Appellant's Reply submission adds another thirteen pages of argument.

I have noted in reviewing the different submissions that at various points they assume knowledge of facts or earlier arguments that they do not reproduce. In that sense they are not entirely stand-alone submissions, and require for full comprehension resort to the submissions made before the Superintendent. Primarily because of this, I am not able to say that oral submissions, which presumably would synthesize and focus the arguments, would be of no value. But that is not the same as saying that oral submissions are necessary for a fair appeal, and begs the question as to the test that must be met by a party seeking an oral appeal hearing before this tribunal.

The juxtaposition of subsections 242.2(5) and (8) of the FSA, reproduced above, suggests that, while clearly the tribunal may permit oral submissions, in general appeals to it will be based on written submissions alone. It is apparent from those provisions that there is a general legislative preference for appeals to this tribunal to be written. For an exception to occur, a party must make an application to make an oral submission and permission to do so must then be granted.

In *Westergaard, supra* (at page 5), this tribunal reasoned as follows:

“The criteria that should be examined by the FST member when determining whether or not an oral hearing is appropriate should include the following:

- a) Is the matter exceptional in terms of its complexity such that a documentary Record will not adequately provide the factual basis for the original decision that is the subject matter of the appeal?
- b) Are there exceptional circumstances surrounding the appeal such as a very lengthy hearing before the initial deciding authority or an unusual number or series of hearings or decisions by the original deciding authority, such that the Record will likely not be able to adequately inform the FST member as to the actual basis for the original decision? and
- c) Do the reasons given for the request for the oral hearing fit within the Guidelines and within the range of available remedies and orders in the Financial Institutions Act?”

In *Interior Lumbermens’, supra* (at page 3), the following was said by this tribunal on the matter of permitting oral submissions:

“Although discretion is provided to the FST to allow oral submissions, it is my view that the same should be restricted to those matters where the FST member considering the Appeal faces either a voluminous and complex record that may not, using reasonable effort, be interpreted and understood without the assistance of oral representations, or where the submissions and authorities are so complex that the FST member considering the appeal requires the assistance of oral submissions in order to properly give consideration to the same. Neither of those circumstances exist in this Appeal in my view.”

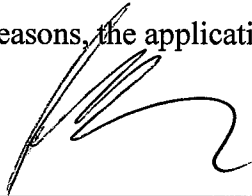
The reasoning in these decisions, though expressed somewhat differently in each case, is consistent with the evident legislative preference for appeals in these matters to be strictly written. The basic proposition that can be distilled from these cases is that oral submissions are not to be permitted unless regarded as necessary to a fair hearing of the appeal, being precisely the point on which the parties here are divided. I would venture to say that in the vast majority of cases this test will not be met and the written material will be considered sufficient for a fair adjudication of the appeal. It surely cannot be enough to invoke the exception to demonstrate that oral submissions may be of some assistance to the tribunal; in virtually every case it can be

said that oral submissions, particularly when delivered by experienced counsel, would assist to some degree. Clearly the applicant must demonstrate something more.

I have taken into account that the record in this case is moderately complex and that the matter appears to be of considerable importance, being factors lending support to the application. Against those considerations, I am not of the view that prospective cost or delay occasioned by an oral hearing militates against the application in any significant way. But the application breaks down, in my view, because of the careful and thorough written submissions which have been provided together with an organized and comprehensible record. Having reviewed those submissions with some care in order to answer this application, I am unable to conclude that the written process is inadequate to a fair resolution of the appeal. The positions of the parties and reasons therefor are discernible from the detailed submissions that have been made. I do not regard the arguments to be obscured by factual or legal complexity, demanding elucidation by oral argument. In my view, the material that has been put forward will permit a fair adjudication of the appeal, without the supplement of an oral hearing.

Conclusion

For these reasons, the application to permit oral submissions is dismissed.



Patrick F. Lewis
Member, Financial Services Tribunal