

FST-07-037

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF THE *PENSION BENEFITS STANDARDS ACT*

APPEAL PURSUANT TO SECTION 21 OF THE
PENSION BENEFITS STANDARDS ACT

BETWEEN:

THE BOARD OF TRUSTEES OF THE INTERIOR
LUMBERMEN'S PENSION PLAN (the "Trustees")

APPELLANT

AND:

THE SUPERINTENDENT OF PENSIONS
(the "Superintendent")

RESPONDENT

FINAL ORDER

Chair: Dale R. Doan LLB, Member, Financial Services Tribunal

Ron A. Skolrood, Lawson Lundell LLP, Counsel for the Trustees

Sandra Wilkinson, Ministry of the Attorney General, Counsel for the Superintendent of Pensions

Final Order Date: June 23, 2008

INTRODUCTION

The Trustees appealed to the Financial Services Tribunal ("FST") from a Reconsideration Decision of the Superintendent dated June 13, 2007 (the "Decision") respecting certain provisions of the Interior Lumbermen's Pension Plan (the "Plan"), which Plan is governed by the *Pension Benefits Standards Act* (the "PBSA"). This appeal (the "Appeal") considers four grounds for appeal proposed by the Trustees as follows:

1. The Superintendent breached the rules of procedural fairness and natural justice by denying the Trustees an opportunity to review and respond to submissions, information and evidence from the Superintendent's staff and Mr. Louwe which the Superintendent relied upon in reaching his final decision.
2. The Superintendent erred in law in holding that common law principles governing the interpretation of pension plans have no application to the Superintendent's exercise of his regulatory function.
3. The Superintendent erred in law by misinterpreting and/or misapplying the provisions of the governing Trust Agreement that give the Trustees full authority to interpret and administer the Pension Plan.
4. The Superintendent erred in law by interpreting the Pension Plan in a manner that is inconsistent with the original intention of the drafters, the reasonable expectations of the parties involved and the Trustees' historical administrative practices.

The Trustees ask the FST to reverse and/or set aside the Direction for Compliance dated December 27, 2006 which Direction for Compliance was confirmed by the Superintendent in the Decision.

The subject matter of this Appeal is section 1(4)(i) of the Plan which deals with the calculation of a Plan member's compensation. It reads:

“Compensation shall mean the gross amount of earnings paid to a participant while a participant in the plan which would be reported on the T-4 form or forms (or comparable forms should the description of these be changed) provided to the participant by the participating employers with respect to each calendar year less amounts reported on such forms as a taxable benefit paid to the participant while a participant in the plan”.

A review by the Superintendent's staff established that a significant discrepancy existed between one member's compensation as reported on his T-4 income tax form and that reported on his year-end pension statements from the Plan. The Superintendent concluded that the Plan was not being administered in accordance with the Plan document. Pursuant to section 71(2)(ii) of the PBSA, the Superintendent directed that the pension benefits payable by the Plan to that member be correctly calculated using the information from his T-4 forms.

The Decision, being the June 13, 2007 Reconsideration Decision of the Superintendent, makes reference to a Notice of Objection filed by the Trustees together with new documents filed with the Superintendent in support of their objection as well as submissions filed by the member in question, Mr. Hans Louwe, responding to the Notice of Objection. Relying heavily upon his staff report, the Superintendent rendered the Decision confirming his December 27, 2006 Order. The affect of the Decision is that the Trustees must administer the Plan by using the gross earnings shown on each member's T-4 income tax form, which earnings include regular salary as well a bonus compensation, rather than using basic salary as the basis of calculation only.

Preliminary Orders

An Interim Order was issued by the FST on December 14, 2007 with respect to the question of the admission of new evidence in this Appeal. The said Interim Order is available from the offices of the FST as well as the register of decisions of the FST on its website.

The Trustees have requested leave to make oral submissions pursuant to section 242.2(8) of the *Financial Institutions Act*. I have determined that oral submissions will not be allowed as the written submissions of both the Trustees and the Superintendent clearly and thoroughly canvas the facts and authorities that are material to this Appeal. 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.

Issues on Appeal

The four issues on Appeal have been outlined in the introduction. Each will be considered in the order presented.

First Issue on Appeal

The Superintendent breached the rules of procedural fairness and natural justice by denying the Trustees an opportunity to review and respond to submissions, information and evidence from the Superintendent's staff and Mr. Louwe which the Superintendent relied upon in reaching his final decision.

The Appellant submits that the Superintendent disregarded the interpretations placed upon the Plan by the Trustees and the long standing practice of the Trustees of calculating pension benefits based upon members' regular salaries only without consideration of bonuses. The Trustees are of the view that the interpretation of the Plan is within their authority, that their interpretation of "compensation" is reasonable and is in full accord within the provisions of the Plan. The Trustees object to the Superintendent substituting his own view for that of the Trustees on a matter that is within the authority of the Trustees. In doing so, the Trustees submit that the Superintendent has erred in law and has breached the rules of procedural fairness and natural justice in the process. This latter allegation arises as a result of an alleged denial of an opportunity on the part of the Trustees to review and respond to all submissions, information and evidence presented by the staff of the Superintendent and by Mr. Louwe which was relied upon by the Superintendent in reaching his Decision.

In determining this Appeal, it is not necessary to review in detail all of the background information regarding the Plan. However, the submissions of the Trustees emphasize the fact that their interpretation of the definition of "compensation" in the Plan, which interpretation considers basic salary only and not bonuses in the calculation of "compensation" and further

does not consider the gross amount of earnings shown by a member in his or her T-4 income tax form, is supported by evidence of the original intention of the drafters of the Plan as well as the uniform practice of member companies since the inception of the Plan. This long-standing practice of the Trustees was confirmed and ratified by way of Trustees' resolution passed effective December 15, 2006, shortly after Mr. Louwe's complaint to the Superintendent.

The Superintendent's original direction to the Trustees was provided on December 27, 2006. On January 3, 2007 the Trustees filed their Notice of Objection to the direction. On February 21, 2007, the Trustees filed a submission with the Superintendent setting out the basis for the Trustees' objection together with additional documents, evidence and authorities for consideration by the Superintendent. The Superintendent provided a copy of the Submission of the Trustees to Mr. Louwe who responded in writing to the Superintendent. The Superintendent's staff provided a detailed Submission to the Superintendent. The Decision is substantially identical in form and content to the staff Submission. The Trustees were not provided with copies of Mr. Louwe's written response or the staff Submission nor were they given an opportunity to comment on or respond to the contents of those materials. Upon reviewing the Record in this Appeal, the Trustees became aware of the Louwe submission and submissions of staff.

The absence of an opportunity on the part of the Trustees to respond to the written submissions of Mr. Louwe and the detailed Submissions of the staff give rise to the first ground for Appeal relating to an alleged lack of procedural fairness and a breach of the principles of natural justice.

The authority of the Superintendent to give directions with respect to the administration of the Plan is found in section 71(2) of the PBSA. That section reads as follows:

“71(2) If, in the opinion of the superintendent, a pension plan does not comply with this Act or the regulations or is not being administered in accordance with this Act, the regulations or the plan, the superintendent may

- (a) direct the administrator, the employer or any person to
 - (i) cease or refrain from committing the act or pursuing the course of conduct that constitutes the non-compliance, and
 - (ii) perform such acts as in the opinion of the superintendent are necessary to remedy the situation, or
- (b) institute any action that could be initiated by a member or any other person entitled to a benefit under the plan.”

The procedures to be followed by the Superintendent are set out in section 20(1) of the PBSA. This section provides that if the Superintendent issues a direction pursuant to section 71 of the PBSA, the Superintendent must promptly serve on the administrator of the Plan a written notification of the issuance of the direction and give reasons for the decision. Within 60 days, the administrator of the Plan may file a Notice of Objection setting out the reasons for the objection and all relevant facts (subsection 20(3) of the PBSA). The Superintendent must then promptly reconsider the direction, rescind, vary or confirm the same and serve on the administrator of the Plan a written notification of that decision (section 20(4)). This notification

must be accompanied by reasons unless the decision is to rescind the direction (section 21(5)). The final decision of the Superintendent may be appealed to the FST (section 21).

It is important to note that with the exception of a duty imposed by section 20(4) of the PBSA to promptly reconsider the direction and to rescind, vary or confirm the same with notification to the administrator of the Plan, no other requirements are imposed upon the Superintendent with respect to the process.

The Trustees provide compelling submissions and authority for their view that the principles of procedural fairness and natural justice apply to any public body or a statutory decision-maker that makes a decision, other than a legislative decision, that affects the rights, privileges or interests of the person. They submit that the content of the duty may vary depending upon the unique factors of the decision in issue, however, it requires the affected person to be told of the case to be met and to be given an opportunity to respond. Cited in support of these propositions are cases and scholarly works which include *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653 at 68, and *Nicolson v. Haldimand-Norfolk (Regional – Municipality) Commissioners of Police* [1979] 1 S.R.C. 311, as well as *C.E.P. Powell River Local 76 v. Power Engineers and Boiler Pressure Vessel Safety Appeal Board* (2001), 209 D.L.R. (4th) 208 (B.C.C.A.) at paras.14 – 15, and Macaulay & Sprague, *Practice and Procedure Before Administrative Tribunals*, 2nd ed. Looseleaf (Toronto: Carswell 1988), Vol. 1 at 9-20.4.

The authority of the Superintendent is created by statute. The scope of his authority and the procedures to be utilized in exercising his authority are set out in those sections of the PBSA that are referred to in this Appeal decision. As I pointed out, the Superintendent has the duty to act promptly and to notify the Trustees. The Superintendent is not required to hold a hearing or provide a full spectrum of disclosure or procedural entitlements to the interested parties. I believe the principles that should apply when determining whether procedural fairness has been provided by the Superintendent to the Trustees are accurately set out in *Hitchcock v. Canada (Attorney General)* 2006 FC at paragraph 22 where Baudry J. summarized the principles set out by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817, as follows:

“Procedural fairness is not absolute. As Madam Justice L’Heureux-Dube’ stated in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, the obligations imposed by the duty of procedural fairness depend on the circumstances in each case. The reviewing Court must consider a non-exhaustive list of factors to determine the applicable degree of procedural fairness. These factors are summarized by the Respondent as follows:

- i) the nature of the decision being made and the process followed in making it; that is, “the closeness of the administrative process to the judicial process”;
- ii) the nature of the statutory scheme;
- iii) the importance of the decision to the individual affected;
- iv) the legitimate expectations of the person challenging the decision; and
- v) the choice of procedure made by the agency itself.”

This Appeal deals with the situation where the Trustees were provided an opportunity file a Notice of Objection together with submissions and evidence in support of the same. A review of the legislative requirements imposed upon the Superintendent indicate that in this case, the Superintendent's functions are not necessarily more than that of assembling the evidence and then determining whether the administration of the Plan is in accordance with the PBSA followed by a notification procedure to the Trustees. The Trustees are thereafter afforded a further level of appeal to the FST.

Although the Trustees were not given an opportunity to respond to Mr. Louwe's evidence or to the staff submissions provided to the Superintendent, and although the Superintendent's Decision is in substance identical to the submissions of staff in this matter, it is clear that the Decision was an interpretation of the Plan provisions. Further, applying the principles provided by the Supreme Court of Canada in *Baker v. Canada (Minister of Citizenship and Immigration)*, it is clear to me that the administrative process set out in the PBSA does not approach that of a judicial process, the nature of the statutory scheme is one of interpretation and direction, and the legitimate expectations of persons challenging the decision would be met through the procedures afforded by the Superintendent in this case.

With respect to the reliance upon the staff Submissions, nothing in the relevant legislation or the submissions presented to the FST establishes that the Superintendent is not properly exercising his discretion following consideration of the evidence even in the situation where he adopts substantially all of the staff Submissions as the substance for his Decision.

Accordingly, I am of the view that the Superintendent did not breach the rules of procedural fairness and natural justice in the process used in reaching the Decision.

Grounds For Appeal No. 2

The Superintendent erred in law in holding that common law principles governing the interpretation of pension plans have no application to the Superintendent's exercise of his regulatory function.

The Trustees submit that the Superintendent chose to ignore common law principles when reaching the Decision. In the Decision, the Superintendent makes it clear that he preferred regulatory enforcement cases over civil dispute cases. Further, at page 6 of the Decision, the Superintendent states:

"The Supreme Court of Canada recently confirmed in *Buschau*, that in Canada trust agreements created in conjunction with a pension plan may not be subject to the common law rules generally applicable to trust agreements."

By this, the Trustees believe the Superintendent has ignored common law principles that may have relevance to the interpretation of the Plan.

I believe the Superintendent is bound by principles of statutory interpretation as well as common law principles when carrying out his statutory responsibilities. In the Decision, the

Superintendent in fact reviewed common law principles with respect to interpretation preferring, as I said earlier, regulatory enforcement cases and also reviewing the case law authority presented by the Trustees. Examples of his application of common law principles are his comments respecting the cases concerning estoppel at pages 4, 5 and 6 of the Decision, as well as his comments respecting the use of parole evidence at page 3 of the Decision. The Superintendent considered and in some cases distinguished the case law presented to him as well as the other evidence presented.

It is my view that the Superintendent did not fail to apply common law principles in the process leading to the Decision.

Grounds For Appeal No. 3

The Superintendent erred in law by misinterpreting and/or misapplying the provisions of the governing Trust Agreement that give the Trustees full authority to interpret and administer the Pension Plan.

This ground for appeal necessarily involves consideration of the standard of review to be used by the FST in this Appeal. The FST has ruled in prior decisions that the appropriate standard of review to be applied to decisions of statutory tribunals will vary depending upon the nature of the appeal. Where, for example, the appeal is based upon a consideration of the facts, a great deal of deference will be accorded to the original tribunal. Where, on the other hand, the appeal considers questions of law, less deference may be afforded. In the FST decision of *Grimm's Fine Foods Ltd. v. Superintendent of Pensions* (FST No. 06-021, January 22, 2007) the FST relied upon an earlier decision of the *Superintendent of Real Estate v. Real Estate Council of British Columbia and Kenneth Scott Spong* (FST No. 05-007, December 19, 2005), where the FST determined that the standard of reasonableness will apply as a standard of review to be applied to decisions of the Superintendent of Pensions. The Trustees submit that the FST in *Grimm's* did not consider the different statutory powers and procedures utilized by the Real Estate Council in *Spong* nor did it give sufficient weight to the authorities that endorsed the correctness standard in respect of issues of interpretation and construction when it accepted the reasonableness standard with respect to Superintendent of Pension decisions. Although I believe this submission to be valid, I am of the view that the Decision of the Superintendent stands whether applying the standard of reasonableness or the standard of correctness.

With respect to the standard of reasonableness, the Superintendent is in a position of greater expertise than the reviewing tribunal with respect to the interpretation of the PBSA and its application to pension plans presented to the Superintendent for review. The Superintendent is a creation of statute and his office serves the function of specialized review in this relatively complex administrative area. In this Appeal, findings of fact are minimal. Rather, the Decision is largely an interpretation of the definition of "compensation" in the Plan and the application of the PBSA to the manner in which the Trustees were administering the Plan. The determination of the Superintendent and the direction provided to the Trustees is reasonable in this analysis.

Further, the PBSA gives administrative and enforcement jurisdiction over pension plans to the Superintendent. The Superintendent has access to court ordered enforcement and parties

affected by the Superintendent's decisions are afforded an objection and reconsideration process. This is all in line with legislation which is by its nature public policy and designed to ensure that contractual schemes such as pension plans are administered in accordance with the statutory requirements in effect in the Province. A greater degree of deference must be afforded to decisions of specialized statutory bodies such as the Superintendent and to that extent, I believe the decision in *Grimm's* to apply the reasonableness test is correct. Given the nature of the legislative scheme in effect and exercise of the responsibility expected of the Superintendent by virtue of the PBSA, the interpretation of the definition of "compensation" and the administration of the Plan by the Trustees in relation to the calculation of member benefits based on that interpretation are matters that fit within the statutory expertise and authority of the Superintendent.

The Trustees refer to the recent decision of the Supreme Court of Canada in *Dunsmuir v. New Brunswick* [2008] SCC 9 where the Supreme Court of Canada held that there are now two standards of review to be applied by reviewing bodies, correctness and reasonableness. As the Trustees point out, the determination of the appropriate standard of review analysis remains largely the same and involves a contextual analysis of the various factors described. The standard of review analysis considers the function of the initial decision-maker and the nature and intended function of the appellate body as set out in the relevant statutory provisions. In support of this latter submission, the Trustees refer to Falzon, Frank A.B., *Appeals To Administrative Tribunals* (2005) 18 C.J.A.L.P. 1 at 19.

It is my view that *Dunsmuir* does not materially alter the required analysis by the FST as patent unreasonableness is not a test that would be applied to decisions of the Superintendent in any event.

Finally, the Trustees submit that the Superintendent should defer to the Trustees in terms of the interpretation of the Plan and the requirements of the Plan. The Trustees submit that the expertise of the Superintendent should be restricted to the interpretation of the provisions of the PBSA and that the expertise of the Trustees should be applied to the interpretation of the Plan and the application of their interpretation to the administration of the Plan. This view is contrary to the intent of the PBSA. As I have stated earlier, the PBSA is public policy legislation intended to ensure that pension plans are correctly administered for the benefit of members. Included in the Superintendent's powers under the PBSA are the discretionary powers to direct a plan administrator to cease or refrain from committing an act or pursuing a course of conduct that constitutes non-compliance with the PBSA and to direct the plan administrator to perform such acts as are necessary to remedy the situation. This, by necessity, involves a determination on the part of the Superintendent as to the proper administration of the Plan in the context of the overall policy inherent in the PBSA. This, in turn, involves interpretation of the Plan provisions, including the definition of "compensation" as in this Appeal.

I do not believe the Superintendent erred in law through any misinterpretation of the Plan.

Grounds for Appeal No. 4

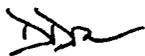
The Superintendent erred in law by interpreting the Pension Plan in a manner that is inconsistent with the original intention of the drafters, the reasonable expectations of the parties involved and the Trustees' historical administrative practices.

Given my findings above respecting the standard of review to be applied in this Appeal, this ground for appeal must fail. The Superintendent has the authority to interpret plan terms and definitions and to determine whether the same are being administered by the Trustees in accordance with the Plan and in a manner that is not contrary to the PBSA. The Superintendent has determined that the definition of compensation is clear and unambiguous. I find no reason to disagree with the findings of the Superintendent and therefore do not believe it appropriate to overturn his Decision even in light of the evidence of the original intention of the drafters or the submissions of the Trustees with respect to the reasonable expectations of the parties involved and the historical administrative practices of the Trustees.

Decision

The grounds for Appeal submitted by the Trustees fail. The Decision of the Superintendent is confirmed by the FST pursuant to its powers under section 242.2(11) of the *Financial Institutions Act*. Costs of this Appeal are awarded in favor of the Superintendent and shall be set at the Appeal fee paid by or on behalf of the Trustees to the FST at the institution of this Appeal procedure.

Respectfully submitted this 23rd day of June, 2008



Dale R. Doan LLB
Member Financial Services Tribunal

