

FST-06-021

FINANCIAL SERVICES TRIBUNAL

BETWEEN:

GRIMM'S FINE FOODS LTD.

APPELLANT

AND:

SUPERINTENDENT OF PENSIONS

RESPONDENT

APPEAL DECISION

BEFORE: DALE R. DOAN, Presiding Member

APPEARANCES: Ms. Sandy Liu, Director of Finance and
Administration, for the Appellant
Ms. Sandra Wilkinson, for the Respondent

**DATE OF LAST
SUBMISSION:** July 4, 2006

DATE OF DECISION: January 22, 2007

INTRODUCTION

This appeal (the “**Appeal**”) began with the filing of a Notice of Appeal dated March 24, 2006 with the Financial Services Tribunal (the “**FST**”) received by the FST on March 28, 2006. The subject matter of this Appeal is a reconsideration decision of the Acting Superintendent of Pensions dated February 27, 2006. That decision required the Appellant, Grimm’s Fine Foods Ltd., to amend the definition of “spouse” contained in the pension plan for its employees to comply with the *Pension Benefits Standards Act* (the “**PBSA**”) within 30 days of the date of that decision.

PRELIMINARY ORDERS

Two issues arose during the submission process requiring interim orders of the FST. The first related to the completeness of the Record in this Appeal. The second involved the representation of the Appellant, Grimm’s Fine Foods Ltd., by a non-lawyer, Mr. Greg R. Hurst of Health Benefits Consulting Inc. By way of Interim Order dated May 8, 2006, the FST ordered that the Superintendent of Pensions thorough its legal counsel confirm by way of letter that those materials and documents referred to in the Interim Order do not represent documents or materials presented to the Acting Superintendent of Pensions when this matter was heard by the said Acting Superintendent of Pensions. That letter of confirmation was provided by counsel representing the Superintendent of Pensions. Further, the FST ordered that neither Greg R. Hurst nor Health Benefits Consulting Inc. be permitted to provide services, advice or representation to the Appellant in a manner that contravenes section 15 of the *Legal Professions Act* and Rule 2-10 of the British Columbia Law Society Rules. A copy of the said Interim Order is available at the FST website or at the FST office.

ACTING SUPERINTENDENT OF PENSIONS’ ORDERS

By way of Order dated February 27, 2006, the Acting Superintendent of Pensions required the Appellant to amend the definition of “spouse” contained in the pension plan for the employees of the Appellant company in a manner so as to comply with the PBSA within 30 days. The Appellant takes issue with this Order and thus this matter has been brought forward by way of this Appeal to the FST.

ISSUES ON APPEAL

The issue on this Appeal primarily involves statutory interpretation. The central question is whether the definition of “spouse” set out in the retirement plan maintained by the Appellant, Grimm’s Fine Foods Ltd. (the “**Plan**”), satisfies the requirements of the definition of “spouse” as set out in section 1 of the PBSA.

BACKGROUND AND CHRONOLOGY

A synopsis prepared by the Executive Director Pensions of the Financial Institutions Commission within the Ministry of Skills Development and Labour conveniently sets out the

background and chronology for this Appeal. As the matters set out in that synopsis are not in issue, I will refer to certain portions of the synopsis here.

The Appellant maintains the Plan for its employees. The Plan is registered with the Respondent, Superintendent of Pensions, as required by the PBSA and the Pensions Benefits Standards Regulation. The current Plan was registered in December 1999.

The Financial Institutions Commission keeps a file with respect to each of the pension plans that it monitors. The Respondent is the chief administrative officer charged with the administration and enforcement of the PBSA. The PBSA was amended in 1999. One of the changes was the definition of "spouse". In the said Act, "spouse" is defined as follows:

"Spouse' means, in relation to another person,

- (a) a person who at the relevant time was married to that other person, and who, if living separate and apart from that other person at the relevant time, did not live separate and apart from that other person for longer than the two year period immediately preceding the relevant time, or
- (b) if paragraph (a) does not apply, a person who is living and cohabiting with that other person in a marriage-like relationship, including a marriage-like relationship between persons of the same gender, and who have been living and cohabiting in that relationship for a period of at least two years immediately preceding the relevant time;"

In July 1999 the Pensions Standards Branch of the Respondent's office issued a bulletin to plan administrators notifying them of the new legislation and upcoming requirements for Plan compliance. A review of the July 1999 bulletin indicates that the notification was very thorough and clear in its terms. With respect to the issue on the Appeal, more than one reference to the amended definition of "spouse" is made including the following descriptive paragraph:

"the definition of 'spouse' has been expanded to permit survivor's pension benefits to a same-sex spouse, and to protect the status of a married spouse for two years following a separation."

The Appellant, through an agent, provided amendments and a revised consolidated text to the Plan to the Respondent's office through the Pensions Standards Branch on December 24, 1999. The definition of "spouse" in the said consolidated text differed from the definition of "spouse" in the PBSA. The definition in the consolidated text of the Plan filed by the Appellant reads as follows:

"(23) 'spouse'...

- (B) in respect of a Member who is employed in British Columbia means in relation to the Member

- (i) a person who at the relevant time was married to the Member and not living separate and apart from the Member for the 2 year period immediately preceding the relevant time, or
- (ii) if there is no person in respect of whom paragraph (i) would apply,
 - (a) a person who at the relevant time lived with the Member as husband and wife for the 2 year period immediately preceding the relevant time, or
 - (b) a person of the same gender who at the relevant time lived in a marriage-like relationship with the member for the 2 year period immediately preceding the relevant time; or
- (iii) if there is no person in respect of whom either subparagraph (i) or (ii) above would apply, a person who at the relevant time was married to the Member.”

On September 13, 2001, the Pension Standards Branch informed the Appellant that the 1999 amendment filed by the Appellant could not be registered since the definition of “spouse” did not comply with the statutory definition contained in the PBSA. The Pension Standards Branch proposed that the offending portion of the definition be severed which would allow the amendments to be registered. The Pensions Standards Branch also proposed that in the alternative the amendment could be re-submitted with the correct definition of “spouse”.

By way of letter dated September 17, 2001, the agent of the Appellant explained the Appellant’s refusal to sever the offending wording, as described by the Pension Standards Branch, or to amend the definition of “spouse” as requested by the Pensions Standards Branch. In its letter of April 3, 2002, the Pension Standards Branch replied to the letter sent on behalf of the Appellant. These two letters essentially describe the respective positions of the parties to this Appeal. The letters form part of the Record. To summarize, I believe it is fair to say that the Appellant takes the positions:

1. That British Columbia legislation does not protect the rights of married persons to a spousal pension on death of a pension plan member to the same extent as other provincial and federal pension standards legislation;
2. The PBSA in British Columbia offers no statutory protection to married persons who have not cohabited for a period of 2 years even if the plan member is not otherwise involved with another person in a common law or same-sex relationship;
3. Other jurisdictions in Canada provide for broader protection of spouses unless a plan member has been cohabiting with another person for a significant length of time, such as two years or more;

4. The PBSA may have an affect on marriage breakdown settlements or the fact that pension rights by way of marriage may be extinguished by the passage of two years of separation may not be understood; and
5. The amended definition of "spouse" did not benefit from any meaningful public consultation or legislative debate before its acceptance into law.

The Respondent, by its response dated April 3, 2002, has taken the positions:

- A. The definition of "spouse" for the purposes of British Columbia Members to the Plan does not comply with the definition of "spouse" required by the PBSA;
- B. The amendments as submitted by the Appellant cannot be registered in their current form;
- C. The PBSA sets out the terms and conditions that must be adhered to by all employment pension plans covering members in British Columbia;
- D. Section 23(2) of the PBSA provides: "the Plan must incorporate the appropriate definition and interpretation provisions of section 1 that are necessary to ensure the Plan's interpretation in accordance with this Act.";
- E. The term "spouse" is defined in section 1 and by virtue of section 23 is one of the definitions required to be used in every plan text;
- F. Flexibility or latitude is not available in terms of the use of an alternative definition for "spouse" in the Plan;
- G. The Pension Standards Branch views the adequacy of protected rights differently from the Appellant and is of the view that the PBSA definition protects spousal rights, member rights, rights of member's beneficiaries and other dependants;
- H. Legislation in British Columbia focuses on the protection of spousal rights, such as the Family Relations Act, and the PBSA must be drafted so as to attempt to not interfere with the provisions, principles and jurisdiction of the Family Relations Act over matters of spousal rights;
- I. The current definition of "spouse" in the PBSA resulted from the passage of the *Definition Of Spouse Amendment Act, 2000*, and further resulted from consideration of principles by the Pension Benefits Standard's Advisory Counsel and the Pension Standards Branch, as well as a review of the definitions of "spouse" in all provincial legislation;
- J. The Pension Standards Branch interprets the respective rights and protections afforded by the PBSA differently than the Appellant; and

- K. Section 23(1) of the PBSA allows a plan to provide for benefits, contributions and other entitlements and obligations that are more favorable having regard to the intent of the Act, than those required by the Act. Provided that the minimum standards required under the definition of "spouse" in the PBSA are met, something better may be incorporated into a plan by an employer.

On January 16, 2006 the Acting Superintendent of Pensions issued a direction to the Appellant pursuant to section 71(2)(a) of the PBSA requiring the Appellant to immediately cease administering the Plan in a manner that reflects the definition of "spouse" as set out in the Plan and that the Appellant immediately amend the definition of "spouse" in the Plan so as to comply with the requirements of the PBSA.

The Appellant, through its agent, objected to this direction in its letter dated January 20, 2006 and indicated its intention not to amend the Plan as requested by the Pension Standards Branch.

FACTS AND EVIDENCE

The facts and evidence to be considered in this matter are set out in the Record much of which has been summarized above. The only other fact of note is that the Appellant stated in its letter dated January 20, 2006 that the BC Law Institute was conducting a review of the pension provisions of BC Legislation at the request of the Ministry of the Attorney General. On inquiries made by Financial Institutions Commission, it was determined that the definition of "spouse" in any British Columbia Legislation was not under review by the BC Law Institute.

ANALYSIS

As I have stated above, this Appeal focuses primarily upon the statutory interpretation of the definition "spouse" contained in the PBSA. It does not, in my view, require an indepth analysis or comparison of the policy considerations behind the choice of the definition of "spouse" found in the amended PBSA. The relevant arguments for the purposes of this Appeal are those positions set forth in the correspondence, the submissions of the parties that deal with the current wording of the definition of "spouse" in the PBSA, the position of the Appellant described in paragraph 1 of its letter dated January 20, 2006, where the Appellant, through its agent, states that the definition of "spouse" contained in the Plan fully incorporates the requirements of the definition of "spouse" contained in the PBSA, and further the Appellant's submission that although the definition in the Plan additionally includes legal married persons who do not otherwise meet the statutory definition of "spouse" in the PBSA, it does so in a manner that only applies if there was no person to whom the statutory definition applies. The Respondent, in its correspondence to the Appellant, acknowledges that a plan may include provisions that "better" the rights of the members or the benefits that accrue under the Plan provided that at a minimum the definitional requirements in the legislation are met. I agree that this is the correct requirement for a plan. The question then becomes whether the Plan wording accomplishes that goal and meets that threshold.

The Appellant's argument centers around the position that the unencumbered act of statutory interpretation will establish that the Plan definition of "spouse" fully incorporates the PBSA

definition of "spouse", does not otherwise conflict with or change that definition and adds an element to the definition in a manner contemplated by and allowed by subsection 23(1)(b) of the PBSA. The added element provides "benefits, contribution and other entitlements and obligations that are more favorable" than those provided under the PBSA. A review of definition 23(B) of the Plan shows that the Appellant has added an element to the PBSA definition of "spouse", which element basically states that if there is no person in respect of whom the definition of spouse in the PBSA would apply, then a spouse shall be a person who at the relevant time was married to the Plan member. In other words, whereas the PBSA definition of spouse contemplates a 2 year period of time where the Member and the person lived together as husband and wife or in a marriage-like relationship regardless of gender, the additional element added by the Appellant to the Plan has no such 2 year period. It is noted that this additional element to the definition of spouse is only applicable if there is no person in respect of whom the PBSA definition of spouse applies. It must also be noted that the definition of spouse in the PBSA is substantively different from that proposed for the Plan and that differing persons could benefit from pension proceeds depending upon the definition used. The question therefore becomes whether or not the FST has the jurisdiction to participate in a statutory interpretation process in order to determine whether or not the definition of spouse in the Plan satisfies section 23(2) of the PBSA in light of the apparent permissive language found in section 23(1)(b) which allows a plan to provide benefits, contributions and other entitlements and obligations that are more favorable than those set out in the Act.

The main thrust of the Respondent's submissions are that the FST has very restricted jurisdiction in terms of the reviewability of the Respondent's decision, that deference to the regulator's decision is required, that section 23 of the PBSA requires the definition of spouse contained in section 1 of the said Act to form the definition of spouse in the Plan without alteration in wording and that the Appellant's definition of spouse is inconsistent with the PBSA and must therefore be amended in order for the Plan to be registrable by the Respondent Superintendent.

I mentioned earlier that this Appeal is one that mainly involves statutory interpretation. Although this is the case, an appellant has significant hurdles to overcome before the FST is in a position to participate in a statutory interpretation exercise. In this Appeal, the Appellant must establish that the FST has the ability or jurisdiction, to review the reconsideration decision of the Respondent. The FST has considered the question of the standard of review that applies to the FST in numerous prior decisions. For the purposes of this Appeal I accept the standard of review determinations set forth in the FST decisions leading up to and including that of the *Superintendent of Real Estate v. Spong and Real Estate Council, FST 05-007, January 13, 2006*. The FST will apply the pragmatic and functional approach when reviewing a decision of a tribunal or regulatory body in its effort to determine the legislative intent of the governing legislation and the reasonableness of the decision. The FST will show considerable deference to the decision of the regulatory body especially in those cases where unique, special or exceptional expertise is required on the part of the regulator in administering the legislation in question or where discretion is provided to the regulator by the legislation in question.

The FST, will not, however, shy away from its review powers even given the strictures imposed upon it by the pragmatic and functional approach and the considerable deference that is required to be shown. This is due to the fact that section 242.2(11) of the *Financial Institutions Act*

clearly empowers the FST to confirm, reverse or vary a decision under appeal, or send the matter back for reconsideration, with or without directions, to the person or body who's decision is under appeal. This legislative mandate imposed upon the FST also empowers the FST to consider a decision of a tribunal under its jurisdiction in a manner that appears analogous to the standard of review of "reasonableness".

Furthermore, in section 21(5) of the PBSA, the reviewing tribunal is given a statutory power to make an order requiring the Superintendent to register the plan or amendment in question, to rescind the cancellation of the registration of the plan in question, or to make any other order that the tribunal considers appropriate. This section of the PBSA clearly expands the power of the FST in terms of its discretionary power to make orders that it considers appropriate in the circumstances. Despite this, it is my view that the standard of review set out in the earlier decisions of the FST as noted above requires a pragmatic and functional approach based upon consideration of the reasonableness of the decision in question and the application of considerable deference given, in this case, to the unique and special expertise required of the regulator in the administration of the pension plan schema set out in the PBSA and the protection of the public interest in the application of the principles set out in that Act.

I accept the Respondent's submission that the PBSA is public policy legislation designed to ensure that plan members' benefits are administered in accordance with the statutory requirements set out in that Act and in particular to ensure planned financial health and distribution according to Plan terms. In order to accomplish the administrative responsibilities imposed upon the Superintendent consistency among plans must be ensured in cases where the PBSA sets out content requirements. The reconsideration decision of the Respondent in this Appeal clearly shows that the Superintendent is attempting to ensure that the Plan does not deviate from mandated definitions set out in PBSA. That would, in my view, be the end of the matter if it were not for the wording of subsection 23(1)(b) of the Act which provides that the Plan may "provide for...benefits, contributions and other entitlements and obligations that are more favorable, having regard to the intent of this Act, than those required by the Part." This subsection appears to contradict subsection 23(2) which provides:

"(2) The plan must incorporate the appropriate definition and interpretation provisions of section 1 that are necessary to ensure the plan's interpretation in accordance with this Act."

A dichotomy is evident. Subsection 23(1) requires the Plan to provide for either the benefits, contributions and other entitlements and obligations required by that Part of the Act, or benefits, contributions and other entitlements and obligations that are more favorable having regard to the intent of the Act than those required by that Part of the Act. Subsection 23(2), on the other hand, requires the Plan to incorporate the appropriate definition and interpretation provisions set out in section 1 of the Act that are necessary to ensure the Plan's interpretation in accordance with the Act as a whole.

The dichotomy may be resolved relatively easily, however, when it comes to the central issue in this Appeal, namely the definition of spouse. In this case, subsection 23(1) has little if any application. That subsection deals with benefits, contributions, other entitlements and obligations. It does not deal, at least directly, with definitions. Thus, with respect to benefits and

other entitlements, for example, the plan drafter may choose to defer to those set out in that Part of the Act or improve upon the same making them more beneficial while at the same time having regard to the intent of the Act. But, subsection 23(2) does deal with definitions directly. It requires the Plan drafter to incorporate the appropriate definition and interpretation of section 1 of the Act that are necessary to ensure the plan's interpretation in accordance with the Act. Subsection 23(2) does not include the alternative of making the definitions "more favorable" or less favorable. Even if it did, by virtue of the use of the word "incorporate" in the subsection, regard to the intent of the Act is required due to the closing words of that subsection: "...to ensure the Plan's interpretation in accordance with this Act."

The submissions of the Respondent as well as the reconsideration decision itself establish that the addition of the element proposed by the Appellant in the definition of spouse in the Plan changes substantive rights to classes of beneficiaries, which changes are not set out in the PBSA. The Superintendent is mandated to oversee the administration of all pension plans in the province of British Columbia that fall within the jurisdiction of the PBSA and to register those plans that comply with the Act. Although discretion exists in this oversight and registration power, the Superintendent must exercise this discretion in a manner that ensures that the policy goals of the Act are fulfilled and that any mandatory plan requirements set out in the Act are met.

In the case of the Appellant's proposed Plan definition of spouse, the Superintendent has determined that the policy goals in the Act will not adequately be met and further that the mandatory definition requirements set forth in subsection 23(2) of the PBSA have not been met. It is my view that the decision of the Respondent is reasonable and that the interpretation and application of the relevant sections of the PBSA by the Superintendent are correct. The proposed added element provides for a substantive change in the rights of the persons affected by the Plan. It potentially affects in a negative manner at least one class of persons, namely beneficiaries of a plan member that are not spouses, and possibly others as well. It does not necessarily improve the definition of spouse. Rather, depending upon the policies of the PBSA, it could reasonably be seen as harming the definition. This type of change is a good example of a provision that would be reviewed by the Superintendent in order to ensure that it is in accordance with the Act. I agree with the Respondent's determination that in this case the definition is not in accordance with the Act.

CONCLUSION

Having applied the appropriate standard of review, I find that the reconsideration decision of the Superintendent is both reasonable and correct and I order that the Appeal of the Appellant be dismissed with costs awarded in favor of the Respondent in accordance with the costs criteria set out in the Guidelines governing the FST. The parties may seek the guidance of the Deputy Registrar of the FST in determining the appropriate costs to be paid in this matter, failing which written submissions regarding the same may be brought back to the FST if agreement has not been reached within 30 days of the delivery of this decision to the parties, in which latter event I will determine the quantum of costs.

Further, I confirm the Superintendent's decision that the Plan not be administered in a manner that reflects the definition of spouse set out in the Plan document proposed by the Appellant and that the Plan definition of spouse be amended to comply with the Act as directed by the Superintendent within 30 days of the date of this Appeal decision and at any rate prior to its registration under the PBSA.

Respectfully submitted this 22nd day of January, 2007



Dale R. Doan LLB
Member Financial Services Tribunal

