

IN THE MATTER OF THE PENSION BENEFITS STANDARDS ACT

- and -

Interior Lumbermen's Pension Plan

Reconsideration Pursuant to Section 20(4) of the Pension Benefits Standards Act

Issue:

Reconsideration of the Superintendent's Direction of December 27, 2006.

Introduction of the Issue:

In November 2006, [redacted] complained that his pension plan benefits were not calculated in accordance with the terms of his pension plan. To support his complaint, [redacted] provided T-4 and pension statement information.

In a letter dated December 27, 2006, the Superintendent of Pensions ("the Superintendent") directed Trustees of the Interior Lumbermen's Pension Plan (the "Plan") to recalculate a Plan member's pension benefit based on his gross earnings which is defined in the Plan as total T-4 earnings, and not just his basic salary.

The Trustees have submitted a Notice of Objection to the direction and in doing so submitted new documents to support their objection.

[redacted] was also provided an opportunity to respond to the Objection and he filed a submission on March 21, 2007.

Background:

The Plan is a multi-employer defined benefit pension plan based in the southern interior region of British Columbia that serves the non-union lumber industry. It has approximately 1,600 members and \$80 million in investment assets.

[redacted] is an employee of ATCO Lumber Ltd. ("ATCO"). ATCO is a participating employer in the Plan. [redacted] was about to retire at the time and informed staff that he was reviewing his pension information and found that the Plan calculated a significantly lower pension benefit than he did. His T-4 statements and annual pension statements demonstrated his pension contributions were not based on gross income but were based on annual salary figures which do not include additional income such as bonuses.

The reason for the discrepancy is that ATCO has been remitting contributions to the Plan based solely on regular salary and reporting that salary figure to the Plan. The terms of the Plan stipulate that the members' pension benefits are calculated based on a member's compensation.

The Plan defines "compensation" in Section I (4) (i) of the Plan as follows:

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.

This definition of "compensation" has never been amended.

In response to [redacted] complaint, the Plan Administrator, [redacted] was contacted. [redacted] confirmed that the issue centres on ATCO having remitted contributions based solely on [redacted] regular salary. It appears to me that, initially, [redacted] indicated that he agreed that the plan document clearly identifies total T-4 gross earnings in the definition of compensation and wanted FICOM to validate that view so as to assist him in addressing the issue with ATCO. However, [redacted] subsequently changed his view and stated that the Plan did not intend for bonus remuneration to be included in compensation.

In [redacted] comments on the objection filed by the Plan, he relays a similar story of [redacted] initially agreeing that ATCO should be remitting contributions based on total T-4 gross earnings.

The CEO of ATCO was also spoken to. He confirmed that contributions from his firm for [redacted] had been calculated solely on [redacted] regular salary. He mentioned that that was also the case for a number of other employees. If that is the case, the related liability for ATCO based on the requirements related to overdue contributions as addressed in the Plan document may be substantial.

[redacted] subsequently advised staff that he had spoken to legal counsel, who was of the opinion that the Trustees are given the right to establish business procedures under the original Declaration of Trust – and that those procedures can further determine what earnings of a member are used to determine a pension benefit.

The notice of objection was filed with four enclosures:

- A letter from the retired plan administrator,
- Plan Brochure dated January 2001;
- A Benefits Statement for [redacted] and [redacted]
- Correspondence between the Plan and [redacted]

The Trustees submit that it was never the intention of the Trustees to allow bonuses to be included in the calculation of compensation and benefits, that the complainant was clearly told of this intention, and that the Trustees' interpretation should not be interfered with.

My Decision:

The Trustees are clearly empowered to interpret the Plan text, however, the *Pensions Benefits Standards Act* (the "PBSA") requires that their actions must be in accordance with the Plan. Where the Plan text is ambiguous or obscure, then recourse to parole or extrinsic evidence may be required to determine the intent of the drafters at the time of drafting. The Trust Agreement was not filed with the Superintendent as required under Sections 14 and 15 of the PBSA. The Trust Agreement and amendments were filed when staff discovered their existence due to them being referenced in the submissions of the Trustees. The Trust Agreement makes no reference to the PBSA or applicable legislation. Its terms do not conflict with the definition of "compensation" in the Plan.

The definition of "compensation" provided in the Plan text is clear and specific. There is nothing ambiguous about the definition. Staff submits that resort to a dictionary is not necessary for this common term, however, it may be useful. "Gross" is defined in this context in the Oxford English Dictionary as:

6. a. Entire, total, whole. Now only (opposed to net) of an amount, value, weight, number, or the like, before necessary deductions have been made.

Oxford English Dictionary, Second Edition 1989, "gross"

The definition does not say "salary" or even "gross salary" but uses "gross amount of earnings". "Gross amount of earnings" is a commonly understood phrase. "Gross amount of earnings" means the entire earnings without deductions. In cases that were not clear enough, the definition goes on to speak to what is reported on T-4's and then specifically excludes certain types of earnings. Bonuses are reported on T-4's as earnings and are not in definition's excluded list. Therefore, the definition of "compensation" used to calculate benefits clearly includes bonuses.

If a plan document uses clear and unambiguous terms, then the Superintendent should not look to outside or extrinsic evidence of the drafters' intent. However, that is what the Trustees request.

The Trustees point out that, at the time the Plan was registered, none of the participating employers paid bonuses. So the best that can be said is that they did not turn their minds to the possibility of bonuses being included in the definition of "compensation".

However, when ATCO joined the Plan, and at any time before and after, the Trustees were free to amend the Plan to list bonuses as an exclusion to the definition of "compensation". They did not.

The *PBSA* requires the Trustees, who are fiduciaries, to administer the Plan in accordance with the terms of the Plan and the *PBSA*. Section 71(2) provides the Superintendent with the power to issue directions to administrators of registered plans in certain circumstances, including where an administrator is not administering a plan in accordance with the registered plan:

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 Trustees point to the English case of *Mettoy* and its citing of *Gulbenkian* in support of its submission that the Superintendent should look outside the Plan text here to determine the intent of the drafters in the definition of "compensation". However, both *Mettoy* and *Gulbenkian* clearly addressed situations where the terms of a pension plan trust and a trust respectively were uncertain on their face. That is simply not the case here. The definition of "compensation" is clear.

*Mettoy Pension Trustees Ltd. v. Evans, [1991] 2 All ER 513
and
Gulbenkian's Settlement Trusts, [1968] All ER 785*

The Trustees also submit that [redacted] should be bound by extraneous documents which he received over the years which they submit show that "compensation" is restricted to salary and does not include bonuses. The Trustees submit that this information imparted knowledge on [redacted] such that there is an estoppel on him from complaining about the Plan being administered in accordance with the extraneous documents. Estoppel is a common law principle which holds that:

...where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations...

...where parties to a transaction proceed on the basis of an underlying assumption...on which they have conducted the dealings between them, neither of them will be allowed to go back upon the assumption where it would be unfair or unjust to allow him to do so.

Dukelow and Nuse; The Dictionary of Canadian Law, Second Edition.

The Trustees submit the English case of *Icarus* as support for the proposition that the members are bound by the Plan brochures and information circulars and cannot rely upon the "formal" Plan documents.

Icarus (Hertford) Ltd.v. Driscoll, [1990] PLR 1

However, the documents submitted by the Trustees do not make it clear that only base salary is used in determining the rate of contributions. There is no evidence that [redacted] and the Trustees ever specifically discussed the issue of bonuses prior to the time that [redacted] was preparing to retire. [redacted] own letter provides evidence of this and [redacted] did not work in a human resources or payroll capacity at ATCO. [redacted] denies ever knowing or thinking that bonuses were not to be included in the calculation of benefits.

The Trustees submit an example page from the Plan pamphlet wherein one example is provided of a "salaried employee", based on "average compensation" and "current annual rate of salary". As the Trustees point out, most of the participating employers in the Plan do not give bonuses and so most of the Plan employees receive only an annual salary. There is nothing in the example which states that for employees receiving bonuses that amount is not included in the calculation. The example does not contradict the definition of "compensation". Furthermore, the brochure has an advisory on the cover which reads:

PLEASE NOTE: This booklet is a summary of the Plan provided for informational purposes and is not intended to replace or otherwise qualify the Plan Text or Trust Agreement. The Plan Text and the Trust Agreement are the governing documents of the Plan and in the event of any dispute between this booklet and these documents, the Plan Text and the Trust Agreement shall prevail.

The Plan has an informational website for its members. One page headed "Highlights of the Sawmill Division January 2006" repeats the wording set forth above, and under "Amount of Pension" uses the following example:

- Joe's annual income for 2004 was \$50,000 and he earned a full year's credit; and
- The value of the pension he earned during the year was – \$50,000 times 1.35%, divided by 12 = \$56.25 of monthly pension at retirement.

Icarus is not a binding decision upon the Superintendent and is not a regulatory enforcement case. Even if the Trustees' argument of estoppel were applicable to [redacted] in the sense of a civil action, (i.e. there may be an argument of estoppel on [redacted] suing the Trustees) it is not applicable to the actions of the Superintendent. The Superintendent's duties and powers to carry out the provisions of the legislation are, like those of municipalities, "...of such public nature that they cannot be waived, lost or vitiated by mere acquiescence, laches or estoppel".

(Langley (Township) v. Wood (1999), 173 D.L.R. (4th) 695, para. 12, references omitted, cited by Madam Justice Rowles in Pitt Meadows (District) v. Ron Jones Ltd., [2004] B.C.J. No. 987 (BCCA), at para. 74.)

There is no submission from the Trustees that there is an estoppel on the Superintendent enforcing the legislation. Furthermore, Staff submits that it would be against public policy to deny a plan member the ability to make a complaint to a regulatory body due to acquiescence. Once the Superintendent receives a complaint, the investigation and resolution of the matter is wholly within the jurisdiction of the Superintendent.

The Trustees also cite *Neville*, and *Cybulski* as authority for the Trustees having broad powers of interpretation and benefit determination. Again, these cases are not regulatory enforcement cases but civil disputes between Trustees and plan members alleging breaches of fiduciary duty and trust. Nor is the issue here one that is a "difficult decision to properly balance the interests of all members" as put forth by the Trustees. Furthermore, this is not a case involving balancing the interests of the members. Either the employer(s) have been remitting the required amount or not.

Neville v. Wynne, [2005] B.C.J. No. 712, and Tab 1: Electrical Industry of Ottawa Pension Plan v. Cybulski, [2001] O.J. No. 4593

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.

[P]ension trusts are part of the complex rights and obligations (not only equitable, but also contractual and statutory) between employers and employees, and obviously serve broad societal and economic purposes.

and

The conclusion that the common law rule [vis-à-vis termination of a trust by its beneficiaries] does not generally apply to traditional pension funds is reinforced by the fact that the P.B.S.A. provides mechanisms that protect members from inappropriate conduct by plan administrators.

Buschau v. Rogers Communications Inc., [2006] S.C.J. No. 28, at para. 28, Deschamps J. citing the decision of the British Court of Appeal; and at para 33.

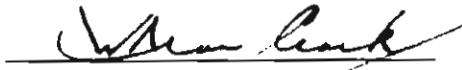
I note that the Trustees have, according to their submission, subsequent to the Superintendent's direction for compliance, passed a resolution adopting an interpretation of the definition of "compensation" which does not include bonuses. They have also adopted this interpretation on a retrospective basis.

Such an interpretation of "compensation" is unreasonable and the adoption of the resolution is an attempt to ratify past acts and attempts to make a retroactive amendment. Such an amendment would not be permissible, however, since it would reduce accrued benefits (*PBSA* Section 59).

A case of note is the Alberta Court of Queen's Bench decision in *Denham*. This action by the employer against its consultants and pension plan policy holder arose after the employer was notified by the Alberta regulator that contributions were not being remitted in accordance with the plan terms. The employer claimed that the amount referenced in the plan text was not what they intended. However, the plan text was very clear. The employer in the action applied for an order rectifying the terms of the plan to reflect what it said was their intended amount, due to a mistake in the drafting of the text. Here, ATCO may have a case for rectification if an application were brought in Supreme Court. However, the Superintendent does not have the equitable jurisdiction to order rectification of a pension plan. It should be also noted the Trustees do not make a claim of mistake at this time.

Denham Ford Sales Ltd. v. Canada Life Assurance Company, 2006 CBPG 8215; 2

Given all of the above, I confirm my order of December 27, 2006 in which I gave direction for compliance, which included the direction issued pursuant to section 71 that the Trustees administer the Plan in accordance with its definition of "compensation" which includes bonuses.



W. Alan Clark

Superintendent of Pensions

Dated at Surrey, British Columbia

This 13th day of June, 2007