

**FINANCIAL SERVICES TRIBUNAL**

**IN THE MATTER OF** the Pension Benefits Act, R.S.O. 1990, c.P.8, as amended by the Financial Services Commission of Ontario Act, 1997 S.O. 1997, c.28 (the “Act”);

**AND IN THE MATTER OF** a refusal by the Superintendent of Financial Services (“the Superintendent”) to make an order in response to a complaint regarding the Brewers Retail Pension Plan for Bargaining Employees, Registration No. 0336081 (the “Plan”);

**AND IN THE MATTER OF** a Hearing in accordance with subsection 89(8) of the Act;

**BETWEEN:**

**UNITED FOOD AND COMMERCIAL WORKERS UNION,  
Local 375W, represented by MR. PATRICK J. MOORE**

Applicant

- and -

**SUPERINTENDENT OF FINANCIAL SERVICES,  
BREWERS RETAIL INC., and UNITED FOOD AND COMMERCIAL WORKERS  
INTERNATIONAL UNION/UNITED BREWERS’ WAREHOUSING WORKERS’  
PROVINCIAL BOARD**

Respondents

**MOTION HEARING**

**BEFORE:**

Ms. Elizabeth Greville, Member of the Tribunal and Chair of the Panel

Ms. Heather Gavin, Member of the Tribunal

Mr. C.S. (Kit) Moore, Member of the Tribunal

**APPEARANCES:**

Mr. Thane Woodside, for the Applicant

Mr. John Evans, for the Respondent United Food and Commercial Workers International Union/United Brewers' Warehousing Workers' Provincial Board  
Mr. Dirk Van de Kamer, for the Respondent Brewers Retail Inc.  
Ms. Deborah McPhail, for the Superintendent of Financial Services

**HEARING DATE:**

September 28, 2001

**REASONS FOR DECISION**

**NATURE OF THE APPLICATION:**

The hearing request arises from a January 26, 2000 decision by the Superintendent of Financial Services (the "Superintendent") that the Superintendent had no authority or jurisdiction to grant the Applicant the relief sought.

The Superintendent's decision was in response to a request that the Superintendent declare an existing pension advisory committee to be improperly constituted, and order that it be replaced by a properly constituted advisory committee under the Act.

On January 26, 2000, the Superintendent wrote to counsel for the United Brewers Warehousing Workers' Locals 375W and 305W. The letter stated in part:

"Please note that although Section 24 of the *Pension Benefits Act*, R.S.O. 1990 (the "Act") gives the plan members the right to establish an advisory committee, there is no requirement under the Act that such a committee be established. Consequently, no grounds exist under the Act for me to order the establishment of such a committee.

Section 1.36 of the plan only defines the term Pension Advisory Committee and does not require that such a committee be established. Therefore, there is no basis under the plan terms for me to order the establishment of an advisory committee.

As you pointed out in your letters, there exists a letter of understanding, which is part of the collective agreement, wherein the employer acknowledges that the Union has a right to appoint a Pension Advisory Committee that has membership, roles, and responsibilities similar to that attributed to the advisory committee described in the Act.

However, the collective agreement has been negotiated between the employer and the union and is not a part of the pension plan. Therefore, any issue with such a document

would be a labour issue and not within the jurisdiction of the Financial Services Commission of Ontario.”

On February 24, 2000 the Applicant requested a hearing before the Financial Services Tribunal with respect to the Superintendent’s decision of January 26, 2000.

## **FACTS:**

By Letter of Understanding dated September 1, 1994 (“1994 Letter”), between Brewers Retail Inc. (the “Employer”) and the United Food and Commercial Workers International Union/United Brewers’ Warehousing Workers’ Provincial Board (the “Union”), the Employer acknowledged the Union’s right to appoint a Pension Advisory Committee with “membership, roles and responsibilities as defined under the pension legislation”. The Letter of Understanding also stated it was to form part of the Collective Agreement.

The 1994 Letter of Understanding was subsequently renewed in July, 1997 and replaced with a Letter of Understanding with identical terms.

A further updated Letter of Understanding was signed on March 8, 1999 (“1999 Letter”). It stated that the Employer acknowledged the right of the Union to appoint a Pension Committee with membership, roles and responsibilities as defined under Section 24 of the Pension Benefits Act, and added that the Employer would remain the Administrator for the Plan and that the “Pension Committee” would have an advisory or consultation role only. Finally, the updated letter retained the provision that the letter would form part of the Collective Agreement.

Between December, 1998 and January, 2000 there was an exchange of correspondence between counsel for the Applicant and the Superintendent’s office concerning the issue of whether the pension committee established pursuant to the 1994 Letter was properly constituted, and the potential jurisdiction of the Superintendent to order that the existing committee was not properly constituted and that a properly constituted committee be formed.

## **PENSION BENEFITS ACT**

The role and contribution of an “advisory committee”, which is not otherwise defined in the Act, are set out in section 24:

- 24 (1) The **members and former members** of a pension plan by the decision of a majority of them participating in a vote, **may establish** an advisory committee.
- (2) **Each class of employees that is represented in the pension plan is entitled to**

**appoint at least one representative** to the advisory committee established under subsection (1).

- (3) The **former members of the plan are entitled to appoint one representative** to the advisory committee established under subsection (1).
- (4) The purposes of an advisory committee are,
  - (a) to monitor the administration of the pension plan;
  - (b) to make recommendations to the administrator respecting the administration of the pension plan; and
  - (c) to promote awareness and understanding of the pension plan on the part of members of the pension plan and persons receiving pension benefits under the pension plan.
- (5) The advisory committee or its representative has the right to examine the records of the administrator in respect of the administration of the pension plan and the pension fund and to make extracts from and copies of the records, but the subsection does not apply in respect of information as to the service, salary, pension benefits or other personal information related to any specific person without the person's prior consent.
- (6) Subsection (1) does not apply,
  - (a) if the pension plan is administered by a pension committee at least one of the members of which is appointed by the members of the pension plan; and
  - (b) in respect of a multi-employer pension plan established pursuant to a collective agreement.
- (7) The administrator of a pension plan shall provide to the advisory committee or its representative such information as is under the control of the administrator and is required by the advisory committee or its representative for the purposes of the committee.  
(emphases added)

The Act defines the term "pension committee" (as opposed to the term "pension advisory committee") as a committee that is the administrator of the pension plan. Section 8 of the PBA sets out a list of authorized administrators, stating in part:

- 8(1) A pension plan is not eligible for registration unless it is administered by an administrator who is,
  - (a) a pension committee composed of one or more representatives of,

- (i) the employer or employers, or any person other than the employer or employers, required to make contributions under the pension plan; and
    - (ii) members of the pension plan;
  - (b) a pension committee composed of representatives of members of the pension plan.
- (2) A pension committee, or a board of trustees, that is the administrator of a pension plan may include a representative or representatives of persons who are receiving pensions under the pension plan.

Section 87 of the Act sets out the general power of enforcement given to the Superintendent:

- 87(1) The Superintendent, in the circumstances mentioned in subsection (2) and subject to section 89 (hearing and appeal), by a written order may require an administrator or any other person to take or to refrain from taking any action in respect of a pension plan or a pension fund.
- (2) The Superintendent may make an order under this section if the Superintendent is of the opinion, upon reasonable and probable grounds,
- (a) that the pension plan or pension fund is not being administered in accordance with this Act, the regulations or the pension plan;
  - (b) that the pension plan does not comply with this Act and the regulations; or
  - (c) that the administrator of the pension plan, the employer or the other person is contravening a requirement of this Act or the regulations.

#### **THE ISSUE:**

As agreed at the pre-hearing conference, the issue for this motion hearing is:

#### **Does the Financial Services Tribunal have jurisdiction to deal with the relief sought in the Applicant's Request for Hearing?**

The relief sought by the Applicant is that the "Commission by Order direct the Superintendent to order the Administrator to cease administering the Plan with an improperly [sic] constituted advisory committee and to cause the creation of a properly constituted advisory committee pursuant to the Act and formulating documentation".

#### **ANALYSIS AND CONCLUSION:**

Before May 3, 1999, the text of the Plan defined “Pension Advisory Committee” as “a committee appointed by the United Brewers Warehousing Workers’ Provincial Board, and not a “pension advisory committee” as defined under “*Applicable Pension Legislation*”.

Prior to May 3, 1999, the plan text defined “Pension Committee” as “the committee which was appointed by the *Employer*, in accordance with Article 14”. Article 14.01 states that the Administrator (defined as the Employer, which is defined as Brewers Retail Inc.) may delegate any of its duties to such other person or persons as deemed appropriate, including but not limited to the Employer of the Pension Committee. The Plan text does not require a Pension Advisory Committee to be established and is silent on the role and/or composition of such a Committee.

Effective May 3, 1999, Amendment No. 2 to the Plan text deleted the existing definition of “Pension Advisory Committee” and substituted the following:

“1.36 “Pension Advisory Committee” means a committee appointed by the United Brewers Warehousing Workers’ Provincial Board, in accordance with membership, roles and responsibilities as defined under Section 24 of the Ontario Pension Benefits Act, R.S.O. 1990.”

The 1994 Letter and the 1999 Letter provide that the respective Letters form part of the Collective Agreement. The letters do not specify that they are incorporated into the Plan or form part of the Plan.

The Act does not authorize the Tribunal or the Superintendent to enforce a provision of a collective agreement unless the provision is incorporated by reference into the pension plan. In this case, the Letters are not so incorporated, nor do they require the Employer or administrator to establish an advisory committee.

The Act does not place any obligation on the employer or the administrator to establish an advisory committee, or to ensure that a committee, once established, is properly constituted. Rather, section 24 of the Act provides that members and former members “may establish” a pension advisory committee, and if such a committee has been established, requires the administrator to provide records and information to the committee.

The Superintendent’s jurisdiction under the Act is limited to the powers conferred on it by the Act, Regulation and provisions of the applicable pension plan. Section 87(1) of the Act confers remedial powers on the Superintendent in relation to matters arising under the Act or a pension plan.

The Applicant has requested the Superintendent to declare an existing pension advisory committee to be improperly constituted and to order its replacement. However, there are no grounds under the Act in the circumstances of this case for the Superintendent to grant the relief requested. Neither the terms of Section 24 of the Act or Section 1.36 of the Plan requires a pension advisory committee to be

established. Therefore, there is no basis on which the Superintendent can make a determination under Section 87 of the Act which would give rise to a hearing under Section 89 of the Act. Accordingly, the Tribunal has no basis on which to assume jurisdiction to direct the Superintendent to order the Administrator to cease administering the Plan with an improperly constituted advisory committee, and to cause the creation of a properly constituted advisory committee.

## **ORDER**

For the reasons noted above, the Tribunal has determined that it lacks the jurisdiction to deal with the relief sought in the Applicant's Hearing Request and therefore lacks jurisdiction to proceed with the hearing request in the circumstances of this case.

Dated at Toronto this 3rd day of June, 2002.

"Elizabeth Greville"  
Elizabeth Greville,  
Member of the Tribunal and Chair of the Panel

"Heather Gavin"  
Heather Gavin,  
Member of the Tribunal

"C.S. Moore"  
C.S. (Kit) Moore,  
Member of the Tribunal