

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 Proposal by the Superintendent of Financial Services (the "Superintendent") to make an order under Section 87 of the Act respecting a request by Mr. Victor Burns relating to the Ontario Public Service Pension Plan, Registration No. 208777;

AND IN THE MATTER OF a Hearing in Accordance with Subsection 89(8) of the Act

B E T W E E N:

ONTARIO PENSION BOARD

Applicant

-and-

**SUPERINTENDENT OF FINANCIAL SERVICES OF ONTARIO
(the "Superintendent")**

-and-

VICTOR BURNS

Respondents

BEFORE:

Ms. Anne Corbett, Member of the Tribunal and Chair of the Panel
Mr. Louis Erlichman, Member of the Tribunal and the Panel
Mr. William Forbes, Member of the Tribunal and the Panel

REPRESENTATIONS BY:

For the Ontario Pension Board
Mr. Murray Gold
Ms. Susan Philpott

For the Superintendent:
Ms. Frederika Rotter
Ms. Deborah McPhail

For Mr. Victor Burns
Mr. David J. Jewitt

HEARING DATES: October 15 and 16, 2001

REASONS FOR DECISION

NATURE OF APPLICATION

The Ontario Pension Board (the "Applicant") requested a hearing before the Financial Services Tribunal in respect of the Notice of Proposal issued by the Superintendent of Financial Services ("Superintendent"). The Notice of Proposal indicated that the Superintendent was proposing to order the Applicant to pay Mr. Victor Burns his full pension benefits, with interest, payable pursuant to Section 24 (11) of Regulation 909 under the *Pension Benefits Act* retroactive to the date of Mr. Burns' retirement from the Ontario Provincial Police. The Applicant takes the position that the Notice of Proposal should be quashed on the basis that Mr. Burns' employment was not terminated with the Ontario Provincial Police but was deemed to be continued pursuant to Section 80 (3) of the Act as Mr. Burns assumed new employment with the Ottawa-Carleton Police Services Commission on or about the day following his termination of employment with the Ontario Provincial Police and that that new employment was in conjunction with the transfer of part of the police services of the Ontario Provincial Police to the Ottawa-Carleton Police Services Commission.

Both the Superintendent and Mr. Burns contend that Section 80 (3) of the Act does not apply to Mr. Burns.

FACTS

Effective February 28, 1997, Mr. Burns terminated his employment with the Ontario Provincial Police. Prior to that date Mr. Burns was employed as a District Inspector with responsibility for seven (7) of thirteen (13) detachments of the Ontario Provincial Police in the Ottawa area.

Effective January 1, 1995, Bill 143, an *Act to Amend Certain Acts related to the Regional Municipality of Ottawa-Carleton and to amend the Education Act in respect of French Language School Boards* was passed. It affected police services in the Ottawa-Carleton region. The former Gloucester, Nepean and Ottawa Police Services were amalgamated into the Ottawa-Carleton Regional Police Services effective January 1, 1997. During the period from December 1996 through to July 1999, there was a divestment of police services from the Ontario Provincial Police to the Ottawa-Carleton Regional Police Services.

In connection with the transfer of police services from the Ontario Provincial Police to the Ottawa-Carleton Regional Police Services a transfer protocol was established which governed the transfer of employees between the police services.

Mr. Burns commenced employment as an Inspector with the Ottawa-Carleton Regional Police Services on March 3, 1997. His new employment arrangements were not governed by the transfer protocol but were the result of arrangements made directly between Mr. Burns and the Chief of the Ottawa-Carleton Regional Police Services. Upon commencing employment with the Ottawa-Carleton Regional Police Services, Mr. Burns became a member in OMERS.

At the time that Mr. Burns terminated his employment with the Ontario Provincial Police he had thirty-three (33) years and seven (7) months pension credit in the Plan and was fifty-five (55) years

of age. On the basis of the combination of his age and pension credits, Mr. Burns was eligible for an unreduced immediate pension under the Ontario Provincial Police Early Retirement Benefit provisions in Section 15 (4) of the Plan. Mr. Burns applied for a pension under the Plan. His application was considered by both the Adjudication Committee of the Ontario Pension Board and by the Pension Policy Committee of the Ontario Pension Board, both of which determined that Mr. Burns did not terminate employment with the Ontario Provincial Police for the purpose of the *Pension Benefits Act* but was deemed by Section 80 (3) of the Act to continue employment with a successor employer, the Ottawa-Carleton Regional Police Services.

Mr. Burns retired from the Ottawa-Carleton Regional Police Services on September 30, 1999 and is now in receipt of a pension from both the Plan and OMERS.

Pension Benefits Act

The relevant provisions of the Act are as follows:

80 (1) Where an employer who contributes to a pension plan sells, assigns or otherwise disposes of all or part of the employer's business or all or part of the assets of the employer's business, a member of the pension plan who, in conjunction with the sale, assignment or disposition becomes an employee of the successor employee and becomes a member of a pension plan provided by the successor employer:

(a) continues to be entitled to the benefits provided under the employer's pension plan in respect of employment in Ontario or a designated province to the effective date of the sale, assignment or disposition without further accrual;

(b) is entitled to credit in the pension of the successor employer for the period of membership in the employer's pension plan, for the purpose of determining the eligibility for membership in or entitlement to benefits under the pension plan of the successor employer; and

(c) is entitled to credit in the employer's pension plan for the period of employment with the successor employer for the purpose of determining entitlement to benefits under the employer's pension plan.

80 (3) Where a transaction described in subsection (1) takes place, the employment of the employee shall be deemed, for the purposes of this Act, not to be terminated by reason of the transaction.

ISSUES

The parties agreed that the issues to be determined by the Tribunal were as follows:

Was there a sale, assignment or other disposition of all or part of the business or all or part of the assets of the Ontario Provincial Police, Mr. Burns' former employer to the Ottawa-Carleton Regional Police Services?

If the answer to issue (1) is yes, did the Applicant become an employee of the Ottawa-Carleton Regional Police Services in conjunction with the sale, assignment or disposition?

If the answers to issues (1) and (2) are yes, what are the consequences that flow from this transaction under subsections 80 (1) (a), (b) and (c) and 80 (3) of the Act.

Issues 1 and 2:

1. Was there a sale, assignment of other disposition of all or part of the business or all or part of the assets of the Ontario Provincial Police, Mr. Burns' former employer to the Ottawa-Carleton Regional Police Services?

If the answer to issue (1) is yes, did the Applicant become an employee of the Ottawa-Carleton Regional Police Services in conjunction with the sale, assignment or disposition?

In argument, all parties acknowledged that there was a disposition of a part of the police services of the Ontario Provincial Police to the Ottawa-Carleton Regional Police Services and accordingly, the only real issue in this case is whether, for the purposes of Section 80 of the *Pension Benefits Act* Mr. Burns became an employee of the Ottawa-Carleton Regional Police Services "in conjunction with" the partial divestment of the policing services from the Ontario Provincial Police to the Ottawa-Carleton Regional Police Services.

The question of whether or not change of employment is "in conjunction with" the disposition of a business is ultimately a question of fact.

Both the Superintendent and Mr. Burns argued a number of factual circumstances as supporting their position that Mr. Burns' new employment with the Ottawa-Carleton Regional Police Services was not "in conjunction with" the transfer of policing services which was taking place between the Ottawa-Carleton Regional Police Services and the Ontario Provincial Police. In particular, the following facts were asserted:

Prior to his change of employment, Mr. Burns did not work exclusively in the geographic areas that were subject to the transfer of policing services.

Mr. Burns' duties were not eliminated by virtue of the transfer.

Mr. Burns' position would not have been terminated by reason of the transfer. Had he not elected to terminate his employment he would have continued to be employed by the Ontario Provincial Police and even if his position had been eliminated by the transfer the Ontario Provincial Police would have found another position for him.

Mr. Burns was not part of the group that was the subject to the transfer protocol which was negotiated between the two police services.

Mr. Burns' new employment was negotiated directly with the Chief of Police and was not on terms that paralleled any of the terms that applied to officers' transferring under the transfer protocol.

In considering the question of whether Mr. Burns' new employment was "in conjunction with" the disposition of police services from the Ontario Provincial Police to the Ottawa-Carleton Regional Police Services it is relevant that Mr. Burns' new employment commenced during the period of disposition. Mr. Burns' duties with the Ontario Provincial Police were directly related to the services that were the subject matter of the disposition. Mr. Burns was responsible for seven (7) of thirteen

(13) detachments. Of those seven (7) detachments, six (6) were the subject of the disposition. The fact that Mr. Burns' duties prior to his termination of employment were related to the services that were the subject of the disposition together with his transfer of employment taking place during the term of disposition are sufficient for Mr. Burns to become an employee of the Ottawa-Carleton Regional Police Services in conjunction with the sale, assignment or disposition of part of the police services of the Ontario Provincial Police to the Ottawa-Carleton Regional Police Services.

Accordingly, the transaction falls within the description of section 80 (1) and therefore section 80 (3) of the Act applies.

It is not necessary for an individual's position to be eliminated by virtue of the disposition for section 80 (3) to apply. Section 80(3) can apply to situations where employees voluntarily leave employment with one employer to commence employment with another if that change of employment is "in conjunction with" the sale, assignment or disposition of the first employer's business. In addition, it does not matter whether the individual negotiates his or her new employment terms directly with the new employer or is part of arrangements negotiated between employers. It is not uncommon in the purchase and sale of a business for different transfer arrangements to apply to different employees and for senior employees to have individual arrangements. Section 80(3) can also apply in circumstances where the employee's duties with the first employer are different than the duties the employee has with the second employer.

Issue 3:

1. If the answers to issues (1) and (2) are yes, what are the consequences that flow from this transaction under subsections 80(1) (a), (b) and (c) and 80(3) of the Act.

As the Tribunal found in *Horgan and Anand and Superintendent of Financial Services and Ontario Pension Board and OPSEU Pension Trust*, FST Reasons for Decision, (FST File P0120-2000 and P0147-2001), FSCO Pension Bulletin, Volume 11, Issue 1, page 149, subsection 80 (3) of the Act is unambiguous. Where a transaction described in Section 80 (1) takes place, the employment of the employee who became employed by the successor employer in conjunction with the transaction is deemed for the purposes of the Act not to be terminated by reason of the transaction.

The effect of section 80 (3) is that Mr. Burns was not entitled to commence receiving a pension on February 28, 1997, the date he ceased his employment with the Ontario Provincial Police.

ORDER

For the reasons noted above, the Superintendent's Notice of Proposal dated July 12, 2000 is quashed.

DATED at Toronto this 28th day of February 2002.

"Anne Corbett"

Anne Corbett
Member of the Tribunal and Chair of the Panel

"William M. Forbes"

William M. Forbes
Member of the Tribunal and Member of the Panel

"Louis Erlichman"

Louis Erlichman
Member of the Tribunal and Member of the Panel