

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 “*Pension Benefits Act*”);

AND IN THE MATTER OF a Proposal of the Superintendent of Financial Services to Refuse to Make an Order under section 87(1) of the *Act* relating to the CCSI Technology Solutions Corp. Retirement Program, Registration Number 0546101;

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

B E T W E E N:

BLAIR SMEARS

Applicant

- and -

**SUPERINTENDENT OF FINANCIAL SERVICES and
CCSI TECHNOLOGY SOLUTIONS CORP.**

Respondents

BEFORE:

Anne Corbett
Vice Chair of the Tribunal and Chair of the Panel

Louis Erlichman
Member of the Tribunal and of the Panel

David Short
Member of the Tribunal and of the Panel

APPEARANCES:

For the Applicant:
Bram Lecker

For the Respondent Superintendent of Financial Services Commission:
Mark Bailey

For the Respondent CCSI Technology Solutions Corp:
Daniel Pugen

HEARING DATE:

August 8, 2006

MAJORITY REASONS FOR DECISION

This hearing involves the determination of the length of Mr. Smears' membership under the CCSI Technology Solutions Corp. Retirement Program (the "Plan"), formerly the G.E. Capital Information Technology Solutions Inc. Retirement Program.

Mr. Smears was employed by G.E. Capital Technology Solutions Inc., ("G.E.") from May 1, 2000 until April 16, 2004. His membership in the Plan commenced on May 1, 2002.

The Plan is a hybrid defined benefit/defined contribution plan. The benefits to which the Applicant, Mr. Smears, was entitled were limited to defined contribution benefits. On termination of employment, Mr. Smears received his contributions to the Plan. In order to be entitled to the employer's contributions, Mr. Smears would have had to have completed the required two years of Plan membership for those benefits to have vested.

Issue

The issue before the Tribunal was the determination of the date of termination of Plan membership for Mr. Smears.

The Applicant's position is that he was terminated by the employer and therefore entitled, pursuant to the *Employment Standards Act, 2000*, S.O. 2000, c.41 (the "ESA") to a continuation of benefit plan contributions and benefit accruals during the period of notice to which he was entitled. Mr. Smears asserts that, as he was employed for more than three years but less than four and he was terminated by his employer, he was entitled to three weeks notice. If he was so entitled, then he claims he was also entitled to three additional weeks of pension contribution and membership thereby completing the mandatory two years of vesting and entitling him to the employer's contributions.

The employer, CCSI Technology Solutions Corp. (“CCSI”) as the successor to G.E., asserts that Mr. Smears’ employment was terminated by mutual agreement and therefore there is no entitlement to notice and benefit contribution during such notice period. In the alternative, CCSI argues that the lump sum payment Mr. Smears received as consideration for entering into the a Memorandum of Settlement and releasing present and future claims was a “greater right or benefit” than the minimum standards required by the ESA and accordingly those minimum standards (including notice of termination and benefit confirmation) do not apply to the Applicant.

During a pre-hearing conference held in connection with this matter an issue was raised as to the jurisdiction of the Tribunal to deal with this matter.

The Superintendent and CCSI both asserted that the Tribunal lacks jurisdiction to hear this matter. As the parties had decided not to call evidence at the hearing, it was agreed that the issue of jurisdiction would be dealt with at the time of the hearing on the merits.

Does the Tribunal have jurisdiction to hear this matter?

The Superintendent and CCSI assert that the Tribunal lacks jurisdiction to hear this matter because:

1. The determination of which adjudication body has jurisdiction to determine a dispute must be made with reference to the intent of the legislature and should not result in the conferral of jurisdiction on a party that was not intended by the legislature. The Superintendent relies on: *Police Assn. Inc. v. Regina (City) Board of Commissioners*, [2000], S.C.R. 360 at paragraphs 26 and 39 and *Weber v. Ontario Hydro*, [1995] 25 O.R. 929.
2. In order to determine jurisdiction, the “essential character” of the dispute must be considered in the factual context not the legal characteristics put forward by the parties.
3. The claim requires interpretation of the ESA.
4. Interpretation of the ESA by the Tribunal is an improper incursion into the jurisdiction of an adjudicator under the ESA.
5. The ESA demonstrates an intention by the legislature to create a complete code relating to the assertion and adjudication of the substantive entitlements set out in that Act.
6. The essential character of this dispute is one of employment law and not pension law. It involves a characterization of the cessation of employment and this factual context does not fall within the scope of the *Pension Benefits Act*.

7. The Tribunal does not have the authority to determine whether the factual circumstances of the termination of employment required that notice be given.
8. Taking jurisdiction on this issue will open a “floodgate” of dismissal and termination cases coming to the Tribunal.

In response, the Applicant asserts that this is in essence a pension dispute. The ESA is remedial legislation intended to set standards and create entitlements. The Applicant further argues that nothing in the ESA or the *Pension Benefits Act* precludes the Tribunal from exercising jurisdiction.

The parties to this proceeding submitted an Agreed Statement of Facts and they acknowledge that they have agreed on all facts but one. The fact that is in dispute as between Mr. Smears and CCSI is the characterization of the termination of employment. The determination of that fact is central to the determination of pension entitlement.

The Superintendent takes no position on this aspect of the case on the basis that the Superintendent is not a party to the facts.

This case involves the correct calculation of the period of plan membership for the purposes of determining vested benefits. Pensions arise in the context of employment relationships and adjudication of pension matters under the *Pension Benefits Act* will, from time to time, require the Tribunal to consider elements of the employment relationship. The *Financial Services Commission of Ontario Act, 1997, S.O. 1997, c 28* provides in section 20(b) that the Tribunal has exclusive jurisdiction to “determine all questions of fact or law that arise in any proceeding before it under any Act [that confers powers on or assigns duties to it].”

We agree with the Superintendent that the “essential character” of the case, which is a determining factor with respect to jurisdiction, must be considered in a factual context.

In order for the Tribunal to determine if Mr. Smears has received the pension benefits to which he is entitled the Tribunal must reach a conclusion as to the factual circumstances of his termination and then consider the application of the ESA. The Tribunal has expertise in pension matters. Pension matters necessarily involve employment issues. To conclude that the Tribunal does not have jurisdiction in pension matters where there are either factual or legal findings that arise out of an employment relationship would place an inappropriate limitation on the scope of the Tribunal’s jurisdiction given that the pension “promise” arises in the context of the employment relationship.

We do not conclude that the legislature's intention was to limit the Tribunal's jurisdiction when a pension matter also involved characterization of the employment relationship. The essential character of this dispute is pension entitlements. The issues with respect to employment and the ESA are necessary components of determining pension entitlement.

We are also not persuaded that the “flood gates” argument should require us to decline jurisdiction in this case. The decision as to whether an adjudicative body has jurisdiction will be determined on a case by case basis. There may be cases which, considered in their factual context, are in their “essential character” employment cases notwithstanding that they may have pension implications. We do not feel that this is one of those cases.

We are therefore satisfied that the Tribunal has jurisdiction to hear this matter.

Was Mr. Smears’ employment terminated by mutual agreement or was it terminated by the employer?

The parties submitted an Agreed Book of Documents and an Agreed Statement of Facts.

No other evidence was called by the parties during the hearing.

Mr. Smears relies on section 37 of the *Pension Benefits Act* and Sections 54, 57 (c), 61 (1) and 62 of the ESA.

Pension Benefits Act

Deferred pension

37. (1) A member of a pension plan who meets the qualifications in subsection (2) is entitled to the benefit mentioned in subsection (3).

Qualifications

(2) The qualifications are,

- (a) that the member must be a member on or after the 1st day of January, 1988;*
- (b) that the member must be a member for a continuous period of at least twenty-four months; and*
- (c) that the member must terminate his or her employment with the employer before reaching the normal retirement date under the pension plan.*

Amount

(3) The benefit is a deferred pension equal to the pension benefit provided in respect of employment in Ontario or in a designated province,

- (a) under the pension plan in respect of employment by the employer after the later of the 31st day of December, 1986 or the qualification date;*

- (b) *under any amendment made to the pension plan after the 31st day of December, 1986; and*
- (c) *under any new pension plan established after the 31st day of December, 1986 for members of the pension plan.*

Application of subss. (1-3)

(4) Subsections (1) to (3) do not apply in respect of benefits that result from additional voluntary contributions. R.S.O. 1990, c. P.8, s. 37.

Employment Standards Act

No termination without notice

54. *No employer shall terminate the employment of an employee who has been continuously employed for three months or more unless the employer,*

- (a) *has given to the employee written notice of termination in accordance with section 57 or 58 and the notice has expired; or*
- (b) *has complied with section 61. 2000, c. 41, s. 54.*

Employer notice period

57. *The notice of termination under section 54 shall be given,...*

- (c) *at least three weeks before the termination, if the employee's period of employment is three years or more and fewer than four years;*

Pay instead of notice

61. (1) *An employer may terminate the employment of an employee without notice or with less notice than is required under section 57 or 58 if the employer,*

- (a) *pays to the employee termination pay in a lump sum equal to the amount the employee would have been entitled to receive under section 60 had notice been given in accordance with that section; and*
- (b) *continues to make whatever benefit plan contributions would be required to be made in order to maintain the benefits to which the employee would have been entitled had he or she continued to be employed during the period of notice that he or she would otherwise have been entitled to receive. 2000, c. 41, s. 61 (1); 2001, c. 9, Sched. I, s. 1 (14).*

Deemed active employment

62. (1) *If an employer terminates the employment of employees without giving them part or all of the period of notice required under this Part, the employees shall be deemed to have been actively employed during the period for which there should have been notice for the purposes of any benefit plan under which entitlement to benefits might be lost or affected if the employees cease to be actively employed. 2000, c. 41, s. 62 (1).*

Benefit plan contributions

(2) *If an employer fails to contribute to a benefit plan contrary to clause 61 (1) (b), an amount equal to the amount the employer should have contributed shall be deemed to be unpaid wages for the purpose of section 103. 2000, c. 41, s. 62 (2).*

Same

(3) *Nothing in subsection (2) precludes the employee from an entitlement he or she may have under a benefit plan. 2000, c. 41, s. 62 (3).*

All counsel agreed that if the employment of Mr. Smears was terminated by the employer then Mr. Smears was entitled to benefit continuation during the notice period pursuant to sections 57 and 61(1)(b) or section 62 of the ESA. CCSI argues that the requirements of section 61(1)(b) or section 62, if applicable to Mr. Smears, were satisfied by the Memorandum and Release and the payments thereunder on the basis that the terms of the Memorandum are a “greater right or benefit” than the minimum standards under the ESA and therefore the minimum standards do not apply to the Applicant.

The characterization of the termination of employment must be decided by the Tribunal on the basis of the evidence before it.

The Agreed Book of Documents contains a Memorandum of Settlement signed by G.E. Solutions as the “Employer” and Blair Smears as the Employee (the “Memorandum”).

The Memorandum is a relevant document to the determination of the characterization of the termination of employment.

- The first recital of the Memorandum reads as follows:

Whereas the parties have agreed to mutually sever the employment relationships by mutual agreement effective April 16, 2004

- Section 1 of the Memorandum refers to the “... termination of the employment relationship”.

- Section 3 provides for a payment of “all wages, commissions and vacation pay earned up to and including April 16, 2004” and “... a further lump sum payment of \$53,000, less applicable statutory deductions.” The payment of \$53,000 is not characterized as a payment in lieu of notice.
- In section 4, the Employer agrees to continue contributing to the benefit plans until April 16, 2004.
- Section 5 provides that: “The said payment are inclusive of any and all obligations which the Employer may have to the Employee pursuant to the provisions of the *Employment Standards Act of Ontario ...*”.

The Agreed Book of Documents also contains a Release and Indemnity signed by Mr. Smears (the “Release”).

The Release makes reference to the employment of Mr. Smears ceasing on April 16, 2004 but is not helpful in characterizing the nature of the termination of employment.

Both parties relied on the Record of Employment signed by the employer. The Record of Employment requires completion of a box indicating the reason for issuing the Record of Employment. The employer is to complete the box with an alphabet code that corresponds to defined explanations. For example, Code “M” is dismissal and Code “E” is quit.

The Record of Employment was completed with Code “K” which stands for “other”. In the comments section which is required to be completed when Code “K” is used the word “restructuring” appears.

The Applicant argues that the payment of \$53,000 is evidence of termination by the employer and section 5 was included in the Memorandum to comply with the requirement to give three weeks’ notice to Mr. Smears under sections 61 and 62 of the ESA.

The Respondent CCSI relies on the wording of the first recital to the Memorandum and argues that the Record of Employment is at best ambiguous.

The respondent CCSI argued that the onus is on the Applicant to provide evidence that termination of employment was by the employer, and relied upon *Osachoff v. Interpac Packaging Systems Inc.*(1992) 44 C.C.E.L. 156 (B.C.S.C.) in this regard. The Applicant did not dispute that the onus is on him to demonstrate that termination of employment was by the employer. We agree with the respondent CCSI’s position in this regard.

There is not sufficient evidence before the Tribunal that would allow us to conclude that Mr. Smears was terminated by his employer. The clearest characterization of the circumstances of the termination of employment is found in the Memorandum which makes reference to

“mutual agreement”. The Record of Employment is ambiguous. Payment of a lump sum is not in and of itself sufficient for us to conclude that the payment was made in lieu of notice and was therefore a payment under section 61(1)(a) of the ESA. Accordingly, we conclude that Mr. Smears’ pension entitlements have been correctly determined and his plan membership ceased as at April 16, 2004.

Order

The Tribunal confirms the decision of the Deputy Superintendent of Pensions to refuse to make an order that CCSI as administrator of the Plan pay an amount equal of the commuted value of the deferred pension in the Applicants account.

DATED at Toronto this 30th day of October, 2006.

“Anne Corbett”

Anne Corbett
Vice Chair of the Tribunal and Chair of the Panel

“David Short”

David Short
Member of the Tribunal and of the Panel

MINORITY REASONS

I agree with the majority on the issue of jurisdiction.

With respect to the substantive issue:

It was agreed among the parties that, if Mr. Smears' period of plan membership was extended by three weeks notice of termination as the result of the ESA, he would have accumulated sufficient service time to vest his pension benefits and qualify for the employer contributions to his pension plan.

CCSI argued that the notice provisions of the Employment Standards Act do not apply to Mr. Smears' termination of employment.

First, they argued that Mr. Smears' termination of employment was, if not a voluntary quit, mutually agreed and therefore not subject to the notice provisions of the ESA. They referred to the language of the Memorandum of Settlement which states that "the parties have agreed to mutually sever the employment relationship by mutual agreement" as evidence that Mr. Smears' leaving of employment was, if not entirely voluntary, not a dismissal.

I do not believe that the language of the Memorandum of Settlement denotes anything more than the parties' mutual agreement to the terms of settlement in the light of the termination.

The ESA is minimum standards legislation. It lays down minimum requirements for the treatment of workers employed in Ontario. It is written to cover all employees working in Ontario, and then enumerates various exceptions and exemptions.

The Section 56(1) of the ESA provides a broad definition of termination of employment for the purposes of entitlement to notice and severance:

- 56(1)** *An employer terminates the employment of an employee for purposes of section 54 if,*
- (a) the employer dismisses the employee or otherwise refuses or is unable to continue employing him or her;*
 - (b) the employer constructively dismisses the employee and the employee resigns from his or her employment in response to that within a reasonable period; or*
 - (c) the employer lays the employee off for a period longer than the period of a temporary layoff.*

Section 56(1)(b) refers to resignation as the result of constructive dismissal, as well as dismissal, as grounds for eligibility for the notice provisions of Section 54.

While the Tribunal has limited documentary evidence on which to base its judgment, there are several indications in the material provided that this was not a voluntary quit on Mr. Smears' part, and would fit within the definition of termination in Section 56(1).

First, the Record of Employment for Employment Insurance purposes provided by the company to Mr. Smears refers to the cause of the termination as “Restructuring” rather than a “quit”.

Second, the Employer agreed, in the Memorandum of Settlement, to pay Mr. Smears \$53,000 on termination in addition to his earned wages, commissions and vacation pay. If Mr. Smears had in fact quit voluntarily, the Employer would have been under no obligation to pay Mr. Smears any extra amount. This, particularly in the light of evidence concerning ongoing disagreements between Mr. Smears and his employer, is strong evidence that Mr. Smears’ termination was a constructive dismissal, rather than a voluntary quit that would absolve the employer of the notice requirements of the ESA.

CCSI also argued that, even if Mr. Smears were considered to be dismissed, its substantial cash payment to Mr. Smears provided a greater benefit than ESA minimum standards, thereby negating the notice requirement.

This argument fails on two grounds. First, Section 5 of the ESA states clearly that it is not possible to contract out of a minimum standard unless there is provided a greater benefit which “directly relates to the same subject matter”. The cash payment does not directly relate to notice provisions and cannot therefore be considered a greater benefit. In any case, Section 62(1) of the ESA deems notice to be given for the purposes of benefit plan entitlements, even if cash is provided in lieu of notice.

Finally, CCSI argued that Mr. Smears, in signing the Memorandum of Settlement and Release, waived all further claims under the pension plan and the PBA. They argued that he had written off his pension rights in exchange for the cash payment, and was now trying to claim benefits that he had already received or waived in the settlement.

There is, however, no specific reference in the Memorandum or Release to the pension plan or the PBA, though the Release refers generally to “benefits” and “any other statute or regulation”. It is, moreover, not possible to explicitly (let alone implicitly) opt out of minimum PBA standards. Furthermore, if the \$53,000 payment encompassed (albeit implicitly) all of Mr. Smears’ pension rights, it is not clear why the company subsequently refunded to Mr. Smears his own contributions to the pension plan.

For these reasons, I would rule that Mr. Smears was vested in the CCSI pension plan and should receive the employer’s share of contributions to his plan, and would direct the Superintendent to issue such an order.

DATED at Toronto this 30th day of October, 2006.

“Louis Erlichman”

Louis Erlichman
Member of the Tribunal and of the Panel