

**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 to make an Order under Section 87 of the Act in relation to the **Pension Plan for Employees of National Steel Car Limited**, Registration No. 0215038;

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

**B E T W E E N:**

**NATIONAL STEEL CAR LIMITED**

**Applicant**

**- and -**

**SUPERINTENDENT OF FINANCIAL SERVICES and TASA RISTIC**

**Respondents**

**BEFORE:**

Paul W. Litner  
Member of the Tribunal and Chair of the Panel

Florence Holden  
Member of the Tribunal and of the Panel

Martin Brown  
Member of the Tribunal and of the Panel

**APPEARANCES:**

For the Applicant:

Mr. Jeffrey Sommers and Mr. Abdul-Basit Khan

For the Superintendent of Financial Services:

Ms Deborah McPhail

For the Respondent Tasa Ristic:

Mr. Chris Winterburn

**Hearing Date:**

November 1, 2006

**REASONS FOR DECISION**

**NATURE OF THE APPLICATION**

The Applicant seeks an Order that the Respondent Superintendent of Financial Services (the “Superintendent”) not proceed with a Notice of Proposal to Make an Order requiring the Applicant to credit the Respondent Mr. Tasa Ristic (“Mr. Ristic”) with service under the Pension Plan for Employees of National Steel Car Limited, Registration No. 0215038 (the “Plan”), for periods of time during which Mr. Ristic was laid-off from employment and in receipt of partial permanent disability benefits from the Workmen’s Compensation Board (the “WCB”).

**ISSUE**

As agreed by the parties, the central issue to be resolved by the Tribunal in this matter is whether Mr. Ristic is entitled to Credited Service pursuant to the terms of the Plan, for the periods from July 14, 1972 to November 6, 1973 and from February 24, 1975 to February 24, 1977, during which he was on lay-off and receiving partial permanent disability benefits from the WCB.

**FACTS**

Both the Applicant and the Superintendent appeared before the Tribunal and filed written submissions, together with an Agreed Statement of Facts and an Agreed Book of Documents. Mr. Ristic appeared before the Tribunal and through his representative made oral submissions at the hearing, but did not file any written submissions or evidence, or otherwise object to the contents of the Agreed Statement of Facts and Agreed Book of Documents. The hearing proceeded on the basis of the Agreed Statement of Facts and the Agreed Book of Documents, which the Tribunal fully reviewed, the salient portions of which are summarized below.

*Mr. Ristic’s Participation in the Plan*

Effective June 30, 1952, the Applicant (then known as National Steel Car Corporation Limited) (the “Company”) established the National Steel Car Corporation Limited Employee Pension Plan (the “Original Plan”) which provided benefits to members in respect of service from June 30,

1952 to June 30, 1965. Mr. Ristic was hired by the Company on June 24, 1964 and became a member of the Original Plan on that date.

Effective July 1, 1965, the Company established the Plan to provide benefits to members in respect of service on and after July 1, 1965. Mr. Ristic became a member of the Plan effective July 1, 1965. The terms of the Plan were set out in a document called the Amended Pension Plan for Hourly-Paid Employees of National Steel Car Corporation Limited (the "1965 Plan text"). The 1965 Plan text, included in the Agreed Book of Documents, was used by all parties as the governing plan document under which Mr. Ristic's benefit entitlements are to be determined. The Tribunal declined Mr. Winterburn's request to introduce the current Plan text into evidence at the hearing, upon the objection of the Applicant, on the basis that it did not apply at the date of determination and thus was not relevant.

In December 1971, Mr. Ristic suffered a workplace injury. From December 21, 1971 to January 17, 1972, Mr. Ristic was on disability leave during which period he received temporary total disability benefits from the WCB (now known as the Workplace Safety and Insurance Board) ("Disability Period 1"). Following Disability Period 1, Mr. Ristic returned to active employment with the Company in the same position that he held prior to departing on leave.

From February 14, 1972 to April 10, 1972, Mr. Ristic was again off work due to a workplace injury during which period he received temporary total disability benefits from the WCB ("Disability Period 2"). On April 11, 1972, Mr. Ristic returned to active employment with the Company in the same position that he held prior to departing on leave during Disability Period 2.

In accordance with the terms of the Plan, Mr. Ristic was granted Credited Service for both Disability Periods 1 and 2.

Effective April 11, 1972, Mr. Ristic began receiving a partial permanent disability pension from the WCB which was payable whether or not he was actively employed. Mr. Ristic continued to receive this pension throughout the remainder of his employment with the Company, including periods of lay-off.

From July 14, 1972 to November 6, 1973, Mr. Ristic was on lay-off from employment with the Company ("Lay-off Period 1"). On November 7, 1973, the lay-off ended and Mr. Ristic returned to active employment with the Company. For the two-year period from February 24, 1975 to February 24, 1977, Mr. Ristic was again on lay-off from employment with the Company ("Lay-off Period 2").

On February 24, 1977, Mr. Ristic's employment with the Company terminated under the terms of the applicable collective bargaining agreement because he had not been recalled within the two-year lay-off period.

In determining Mr. Ristic's Credited Service under the Plan, the Company did not include Lay-off Period 1 or Lay-off Period 2 (collectively, the "Lay-off Periods").

### *The Plan Provisions*

The terms of the 1965 Plan text in effect during the Lay-off Periods included the following provisions relevant to the issue before us:

Section I            Definitions

5.        “Employee” means any person who is regularly employed by the Company and who is paid on an hourly basis on and after the Effective Date, but said term does not include any such person employed on a temporary, casual or part-time basis. A person shall be deemed to be regularly employed by the Company if such person is on the payroll of the Company or is off the payroll during an absence which does not constitute a break in employment as hereinafter provided in Paragraph 7 of this Section I.

...

7.        “Continuous Service” means continuous employment by the Company. The Continuous Service of an Employee shall be deemed to have commenced on the date of his first such employment or in the event of a break in his employment as hereinafter provided, on the date of his re-employment thereafter, and shall terminate upon retirement or death, or on the date of a break in his employment, whichever shall first occur. The Continuous Service of an Employee shall be deemed to have been broken (a) by a quit, discharge or failure to return to work upon recall, or (b) by a layoff, absence for sickness, or leave of absence of a duration of more than one year, or (c) by the termination of the Plan. The Continuous Service of an Employee shall not, however, be broken by his retirement on account of permanent and total disability pursuant to Paragraph 2 of Section III hereof if such Employee is re-employed by the Company immediately upon his recovery from such permanent and total disability, but the period of such retirement shall not be included in computing the Continuous Service of such Employee. The period of any absence of an Employee which does not constitute a break in employment shall not be included in computing the Continuous Service of such Employee.

8.        “Credited Service” means the service of an Employee as determined in accordance with Section II of the Plan.

...

Section II            Credited Service

...

Paragraph 3        On and After July 1, 1965

Service on and after July 1, 1965 shall be credited as follows:

- (a)        One year of Credited Service for each Plan Year in which the Employee has 1700 or more compensated hours.
- (b)        Where the Employee’s total hours compensated during a Plan Year are less than 1700 hours, a proportionate credit shall be given to the nearest 1/10 of a year.
- (c)        For the purpose of computing Credited Service:
  - (i)        Hours of pay at an overtime or premium rate shall be computed as straight time hours.
  - (ii)       The number of complete weeks for which an Employee receives Workmen’s Compensation benefits shall be credited on the basis of 40 hours for each week, provided that no Employee shall be credited with service under this subsection after retirement.

...

Paragraph 4      Loss of Credited Service

For purposes of this Plan, an Employee who is not otherwise eligible for a pension or a deferred vested pension shall lose all Credited Service and if re-employed shall be considered a new Employee

- (i) If the Employee quits;
- (ii) If the Employee is discharged; or
- (iii) If the Employee's Continuous Service is broken for any other reason.

The terms of the Plan in effect during Lay-off Period 1 and Lay-off Period 2 did not include a definition of the term "Workmen's Compensation benefits".

*Mr. Ristic's Pension Benefits*

Upon the termination of Mr. Ristic's employment, the Company determined that he had 8.93 years of Credited Service under the Plan. The Company originally took the position that Mr. Ristic was not entitled to any benefits under the Plan, as he was not vested under the terms of the Plan in effect at the date of his termination. Based on the 1965 Plan text, a member was not vested unless and until he or she had 10 or more years of Credited Service. Initially the Financial Services Commission of Ontario staff supported the Company's position that Mr. Ristic was not vested.

However, in subsequent correspondence with the Financial Services Commission of Ontario staff and also at this hearing it was acknowledged by the Company that Mr. Ristic was in fact entitled to a deferred vested benefit from the Plan.

The Company did not concede that Mr. Ristic had attained 10 years or more of Credited Service, and continues to take the position that Mr. Ristic's 8.93 years of Credited Service (which does not include the Lay-off Periods) is correct. However, the Company acknowledged that Mr. Ristic was nevertheless vested based on the provisions of Section 21 of the *Pension Benefits Act*, R.S.O. 1970, c. 342 (the "1970 Act"), which applied to the Plan and Mr. Ristic at the relevant times. The 1970 Act did not require the Plan to grant Credited Service during the Lay-off Periods but did provide that a member of a pension plan was entitled to a vested benefit if he or she had been a member of the Plan for a period of 10 years or more. The Company takes the position that Mr. Ristic qualifies for a deferred vested benefit from the Plan based on his plan membership, but not based on his Credited Service. In this regard, the Company conceded that the vesting provisions of the 1965 Plan text were inconsistent with the requirements of the 1970 Act and the 1970 Act overruled the Plan terms.

On February 6, 2006, the Superintendent issued a Notice of Proposal to make an Order, pursuant to section 87 of the Act, that would require the Company to credit Mr. Ristic with Credited Service under the Plan for the periods of time during which Mr. Ristic was laid-off from employment and receiving partial permanent disability benefits from the WCB (the "Notice of Proposal").

## ANALYSIS

### *The Positions of the Parties*

The Company advanced two main arguments in support of its position that Mr. Ristic is not entitled to Credited Service during the Lay-off Periods:

1. Mr. Ristic was not entitled to Credited Service in respect of the Lay-off Periods because he was not an “Employee”, as that term was defined under the 1965 Plan text; and
2. the Plan does not provide for Credited Service to be earned by an employee in receipt of partial permanent disability pension while on lay-off.

The Superintendent argued that Mr. Ristic is entitled to Credited Service for the Lay-off Periods based on the clear and express terms of the Plan. According to the Superintendent, paragraph 3 (c) (ii) of Section II of the Plan clearly provides that Credited Service accrues while a member is in receipt of “Workmen’s Compensation benefits” which term should be broadly interpreted to include any and all benefits payable from the WCB, including the partial permanent disability benefits payable to Mr. Ristic during the Lay-off Periods. In the alternative, the Superintendent argued that if the Tribunal finds that the Plan terms are ambiguous, we should apply the legal doctrine of *contra proferentem*, and construe any such ambiguity against the Company, as the drafter of the Plan, and in favour of the Plan members.

As noted above, the Respondent Mr. Ristic did not file any written submissions with the Tribunal, but did appear before the Tribunal and, through his representative Mr. Winterburn, made submissions on the issues under consideration. In essence, Mr. Ristic supported the Superintendent’s position, also arguing that the Plan terms expressly require Credited Service to be accrued where a member is in receipt of “Workmen’s Compensation benefits”, that such term is not limited and includes any type of benefits payable to a member from the WCB (including partial permanent disability benefits) and, in the alternative, that any ambiguity in such term should be construed against the Company and in favour of Mr. Ristic.

We have addressed each of these arguments below.

### *Principles of Interpretation*

The parties gave us varying submissions on the principles of interpretation which the Tribunal ought to employ in determining Mr. Ristic’s Credited Service under the terms of the 1965 Plan text.

The courts have provided ample guidance to the Tribunal in terms of the approach to be used to interpreting pension plan documents such as the 1965 Plan text. A useful summary of these principles is set forth in the following passage from *Electrical Industry of Ottawa Pension Plan v. Cybulski* [2001] O.J. No. 4593 (Ont. Sup. Ct.) (“*Cybulski*”) at paras. 16-23:

In interpreting the provisions of a pension plan certain general principles of interpretations apply.

...

The pension plan is registered with FSCO and the Canada Customs and Revenue Agency. The Plan of course has to comply with the provisions of both statutes. The Court should avoid interpretations, which do not comply or avoid the provisions of these statutes.

In exercising their interpretative function, the Trustees generally use interpretative principles that are the same or, analogous to contract interpretation and, to a lesser extent, statutory interpretation.

...

The Courts also look to the economic and social purpose of the contract in order to interpret such documents. In the instance of ambiguous contract language, the interpretation should give effect to reasonable expectations of the parties. Courts are reluctant to interpret a contract in such a way as to produce an unrealistic result. The Supreme Court has held that the most reasonable and fairest interpretation of a contract is one, which promotes the intention of parties to the contract. (See *Non-Marine Underwriters, Lloyd's of London v. Scalera*, [2000] 1 S.C.R. 551 at para. 68 onward.)

The Court after reviewing the documents and the facts must give careful consideration to the complete picture. In interpreting pension plan contracts, the Courts are guided not only by the language of the pension plan document, but also by the parties' conduct, statements and representations made to each other. (See *Bathgate et al. v. National Hockey League Pension Society et al.* (1994), 16 O.R. (3d) 761 (C.A.) at 768.)

The Superintendent argued that the legal doctrine of *contra proferentem* ought to be applied by the Tribunal in this case. The manner in which courts apply the doctrine of *contra proferentem* in cases involving the interpretation of contracts is well-articulated in *Milner v. Manufacturer's Life Insurance Company*, [2006] B. C. J. No. 2787 (Sup. Ct.) ("*Milner*"), para. 7:

The leading case on the interpretation of insurance contracts is **Consolidated Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.**, [1980] 1 S.C.R. 888. In this case, Mr. Justice Estey, speaking for the majority, outlined the steps to follow when interpreting insurance contracts. Step one in the interpretive process is that effect must be given to the intention of the parties, to be gathered from the words they have used. However, Mr. Justice Estey cautioned against using the literal meaning of the words where to do so would bring about an unrealistic result or one not contemplated in the commercial atmosphere in which the insurance was contracted. If this first step does not resolve the ambiguity, step two in the interpretative process is to apply the doctrine of *contra proferentem*. This doctrine was applied in **Indemnity Insurance Company of North America v. Excel Cleaning Service**, [1954] S. C. R. 169. Here it was explained that in the face of ambiguity it is appropriate to construe the language used in an insurance contract in a manner favourable to the insured because it is within the insurer's power to be as clear as it wants to be when trying to limit its risk. Properly applied, *contra proferentem* is a rule for resolving a conflict between two reasonable but opposing interpretations of the policy wording. However, one should only have to resort to this rule if all other rules of construction fail to ascertain the meaning of a document.

Although *Milner* involved the interpretation of an insurance contract, which in some respects is different than the interpretation of a pension plan, we find these statements to be persuasive. We think that the principles of contractual interpretation and the order in which they ought to be employed, as noted in the foregoing passage, are helpful in the interpretation of a pension plan document.

In analyzing the issues before us, we have adopted the foregoing principles of interpretation and applied them to the terms of the 1965 Plan text in the context of the parties' submissions.

In order to decide the question of Mr. Ristic's entitlements, we have addressed the Company's two main arguments in turn. If the Company were to succeed on either of these arguments, Mr. Ristic would not be entitled to Credited Service during the Lay-off Periods.

*1. Was Mr. Ristic an "Employee" as defined in the Plan during the Lay-off Periods?*

The Company argued that Mr. Ristic was not entitled to Credited Service during the Lay-off Periods because he was not an "Employee" within the meaning of the 1965 Plan text.

In support of its position, the Company submitted that:

- Only a person who is an "Employee" as defined in the 1965 Plan text is eligible to earn Credited Service. Paragraph 3 of Section II of the Plan makes it clear that only an Employee can receive and earn Credited Service.
- More specifically, paragraph 3(c)(ii) of Section II of the Plan expressly provides that during a period in which a member is in receipt of "Workmen's Compensation benefits", he or she must be an Employee in order to earn such Credited Service.
- In order to come within the definition of an "Employee" under the 1965 Plan text, a person must be "regularly employed" by the Company. Under that definition a person is deemed to be regularly employed if he or she is (i) on the payroll of the Company or (ii) off the payroll during an absence which does not constitute a break in employment under the Plan (i.e. a break in Continuous Service).
- Mr. Ristic was not on the Company's payroll during the Lay-off Periods. Under paragraph 7 of Section I of the 1965 Plan text (the definition of Continuous Service), a break in employment is deemed to occur where the Employee is on a lay-off of more than one year. Since each of the Lay-off Periods were greater than one year in duration, each Lay-off Period resulted in a deemed break in Mr. Ristic's employment with the Company.
- As Mr. Ristic was not on the payroll of the Company during the Lay-off Periods and since each Lay-off Period constituted a break in his employment under paragraph 7 of Section I of the 1965 Plan text, Mr. Ristic was not regularly employed with the Company during such periods, was not an "Employee" for purposes of the Plan and hence is not entitled to Credited Service for the Lay-off Periods.

The Superintendent conceded that "Continuous Service" is deemed broken for Plan purposes if the employee is on a lay-off, absence for sickness or leave of absence for more than one year and in such circumstances the affected person loses the status of an "Employee" under the Plan, but argued that the break in status occurs at the end of the one year period, not the beginning of the lay-off period as contended by the Company.

Mr. Ristic argued that he was an "Employee" for purposes of the Plan because he was "regularly employed" within the meaning of the 1965 Plan text. Mr. Ristic directed us to the relevant provisions of a Collective Agreement between the Company and the union representing Mr. Ristic to support his position that an employee only loses all seniority and service rights if

laid-off for a period in excess of two years. Accordingly, Mr. Ristic contends that he does not cease being regularly employed until a lay-off period exceeds two years in duration.

By all accounts, the 1965 Plan text was not a model of clarity in terms of drafting. For example, none of the parties were able to provide us with an explanation of the meaning of the last sentence in the definition of the term “Continuous Service”. That sentence provides: “The period of any absence of an Employee which does not constitute a break in employment shall not be included in computing the Continuous Service of such Employee.” The wording of this sentence, taken in context, appears to us to be the complete opposite of the result that was intended. The Company suggested that this was likely an error in drafting and the provision should instead provide that the period of any absence of an Employee which does not constitute a break in employment shall be included in computing the Continuous Service of such Employee.

Although the foregoing provision in the definition of Continuous Service is not directly relevant to Mr. Ristic’s entitlements under the Plan, it illustrates the dangers inherent in applying a literal interpretation to the 1965 Plan text and the unrealistic result which can occur if such an approach is adopted without considering the purpose of the Plan provisions when read together and the reasonable expectations of the parties.

In any event, we think it unnecessary to rely on principles of interpretation which apply where the terms of a contract are ambiguous as the 1965 Plan text is quite clear that any person who is not an “Employee” cannot accrue Credited Service. Moreover, we think it is clear that when a person ceases to accrue Continuous Service within the meaning of the Plan, he or she is no longer an “Employee” for Plan purposes.

Under the 1965 Plan text, we find that Continuous Service is deemed to have been broken by a lay-off, absence for sickness or leave or absence, as applicable, of a duration of more than one year. In our view, this would result in a break in employment only at the end of the one year lay-off or leave. In Mr. Ristic’s case, he ceased being an “Employee” and stopped accruing Continuous Service one year into Lay-off Period 1 and Lay-off Period 2, not at the outset of each Lay-off Period as the Company contends. While we accept that under the Plan terms an Employee is deemed to have been terminated and ceases accruing Continuous Service during a lay-off, the express terms of the Plan do not state that that deemed break in employment is retroactive to commencement of the leave of lay-off. Rather, the most reasonable interpretation of paragraph 7 of Section I of the 1965 Plan text is that a deemed break in employment occurs one year into the leave.

It does not matter that these provisions of the 1965 Plan text are not consistent with the treatment of an employee’s seniority and service under a collective agreement, as the Plan itself operates independently of any collective agreement. None of the parties were able to point us to a provision in a collective agreement which would require the Plan to use the same definitions of service or employment as in the Collective Agreement. Nor were the Plan terms part of or expressly subject to the Collective Agreement.

According to our interpretation of the definition of “Continuous Service” in the Plan, we find that Mr. Ristic would be entitled to an additional year of Continuous Service for each of the Lay-Off Periods since the Plan terms do not deem his employment to be terminated retroactive to the beginning or commencement of his lay-off.

However, if the Tribunal were to accept the Company's second argument, Mr. Ristic would not be entitled to any additional Credited Service and hence we must next analyze that argument.

*2. Does the Plan provide for the accrual of Credited Service while an employee is in receipt of partial permanent disability benefits?*

The Applicant argues that the Plan does not provide for Credited Service to be earned by an Employee in receipt of partial permanent disability pension while on lay-off.

This issue boils down to an interpretation of the terms "Workmen's Compensation benefits" as used in the 1965 Plan text and whether that term encompasses the partial permanent disability benefits payable to Mr. Ristic during the Lay-off Periods, as the Respondents contend.

An employee who suffers a workplace injury and is unable to perform his or her duties is eligible to receive temporary total disability benefits from the WCB while unable to perform his or her duties with the employer. Mr. Ristic was entitled to such temporary total disability benefits during Disability Period No. 1 and Disability Period No. 2, and was given Credited Service during those periods.

An employee who does not fully recover from a workplace injury is eligible to receive permanent disability benefits from the WCB. As noted above, effective April 11, 1972, Mr. Ristic began receiving partial permanent disability benefits from the WCB, which were payable whether or not Mr. Ristic was actively employed. Mr. Ristic continued to receive these benefits throughout both his active employment with the Company and also during the Lay-off Periods.

The term "Workmen's Compensation benefits" is not defined under the Plan and, when read in isolation, is ambiguous given the different types of disability benefits payable from the WCB. Using the principles of interpretation discussed above, the Tribunal must interpret this term within the context of the entire Plan document, taking into account the relevant legislation and the reasonable expectations of the parties, with a view to an interpretation which will produce a reasonable, fair and realistic result in the context in which the pension plan operates and in accordance with applicable legislation.

Nothing in the 1970 Act requires that Credited Service be granted while an individual is in receipt of benefits from the WCB. Nor did the parties point to any other workmen's compensation, pension standards or tax legislation which would require such a result. Instead, the right to accrue Credited Service during period of disability or lay-off is entirely dependent upon the terms of the Plan.

Under the terms of the 1965 Plan text, Credited Service is based on an Employee's number of compensated hours worked during a year. Subject to limited exceptions, an Employee does not receive Credited Service for periods during which he or she does not work any compensated hours. The Plan does provide some exceptions; for example, it recognizes that Employees who are off work as a result of having suffered a workplace injury should not be denied Credited Service. As such, the Plan includes an exception to the general rule that an Employee only earns Credited Service for periods of compensated hours worked. Specifically, under paragraph 3(c)(ii) of Section II of the 1965 Plan text, an employee is credited for 40 compensated hours for each complete week during which the employee received "Workmen's Compensation benefits".

We note that the Plan also provides for differential treatment for those who meet the definition of “permanent and total disability” by providing for a retirement pension in certain circumstances. Mr. Ristic did not qualify for benefits in this regard.

We are satisfied that the purpose and intent paragraph 3(c)(ii) of Section II of the 1965 Plan text is to ensure that employees who are unable to work due to workplace injury are not penalized and thus are permitted to continue to accrue Credited Service. We must recognize the manner in which the Plan, a defined benefit pension plan, is designed to operate. The basic concept under the Plan is that Credited Service is awarded to Employees who work compensated hours. Therefore an employee who was laid-off would cease to accrue further Credited Service. In other words, employees who are not disabled and are able to work do not accrue Credited Service if they are laid-off by the Company.

We find that the purpose of the exception in paragraph 3(c)(ii) of Section II of the Plan is to protect employees who are injured on the job and unable to work on a full-time basis, whether on a permanent or temporary basis. Such persons would be given Credited Service for the duration of the time they are unable to work. This is consistent with the treatment of other employees who are able to work on a reduced basis, who have the ability to accrue Credited Service on a pro-rata basis (see paragraph 3 (b) of Section II of the 1965 Plan text).

We do not believe that paragraph 3(c)(ii) of Section II encompasses the accrual of Credited Service during periods of receipt of partial permanent disability benefits as the Respondents contend. To adopt such an interpretation would put Mr. Ristic in a better position than other part-time Plan members who would not get any further accrual of Credited Service for periods they do not work.

As noted above, the partial permanent disability benefits were payable to Mr. Ristic while he was actively employed by the Company and while he was laid-off. If we were to adopt the Respondent’s interpretation of the Plan, Mr. Ristic would be entitled to accrue Credited Service for his hours worked (under paragraphs 3(a) and (b) of Section II) and in addition would get credit for 40 hours per week (under paragraph 3(c) of Section II) while he was actively employed and in receipt of his partial permanent disability benefits from the WCB.

We think that such an interpretation would result in an absurdity. Mr. Ristic would, under this interpretation, be entitled to Credited Service both for hours in which he worked and was compensated and also in respect of the same period during which he received partial permanent disability benefits from the WCB during his active employment. This would place him in a superior position to any other active plan member who is given Credited Service only for hours worked or while disabled, on leave or lay-off.

The key distinction made under the Plan is between those employees who cannot work versus those who are able to work. In Mr. Ristic’s case, he was able to work and accrued additional Credited Service while he was actively employed. During the Lay-off Periods, Mr. Ristic was treated in the same fashion as any other employee who was laid-off from employment with the Company. For the lay-off provisions to have meaning, they must apply to Mr. Ristic’s case to preclude accrual of Credited Service, but permit Continuous Service for one year.

The intention of such provisions in a plan is to protect the persons who have suffered a disability and who are unable to work as a result of such a disability from losing their pension accrual

during such periods of disability. It is not to provide them with an enhanced pension accrual while they are in active employment or, as in this case, while they are in active employment and subsequently in a lay-off.

The Respondents urged us to accept that the term “Workmen’s Compensation benefits” must be interpreted broadly to include any and all benefits payable from the WCB, in the absence of any express language limiting its application and also argued that the legal doctrine of *contra proferentem* ought to apply if the Tribunal finds that the term is ambiguous.

While *prima facie* it would appear that the term “Workmen’s Compensation benefits” would extend to any and all benefits payable to a Plan member from the WCB, in our view the Respondents’ position with respect to the interpretation of the phrase is fundamentally misconstrued. It is not necessary for the Company to establish that the term be more precisely limited in order to justify its interpretation, rather it is up to the Tribunal to determine the purpose of this provision in the context of the Plan, using the rules of contractual and statutory interpretation as described above.

We also have serious doubts about the Superintendent’s ability to rely on *contra proferentem* in support of the Notice of Proposal. The Superintendent in issuing a notice of proposal is exercising a statutory power pursuant to Section 87 of the Act, to cause the plan administrator to take action in accordance with the terms of the pension plan. In exercising such authority, the Superintendent can only require the administrator to comply with the terms of the Act or the terms of the plan as filed. In this case there has been no allegation by the Superintendent of breach of the terms of the Act, once vesting was acknowledged by the Company. A charge that the Company has failed to comply with the Plan terms is inconsistent with the view that the Plan terms are ambiguous.

In any event, we have concluded that this is not a case where we ought to apply the doctrine of *contra proferentem*. As noted by the court in *Milner, supra*, we only ought to have resort to *contra proferentem* if all other rules of construction first fail to ascertain the meaning of the document.

The Respondents relied on *McCreight v. 146919 Canada Ltd.*, [1991] O.J. No. 138 (H.C.) as authority for the proposition that we ought to interpret any ambiguous provisions of the Plan against the Company. However, *McCreight* involved a dispute between an employer and employees over ownership of surplus. This is quite different from the case before us in which a plan administrator is being called upon to interpret plan provisions in a reasonable, fair and consistent manner among different classes of plan members and employees.

In our view, a purposive interpretation of the Plan should take into account the fact that the Company, as administrator, has a discretionary power and statutory duty to interpret plan provisions in a fair and consistent manner. In *Cybulski, supra*, the Court acknowledged the role of a trustee in interpreting plan and trust documents (at para. 19):

Trustees are obliged to interpret Trust Agreements in a way that is evenhanded as between beneficiaries. Interpretative results that favour a beneficiary group or group of beneficiaries over others, are to be avoided unless, the trust document language mandates its results.

The role being played by the Company as administrator of the Plan is a fiduciary one, similar to the role being played by the trustees in the *Cybulski* case. It is not in the nature of an

employer-employee dispute over ownership of trust (surplus) assets, as was the case in *McCreight*.

Section VIII of the Plan provides that the Company is responsible for administering and interpreting the Plan, as follows:

The Company shall be responsible for all matters relating to the administration, interpretation and application of the Plan.

...

The Company may make such rules and regulations for the operation of the Plan as it shall be necessary, and may amend or revoke such rules from time to time and shall have the power to decide finally and conclusively any and all questions that may arise in connection with the Plan subject to and consistent with the provisions of the Plan.

We accept that the Company's interpretation of paragraph 3 of section III of the Plan has been consistently applied as between Mr. Ristic and other part-time Plan members. Since the Company has exercised its authority as Plan administrator to interpret this paragraph in a reasonable and consistent manner, that interpretation should be allowed to stand. The Company's interpretation of this term should not be interfered with since it achieves a reasonable and equitable result, and reflects the manner in which the Plan has been consistently administered and the reasonable expectations of the parties to the plan (the Company and the Plan members).

Accordingly, we are of the view that the term "Workmen's Compensation benefits" as used in the 1965 Plan text, does not extend to partial permanent disability benefits paid to Mr. Ristic during his active employment with the Company and during the Lay-off Periods.

#### *Mr. Ristic's Entitlements under the Plan*

As a result, Mr. Ristic is not entitled to Credited Service during the Lay-off Periods.

However, as noted above, the Company conceded that Mr. Ristic is entitled to a pension benefit from the Plan based on his Credited Service (not counting the Lay-off Periods) and was entitled to be paid that pension retroactive his normal retirement date of August 1, 1987.

It was of great concern to the Tribunal that Mr. Ristic still has not been paid any of his pension nearly 20 years after his normal retirement date. While there is some explanation for this delay (Mr. Ristic did not contact the Company to claim entitlement to a vested pension until 1998, was initially not supported by the pension regulator, and his entitlement to a vested pension was only resolved in 2005), it became apparent at the hearing that Mr. Ristic still has not been paid his pension under the Plan nor has he been offered proper election forms (even if the amount of his pension was in dispute). We are disappointed in both the Company and the regulator for the delays in resolving this matter.

The Company, as administrator of the Plan, has a duty under the Act to take all reasonable and necessary steps to ensure that benefits are paid to Plan members as and when they become entitled to them. The delay in processing Mr. Ristic's pension is well beyond the relevant time frames set forth in the Act.

We strongly encourage the Company to ensure that Mr. Ristic's benefits are paid to him, with appropriate interest, forthwith upon his completing any documentation necessary to allow the administrator to pay his benefits.

## **CONCLUSION**

We find in favour of the Applicant.

The Superintendent is ordered not to proceed with the Notice of Proposal dated February 6, 2006.

**Dated** at the City of Toronto this 16<sup>th</sup> day of February, 2007.

"Paul Litner"

Paul W. Litner

Member of the Tribunal and Chair of the Panel

"F. Holden"

Florence Holden

Member of the Tribunal and of the Panel

"M. Brown"

Martin Brown

Member of the Tribunal and of the Panel