

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF the *Pension Benefits Act*, R.S.O. 1990, c. P.8, as amended (the "PBA");

AND IN THE MATTER OF a Proposal of the Superintendent of Financial Services to Refuse to Make Orders under section 87 of the PBA requested by the York University Faculty Association respecting the manner in which the Administrator of the York University Pension Plan, Registration No. 0329763, calculates and applies annual adjustments to retirement pensions of the York University Pension Plan;

AND IN THE MATTER OF a Hearing in accordance with subsection 89(8) of the PBA.

BETWEEN

YORK UNIVERSITY FACULTY ASSOCIATION

Applicant

and

SUPERINTENDENT OF FINANCIAL SERVICES and YORK UNIVERSITY

Respondents

and

CANADIAN UNION OF PUBLIC EMPLOYEES LOCAL 3903

Added Party

BEFORE:

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

Shiraz Bharmal,
Member of the Tribunal and of the Panel

Paul Litner,
Member of the Tribunal and of the Panel

APPEARANCES:

For York University Faculty Association,
James K. McDonald

For Canadian Union of Public Employees Local 3509,
David Wright

For York University,
J. A. Prestage,
Kathryn Bush

For the Superintendent of Financial Services,
Mark Bailey

HEARING DATE:

February 23, 2010

DECISION

NATURE OF THE APPLICATION

The essential matter at issue before the Tribunal is the interpretation of certain provisions of the York University Pension Plan (the "Plan") with respect to the calculation of the amount of pension benefit payable to retired members under the Plan.

All parties appearing before the Tribunal assert that the Plan is clear and unambiguous and capable of only one interpretation. They disagree on what that interpretation should be.

At issue is the manner in which two clauses of the Plan are to be interpreted. One of the two clauses in question (the "annual adjustment clause") relates to the calculation of an annual adjustment to pensions in pay based on the investment performance of the appropriate portion of the pension trust fund. The second clause (the "non-reduction clause") provides that the application of the annual adjustment clause shall not reduce a pension in pay below the amount paid in the previous year. This second clause operates to provide a guarantee that a pension payment will not be less than that paid the previous year.

The parties dispute whether the annual adjustment clause is calculated on a cumulative year over year basis or only applies each year to the pension paid in the previous year. In other words, does the annual adjustment, whether positive or negative, accumulate over time or is it an adjustment applied each year to the pension paid the previous year, thus eliminating the effect of any negative adjustment.

The Applicant, York University Faculty Association, asserts that the correct interpretation of the Plan is that the amount of pension benefit paid in the previous year is the amount which is to be adjusted. If the adjustment of this amount results in a decrease then the amount of pension paid will remain the same by virtue of the operation of the non-reduction clause and the amount of

pension actually paid becomes the starting point for the application of the adjustment clause the following year.

The Canadian Union of Public Employees Local 3903 ("CUPE"), added as a party, supports the position of the Applicant.

The Respondent, York University (the "University"), which is the administrator of the Plan, disagrees with the Applicant's interpretation and asserts that the Plan language does not support the position advanced by the Applicant and CUPE.

The University's administration of the Plan has been based on its interpretation that the amount of the pension paid in the previous year is relevant for the purposes of the non-reduction clause only but not for the purposes of the application of the annual adjustment clause. The University argues that different wording is used to describe the amount which is subject to the adjustment in the annual adjustment clause itself and that such wording references the amount of the pension as originally calculated and as adjusted in previous years.

Accordingly, based on its interpretation, the University has administered the Plan on the basis that the annual adjustment clause is applied to the amount of pension benefit as originally calculated under the Plan plus the aggregate of all past adjustments (both negative and positive) and not to the pension paid pursuant to the non-reduction clause. The amount of pension as originally calculated as adjusted over the years is then compared to the actual pension paid in the previous year and if it is lower, then the non-reduction clause in the Plan is triggered. The non-reduction clause provides that in such circumstances, the amount of pension paid in the adjustment year will be the amount of pension paid in the previous year.

The Superintendent of Financial Services (the "Superintendent"), which is the other Respondent, agrees with the University's interpretation. The Superintendent, therefore, issued a Notice of Proposal (the "NOP") on September 11, 2008, proposing to refuse to make an order to require the administrator of the Plan to cease taking account of any negative adjustments in investment returns which are below the level identified in the Plan in previous years, and to refuse to make an order to require the administrator to rectify the pensions of former members affected by such negative adjustments.

ISSUES

As noted above, the essential issue to be resolved by the Tribunal in this proceeding is the correct interpretation of the annual adjustment clause and the non-reduction clause.

At a pre-hearing conference, the parties had also agreed that the following issues should be determined by the Tribunal.

- (i) What degree of deference, if any, must be afforded by the Tribunal to the Superintendent's decision in the NOP refusing to make the orders requested by the Applicant?
- (ii) Given the Tribunal's determination of the correct interpretation of the Plan, what remedies, if any, should be granted by the Tribunal?

- (iii) Was the University required to give notice regarding amendments to the adjustment and non-reduction provisions of the Plan as set out in the NOP and if so, did the University comply with that requirement and, if not, are there grounds for waiving such a requirement under subsection 26 (4) of the PBA and what were the consequences?

At the hearing the parties agreed that the issue of notice (issue (iii)) was no longer an issue on which a determination by the Tribunal was being sought.

The parties agreed to defer any consideration of the remedial issue (issue (ii)) until the Tribunal has made its determination on the interpretation issue and only if the Tribunal determines in favour of the Applicant and CUPE on the interpretation issue.

The Applicant requested that the Tribunal remain seized of two additional issues referred to by the Applicant as the Mid-year Retirees and Misrepresentation issues:

- (iv) Mid Year Retirees. There is a dispute between the parties as to the application of the adjustment mechanism to the final determination of the retirement date base pension for mid-year retirees; and
- (v) Misrepresentation. The Applicant asserts that even if the University interpreted the Plan correctly, it misrepresented the terms of the Plan to Members.

The Tribunal makes no decision as to whether these issues are properly before the Tribunal or within its jurisdiction. The parties may, within 60 days of this decision, make submissions to the Tribunal in respect of its jurisdiction to hear either or both of these issues.

FACTS

The Plan was established effective July 1, 1960 to provide pensions and certain ancillary benefits for members of the staff of York University. The University is the administrator of the Plan.

The Plan is a contributory hybrid pension plan consisting of a money purchase component to which both the University and members contribute and a minimum defined benefit component determined in accordance with the formula set out in the Plan. This minimum guaranteed pension benefit is a pension benefit amount calculated by a formula which is based on the employee's service and earnings. Following retirement, a member receives his money purchase pension and, if the money purchase pension does not meet the minimum guaranteed pension benefit amount, the retiree also receives the difference between the money purchase benefit amount and the minimum guarantee pension benefit amount.

The cost of the minimum guaranteed pensions in excess of the money purchase pensions is funded by additional employer (University) contributions as determined by periodic actuarial valuations.

Prior to 1985, money purchase pensions were paid as variable annuities which were adjusted to reflect annual pension fund earnings after retirement. The minimum guarantee amounts were

increased each year after retirement with the rate of increase in the Consumer Price Index, to a maximum of 2% per year. An additional pension was paid in any year when the adjusted minimum guarantee amount was higher.

The Plan assets are held pursuant to a Trust Agreement dated as of January 1, 1977. There is a Pension Fund Board of Trustees (the "Board of Trustees") which is responsible for the administration of the pension trust fund (the "Fund").

At a December 5, 1980 meeting of the Board of Trustees, W.M. Mercer Limited ("Mercer") was requested to develop a proposal to improve pension benefits for current and future pensioners which would retain a minimum guaranteed pension, while addressing the issue of inflation.

Mercer prepared a number of reports in connection with proposals to improve pension benefits under the Plan which were considered at various meetings of the Board of Trustees in 1983 and 1984.

At the meeting of the Board of Trustees on June 8, 1984 the Board of Trustees resolved that the Board of Governors be urged to approve improvements to the Plan, including the use of a four year moving average return for the purposes of adjusting pensions and a guarantee of non-reduction to pensions if the four year average return were to fall below 6%.

On May 12, 1986 the University's Board of Governors approved a resolution adopting an amended and restated plan text as at July 1, 1985.

In calculating the pensions that are to be paid under the Plan subsequent to July 1, 1985, the University tracked and adjusted the amount that is originally calculated as the pension benefit when the benefit is first paid pursuant to the Plan. Effective January 1 of each year following the calculation of the initial pension, the amount originally calculated as a pension benefit was adjusted up or down based on the four year average return formula. If a member retired mid-year the adjustment for the first year was pro-rated. The result of the calculation (referred to by the parties in an agreed statement of facts as a "Tracked Amount") was carried forward in each subsequent year on a cumulative basis. The Tracked Amount was then, in each year, compared to the pension actually paid in the previous year and if greater, the pension paid was adjusted upwards. If the Tracked Amount was less than the pension paid in the previous year the pension paid remained unchanged by operation of the non-reduction guarantee.

For example in a year when the four year average return was less than 6%, the University adjusted the Tracked Amount accordingly but the actual pension paid to a retiree was not reduced (due to the Plan's non reduction guarantee). In the next year, if the four year average return was greater than 6%, the Tracked Amount was increased. If the Tracked Amount was then greater than the pension paid for the prior year, the pension paid was increased to the new Tracked Amount level. If the new Tracked Amount remained below the prior year pension paid there was no adjustment in the pension paid. The amount of the pension paid remained unchanged until a year when it was exceeded by the Tracked Amount.

In each year prior to 2002 the four year average return at each year-end was calculated to be above 6%. Accordingly, the Tracked Amount and the amount of pension paid were adjusted by equal amounts.

In each of 2003, 2004, and 2005, the four year average return as at December 31 of the previous year was below 6% and the pensions paid in these years were maintained at their existing levels. During these years the University made an adjustment to the Tracked Amounts that it maintained for pensioners of -2.1481% effective January 1, 2003, -0.6035% effective January 1, 2004 and -0.8861% effective January 1, 2005.

The annual adjustment each year is derived using a geometric formula: $((\text{the four year average return at December 31 of previous year})\% - 6\%)/106\%$. The four year average return ending in 2005 was 7.6050%. The University increased the Tracked Amounts by 1.5142%, effective January 1, 2006 for all retirees who retired prior to 2005. However, the Tracked Amounts for members who retired prior to 2002 (and at least some members who retired in 2002) remained lower than the pensions paid during 2005. Pensions paid for 2006 for these members were maintained at the 2005 level.

The four year average return ending in 2006 was 12.4885%. The University increased the Tracked Amounts by 6.1212% effective January 1, 2007 for all retirees who retired prior to 2006.

The four year average return ending in 2007 was 8.5646%. The University increased the Tracked Amounts by 2.4194% effective January 1, 2008 for all retirees who retired prior to 2007.

The four year average return ending in 2008 was 0.5508%. The University reduced the Tracked Amounts by 5.1408% effective January 1, 2009 for all retirees who retired prior to 2008. Pensions paid in 2009 are being maintained at the 2008 level.

The actuarial reports for the Plan have assessed the Plan's liabilities on a basis that is consistent with the University's calculation of a Tracked Amount as outlined above and the Plan has at all time been funded on that basis.

As at December 31, 2008 the actuarial valuation of the Plan shows a going concern deficit of \$265.6 million and a solvency deficit of \$281.4 million.

Had the University made a positive adjustment to the amount of benefit paid to such a pensioner in any year in which the four year average return exceeded 6% without regard to prior years' experience in which the four year average return was less than 6% (i.e. without regard to the Tracked Amount), Mercer has calculated that the Plan's going concern liabilities as at December 31, 2008 would be increased by \$87.2 million and its liabilities on a solvency basis would be increased by \$11.7 million.

THE PLAN TEXT

Effective July 1, 1985 the Plan provided:

7.01 At Normal Retirement Date

(a) Variable Pension

A Member who retires from service with the University at normal retirement date will receive a pension, commencing on that date and payable in monthly instalments for the Member's remaining lifetime, in such amount as can be provided from the total balance to the Member's credit in his or her "Money Purchase" Component Account based on the actuarial table in force for Plan purposes at that time. This basic pension will be in the form of a variable pension which will remain constant during the balance of that Pension Year but which will be subject to adjustment, as determined by the Actuary, at the commencement of each subsequent Pension Year based upon the Four Year Moving Average Fund return at that date.

(b) Supplementary Pension

In addition, each Member who retires at normal retirement date will receive such amount of supplementary pension from the Minimum Guarantee Fund as may be required in each Pension Year to provide a total pension during that Pension Year equal to the minimum guaranteed benefit to which the Member is entitled during that year.

The amount of the Member's minimum guaranteed benefit, commencing at normal retirement date, will be calculated as follows and will be subject to adjustment, as determined by the Actuary, at the commencement of each subsequent Pension Year based upon the Four Year Moving Average Fund Return at that date:

1.4% of that portion of the member's Final Average Earnings which does not exceed the average of the Year's Maximum Pensionable Earnings for those years;

plus

1.9% of that portion of the Member's Final Average Earnings which exceeds the average of the Year's Maximum Pensionable Earnings for those years;

multiplied by

the number of years (completed days as a fraction) of Credited Services as at normal retirement date.

(c) No reduction of Amount of Pension Paid

Notwithstanding the foregoing, in the event that the amount of pension payable under paragraphs (a) and (b) above, as adjusted at the commencement of any given Pension Year, is less than the amount of

pension paid in the previous Pension Year, the amount of pension to be paid in that Pension Year shall not be reduced but shall instead remain the same as that paid in the previous Pension Year.

The Plan was restated effective January 1, 1992, and the relevant clauses provided:

7.01 At Normal Retirement Date

(1) Variable Pension

A Member who retires from service with the University at normal retirement date will receive a pension, commencing on that date and payable in monthly instalments for the Member's remaining lifetime, in such amount as can be provided from the total balance to the Member's credit in his or her "Money Purchase" Component Account based on the actuarial tables in force for Plan purposes at that time, which shall take into account the provision for increases in pension after retirement and with respect to contributions made from January 1, 1992, the guarantee of non-reduction of pension under Section 13 of the Plan.

(2) Supplementary Pension

In addition, each Member who retires at normal retirement date will receive such amount of supplementary pension from the Minimum Guarantee Fund as may be required in each Pension Year to provide a total pension during that Pension Year equal to the minimum guaranteed benefit to which the Member is entitled during that year.

The amount of the Member's minimum guaranteed benefit, commencing at normal retirement date, will be calculated as follows:

1.4% of that portion of the Member's Final Average Earnings, determined at normal retirement date, which does not exceed the average of the Year's Maximum Pensionable Earnings for those years;

plus

1.9% of that portion of the Member's Final Average Earnings, determined at normal retirement date, which exceeds the average of the Year's Maximum Pensionable Earnings for those years;

multiplied by

the number of years (completed days as a fraction) of Credited Service as at normal retirement date.

...

13.01 Adjustment and Non-Reduction of Pensions

(1) Pensions payable under Section 7.01, 7.02, 7.03, 7.04, 8.02, 9, 11.01(1)(a) and 11.02(2)(b) will be subject to adjustment, as determined by the Actuary, at the commencement of each Pension Year, starting with the Pension Year subsequent to the year in which the pension begins to be paid. The percentage adjustment is determined by the following formula:

$$\left[\frac{(1 + A)}{(1 + B)} - 1 \right] \times 100\%$$

where

A is the Moving Four Year Average Fund Return at the commencement of each Pension Year, expressed as a decimal to 6 places; and

B is .06

(2) Notwithstanding the provisions of Section 13.01(1), in the event that the amount of pension payable under Section 7.01, 7.02, 7.03, 7.04, 8.02, 9, 11.01(1)(a) or 11.02(2)(b), whichever is applicable, as adjusted at the commencement of any given Pension Year is less than that amount of pension paid in the previous Pension Year, the amount of pension paid shall not be reduced, but shall remain the same as that paid in the previous Pension Year.

The 1992 changes were adopted as part of a significant redrafting of the Plan following a major overhaul of the *Income Tax Act* and Regulations provisions relating to retirement savings arrangements, including provisions which required that the minimum guaranteed pension benefit had to be a self-supporting defined benefit provision. All parties agreed that the 1992 changes were not intended to reflect any change in the application of the pension adjustment.

ANALYSIS

Deference to the Superintendent

Although raised as an issue to be determined by the Tribunal, all parties agreed that the issue of deference to the Superintendent is not applicable to a hearing *de novo*. The Superintendent and the University argue that the views of the Superintendent should be entitled to "respect" without offering any authority for that concept or definition of the term.

This is a hearing *de novo* and, as the Tribunal has previously held, where it comes to a different conclusion than the Superintendent, "there is no basis in reason or in statute to refrain from acting on it's [the Tribunal's] own view". *Marino and Jones v. Superintendent of Financial Services*, Decision No. P0257-2005-3 (August 1, 2007) at pp. 21-22, appeal dismissed *Hydro One Inc. v Ontario Superintendent of Financial Services* [2008] O.J. No. 1436 (Div. Ct.), appeal dismissed 2010 ONCA 6 (C.A.)

Accordingly, the Tribunal does not accept that the decision of the Superintendent is entitled to deference in this matter.

Correct Interpretation of the Plan

While the parties disagree on the correct interpretation of the Plan, all parties assert that the Plan is clear and unambiguous.

If the language of the Plan is not clear and unambiguous, the University argues that the Tribunal must rely on extrinsic evidence and further argues that such evidence supports the University's interpretation.

The Applicant argues that if the language of the Plan is found to be ambiguous, the Tribunal ought to apply the *contra proferentum* rule to interpret the Plan. The Applicant argues that the application of the *contra proferentum* rule supports the Applicant's interpretation of the Plan as any ambiguity must be interpreted against the University who is the unilateral drafter of the Plan.

All parties agree that neither resort to extrinsic evidence nor the application of the *contra proferentum* rule is necessary if the Tribunal finds that the Plan language is clear and unambiguous.

The Tribunal must start from applying the well-established basic rules of construction to interpretation of the Plan. The words in the Plan should be given their natural and ordinary meaning and the Plan should be interpreted as a whole and every part of the text should be given effect. *Davenport v. Hudson's Bay Company*, [2006] O.J. No. 3623 (Sup. Ct.) at paragraph 27.

Applying the basic rules of construction to the interpretation of the 1985 and 1992 Plan, the Tribunal finds that the University's interpretation of both the 1985 and 1992 Plan is correct and the interpretation advanced by the Applicant and CUPE is not supported by the Plan language.

As set out above, Section 7.01 of the 1985 Plan provided:

7.01 At Normal Retirement Date

(a) Variable Pension

A Member who retires from service with the University at normal retirement date will receive a pension, commencing on that date and payable in monthly instalments for the Member's remaining lifetime, in such amount as can be provided from the total balance to the Member's credit in his or her "Money Purchase" Component Account based on the actuarial table in force for Plan purposes at that time. This basic pension will be in the form of a variable pension which will remain constant during the balance of that Pension Year but which will be subject to adjustment, as determined by the Actuary, at the commencement of each subsequent Pension Year based upon the Four Year Moving Average Fund return at that date.

(b) Supplementary Pension

In addition, each Member who retires at normal retirement date will receive such amount of supplementary pension from the Minimum Guarantee Fund as may be required in each Pension Year to provide a

total pension during that Pension Year equal to the minimum guaranteed benefit to which the Member is entitled during that year.

The amount of the Member's minimum guaranteed benefit, commencing at normal retirement date, will be calculated as follows and will be subject to adjustment, as determined by the Actuary, at the commencement of each subsequent Pension Year based upon the Four Year Moving Average Fund Return at that date:

1.4% of that portion of the member's Final Average Earnings which does not exceed the average of the Year's Maximum Pensionable Earnings for those years;

plus

1.9% of that portion of the Member's Final Average Earnings which exceeds the average of the Year's Maximum Pensionable Earnings for those years;

multiplied by

the number of years (completed days as a fraction) of Credited Services as at normal retirement date. (emphasis added)

(c) No reduction of Amount of Pension Paid

Notwithstanding the foregoing, in the event that the amount of pension payable under paragraphs (a) and (b) above, as adjusted at the commencement of any given Pension Year, is less than the amount of pension paid in the previous Pension Year, the amount of pension to be paid in that Pension Year shall not be reduced but shall instead remain the same as that paid in the previous Pension Year. (emphasis added)

The Tribunal agrees with the position of the University that the key elements of the 1985 wording are:

- (i) the Plan language makes a distinction between a pension payable and a pension paid.
- (ii) the pension payable is the amount of a member's pension entitlement both initially and at the beginning of each year as determined pursuant to sections 7.01 (a) and 7.01 (b).
- (iii) the pension payable amounts originally determined under sections 7.01 (a) and 7.01 (b) (the basic pension and the supplementary pension) were subject to annual adjustment each year based on the four year moving average fund rate of return. This adjustment could be positive or negative.

- (iv) the non-reduction guarantee in section 7.01 (c) did not "set" the pension payable to which the member was entitled, that amount was determined by Sections 7.01 (a) and 7.01 (b). Section 7.01 (c) simply provided a non-reduction guarantee. Section 7.01 (c) provided the pension that would *actually be paid* in "that pension year" would not be reduced where the effect of the calculations under sections 7.01 (a) and 7.01 (b) were such that the decline in the pension as a result of the adjustment would result in a pension being less than that paid the previous year.

Accordingly, section 7.01 (c) does not determine the pension entitlement but only the pension payment. The pension entitlement is the amount of pension payable as determined pursuant to the calculations in Sections 7.01 (a) and 7.01 (b).

The provisions set out in Section 7.01 (c) do not provide that the future adjustment is to be made to the pension payment (the "guaranteed" pension amount under Section 7.01 (c)). The language of Sections 7.01 (a) and 7.01 (b) is very clear that it is the amount calculated under those sections that are subject to the year over year adjustments (positive and negative) based on the four year average return.

Accordingly, the University's interpretation and administration of the Plan with respect to annual adjustments was consistent with the unambiguous provisions of the 1985 Plan. The Tribunal also finds that the 1992 Plan terms are consistent with the 1985 Plan terms.

The Tribunal agrees with the University that the use of Tracked Amounts is only an administrative device to determine the successive amounts of pension payable, and does not require explicit wording in the Plan provisions as argued by the Applicant.

Given that the Tribunal has found that the Plan terms are clear and unambiguous the Tribunal has no need to make regard to extrinsic evidence or to the factual matrix in which the 1985 Plan was adopted, to determine the issues in this proceeding. If however the Tribunal had needed to rely on extrinsic evidence to interpret the provisions of the Plan, such extrinsic evidence was consistent with the interpretation adopted by the University.

Prior to adoption of the 1985 Plan text, Mercer prepared a report that identified as a matter for decision the issue of whether pension adjustments in years following negative fund performance would be based on the pension actually paid in the previous year or the amount that would have been paid but for the non-reduction guarantee. The decision made and recorded in subsequent correspondence was that the adjustment would apply not to the pension actually paid but to the amount that would have been paid but for the non-reduction guarantee.

Following the May 29, 1984 meeting of the Board of Trustees at which a Mercer report discussing proposed changes to the Plan was discussed, Mercer wrote a letter dated May 30, 1984 which posed this question:

In years subsequent to a year in which pensions were subsidized to prevent a reduction, should the future adjustment be applied to subsidized pension or the pension that would have been paid had there been no subsidy?

In a letter dated December 18, 1984 from Mercer to Mr. Small, Secretary to the Board of Trustees, Mercer confirms the decision to apply the adjustment to the pension that would have been paid but for the non-reduction guarantee. This is further confirmed in a letter from Mr. Small to Mercer dated February 15, 1985.

Based on the foregoing, the Tribunal finds that the *contra proferentum* rule has no application in this case.

In light of the Tribunal's finding in this matter, issue (ii) is not required to be decided.

Order

The Application is denied and the Superintendent is instructed to proceed to issue the Orders in accordance with the Notice of Proposal dated September 11, 2008.

Dated at Toronto this 9th day of July, 2010.

“Anne Corbett”

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

“Shiraz Bharmal”

Shiraz Bharmal,
Member of the Tribunal and of the Panel

“Paul Litner”

Paul Litner,
Member of the Tribunal and of the Panel