

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, as amended (the “Act”).

AND IN THE MATTER OF a Proposal of the Superintendent of Financial Services to Refuse to Make an Order under Section 87(2)(a) of the *Pension Benefits Act* relating to The Pension Plan for Certain Hourly Rated Employees (Dixie Manufacturing Plant) of Fruehauf Canada Inc., Registration No. 7959.

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

B E T W E E N:

RAINER REDMANN

Applicant

- and -

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

BEFORE:

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

Martin Brown,
Member of the Tribunal and of the Panel

Shiraz Bharmal,
Member of the Tribunal and of the Panel

APPEARANCES:

Rainer Redmann, the Applicant and unrepresented

Deborah McPhail, Counsel for the Superintendent of Financial Services

HEARING DATES:

June 18, 2009 and July 9, 2009

REASONS FOR DECISION:

1. BACKGROUND

The applicant, Mr. Rainer Redmann, is a former member of The Pension Plan for Certain Hourly Rated Employees (Dixie Manufacturing Plant) of Freuhauf Canada Inc. (the "Plan").

The Plan was established on July 1, 1961 as a defined benefit, non-contributory pension plan. The Plan was wound-up as at May 31, 1989 due to the closure of the Dixie Manufacturing Plant. At the date of Plan windup, Mr. Redmann was 46 years of age and had 10.5 years of credited service in the Plan. He was entitled on retirement to a monthly lifetime pension of \$168.00 a month, representing the monthly benefit of \$16.00 multiplied by his 10.5 years of Plan service. He was also entitled to monthly bridge benefits of \$73.50, being \$7.00 times his 10.5 years of service. He was entitled to begin collecting his pension with a reduction at age 60 or as an unreduced pension from age 62.

The commuted value of his benefit as at the date of Plan windup was \$5,942.00 which consisted of \$4,994.00 for the pension benefit and \$948.00 for the bridge benefit.

Mr. Redmann was a "locked-in" member of the Plan. Accordingly, upon discontinuation of the Plan, he was entitled pursuant to the provision of section 42 (1) of the *Pension Benefits Act* to receive either a lifetime pension payable in accordance with the terms of the Plan or to elect to transfer the commuted value of his pension to another employer's registered pension plan or to his own registered retirement savings plan ("RRSP") provided that that such RRSP was administered as a locked-in RRSP.

2. RELEVANT LEGISLATION

The relevant sections of the *Pension Benefits Act* are as follows:

- 42(1) A former member of a pension plan who, on or after the 1st day of January, 1988, terminates employment or ceases to be a member of the pension plan and who is entitled to a deferred pension is entitled to require the administrator to pay an amount equal to the commuted value of the deferred pension,
- (a) to the pension fund related to another pension plan, if the administrator of the other pension plan agrees to accept the payment;
 - (b) into a prescribed retirement savings arrangement; or
 - (c) for the purchase for the former member of a life annuity that will not commence before the earliest date on which the former member would have been entitled to receive payment of pension benefits under the pension plan.

- (2) The entitlement under subsection (1) is subject to the prescribed limitations in respect of the transfer of funds from pension funds.
- ...
- (6) The administrator shall not make payment,
 - (a) under clause (1) (b) unless the retirement savings arrangement meets the requirements prescribed by the regulations; or
 - (b) under clause (1) (c) unless the contract to purchase the deferred life annuity meets the prescribed requirements.
- ...
- (11) The administrator is discharged on making the payment or transfer in accordance with the direction of the former member if the payment or transfer complies with this Act and the regulations.

The relevant section of the Regulation 909 under the Act is as follows:

- 21. (1) This section governs the transfer of an amount equal to the commuted value of a deferred pension under clause 42 (1) (b) of the Act into a prescribed retirement savings arrangement.
 - (1.1) The following are the prescribed retirement savings arrangements:
 - 1. A life income fund.
 - 1.1 A locked-in retirement income fund.
 - 2. A locked-in retirement account.
 - 3. An RRIF.
 - 4. An RRSP.
 - (1.2) If the amount to be transferred does not exceed the amount prescribed for such a transfer under the *Income Tax Act* (Canada), it must be transferred into a life income fund or a locked-in retirement account.

Mr. Redmann was also entitled to receive a share of the Plan's surplus. There is no dispute with respect to the payment to Mr. Redmann of his entitlement to his share of the surplus. The issue in dispute is whether Mr. Redmann has received the pension to which he was entitled under the Plan. Mr. Redmann asserts that he did not request the transfer of the commuted value to a locked-in RRSP but rather elected to collect a monthly pension in accordance with the terms of the Plan.

It is the position of the Superintendent that Mr. Redmann was in fact paid his pension entitlement under the Plan by way of a transfer of the commuted value to a locked-in RRSP.

3. ISSUE

The issue to be determined in this case is whether or not Mr. Redmann received the commuted value of his pension benefit from the Plan following the termination of the Plan in May of 1989.

If Mr. Redmann did not receive the commuted value from the Plan then he is entitled to a monthly pension in accordance with the terms of the Plan.

4. EVIDENCE OF MR. REDMANN

Mr. Redmann appeared in his own behalf and gave testimony as to the discussions that he participated in at the time of the termination of his employment as a result of the closing of the Dixie Manufacturing Plant, and the payments that he received following his termination. In particular, Mr. Redmann recalls that:

- He had conversations with the Plan actuary where he was advised that he could take an immediate payment or leave his money in the pension plan.
- His decision was to leave his money in the pension plan and that is what he communicated to the actuary.
- He also understood that the union (the National Automobile, Aerospace and Agricultural Implement Workers of Canada (C.A.W.) (the “Union”)) had negotiated a special payment of about \$5,000.00 and that because he was not yet age 55 that money would need to be deposited into a locked-in RRSP account.
- He recalls that he gave information to either the actuary or the company to enable the opening of an RRSP account and the direct deposit into that account of the special payment negotiated by the Union in the amount of approximately \$5,000.00.
- He received the amount of approximately \$5,000.00 into the locked-in account sometime in September of 1989.

Mr. Redmann also testified that he called the company’s offices in Chicago in 2005 and inquired about his pension. He was told that “his pension was there”.

5. SUPERINTENDENT'S EVIDENCE

The Superintendent produced a number of documents in support of the Superintendent’s position that the payment of approximately \$5,000.00 received into the locked-in RRSP account was the commuted value of the pension benefit to which Mr. Redmann was entitled under the Plan. In particular, the Superintendent produced the following:

- A statement from Confederation Life entitled “Fruehauf Canada Statement of Benefit Payments and Other Disbursements for the Period January 1, 1990 to March 31, 1990”. This statement shows an entry date of January 5th with the type of payment described as “Termination ... RR Redmann ... \$6,747.67.”
- A Scotiabank statement showing an account summary which was provided to the Superintendent by Mr. Redmann and described as a summary of his RRSP accounts. This summary shows two accounts: a Locked-In Retirement Account opened September 6, 1989 which is noted as "closed" and has a zero balance. A handwritten entry beside this account which Mr. Redmann acknowledges was made by him says, “FROM FRUEHAUF WAS ≈ 5,000,-”. The statement also shows an RSP Account opened February 2, 1982 with a balance of \$15,442.55.

- A form entitled “Transaction History Summary” also from Scotiabank showing a transfer of \$14,324.08 from the Locked-In Retirement Account On March 27, 2007.
- A letter dated November 20, 2007 from Eckler Ltd. Consultants and Actuaries to Trailmobile Corporation which letter included the following statements:

The commuted value calculation based on our calculation was \$5,942.00 which is made up of \$4,994.00 for the pension benefit and \$948.00 for the bridge benefit.

The amount of transfer value as at May 31, 1989 for Mr. Rainer was \$6,295.00 with the actual amount paid out on January 5, 1990 being \$6,758.00.

Thus Mr. Rainer was paid the appropriate amount of commuted value for his pension with such amount being consistent with the benefit provided on his employee benefit statement.

- A letter dated November 8, 2007 from Trailmobile Corporation to Mr. Redmann. The connection between Trailmobile Corporation and Fruehauf Canada is not completely clear from the material provided to the Tribunal; however, it would appear that they may both have been divisions of Gemala Industries Limited. In any event, Trailmobile Canada would appear to have access to the historical records of the Plan. The November 8, 2007 letter includes the following statements:

The Plan was wound up on May 31, 1989. At the time of the windup, you were entitled to an amount of \$6,295.00 with respect to your pension earned to the date of the windup. On January 5, 1990 you received a payment of \$6,757.67 from the pension plan. That is the \$6,295.00 with interest from May 31, 1989 to the date of payment. Please find enclosed a copy of the financial statement from Confederation Life showing that this payment was made to you out of the Plan’s funds.

At the time of this payment, you would have been older than age 45 and had more than 10 years of service in the Plan, therefore, this amount would have been locked-in funds. Locked-in funds are required to be transferred directly to an institution holding the locked-in RRSP. This transfer of funds could only have occurred with the direction from you, as the administrator would not have otherwise known where to transfer the funds. Please also note that the funds were transferred to a financial institution and not directly to you.

We were not provided with any written documentation with respect to the instructions that were given by Mr. Redmann to either the actuary or his employer or Plan in connection with how he wished to receive his pension entitlement when his employment was terminated. Accordingly, we must assess, based on the evidence provided to us, whether or not, on a balance of probabilities, Mr. Redmann has received the pension to which he is entitled under the Plan.

During the course of his final argument, Mr. Redmann asserted that there were in fact three payment amounts to which he was entitled. His pension, which he asserts he elected to leave in the Plan, a special RRSP payment negotiated by the Union in the amount of approximately \$5,000.00 and the surplus payment. He acknowledges that he received the surplus payment but it is his position that the money deposited into the locked-in RRSP account was the special payment money.

The Superintendent requested that the hearing be adjourned to allow further enquiries to be made of the Union with respect to whether there was a special payment in addition to the pension entitlement. The Tribunal granted that request. The hearing resumed on July 9th, 2009; however, the further enquiries made of the Union did not provide any additional information that is useful or of assistance in determining if there was an additional payment negotiated by the Union.

6. ANALYSIS

The Superintendent relied on the decision of the Financial Services Tribunal in *Capaldi v. Ontario (Superintendent of Financial Services)* (2006), 56 C.C.P.B. 109 (F.S. Trib). That case also dealt with whether or not a pension entitlement had been transferred from the plan in question to the former member's RRSP. The Panel in that case was also required to make its decision with incomplete evidence and to make its decision on the best evidence before the Tribunal. In that case, the Tribunal concluded that the best evidence were the documents provided by the Plan's funding agent.

The Superintendent also relied on *Hofer (Re)*, [1997] B.C.E.S.T.D. No. 452, a decision of the British Columbia Employment Standards Tribunal. That case involved a claim for hours of work and required a consideration of the test to be applied where there are incomplete records before the tribunal. The following extract from that decision is relevant:

In the absence of proper records ... it is reasonable for the Tribunal (or the Director's Delegate) to consider the employees' records or their oral evidence concerning their hours of work. These records or oral evidence must then be evaluated against the employer's (incomplete) records to determine the employee's entitlement (if any) to payment of wages. Where an employer has failed to keep any payroll records, the Director's Delegate may accept the employee's records (or oral evidence) unless there are good and sufficient reasons to find that they are not reliable ...

...

Thus, in my opinion, the appropriate test to apply in such circumstances is "the best evidence rule". That is the Director's Delegate must make a reasoned decision, based on an evaluation of all of the records and evidence which is available, to determine what is the best evidence of the number of hours actually worked by the employee.

No evidence has been provided to the Tribunal which conclusively demonstrates that Mr. Redmann received or did not receive his pension. Accordingly, we must evaluate all of the

evidence provided to us and determine, on a balance of probabilities, whether or not the pension entitlement of Mr. Redmann was paid out as a commuted amount in 1990.

We find that Mr. Redmann was paid the commuted value of his pension.

The statement from Confederation Life showing a payment in January of 1990 together with the banking documentation provided to us showing an account opened in September of 1989 as a locked-in RRSP account and Mr. Redmann's own testimony that he received a payment into the locked-in RRSP account in the amount of approximately \$5,000.00 and that he was required to have such funds deposited to a locked-in RRSP account all support the conclusion that Mr. Redmann's pension entitlement under the Plan was paid as a commuted value amount into Mr. Redmann's locked-in RRSP account.

Mr. Redmann testified that his instructions to the actuary were that he wished to receive his pension by way of monthly payment from the Plan in accordance with the Plan terms. We accept that Mr. Redmann genuinely and honestly believed that he was still entitled to receive a monthly pension. Regrettably, this belief was reinforced by a conversation with the representative of the employer in 2005. Mr. Redmann would have been at or near age 62 in 2005 and his inquiry at that time is consistent with his belief that he was entitled to collect a monthly pension in accordance with the terms of that Plan. We accept that Mr. Redmann did not believe that when he opened the locked-in RRSP account it was for the purpose of receiving the commuted value of his pension. However, the opening of that account is consistent with the exercise of one of the two options that was presented to him with respect to his pension entitlement, that being the payment of the commuted value to a locked in RRSP account. Mr. Redmann has acknowledged that the payment into the locked-in RRSP account came from Fruehauf. In the absence of any evidence as to what that payment might have been other than Mr. Redmann's own evidence that it was a special payment negotiated by the Union, we conclude that the payment was the payment of the pension amount as shown on the Confederation Life statement. That payment was the entitlement of Mr. Redmann under the Plan and he is not entitled to a monthly pension under the terms of the Plan. We also note that if the payment had been a special RRSP payment negotiated by the Union, outside of the pension plan, there is no reason in law for such a special payment to have been locked-in.

7. ORDER

The Panel orders that the applicant's request be dismissed and the Superintendent's Notice of Proposal be affirmed.

8. COSTS

As no party made a request as to costs, the Panel makes no order as to costs.

Dated at Toronto this 11th day of August, 2009.

“Anne Corbett”

Ms. Anne C. Corbett
Vice-Chair of the Tribunal and Chair of the Panel

“Martin Brown”

Mr. Martin Brown
Member of the Tribunal and Member of the Panel

“Shiraz Bharmal”

Mr. Shiraz Bharmal
Member of the Tribunal and Member of the Panel