

**FINANCIAL SERVICES TRIBUNAL**

**IN THE MATTER OF** the *Pension Benefits Act*, R.S.O. 1990, C.P.8, as amended by the *Financial Services Commission of Ontario Act*, 1997, S.O. 1997, c.28 ("the Act")

**AND IN THE MATTER OF** a Proposal of the Superintendent of Financial Services of Ontario to Refuse to Make an Order under Section 87 of the Pension Benefits Act relating to the Woodbine Entertainment Group Mutuel Employees' Pension Plan, Registration Number 0430165 ("the Plan");

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

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

**CAW-CANADA LOCAL 2007**

**Applicant**

**-and-**

**SUPERINTENDENT OF FINANCIAL SERVICES and  
WOODBINE ENTERTAINMENT GROUP**

**Respondents**

**BEFORE:**

Florence A. Holden,  
Vice Chair of the Tribunal and Chair of the Panel

Jeffrey Richardson,  
Member of the Tribunal and of the Panel

David A. Short,  
Member of the Tribunal and of the Panel

**APPEARANCES:**

For the Applicant:  
Lewis Gottheil

For the Superintendent of Financial Services:  
Mark Bailey and Alena Thouin

For Woodbine Entertainment Group:  
Brian O'Byrne, Fasken Martineau DuMoulin LLP

Hearing Dates:  
November 19, 20, 23 and 24, 2009

## **REASONS FOR DECISION**

### **BACKGROUND**

1. This case involves a pension plan now known as the Woodbine Entertainment Group Mutuel Employees' Pension Plan ("the Plan") that was originally established in 1981 as a result of collective bargaining negotiations between Woodbine Entertainment Group ("WEG") (then known as The Ontario Jockey Club ("OJC")) and the union that represented the Mutuel employees bargaining unit. At the time the Plan was first established that union was the Service Employees International Union, Local 528. The CAW Local 2007 is the union that currently represents Mutuel employees, including the Non-Seniority List Employees who are the subject of this hearing.
2. Since its establishment (and continuing to the present date), the Plan has provided for the participation of a distinct group of employees, namely, employees whose names appear on a seniority list ("Seniority List"), referred to herein as Seniority List Employees.
3. The main issue is whether or not certain Mutuel employees who are not on the Seniority List ("Non-Seniority List Employees") ought to be, as the Applicant requests, extended membership in the Plan. It is the Applicant's submission that the nature of the Non-Seniority List Employees' employment is the same as for Seniority List Employees, and further that, in the alternative, the terms of employment are so similar as to justify on the balance of probabilities, the conclusion that they are part of the same class of employees for whom the Plan was established and maintained.

### **NATURE OF THE APPLICATION**

1. On January 13, 2009, the Superintendent of Financial Services issued a Notice of Proposal, which Notice is the subject of this hearing. The Superintendent refused to make an order in respect of the Plan under section 87 of the *Act* to require the administrator of the Plan to accept all Non-Seniority List Mutuel employees of WEG who meet the minimum service requirement under the *Act* as members of the Plan retroactive to 1988.

2. WEG sought and was granted full party status with respect to the Application prior to this hearing.
3. A Notice of Hearing was published on September 21, 2009. No new persons applied for party status.
4. The Applicant seeks the following orders of the Tribunal:
  - (a) an order directing the Superintendent to take the following action, pursuant to the Superintendent's authority under section 33 of the *Act*. The Superintendent shall order the administrator of the Plan herein to accept all Non-Seniority List Employees on the payroll of WEG, on or after June 1, 2004, including all persons who may be currently receiving a pension from the Plan ("retiree(s)") into membership in the Plan, retroactively, effective the first day of the calendar month immediately following the date the employee or retiree completed 24 months of continuous employment with WEG, and the employee or retiree satisfied at least one of the following conditions:
    - (i) the employee or retiree worked a minimum of 700 hours with WEG; or
    - (ii) the employee or retiree had earnings from WEG of not less than 35% of the year's maximum pensionable earnings, in each of two consecutive calendar years;<sup>1</sup>
  - (b) an order, directing the Superintendent to take the following action pursuant to the Superintendent's authority under section 33 of the *Act*: the Superintendent should direct the administrator of the Plan herein to file (and the Superintendent shall accept) for registration under the *Act*, an amendment to the Plan which provides for eligibility for membership in the Plan of the employees noted above (the "affected member"), thereby amending Article 3.02 of the Plan;
  - (c) an order that WEG provide an accounting of the contributions due to each affected member's pension account on the basis of 5% of the affected member's earnings each year since his/her membership ought to have begun;
  - (d) an order that WEG provide an accounting of the compound earnings that each affected member should have in their respective accounts taking into consideration the date(s) employer and employee contributions were due; and

---

<sup>1</sup> We have slightly re-worded the Applicant's request to reflect our understanding of the requested order.

- (e) an order that WEG contribute in to each affected member's account under the plan 18% of the member's gross compensation for the calendar year 2009, and in each successive calendar year until all of the outstanding employer contributions pursuant to the paragraph (c) above, due to the member's account are paid with interest on any balance not paid into the fund at an interest rate to be determined as fair by the Tribunal.

**ISSUES:**

1. The parties identified and agreed on the following issues to be addressed by the Tribunal for purposes of this hearing and as expressed in the Notice of Hearing dated September 21, 2009 (“Issue(s)”):
  - a) Are the Non-Seniority List Employees who are on the Eligibility List (“Eligibility List Employees”) and/or the Non-Seniority List Employees who are not on the Eligibility List, on the basis of the nature of their employment or the terms of their employment, members of the class of employees for whom the Plan has been established or maintained?; and
  - b) If the answer to issue (a) is yes, what remedies (if any) should the Tribunal direct the Superintendent to order? Should such remedies be retroactive and, if so, to what date? To whom should these remedies apply?
2. Non-Seniority List Employees are subdivided as between those employees on the Eligibility List (the “Eligibility List Employees”) and those employees who are on neither the Eligibility List nor the Seniority List (the “Non-Eligibility List Employees”). Eligibility List Employees are described in the current collective agreement as follows:

“It is understood that all Eligibility List employees are Non-Seniority List Employees **employed on an “elect-to-work” basis with a casual employment status.** It is understood that there is no preferential status, guarantee of employment, or guarantee of placement on the Seniority List for employees on the Eligibility List employment and placement on the Seniority List remains at the discretion of Woodbine Entertainment Group.” [Emphasis ours.]<sup>2</sup>

---

<sup>2</sup> Current Collective Agreement, Schedule “E”, page 48.

Since the early 1980s, the Seniority Lists under the various collective agreements in respect of Mutuel employees were capped at a certain number of people and new people could only be added to the Seniority List after a vacancy arose as a result of someone on the Seniority List either dying, retiring or otherwise having his or her employment terminated. Before the Eligibility List came into existence, WEG management decided on which employee would be placed on the Seniority List to fill the vacancy that had arisen.

After the Eligibility List was established in 1989, it was agreed between WEG and the union that any vacancies that arose on the Seniority List would be given to employees on the Eligibility List in the order in which they appeared on that List. Unlike Non-Seniority List Employees on the Eligibility List, Non-Seniority List Employees who are not on the Eligibility List are essentially “on call” and do not have to provide WEG with any written notice as to availability for employment.

We note that the requested remedy no longer distinguishes between Non-Seniority List Employees who are on the Eligibility List and those who are not.

3. At the conclusion of the hearing, the Tribunal advised the parties that it would decide the first issue, and with the full agreement of the parties, would reserve its decision on the second issue. The Tribunal advised the parties that further submissions would be required on the second issue if the answer to the first issue was yes and the matter proceeded. For the reasons that follow, the Tribunal concludes that the answer to the first issue is no and therefore there is no need to come to a conclusion on the second issue or continue the hearing to hear further submissions on the second issue.

#### **JURISDICTIONAL ISSUES:**

1. The parties agreed prior to the hearing that the Tribunal had full jurisdiction to decide this matter and we concur.

#### **THE FACTS:**

1. The Applicant, the Superintendent and the Respondent for WEG appeared before the Tribunal and each filed written submissions, together with an Agreed Statement of Facts and an Agreed Book of Documents. In addition, the parties introduced at the hearing additional documents and witnesses. The Tribunal has fully reviewed the documents before us, as well as the witness’ evidence, the salient portions of which are summarized below.

2. We find the following:

- a) Woodbine Entertainment Group is a not for profit corporation which carries on the business of horse racing and gaming on horse racing. It owns and operates two racetracks – Woodbine and Mohawk – where it conducts live horse racing. It also offers gaming on both races run at its own tracks as well as at tracks across Canada, the United States and other countries.

Gaming on these races is offered through a number of different platforms and locations. Gaming can be carried out through the internet, through the telephone (for people who have established an account) or a bet can be made in person at either Woodbine or Mohawk Racetracks as well as at various (approximately 30) teletheatres (off-track betting establishments) in the Greater Toronto area.

- b) Prior to June 1, 2001 WEG was known as the Ontario Jockey Club ("OJC").
- c) A large proportion of the employees of WEG are unionized. The largest bargaining unit, in terms of number of employees, is the Mutuel employees bargaining unit. The employees in this bargaining unit are basically engaged in the selling and cashing of bets on horse races.

There are approximately 507 employees at the present time in the Mutuels bargaining unit. Of those, there are 190 employees on the Seniority List. No evidence was offered to dispute the membership on the Seniority List, which List was periodically updated and made available to the union.

The CAW Local 2007 ("CAW") is the union that currently represents the Mutuel employees bargaining unit. It became the bargaining agent on February 19, 2007 as a result of a merger between the prior bargaining agent the Canadian Racetrack Workers Union (CRWU) and the CAW.

CAW and WEG are currently parties to a collective agreement covering the Mutuel employees' bargaining unit which expires on December 31, 2011. This collective agreement is effective February 8, 2009.

- d) The Mutuel employees have been represented for collective bargaining purposes by a union since approximately 1962. Prior to 1962, these employees were represented by Mutuel Employees Association. From 1962 to November, 2005 they were represented by Service Employees International Union, Local 528 ("SEIU Local 528") and from November, 2005 until February 19, 2007 they were represented by the CRWU.

Initially, there were two separate bargaining units – one consisting of the Mutuel employees who worked in the Standardbred Division (harness racing) of the OJC and the other consisting of the Mutuel employees who

worked in the Thoroughbred Division (thoroughbred racing) of the OJC. Separate collective agreements were negotiated over the years between the OJC and the union that represented these Mutuel employees.

- e) The union that represented the Mutuel employees from the time they first became unionized until November 2005 was the SEIU Local 528.
- f) Over the years from the time the Mutuel employees first became unionized, SEIU Local 528 and the OJC entered into a series of collective agreements covering both the Standardbred Division Mutuel employees bargaining unit and the Thoroughbred Division Mutuel employees bargaining unit.

In 1995 SEIU Local 528 and the OJC agreed to combine the two Mutuel employees bargaining units (the Standardbred Division and the Thoroughbred Division) into one bargaining unit. After this happened there was simply one collective agreement that covered all the unionized Mutuel employees.

Copies of the collective agreements in effect between SEIU Local 528 and the OJC (and later WEG after its name was changed) from January 1, 1986 to December 31, 2005 covering the Mutuel employees bargaining unit were provided to the Tribunal and consistently referred to the eligible employees under the Plan to be employees appearing on the Seniority List.

- g) The Plan was first created in 1981. A copy of the current Plan as revised and restated at January 1, 1999 and including amendments to and including January 1, 2002, was provided to the Tribunal. The Plan is a defined contribution pension plan to which members are required to make contributions at a rate of five percent (5%) of defined earnings.
- h) Section 2.07 of the current Plan text defines "Employee" as:

"...a person employed by the Employer whose name appears on a Seniority List of the Mutuel or Starting Gate or Admission Division of the Union."

The "Union" at the time this document was created was SEIU Local 528 and it represented at that time the Mutuel employees, Starting Gate employees and Admissions employees.

An Employee is eligible for membership in the Plan once he or she meets the criteria set out in Sections 3.01 and 3.02 of the Plan which are as follows:

### "3.01 Current Plan Members

Each Employee employed by the Employer on January 1, 1999 and who was a Member of the Plan on that date shall automatically continue as a Member of the Plan.

### 3.02 New Employees:

Each other Employee shall become a Member of the Plan on the date he is placed on a Seniority List of the Mutuel or Starting Gate or Admissions Division of the Union."

- i) We find that these provisions of the Plan are, on agreement of the parties, consistent with the terms of each of the collective agreements covering the Mutuel employees, Starting Gate employees and Admissions employees that have been entered into over the years between WEG and the various unions that have represented these groups of employees. No evidence was offered to the Tribunal to suggest at any time that the Plan documents were incorrect in respect of its description of eligibility for Plan membership or its definition of "Employee", or that there was any inadvertent exclusion of Non-Seniority List Employees from membership in the Plan. The relevant provisions in prior collective agreements in respect of Mutuel employees have consistently referred to Seniority List Employees as eligible for Plan membership since the inception of the Plan to date.

We are advised by the Applicant that the above Plan provisions are not inconsistent with the relevant provisions in each of the current collective agreements covering each of these groups of employees which are as follows:

- (i) Mutuel Employees -Agreement with CAW Local 2007 expiring December 31, 2011:

"Article 22: 10 The Employer and the Union have jointly agreed to provide a Pension Plan (hereinafter called the "pension contract") for all Mutuel employees appearing on the Seniority List..."

- (ii) Starting Gate Employees -Agreement with SEIU Local 2.on expiring December 31, 2009:

"Article 6.8 The Employer and the Union have jointly agreed to provide a Pension Plan (hereinafter called the "pension contract") for all Starting Gate employees appearing on the Seniority List..."

We note that the Tribunal was not provided with the agreement relating to Starting Gate employees.

(iii) We were also advised by the Applicant that there is no current collective agreement covering Admissions Employees since WEG ceased employing such employees in 2006.

- j) Further, we accept the evidence of the Applicant's witness, Mr. Henderson the current president of CAW Local 2007, who has been an employee of the OJC and WEG since 1962, who actively participated in many bargaining committees, and who still sits on the joint pension committee that acts as the administrator of the Plan. Mr. Henderson's testimony was that the establishment of the Plan and its terms was the result of collective bargaining. Even when there were separate collective agreements covering both the Thoroughbred and Standardbred division Mutuel Employees, each of those collective agreements still divided the eligible employees into two separate and distinct groups, namely, Seniority List and Non-Seniority List Employees.

We further accept the testimony of Ms. Debra Carey, WEG's Vice President, Human Resources since 1996, that attempts by the prior union bargaining agent (SEIU Local 528 at the time) to amend the Plan provisions to permit eligible employees who meet a minimum hours or earnings test to be required to join the Plan first arose, and were withdrawn, during negotiations in 2002 and 2003.

- k) The Pension Committee under section 12.01 of the Plan is the administrator of the Plan for purposes of both the Plan and the *Act*. The Plan terms provide that WEG appoints four representatives to the Pension Committee, and the Union appoints the other four.<sup>3</sup> Although CAW's witness Mr. Henderson testified that he has been a member of the Pension Committee since 1981, he indicated that it was not until 2004 that he raised with WEG and subsequently about June 15, 2004, with the Superintendent, the issue of the inclusion of Non-Seniority List Employees in the Plan. There was no evidence before the Tribunal that the Pension Committee considered this issue or voted on it or otherwise referred it to arbitration, as the Plan would permit and even though under section 12.01 (2) of the Plan had the power to "conclusively decide all matters related to administration, interpretation, application and overall operation of the Plan, consistently, however, with the Income Tax Act, the Pension Benefits Act, with the text of the Plan and the terms of the Funding Agreement." However, as noted above, all parties accepted the jurisdiction of the Tribunal to now decide this issue.

We note further that the Applicant's requested remedy, of retroactive inclusion of Non-Seniority List Employees into the Plan uses the June 2004 timeframe, although it is acknowledged that any retroactive inclusion

---

<sup>3</sup> Current Woodbine Entertainment Group Mutuel Employees' Pension Plan, section 12.01.

of Non-Seniority List Employees into Plan membership could well precede this date.

- l) The term "Seniority List" is a term of art under the collective agreement (both the current agreement and the past agreements). We find that Seniority List Employees are not necessarily employees who have the greatest overall length of service. Rather the Seniority List Employees are employees who are clearly listed by name on a schedule to the collective agreement (Schedule "D"). The current collective agreement in Article 14 also spells out how a vacancy on the Seniority List is created and how it is to be filled once it is established that a vacancy has, in fact, been created. Finally, the current collective agreement in Article 14 spells out the terms under which a Seniority List employee will be removed from the Seniority List.
  
- m) We accept the evidence of Ms. Debra Carey, that Seniority List Employees are WEG's regular or core group of Mutuel employees that WEG counts on to provide betting services to its customers year round. Seniority List Employees must be available to work five shifts per week to a maximum of 40 hours per week and they do not have the right to elect to work or not work assigned shifts.

The Non-Seniority List Employees on the other hand, are casual or elect to work employees. Essentially, Non-Seniority List Employees are supplementary to the core group of Mutuel employees. Preference for work allocation is first given to Seniority List Employees; work is offered to Non-Seniority List Employees after work has been allocated to Seniority List employees. Non-Seniority List Employees are not required to accept the shifts offered to them; they merely have to work a minimum of one shift over a period of twelve (12) consecutive months (with exceptions for illness or injury).

- n) We heard extensive evidence from the Applicant's two witnesses, Mr. Henderson and Mr. Alan Lee, another WEG employee who is currently a Seniority List Employee. Both testified as to the differences in terms of employment already noted above. Both also testified, at length, as to the day-to-day job functions of various positions. We find that whether such job functions were performed by a Seniority List Employee or a Non-Seniority List Employee that they were essentially performed in a similar manner by both sets of employees. Further we find that Mutuel employees were generally subject to the same managerial authority, training, regulatory rules and discipline regardless of classification.

**ANALYSIS:**

1. The Applicant's case turns on whether or not the terms of the Plan define an acceptable "class of employees" for purposes of the *Act* and whether under section 33 (2) of the *Act*, the Non-Seniority List Employees should be included in the class of employees based on the nature or terms of employment. For the purpose of this Issue, we have included both Non-Seniority List Employees who appear on the Eligibility List and those who do not, without distinction. However, we find that those Non-Seniority List Employees who do not appear on the Eligibility List have an even more tenuous employment relationship with WEG than those who do appear on the Eligibility List.
2. Sections 31 to 34 of the *Act* are designed as a specific exception to the general rule that decisions to extend pension benefits are left up to employers and, where applicable, jointly to employers and unions. It ensures that pension plan coverage is not denied solely on the basis of part time status and that legitimate differences in the nature or terms of employment are the basis for drawing distinctions about pension plan coverage. The section goes no further and leaves it otherwise open to an employer to circumscribe membership as it chooses.

There is no legal requirement under the *Act* that an employer provide a pension plan for any of its employees. If provided, of course, then the *Act* will apply. The *Act* contemplates that a pension plan may be established for some but not all employees of an employer, as evidenced by the usage of the phrase "class of employees" throughout the *Act*. The *Act* does not prescribe permissible classes of employees.

3. Sections 31- 33 of the *Act* read as follows:

**Eligibility for membership**

"31. (1) Every **employee** of a **class of employees** for whom a pension plan is established is eligible to be a member of the pension plan.

**Full-time employment**

- (2) An employee **in a class of employees** for whom a pension plan is maintained is entitled to become a member of the pension plan upon application at any time after completing twenty-four months of continuous full-time employment. [Emphasis ours.]

**Part-time employment**

- (3) A pension plan may require not more than twenty-four months of **less than full-time continuous employment** with the employer, with the lesser of,

(a) earnings of not less than 35 per cent of the Year's Maximum Pensionable Earnings; or

(b) 700 hours of employment with the employer,

in each of two consecutive calendar years immediately prior to membership in the pension plan, or such equivalent basis as is approved by the Superintendent, as a condition precedent to membership in the pension plan. [Emphasis ours.]

### **Multi-employer pension plan**

(4) A multi-employer pension plan may require not more than the lesser of,

(a) earnings of not less than 35 per cent of the Year's Maximum Pensionable Earnings with one or more of the participating employers; or

(b) 700 hours of employment with one or more participating employers,

in each of the two consecutive calendar years immediately before the year in which membership is applied for, or such equivalent basis as is approved by the Superintendent, as a condition precedent to membership in the multi-employer pension plan.

(5) The Superintendent may give the approval mentioned in subsection (3) or (4) if the Superintendent is of the opinion that the basis is equivalent in the circumstances to the earnings mentioned in the subsection. R.S.O. 1990, c. P.8, s. 31.

### **Loss of membership**

32. A member of a pension plan who is employed continuously **on a less than full-time basis** does not cease to be a member by reason only that he or she has earnings of less than 35 per cent of the Year's Maximum Pensionable Earnings in a calendar year or is employed for fewer than 700 hours in a calendar year. R.S.O. 1990, c. P.8, s. 32. [Emphasis ours.]

### **Dispute as to member of class of employees**

33. (1) Where there is a dispute as to whether or not an employee is a **member of a class of employees for whom a pension plan is established or maintained**, the Superintendent, subject to section 89, by order may require the administrator to accept the employee as a member. [Emphasis ours.]

#### **Ground for order**

(2) The Superintendent may make the order if the Superintendent is of the opinion that, **on the basis of the nature of the employment or of the terms of employment of the employee**, the employee is a member of the class. R. S. O. 1990, c. P.8, s. 33. [Emphasis ours.]

#### **Separate pension plan**

34. An employer may establish or maintain a separate pension plan for employees employed **in less than full-time continuous employment** if the separate pension plan provides pension benefits and other benefits reasonably equivalent to those provided under the pension plan maintained by the employer for employees of the same class employed in full-time continuous employment. R.S.O. 1990, c. P.8, s. 34.” [Emphasis ours.]

4. Sections 31 to 34 do not operate to require that pension plan coverage be granted to all employees if an employer or an employer and union, as applicable, decide to grant such coverage only to a sub-group or “class” of the employee population. To suggest otherwise would ignore the plain meaning of the *Act* which in subsection 31(1) clearly refers to “employee(s) of a class of employees for whom the pension plan is established”. The *Act* permits that, within a class of employees, different waiting periods for plan entry based on full-time and less than full-time employment can be created. The *Act* does not define the terms “full-time employment”, “full-time continuous employment”, “less than full time” or “part-time” employment.
5. We find, and it was not disputed, that Non-Seniority List Employees are “employees” for purposes of the *Act*. The definition of “employee” under the *Act* simply includes a relationship where a person receives remuneration from an employer<sup>4</sup>, regardless of their status of employment (e.g. “full-time or part-time”) or the nature or terms of their employment. What is in dispute is whether or not Non-Seniority List Employees are within the “class of employees” for whom the Plan was established or maintained.

---

<sup>4</sup>Victorian Order of Nurses, decision of the Financial Services Tribunal, July 3, 2009 at page 21-22.

6. The Applicant argued that Seniority List Employees were full-time employees and that "...all full time employees are and always have been seniority list employees. All other employees are and always have been less than full time non-seniority list employees."<sup>5</sup> Based on the evidence before us, including evidence of actual hours worked by Mutuel Seniority List and Non-Seniority List Employees in 2001-2008, we find that some Non-Seniority List Employees could be considered "full-time" based on hours worked, and some Seniority List Employees could be considered less than full time over successive periods when compared to the "minimum standards" under section 31 (3) of the *Act*. Further, we were not directed to any part of the current Mutuel collective agreement which defines the concept of a "full-time employee" and the collective agreement does not categorize employees as full-time or less than full-time or part-time. Rather, employees are either Seniority List Employees or Non-Seniority List Employees (and as noted there is also a subclass of Non-Seniority List Employees called Eligibility List employees). The Mutuel collective agreement does not state that "all full-time employees are Seniority List Employees" or that "all Seniority List Employees are full-time employees" or that the two terms have the same meaning. In fact, throughout the history of collective bargaining presented to us through the Applicant's witness Mr. Henderson, it was clear that even the notion of how many days a Non-Seniority List Employee had to be available to get on the Eligibility List or for a Seniority List Employee to stay on the Eligibility List varied over time. Full-time status was not a condition of the class.

We make this finding on the preponderance of the evidence before us, notwithstanding that there is a reference on Schedule "F", Application for Eligibility List, in the collective agreements prior to 2003 which states that "I, the undersigned, hereby advise that I am interested in being placed on a full-time "Eligibility List". The Schedule further recognizes that placement on the Eligibility List "does not in itself constitute .... placement on the Seniority List". Consequently we give this reference no weight.

We note the Applicant's submission which conceded that the number of hours actively worked by each member of each group is not necessarily the most significant difference [between the two groups] or any difference at all. We agree.

In our view, this case is not about full-time employees versus less than full-time employees and the Applicant has failed to convince the Tribunal on the facts that this is the only or defining distinguishing feature between these groups of employees.

The Applicant's argument that the only basis for distinguishing between the Seniority List Employees and the Non-Seniority List Employees is on a "full-time" or "less than full-time status" fails. We find that hours worked, while an important result of the employment relationship, was not the sole distinguishing

---

<sup>5</sup> Paragraph 27 of the Applicant's submissions to the Tribunal.

feature of the terms or nature of employment, and in our view the denial of pension coverage to Non-Seniority List Employees is not based on hours worked to create the class. There are other legitimate features that distinguish the groups.

7. Sections 31 to 34 of the *Act* set out a scheme for the statutory delineations of pension plan coverage. These provisions are limited in their scope and should be interpreted within the context of the overall object and scheme of the *Act*. We agree with the Applicant that the appropriate approach to the interpretation of the sections in issue is the approach adopted by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd.*<sup>6</sup> Moreover, that approach was specifically employed in respect of the *Act* in *Monsanto Canada Inc. v. Ontario (Superintendent of Financial Services)* and requires that the words of an Act “be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the legislature.”<sup>7</sup> We also accept as we have in other decisions of the Tribunal that the *Act* is remedial legislation, the objects of which are set out by the Supreme Court of Canada in paragraph 38 of *Monsanto* as follows:

*“The Act is public policy legislation that recognizes the vital importance of long-term income security. As a legislative intervention in the administration of voluntary pension plans, its purpose is to establish minimum standards and regulatory supervision in order to protect and safeguard the pension benefits and rights of members, former members and others entitled to receive benefits under private pension plans (see GenCorp, supra; Firestone Canada Inc. v. Ontario (Pension Commission) (1990), 1 O.R. (3d) 122 (C.A.), at p. 127). This is especially important when, as recognized by this Court in Schmidt v. Air Products Canada Ltd., [1994] 2 S.C.R. 611, at p. 646, it is remembered that pensions are now generally given for consideration rather than being merely gratuitous rewards. At the same time, the voluntary nature of the private pension system requires the interventions in this area to be carefully calibrated. This is necessary to avoid discouraging employers from making plan decisions advantageous to their employees. The Act thus seeks, in some measure, to ensure a balance between employee and employer interests that will be beneficial for both groups and for the greater public interest in established pension standards.”*

8. The *Act* requires the Superintendent to make a decision under Section 33 of the *Act* based on a factual enquiry as to whether or not the disputed employees belong to a class of employees entitled to plan membership as defined in the Plan terms. On the facts before us, the Applicant urges us to accept that the Non-Seniority

---

<sup>6</sup> (1998) 1 S.C.R. 27.

<sup>7</sup> (2004) 3 S.C.R. 152, paragraph 19.

List Employees do not need to establish that he or she is a member of a class on the basis of both the nature of his employment and the terms of his employment. We agree, but in our view the Non-Seniority List Employees must first be part of the class covered by the plan. We also recognize that the phrase “nature of employment” and “terms of employment” are also not defined under the *Act* and must be interpreted in a reasonable manner given the purposes of the legislation and on a balance of interests.

9. We find that the creation of a class based on inclusion of “Seniority List” membership only is reasonable and acceptable under the Act for the following reasons:
  - a) The extension of pension plan coverage to Seniority List Employees only is not the result of a unilateral and arbitrary decision by the employer. The employer has not picked favorites and pension plan membership is not being awarded as a discretionary item. Rather, the limitation of pension plan coverage is the result of the valid bargain struck between the unions, including the Applicant, and WEG in many successive rounds of collective bargaining. As noted above, no evidence was offered that the Plan terms did not reflect the collective agreement or intention between the parties to distinguish between these groups of employees. The class is clearly and unambiguously defined. The collective agreements speak for themselves in terms of what the union and the employer jointly agreed to. In this result there is no inherent “unfairness” to the Non-Seniority List Employees.
  - b) As there are no prescribed classes under the *Act*, the parties were free to choose whatever class of employees for whom they wished to provide a pension plan, provided no applicable law is contravened. While not binding, we accept the view of the Federal Court of Appeal in the case of *Syndicat des journalistes de Radio-Canada (CSN) v. Canadian Broadcasting Corporation* (1997), 15 C.C.P.B. 278, aff'd (2008) 23 C.C.P.B. 219 (Fed. C.A.) (the “**CBC**” case).

The **CBC** case involved a consideration of the federal equivalent of section 31 of the *Act* which also refers to membership in pension plans being provided to a "class" of employees. In that case, the Superintendent of Financial Institutions had declared fixed-term contract employees to be ineligible to participate in CBC's pension plan since the plan clearly indicated that it applied only to employees hired for an indefinite period with continuing employment contracts. The union's application for judicial review of the Superintendent's decision was dismissed by both the Federal Court Trial Division and also the Federal Court of Appeal.

In the Trial Division, Mr. Justice Noel, at paragraph 24 of the decision made the following comments:

*"In addition, as the union has had to concede, the 1985 Act is silent as to the class of employees that the employer may select for the purposes of establishing a pension plan. Accordingly, any distinction that complies with the minimum standards established by the Act and that differentiates between one group of employees and another may prima facie be used to circumscribe eligibility for membership in a pension plan."*

In the Federal Court of Appeal, Mr. Justice Decary, speaking for the Court, made the following comments at paragraph 6 of his judgment:

*"A 'class' is not defined in the Act. In the Court's view, it is clear that the word 'class' refers to groupings of employees which an employer sees fit to make for internal administrative purposes, regardless of any question of a pension plan, and based for example on working conditions such as the initially specified length of the contract or the method of pay. Nothing in the Act suggests that Parliament intended to interfere with the employer's right of control and, for example, as the appellant suggests, require it to define a class solely in terms of the nature of the duties performed by its employees."*

In our view, the comments of both the Trial Division and the Federal Court of Appeal, are equally applicable when dealing with the *Act*. A "class" is not defined in the *Act* and it is clear from an overall reading of the *Act* that it is up to an employer (or an employer and a union, where there is a union involved) to choose the class of employees for whom a pension plan is to be established, provided that the class does not contravene any applicable law and that the membership within the class is determinable, clear and identifies a defined group. If the sole distinguishing feature was full or less than full-time employment, then the provisions of Section 33(3) of the *Act* would come into force from a compliance perspective. We were not referred to any legislation or case law that would suggest that a group of employees based on a seniority list would be an unlawful class of employees.

- c) We find that there are fundamental differences in the terms of employment between Seniority List Employees and the Non-Seniority List Employees. These significant differences in the terms of the employment are the result of valid collective bargaining between WEG and its' predecessor the OJC and the unions. No legal basis was offered for arguing, as the Applicant did, that the *Act* should be interpreted in such a manner to "equalize the bargaining parties in a collective bargaining arrangement" as a matter of fairness. In fact it is clear on the evidence that no attempt was made to

change the pension eligibility of Non-Seniority List Employees under bargaining before 2003.

- d) The Applicant contends, and the Respondent WEG agrees that the phrase “terms of employment” is often used to refer to the actual terms of an employment contract or the actual terms of a collective agreement, as may be supplemented by employer rules consistent with the contract. As a general statement we agree. Such terms frequently include the economic terms of employment and may include wages, scheduling of work, maximum hours, vacation, overtime, etc. However there may also be matters related to the employment relationship that do not neatly fall into a “term” or “nature” of employment and we do not find that these terms are mutually exclusive.

On the evidence before us, we find the following significant differences in terms of employment between the Seniority List Employees and Non-Seniority List Employees:

- i. Seniority List Employees have different group insurance coverage than are Non-Seniority List Employees.<sup>8</sup>
- ii. Seniority List Employees are entitled to continuation of dental, prescription drugs and vision care benefits to age 65 if they take early retirement. No such benefit continuation is offered to Non-Seniority List Employees.<sup>9</sup>
- iii. Seniority List Employees are entitled to accumulate sick credits at the rate of three hours per month. No similar entitlement in the collective agreement is extended to Non-Seniority List Employees.<sup>10</sup>
- iv. Seniority List Employees receive significantly different vacation and vacation pay entitlements than do Non-Seniority List Employees. For example, Non-Seniority List Employees receive two weeks of vacation irrespective of

---

<sup>8</sup> Current Collective Agreement, Article 22, pages 22 to 27; Collective Agreement (expired December 31, 2008), Article 22, pages 22 to 27; Collective Agreement (expired December 31, 2005), Article 22, pages 18 to 22; Collective Agreement (expired December 31, 2002), Article 22, pages 17 to 20.

<sup>9</sup> Current Collective Agreement, Article 22(5), page 24; Collective Agreement (expired December 31, 2008), Article 22(5), page 25; Collective Agreement (expired December 31, 2005), Article 22(7), page 21; Collective Agreement (expired December 31, 2002), Article 22(7), page 19.

<sup>10</sup> Current Collective Agreement, Article 22(11), page 25; Collective Agreement (expired December 31, 2008), Article 22(11), page 26; Collective Agreement (expired December 31, 2005), Article 22(12), page 22; Collective Agreement (expired December 31, 2002), Article 22 (8), page 19.

service; Seniority List Employees receive vacation related to service.<sup>11</sup>

- v. Significantly different wage schedules and minimum shift lengths are applicable to Seniority List Employees than are applicable to Non-Seniority List Employees.<sup>12</sup>
  - vi. Seniority List Employees are entitled to be paid the difference between jury duty pay and their regular remuneration while serving on jury duty. Other employees are not entitled to the difference.<sup>13</sup>
  - vii Seniority List Employees have a measure of job security, to which Non-Seniority Employees are not entitled.<sup>14</sup> In addition differences exist between the two groups in relation to work allocation, entitlement to new job classifications, severance packages on voluntary resignation, and the right to file a grievance<sup>15</sup>
- e) It is the Applicant's contention that the inclusion of Non-Seniority List Employees is required because they essentially do the same job as Seniority List Employees. The Applicant submits that the "nature of employment" referred to in section 33 (2) of the *Act* refers to the essential character of the day to day activities of the employee. Fundamentally the Applicant argues that a worker who does the same job should be treated in the same way for pension purposes provided that they meet the minimum service and hours requirements under section 31(3) of the *Act*. Their status is not impacted by being on or off the Seniority List, which the Applicant acknowledges does impact the "terms of employment".
- f) We disagree with this approach to interpretation of the *Act* and of the phrase "nature of employment" as it unduly constricts the employer and

---

<sup>11</sup> Current Collective Agreement, Article 24, pages 28 to 30; Collective Agreement (expired December 31, 2008), Article 24, pages 28 to 29; Collective Agreement (expired December 31, 2005), Article 24, pages 23 to 25; Collective Agreement (expired December 31, 2002), Article 24, pages 21 to 23.

<sup>12</sup> Current Collective Agreement, Schedule "C", page 40; Collective Agreement (expired December 31, 2008), Schedule "C", page 42; Collective Agreement (expired December 31, 2005), Schedule "C", pages 38 to 39; Collective Agreement (expired December 31, 2002), Schedule "C", pages 35 to 36.

<sup>13</sup> Current Collective Agreement, Article 35, pages 33-34; Collective Agreement (expired December 31, 2008), Article 35, page 33-34; Collective Agreement (expired December 31, 2005), Article 35, page 29; Collective Agreement (expired December 31, 2002), Article 35,, page 26-27.

<sup>14</sup> Current Collective Agreement, Article 14 (a).

<sup>15</sup> Current Collective Agreement, Articles 15 and Schedule E, 15(k), 33(a), Letter of Undertaking (pages 61-64) and 6 .

the union from creating a legitimate class based on other distinctions, such as job location or pay grades or contract status or location, all of which have universally been considered acceptable classes of employment under the *Act*. It is necessary in our view under the *Act* to first establish that excluded employees are part of a “class”, not merely that they perform the same or similar job functions. To follow the Applicant’s approach would have the effect of “reading out” the requirement to be a member of the class, which plainly is necessary under section 33 (2). Taken to an extreme, the Applicant’s view would end in the unreasonable result that all employees who, at a point in time, perform the same job functions should be plan members and would defeat the intent of the legislature that permissible classes can be constructed on a variety of bases.

Sections 31-34 do not operate to extend coverage to all employees performing the same or similar job functions where there are fundamental differences in the terms and/or nature of the employment as defined by the essential characteristics of the employment relationship relevant to the issue of pension plan coverage. To repeat the provisions of section 33 (2):

- (2) The Superintendent **may** make the order **if** the Superintendent is of the opinion that, on the basis of the nature of the employment or of the terms of employment of the employee, **the employee is a member of the class.** R. S. O. 1990, c. P.8, s. 33. [Emphasis ours.]

The ordinary and grammatical meaning of the *Act* would suggest that extension of coverage for less than full-time employees is still predicated on membership within a covered class of employees. A class of employees can reflect the employment circumstances of a particular situation. This approach to interpretation is consistent in our view with the intended purpose of the legislation. Further as noted above the class as defined under the Plan is clear and unambiguous, and the result of collective bargaining over many years. As stated above this is not a case of full-time versus part-time employees within a class, therefore the social policy concerns of extending coverage to part-timers are not an issue in this case. The Superintendent is not obliged by law to make the order requested, only to review the individual factual circumstances and come to a conclusion as to whether the Non-Seniority List Employees are covered by the Plan.

- g) Moreover, on the facts of this case, the essential character of the employment relationship leads to the undeniable conclusion that there are differences in the nature of the employment which also support the

exclusion of Non-Seniority Employees from plan coverage. These differences are not mitigated solely on the basis of a finding that the actual job duties are the same or substantially similar, and which duties may change over time.

- h) We acknowledge the Superintendent's submission in this regard that the term "nature of the employment" in the *Act* cannot be given a meaning completely distinct from the phrase "terms of employment". This position would suggest that the use of the word "or" in subsection 33 (2) was meant to be inclusive, not mutually exclusive. On either interpretation, we still conclude that the phrase "nature of employment" may mean more than day-to-day job functions. In fact job duties could equally be interpreted in our view as a term of employment. The alternative interpretations of "nature" offered to us by the parties include such definitions as the "inherent character or basic condition of a person or thing; its essence" or "essential characteristics" or "basic qualities".<sup>16</sup> While the legislature may well have intended to assign differing definitions to the phrase "nature" or "terms" of employment under the *Act*, it did not define those terms.

The proper approach to statutory interpretation as articulated by the Supreme Court of Canada, and the one which we see fit to employ in this case, is best summarized in the following passages from *Monsanto*:

*"The established approach to statutory interpretation was recently reiterated by Iacobucci J. in Bell ExpressVu Ltd. Partnership v. Rex, [2002] 2 S.C.R. 559, 2002 SCC 42 (S.C.C.), at para. 26, citing E. A. Driedger, Construction of Statutes (2<sup>nd</sup>. ed. 1983), at p. 87:"*

*Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."*<sup>17</sup>

We have already found that the characterization of employment between the two groups to be fundamentally different. Such difference in the character of the employment relationship in our view reflects the "nature of employment" and is an essential difference between the employee groups. The difference between a regular employee and a casual employee has been described in *Re Kenora Association for Community Living and O.P.S.E.U.* (1999) 55 C.L.A.S. 367 as follows:

---

<sup>16</sup> Merriam Webster Dictionary (online): [www.merriam-webster.com](http://www.merriam-webster.com)

<sup>17</sup> *Monsanto*, *ibid.* paragraph 19.

*“The employer and a regular employee have made a significant commitment to each other. Unlike regular employees, casual employees are provided with no schedule of “normal” hours and may be used very infrequently on an irregular basis. A regular employee’s relationship with the employer might be described as more “substantial” than that of the casual employee. There is clearly a difference between the two types of employment status in the degree of mutual obligations described in the collective agreement. It does not make sense that the employer should be put to a higher standard of proof in justifying its decision to end the less “substantial” relationship, particularly where there is no obligation to provide any particular quantity or frequency of work to that class of employee.”*

A similar characterization exists on the facts of this case between the Seniority List Employees and the Non-Seniority List Employees.

- i) Within the remedial purposes of the *Act*, the relevant section grants the Superintendent discretionary power to require the Plan administrator to accept employees as Plan members if ***“on the basis of the nature of the employment or of the terms of employment of the employee, the employee is a member of the class”***. The *Act* does not require the Superintendent to make such an order on satisfaction of both bases; one is sufficient. On the facts of this case, we conclude no such order is necessary as there are significant distinctions between the groups on both bases.
- j) We find that there is no evidence on the facts or in law that the Seniority List Employees do not constitute a proper class or that the Non-Seniority List Employees are a member of that class, either on the terms of their employment or the nature of their employment both of which vary markedly. Therefore we find that the Superintendent’s Notice of Proposal was reasonable and is upheld.

## **DECISION AND ORDER**

For all of these reasons, the Tribunal finds that on the first issue which was:

Are the Non-Seniority List Employees who are on the Eligibility List (“Eligibility List Employees”) and/or the Non-Seniority List Employees who are not on the Eligibility List, on the basis of the nature of their employment or the terms of their employment, members of the class of employees for whom the Plan has been

established or maintained for the Superintendent and WEG and as against the Applicant?,

the answer is no.

Accordingly, the Applicant's objection to the Superintendent's Notice of Proposal is dismissed and we confirm the Superintendent's proposed refusal to grant the orders requested by the Applicant. Consequently, there is no need to come to a conclusion on the second issue or continue the hearing for that purpose.

We have not been asked to make an order as to costs in the matter. We do confirm a previous order of this Tribunal that the parties share equally the costs of the Notice of the Hearing. However, we remain seized of this matter in respect of any written applications made for costs within thirty days of the date of this decision.

Dated at Toronto this 27<sup>th</sup> day of January 2010.

“Florence A. Holden”

Florence A. Holden  
Vice Chair of the Tribunal and Chair of the Panel

“Jeffrey Richardson”

Jeffrey Richardson  
Member of the Tribunal and of the Panel

“David A. Short”

David A. Short  
Member of the Tribunal and of the Panel