

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 Complaint by David Horgan relating to the **Ontario Public Service Pension Plan, Registration Number 208777** (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 :

DAVID HORGAN

Applicant

- and -

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

REASONS FOR DECISION

SUMMARY

1. On December 6, 1999, the Financial Services Tribunal allowed the preliminary motion brought by counsel for the Superintendent and dismissed the Applicant’s request for a hearing under subsection 89(8) of the *Pension Benefits Act*. Having heard the evidence adduced by the parties at the hearing and having reviewed the Agreed Statement of Facts and heard the parties’ submissions, the Tribunal found that the Superintendent of Financial Services (“Superintendent”) had not made a decision in

respect of the Applicant's complaint and that consequently, the Tribunal did not have jurisdiction to proceed.

FACTS

2. On December 17, 1998, while employed as a valuation manager with the Ministry of Finance's Property Assessment Office, the Applicant signed a "Notice of Election" advising that he was retiring from his employment effective December 31, 1998. The Applicant was a member of the Ontario Public Service ("OPS") Pension Plan, and he proceeded to sign the Plan's "Termination of Membership Notice" on December 23, 1998 stating that the reason for his termination was retirement on immediate pension, effective December 31, 1998.

3. Pursuant to a memorandum of understanding between the Ministry of Finance and the Ontario Property Assessment Corporation ("OPAC"), the Ministry of Finance divested its property assessment operations to OPAC. The divestiture was effective at 12:01 a.m. on December 31, 1998.

4. The Applicant accepted an offer of employment with OPAC that had been made on December 15, 1998 and continued his work with OPAC effective December 31, 1998. As part of the terms of the divestiture, the Applicant became a member of the OMERS in respect of future pensionable service.

5. It is the Applicant's position that by his actions, he retired from the Ministry of Finance and is entitled to receive immediate payment of a pension benefit from the OPS Plan. The Plan administrator, the Ontario Pension Board took the position that pursuant to section 80 of the *Pension Benefits Act*, the Applicant's employment was deemed not to have been terminated and that rather than retiring, the Applicant accepted a position with OPAC in conjunction with the Ministry's divestiture. The Board denied the Applicant's claim for payment of a pension benefit by way of letter dated April 9, 1999.

6. On May 12, 1999, the Applicant wrote to the person he thought was the Chair of the Financial Services Commission of Ontario requesting a hearing be scheduled so that the Commission could consider his situation. On May 21, 1999, the Registrar of the Financial Services Tribunal wrote to the Applicant stating:

Since it is the responsibility of the Superintendent to consider the issues you have raised and to make a decision on what action to take, by copy of this letter, I have referred your letter to Mr. David Gordon, Director, Pension Plans Branch, so that he can review the matter and advise the Superintendent accordingly.

7. The Applicant also received a letter dated May 27, 1999 from Mr. Gordon stating:

I have referred your letter to Mr. John Graham, the Pension Officer responsible for this pension plan, and have asked him to look into the matter. Upon completion of his review, he will be in touch with you.

8. Mr. Graham replied to the Applicant by letter dated July 5, 1999 in which he advised:

We have reviewed the response you received from the Plan dated April 9, 1999. Based on our review of the information and documents provided to us, we have no basis on which to conclude that the administrator has failed to comply with the requirements of the Act and regulations thereunder, or with the Financial Services Commission of Ontario's Policy. If additional information or documents become available which might demonstrate non-compliance by the administrator, please send them to us and we will be pleased to review them.

9. On August 9, 1999 the Applicant filed his request for a hearing before the Financial Services Tribunal. By letter dated August 31, 1999 counsel for the Superintendent wrote to counsel for the Applicant:

It will be our position at the pre-hearing conference that the Financial Services Tribunal does not have jurisdiction to hear your client's complaint, as no decision or refusal to make a decision has been made by the Superintendent. Section 89 of the *Pension Benefits Act* does not provide a right to a hearing in circumstances where the

Superintendent has not made a decision or refusal as listed in subsection (1), (2), (3), (3.1), (3.2),(4) or (5). I am enclosing a copy of section 89 for your reference.

In this case, the decision was made by John Graham as Pension Officer and not under any delegated authority from the Superintendent. As such, I am suggesting that your hearing request be withdrawn and that your client request the Superintendent to make an order under section 87 of the *Pension Benefits Act*.

10. At the hearing of the preliminary motion on December 6, 1999, the Tribunal heard the evidence of Mr. John Graham, the FSCO Pension Officer with whom the Applicant had contact and also the evidence of the Applicant. We accept Mr. Graham's evidence that he had neither the direct statutory nor delegated authority to make a decision relating to the Applicant's claim for benefits from which an appeal or request for hearing could be brought. There was also no evidence offered to suggest that the Superintendent or anyone with the proper delegated authority of the Superintendent had made a decision regarding the Applicant's claim for payment of a pension.

11. With respect to the Applicant's evidence, the Applicant spoke of what he believed he was being told about his claim for payment of a pension benefit and the correct course of action. The Tribunal can understand the Applicant's frustration of having to deal with complex pieces of legislation like the *Pension Benefits Act* and the *Financial Services Commission of Ontario Act*, and a new and renamed regulator with different powers and organization than its predecessor. However, whatever misunderstanding or misapprehension there was in July, 1999, when the request for a hearing was filed, was cleared up with the advice of counsel for the Superintendent in her letter of August 31, 1999. There was no extreme delay in communicating the correct state of affairs and the appropriate course of action to the Applicant. Consequently, the Tribunal does not find that the PCO decision in *Stanley Dwyer v. Chrysler Canada Ltd. et al.*, PCO, August 19, 1998, XDEC-40 ("*Dwyer*") has application in this case and distinguishes it on its facts.

12. In any event, the Applicant chose to continue with his request for a hearing to the Tribunal. The Tribunal, however, as a creature of statute has only the powers and jurisdiction given it by the Legislature.

JURISDICTION OF THE TRIBUNAL

Financial Services Commission of Ontario Act

13. Section 20:

s.20 The Tribunal has exclusive jurisdiction to,

- (a) exercise the powers conferred on it under this Act and every other Act that confers powers on or assigns duties to it; and
- (b) determine all questions of fact or law that arise in any proceeding before it under any Act mentioned in clause (a).

Pension Benefits Act

14. Sections 89(1), 89(2), 89(6), 89(8), 89(9)

- s.89
- (1) Where the Superintendent proposes to refuse to register a pension plan or an amendment to a pension plan or to revoke a registration, the Superintendent shall serve notice of the proposal, together with written reasons therefor, on the applicant or administrator of the plan.
 - (2) Where the Superintendent proposes to make or to refuse to make an order in relation to, [*FSCO Act s. 208(1)*]
 - (a) subsection 42(9) (repayment of money transferred out of pension fund);
 - (b) subsection 43(5) (repayment of money paid to purchase pension, deferred pension or ancillary benefit);

- (c) subsection 80(6) (return of assets transferred to pension fund of successor employer); [*FSCO Act* s.208(2)]
- (d) subsection 81(6) (return of assets transferred to new pension fund); [*FSCO Act* s. 208(2)]
- (d.1) section 83 (the Guarantee Fund applies to a pension plan). [*FSCO Act* s. 208(2)]
- (e) section 87 (administration of pension plan in contravention of Act or regulation), or [*FSCO Act* s. 208(3)]
- (f) section 88 (preparation of a report). [*FSCO Act* s. 208(3)]

the Superintendent shall serve notice of the proposal, together with written reasons therefor, on the administrator and on any other person to whom the Superintendent proposes to direct the order.

- (6) A notice under subsection (1), (2), (3), (3.1), (3.2), (4) or (5) shall state that the person on whom the notice is served is entitled to a hearing by the Tribunal if the person delivers to the Tribunal, within thirty days after service of the notice under that subsection, notice in writing requiring a hearing, and the person may so require such a hearing. [*FSCO Act* s. 208(6)]
- (8) Where the person requires a hearing by the Tribunal in accordance with subsection (6), the Tribunal shall appoint a time for and hold the hearing. [*FSCO Act* s. 208(7)]
- (9) At or after the hearing, the Tribunal by order may direct the Superintendent to carry out or to refrain from carrying out the proposal and to take such action as the Tribunal considers the Superintendent ought to take in accordance with this Act and the regulations, and for such purposes, the Tribunal may substitute its opinion for that of the Superintendent. [*FSCO Act* s. 208(7)]

ORDER

15. Accordingly, having found that neither the Superintendent nor anyone with the proper delegated authority made a final decision (to issue a notice of proposal to issue an order or to refuse to issue such notice) regarding the Applicant's claim, the Tribunal is without jurisdiction to proceed with the merits of the Applicant's request for a hearing and the request is hereby dismissed.

Dated at Toronto, this 27th day of March, 2000.

"Martha Milczynski"
Martha Milczynski
Chair, Financial Services Tribunal

"Kit Moore"
Kit Moore
Member, Financial Services Tribunal

"Judith Robinson"
Judith Robinson
Member, Financial Services Tribunal