

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 Partial Plan Wind-Up Report submitted by BICC Cables Canada Inc. to the Superintendent of Financial Services in respect of the Employees Pension Plan of BICC Phillips Inc., Registration Number 293761 (the "Plan");

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

BETWEEN:

BICC CABLES CANADA INC.

Applicant

-and-

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

BEFORE:

C. S. (Kit) Moore,
Chair of the Panel and Member of the Tribunal

William M. Forbes,
Member of the Tribunal

Colin H. H. McNairn,
Vice Chair of the Tribunal

APPEARANCES:

For BICC Cables Canada Inc.:
James D. G. Douglas
Markus F. Kremer

For the Superintendent of Financial Services:
Deborah McPhail

HEARING HELD: October 12, 2000
Toronto, Ontario

REASONS FOR DECISION

The Background

As a result of a plant closure and downsizing, BICC Cables Canada Inc. (“BICC”) (formerly BICC Phillips Inc.) prepared a Partial Wind-Up Report dated June, 1999 (the “Partial Wind-Up Report”) in respect of a partial wind-up as at May 17, 1996 (the “Partial Wind-Up”) of the Employees Pension Plan of BICC Phillips Inc., Registration No. 293761 (the “Plan”) (now called the Employees Pension Plan of BICC Cables Canada Inc.). The Partial Wind-Up Report was filed with the Superintendent pursuant to the provisions of the Act.

On November 10, 1999, the Superintendent of Financial Services (the “Superintendent”) issued a Notice of Proposal to Refuse to Approve the Partial Wind-Up Report (the “Notice of Proposal”) because the Report made no provision for payment of certain special early retirement pensions referred to in section 7.3 of the Plan, for those Plan members affected by the Partial Wind-Up whose age plus years of continuous employment or membership in the Plan totalled at least fifty-five at the effective date of the Partial Wind-Up.

Under the authority of subsection 89(6) of the Act, BICC requested a hearing before the Financial Services Tribunal in respect of the Notice of Proposal. The Tribunal received written submissions from the parties, namely BICC and the Superintendent, and heard their oral arguments at a hearing held October 12, 2000. The Tribunal also received letters of comment from other interested persons.

The Facts

BICC operated the Plan, amending it in 1992 to provide for a “special early retirement pension,” as set out in section 7.3 of the Plan. The text of that section is reproduced below under the heading “The Principal Plan Provision at Issue.”

The Partial Wind-Up Report made no provision for the payment of special early retirement pensions to any of those members of the Plan affected by the Partial Wind-Up nor did it value any such pensions.

On July 19, 1999, the Superintendent authorized the distribution of the assets representing the defined benefit entitlements under the Plan to the members, former members and other persons affected by the Partial Wind-Up in accordance with the Partial Wind-Up Report, “conditional upon additional adjustments to the benefits of affected members and the employer funding the additional cost, should it be determined that the Special Early Retirement Pension benefit must be provided on wind up.”

The Issues

At a pre-hearing conference held on April 17, 2000, the parties agreed on the wording of the substantive issues to be addressed in this proceeding. That wording was included in the pre-hearing conference memorandum as follows:

- (1) What is the proper interpretation of section 7.3 of the Plan?
- (2) Should this Tribunal direct that the Respondent [the Superintendent] carry out the proposal set out in the Notice of Proposal?

The Principal Plan Provision at Issue

Section 7.3 of the Plan sets out the requirements for determining the special early retirement date and eligibility for a special early retirement pension, as follows:

7.3 Special Early Retirement Date

If the Continuous Service of a Member terminates before normal retirement date under special circumstances as consented by the Company,

- (a) the Member will be considered to have retired early for the purposes of the Plan on his special early retirement date which is the first day of the month coincident with or next following the month in which the Member's Continuous Service terminates, and
- (b) the Member will be entitled to receive a special early retirement pension.

For the purposes of the Plan, "Continuous Service" means an uninterrupted period of employment (sections 2.9 and 5.1), a "Member" means an employee or former employee who has become a member of the Plan and continues to be entitled to benefits under the Plan (section 2.29) and "normal retirement date" means the first day of the month coincident with or next following a Member's 65th birthday (section 7.1).

The Principal Statutory Provisions that are Relevant

The provisions of the Act that are particularly relevant to this proceeding are as follows:

40.-(1) A pension plan may provide the following ancillary benefits:

...
 5. Early retirement options and benefits in excess of those provided by section 41 (early retirement option).
 ...

41.-(1) A former member is entitled to elect to receive an early retirement pension under the pension plan if he or she,

- (a) terminated employment on or after the 1st day of January, 1988;
- (b) is entitled to a deferred pension under this Act; and
- (c) is within ten years of attaining the normal retirement date.

74.-(1) A member in Ontario of a pension plan whose combination of age plus years of continuous employment or membership in the pension plan equals at least fifty-five, at the effective date of the wind up of the pension plan in whole or in part, has the right to receive,

- (a) a pension in accordance with the terms of the pension plan, if, under the pension plan, the member is eligible for immediate payment of the pension benefit;
- (b) a pension in accordance with the terms of the pension plan, beginning at the earlier of,
 - (i) the normal retirement date under the pension plan, or
 - (ii) the date on which the member would be entitled to an unreduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date; or
- (c) a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the pension plan were not wound up and if the member's membership continued to that date.

74.-(7) For the purposes of this section, where the consent of an employer is an eligibility requirement for entitlement to receive an ancillary benefit, the employer shall be deemed to have given the consent.

The Arguments

BICC argued that section 7.3 of the Plan is intended to provide special early retirement benefits to Plan members if their continuous service is terminated in a situation involving special circumstances determined and consented to by the employer. As BICC did not make that determination, BICC took the position that none of the members of the Plan affected by the Partial Wind-Up was entitled to receive a special early retirement pension under section 7.3 of the Plan. BICC then argued that the deemed consent in subsection 74(7) of the Act does not operate to confer such an entitlement for two reasons. First, the Act cannot supply the determination that “special circumstances” exist under section 7.3 of the Plan, as that determination is for BICC to make in its discretion. Second, subsection 74(7) operates only where the consent of an employer is an eligibility requirement for an “ancillary benefit.” BICC maintained that a special early retirement pension under section 7.3 of the Plan is not an “ancillary benefit” as section 7.3 does not confer early retirement options or benefits “in excess of” those provided by section 41 of the Act and does not limit eligibility to Plan members of a pension plan who are within ten years of normal retirement, which is a limiting factor in section 41.

The Superintendent argued that “special circumstances” in section 7.3 of the Plan logically means circumstances that are special in the sense that they would not entitle a member to an early retirement pension under any other provisions of the Plan. Therefore, the consent of BICC called for by section 7.3 is a consent to early termination and need not involve a determination of “special circumstances.” Consequently, subsection 74(7) of the Act can operate to deem such consent to be given, in the event of the Partial Wind-Up. The Superintendent argued that subsection 74(7) applies in this case because the early retirement pension under section 7.3 of the Plan is a true “ancillary benefit”; it affords an option “in excess of” the option provided under section 41 of the Act in that it provides for a special early retirement pension for a Plan member more than ten years from normal retirement.

Reasoning and Results

The Plan contains no definition of the term “special circumstances” as used in section 7.3 nor any statement of the purpose of that section that would assist in understanding the meaning of the section. Section 7.3 must, therefore, be interpreted in the overall context of the Plan without the benefit of such aids.

We agree with the Superintendent that the most reasonable interpretation of section 7.3, taken in context, is that it provides for a special early retirement pension in the event that a member's continuous service terminates before the normal retirement date in circumstances in which an early retirement pension would not otherwise be payable under the Plan. Other sections of the Plan (sections 7.2 and 7.4) provide for an early retirement pension or an unreduced early retirement pension for a Plan member whose continuous service terminates before the normal retirement date and who meets the age or age and service qualifications, prescribed by the relevant section, at the

time of termination. Therefore, the “special circumstances” to which section 7.3 logically relates are those other circumstances that do not qualify a member for an early retirement pension under another section of the Plan. The circumstances of those members of a partial wind-up group who are in that position can, therefore, be said to be “special circumstances” in the sense of section 7.3.

If the term “special circumstances” in section 7.3 of the Plan has the meaning set out above, there is no need for BICC to determine the scope of the term on an *ad hoc* basis by declaring “special circumstances” to exist for a particular member or class of members. Rather, the term speaks for itself and is capable of application in a particular case without any consent or other determination on the part of BICC.

In our view, the consent of the employer required by section 7.3 of the Plan refers to the early termination of the continuous service of a member under special circumstances. Even if special circumstances exist in respect of a member whose continuous service terminates before the normal retirement date, that member does not have a right, under section 7.3, to a special early retirement pension, unless BICC also gives its consent to the early termination of membership.

We are, therefore, in agreement with the Superintendent's interpretation of section 7.3 of the Plan. Had we been of the opinion that the interpretations of section 7.3 of the Plan urged by BICC and the Superintendent were equally compelling, we would still have favoured the Superintendent's interpretation on the basis that any ambiguity should be resolved against BICC as the drafter of the Plan (see *McCreight v. 146919 Canada Ltd.*, [1991] O.J. No. 136 (Q.L.) (Ont. H.C.), esp. at p. 12).

Having determined the proper interpretation of section 7.3 of the Plan, we turn our attention to the potential application of subsection 74(7) of the Act, which involves consideration of the meaning of the term “ancillary benefit” as used in that subsection. This term is not defined in the Act, but subsection 40(1) of the Act states that a pension plan may provide certain kinds of “ancillary benefits,” which include, in paragraph 5:

Early retirement options and benefits in excess of those provided by section 41 (early retirement option).

The early retirement option under section 41 of the Act is available only to those members of a plan who are within ten years of normal retirement. “Ancillary benefits” is defined in the General Regulation under the Act (Ont. Reg. 909, as am.) as meaning the benefits referred to in subsection 40(1) of the Act, but this definition is simply for the purposes of the Regulation and not the Act.

We conclude that the special early retirement pension provided for in section 7.3 of the Plan is, in fact, an “ancillary benefit” in the sense of subsection 74(7) of the Act. It involves an early retirement option (if not also an early retirement benefit) that is in excess of the early retirement option provided for in section 41 of the Act. One of the accepted meanings of the phrase “in excess of” is

“more than” (see *The Concise Oxford Dictionary*, 9th ed. (Oxford: Oxford University Press, 1995). In our view, a special early retirement pension under section 7.3 of the Plan is “more than” the early retirement option under section 41 of the Act because, unlike the latter option, it is not simply available to plan members who are within ten years of normal retirement.

We conclude that a member of the Plan who is affected by the Partial Wind-Up is entitled to a special early retirement pension, in accordance with subsection 74(1) of the Act as read with section 7.3 of the Plan, provided that,

- the member's age plus years of continuous employment or membership in the Plan total at least fifty-five at the effective date of the Partial Wind-Up in accordance with the opening clause of subsection 74(1), and
- the member does not qualify for an early retirement pension under any other provisions of the Plan with the result that the member's circumstances are “special” in the sense of section 7.3 of the Plan.

The only other qualification for a special early retirement pension - that of the consent of BICC under section 7.3 of the Plan - is deemed to be satisfied, on the Partial Wind-Up, by subsection 74(7) of the Act.

Consequently, the proposal of the Superintendent, in her Notice of Proposal, to refuse to approve the Partial Wind-Up Report, for failure to take account of the special early retirement pensions provided for in section 7.3 of the Plan, was proper. We, therefore, direct the Superintendent to carry out the proposal.

DATED at Toronto this 16th day of November, 2000.

“C.S. Moore”
C. S. (Kit) Moore
Chair of the Panel

“William M. Forbes”
William M. Forbes
Member of the Panel

“Colin H.H. McNairn”
Colin H.H. McNairn
Member of the Panel