

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 by the Superintendent of Financial Services to refuse to make an Order under section 87 of the Act respecting a request by Mr. David Horgan relating to the **Ontario Public Service Pension Plan, Registration Number 208777**;

AND IN THE MATTER OF a Proposal by the Superintendent of Financial Services to refuse to make an Order under section 87 of the Act respecting a request by Mr. Rupinder Anand relating to the **Ontario Public Service Employees' Union Pension Plan, Registration Number 1012046**;

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 and RUPINDER ANAND

Applicants

- and -

SUPERINTENDENT OF FINANCIAL SERVICES

- and -

ONTARIO PENSION BOARD

- and -

OPSEU PENSION TRUST

Respondents

BEFORE:

Ms. Martha Milczynski,
Chair of the Tribunal and Member of the Panel

Mr. Louis Erlichman
Member of the Tribunal and Member of the Panel

Mr. William Forbes
Member of the Tribunal and Member of the Panel

APPEARANCES: For Mr. Horgan and Mr. Anand
Mr. Simon Schneiderman

For Superintendent of Financial Services
Ms. Deborah McPhail
Ms. Frederika Rotter

For Ontario Pension Board and
OPSEU Pension Trust
Mr. Murray Gold
Ms. Susan Philpott

HEARING DATE: July 11, 2001

REASONS FOR DECISION

Nature of Application

The applicants in this matter, Mr. David Horgan and Mr. Rupinder Anand (together the “Applicants”) each requested a hearing before the Financial Services Tribunal in respect of the Notice of Proposal issued to each applicant by the Superintendent of Financial Services (“Superintendent”). The Notices of Proposal indicated that, in the case of Mr. Horgan, the Superintendent was refusing to issue an order under section 87 of the *Pension Benefits Act* (the “Act”) directing the Ontario Pension Board (“OPB”) to pay a pension benefit to Mr. Horgan under the terms of the Ontario Public Service Pension Plan (“OPS Plan”). In the case of Mr. Anand, the Superintendent was refusing to issue an order under section 87 of the Act directing the OPSEU Pension Trust (“OPT”) to pay a pension benefit to Mr. Anand under the terms of the Ontario Public Service Employees’ Union Pension Plan (“OPSEU Plan”).

The Superintendent’s grounds for the refusals stated in each Notice that section 80 of the *Pension Benefits Act* applied to Mr. Horgan and Mr. Anand, and by virtue of subsection 80(3) of the Act, their employment was deemed not to have been terminated. For reasons

set out below, the Tribunal affirms the Superintendent's determination and Orders as proposed.

Facts

The Applicants were employed in the Property Assessment Office of the Ministry of Finance until December 31, 1998. Mr. Horgan was a member of the OPS Plan; Mr. Anand was a member of the OPSEU Plan.

Pursuant to the requirements of the *Ontario Property Assessment Corporation Act* and the terms of the Memorandum of Understanding between the Minister of Finance and the Ontario Property Assessment Corporation ("OPAC"), effective 12:01 a.m. on December 31, 1998 ("Memorandum of Understanding"), the property assessment functions of the Ministry of Finance and the Ministry's assets, leasehold and other interests or property associated with the property assessment operations were transferred to OPAC.

As part of this transfer and as contemplated by the Memorandum of Understanding, on or about December 15, 1998 each of the Applicants received an offer of employment from OPAC to be effective December 31, 1998. Each of the Applicants accepted the offer of continued employment under substantially similar terms and conditions of employment. Pursuant to each of their respective offers of employment, Mr. Horgan and Mr. Anand would cease being employed in the Ontario Public Service and continue with OPAC in their positions with the same job titles, at the same rate of pay - the difference being that for pension purposes, each would commence participation in the Ontario Municipal Employees Retirement System ("OMERS") rather than the OPS Plan or OPSEU Plan where their benefits accrued to the effective date of the transfer would remain. In addition, the Applicants' years of service in the Ontario Public Service would be carried over and included in their service with OPAC.

As of the time of the transfer, Mr. Horgan and Mr. Anand were eligible to retire under the "Factor 80" provisions of the OPS Plan and OPSEU Plan. On December 16, 1998, Mr. Anand signed a Notice of Election advising that he was retiring from his employment

effective December 30, 1998. On December 17, 1998, Mr. Horgan signed a Notice of Election advising that he was retiring from his employment effective December 31, 1998. Both Applicants continued to work for the Ministry and, as at December 31, 1998, continued working for OPAC. However, both Applicants sought also to receive payment of their pension benefits from either of the OPS Plan or OPSEU Plan as applicable.

The OPB as administrator of the OPS Plan and OPT as administrator of the OPSEU Plan refused to pay the Applicants any pension benefits and advised, in each case, that although eligible for "Factor 80" benefits, and notwithstanding their Notices of Election, neither Mr. Horgan nor Mr. Anand had "retired". In the circumstances of each case, the OPB and OPT advised that section 80 of the *Pension Benefits Act* applied such that notwithstanding the transfer of the Ministry's property assessment functions to a new employer, Mr. Horgan and Mr. Anand's employment with the Ministry was deemed not to have been terminated pursuant to ss.80(3) of the Act.

The Applicants each requested the Superintendent to order the plan administrator to commence payment of pension benefits. In the case of Mr. Horgan, by Notice of Proposal dated July 12, 2000, the Superintendent refused to order that the OPB pay Mr. Horgan pension benefits as he requested. By Notice of Proposal dated January 4, 2001, the Superintendent refused to order OPT to pay Mr. Anand pension benefits as he requested. The Superintendent found no basis in the case of either the OPB or OPT that the administrator failed to comply with the requirements of the Act or regulation made thereunder.

At the request of the Applicants and on the consent of the other parties, the Tribunal ordered that the hearings in respect of both matters be joined and heard concurrently.

Pension Benefits Act

The relevant provisions of the Act are as follows:

80. (1) Where an employer who contributes to a pension plan sells, assigns or otherwise disposes of all or part of the employer's business or all or part of the assets of the employer's business, a member of the pension plan who, in conjunction with the sale, assignment or disposition becomes an employee of the successor employer and becomes a member of a pension plan provided by the successor employer,

- (a) continues to be entitled to the benefits provided under the employer's pension plan in respect of employment in Ontario or a designated province to the effective date of the sale, assignment or disposition without further accrual;
- (b) is entitled to credit in the pension of the successor employer for the period of membership in the employer's pension plan, for the purpose of determining eligibility for membership in or entitlement to benefits under the pension plan of the successor employer; and
- (c) is entitled to credit in the employer's pension plan for the period of employment with the successor employer for the purpose of determining entitlement to benefits under the employer's pension plan.

80. (3) Where a transaction described in subsection (1) takes place, the employment of the employee shall be deemed, for the purposes of this Act, not to be terminated by reason of the transaction.

Issues

All parties agreed that to determine whether the Applicants were entitled to receive payment of pension benefits in the circumstances of this case, the Tribunal would be required to determine the following issues:

1. Was there a sale, assignment or other disposition of all or part of the business or all or part of the assets of the Ministry, the Applicants' former employer, to OPAC?
2. If the answer to issue (1) is yes, did the Applicants become employees of the successor employer, OPAC, in conjunction with the sale, assignment or disposition of the business?
3. If the answer to issues (1) and (2) are yes, what are the consequences that flow from this transaction under subsections 80(1) and 80(3) of the Act?

Issue #1 Was there a sale, assignment or other disposition of all or part of the business or all or part of the assets of the Ministry, the Applicants' former employer, to OPAC?

There is no doubt, having regard to the provisions of the *Ontario Property Assessment Corporation Act*, the terms of the Memorandum of Understanding and the facts surrounding the transfer of operations, that the nature of the transaction between the Ministry of Finance and OPAC fits squarely within the type of transaction contemplated by section 80(1) of the *Pension Benefits Act*. The Tribunal does not accept counsel for the Applicant's submissions that section 80(1) of the Act applies only to transfers affecting "for profit" business operations. The Act applies to all pension plans registered in Ontario and makes no such distinction in that regard as to whether or not the plan sponsor is a "for profit" or a "not for profit" entity.

In this case, the entire property assessment operation of the Ministry of Finance was transferred to OPAC and as part of this transfer the assignment or disposition of all of the assets associated with the Ministry of Finance's "business" of property assessment was also included.

Issue #2 If the answer to issue (1) is yes, did the Applicants become employees of the successor employer, OPAC, in conjunction with the sale, assignment or disposition of the business?

It is clear from the terms of the Memorandum of Understanding and the written offers of employment the Applicants received that each of Mr. Horgan and Mr. Anand became an employee of OPAC as part of or in conjunction with the overall transfer of the property assessment operation from the Ministry of Finance to OPAC. There was no other reason but this transaction or transfer of property assessment functions that caused the Applicants' employment to cease with the Ministry of Finance and commence with OPAC. Consequently, as at 12:01 a.m. on December 31, 1998 each of the Applicants became employed by OPAC who became the "successor" employer of the Applicants for the purposes of subsection 80(1) of the Act.

Issue #3 If the answer to issues (1) and (2) are yes, what are the consequences that flow from this transaction under subsections 80(1) and 80(3) of the Act?

In this matter, the Tribunal has found on the first two issues that the transfer of property assessment functions from the Ministry of Finance to OPAC was a transaction described by subsection 80(1) of the Act:

- (a) the transfer of property assessment function from the Ministry of Finance to OPAC was (i) an assignment or other disposition of all or part of the Ministry's business; and (ii) was also the assignment or other disposition of all or part of the assets associated with that business;
- (b) the Applicants became employed by OPAC as part of or "in conjunction with" the transaction; and
- (c) OPAC became the "successor employer" for the purposes of the Act.

Subsection 80(3) of the Act is unambiguous - where a transaction described in subsection 80(1) takes place, the employment of the employee who became employed by the successor employer in conjunction with the transaction, is deemed, for the purposes of the

Act not to be terminated by reason of the transaction. The Applicants are deemed not to have had their employment with the Ministry of Finance terminated by reason of the transaction.

Consequently, for the purposes of subsection 80(1):

- (a) each of the Applicants remain entitled to benefits accrued under the OPS Plan or OPSEU Plan as the case may be;
- (b) each of the Applicants is entitled to credit in OMERS for the period of membership in the OPS Plan or OPSEU Plan as the case may be, for the purposes of determining eligibility for membership in or entitlement to benefits under OMERS; and
- (c) each of the Applicants is entitled to credit in the OPS Plan or OPSEU Plan, as the case may be, for the period of employment with OPAC for the purposes of determining entitlement to benefits under either of the OPS Plan or OPSEU Plan as the case may be.

Subsections 80(1) and 80(3) provide important protection for eligibility and benefit entitlement related to service for pension plan members affected by transactions like the transfer between the Ministry of Finance and OPAC. The very purpose of section 80 is to protect employees in a transfer or sale of business situation by deeming pension plan membership to be continuous as between the predecessor and successor employer.

Had the transfer between the Ministry of Finance and OPAC not occurred, the Applicants would not have transferred their employment from the Ministry to OPAC and they would not have had any entitlement to trigger a retirement under a Factor 80 pension without actually terminating their employment. Subsection 80(3) deems the Applicants' employment to continue for the purposes of the Act as between the Minister of Finance and OPAC without a termination having been caused by the transaction. The Applicants are thus in the same position as they would have been in had the transfer not occurred and their employment

simply continued with the Ministry of Finance. Under those circumstances, the Applicants cannot retire and commence receiving payment of a pension benefit without terminating employment with or retiring from OPAC.

Similarly, by virtue of subsection 80(3) of the Act an employee affected by the transfer between the Ministry of Finance and OPAC could not exercise the termination/portability provisions of section 42 of the Act without terminating employment with OPAC.

As noted above, the very purpose of section 80 is to protect employees in a sale, assignment or transfer of business situation by deeming pension plan membership and credits to be continuous for eligibility and entitlement purposes as between predecessor and successor employers. Without the deeming provision of subsection 80(3) of the Act, transferred employees would be treated as terminated employees for pension purposes and lose the valuable growth in rights and entitlements associated with continuous plan membership.

Order

Accordingly, for the reasons noted above, the Superintendent's Notice of Proposal dated July 12, 2000 and Notice of Proposal dated January 4, 2001 whereby the Superintendent refused to issue an order directing the OPB and the OPT to pay the Applicants pension benefits are affirmed and the application to the Tribunal to make such order is dismissed.

Dated this 1st day of August, 2001.

"Martha Milczynski"
Ms. Martha Milczynski
Chair of the Panel

"Louis Erlichman"
Mr. Louis Erlichman
Member of the Panel

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