

FINANCIAL SERVICES TRIBUNAL

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

AND IN THE MATTER OF a Proposal by the Superintendent of Financial Services (the "Superintendent") to Refuse to Make an Order Under Section 87 of the Act Respecting a Request by Mr. Marcel Brousseau Relating to the Electrical Industry of Ottawa Pension Plan Ontario, Registration No. 0586396 (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:

MARCEL BROUSSEAU

Applicant

- and -

**SUPERINTENDENT OF FINANCIAL SERVICES OF ONTARIO And
BOARD OF TRUSTEES OF THE ELECTRICAL INDUSTRY OF OTTAWA PENSION
PLAN**

Respondents

BEFORE:

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

Ms. Heather Gavin
Member of the Tribunal and Member of the Panel

Mr. David Vincent
Member of the Tribunal and Member of the Panel

APPEARANCES:

Mr. Marcel Brousseau
Appearing on his own behalf

For the Superintendent of Financial Services
Mr. Mark Bailey

For the Board of the Trustees of the Electrical Industry of Ottawa Pension Plan
Ms. Fiona Campbell

HEARING DATE: March 30, 2004

REASONS

Background

The Applicant, Mr. Brousseau, is a member of the Electrical Industry of Ottawa Pension Plan (the "Plan"). The Plan is a multi-employer pension plan covering members of the International Brotherhood of Electrical Workers, Local 586. The Plan is administered by the Board of Trustees of the Electrical Industry of Ottawa Pension Plan (the "Trustees"). Coughlin and Associates Limited ("Coughlin") provide administrative services to the Plan.

This hearing results from a request made by Mr. Brousseau to the Financial Services Commission in October, 2001 with respect to his pension credits prior to 1985. In response to that request the Deputy Superintendent issued a Notice of Proposal to issue an Order dated January 22, 2002 that the Trustees, in refusing to give Mr. Brousseau credit during the lay-off period from November 1983 to 1985, had interpreted the Plan in compliance with the requirements of the *Pension Benefits Act*, the regulation thereunder and the 1985 Plan Text and the 1987 Declaration of Trust.

Mr. Brousseau became a member of the Plan on January 1, 1974 and he was a member of the Plan at the date of the hearing of this matter.

Mr. Brousseau was not given credit under the Plan for the period November 1, 1983 to August 31, 1985.

It is the position of the Superintendent and the Trustees that Mr. Brousseau is not entitled to credit under the Plan for this period of time as he was working for a non-union employer and therefore not "ready, willing and able to work in the electrical industry" as was, it is alleged by the Trustees and the Superintendent, required by the Plan. The Trustees and the Superintendent rely on the decision of the Ontario Superior Court of Justice released November 19, 2001 with respect to the correct interpretation of the Plan in Mr. Brousseau's circumstances.

Mr. Brousseau argues that he relied on the advice of the Business Manager and was never told that he would lose pension credits if he worked for a non-union employer.

At the opening of the hearing counsel for the Trustees acknowledged that there had been a miscalculation of Mr. Brousseau's period of eligibility and a correction would be made to provide an additional thirty-day credit.

The parties submitted an Agreed Statement of Facts to the Tribunal, however, during the hearing the evidence contradicted the Agreed Statement of Facts.

Relevant Provisions of the Plan and Trust Agreement

This Trustees' decision regarding Mr. Brousseau's pension credit during the lay-off period is based on the provisions of the 1977 Trust Agreement. In particular, Article IV of the Trust Agreement provides as follows:

"Insurance Coverage During Unemployment:

If the employment of an Employee is terminated by the act of a contractor and while such Employee is a member of the Local, all insurance benefits hereunder shall be continued in force by the Trustee for a period of ninety (90) days after cessation of such employment or longer at the discretion of the Trustees. Employees must be ready, willing and able to work in the electrical industry to remain eligible for insurance benefits under the Plan."

Article V of the Trust Agreement provides as follows:

"Authority of Trustees:

Subject to the stated purposes of the Plan and the provisions of this Agreement the Trustees shall have full authority to determine all questions of coverage and eligibility. They shall have the power to construe the provisions of this Agreement and the terms used herein. Any such determination or such construction adopted in good faith shall be binding on all parties and beneficiaries hereto."

Issue:

Should the Applicant be granted "credit service" for periods when the Applicant continued to be a member of the Local but was employed by an employer who was not a participating employer under the Plan?

Analysis:

The determination of the "credited service" to which the Applicant is entitled is dependent upon an application of the Plan terms to Mr. Brousseau's employment history.

The parties submitted an Agreed Statement of Facts. The Agreed Statement of Facts states that Mr. Brousseau worked for a participating employer under and was a member of the Plan from January 1, 1974 to the present except during a period between November 1, 1983 and August 31, 1985 when he was on temporary layoff. The Agreed Statement of Facts further provides that during the layoff period, the Applicant worked for Metcalfe Realty, an employer that did not participate in the Plan. During this period the Applicant did not receive pension credits under the Plan except for the first 90 days of the period.

Mr. Brousseau gave evidence that he was laid off by his employer, Glen-Mur Ltd. on September 12, 1983. He then became employed by Metcalfe Realty, an employer who did not participate in the Plan. Mr. Brousseau returned to his former employer (Glen-Mur Ltd.) for whom he worked for a two-week period in September 1984. All parties agreed that the former employer was a participating employer prior to 1983 and after August 1, 1985. The Trustees argued that there was no evidence that the former employer was a union employer during the relevant two-week period in September 1984. In the absence of evidence that the former employer ceased being a union employer during the relevant period of time (September 1984), we have concluded Mr. Brousseau did work for a participating employer up until November 1, 1983, for two weeks in September 1984 and after August 1, 1985.

The question then becomes how should the Plan terms be interpreted in the case of this employment history.

The interpretation of the relevant Plan provisions has been the subject of a decision of the Court [Ontario Superior Court of Justice, Court File No. 01 CU-18268 dated October 19, 2001]. In that case, the Court was asked to determine whether the Trustees had properly interpreted the Plan documents and adequately exercised their discretion in deciding whether to give members of the Plan credited service under the Plan for the periods before 1984 when they had a break in service and were not working for a participating employer under the Plan. The practice of the Trustees was to give Plan members whose employment by a participating employer was terminated, pension credits for a period of 90 days following the termination. After 90 days if the members were still not working for a participating employer, the Trustees considered whether the member was "ready, willing and able" to work in the electrical industry. The Trustees did not consider members who were employed by non-participating employers to be "ready, willing and able" to work in the electrical industry. If the members were "ready, willing and able" to work in the electrical industry the Trustees exercised their discretion whether to continue to give the members credited service based on the individual circumstances of each case.

The Court determined that the interpretation and practice of the Trustees was reasonable.

In the case of Mr. Brousseau, the Trustees concluded he was not ready, willing and able to work in the electrical industry given that he was working for a non-participating employer.

Mr. Brousseau gave evidence that he was advised by a Business Manager with Local 586 that if he did become employed by a non-participating employer during the layoff period his pension benefits would be maintained so long as he continued to pay his union dues. Mr. Brousseau argues that the representation from the Business Manager should determine his credited service and therefore there should be no break in his credited service for the periods during which he was employed by a non-union employer.

While we believe that Mr. Brousseau was of the impression that his service would continue, the interpretation of the Trustees, as confirmed by the Court, determines the eligibility of Mr. Brousseau to benefits under the Plan.

The question remains however as to whether the Plan terms have been correctly applied to Mr. Brousseau's circumstances. Given that Mr. Brousseau worked for his former employer for two weeks during September 1984 we have concluded that Mr. Brousseau was eligible for credited service for that period and for a period of 90 days following termination with that union employer in 1984 and that such service must be recognized by the Trustees as service with a participating employer under the Plan.

Conclusion:

For the reasons noted above, the Superintendent is ordered to refrain from issuing the Notice of Proposal and the Trustees are directed to provide credited services to Mr. Brousseau for the first 90 days after his layoff in 1983 (starting from September 12, 1983) and for two weeks plus 90 days in 1984.

Costs:

Mr. Brousseau requested an opportunity to make submissions as to costs. He may do so by written request filed with the Tribunal and served on the other parties within 30 days of the date of this decision. The other parties shall have 14 days to file and serve written responses to any such request.

Dated at the City of Toronto this 22nd day of October 2004.

“Anne Corbett”

Anne Corbett, Vice Chair of the Tribunal and Member of the Panel

“Heather Gavin”

Heather Gavin, Member of the Tribunal and Member of the Panel

“David Vincent”

David Vincent, Member of the Tribunal and Member of the Panel