

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*, S.O. 1997, c. 28 (the "Act");

AND IN THE MATTER OF a Proposal by the Superintendent of Financial Services to Make an Order under subsection 87(2) of the Act relating to the Ontario Teachers' Pension Plan, Registration No. 0345785 (the "Plan");

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

BETWEEN:

ONTARIO TEACHERS' PENSION PLAN BOARD

Applicant

-and-

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

-and-

JANE KALBFLEISCH-WILSON and RONALD WILSON

Additional Parties

BEFORE:

Colin H.H. McNairn
Vice Chair of the Tribunal
and Chair of the Panel

Louis Erlichman
Member of the Tribunal
and of the Panel

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

APPEARANCES:

For the Ontario Teachers' Pension Plan Board
Lawrence E. Ritchie
Anna Zalewski

For the Superintendent
Deborah McPhail

For Jane Kalbfleisch-Wilson
Ari Kaplan

For Ronald Wilson
Timothy F. Deeth

REASONS FOR DECISION

Facts

The Ontario Teachers' Pension Plan Board (the "Board") is the administrator of the Ontario Teachers' Pension Plan (the "Plan"), a pension plan for Ontario teachers that is registered under the *Pension Benefits Act* (the "Act").

Mr. Ronald Wilson ("Mr. Wilson") commenced membership in the Plan in 1969. He ceased employment as a teacher on January 31, 2000, at which time he was entitled to receive an immediate and unreduced special early retirement pension under the terms of the Plan. Mr. Wilson completed an application for the pension to which he was entitled under date of February 7, 2000, requesting that his pension commence on February 1, 2000. That application was received by the Board on February 21, 2000.

Mr. Wilson and Ms. Jane Kalbfleisch-Wilson ("Mrs. Wilson") were married on March 21, 1970. They began living separate and apart on February 7 or 8, 2000.

The Board made the first payment to Mr. Wilson in respect of his pension on April 28, 2000. That payment related to the month of April. On May 10, the Board made a second payment to Mr. Wilson in respect of his pension - for the months of February and March of 2000. That payment included interest on the February pension amount calculated from February 29, 2000 and on the March pension amount calculated from March 31, 2000.

The pension that was paid to Mr. Wilson was not in the form of a joint and survivor pension, which would provide a continuing, although reduced, pension to Mrs. Wilson should she outlive Mr. Wilson.

By notice of proposal dated January 8, 2003 (the "Notice of Proposal"), the Superintendent of Financial Services (the "Superintendent") proposed to make an order

under subsection 87(2) of the Act requiring the Board, as administrator of the Plan, to pay Mr. Wilson his pension in the form of a joint and survivor pension in accordance with subsection 44(1) of the Act. On February 25, 2003, the Board made a request for a hearing by this Tribunal in respect of that proposal. At a pre-hearing conference, Mr. Wilson and Mrs. Wilson were added, on separate applications, as parties to this proceeding, joining the Board and the Superintendent in that role.

Positions of the Parties

The Board has taken the position that Mr. and Mrs. Wilson were living separate and apart on the date that payment of the first instalment of Mr. Wilson's pension was due. In those circumstances, subsection 44(4)(b) of the Act provides an exception from the requirement, in subsection 44(1), that a pension paid to a member of a pension plan who has a spouse shall be a joint and survivor pension. The Board argued before the Tribunal that the earliest date by which payment of the first instalment of Mr. Wilson's pension could be said to be due was February 21, 2000, when the Board received Mr. Wilson's application to commence his pension and the actual due date, if it had to be determined, would be April 30, 2000 as Mr. Wilson's application was not complete until March, 2000.

The Superintendent maintained before the Tribunal that the Act equates the due date for payment of the first instalment of a pension with the member's entitlement to the pension, which in the present case was February 1, 2000, and nothing in the Plan can prevail over this minimum standard evidenced by the Act. Mrs. Wilson took the same position but put arguments forward in support that differed from those of the Superintendent.

Mr. Wilson did not make any arguments to the Tribunal, preferring to assume the role of observer in the hearing even though entitled, as a party, to make representations.

Relevant Provisions of the Act and the Plan

Subsections 44(1) to (4) of the Act are to the following effect:

44. (1) Every pension paid under a pension plan to a former member who has a spouse or a same-sex partner on the date that the payment of the first instalment of the pension is due shall be a joint and survivor pension.

(2) The commuted value of a joint and survivor pension under subsection (1) shall not be less than the commuted value of the pension that would be payable under the pension plan to the former member.

(3) The amount of the pension payable to the survivor of the former member and the spouse or same-sex partner of the former member shall not be less than 60 per cent of the pension paid to the former member during the joint lives of the former member and his or her spouse or same-sex partner.

(4) Subsections (1) to (3) do not apply,

- (a) in respect of a pension benefit if payment of the pension has commenced before the 1st of January, 1988; or
- (b) in respect of a former member who is living separate from his or her spouse or same-sex partner on the date the payment of the first instalment of the pension is due.

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The Plan provides in section 48 as follows:

- 48.** (1) The administrator shall begin payment of a member's retirement pension not later than the later of,
- (a) the month following the month in which the member ceases to be employed in education, or
 - (b) the month following the month in which application for the pension is complete.
- (2) The administrator shall pay a retirement pension in monthly instalments on the last day of the month.
- (3) The administrator shall pay interest on late payments.

Analysis

The term "pension", which is used in subsections 44(1) and 44(4)(b) of the Act, is defined (in section 1 of the Act) as meaning a "pension benefit that is in payment". A "pension benefit" is defined, in turn, as meaning the aggregate amounts payable to a member to which the member will become entitled under a pension plan. Given the use of the term "pension", rather than "pension benefit", the clause "date that the payment of the first instalment of the pension is due", in subsections 44(1) and 44(4)(b), must refer to a pension that is already in the payment phase. Therefore, the due date for payment of the first instalment of a "pension" must logically follow a "pension benefit" coming into payment although it could, of course, come immediately thereafter.

Other provisions of the Act that turn on the time of commencement of payment of a pension or pension benefit use different wording from that in section 44, for example;

subsection 45(1) - "before commencing payment of a pension or pension benefit"

subsection 46(2) - "within 12 months preceding commencement of payment of the pension benefit"

subsection 46(3) - "before commencement of payment of the pension benefit"

subsection 48(1) - "before commencement of payment of the deferred benefit" (a "deferred benefit" means a pension benefit that is deferred until the normal retirement date; see section 1 of the Act)

subsection 51(1) - "the date on which payment of the pension benefit commences"

These provisions would all seem to relate to the time that a pension benefit becomes a pension, i.e. the effective date of a pension in pay. If subsections 44(1) and 44(4)(b) were meant to key off that date, we would expect to see language similar to that in these other provisions of the Act. But the subsections of section 44 refer to the "due" date for "payment of the first instalment of the pension". On a plain reading, this would indicate that the date in question represents the time at which there is an obligation to start the actual payment stream in respect of a pension benefit that has matured into a pension.

Subsection 41(5) of the Act allows a member of a pension plan who is entitled to a deferred pension and is within 10 years of reaching normal retirement age (the position of Mr. Wilson in this case) to make an election requiring that payment of an early retirement pension commence at the time of termination of employment (or at any time thereafter that is at or before the normal retirement date). We think that this election is simply to determine the commencement of the in-pay phase of the pension and is not meant to allow the member to fix the due date for the payment of the first instalment of the pension, as suggested by Mrs. Wilson.

We conclude that the date at which payment of the first instalment of a pension is due, in the sense of subsections 44(1) and 44(4)(b), should not be equated with the commencement date of the pension. But that does not resolve the question that we have to decide in this case, which is whether Mr. and Mrs. Wilson were living separate and apart by the due date for payment of the first instalment of Mr. Wilson's pension. The Act does not elaborate on how that due date is to be determined.

Since the Act does not, itself, provide a method for fixing the due date for payment of the first instalment of Mr. Wilson's pension, we must then consider the terms of the Plan in this regard. Subsection 48(2) of the Plan tells us that the due date for that payment cannot be earlier than February 29, 2000 because all monthly instalments of a pension provided for by the Plan are payable in arrears at the end of the month and Mr. Wilson's pension did not start until February 1, 2000, the date he elected for commencement of the pension.

As there is nothing in the Act that is inconsistent with payment of monthly instalments of a pension in arrears, effect must be given to subsection 48(2) of the Plan. Consequently, it informs the meaning of the phrase "date that payment of the first instalment of the pension is due" in subsections 44(1) and 44(4)(b) of the Act as applied to Mr. Wilson's early retirement pension.

Since Mr. Wilson was living separate and apart from his wife before February 29, 2000, the earliest possible due date for payment of the first instalment of his pension, subsection 44(4)(b) of the Act applies, with the result that the pension is not required to be a joint and survivor pension. Accordingly, the Board acted properly in determining the form of pension to be paid to Mr. Wilson. In the circumstances, it is not necessary for us to decide the precise date at which payment of the first instalment of Mr. Wilson's pension came due.

We are not aware of any considerations relating to the policy or underlying aims of the Act that militate against our conclusion as to the earliest possible due date for payment of the first instalment of Mr. Wilson's pension. Generally speaking, any hardship to either spouse on a marriage breakdown that may be caused by one spouse failing to receive a joint and survivor pension or receiving such a pension can, of course, be redressed through the property division regime that applies on such a breakdown.

At the pre-hearing, the parties identified a second issue to be considered in this case, that is whether the Tribunal has the authority to determine the status of the pension payments that Mr. Wilson has already received and, if so, what relief ought to be directed in that regard. However, the parties recognized that this was a "live issue" only if the Tribunal were to conclude that Mr. Wilson should receive a joint and survivor pension. Accordingly, they reserved their arguments on this issue pending such a conclusion. It follows from our decision that it is not necessary to hear those arguments and address that issue.

Disposition

In light of our conclusions in this matter, we direct the Superintendent, by order, to refrain from carrying out the proposal contained in the Notice of Proposal.

DATED at Toronto, this 14th day of October, 2003.

"C. H.H. McNairn"
Colin H.H. McNairn
Chair of the Panel

"Louis Erlichman"
Louis Erlichman
Member of the Panel

"David A. Short"
David A. Short
Member of the Panel