

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF the *Pension Benefits Act*, R.S.O. 1990, c. P.8,
as amended (the "Act");

AND IN THE MATTER OF a proposal by the Superintendent of
Financial Services (the "Superintendent"), pursuant to the Act, to refuse
to make an order directing Pascol Engineering to make an additional
payment from the fund for the Portship Employees Negotiated Pension
Plan, Registration No. 0393199 (the "Plan") in respect of Constantin
Munteanu's pension benefits, or the commuted value thereof;

AND IN THE MATTER OF a request to the Financial Services
Tribunal for a hearing in respect of the proposal, made pursuant to the
Act;

AND IN THE MATTER OF a hearing by way of written submissions
on the jurisdictional questions of whether the Tribunal has authority to
entertain that request and, if so, whether it should do so;

BETWEEN:

CONSTANTIN MUNTEANU

Applicant

-and-

SUPERINTENDENT OF FINANCIAL SERVICES

Respondent

BEFORE:

Mr. Colin H.H. McNairn
Chair of the Tribunal

WRITTEN SUBMISSIONS:

On behalf of Constantin Munteanu, from
Mr. Doron J. Gold of Wrock & Associates

On behalf of the Superintendent of Financial Services, from
Mr. Mark Bailey

REASONS FOR DECISION

The Background

The Deputy Superintendent, Pensions Division of the Financial Services Commission of Ontario, acting under delegated authority from the Superintendent, served a notice of proposal dated April 8, 2004 on Mr. Constantin Munteanu, a former employee of Pascol Engineering (or its predecessor company) and member of the Plan, and on Pascol Engineering, the plan sponsor and administrator of the Plan. The notice was to the effect that the Deputy Superintendent refused to make an order under subsection 87(1) of the Act, requested by Mr. Munteanu, directing Pascol Engineering to make an additional payment from the pension fund for the Plan in respect of Mr. Munteanu's pension benefits or the commuted value of those pension benefits.

The notice advised Mr. Munteanu that he was entitled to a hearing by this Tribunal, pursuant to subsection 89(6) of the Act, and that, to request a hearing, he must deliver to the Tribunal a written request requiring a hearing within 30 days of service of the notice. The notice also advised that if Mr. Munteanu should fail to request a hearing within 30 days, the Superintendent may refuse to make the order, as proposed in the notice.

The Tribunal did not receive written notice requesting or requiring a hearing in this matter within 30 days of service of the notice of proposal. On June 9, 2004, Mr. Charles Wrock of Mr. Munteanu's firm of solicitors faxed a letter bearing that date to the Registrar of this Tribunal requesting a hearing in this matter and indicating that "the correspondence requiring [the solicitors] to file a request for hearing" had been misplaced. That letter was received by the Registrar on June 10, 2004. By letters dated June 11, 2004, the Registrar advised Mr. Wrock that a Request for Hearing, in the form prescribed by the Tribunal's Rules of Practice, was required to be filed and served, in accordance with Rule 15. A completed Request for Hearing was sent by Mr. Wrock to the Tribunal with a cover letter of July 2, 2004 asking, in effect, that the Tribunal convene a hearing notwithstanding the late filing of the Request. The Request for Hearing was received by the Tribunal on July 8, 2004.

On August 9, 2004, the Registrar faxed a letter to counsel for the parties to this proceeding and to Pascol Engineering inviting the submission of written representations to the Tribunal on the following jurisdictional questions;

- ◆ whether the Tribunal has the authority to extend the 30-day time period for delivering a notice requiring a hearing under subsection 89(6) of the Act; and
- ◆ if so, whether the Tribunal should exercise that authority in the circumstances of this case.

Such representations were made by counsel for the parties, both taking the position that the Tribunal could and should convene a hearing in this matter despite the late delivery or filing of a notice requiring, and a request for, such a hearing. Pascol Engineering did not submit any written representations.

The Statutory Framework

Section 89 of the Act provides, in its relevant provisions, as follows;

(2) Where the Superintendent proposes to make or to refuse to make an order in relation to,

...

(e) section 87 (administration of pension plan in contravention of Act or regulation);

...

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

...

(6) A notice under subsection ... (2) ... 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.

(7) Where the person on whom the notice is served does not require a hearing in accordance with subsection (6), the Superintendent may carry out the proposal stated in the notice.

(8) Where a person requires a hearing by the Tribunal in accordance with subsection (6), the Tribunal shall appoint a time and hold the hearing.

...

The *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended (the "SPPA"), to which this Tribunal is subject, provides as follows;

4.(1) Any procedural requirement of this Act or of another Act or regulation that applies to a proceeding, may be waived with the consent of the parties and the tribunal.

The Relevant Rules of Practice

At the time the Request for Hearing was filed in this case, the Tribunal's Rules of Practice (then called the "Interim Rules of Practice") provided, in Rule 15, as follows;

15.01 A proceeding is initiated by a written *Request for a Hearing* (in **Form 1**) or by written *Notice of Appeal* (in **Form 2**).

15.02 A *Request for a Hearing* shall be in writing and shall be filed **within the time period set out in the statute setting out the right of hearing** and shall be served on the Superintendent and any other interested parties or as directed by the Tribunal.

There are no substantial differences in the versions of these provisions as set out in the Tribunal's current Rules of Practice (the "Current Rules of Practice"), which replaced the Interim Rules of Practice effective August 1, 2004.

The Rules of Practice provide for variations in time periods prescribed by the Rules as follows;

5.01 The Tribunal may, before or after the expiration of a prescribed time period and on such conditions as it considers just, extend or abridge the time prescribed for the performance of anything required under the Rules.

A party who cannot meet a time limit prescribed by the Rules must promptly request an extension (Rule 5.02), although the process for doing so varies between the Interim Rules of Practice and the Current Rules of Practice. Both versions of the Rules authorize the Tribunal to exercise any of its powers under the Rules (*e.g.* under Rule 5.01) on its own initiative or at the request of a party (Rule 2.02 of the Current Rules of Practice and Rule 2.03 of the Interim Rules of Practice).

Analysis

Section 89 of the Act provides for a hearing by the Tribunal in a back-handed way. It comes at the subject through its prescription of the contents of the notice of proposal that the Superintendent is required to serve on affected persons. The notice must set out the fact that the recipient of the notice is entitled to a hearing by the Tribunal if a written notice requiring a hearing is delivered to the Tribunal within 30 days of service of the notice of proposal. Although the Act is drafted on the basis that the entitlement to a

hearing has its source in the terms of the notice of proposal, it does not indicate how that entitlement will be affected if the notice describes it in an inaccurate and misleading way or not at all. Suppose the notice does not advise a person to whom it is directed of the 30-day period for requiring a hearing by the Tribunal or advises, incorrectly, that the period is 60 days. Would the Tribunal be without any authority to waive the 30-day time period and entertain a notice requiring a hearing that was delivered to it beyond that period? It shouldn't be, given the unfairness of such a result to the person giving the notice requiring a hearing. This unfairness suggests that the 30-day time limit referred to in subsection 89(6) of the Act should not be construed as mandatory (*i.e.* imperative) or substantive, as it is sometimes put, for that would preclude any discretion, on the part of the Tribunal, to afford a hearing when it was requested beyond the 30-day period, whatever the circumstances might be.

If the time limit is not mandatory or substantive, it must then be directory or procedural in nature. Consequently, it can be waived with the consent of the parties and the Tribunal in accordance with subsection 4(1) of the SPPA. The parties to this proceeding, Mr. Munteanu and the Superintendent, have effectively consented to such a waiver and the question of whether the Tribunal should also consent is a remaining question that I have to address in these Reasons. Since the parties have consented to waive the time limit, I don't have to decide, for the purposes of this case, whether that time limit could be waived in the absence of the consent of the parties, which would necessitate a consideration of whether subsection 4(1) of the SPPA should be taken to contain an exhaustive description of the circumstances in which the time limit, in subsection 89(6) of the Act, can be waived or otherwise dispensed with.

Rule 15.02 of the Tribunal's Rules of Practice has the effect, in the present case, of incorporating by reference the 30-day time limit referred to in subsection 89(6) of the Act and making it the limit within which Mr. Munteanu was obliged to file with this Tribunal a written Request for Hearing in the form prescribed by the Rules. He did not file such a Request with the Tribunal until 3 months after the date of the notice of proposal. However, the Tribunal has the authority, under Rule 5.01, to extend the 30-day time limit, as adopted by Rule 15.02. I am prepared to consider the correspondence of Mr. Munteanu's counsel to the Registrar as, in effect, a request for such an extension under Rule 15.02 or alternatively to consider, on my own initiative under Rule 2.02 (formerly Rule 2.03, in the Interim Rules), whether such an extension should be granted.

I turn then to the question of whether in the circumstances of this case, the Tribunal should;

- ◆ consent to the waiver of the 30-day time limit, for delivering a written notice requiring a hearing, in subsection 89(6) of the Act, and
- ◆ grant an extension of the similar time limit, for filing a written Request for Hearing, in Rule 15.02 of the Tribunal's Rules of Practice.

In this case, the delay in delivering a notice requiring a hearing and in filing a Request for Hearing was not significant and, apparently, was the result of inadvertence on the part of Mr. Munteanu's solicitors. Moreover, neither party seems to have taken any action on the faith of the proposal contained in the notice following the expiry of the 30-day period. I am unaware of any third parties whose reasonable expectations might be frustrated if the proposal didn't have finality after 30 days in the absence of a notice requiring or requesting a hearing. While Pascol Engineering might have had an interest in the proposal being final in that event, it was given notice of the jurisdictional questions that were to be decided in this case and was invited to make written representations but declined to do so.

Disposition

In the circumstances, I make the following orders with respect to the jurisdictional questions that are before me;

- the Tribunal has the authority to extend the 30-day time period, under subsection 89(6) of the Act, for delivering a written notice requiring a hearing in this matter;
- that 30-day time period is waived, with the result that the written notice delivered by Mr. Munteanu, through his solicitors, to the Tribunal in a letter dated June 9, 2004 shall be treated as an adequate notice requiring a hearing in this matter for the purposes of subsection 89(6) of the Act.

I also order that the 30-day time limit for filing a Request for Hearing in this matter is extended, retroactively, to July 8, 2004, with the result that the Request for Hearing filed by Mr. Munteanu with the Tribunal on that date shall be treated as having been properly filed in accordance with the Rule 15.02 of the Tribunal's Rules of Practice and Procedure.

DATED at Toronto, Ontario this 29th day of November, 2004.

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