

FSRAFinancial Services Regulatory
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December 3, 2020

Mr. Greg Fender
Pension Manager
Coca-Cola Ltd.
c/o The Coca-Cola Company
P.O. Box 1734, Nat 15 D2602
Atlanta GA 30301gfender@coca-cola.com**Re: Retirement Plan for Coca-Cola Employees in Canada
Registration Number 0966440**

Enclosed, please find the Notice of Intended Decision with respect to the above noted pension plan.

Yours truly,

A handwritten signature in black ink, appearing to read "Mitzi D'Souza".

Mitzi D'Souza
Administrative Assistant, Pensions

Enclosure

c: Plan Member "RC"
Sharon Polischuk, Financial Services Regulatory Authority of Ontario

IN THE MATTER OF the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (the “Act”), in particular sections 19, 87 and 89;

AND IN THE MATTER OF the Retirement Plan for Coca-Cola Employees in Canada, Registration Number 0966440 (the “Plan”).

NOTICE OF INTENDED DECISION

TO: Coca-Cola Ltd.
c/o The Coca-Cola Company
P.O. Box 1734, NAT 15 D2602
Atlanta GA 30301
USA

Attention: Greg Fender
Pension Manager

Administrator

AND TO: RC

Plan Member

TAKE NOTICE THAT pursuant to sections 87 and 89 of the Act, and by delegated authority from the Chief Executive Officer of the Financial Services Regulatory Authority of Ontario (the “Chief Executive Officer”), the Head, Pension Plan Operations and Regulatory Effectiveness (the “Head”) intends to make an order to require Coca-Cola Ltd. (the “Administrator”) to include both the Transition Payment (defined below) and the Car Loss Payment (defined below) in RC’s pensionable earnings for the purpose of calculating RC’s defined benefit pension entitlement under the Plan. Details of this intended decision are described below.

SI VOUS DÉSIREZ RECEVOIR CET AVIS EN FRANÇAIS, veuillez nous envoyer votre demande par courriel immédiatement à: contactcentre@fsrao.ca.

YOU ARE ENTITLED TO A HEARING BY THE FINANCIAL SERVICES TRIBUNAL (THE “TRIBUNAL”) PURSUANT TO SUBSECTION 89(6) OF THE ACT. A hearing by the Tribunal about this Notice of Intended Decision may be requested by completing the enclosed Request for Hearing Form (Form 1) and delivering it to the Tribunal within thirty (30) days after this Notice of Intended Decision is served on you. The Request for Hearing Form (Form 1) must be mailed, delivered, faxed or emailed to:

Address: Financial Services Tribunal
5160 Yonge Street
14th Floor, Box 85
Toronto ON M2N 6L9

Attention: Registrar

Fax: 416-226-7750

Email: contact@fstontario.ca

TAKE NOTICE THAT if you do not deliver a written request for a hearing to the Tribunal within thirty (30) days after this Notice of Intended Decision is served on you, an order will be issued as described in this Notice of Intended Decision.

For additional copies of the Request for Hearing Form (Form 1), visit the Tribunal's website at www.fstontario.ca.

The hearing before the Tribunal will proceed in accordance with the *Rules of Practice and Procedure for Proceedings before the Financial Services Tribunal* ("Rules") made under the authority of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22. The Rules are available at the website of the Tribunal: www.fstontario.ca. Alternatively, a copy can be obtained by telephoning the Registrar of the Tribunal at (416) 590-7294, or toll free at 1-800-668-0128 extension 7294.

REASONS FOR INTENDED DECISION

Background – Transition Payment

1. RC is a member of the Plan and is employed in Ontario.
2. Effective July 1, 2017, the employer in respect of the Plan, Coca-Cola Refreshments Canada Company ("CCRC"), amended and restated the Plan to implement a "soft freeze" of defined benefit accruals for non-union employees (i.e., no further accrual of pensionable service but earnings after the date of amendment are still considered in calculating the pension benefit) and introduced a new defined contribution component with respect to future service of those employees.
3. Affected employees could elect to participate in the defined contribution component. Those electing to enroll in the defined contribution component by May 31, 2017 were paid a transition payment.
4. RC elected to participate in the defined contribution component and was paid a transition payment of \$65,601 (the "Transition Payment") in August 2017.

5. The Transition Payment was not included in RC's pensionable earnings but was included in his employment income for purposes of his *T4 Statement of Remuneration Paid*.

6. The defined benefits provided by the Plan are based on "Final Average Earnings", which is defined in section 2.44 of the Plan text as follows:

...means the average of the Member's annualized Earnings during the 5 calendar years in the 10 calendar years of Continuous Service immediately prior to the year of the Date of Determination which produce the highest average, or where the Member's Continuous Service is less than 5 years, the average of the Member's annualized Earnings during his calendar years of Continuous Service immediately prior to the year of the Date of Determination.

7. The term "Earnings", with respect to defined benefit provisions of the Plan, is defined in paragraph 2.40(a) of the Plan text:

2.40 "Earnings" means

(a) for the purposes of Part 2, Part 3, and Part 12, the amount of remuneration, exclusive of contest prizes and payments under the Coca Cola Refreshments Long Term Incentive Plan, paid through the payroll of a Participating Employer in a Plan Year and includes sales incentive and weekly indemnity benefits received by an hourly paid Employee;

(b) for the purposes of Group B DC Provisions, all salary, wages, and bonuses that are payable by a Participating Employer to the Member excluding any payments under the Coca-Cola Refreshments Long Term Incentive Plan; and

(c) for the purposes of Contributory DC provisions and Non-Contributory DC Provisions, all salary, wages, commissions, sales incentive and bonuses including overtime but excluding any shift differential that is payable by a Participating Employer to the Member and any payments under the Coca-Cola Refreshments Long Term Incentive Plan....

8. An employee booklet entitled "Introducing the CCRC Retirement Readiness Program" described the Transition Payment on page 8 of the booklet as a "*special one-time payment*" that is "*based on a formula which recognizes your age, earnings and the DB pension plan provision you were participating in up to June 30, 2017.*"

9. Page 4 of the booklet included the following question and answer:

7. WHAT IS THE TRANSITION PAYMENT? HOW WILL I RECEIVE IT?

The company is also providing eligible non-union DB members a special

one-time cash payment in connection with the transition to the Retirement Readiness Program.

In order to receive the transition payment in August 2017, you must enrol in the DC plan by May 31, 2017 and make the required associate contribution of 2% of eligible earnings. The transition payment will be paid in a single lump sum. It will therefore be subject to tax and government deductions. This payment can be taken as taxable cash or you may be able to transfer up to 75% to an RRSP. Your election to transfer a portion of your transition payment to an RRSP will be made after May 31, 2017.

Information to help you determine your available RRSP room is provided by the Canada Revenue Agency (CRA) on your most recent Notice of Assessment.

Associates must be employed by the company at the time the payment is made in order to receive it.

10. Page 19 of the booklet included a Glossary with the following description of Transition Payments:

Transition Payment: *to help reflect the move from a DB to DC plan, eligible associates will receive a one-time transition payment in August 2017. This payment can be taken as taxable cash or up to 75% can be transferred to an RRSP (if you have available RRSP room). Associates who are not employed by the company on the date the transition payment is made will not be eligible to receive it.*

Background – Car Loss Payment

11. On or about December 20, 2011, CCRC sent an interoffice memo to RC to inform him that he was no longer eligible for a vehicle allowance. The interoffice memo included the following statements:

In order to mitigate the impact of these changes to your compensation, the Company is making a one-time lump sum payment equal to twelve (12) months of your current vehicle allowance. This payment will be made in lieu of reasonable notice and is made on a confidential and “without prejudice” basis.

Your lump sum payment will be made in January 2012 and will be \$8,100.00. Please note that this is taxable income.

12. The lump sum payment of \$8,100 (the “Car Loss Payment”) was not included in RC’s pensionable earnings.
13. Subsection 19(1) of the Act requires a pension plan administrator to administer the pension plan in accordance with the Act.
14. Subsection 19(3) of the Act requires a pension plan administrator to ensure that the pension plan is administered in accordance with documents filed with the Chief Executive Officer, such as plan texts and amendments.

Positions of the Parties

15. RC takes the position that both the Transition Payment and the Car Loss Payment should be included in pensionable earnings for the purpose of calculating his defined benefit entitlement because both payments fit within the plain and ordinary meaning of the term “remuneration” and do not fall within either of the two exclusions from the definition of “Earnings” (i.e., contest prizes and payments from the long term incentive plan).
16. In a letter dated July 5, 2018, CCRC responded to RC as follows:

In 2017 your total taxable income also included a transition payment of \$65,601 which is not included in pensionable earnings. The transition payment is not “remuneration” for purposes of the pension plan since the normal meaning of the word indicates a payment for services rendered or work done. The transition payment was not provided as a payment for services to the Company but was instead a one-time payment to recognize your transition from a defined benefit accrual to a defined contribution accrual.

17. In a letter to legal counsel for RC dated May 21, 2019, the Administrator stated that the ordinary meaning of the term “remuneration” is a payment by the employer to the employee for services rendered by the employee, i.e., compensation in exchange for the work performed by the employee. The Administrator stated that the term “remuneration” does not include payments “*that are intended to compensate the employee for a potential future loss due to a change in benefits.*”
18. In that same letter, the Administrator described the purpose of transition payments as follows:

The transition payment was provided to employees, including [RC], who were transitioning out of the defined benefit provisions of the Plan when accrual of credited service ceased on June 30, 2017. The employer recognized that the defined contribution provisions that would apply to service beginning July 1, 2017 would not necessarily provide the same value as compared to continued accrual under the defined benefit provisions of the Plan and the employer calculated a single lump sum

payment for each transitioning employee. This amount was individualized for each employee and reflected the employee's age, earnings and applicable DB provision. Given the nature of the transition payment, it is not considered to be "remuneration" since it is not related in any way to the services rendered by [RC] during 2017.

19. The Administrator also stated in the May 21, 2019 letter that the Transition Payment should not be included in RC's pensionable earnings because it was *"made to compensate for a less valuable form of pension accrual in the future and it would not be a reasonable expectation that this payment would be applied to materially increase an employee's earnings, particularly considering that the payment was made in lieu of something (future DB accrual) which was not itself pensionable earnings."*
20. The Administrator also takes the position that the Car Loss Payment was not "remuneration" and therefore should not be included in "Earnings" for the same reasons given with respect to the Transition Payment.

Interpretation of "remuneration" as used in the definition of "Earnings"

21. The plain and ordinary meaning of the word "remuneration" is broad and includes payment and compensation.
22. Although the Administrator takes the position that the Transition Payment does not fit within the definition of "remuneration", it has also stated that the Transition Payment was compensation for the change in RC's pension benefits.
23. The Transition Payment was a *quid pro quo*, i.e., something of value exchanged for something else of value.
24. The Car Loss Payment was also a *quid pro quo* since it was compensation for RC's loss of a vehicle allowance.
25. There are a number of court cases wherein "remuneration" has been interpreted to mean a *quid pro quo*.
26. Neither the Transition Payment nor the Car Loss Payment is captured by the exclusions from the definition of "Earnings" in the Plan text, i.e., they are neither contest prizes nor payments under the long term incentive plan.
27. The sections of the definition of "Earnings" that relate to the defined contribution component of the Plan do not refer to "*remuneration*" but instead refer to "*all salary, wages and bonuses....*" and "*all salary, wages, commissions, sales incentive and bonuses including overtime*".

28. A contextual interpretation of how the term “remuneration” is used in the definition of “Earnings” supports the conclusion that the term “remuneration” is broader than the terms used with respect to the defined contribution component and can include other types of payment.
29. In the case of *Salvation Army v. Ontario* (1992), 88 D.L.R. (4th) 238 the Ontario Court (General Division) found that a payment or benefit could be remuneration even if it was conferred voluntarily on a recipient who was also acting voluntarily, i.e., outside of an employer/employee relationship.
30. Even if one accepts the Administrator’s position that neither the Transition Payment nor the Car Loss Payment was a *quid pro quo* for employment services, those payments would still be considered “remuneration” based on the decision in the Salvation Army case.
31. The Administrator’s characterization of what RC received does not determine what constitutes “remuneration” as that term is used in the Plan (see the decision of the Ontario Court of Appeal in *St. Marys Paper Inc. (Re)*, 19 O.R. (3d) 163).
32. The Administrator failed to comply with section 19 of the Act by not including the Transition Payment and the Car Loss Payment in “Earnings” for the purpose of calculating RC’s defined benefit pension entitlement under the Plan.
33. Such further and other reasons as may come to my attention.

DATED at Toronto, Ontario, December 3, 2020.



Jennifer Rook
Head, Pension Plan Operations and Regulatory Effectiveness

By delegated authority from the Chief Executive Officer