

FSRA

Financial Services Regulatory
Authority of Ontario

Office of the
Chief Executive Officer



ARSF

Autorité ontarienne de réglementation
des services financiers

Bureau du
directeur général

IN THE MATTER OF the *Pension Benefits Act*, R.S.O. 1990, c. P.8, as amended (the "Act"), in particular sections 87 and 89.

AND IN THE MATTER OF a Notice of Intended Decision of the Chief Executive Officer of the Financial Services Regulatory Authority of Ontario (the "Chief Executive Officer") to Refuse to Make an Order respecting the Ontario Public Service Employees' Union Pension Plan, Registration Number 1012046 (the "Plan").

NOTICE OF INTENDED DECISION

TO: Complainant A

Plan Member

AND TO: OPSEU Pension Trust
Board of Trustees
1200-1 Adelaide Street East
Toronto ON M5C 3A7

Attention: Reg Swamy
Chief Pension Officer

Administrator of the Plan

TAKE NOTICE THAT pursuant to sections 87 and 89 of the Act, the Chief Executive Officer intends to refuse to make an order (a) declaring Amendment No. 22 to the Plan void, (b) requiring the Plan to make additional payments to Complainant A with respect to the transfer of Complainant A's pension benefits from the Plan to the Public Service Pension Plan (the "PSPP"), or (c) declaring that the Plan has otherwise breached the Act in its dealings with Complainant A.

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 SECTION 89(6) OF THE ACT. A hearing before 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

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thirty (30) days after this Notice of Intended Decision is served on you. A copy of that form is included with this Notice of Intended Decision. Additional copies can be obtained by visiting the Tribunal's website at www.fstontario.ca.

TAKE NOTICE THAT if no written request for a hearing is delivered to the Tribunal within thirty (30) days after this Notice of Intended Decision is served on you, the Chief Executive Officer will carry out the refusal to issue an order pursuant sections 87 and 89 of the Act.

In order to request a hearing, a completed Request for Hearing Form (Form 1) must be delivered to the Tribunal within thirty (30) days after this Notice of Intended Decision is served. The form must be mailed, delivered, faxed, or emailed to:

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

Attention: Registrar

Fax: 416-226-7750

Email: contact@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, as amended. 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

1. The Plan is a contributory defined benefit pension plan established for employees of the Ontario Public Service ("OPS"). Members of the Ontario Public Service Employees' Union ("OPSEU") are required to participate in the Plan.
2. OPSEU Pension Trust ("OPTrust") is the administrator of the Plan.
3. Complainant A accrued approximately 21.033 years of credited service due to his mandatory participation in the Plan.
4. In 2015, Complaint A's employment with the OPS changed such that Complainant A

became a member of the Association of Management, Administrative and Professional Crown Employees of Ontario ("AMAPCEO"). Members of AMAPCEO are required to participate in the Public Service Pension Plan (the "PSPP").

5. A reciprocal transfer agreement ("RTA") exists between the Plan and the PSPP. The purpose of the RTA is to permit the transfer of credited service between the pension plans when a change in an OPS employee's employment requires a corresponding change in pension plan membership between the Plan and the PSPP.
6. Reciprocal transfer agreements are generally permitted pursuant to sections 21 and 19.1 of the Act.
7. In 2015, Complainant A's service was transferred from the Plan to the PSPP pursuant to an RTA between the Plan and the PSPP. Complainant A's consent to the transfer was not requested though Complainant A was advised of the transfer by the Plan administrator.
8. On December 20, 2016, Complainant A sent an e-mail to the Plan administrator requesting information concerning the commuted value of his accrued benefit under the Plan, the amount paid to purchase the service transferred to the PSPP, and an explanation as to why he was not paid an "excess transfer amount" as such amounts had been previously paid to other employees when service was transferred from the Plan to the PSPP.
9. In January 2017, Complainant A wrote to the Financial Services Commission of Ontario ("FSCO") with respect to the transfer, requesting that:
 - a. The Superintendent of Financial Services (the "Superintendent") find Amendment 22 to the Plan void pursuant to section 14 of the Act; and
 - b. The Superintendent find that the Plan be required to disclose to Complainant A the commuted value of Complainant A's benefits under the Plan.
10. The core of Complainant A's complaint against that Plan is that the transfer of

Complainant A's service from the Plan to the PSPP has resulted in a forfeiture of a portion of his accrued entitlement. Further, Complainant A asserts a number of the Plan administrator's actions in the context of the transfer contravene the Act, such contraventions include, but are not limited to the allegations summarized below:

- a. breach of fiduciary duty owed by the administrator of the Plan pursuant to section 22 of the Act by reducing Complainant A's benefit under the Plan;
- b. breach of section 3.1(1) of Regulation 909 by the Plan administrator in permitting a reduction of Complainant A's accrued benefit under the Plan
- c. failure of the administrator of the Plan to provide a termination statement to Complainant A in accordance with section 41(2) of Regulation 909 within 30 days of Complainant A's change of position within the OPS;
- d. failure of the administrator of the Plan to provide Complainant A with a statement of benefits in accordance with section 28(1) of the Act as a result of Complainant A's change of positions within the OPS;
- e. failure of the administrator of the Plan to comply with section 42 of the Act in the transfer of assets from the Plan to the PSPP without Complainant A's consent; and
- f. failure of the administrator of the Plan to comply with section 79.2 of the Act in failing to permit Complainant A to transfer an amount to a prescribed retirement arrangement.

11. Effective June 8, 2019, pursuant to the *Financial Services Regulatory Authority of Ontario Act, 2016*, S.O. 2016, c. 37, Sched. 8 (the "FSRA Act"), the Financial Services Regulatory Authority of Ontario ("FSRA") became the regulator under the Act and the powers and duties previously vested in the Superintendent were vested in the Chief Executive Officer of FSRA.

12. Complainant A also asserts that FSRA has failed to satisfy its statutory objects pursuant to section 3(b) of the FSRA Act in failing to act with respect to the complaints against the

Plan made by Complainant A.

13. On September 27, 2013, OPTrust filed Amendment 22 to the Plan. Prior to Amendment 22, section 15.4 of the Plan text provided that if on termination of membership in the Plan due to a transfer of employment covered by the PSPP, the commuted value of a member's credit determined as of the date of the member's termination of Plan membership exceeds the amount paid to the importing plan, the excess amount with interest shall be paid to the transferring member (the "excess value"). Amendment 22 revoked this provision, and as such, a payment of excess value is not permitted by the current Plan terms.
14. Section 15.5 of the current Plan text provides that transfers from the Plan to the PSPP are mandatory where a member of the Plan commences participation in the PSPP. Section 15.5 of the Plan text also provides that members affected by a transfer in Plan membership are not entitled to transfer or receive payment of their commuted value under section 10.8 of the Plan. As such, the current Plan terms do not provide for the payment of an "excess value". The transfer of a member's credited service from the Plan to the PSPP is determined as required by section 15(6) of the Plan text. The amount transferred is determined without reference to a commuted value.
15. The Act permits an employer to amend a plan from the effective date of the amendment provided that it does not reduce the amount or commuted value of a pension benefit accrued at the date of transfer.
16. It is FSRA's determination that at the time of the amendment, Amendment 22 to the Plan did not remove an entitlement under the Plan, nor did it reduce the amount or the commuted value of Complainant A's benefit under the Plan. As such, FSRA has determined that the amendment was not void pursuant to section 14 of the Act.
17. As the current Plan terms do not permit the payment of an "excess value", and the Act does not require the payment of such amount, FSRA has determined that the Plan administrator has neither contravened the Plan terms nor the requirements of the Act.
18. The Act provides that only former members of a pension plan are entitled to portability based on the requirements of section 37 and 42 of the Act. That is, section 37 requires

a member to terminate employment to be entitled to a deferred pension. Section 42 permits portability rights to be exercised only with respect to deferred pensions. As such, it is FSRA's view that the Act requires a member to terminate employment to be entitled to the transfer of a deferred pension.

19. As Complainant A's employment was not terminated with the OPS, Complainant A is not a "former member" and as such is not entitled to a deferred pension as required by Section 37 of the Act. Therefore, Complainant A is not entitled to the payment of an amount equal to the commuted value of Complainant A's pension as prescribed under section 42 of the Act.

20. Further, as only "former members" of a pension plan are entitled to portability rights under the Act, section 41(2) of Regulation 909 to the Act must be interpreted in this context. As such, only "former members" are entitled to the calculation of a commuted value by the Plan administrator.

21. On this basis, it is FSRA's determination that there is no requirement in the Act or the Regulations thereunder that Complainant A be provided with the commuted value of his benefit from the Plan due to the cessation of Complainant A's Plan membership.

22. It is on the basis of FSRA's conclusion that there has been no breach of the Act, it is FSRA's determination that:

- a. Amendment 22 is not void under the Act;
- b. the Plan administrator did not breach the Act by not providing Complainant A with a commuted value calculation;
- c. the Plan administrator did not breach the Act by not offering Complainant A portability rights, and more specifically, by not offering Complainant A a commuted value transfer; and
- d. the Plan administrator did not breach the Act by not providing the payment of an "excess value" to Complainant A.

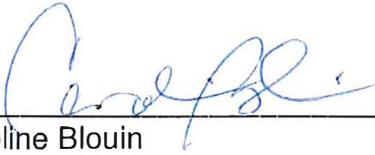
23. Further, on the basis of FSRA's determination as set out above, FSRA has also concluded

that there have been no contraventions of the Act or the Regulations as described, but not limited to those outlined in paragraph 10 above.

24. In conclusion, FSRA has determined that there has been no contravention of the Act which would permit the issuance of an Order under section 87 of the Act: (a) declaring Amendment No. 22 to the Plan void, (b) requiring the Plan to make additional payments to Complainant A with respect to the transfer of his pension benefits from the Plan to the PSPP, or (c) declaring that the Plan has otherwise breached the Act in its dealings with Complainant A.

25. Such further and other reasons as may come to my attention.

DATED at Toronto, Ontario, *November 20*, 2019.



Caroline Blouin
Executive Vice President, Pensions

By delegated authority from the Chief Executive Officer