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Superintendent of  
Financial  
Services



Surintendant des  
services  
financiers

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

**AND IN THE MATTER OF** a Notice of Intended Decision of the Superintendent of Financial Services to Make an Order under section 87 of the PBA relating to the Pension Plan for Employees of Hewlett Packard Enterprise Canada Co. (for Former EDS Retirement Plan Members), Registration Number 0911271.

**TO:**

**Hewlett Packard Enterprise Canada Co.**  
3550-419 King Street West  
Oshawa ON L9J 2K5

**Attention:**

Doug Wetmore  
Compensation & Benefits Analysis

Administrator of the Plan

**AND TO:**

**F.B.**

Retired Member of the Plan

## NOTICE OF INTENDED DECISION

**I INTEND TO MAKE AN ORDER** in respect of the Pension Plan for Employees of Hewlett Packard Enterprise Canada Co. (for Former EDS Retirement Plan Members), Registration Number 0911271 (the “Plan”), that vacation pay be factored into F.B.’s pensionable earnings under section 87 of the *PBA*.

Si vous désirez recevoir cet avis en français, veuillez envoyer votre demande immédiatement à: Adjointe, audiences, Greffe, Commission des services financiers de l’Ontario, 5160 rue Yonge, boîte 85, Toronto ON M2N 6L9.

**YOU ARE ENTITLED TO A HEARING** by the Financial Services Tribunal (the “Tribunal”) pursuant to section 89(6) of the *PBA*. **A hearing before the Tribunal about this Notice of Intended Decision may be requested by completing the enclosed Request for Hearing (Form 1) and submitting it to the Tribunal within 30 days after this Notice of Intended Decision is served on you.**<sup>1</sup> 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](http://www.fstontario.ca).

**If a Request for Hearing (Form 1) is submitted to the Tribunal within 30 days after this Notice of Intended Decision is served on you,** sections 89(8) and 89(9) of the *PBA* provide that the Tribunal shall appoint a time for and hold a hearing, and by order may direct the Superintendent of Financial Services (the "Superintendent") to make or refrain from making the intended decision indicated in this notice and to take such action as the Tribunal considers the Superintendent ought to take in accordance with the *PBA* and the regulations, and for such purposes, the Tribunal may substitute its opinion for that of the Superintendent.

**IF NO WRITTEN REQUEST FOR A HEARING IS MADE within 30 days after this Notice is served on you, TAKE NOTICE THAT the Superintendent will carry out the intended decision to order that vacation pay be factored into F.B.'s pensionable earnings pursuant to section 87 of the PBA.**

A completed Request for Hearing form must be received by the Tribunal within 30 days after this Notice is served on you. They may be mailed, faxed, or delivered to:

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

Attention: The Registrar  
Fax: 416-226-7750

The hearing before the Tribunal will proceed in accordance with the Rules of Practice and Procedure for Proceedings before the Financial Services Tribunal made under the authority of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22. Those Rules are available at the website of the Tribunal: [www.fstontario.ca](http://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 ext 7294.

#### **REASONS FOR INTENDED DECISION:**

1. The Plan is a single employer combined defined benefit and defined contribution pension plan that was established on March 1, 1985.
2. Hewlett Packard Enterprise Canada Co. ("Hewlett") is the employer, sponsor and administrator of the Plan.
3. F.B. is a retired member of the Plan who took an enhanced early retirement as of November 30, 2012. Vacation pay was not factored into F.B.'s pensionable earnings when he retired.
4. At the time F.B. retired, pensionable service under the Plan was calculated on a final average earnings basis. "Final Average Earnings" was defined in the Plan text as meaning the average of a Member's highest 5 discrete periods of 12 consecutive months of Earnings during the Member's final 120 consecutive calendar months of Continuous Service.
5. Amendment Number 5 to the Plan was effective January 1, 2011, and stated that "Final Average Earnings" for a full time employee was determined based on the remuneration paid to a member of the Plan including "base pay" and eligible commissions but "excluding bonuses, overtime pay, and any other forms of compensation". The amount of taxable

benefit in respect of the exercise of any stock options was also excluded.

6. The previous definition of “earnings” in the Plan included structured bonus plans, performance-related bonuses, commissions, overtime pay and the taxable benefit in respect of certain stock options that were available to members.
7. The Plan does not define “base pay”. However, vacation pay is an integral part of base wages and is not a separate amount that is earned through bonuses or stock options. Under the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (the “ESA”), vacation pay is a statutory entitlement and accrues while the employee is employed. In other words, vacation pay represents the base pay amounts payable in respect of earned vacation days.
8. Hewlett takes the position that F.B. is not entitled to have vacation pay factored into his pensionable earnings because he was paid a lump sum representing unused vacation when he terminated his employment, and that to include vacation pay in his pensionable earnings would be double counting.
9. The Superintendent takes the position that vacation pay is included in “base pay” because it is not excluded from either version of the definition of Final Average Earnings in the Plan and because the *ESA* provides that vacation pay accrues during employment.
10. Moreover, F.B. received the lump sum on his termination because he had unused vacation time. The lump sum was payment of a past amount owing, and did not operate to exclude vacation pay from F.B.’s pensionable earnings. The lump sum payment represents the base pay amounts payable to F.B. in respect of his unused vacation days.
11. Section 87(1)(a) of the *PBA* states that the Superintendent may make an order requiring an administrator to take any action in respect of a pension plan or a pension fund if the Superintendent is of the opinion, upon reasonable and probable grounds, that the pension plan or pension fund is not being administered in accordance with the *PBA*, the regulations made under the *PBA* or the pension plan.
12. Hewlett is not administering the Plan in accordance with its terms by failing to factor vacation pay into F.B.’s pensionable earnings.
13. Such further reasons as may come to my attention.

**DATED** at Toronto, Ontario, this 28<sup>th</sup> day of December, 2018.

*Original Signed By*

Gino Marandola (Acting)  
Deputy Superintendent, Pensions  
By delegated authority from the  
Superintendent of Financial Services

1 NOTE - Pursuant to section 112 of the *PBA* any Notice, Order or other document is sufficiently given, served or delivered if delivered personally or sent by regular mail and any document sent by regular mail shall be deemed to be given, served or delivered on the fifth day after the date of mailing.

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