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Superintendent of
Financial
Services



Surintendant des
services
financiers

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 Refuse to Make an Order under section 87 of the PBA relating to the Colleges of Applied Arts and Technology Pension Plan, Registration Number 0589895.

TO:

D.A.

Applicant

AND TO:

Board of Trustees
Colleges of Applied Arts and Technology
2900-250 Yonge Street
PO Box 40
Toronto ON M5B 2L7

Attention: Evan Howard
Vice President, Pension Management

Plan Administrator

NOTICE OF INTENDED DECISION

I INTEND TO REFUSE TO MAKE AN ORDER in respect of the College of Applied Arts and Technology Pension Plan, Registration Number 0589895 (the “Plan”), under section 87 of the PBA requiring the Plan Administrator to continue indexation for pre-1992 service.

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.**¹ 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.

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 thirty 30 days after this Notice is served on you, TAKE NOTICE THAT the Superintendent will carry out the ORDER pursuant to section 89(7) of the PBA.

A completed Request for Hearing form must be received by the Tribunal within 30 days of this Notice is served on you. The Request for Hearing form 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 Procedures 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 at: 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 jointly sponsored defined benefit pension plan registered under the PBA and administered by a Board of Trustees (the “Trustees”).
2. The Applicant, D.A., is a retired member of the Plan with pre-1992 service.
3. Under the provisions of the Plan, ad hoc inflation protection for service earned before 1992 ended on January 1, 2014, and is subject to the pension fund meeting certain solvency criteria set out in the Plan.
4. It is the position of the Applicant that (i) the “change of rule” ending ad hoc inflation protection for service earned before 1992 contravenes section 53 of the PBA and that (ii) the past conduct of the Trustees has caused the reasonable expectation of the Applicant that indexation would continue at its previous rate.
5. The Applicant requests that the Superintendent issue an order that the Trustees reinstate “...the original established formula on indexation for the pre-1992 members...” thereby restoring inflation protection to the Applicant’s pension relating to service earned before 1992.
6. Section 87(2) of the PBA authorizes the Superintendent to make an order if the Superintendent is of the opinion on reasonable and probable grounds that the pension plan or pension fund is not being administered in accordance with the PBA, the regulations or the terms of the pension plan; that the pension plan does not comply with

the PBA and its regulations; or that the administrator of the pension plan, the employer or another person is contravening a requirement of the PBA or its regulations.

7. Section 53 of the PBA provides that pension benefits, pensions or deferred pensions shall be adjusted in accordance with the established formula or formulas and in the prescribed manner to provide inflation-related increases, but that any formula or formulas for any inflation related adjustments to pension benefits, pensions or deferred pensions shall be established only by amendment to the PBA.
8. As noted by the Financial Services Tribunal in *General Motors of Canada Limited v. Ontario (Superintendent Financial Services)* 2014 ONFST 11, section 53 of the PBA does not currently require that indexation be applied to pension benefits, pensions or deferred pensions. It is essentially inoperative:

While the section itself is in effect, it would require both a regulation and a statutory amendment to make it operative; neither have ever been passed. If they were passed, they would presumably make provision for how prescribed inflation adjustments would be treated under the Act.

As such, any indexation increases provided must result from the requirements of a pension plan's terms.

9. Prior Plan terms had provided for ad hoc inflation protection increases for pensions payable with respect to pre-1992 service until December 31, 2014. Ad hoc inflation protection payments after December 31, 2014, must be provided in accordance with the current Plan terms. The current Plan text authorizes "ad hoc" (i.e., discretionary) increases in pensions, notwithstanding any other Plan provisions, subject to specific criteria and in accordance with an inflation protection factor set out under the Plan.
10. The Plan also provides for increases in pensions in payment subject to specific criteria set out in the Plan and to two period-specific limitations. Both period-specific provisions are also subject to a cap on the aggregate benefit increases that could otherwise be paid.
11. The first limitation on increases in pensions payable applies to increases in pensions payable after December 2007. Annual increases in pensions payable under the Plan after December 31, 2007, in respect of service attributable to each calendar year after December 31, 2007, will only be implemented if the most recent actuarial valuation of the Plan for funding purposes discloses prior unutilized funding excesses or cumulative gains in the order of priority specified in the Plan.
12. The Applicant's complaint is based upon the second limitation on increases in pensions payable. This limitation applies to increases in pensions payable after December 2014. Annual increases in pensions payable under the Plan after December 31, 2014, in respect of service attributable to each calendar year prior to January 1, 1992, will only be implemented if the most recent actuarial valuation of the Plan for funding purposes discloses prior unutilized funding excesses or cumulative gains in the order of priority specified in the Plan. No increases in relation to service attributable to each calendar year prior to January 1, 1992, may be implemented until after any increases for service attributable to each calendar year after December 31, 2007, are implemented in accordance with the Plan terms.
13. The effect of these Plan provisions is that pension amounts based on pre-1992 service are eligible for ad hoc increases, but are subject to specific solvency criteria being met for

any increase after December 31, 2014. Such increases are not pre-funded, must be paid out of surplus amounts and are a secondary priority under the Plan after increases for service attributable to each calendar year after December 31, 2007.

14. D.A. asserts that the doctrine of “reasonable expectation” applies to require the Plan Administrator to continue to provide ad hoc increases with respect to pre-1992 service. D.A asserts that the provision of indexation increases from 2000 to 2014 created a “reasonable expectation” that such increases would continue to be provided with respect to pre-1992 service.
15. However, a doctrine of “reasonable expectation” has not been determined by any court to apply to the interpretation of a pension plan text.
16. No evidence of communications from the Plan Administrator was provided to the Superintendent to indicate that inflation increases were to be provided other than on the basis of the Plan terms described above.
17. Further, section 19(3)(a) of the PBA requires that an administrator ensure that a pension plan is administered in accordance with the documents filed with the Superintendent, including the pension plan text. The doctrine of “reasonable expectation” cannot be used to compel a result that is contrary to the PBA.
18. As a result, there has been no contravention of the PBA, its regulations or the Plan terms.
19. Such further and other reasons as may come to my attention.

DATED at Toronto, Ontario, this this 5th day of April, 2018.

Original Signed By

Lester J. Wong
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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