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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 a Notice of Intended Decision of the Superintendent of Financial Services to Refuse to Make an Order under sections 42(1)(b) and 87(2)(a) of the PBA relating to the Diversey Canada, Inc. Pension Plan, Registration Number 1090208 (the “Plan”)

NOTICE OF INTENDED DECISION

TO:

Diversey Canada, Inc.
3755 Laird Road
Mississauga ON L5L 0B3

Attention:

Kathy Koskinen
Human Resources Generalist - Pension and Benefits

Plan Administrator

AND TO:

R.P.

Plan Member

AND TO:

G.A.

Plan Member

I INTEND TO REFUSE TO MAKE AN ORDER under section 42(1)(b) and sections 87(2)(a), (b) and (c) of the *PBA* that the Plan administrator, Diversey Canada, Inc. (“Diversey”) transfer the

commuted values of the pension benefits of R.P. and G.A. under the Plan to prescribed retirement savings arrangements.

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, subsections 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 Refusal to make an order pursuant to sections 42(1)(b) and 87(2)(a).

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, Ontario
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. 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. Diversy is the employer, sponsor and administrator of the Plan.
2. The Plan was established effective May 3, 2002 as a single-employer, defined benefit (DB) plan. Effective January 1, 2013, a defined contribution component was added and all members ceased accruing DB benefits as of that date with entitlement to DB past service.

3. R.P. is an active member of the Plan, who has remained in his employment with the employer after his Normal Retirement Date (“NRD”), as defined in the Plan text, which was in August, 2013. R.P. is now over the age of 65 years.
4. G.A. is an active member of the Plan, who has remained in his employment with the employer after his NRD, as defined in the Plan text, which was in May, 2013. G.A. is now over the age of 65 years.
5. Neither R.P. nor G.A. have ceased or terminated active employment with Diversey, nor have they terminated membership in the Plan. Both continue to accrue pension benefits under the Plan.
6. Both R.P. and G.A. have requested that, on termination of employment or membership in the Plan, Diversey transfer the commuted values of their pension benefits from the Plan into prescribed retirement savings arrangements pursuant to section 42(1)(b) of the *PBA* and section 9.08(b)(ii) of the Plan text and Diversey has refused.

The Plan Text

7. “Normal Retirement Date” is defined in section 5.01 of the Plan text:

Normal Retirement Date

For the purposes of the Plan, a Member’s Normal Retirement Date is the first day of the month coincident with or next following the date on which the Member attains age 65.

Except as otherwise provided herein, a Member shall retire on his or her Normal Retirement Date and shall thereupon be entitled to receive a retirement pension under the Plan determined in accordance with Section 6.01.

8. Members who choose to retire after their NRDs may continue to accrue benefits and make contributions under the Plan as long as they maintain active employment. Section 5.03 of the Plan text states:

Postponed Retirement Date

- a. A Member may, with the consent of the Company, remain in the service of the Company beyond his or her Normal Retirement Date. Such Member shall continue to accrue benefits under the Plan and, in the case of a Contributing Member, to continue to make contributions until the date on which he or she leaves active employment with the Company. The Member’s Postponed Retirement Date shall be the first day of the month coincident with or next following the date on which the Member leaves active employment with the Company. Upon his or her Postponed Retirement Date, the Member shall receive a pension determined in accordance with Section 6.03.

b. The Payment of a retirement pension upon a Member's Postponed Retirement Date shall commence on the earlier of:

i. the Member's Postponed Retirement Date; and

ii. the end of the calendar year in which the Member attains age 69, or such other time as is acceptable under the Income Tax Act.

9. Section 6.03 of the Plan text states:

Postponed Retirement Pension

A Member who retires after his or her Normal Retirement Date Pursuant to Section 5.03 shall receive an annual retirement pension, commencing on his or her Postponed Retirement Date and Payable in equal monthly installments, in an amount determined in accordance with Section 6.01, taking into account the Member's Non-Contributory Service and Contributory Service and Pensionable Earnings up to his or her Postponed Retirement Date.

10. The Plan permits members who terminate employment prior to age 65 and who are entitled to immediate or deferred pensions under the Plan to direct that an amount equal to the commuted value of their pensions be transferred to a prescribed retirement savings plan. Section 9.08(b)(ii) states:

Transfer of Entitlement to Another Registered Trust or Plan

...

b. A Member who terminates employment with the Company prior to age 65 and who is entitled to a deferred pension under Sections 9.02 or 9.03 or to an immediate or deferred pension under Sections 6.01, 6.02 or 6.03, may direct that an amount equal to the Commuted Value of the pension:

...

ii. be transferred, on a locked-in basis, to a prescribed retirement savings arrangement; ...

11. Section 9.08(c)(i) of the Plan text prohibits Diversey from permitting a transfer under section 9.08(b) unless it is satisfied that the transfer is in accordance with the *PBA*:

c. The Company shall not permit a transfer or purchase under Section 9.08(b) unless the Company is satisfied that:

i. the transfer or purchase is in accordance with the Pension Benefits Act;...

The *PBA*

12. Section 42(1)(b) of the *PBA* gives a former member of a pension plan who is entitled to a deferred pension the right to require the administrator of the pension plan to transfer the

former member's deferred pension into a prescribed retirement savings arrangement (emphasis added):

42. (1) A former member of a pension plan is entitled to require the administrator to pay an amount equal to the commuted value of the former member's deferred pension,

...

b. into a prescribed retirement savings arrangement;

13. "Deferred pension" is defined in section 1(1) of the *PBA* as follows (emphasis added):

"deferred pension" means a pension benefit, payment of which is deferred until the person entitled to the pension benefit reaches the normal retirement date under the pension plan;

14. "Former member" is defined in section 1.1(2) of the *PBA* as follows (emphasis added):

(2) For the purposes of this Act, an individual is a former member of a pension plan if he or she has either terminated the employment that relates to the pension plan or has terminated membership in the pension plan and if either of the following criteria is also satisfied:

1. The individual is entitled to a deferred pension payable from the pension fund.

2. He or she is entitled to receive any other payment from the pension fund.

15. Pursuant to section 1.1(3), someone who is a retired member under the *PBA* is not a "former member:"

(3) Despite subsection (2), if an individual is a retired member of a pension plan, the individual is not a former member of the pension plan.

16. "Retired member" is defined in section 1.1(1) of the *PBA* as follows (emphasis added):

1.1 (1) For the purposes of this Act, an individual is a retired member of a pension plan if he or she has either terminated the employment that relates to the pension plan or has terminated membership in the pension plan and if one or more of the following criteria is also satisfied:

...

2. He or she is entitled to begin to receive a pension from the pension fund by virtue of having reached the normal retirement date under the pension plan, even though he or she has not yet elected to receive the pension.

...

17. If R.P. and G.A. terminated employment or membership in the Plan, both would come within the definition of "retired member" under section 1.1(1) of *PBA*, both having reached their NRDs under the Plan and therefore, pursuant to section 1.1(3), would not be former members under the *PBA*. Neither of R.P. and G.A. would be entitled to a deferred pension under the Plan as defined in section 1(1) of the *PBA*. As a result, section 42(1)(b) of *PBA*

could not apply to either R.P. or G.A. to entitle them to require Diversey to transfer the commuted values of their pension benefits to prescribed retirement savings arrangements.

18. No other provision of the *PBA* applies or would apply to permit Diversey to make, or entitle R.P. and G.A. to, a transfer under section 42(1)(b) of the *PBA*.
19. Section 87(2) of the *PBA* states that the Superintendent may make an order if the Superintendent is of the opinion, upon reasonable and probable grounds:
 - a. that the pension plan or pension fund is not being administered in accordance with this Act, the regulations or the pension plan;
 - b. that the pension plan does not comply with this Act and the regulations; or
 - c. that the administrator of the pension plan, the employer or the other person is contravening a requirement of this Act or the regulations.
20. The Superintendent is not of the opinion that the pension plan or pension fund is not being administered in accordance with the *PBA*, the regulations or the pension plan, or that the Plan does not comply with the *PBA* or the regulations, or that Diversey is contravening a requirement of the *PBA* or the regulations in respect of Diversey's refusal to transfer the commuted values of R.P.'s and G.A.'s pension benefits to prescribed retirement savings arrangements under section 42(1)(b) of the *PBA*.
21. Such further and other reasons as may come to my attention.

DATED at Toronto, Ontario, this **13th** day of **March, 2015**.

Original Signed By

Lester J. Wong
Deputy Superintendent, Pensions

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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