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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 (the “Superintendent”) to Refuse to Register in part Amendment Nos. 19 and 20 to the Canadian Commercial Worker Industry Pension Plan, Registration Number 0580431 (the “Plan”)

AND IN THE MATTER OF a Notice of Intended Decision of the Superintendent to issue an order under section 87 relating to the Plan.

TO:

Board of Trustees
Canadian Commercial Worker Industry Pension Plan
110-61 International Boulevard
Rexdale, ON M9W 6K4

Attention:

Bernard Christophe
Chair of the Board of Trustees

Plan Administrator

NOTICE OF INTENDED DECISION

I INTEND TO REFUSE TO REGISTER, under section 18(1)(f) of the *PBA*, section 1 of Amendment No. 20 to the Plan adopted December 6, 2013 and section 3 of Amendment No. 19 adopted June 27, 2013 to the extent that the identified parts of Amendment Nos. 20 and 19 apply to Ontario members; and

I ALSO INTEND TO ORDER, under section 87 of the *PBA*, that the Administrator forthwith provide termination statements to Ontario members affected by the withdrawal from the Plan as a result of negotiated agreements between Coca-Cola Refreshments Canada Company (“Coca-Cola”), a participating employer under the Plan, and the applicable locals of the United Food and Commercial Workers (“UFCW”).

REASONS:

1. The Plan is a multi-employer defined benefit pension plan covering employees employed in grocery stores and other companies operating in the food service and food processing sector. The Plan is administered by a board of trustees (the "Administrator")
2. This Notice of Intended Decision relates only to Ontario members. The Ontario Superintendent of Financial Services will issue separate decisions in respect of Saskatchewan and Manitoba members.
3. Coca-Cola operates a number of facilities in Canada, including facilities in Ontario, and employs members of the Plan.
4. Certain locals of the UFCW are the bargaining agents for members of the Plan employed at Coca-Cola. In collective bargaining in 2013 and early 2014, some of these locals in Ontario, Manitoba and Saskatchewan agreed with Coca-Cola to collective agreement changes requiring the cessation of participation and the cessation of the accrual of benefits in the Plan effective upon the date the collective agreement changes were ratified. Specifically, the affected Ontario locals and the ratification dates are as follows:
 - UFCW Local 175 (London), ratified, December 14, 2013;
 - UFCW Local 175 (Barrie), ratified, December 29, 2013; and
 - UFCW Local 175 (Ottawa), ratified, June 8, 2014.
5. In each case, Coca-Cola advised the Administrator of the cessation of the participation in the Plan as a result of the collective agreement amendments and requested that termination statements be provided within the prescribed time periods. Initially, the Administrator refused to provide termination statements nor, otherwise, process the terminations of the affected members. The basis for this refusal was the wording of Amendment No. 19 and Amendment No. 20 as set out below. The Administrator took the position that the withdrawals of locals were effective as at the date specified in those amendments rather than as of the date that the collective agreement changes were ratified. In effect, the Administrator purported to impose a moratorium on withdrawals.
6. The Administrator eventually advised that it had resolved to end the moratorium on withdrawals provided under the Plan effective September 1, 2014. Specifically, the Administrator advised that where a bargaining unit or employer ceased to participate in the Plan between September 11, 2013 and August 31, 2014 that the Administrator would treat the withdrawal as if it occurred effective September 1, 2014. The Administrator further advised that termination statements would be issued to the affected members after a direction was provided by Coca-Cola and the relevant union local to the Plan as to allocation of certain stabilization fund account balances.
7. Finally, the Administrator advised that the entitlement of affected members to exercise portability options under section 42 of the *PBA* would be based on their age as at the date that their bargaining unit or employer ceased to participate in the Plan not as at September 1, 2014. Under the Plan terms, members over age 50 as of the date they terminate membership are not eligible to exercise portability rights. Accordingly, the Administrator advised that it was prepared to afford portability rights to members who turned 50 between the date of the actual withdrawal of their bargaining unit or employer and September 1, 2014.

8. For all other purposes, the Administrator advised that the affected members would be treated as if they ceased membership in the Plan as at September 1, 2014.

Terms of the Plan

9. Prior to Amendment No. 19, section 14.05 dealt with the withdrawal of a participating employer. Section 14.05(b) stated:

A Withdrawal Event occurs on the first to occur of the following:

- i. when a Participating Employer ceases to participate in the Plan; or
- ii. when a bargaining unit of the Union ceases to participate in the Plan.

10. Further, section 14.05(d) of the Plan stated that the reductions applicable upon withdrawal of a participating employer or bargaining unit only applied to members who were not entitled to an immediate pension. In other words, the reductions did not apply to members who were entitled to an immediate pension (i.e.: who were over age 50).
11. Finally, section 14.05(h) stated that the reductions applicable upon withdrawal of a participating employer or bargaining unit did not impact offsets in certain benefit reductions achieved through the application of the stabilization fund reserve established under the Plan.
12. Amendment No. 19 was adopted on June 27, 2013. Effective September 11, 2013, section 3 of Amendment No. 19 purported to amend section 14.05(b) of the Plan to add the following paragraph to the end of section:

Notwithstanding the above, should a Participating Employer or a bargaining unit of the Union cease to participate in the Plan between September 11, 2013 and December 31, 2013, such Withdrawal Event shall be deemed not to occur until January 1, 2014 or such later date as is acceptable to a pension regulatory authority under the Act.

13. Further, effective January 1, 2014, Amendment No 19 purported to amend section 14.05(d) so that the withdrawal reductions would be applicable to individuals over age 50 and to delete section 14.05(h) in its entirety.
14. Amendment No. 20 was adopted on December 6, 2013. Amendment No. 20 states that "effective immediately Amendment No. 19 is hereby replaced with this Amendment No. 20 to the Plan". Again effective September 11, 2013, section 1 of Amendment No. 20 purports to further amend section 14.05(b) so that the final paragraph of the section reads as follows:

Notwithstanding the above, should a Participating Employer or a bargaining unit of the Union cease to participate in the Plan between September 11, 2013 and March 31, 2014, or such later date as may be determined by the Trustees and that is acceptable to a pension regulatory authority under the Act, such Withdrawal Event shall be deemed not to occur until April 1, 2014, or such later

date as may be determined by the Trustees and that is acceptable to a pension regulatory authority under the Act.

15. Further, Amendment No 20 purported to adopt the changes to section 14.05(d) and (h) as set out in Amendment 19 except that the effective date of the amendment was April 1, 2014 rather than January 1, 2014.
16. The Administrator takes the position that, on the basis of the wording of the Plan text in section 14.05(b), as amended by Amendment No. 20, the withdrawal of the Coca-Cola bargaining units is not effective until the date specified by the Administrator pursuant to section 14.05(b) of the Plan text. The Superintendent understands this date has now been established by the Administrator to be September 1, 2014. However, neither the Superintendent nor any other applicable regulatory authority have approved or otherwise indicated their acceptance of the September 1, 2014 date as is required under section 14.05(b) nor has the Administrator sought such approval.

Provisions of the *Pension Benefits Act*

17. Section 28(1) of the PBA states that “[w]here a member of a pension plan terminates employment with the employer or otherwise ceases to be a member, the administrator of the pension plan shall give to the member, ... a written statement setting out the prescribed information in respect of the benefits, rights and obligations of the member or other person.”
18. Section 28(2) of the PBA states that section 28(1) “applies in respect of a multi-employer pension plan where a member ceases to be a member” but does not apply where employment of the member ceases but plan membership continues. In this case, Plan membership ceased as of the applicable ratification dates although employment with Coca-Cola continues.
19. Section 41(2) of Regulation 909, R.R.O. 1990 (the “Regulation”) states that termination statements must be provided by the administrator within thirty days following the member’s “termination of employment or cessation of membership” or within thirty days of the date the administrator receives notice of the termination of employment or cessation of membership.
20. The termination statements contain detailed information and calculations concerning member entitlements and options. This information is essential for members to make informed choices concerning the exercise of portability options under section 42 of the *PBA*. Accordingly, any delay or denial of the provision of termination statements delays or frustrates the exercise of portability rights and does not comply with section 42 of the *PBA*.
21. The prior refusal of the Administrator to provide the termination statements and the ongoing delay in the provision of these statements contravenes section 28 of the *PBA* and section 41 of the Regulation and delays and frustrates the exercise of portability options under section 42 of the *PBA*.
22. Further, to the extent that the terms of Amendment No. 20 and Amendment No. 19 result in circumstances where termination statements are not provided within the statutorily required time period after the actual cessation of membership those Plan provisions contravene the *PBA*. In this case, the cessation of membership occurred, in fact and law, on the date the collective agreements amendments were ratified. This change arises out of an agreement duly entered into by the parties to the collective bargaining relationship

and was ratified by the relevant members. It is not within the authority of the Administrator to alter this result by adopting Plan provisions which purport to apply a later withdrawal date. By purporting to deem a cessation of membership later than the actual cessation of membership, the amendments contravene section 28.

23. The failure to give effect to the actual date which membership in the Plan ceased also impinges on another statutory entitlement under the *PBA*. Section 24.1 of the Regulation requires that where a “person is entitled to be paid a lump sum from a pension plan” interest is to be calculated from the “from the date of termination until the beginning of the month in which the lump sum is paid.” Accordingly under the *PBA* and Regulation, the commuted value would be determined on the actual date of withdrawal with interest accumulating to the date on which the lump sum is transferred rather than calculating the commuted value on September 1, 2014 as asserted by the Administrator with interest accumulating to the date of transfer from that date.
24. Further, section 19 of the *PBA* requires that an administrator administer a pension plan in accordance with pension plan documents filed with the Superintendent subject to the requirement that the administrator comply with the *PBA*. In this case, Amendment No. 19 and Amendment No. 20 also purport to alter the Plan terms which apply in respect of a bargaining unit or an employer who withdraws from the Plan. As set out above, Amendments No. 19 and 20 purport to amend the Plan to apply the benefit reductions applicable upon withdrawal to members over age 50 and to stabilization fund offsets. These changes purport to be effective on April 1, 2014 under Amendment No. 20 after the date of the actual withdrawal of two of the bargaining units in question. If the actual withdrawal dates are applied then the affected members will not be subject to the amendments to section 14.05(d) and (h) set out in Amendments Nos. 19 and 20. Accordingly, the Administrator’s intention to deem later withdrawal dates has the effect of contravening section 19 of the *PBA* because the treatment of the members who are subject to the withdrawal is not based on the plan terms as they read at the time of their withdrawal.
25. The Administrator relies on section 38(1) of the *PBA* which states:

A person who is,

 - a. (a) a member of a multi-employer pension plan;
 - b. a member of a pension plan who is employed by the employer on a less than full-time basis; or
 - c. a member of a pension plan who has been laid off from employment by the employer,

is entitled to terminate his or her membership in the pension plan if no contributions are paid or are required to be paid to the pension fund by or on behalf of the member for twenty-four consecutive months or for such shorter period of time as is specified in the pension plan.
26. On the basis of section 38(1), the Administrator argues that the cessation of membership in this case does not occur until the date specified by the Administrator under the Plan text. The Administrator states that the Plan text does not violate the *PBA* because it complies with the requirements of section 38(1). However, section 38(1) simply creates an entitlement for individual members of MEPPs who have terminated employment (or

otherwise have not had any contributions made on their behalf), but who remain members of the pension plan, to elect to cease membership. Section 38(1) does not apply to situations, such as this case, where employment continues but membership has ceased.

27. This interpretation is supported by the wording of section 28(2) which indicates that termination statement requirements apply “in respect of a multi-employer pension plan where a member ceases to be a member” (as in this case) but not “where a member terminates employment with an employer but continues to be a member” as in situations covered by section 38(1).

Refusal to Register Amendments

28. Section 18(1)(f) states that the “Superintendent may ... refuse to register part of an amendment to a pension plan if the part is void or if the pension plan with the part of the amendment would cease to comply with the Act and the regulation.” For the reasons set out above, section 1 of Amendment No. 20 to the Plan and section 3 of Amendment No. 19 do not comply with the Act and Regulation and, consequently, the Plan with the impugned parts of Amendment Nos. 19 and 20 does not comply with the *PBA* and Regulation. Accordingly, the Superintendent intends to refuse to register the identified parts of Amendment No. 20 and No. 19 to the extent that they apply to Ontario members.

Section 87 Order

29. Section 87 of the *PBA* states that the Superintendent “may require an administrator or any other person to take or to refrain from taking any action in respect of a pension plan or a pension fund” where “the Superintendent is of the opinion, on reasonable and probable grounds” that the pension plan is not being administered in accordance with the *PBA* and the Regulation, that the pension plan does not comply with the *PBA* and Regulation or that the administrator is not complying with the *PBA* or the Regulation.
30. For the reasons set out above, the Superintendent has reasonable and probable grounds to support the opinion that the Plan is not being administered in accordance with the *PBA* and the Regulation, that the Plan terms do not comply with the *PBA* and the Regulation and that the Administrator is not complying with the *PBA* and the Regulation. Accordingly, the Superintendent intends to issue, under section 87, the Order specified above.
31. Such further and other reasons as may come to my attention.

YOU ARE ENTITLED TO A HEARING by the Financial Services Tribunal (the “Tribunal”) pursuant to section 89(6) of the *PBA*. **To request a hearing, you must deliver to the Tribunal a written notice that you require a hearing, within thirty (30) days after this Notice of Intended Decision is served on you.**¹

YOUR WRITTEN NOTICE must be delivered to:

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

Attention: The Registrar

FOR FURTHER INFORMATION on a Form for the written notice, please see the Tribunal website at www.fstontario.ca or contact the Registrar of the Tribunal by phone at 416- 590-7294, toll free at 1-800-668-0128, ext. 7294, or by fax at 416-226-7750.

IF YOU FAIL TO REQUEST A HEARING WITHIN THIRTY (30) DAYS, I MAY CARRY OUT THE INTENDED DECISION AS DESCRIBED IN THIS NOTICE.

DATED at Toronto, Ontario, this **20th** day of **November, 2014**.

Original Signed By

Lester 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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