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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* with respect to the Pension Plan for Hourly-Paid Employees of Diesel Equipment Limited, Registration No. 0565895 (the “*Plan*”)

TO:

E.B.

Applicant

AND TO:

Diesel Equipment Limited (DEL)

Attention:

T.J. Quinn

Plan Administrator and Employer

NOTICE OF INTENDED DECISION

I INTEND TO REFUSE TO MAKE AN ORDER under section 87 of the *PBA* ordering the Administrator to permit the Applicant to transfer the commuted value of his pension benefit from the Plan.

REASONS:

Background

1. E.B. terminated employment with DEL on February 27, 2004. At that time, he had a vested pension benefit in the Plan.

2. DEL is the administrator of the Plan (Administrator) and was the Administrator at all relevant times.
3. On March 23, 2004, DEL sent a termination statement to E.B. at the address in its files. E.B. has confirmed that this was the mailing address that he had provided to the Administrator and that his family lived at that address until 2011.
4. The termination statement indicated that E.B. had the option of receiving a deferred pension from the Plan (Option 1) or transferring the commuted value of the pension to a locked-in arrangement (Option 2) and that if the attached form was not returned to DEL within 60 days of receipt, the benefits would be paid as if Option 1 had been chosen.
5. The form was not returned. According to E.B., he did not receive the termination statement in 2004 after his termination of employment.
6. In 2007, E.B. asked the Administrator to transfer the pension funds. The Administrator responded that E.B. no longer had the right to transfer the funds. E.B. again requested the transfer in 2012. When the Administrator again refused, E.B. contacted the Financial Services Commission of Ontario (FSCO).

Portability Rights

7. Section 42(4) of the PBA, as it read in 2004, provided that a former member is entitled to require the administrator to pay the commuted value of his pension to a prescribed retirement savings arrangement if the member delivers a direction to the administrator in the prescribed period. Section 20(1) of Regulation 909 (as it read in 2004) prescribed the period for this purpose as follows:

A member of a pension plan who makes an election under section 42 of the Act ...shall deliver a completed direction to the administrator within 60 days after termination of employment.
8. E.B. did not deliver a completed direction to the Administrator within 60 days after termination of employment.
9. An administrator must provide a written termination statement describing the former member's benefits and options under the plan within 30 days of termination of employment (or receipt of notice of termination) (PBA, s.28; Regulation 909, s. 41(2) as they read in 2004).
10. In 2004, section 112(1) of the PBA provided, in part, that a document is sufficiently given if sent by first class mail addressed to the person to whom it is to be given at the person's last known address. The Administrator complied with this requirement when it sent the termination statement to the last known address in its files for E.B.
11. In 2004, section 112(2) of the PBA provided that a document sent by mail is deemed to be given on the seventh day after the day of mailing "unless the person to whom it is sent establishes that, acting in good faith, the person did not receive the notice, order or other document, or did not receive it until a later date, through absence, accident, illness or other cause beyond the person's control." E.B. has indicated that he did not receive the termination statement and that he is acting in good faith in making that statement.

However, in order for section 112(2) to apply, E.B. would have to establish that, acting in good faith, he did not receive the termination statement through some cause beyond his control such as absence, accident or illness. E.B. has offered no explanation for why the termination statement was not received or why he waited three years after termination of employment to approach the Administrator (in 2007) and a further five years to contact FSCO (in 2012).

12. 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 28th day of August, 2013.

Original Signed By

Brian Mills
Deputy Superintendent, Pensions (A)

¹NOTE - 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.