FTR Now

Defining “Employer” For Pension Funding Purposes

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The Financial Services Tribunal (the “Tribunal”) recently released a decision that discusses, in detail, who is the employer for funding purposes under the *Pension Benefits Act* (“*PBA*”). This decision will be of interest to employers who participate in pension plans with more than one employer, but are not multi-employer pension plans or “MEPPs”, if the pension plan has a solvency deficiency. The decision addresses the employer’s responsibility for funding deficits when an employer terminates participation in the pension plan.

BACKGROUND

Founded in 1897, the Victorian Order of Nurses (“VON”) is a not-for-profit, national health care organization and registered charity offering a wide range of community health care services. Historically, the VON has had a network of branches that deliver community health care services across 10 provinces. Until 2006, this network of branches was comprised of both local branches (“Local Branches”) and national level branches. The national level branches are divisions of the VON, not separate legal entities, and employees were employed directly by VON.

The Local Branches, on the other hand, were separately incorporated legal entities. Prior to October 2006, Local Branches were authorized to carry on the objects of the VON in their local jurisdictions within Canada. The Local Branches employed their own employees, maintained their own payroll system, collectively bargained directly with their unions and set the terms of employment for their non-unionized staff, within guidelines established by the VON. In many ways, VON played a significant role in the operations and affairs of the boards of Local Branches.

THE VON CANADA PENSION PLAN

The VON established the VON Canada Pension Plan (the “Plan”) effective January 1, 1958 as the continuation of two prior plans. All Local Branches participated in the Plan. There were no participation agreements or other agreements between the VON and the Local Branches which stipulated the roles, duties and responsibilities of the Local Branches in relation to the Plan. Nevertheless, the Local Branches were obliged to have their employees participate in the Plan. The Local Branches were required to perform certain administrative functions in relation to the Plan, such as the enrollment of members and the deduction and remittance of contributions.

The Plan is a defined benefit pension plan that is funded by both employee and employer contributions. All employees of VON and the Local Branches, were required to participate and accrue pension benefits under the Plan.

The Plan originally did not address the remittance of contributions in the event there was a solvency deficiency. In 1993, VON amended the Plan to stipulate that VON and the Local Branches were obligated to remit contributions to the Plan required to amortize any unfunded liability or solvency deficiency that might arise from time to time. On January 9, 1999, VON implemented further amendments to the Plan, which included a formula to calculate such contributions. Local Branches were required to make payments to amortize any unfunded liability or solvency deficiency that might arise based on the ratio of a Local Branches’ current service contributions to the total annual current service contributions of VON and the Local Branches. The Plan text did not address how a wind up deficit was to be funded.

THE SIX SEPARATE BRANCHES AND THE INSOLVENT BRANCHES

In 2006, VON implemented a new organizational strategy called “One VON”. Essentially, there would be a single VON entity and no branch would be separately incorporated in future. Each Local Branch was required by the VON to make a decision as to whether it intended to join the One VON or operate outside of the VON framework. The Plan had a solvency deficiency at this time.

A number of Local Branches decided to leave VON instead of joining the new One VON organizational framework. The employees of those departing Local Branches (the “Six Separate Branches”) were no longer permitted to accrue service in the Plan. Shortly after leaving VON, the Six Separate Branches were informed for the first time by VON that each of them was required to make special payments to the Plan fund in respect of the solvency deficiency related to their employees’ benefit liabilities.

Prior to the departure of the Six Separate Branches, VON declared partial wind ups of the Plan with respect to the closure of a number of Local Branches, due to bankruptcy or insolvency (the “Insolvent Branches”). VON determined that the Insolvent Branches were responsible for the wind up deficit attributable to their employees’ benefits. As these branches were bankrupt and could not make the special payments required under the *PBA* to fund the deficits, VON applied to the Superintendent of Financial Services (the “Superintendent”) for a claim against the Pension Benefits Guarantee Fund (the “PBGF”) in respect of the funding of these benefits.

THE SUPERINTENDENT’S NOTICE OF PROPOSAL

On February 8, 2008, the Superintendent issued a Notice of Proposal to VON refusing to approve the partial wind up reports filed by the VON in respect of the Insolvent Branches. The Superintendent also did not approve the application for a claim against the PBGF. Instead, the Superintendent ordered VON to fund the wind up deficits related to each of the Insolvent Branches on the basis that the Plan was a single employer pension plan sponsored and administered by the VON and, as such, VON was solely responsible for funding the Plan.

VON sought a hearing with the Tribunal on the basis that VON was not the employer of the Insolvent Branches’ employees and therefore could not make contributions to the Plan to fund the wind up deficits.

The Six Separate Branches obtained party status to the hearing with respect to the issue of whether VON was responsible for any solvency deficit relating to the benefits of employees of the Six Separate Branches.

The Six Separate Branches took the position that VON had always been the sole employer for the purposes of the *PBA* and, therefore was solely responsible for any solvency deficit relating to all members and former members of the Plan and any wind up deficits relating to the Insolvent Branches. Two of the VON’s unions also obtained party status and argued that VON was the sole employer for funding purposes, or in the alternative, the VON and the Local Branches should be jointly and severally liable for funding the solvency deficit.

THE TRIBUNAL’S DECISION

The Tribunal characterized the issue before it as determining which entity participating in the Plan was an employer for the purposes of the *PBA*, and as such were required to make contributions to fund the Plan, including wind up deficits. In short, the Tribunal concluded the following:

- VON was not the employer of Plan members employed at the Insolvent Branches and was therefore not responsible under section 75 of the *PBA* for funding the wind up deficits associated with the Insolvent Branches’ employees;
- the Tribunal did not have jurisdiction to make an order in respect of who was responsible to fund of the solvency deficiencies relating to employees and former employees of the Six Separate Branches; and
- there was no joint and several funding obligation among employers.

TRIBUNAL'S JURISDICTION TO ADDRESS THE SIX SEPARATE BRANCHES

The Tribunal declined jurisdiction to make an order in respect of the Six Separate Branches primarily because the Superintendent's Notice of Proposal regarding the wind ups related to the Insolvent Branches did not address the Six Separate Branches in any way.

The Tribunal also held that they could not rely upon section 89(9) of the *PBA* to assume jurisdiction to make an order, as that provision requires the subject matter to be closely related to the Superintendent's proposal that is before the Tribunal. The Tribunal held that the issue of the solvency deficiency in relation to the Six Separate Branches' employees was not closely related to who was required to fund the wind up deficits related to the Insolvent Branches. In addition to the fact that the Six Separate Branches were not the subject of the Notice of Proposal, the Tribunal noted that the circumstances regarding the withdrawal of the Six Separate Branches were different than those of the Insolvent Branches. The Tribunal also noted that who the "employer" was for the purposes of the PBA could differ depending on the facts of each case and that the funding obligations of an ongoing plan are different than the obligations for a wound up plan (or part thereof).

VON WAS NOT THE "EMPLOYER"

With respect to the merits of the case, the Tribunal found that the issue was completely determined based on the statutory definition of "employer" under the *PBA*. The *PBA* defines "employer" as follows:

> "employer", in relation to a member or a former member of a pension plan, means the person or persons from whom or the organization from which the member or former member receives or received remuneration to which the pension plan is related. …

The Tribunal found that the definition of "employer" in the *PBA* was not ambiguous and clearly stated that the employer was the entity who pays the remuneration to which a pension plan relates. Based on the evidence, the Tribunal held that VON was not the employer of the Insolvent Branches' employees as VON did not provide any remuneration to those employees. The Insolvent Branches paid remuneration to their own employees.

The Tribunal dismissed arguments that the definition of employer under the *PBA* contemplated a broader meaning to the term "employer". The Tribunal also disregarded the previous decision of the Tribunal in *Dustbane Enterprises Limited and Superintendent of Financial Services (Ontario)* (2001), 27 C.C.P.B. 1, (F.S. Trib.), aff'd [2002] O.J. No. 2943 (Div. Ct.), (which was relied upon by the Six Separate Branches), in which the question of who paid the members of the pension plan was not held to be the determinative factor.

The Tribunal also dismissed arguments by the Six Separate Branches that the *PBA* contemplates that there is a "controlling employer" in a single employer pension plan that has more than one employer. The Tribunal agreed with the VON that the *PBA* clearly contemplated that some single employer plans could have more than one employer without constituting a MEPP under the *PBA*. The Tribunal found this was evidenced by section 86(1) of the *PBA*, regarding payments to the PBGF and the Superintendent's ability to place a lien on the assets of the employer or employers. With respect to the concept of a "controlling employer", the Tribunal specifically noted that the fact that the VON wound up the Plan in relation to the Insolvent Branches, "under the mistaken impression that declaring the Partial Wind Ups was part of its role as Plan administrator" did not mean that the VON was the controlling employer. Instead, the Tribunal agreed that VON was exercising its power to amend the Plan as the administrator.

The Tribunal also rejected the Superintendent's argument that the principle of *contra proferentum* should apply to interpret

the terms of the Plan against the VON. The Superintendent had argued that any ambiguity in the funding provisions of the Plan should be interpreted against VON. However, the Tribunal stated that the parties could not contract out of the funding provisions of the *PBA* and the *PBA* provided the complete answer as to which parties were responsible for funding the Plan.

NO JOINT AND SEVERAL LIABILITY

Finally, the Tribunal rejected the arguments by the Superintendent and the unions that “employer” could be interpreted to mean all participating employers jointly and severally. Under this interpretation, if a participating employer of a pension plan was in bankruptcy and could not fund, the remaining employers would be jointly and severally liable to fund the deficit in respect of the bankrupt employer’s employees. The Tribunal found that there was no statutory authority for such an interpretation and if it was the intention of the legislature to attach funding liability to all participating employers of a pension plan, they could have easily expressed such an intention. The Tribunal noted that accepting this interpretation of “employer” would permit the Superintendent to “cherry pick” amongst participating employers of a pension plan as to which employers were responsible for funding. The Tribunal held that this was not reasonable.

Based on these reasons, the Tribunal held that the VON is not an “employer” under the *PBA* for the purpose of funding obligations related to Insolvent Branch employees. On that basis, the Tribunal ordered that (i) VON is not responsible for funding any obligations under the *PBA* with respect to the partial wind ups of the Insolvent Branches; (ii) the Superintendent is required to proceed with a review of the partial wind up reports as quickly as possible; and (iii) the Superintendent is required to make a finding as to the application of the PBGF to the partial wind ups and to the related benefits of the affected employees.

POTENTIAL IMPACT OF THE DECISION

The Tribunal’s decision provides some guidance with respect to which entities are responsible for funding wind up deficits in pension plans with more than one employer. The decision is also positive for employers, as the Tribunal clearly rejected an interpretation of “employer” that would make participating employers jointly and severally liable for funding deficits in respect of all plan members, regardless of who actually was the members’ employer.. Therefore, it is clear that when a participating employer withdraws from a pension plan (other than a MEPP), the remaining employers are not responsible for funding any wind up deficit associated with the withdrawing employer’s employees.

By adopting a narrow definition of “employer”, based only on who remunerated the employees, the decision raises issues with respect to the degree to which employers participating in a pension plan can structure their affairs to immunize themselves from potential funding obligations. For example, could multiple employers arrange for all employees to receive remuneration through one corporate entity and take the position that this corporate entity was the only “employer” for purposes of funding the plan?

At the time of publication, no information was available as to whether any of the parties will seek to appeal the Tribunal’s decision through judicial review. If you have any questions regarding this decision, please contact Susan Nickerson at 416.864.7257, Ian Dick at 416.864.7334 or Natasha Monkman at 416.864.7302 who represented the Six Separate Branches in this case.

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