

Case In Point

Divisional Court Confirms that Section 80(3) of the PBA Deems Employment to Continue Following Sale of Business

Date: March 20, 2013

In [*Ontario Pension Board v. Ratansj*](#), the Ontario Divisional Court confirmed that the *Pension Benefits Act* (“PBA”) deems that following a sale of business transaction, both employment **and** pension plan membership continue under the predecessor employer’s pension plan while the employee continues in employment with the successor employer. The decision overturns an earlier decision of the Financial Services Tribunal (“FST”).

The case involved employees of the Ontario government whose employment was transferred to the Canada Revenue Agency (“CRA”), resulting in their transfer for pension purposes from the Ontario Public Service Pension Plan (“PSPP”) to the federal Public Service Superannuation Fund. This transfer was a transaction as contemplated by section 80 of the PBA, which protects a plan member’s pension in a “sale of business” situation. Specifically, subsection 80(1) of the PBA recognizes the continuation of pension benefits with a successor employer, and subsection 80(3) provides that in a sale of business situation, if “an employee of the original employer who is a member of the original pension plan becomes an employee of the successor employer and a member of the successor pension plan, his or her employment is deemed, for the purposes of this Act, not to have been terminated by the change of employer.”

Some of the affected employees, who were eligible to commence immediate pensions under the PSPP at the time of the “sale”, argued that they should be permitted to start their pension under the PSPP while continuing to be employed by the CRA. The FST agreed, finding that subsection 80(3) only deemed “employment” with the predecessor employer to continue.

The FST’s interpretation of subsection 80(3) permitted a plan member to draw a pension without first terminating his or her employment with a successor employer in a “sale of business” transaction, where the pension plan in question permitted the member to commence a pension. The FST found that the PSPP allowed affected employees to start a pension in the circumstances.

The Divisional Court found that the FST’s “narrow interpretation of subsection 80(3)” was “untenable” and “internally inconsistent.” The plain meaning of subsection 80(3) required that the rights and benefits of the affected employees under their predecessor pension plan (here, the PSPP) are to be determined “as if their employment *and* pension plan membership are not interrupted” by the sale of business, even though the affected employees had formally changed employers. As such, the “deemed employment” provision in subsection 80(3) of the PBA deemed the employment between the Ontario government and the CRA to be continuous such that the affected employees were to be in the same position they would have been if the transfer had not occurred. Accordingly, since the PSPP did not permit members to work and receive a pension simultaneously, the affected employees could not start their pension under the PSPP while continuing to work for the CRA. As a result, the Divisional Court found that in order for the affected employees to start their pensions under the PSPP, they would need to terminate their employment with the CRA.

This case is important as it restores the previous understanding of the effect of the PBA following a sale of business. The PBA continues to deem employment and pension plan membership as continuous, and employees affected by a sale of business continue to be required to terminate employment with the successor employer before commencing their pensions with their predecessor employers where subsection 80(3) of the PBA is engaged.