

IN THE MATTER OF THE *PENSION BENEFITS STANDARDS ACT*

[SBC 2012] CHAPTER 30

AND

RETAIL WHOLESALE UNION PENSION PLAN (PLAN) AND THE SUMMIT/LUCERNE/MACDONALDS DIVISION
(DIVISION)

RECONSIDERATION DECISION (SECTION 126)

1. This is a decision arising from a notice of objection, pursuant to section 126 of the *Pension Benefits Standards Act (PBSA)*, filed by the trustees of the Plan (Trustees) with respect to a decision I made on December 16, 2015 (Original Decision). In making this reconsideration decision, I have considered the submissions and supporting materials of the Trustees included in their Notice of Objection, the submissions of staff, and letters of complaint from a retired Plan member.

Background

2. The Plan is a multi-employer negotiated cost defined benefit pension plan that covers members of unions in the food industry. This decision relates to provisions of the Plan covering members of the Plan who were employees of the Division.
3. There were two employer groups in this Division: Summit Logistics Inc. (Summit) and Lucerne Milk Plant (Lucerne).
4. Normal Retirement Age (NRA) for regular terminations and retirements is 60 for members of the Division. Effective January 1, 2003, the Trustees amended the Plan to change the NRA for non-retired members from 60 to 65 on termination of the Division. In a disclosure to members, the Trustees informed members that "the NRA 65 on plan windup rule was adopted with a view to helping the Plan comply with provincial pension funding rules".

5. The December 31, 2007 actuarial valuation revealed that the solvency ratio of the Division was 97 per cent. The negotiated employer contributions were insufficient to meet the funding requirements under the legislation. In a letter dated April 21, 2009, the Plan actuaries estimated the solvency ratio of the Division was 76 per cent as at December 31, 2008. As a result, the following changes, affecting members of the Division, were adopted by the Trustees effective July 1, 2009:
 - a) A 24 per cent reduction to all accrued benefits; and
 - b) A 30 per cent reduction to future accruals for all active membership (from 2.0 per cent to 1.4 per cent of earnings).
6. A partial termination of the Plan was filed with my office following the cessation of business operation of Summit effective February 28, 2011. The Superintendent registered an amendment dated October 18, 2010 to change the NRA for non-retired members from 65 to 60 for this particular employer group upon partial termination of the Plan. This did not apply to the remaining Lucerne employees.
7. Assets between the two employer groups were allocated in proportion to the windup liabilities of each group as at February 28, 2011, the effective date of partial termination. For this purpose, liabilities of all members were calculated on the same basis, i.e., assuming a NRA of 60 upon termination of the Division.
8. Effective October 4, 2010, the negotiated employer contribution rate for the Division increased from 10 per cent to 12 per cent of earnings. The Trustees approved an increase in benefit rate from 1.40 per cent to 1.65 per cent of earnings for service after December 31, 2010. These changes applied to members of the remaining employer group (i.e. Lucerne).
9. The Division fully terminated effective February 28, 2015 due to the decertification of the Retail Wholesale Union (RWU) as bargaining agent following Agropur's purchase of Lucerne. As at February 28, 2015, the Division had 60 active members, 42 terminated vested members, and 60 retired members and beneficiaries.
10. A portion of the amendment dated May 29, 2015 that was submitted to the Superintendent was to change the NRA from 65 to 62 upon termination of the Division effective February 28, 2015. The

proposed change was made to 62 (but not 60) because active members of Lucerne had continuing employment with the new employer.

11. My office received two complaint letters dated May 4, 2015 and June 23, 2015 from a retired member of Lucerne, raising concerns about the Trustees' intent to change the NRA from 65 to 62 upon termination of the Division.
12. The Trustees were aware that there would be a shortfall on termination of the Division. In anticipation of the shortfall and what would be contained in the termination report, the Trustees requested to implement a 20 per cent interim reduction to pensions in-pay effective August 1, 2015 in order to address the expected wind-up deficiency. Adjustments for overpayments or underpayments will be made once the final solvency ratio is determined. My office consented to the interim approach pursuant to section 8(5)(1) of the *Pension Benefits Standards Act [RSBC 1996] Chapter 352 [Repealed effective September 30, 2015 (old PBSA)]*.
13. The termination report as at February 28, 2015 was filed on September 11, 2015. The termination report identifies the solvency ratio of the Division as 86.5 per cent, without taking into account the proposed amendment. The proposed amendment would increase the liabilities of non-retired members, resulting in a decrease in the solvency ratio to 81.7 per cent.

14. Section 22 of the PBSA provides:

22 (1) After the filing, under section 18, of a certified copy of an amendment to the plan text document of a pension plan, the superintendent, subject to subsection (2) of this section, must

(a) register the amendment, and

(b) issue to the administrator a notice of registration for the amendment.

(2) Without limiting any other basis on which the superintendent may refuse to register an amendment to the plan text document of a pension plan, the superintendent may refuse to register the amendment

(a) if the superintendent is of the opinion that the amendment does not comply with this Act or the regulations,

(b) if the superintendent is of the opinion that the administrator has not complied with this Act in respect of the amendment, or

(c) in the prescribed circumstances.

(3) For the purposes of this section, the superintendent may sever from an amendment referred to in subsection (1) that portion of the amendment that does not comply with this Act or the regulations, and register in accordance with subsection (1) the remaining portion of the amendment.

15. Section 22 of the Pension Benefits Standards Regulation (PBSR) is prescribed pursuant to section 22(2)(c) of the PBSA and provides as follows:

22 For the purposes of section 22 (2) (c) of the Act [PBSA], the superintendent may refuse to register an amendment to the plan text document of a pension plan

(a) if

- (i) the plan text document contains a defined benefit provision,*
- (ii) the effect of the amendment would be to reduce the defined benefit component's solvency ratio, and*
- (iii) there has not been filed, in support of the amendment,*
 - (A) an actuarial valuation report that demonstrates that, immediately after the amendment takes effect, the defined benefit component's solvency ratio would be at least 0.9, and*
 - (B) any other information or records required by the superintendent, or*

(b) if

- (i) the plan text document contains a target benefit provision,*
- (ii) the effect of the amendment would be to reduce the target benefit component's going concern funded ratio, and*
- (iii) there has not been filed, in support of the amendment,*
 - (A) an actuarial valuation report and a cost certificate that demonstrate that, immediately after the amendment takes effect, the target benefit component will have accessible going concern excess, and*
 - (B) any other information or records required by the superintendent.*

16. In my Original Decision, I refused to register the proposed amendment pursuant to section 22(2) of the PBSA and section 22(a) of the PBSR. Two main reasons for exercising my discretion under section 22(2) of the PBSA were:

- a) Members' benefits at termination should be determined based on the Plan provisions immediately preceding the effective date of termination since that is the basis upon which the Division's benefits have been funded for over the last ten years; and
- b) The proposed amendment would significantly impact benefits of retired members and beneficiaries of the Division.

DISCUSSION:

17. The following section highlights the key issues or arguments that were raised in the Notice of Objection and staff's submissions in response. *Italicized sentences/paragraphs* are excerpts from the Notice of Objection. I have followed the outline of staff's submissions extensively in this decision as I agree with their submissions on this reconsideration.

18. The Trustees submit that they have authority to make the amendment under the terms of the Plan pursuant to their discretionary authority to amend the Plan as per section XV(2)(a)(ii) and XV(3)(b)(i) of the Plan text:

Section XV(2)(a)(ii) and XV(3)(b)(i) of the Plan Text provide the Trustees with discretion upon termination of a division to allocate that division's assets in accordance with the allocation established under the Plan Text or "in accordance with a different formula which, in the opinion of the Trustees, constitutes a more equitable allocation bearing in mind all of the circumstances as they exist at the time of any such termination".

19. I agree with staff that Trustees are required to administer the Plan based on Plan provisions registered with the Superintendent and applicable pension legislation as at the effective date of termination. Trustee authority under the plan text does not eliminate the Superintendent's jurisdiction pursuant to section 22(2) of the PBSA. Trustees may amend the provisions as they see necessary and such amendment must be registered unless the Superintendent forms an opinion that the amendment does not comply with the PBSA or the PBSR. This is not to say that I am of the opinion that the Trustees are in any way acting improperly. They are attempting, in their opinion, to provide an equitable result upon termination of the Division. But as I set out below, I disagree with the appropriateness of their proposal.

20. The Trustees have asked me to reconsider my Original Decision on three grounds.

Reasonable Expectations

21. The Trustees submit that termination of the Division *“resulted from matters outside the control of the members, Trustees or the RWU... The Trustees had hoped and expected that the Division would remain in existence indefinitely. If that had occurred, all of the non-retired members would have had a normal retirement date of age 60.”*
22. They say that given the treatment of the 2011 partial termination of the Plan, non-retired members had a reasonable expectation that the NRA of 65 would be altered on termination of the Division. The Superintendent registered an amendment dated October 18, 2010 to change the NRA for non-retired members from 65 to 60 upon partial termination of the Plan. The change only applied to members affected by the 2011 partial termination (i.e. members of Summit). For purposes of allocating assets between the two employer groups, all members were assumed a NRA of 60.
23. Immediately following the February 28, 2015 termination, staff had preliminary discussions with the administrator and actuary of the Plan, and indicated in writing on May 28, 2015 that the proposed amendment was *“appropriate in the circumstances and consistent with the plan administrator’s obligation under section 8 of the old PBSA”*. A *“Pension Update”* dated June 3, 2015 was mailed to all members of Lucerne indicating that the proposed amendment would likely be registered by the Superintendent.
24. The Trustees submit that *“Contrary to the position taken in the Decision [Original Decision] that the Division has been funded “on the basis [of an age 65 normal retirement date] for over 10 years”, since at least 2011 your [Superintendent’s] office has recognized that this Division was being funded on the basis that all Milk Plant members of the Division would receive benefits with an age 60 normal retirement age. It is accordingly submitted that the Decision [Original Decision] be reconsidered in light of the above-noted history and the significant public interest in ensuring consistent treatment for similarly situated pension plan members.”*
25. The NRA for regular terminations and retirements is 60 for members of the Division. However, the Trustees had made a decision to amend the Plan effective January 1, 2003 to change the NRA for non-retired members from 60 to 65 on termination of the Division, in order to avoid solvency

funding following the December 31, 2002 valuation. The amendment of October 18, 2010 following the 2011 partial termination was acceptable because the remainder of the Plan, that is, the portion of the Division continuing after the termination of Summit, would continue to be funded on an on-going basis. That is not the case here. As staff points out, this Division is being terminated at the same time as the effective date of the proposed amendment.

26. The method of asset splitting following the 2011 partial termination was consented to (i.e., all members including the Lucerne employer group were assumed a NRA of 60) since the NRA for members of the Division is 60 on an on-going basis. However, this does not translate to the statement noted in the Notice of Objection that *"since at least 2011 your [Superintendent's] office has recognized that this Division was being funded on the basis that all Milk Plant members of the Division would receive benefits with an age 60 NRA"*. The Division was funded, on a solvency basis, assuming a NRA of 65 upon termination of the Division since the December 31, 2002 valuation.
27. At the time staff was providing a preliminary response to the Trustees on May 28, 2015, the required filing of the amendment and the valuation report had not been submitted to the Office of the Superintendent. No decision had been made by the Superintendent. The application material had not been received.
28. Staff received submission of the proposed amendment on June 1, 2015. The termination report was submitted on September 11, 2015. The Pension Update dated June 3, 2015 was provided to members prior to the Trustees' submissions of all the relevant documents related to the proposed amendment and prior to the Superintendent's decision. The effect of the proposed amendment on solvency funding was set out in the proposed termination report. Upon my review of the documents in support of the proposed amendment, I exercised my discretion to refuse to register it under the current legislation. Any reliance on the preliminary discussion with staff by the Trustees or plan members would have been unreasonable and I do not consider such reliance as being of importance to my decision in this matter. Furthermore, it would be reasonable to members and retirees to have placed their reliance on the provisions in place during the last ten years since the Plan was funded in accordance with those NRA ages.

Equitable Distribution among Division Members

29. The Trustees submit *"[w]hile the Decision [Original Decision] appropriately considers the impact of the Proposed Amendment on the retired members, the Decision [Original Decision] does not in any way consider the impact of not registering the Proposed Amendment on the non-retired members... Absent the Proposed Amendment, non-retired members will effectively experience a benefit reduction of approximately 30% (taking into account their expectation of retirement at age 60), while retired members will experience a reduction in the range of 13%. In other terms, absent the Proposed Amendment, the 60 retirees will receive \$15.7M [million] of the Division's assets with the 100 non-retired members receiving \$8.7M [million].*
30. They further submit that *"[t]he Proposed Amendment provides for a more balanced result between these groups – generating a 24% reduction for non-retired members and an 18% reduction for retired members. The 60 retirees will receive \$14.8M [million] of the RWUPP's [Plan's] assets and the 100 non-retirees will receive \$9.6M [million].*
31. The trustees then submit that *"...this result is consistent with your [Superintendent's] office's longstanding policy of encouraging windup provisions that attempt to treat all member groups equally.*
32. I consider the proposed amendment to be a "last minute" change to the Plan provisions. The Trustees submit that *"characterizing the changes as "last minute" is inapt... We [Trustees] say it is inappropriate to characterize the discharge of a power that can only be exercised on Plan termination, and which was in fact exercised as early as possible after it became clear such a termination would occur as "last minute".* To clarify, in case it was not clear in my Original Decision, I find that the effect of the change is such that it takes effect on the last minute before the termination and wind-up of the Division.
33. Staff prepared, based on materials submitted by the Trustees, a chart to summarise and analyse the allocation of the Division's assets between non-retirees and retirees under the two scenarios (i.e. with and without the proposed amendment) and I replicate it here:

	Without Proposed Amendment (NRA 65 upon termination)			With Proposed Amendment (NRA 62 upon termination)		
	Amount	%	Effective reduction	Amount	%	Effective reduction
Wind-up Assets						
- Non-retirees	\$8.7 M	36	30% ¹	\$9.6 M	39	24% ¹
- Retirees	\$15.7 M	64	13%	\$14.8 M	61	18%
Total	\$24.4 M	100		\$24.4 M	100	
Wind-up Liabilities						
- Non-retirees	\$10.1 M	36		\$11.7 M	39	
- Retirees	\$18.1 M	64		\$18.1 M	61	
Total	\$28.2 M	100		\$29.8 M	100	
Funded Position	(\$3.8 M)			(\$5.4 M)		
Funded Ratio	86.5%			81.7%		
Reduction	13.5%			18.3%		

¹ Taking into account NRA of 60 assuming the Plan is on-going.

34. The Trustees requested that *“the Decision [Original Decision] be reconsidered in light of the effect of the Proposed Amendment on both the retired and non-retired members, and the fact that it will more equitably allocate the Division’s assets between those two groups.”*

35. The “effective reduction” of 30 per cent (without the proposed amendment) to non-retirees’ benefits is comprised of the following:

- a) Impact of assuming NRA of 65 (instead of age 60); and
- b) Impact of the wind-up deficit (13 per cent).

36. In this situation, retirees’ benefits are reduced by approximately 13 per cent. The gap of reduction between the non-retirees and retirees is 17 per cent.

37. The “effective reduction” of 24 per cent (with the proposed amendment) to non-retirees’ benefits comprised of the following:

- a) Impact of assuming NRA of 62 (instead of age 60); and
- b) Impact of the wind-up deficit (18 per cent).

38. In this situation, retirees’ benefits are reduced by approximately 18 per cent. The gap of reduction between the non-retirees and retirees is 6 per cent.

39. The proposed amendment would reduce the gap of reduction between non-retirees and retirees. However, non-retired members' benefits are determined subject to Plan provisions at the effective date of termination.
40. I am still of the opinion that I find it reasonable to exercise my discretion to refuse to register the proposed amendment regarding NRA changes because it is not consistent with how the Plan has been funded for the last ten years and because it would result in additional reduction to benefits of retired members and beneficiaries.
41. The letter referenced by the Trustees was provided to many plan sponsors in early 2009 to address a concern over inequitable plan termination provisions in underfunded situations. The concern raised by the Superintendent at the time no longer exists as section 135 of the PBSR now mandates how distribution is to occur in underfunded plans upon wind-up. The Original Decision was made pursuant to section 22(2) of the PBSA and section 22(a) of the PBSR.

Application of section 22(2) of the PBSA and section 22(a) of the PBSR

42. The Trustees submit that section 22(2) of the PBSA is inapplicable since, *"as in the present case, the proposed amendment is made concurrently with the termination of a negotiated cost plan. Since the Division is terminating, all of the Division's benefits are as of the termination date, which is also the effective date of the Proposed Amendment, immediately and automatically subject to the benefit reduction rules set out in s. 135 of the PBSR. Pursuant to s. 135(10) of the PBSR, if there is a solvency deficiency at termination in a plan such as the Division, the relevant benefits must be reduced in proportion to the extent to which those benefits remain unfunded. The resulting benefit reduction generates a solvency ratio of 1.0. Therefore, if the Proposed Amendment is registered, it will automatically and immediately become subject to the benefit reductions mandated by s. 135(10), with the result that after it is registered the Division's solvency ratio will inevitably be 1.0. We [Trustees] therefore respectfully submit that your [Superintendent's] office's discretion to deny the amendment pursuant to s. 22(2) of the PBSA and s. 22(a) of the PBSR does not arise, and that these provisions do not provide a basis on which to decline registration of the Proposed Amendment.*

43. I agree with my staff that an amendment filing is a separate process from the acceptance of a termination report. Since the report was based on the rejected amendment, the formal decision on the acceptance of the report has not been made. That distinct process is still pending.

44. Section 22(2) of the PBSA and section 22(a) of the PBSR set out conditions where the Superintendent may refuse to register an amendment. These conditions are:

- a) The plan contains a defined benefit provision;
- b) The amendment reduces the solvency ratio; and
- c) The solvency ratio is not at least 90 percent.

45. The Plan is a defined benefit plan, and the proposed amendment reduces the solvency ratio of the Division from 86.5 per cent to 81.7 per cent. All conditions under section 22(a) of the PBSR are met. My Original Decision was made pursuant to section 22(2) of the PBSA and section 22(a) of the PBSR.

46. Sections 135 (1)(b), 135 (9)(d) and 135 (10) of the PBSR provide:

135 (1) If, at the time that the assets of a defined benefit component of a pension plan are to be distributed as a result of the winding-up of the plan, the assets of the defined benefit component are not sufficient to pay all benefits,

...

(b) the assets of the defined benefit component must be allocated and distributed in accordance with subsections (9) to (11) if, on the effective date of the termination of the plan, the defined benefit component of the plan has a solvency deficiency and one of the following applies:

- (i) a payment is required to be made under section 132 (1) (a);*
- (ii) the plan is a jointly sponsored plan or a negotiated cost plan.*

...

135 (9) The assets of a defined benefit component must be allocated to each person who is entitled to receive benefits from the defined benefit component in accordance with the following:

...

(d) if the defined benefit component has one or more unfunded liabilities as at the effective date of the termination of the plan, assets unallocated under paragraph (a) or (b) must be allocated to each of those persons.

...

135 (10) For the purposes of section 9 (d),

(a) if there is an unfunded liability that

(i) has not been amortized as at the effective date of the termination of the plan, and

(ii) is the result of a benefit improvement,

the benefits that led to the establishment of the unfunded liability must be reduced in proportion to the extent to which those benefits remain unfunded, and

(b) each unfunded liability must be dealt with separately and applied only to the benefits in respect of which it was established.

47. The proposed amendment would be effective as of the termination date of the Division. However, it was not registered with the Superintendent. Therefore, the proposed amendment was not effective as at the date of termination of the Division. The provision of section 135(10) of the PBSR applies as at the effective date of termination of a pension plan, that is, without the registration of the proposed amendment.

48. Although section 135(10) of the PBSR deals with unfunded liability and not solvency deficiency arising from an amendment, the logic continues to apply. The reduction of NRA from 65 to 62 is a benefit improvement to non-retired members. If an unfunded liability were determined as at the purported amendment date, which is the same as at the effective date of termination of the Division, the amount of the unfunded liability funded prior to termination is zero.

49. To take the position of the Trustees to its logical end, any plan administrator could amend the terms of its plan text to put into place changes to the NRA as of the date of termination and thus avoid the purpose of section 135(10) of the PBSR. This would mean that, despite section 135(10) of the PBSR, this benefit improvement would have to be paid out from the Plan. As a result, those not in receipt of the improvement would be negatively affected, due to the change in funded status of the Plan at termination as set forth above. That is exactly the circumstance which section 135(10) of the PBSR is meant to remedy through.

CONCLUSION

50. Based on the above, I confirm my Original Decision and exercise my discretion to refuse to register the proposed amendment regarding the change in NRA.

Issued this 31 day of ^{May} April, 2016
at Vancouver, British Columbia



Carolyn Rogers
Superintendent of Pensions