SUPREME COURT OF NOVA SCOTIA
Citation: *Frame v. Mancinelli*, 2014 NSSC 461

Date: 20140214
Docket: Hfx No. 420169
Registry: Halifax

Between:

Deena Georgina Alice Frame

Applicant

v.

Joseph S. Mancinelli, Carmen Principato, Douglas Serroul, Luigi Carrozzi, Manuel Bastos, Jack Oliveira and Cosmo Mannella, Trustees of the Labourers' Pension Fund of Central and Eastern Canada, David Logan and Lisa Logan

Respondents

DECISION

Judge: The Honourable Justice Suzanne M. Hood

Heard: February 11, 2014 in Halifax, Nova Scotia

Oral Decision: February 14, 2014

Written Release of Oral Decision: April 8, 2015

Counsel: Theresa Graham, on behalf of Deena Frame
Brian Casey, on behalf of David and Lisa Logan
Ronald Pink, on behalf of the Labourers' Pension Fund

By the Court (Orally):

Introduction:

[1] The issues in this case are 1) to whom the death benefits pursuant to the Pension Plan should be paid, and 2) the interpretation of section 5 of the *Pension Benefits Act*, R.S., c. 340.

[2] Wade Logan died on June 20, 2008 at his place of employment. He was married to, separated from, but not divorced from Deena Georgina Alice Frame, the Applicant.

[3] The *Pension Benefits Act* in Nova Scotia provides for a pre-retirement death benefit in the following words. Section 56(1) provides:

> **Pre-retirement death benefit for spouse or partner**
>
> 56 (1) Where a person entitled under a pension plan to a deferred pension benefit described in Section 43 dies before commencement of payment of the deferred pension, the person's spouse or common-law partner at the date of death is entitled to receive payment of not less than sixty per cent of the commuted value of the deferred pension.

Sub-section (4) provides:

> (4) Where the person does not have a spouse or common-law partner or where subsection (3) applies or where the person is living separate and apart from the person's spouse or common-law partner and a division of the deferred pension has been made pursuant to Section 61, the person's beneficiary or estate is entitled to receive a refund of that person's contributions with interest as prescribed.

[4] The relevant definition of spouse is in section 2(aj)(i) of the *Act* and it provides:

> (aj) "spouse or a common-law partner" means either of a man and woman who
> (i) are married to each other

[5] A common law partner is defined in section 2(ga) as follows:

> (ga) "common-law partner" of an individual means another individual who has cohabited with the individual in a conjugal relationship for a period of at least two years, neither of them being a spouse

[6] There are also provisions in the *Act* for pension division on marriage breakdown in section 61(1), which provides that the pension may be divided by Court order or as the *Regulations* prescribe. In addition, *Regulation* 70(1) allows for pension division pursuant to a separation agreement.

[7] In this case there was no court order or separation agreement providing for a pension division. Accordingly, section 56(4) quoted above does not apply since there was no pension division and Mr. Logan at the time of his death did have a spouse.

[8] However, there is a provision in the Ontario Pension Plan of which Mr. Logan was a member that refers to a spouse with whom the member was living at the time of his death. The definition of spouse in the Ontario Plan is set out in the

"Application for Spouse's Pre-retirement Death Benefit" which is at page 3 of Exhibit A to the affidavit of Ms. Frame. It states as follows:

> "Spouse", means either of a man or woman who,
>
> (a) are married to each other and are not living separate and apart, subject to the Income Tax Act; or
>
> (b) are not married to each other and are living together in a conjugal relationship continuously for a period of not less than three years, or….

[9] An affidavit was filed by Sonia Henriques, who is a pension benefits analyst with the Labourers' Pension Fund of Central and Eastern Canada. She states that the death benefit is calculated to be $173,910.99. She also said that Mr. Logan's son, David Logan, applied for the death benefit. Mr. Logan's will was provided and it named Ms. Frame as Executrix. Thereafter, Ms. Frame applied for the death benefit and David Logan and his sister Lisa Logan objected to the payment to her. Ms. Henriques says in her affidavit at para 16:

> The Fund will await the decision of this Court before paying out Wade Logan's Death Benefit.

Analysis

[10] Ms. Frame says she is a spouse pursuant to the *Pension Benefits Act* and no pension division was made. She says, therefore, she is the one who is entitled to the death benefit.

[11] David Logan and Lisa Logan (hereinafter referred to as "the Logans") say that there is another provision in the *Pension Benefits Act* which the Court must consider in determining how the death benefit should be paid. They refer to section 5 of the *Act* which provides:

> **More advantageous plans**
>
> 5 This Act and the regulations shall not be construed to prevent the registration or administration of a pension plan and related pension fund that provide pension benefits or ancillary benefits more advantageous to members than those required by this Act and the regulations.

[12] They say the wording of the Plan is more advantageous to Plan members than the wording of the *Act* and, therefore, the death benefit should be paid to the Estate of Wade Logan since he was not living with his spouse at the time of his death.

[13] In the context of determining whether the Plan provision is more advantageous to members, Mr. Logan provided an affidavit setting out certain facts concerning his father and concerning the Applicant, Ms. Frame. The Logans do so although admitting that the question for the Court is not whether the Plan provision is more advantageous only for Wade Logan but for Plan members generally.

[14] David Logan says his father and the applicant were married on May 14, 1988 and separated in August of 2002. Thereafter, both entered into separate common-law relationships: Ms. Frame in approximately 2006 which relationship

continues; and Wade Logan in 2006, but less than two years prior to his death. Ms. Young, the common-law spouse does not claim, therefore, to be entitled to the death benefits.

[15] David Logan also provided a copy of Wade Logan's Will on which he says his father made notations deleting any reference to Ms. Frame. He also provided copies of the front page of his father's 2002, 2004 and 2006 income tax returns. On the first two he referred to himself as "separated" and on the latter as "single".

[16] Mr. Logan submits it was his father's intent that Ms. Frame not benefit on his death.

[17] As I have said, both parties agree that the question is whether the Ontario Plan provision is more advantageous to Plan members generally, not just to Wade Logan.

[18] No Nova Scotia case law was submitted which interpreted section 5 of the *Pension Benefits Act* but authorities from Ontario have considered an identical provision.

[19] In *Independent Electricity System Operator v. Power Workers' Union*, 2013 ONSC 2131, the Ontario Divisional Court dealt with an application for judicial review of a decision of an arbitrator who concluded that the provisions of a

pension plan were not in conflict with the *Pension Benefits Act*. The Union, in that case, submitted that the *Pension Benefits Act* provision in issue was a minimum requirement and the pension plan provision that provided more than the minimum was not in conflict with the *Act*. The Divisional Court agreed, saying in para 50:

> The interpretation that s. 42(1) is a minimum entitlement and a plan may permit a member to choose to transfer less than the entire amount is consistent with both the general proposition that the PBA provides minimum standards and the language of the provision ("a former memer" "is entitled to")

The Court concluded that the *Act* set only minimum standards and a more advantageous provision was contemplated. Accordingly, there was no conflict between the *Act* and the Plan wording.

[20] In *BICC Cables Canada Inc. v. Ontario (Superintendent of Financial Services)*, [2001] O.J. No. 1856 (Div Ct), the Court in 2001 also dealt with section 5 of the Ontario *Pension Benefits Act*. The Court in that case concluded the special early retirement benefit was an ancillary benefit under the *Act* which provided a greater benefit than the minimum standards set out in the *Act*. The *Act* provided in s. 40(1)5:

> A pension plan may provide the following ancillary benefits:
>
> …
>
> 5. Early retirement options and benefits in excess of those provided by section 41 (early retirement option).

[21] The Court said in paras 21 and 22:

> 21 In my view the appellant has advanced an unduly restrictive interpretation of the word "excess" in subsection 40(1)(5) of the PBA. This provision states that ancillary benefits that may be provided by a pension plan include "early retirement options and benefits in excess of those provided by section 41 (early retirement option)". The appellant takes the position that this can only mean an early retirement pension that is a higher amount, and does not mean an early retirement pension that is available earlier or to more members than those who have attained the age of fifty-five. In other words, the appellant interprets the word "excess" as meaning "higher amount", not "additional".
>
> 22 I agree with the Superintendent's position that the phrase "in excess of those provided by section 41" in subsection 40(1)5 of the PBA means any early retirement option or benefit provided by a pension plan that exceeds the options and benefits provided by section 41 of the PBA…

[22] In *Ontario Public Service Employees Union Pension Plan Trust Fund, (Trustees of) v. Ontario (Management Board of Cabinet)*, [1998] O.J. No. 5075 (Ont. C.J. Gen'l Div.), Justice Rivard considered section 5 of the Ontario *Pension Benefits Act* in the context of benefits for same sex couples. Neither the *Act* nor the pension plan provided such benefits; however the Trustees of the pension plan believed they had an obligation to provide such benefits because of previous court decisions. They sought the direction of the court with respect to the compliance with the *Pension Benefits Act*, which had not amended its definition of spouse to include same sex couples. Justice Rivard referred to section 5 of the *Act* and said in para 31:

> 31 Section 5 clearly provides that the P.B.A. is minimum standards legislation. The Act does not prevent a pension plan from providing benefits that

> are more advantageous to pension plans than those set out in the P.B.A. The requirement that the Plan must, in its definition of "spouse" include same sex spouses does not prevent the Plan from complying with the P.B.A.

He then went on to consider whether the definition of spouse in the *Pension Benefits Act* itself was contrary to the *Charter* and he concluded that it was.

[23] Counsel for the Pension Fund provided to the Court and other counsel an Ontario Court of Appeal decision in *Carrigan v. Quinn*, 2012 ONCA 736. I subsequently received written submissions from the Applicant and the Logans with respect to it. Both say that since it did not consider section 5 of the *Pension Benefits Act*, it is not helpful in this case.

[24] The issue for the Court, as here, was who was entitled to the pre-retirement death benefit. The wording of the Ontario *Pension Benefits Act* differs from the Nova Scotia wording in its definition of spouse. The deceased plan member had a wife from whom he was not divorced, but he also had a common law partner who met the definition of spouse in the *Act* as well. Both claimed the death benefit. However, Mrs. Carrigan was disentitled because she was not living with Mr. Carrigan at the time of his death. Accordingly, his common law spouse said she was entitled to the death benefit.

[25] In the Ontario *Pension Benefits Act*, there was a provision for designation of a beneficiary. Mr. Carrigan had designated his wife, Mrs. Carrigan, and their

children as his beneficiaries under the pension plan. Through an interpretation of provisions in the *Act*, the Court concluded that the beneficiary designation prevailed and Mrs. Carrigan and her children were entitled to the death benefit.

[26] The decision did not turn on a reference to the pension plan provisions, nor on section 5 of the *Pension Benefits Act*. I therefore conclude, as counsel submitted, that it does not affect my decision in this matter.

[27] The question for me is whether the provisions of the pension plan are more advantageous to the members of the plan generally. The pension plan provides that the member's spouse is only entitled to the death benefit if she is living with the member at the time of his death. I must determine if that is a provision that gives "benefits or ancillary benefits" which are more advantageous.

[28] The Applicant encourages me to adopt what she says is the plain meaning of the phrase "benefits and ancillary benefits". She says the cases cited by the Logans involved pension plans which extended the minimum requirements of the *Pension Benefits Act*. She says in this case the plan provision does not give a benefit earlier, to more members, or in greater amounts than the minimums set out in the *Act*. She also says it disadvantages the Applicant and essentially reassigns the priorities for payment of the death benefit. She says this clearly cannot be within

the plain meaning of the words "pension benefits and ancillary benefits more advantageous to members". She says that this interpretation is more consistent with the rules of statutory interpretation set out in *Rizzo v. Rizzo Shoes Ltd., (Re)*, [1998] S.C.J. No. 2. In that case, Justice Iacobucci said in para 21:

> Elmer Driedger in *Construction of Statues* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intentions of Parliament.

[29] The *Pension Benefits Act* sets minimum standards for pension plans. However, it also allows for pension plans to provide for more than that minimum. Some of the provisions which have been found to provide benefits and ancillary benefits beyond that minimum were considered in the cases to which I have referred above. The argument of the Logans is that allowing greater flexibility and more choice to plan members in determining to whom the benefits should be paid in the event of their death is more advantageous to members generally.

[30] Pension benefit is defined in the *Act* as follows:

> Subsection 2(ab):
>
> "pension benefit" means the aggregate monthly, annual or other periodic amounts payable to a member or former member during the lifetime of the member or former member, to which the member or former member will become entitled

> under the pension plan or to which any other person is entitled upon the death of a member or former member.

It specifically refers to "amounts". I therefore conclude that what the Logans seek does not fit within that definition.

[31] Is it an ancillary benefit? These are listed in section 48(1) of the *Act* as follows:

> 48 (1) A pension plan may provide the following ancillary benefits:
>
> (a) disability benefits;
> (b) death benefits in excess of those provided in Section 56 (pre-retirement death benefit);
> (c) bridging benefits;
> (d) supplemental benefits, other than bridging benefits, payable for a temporary period of time;
> (e) early retirement options and benefits in excess of those provided by Section 49 (early retirement option);
> (f) postponed retirement options and benefits in excess of those referred to in subsection (4) of Section 41;
> (g) any prescribed ancillary benefit.

[32] The *Regulations* in section 59 set out two prescribed ancillary benefits as follows:

> The following ancillary benefits are prescribed for purposes of Section 48 of the Act:
>
> a) survivor benefits in excess of those required under subsection 52(3) of the Act; and
>
> b) any vesting provisions in excess of those required under Sections 41, 42 and 43 of the Act.

[33] In each case the word "benefits" is used. The relevant one for our purposes is section 48(1)b dealing with pre-retirement death benefits. The words "in excess" in that subsection were considered in *BICC*, where the Court rejected a narrow interpretation of the words and concluded that it meant any option or benefit that exceeds the options and benefits provided by the *Act*.

[34] The option or benefit provided pursuant to section 56 of the *Act* in this case is a death benefit of a certain amount payable to the member's spouse or common law partner at the date of the member's death. If the death benefit can be paid to the member's estate, even where that member has a spouse or common law partner, is that an option or benefit beyond what the *Act* sets out as a minimum?

[35] In my view the plain meaning of "option or benefit" is something tangible, an enhanced or additional benefit. Earlier payment of benefits and a choice as to how much to transfer are examples from the authorities of these types of enhancements. In my view, greater flexibility in determining who should receive those death benefits is not of the same character.

[36] Furthermore, I also note that section 52(1) of the *Act* uses different wording than section 56. It provides that where a retired member has a spouse or common law spouse, the pension is a joint and survivor pension. However, that is not the

case where the retired member is living separate and apart from the spouse when the first pension payment is due. The Legislature could have used similar wording in both sections 52 and 56 but did not. I do note that there is un-proclaimed legislation which uses the wording "living separate and apart" in the context of the preretirement death benefits, but, as I say, that legislation is not proclaimed.

[37] There is a statutory requirement and the wording of the pension plan which provides something quite different is, in my view, in conflict with the *Act*.

[38] Another way to consider is to look at whether the additional or enhanced benefit is something only available pursuant to the plan, or is it something that an individual member has control over, such as by dividing his pension pursuant to a separation agreement or Order of the Court? For example, in *BICC*, the option in the plan was to grant special early retirement benefits to members. That was a benefit additional to the benefits provided by the *Act*. It was only available if the Plan allowed it.

[39] In the *Independent Electricity* case, the former members of the pension plan were permitted by the plan to transfer less than the entire amount of their benefits. The Court concluded that the *Act* only dealt with the amount the member was entitled to transfer, but did not preclude an agreement to transfer less than that.

The provision in the *Act* was not one limiting the amount to be transferred, therefore the plan could provide this additional benefit.

[40] These were provisions with respect to options or benefits of the pension plan beyond those mandated by the *Act*. The plan members in both cases had no ability to access these benefits unless they were provided for in the plan.

[41] One might also consider the distinction from the decision in *Ontario Public Service Employees Union Pension Plan Trust Fund* in this context. A member with a same sex partner had no way to ensure that his or her partner obtained survivor benefits pursuant to the plan. The plan simply did not permit it, nor did the *Pension Benefits Act*. In this case, had Mr. Logan wanted to be sure that the Applicant had no right to his death benefits, he was not prevented by the *Act* provisions from ensuring his wishes were carried out. The *Act* in fact set out a way in which this could be accomplished.

[42] I conclude the plain meaning of section 5 of the *Pension Benefits Act* is to allow pension plans to provide tangible benefits to plan members which are additional to or enhanced benefits than those minimums set out in the *Act*. In this case, the *Pension Benefits Act* requires that pension plans provide for a preretirement death benefit and the pension plan provides that benefit. Choice of

the means by which that benefit is paid is neither an additional benefit nor an ancillary benefit, according to the wording of the *Act*.

[43] In any event, I conclude it is not more advantageous for members generally to have a more limited definition of spouse like the one in the pension plan. The *Act* sets out a means by which the same result can be achieved.

[44] I therefore conclude that section 5 is not applicable in these circumstances and the death benefit is payable to the Applicant pursuant to the wording of the *Pension Benefits Act*.

Hood, J.