



February 16, 2021

Tamara DeMos
Managing Director, Private Pension Plans Division
Office of the Superintendent of Financial Institutions Canada
Kent Square 255 Albert Street, 12th Floor
Ottawa, ON K1A 0H2

Re: InfoPensions 23 - Entitlement to Pension while employed

Dear Tamara,

The Association of Canadian Pension Management (“**ACPM**”) is the leading advocate for plan sponsors and administrators in the pursuit of a balanced, effective and sustainable retirement income system in Canada. We represent plan sponsors, administrators, trustees and service providers and our membership represents over 400 companies and retirement income plans that cover millions of plan members.

We are writing to you further to our discussion of December 16, 2020, regarding InfoPensions 23 and the guidance provided therein under the heading “Entitlement to Pension while employed”. We appreciate that OSFI has advised that this interpretation is under review and wanted to take the opportunity to provide our feedback.

Respectfully, we disagree with OSFI’s interpretation of the *Pension Benefits Standards Act, 1985* (the “PBSA”) as articulated in InfoPensions 23. Our view is that the PBSA **permits** an employer to design a plan such that a member may commence receiving a pension while employed, but it is **not a minimum standard** that a plan be designed to permit this outcome. Our view is based on a reading of the statute as a whole, the history of the PBSA, and a purposive approach to the interpretation of the statute.

1. SUBSECTION 16(1)

Subsection 16(1) sets out that a member is “entitled” to an “immediate pension benefit” on attaining “pensionable age”. Each of those three terms is important to the interpretation of subsection 16(1), and the plain meaning and contextual usage of these terms is discussed below. For ease of reference, subsection 16(1) states:

Entitlement at pensionable age
16 (1) A pension plan shall provide that each member is entitled to an immediate pension benefit on attaining pensionable age. [emphasis added]

(a) Meaning of “Entitled”

The word entitled is defined to mean “having a right to certain benefits or privileges”.¹ The PBSA uses the term “entitled” 53 times. Frequently, it is used where a person has an unconditional and immediate right to benefits or privileges. For example, subsection 23(1) describes a survivor’s entitlement to a survivor benefit which is unconditional and immediate:

23 (1) In the case of the death of a member or former member of a pension plan who is entitled to a deferred pension benefit under section 17, or, in the case of a member, would be entitled to that benefit if the member ceased membership in the plan, the member’s or former member’s survivor is entitled to the pension benefit credit, calculated in accordance with section 21, to which the member or former member would have been entitled on the day of death if they had terminated employment on that day and had not died.

However, in other sections of the PBSA, the term “entitled” refers to a **conditional** and **future** right to a benefit or privilege. For example, in subparagraph 28(1)(b)(i), a member’s annual statement must show the pension benefits to which the member is “entitled” as follows:

28 (1) A pension plan shall provide
(b) that each member of the plan and the member’s spouse or common-law partner will be given, in the prescribed circumstances and manner and within six months — or any longer period permitted by the Superintendent — after the end of each year of operation of the plan, a written statement showing
(i) in the case of a defined benefit plan, the pension benefits to which the member is entitled under the plan at the end of that year,

Notwithstanding that the word “entitled” is used, the pension benefit disclosed under subparagraph 28(1)(b)(i) is the pension benefit accrued to the member as of the end of the year, to which he is merely conditionally entitled should he terminate employment or retire. In addition, such entitlement may only be payable “at the end of that year” on the condition that he terminate or retire, otherwise the entitlement is payable in the future.

Similarly, section 30 of the PBSA describes an employee’s rights in the context of a sale of business as follows:

30 (1) Where
(a) an employer who is a party to a pension plan sells, assigns or otherwise disposes of all or part of its business or undertaking or all or part of the assets of its business or undertaking,
(b) an employee of that employer becomes an employee of the person acquiring the business, undertaking or assets (in this section called the “successor employer”), and
(c) the successor employer does not assume responsibility for the accrued benefits of the employer’s pension plan, the employee continues to be entitled to the benefits provided under the employer’s plan in respect of the period of membership in that employer’s plan, without further accrual.
(2) Where the events described in paragraphs (1)(a) and (b) occur, whether or not the successor employer assumes responsibility for the accrued benefits of the employer’s plan, then,
(a) for the purposes of the employer’s plan, membership in the employer’s plan of an employee referred to in paragraph (1)(b) shall be deemed not to have ceased by reason of those events; and
(b) for the purposes of
(i) determining the period of employment with respect to any eligibility condition of the successor employer’s pension plan, and
(ii) determining whether such an employee is entitled to a benefit under a pension plan of the employer or of the successor employer,
the period of employment shall be deemed to include employment with both the employer and the successor employer without any interruption.

¹ See: [Merriam-Webster.com/dictionary/entitled](https://www.merriam-webster.com/dictionary/entitled)

The entitlement described in subsection 30(1) is also a contingent future entitlement that may not be payable or even determinable until after the employee terminates employment or retires from a successor employer.

The common thread between subparagraph 28(1)(b)(i) and subsection 30(1) is that both deal with pension benefits to which the member has a contingent future entitlement but which are not yet payable because the member may not have met all of the necessary conditions under the pension plan in order to actually receive the pension benefit. The meaning of “entitled” in the context of subparagraph 28(1)(b)(i) and subsection 30(1) is therefore akin to the concept of “vested”.

The first interpretation of “entitled” appears to be how OSFI has interpreted the word in subsection 16(1) for purposes of InfoPensions 23. However, for the reasons below, we think that the proper construction of the PBSA demands that the entitlement described in subsection 16(1) be a contingent future entitlement, similar to that which is contained in subparagraph 28(1)(b)(i) and subsection 30(1), and that the contingency – be it an election to retire or a requirement to cease employment - is determined by reference to the pension plan terms.

(b) Immediate Pension Benefit

Subsection 16(1) entitles a member to an “immediate pension benefit”. The term “immediate pension benefit” embeds the term “pension benefit”, both of which are defined as follows:

immediate pension benefit means a pension benefit that is to commence within one year after the member becomes entitled to it; [emphasis added]

pension benefit means a periodic amount to which, under the terms of a pension plan, a member or former member, or the spouse, common-law partner, survivor or designated beneficiary or estate or succession of a member or former member, is or may become entitled; [emphasis added]

An “immediate pension benefit” “is to” (i.e., **must**) commence within one year of the member becoming entitled to it. Absent any contingency or triggering event – such as cessation of employment or member election - the definition of “immediate pension benefit” would demand that every person who attains “pensionable age” automatically start to receive a pension benefit within one year of having attained it, whether they want to or not, whether they continue to be employed or not. For obvious reasons, that cannot be the intent of the legislature. Moreover, such a result would be inconsistent with subsection 16(5) of the PBSA, which contemplates that someone could remain in employment past “pensionable age” and not be in receipt of a pension benefit.²

² Subsection 16(5) states:

Employment after pensionable age

(5) Where a pension plan provides generally that a member’s period of employment or the member’s salary during that period, or both, affect the member’s pension benefit, it shall provide that, where a member continues employment after attaining pensionable age and is not receiving a pension benefit in respect of employment with the current employer, the member’s period of employment after pensionable age or the member’s salary during that period, or both, as the case may be, shall be taken into account in calculating the member’s pension benefit, subject to any term of the pension plan

- (a) fixing a maximum number of years of employment that can be taken into account under the plan for purposes of determining the pension benefit; or
- (b) fixing a maximum amount of the pension benefit.

Given the foregoing, the only way in which to interpret the word “entitled” in subsection 16(1) in a manner that is harmonious with subsection 16(5) and gives meaning to the one-year requirement in the definition of the term “immediate pension benefit”, is to interpret it as a vested, but contingent future right (i.e., it is not yet payable because the member must still do something to start the pension). This interpretation would also be consistent with the view that the original purpose of subsection 16(1) was to simply provide for the vesting of a “pension benefit” at “pensionable age”.³

In addition, this interpretation is supported by the definition of “immediate pension benefit”, which embeds the defined term “pension benefit”. A “pension benefit” is the “periodic amount to which, under the terms of the pension plan, a member...is or may become entitled”. Therefore, an “immediate pension benefit” is the periodic amount that is to commence within one year after the member becomes entitled to it under the terms of the pension plan. As a result of the definition of “pension benefit”, the definition of “immediate pension benefit” includes an acknowledgement that the pension plan may impose a condition on a member’s entitlement to the “immediate pension benefit”, provided that such condition is not otherwise contrary to the PBSA.

c) Meaning of “Pensionable Age”

“Pensionable age” is defined under the PBSA as follows:

pensionable age, in relation to a member, means the earliest age (taking into account the period of employment with the employer or the period of membership in the pension plan, if applicable) at which a pension benefit, other than a benefit in respect of a disability (as defined in the regulations), is payable to the member under the terms of the pension plan without the consent of the administrator and without reduction by reason of early retirement; [*emphasis added*]

In this regard, the definition of “pensionable age” is also deferential to the terms of the pension plan to determine whether a “pension benefit” is payable.

2. CESSATION OF EMPLOYMENT CONDITION IS NOT CONTRARY TO PBSA

In our view, a condition that requires a member to cease employment in order to commence receipt of a pension is not contrary to the PBSA. Rather, ACPM’s view is that the PBSA **permits** an employer to design a plan such that a member may commence receiving a pension while employed, but it is **not a minimum standard** that a plan must be designed to permit this option. We are of this view for the following reasons.

First, allowing a termination of employment condition would not lead to a single inconsistency within the PBSA. The term “entitled” within the PBSA has two meanings, and the above interpretation is consistent with one of them. Unlike the view expressed in InfoPensions 23 for which we must either read in some member-initiated election into subsection 16(1) or read out the one-year requirement in the definition of “immediate pension benefit”, the above interpretation gives every section in the statute meaning.

³ Prior to amendments to the PBSA in 2010, a pension plan could have imposed a minimum service vesting condition (i.e., 2-year vesting for post-86 service and age 45 & 10 years of service for pre-87 service).

We also note that OSFI's position in InfoPensions 23 appears to be influenced by subsection 2(3) which defines "retire" as follows:

2 (3) For the purposes of this Act, a member of a pension plan shall be deemed to retire on commencing to receive an immediate pension benefit, whether the member's employment has terminated or not.

ACPM believes that the term "retire" simply contemplates that a pension plan **could** be designed to require cessation of employment or not. It does not dictate a minimum standard. As it is a longstanding principle of statutory interpretation that an interpretation that gives all sections of a statute, and all words in each section, meaning ought to be preferred over an interpretation that does not, we believe that ACPM's interpretation ought to be preferable.

Second, ACPM's interpretation is consistent with the Income Tax Act ("ITA"). The ITA requires that a "pension benefit" commence no later than December 31 of the year in which a member turns 71 (and in prior years 69). Plans must be drafted to permit a pension to commence without a cessation of employment if an employee chooses to stay in employment past 71 because of the ITA, and the PBSA allows for that duality. Subsection 8502(a) of the regulations under the ITA also requires that the primary purpose of a pension plan be to provide "periodic payments to individuals after retirement and until death in respect of their service as an employee". If the primary purpose of a pension plan under the ITA must be to provide pensions in retirement, the default minimum standard under the PBSA should not be to pay pensions to those individuals who remain employed.

Third, if commencing a pension at "pensionable age" while employed is a minimum standard right, such a significant substantive right should be unambiguous and unequivocal in light of its implications. It is not. In fact, nearly all ACPM members' pension plans are designed, and have a longstanding administrative practice to require, a cessation of employment prior to pension commencement. In addition, we are aware that OSFI's historical practice was to review pension plan texts for compliance, and we are not aware of this issue being flagged as a non-compliance item by OSFI at that time.⁴ The fact that for over 35 years neither OSFI nor federally regulated pension plan administrators interpreted the PBSA this way is, in our view, suggestive of a general acceptance of the interpretation of the PBSA advanced by ACPM.

Finally, it is problematic public policy to interpret the PBSA in the manner suggested in InfoPensions 23.

First, the Canadian retirement system is not designed to encourage the "double-dipping" that would be authorized by the interpretation espoused in InfoPensions 23. The design of our system from a tax policy and social engineering perspective is to allow an employee to accrue retirement benefits on a tax deferred basis, and then to take that amount into income to support their retirement. It is not designed to allow a subset of fortunate individuals to receive a windfall.

Second, no other Canadian jurisdiction provides for such a minimum standard, probably for the above reasons.

⁴ We note that mandatory retirement was eliminated at under federal law in 2012. However, mandatory retirement applied only for those 65 and older and many federal plans are designed with a pensionable age that is less than age 65. As such, the elimination of mandatory retirement should not have influenced OSFI's interpretation of subsection 16(1).

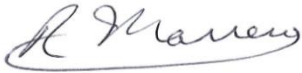
Third, the federal Public Service Pension Plan does not permit an employee to double-dip and many of OSFI's plans were spun out of that plan.

Finally, there are significant workforce management challenges and implications if older employees have little to no incentive to leave the workforce, which has the potential to create additional cost for employers and intergenerational issues relating to job opportunities and career advancement.

For the above reasons, we respectfully ask that OSFI reconsider its view. In addition, we ask that OSFI support ACPM's request to Finance Canada that a clarifying amendment be made to the PBSA to provide, for greater certainty, that the PBSA has always permitted a pension plan to require an employee to cease employment in order to "retire" for PBSA purposes.

We thank you for your consideration on this very important issue and we look forward to continuing dialogue on this issue and other matters affecting the retirement income community.

Yours truly,

A handwritten signature in cursive script, appearing to read "R. Marrero", written in dark ink.

Ric Marrero
Chief Executive Officer
ACPM

cc: Kathleen Wrye, Acting Director, Pensions Policy | Financial Crimes and Security Division
Financial Sector Policy Branch | Department of Finance Canada