



This arbitration results from the August 2007 Memorandum of Settlement between the parties which included the following provision:

### **Pension Plan Governance and Funding**

The parties agreed to establish a Joint Working Group to consider:

- (i) existing governance mechanisms related to the University of Toronto Pension Plan, other models of pension plan governance, the appropriate forum for the Association to have a voice concerning pension plan governance and issues related thereto, and issues related to plan structure including issues related to the possibility of a separate pension plan for faculty and librarians. The parties acknowledge the University's role as legal Administrator of the plan and the Plan Sponsor.

If the joint working group fails to make a unanimous recommendation on the issue of the appropriate forum for the Association to have a voice concerning pension plan governance the parties agree that Martin Teplitsky shall remain seized.

- (ii) Issues related to the funding of the Pension Plan including both member contributions and University contributions.

This Working Group can include advisors, actuaries and/or counsel for each of the parties.

The parties attempted to resolve the matter in direct negotiations but were unsuccessful. Mediation did not secure agreement; hence this award.

At the outset I want to thank all counsel for their submissions. They brought both extensive pension law and collective bargaining expertise to the resolution of the issues and were very helpful. I also had the benefit of Professor Arthurs' recent report on pensions, "A Fine Balance – Safe Pensions, Affordable Pensions, Fair Rules" (hereinafter the "Arthurs Report") which proved of enormous value.

### **BACKGROUND:**

The Faculty and Librarians are members of several pension plans which include other unionized employees and non-unionized employees.<sup>1</sup> These are defined benefit plans. Simply put, the "Pension Plans" promise to pay plan members fixed sums on their retirement calculated according to a formula established in the Pension Plans. Both Faculty and Librarians and the Governing Council contribute to the plans. The Governing Council is both the Plans' sponsor and administrator. The Governing Council alone is responsible for the fiscal health of the plan. If a deficit arises, the Governing Council must, in accordance with regulatory requirements, address it. These Plans are known as SEPPS-Single Employer Pension Plans.<sup>2</sup> The Arthurs Report describes defined benefit plans as follows at p. 15.

"By contrast, "true" DB plans commit the sponsor to provide retirees with pensions of a fixed or ascertainable amount; hence,

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<sup>1</sup>There are 3 plans: University of Toronto Pension Plan; a supplementary retirement arrangement (the SRA) for pensions which exceed the Income Tax maximum limit; University of Toronto (OISE) Pension Plan. I will refer to these as the "Pension Plans".

<sup>2</sup>The other typical plan is a Defined Contribution Plan. In this model, the employer makes its contributions but has no responsibility for outcomes. The employee on retirement receives whatever the Plan has generated. For fuller discussions, see the Arthurs Report at p. 15

“defined benefit.” The level of the pension benefit is calculated by reference to a specified benchmark—most commonly some combination of the level of the employee’s earnings and his or her length of service. In some cases, DB pensions are calculated as a proportion of the wages the employee earned during the final or best-paid years of their employment; in others, as a percentage of average earnings across their whole career; and in still others, as a “flat” or fixed sum payable on retirement in respect of each month of employment.

Unlike DC plans, DB plans do not earmark specific accounts for the support of individual retirees. Rather, the plan’s entire assets are available to meet all of its obligations. If funds are inadequate at any point to meet those obligations, the sponsor must contribute additional funds to make good the deficiency. As a result, the risks that retirees will live longer than anticipated, or that the plan’s investments will perform below expectations, are largely assumed by the sponsor, not by the plan members.”

To date, the Faculty Association has not had an institutionalized “voice” in governance of the Pension Plans. Governing Council has delegated to the Business Board the duties of the administrator. The Faculty Association has no presence on the Business Board. Plan member involvement in governance of a SEPP is rare. (Arthurs Report, p. 65).

#### **ISSUES:**

The issues which arise in this arbitration are as follows:

1. Should Plan members have equal representation with the Governing Council in the organization which acts as administrator.
2. What organization should perform the role of the Administrator.
3. What should the composition be of the organization performing the Administrator’s role and other related matters.

4. What are the duties and responsibilities of this organization.
5. Some ancillary matters.

### **Submissions**

The Faculty Association's position is that the Governing Council should cease its role as administrator. An independent Administrator should be established in which the Faculty Association has equal representation with the Governing Council. Deadlocks would be resolved by arbitration. The new Administrator would have its own executive director, accountable to the new administrator and not to the Governing Council. It would hold the pension assets of the Faculty and Librarians. This new Plan would be for Faculty and Librarians only.

The Governing Council's submission at arbitration is<sup>3</sup> that the Pension Committee already referenced in the Pension Plan should be established. The Governing Council should have the right to appoint a majority of members. The duties previously assigned to the Business Board would be removed from that body and given to the Pension Committee. Governing Council would remain the Administrator and would essentially delegate this role to the Pension Committee. The Faculty and Librarians would not have a separate Pension Plan.

#### **1. Should the Plan Members have Equal Representation with the Governing Council in the body which acts as Administrator?**

By their agreement, the parties have recognized that the Faculty Association should have

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<sup>3</sup>Its original position at mediation was substantially different. It advocated that a Pension Committee be formed which would be advisory in nature only.

a “voice”– a “role” in Pension Plan governance. In my opinion, this agreement requires a significant voice in an organization which is the de facto administrator of the Plan. However, it does not require an equal voice. An equal voice is a potential outcome but not a mandated outcome. It is unnecessary for me to elaborate the important values which member involvement in governance promotes. Suffice it to say that member participation in governance accords with the recommendations in the “Arthurs Report”.

What informs my conclusion on this issue is the fact that the Governing Council has the sole responsibility for the Plan’s financial results. As such, it is entitled to a majority of members in the body to whom the role of Administrator is delegated by Governing Council. This seems to me a self-evident conclusion. The Arthurs Report’s recommended model includes joint control but also includes joint responsibility for deficits<sup>4</sup>. There is no basis for joint control when one party alone bears the financial risk. I recognize that Faculty and Librarians are theoretically at risk if the Governing Council defaulted on its obligations to fund the deficit. However, this doomsday scenario has no evidentiary support in this case and in my judgment is so unlikely an event as to warrant little consideration in my conclusions. In the result, the Governing Council is entitled to appoint a majority of members to the body fulfilling the delegated duties and responsibilities of an Administrator.

**2. Which organization should perform the role of Administrator?**

Given the size of the Pension Plan, the complexity of managing funds of this magnitude

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<sup>4</sup> At p. 176

and the many other duties which are delegated to business board, it seems clear that it is time to establish a body whose sole responsibility will be the administration of the Pension Plan.

I have concluded that the Pension Committee, which is already referenced in the Pension Plans, is the ideal body to whom the Governing Council can delegate the necessary powers. I reject the submission that Governing Council should be removed as the Administrator and a different body be established to assume that role. My reason for this conclusion is simple. No useful purpose would be served and substantial costs would be incurred.

In the result, it is my award that the Governing Council take the necessary steps to establish the Pension Committee referenced in the Pension Plans. I will elaborate somewhat more fully its duties and powers later in this award. For the moment, it is sufficient to state that, in essence, the administrator's role which has been delegated to the Business Board will be transferred to the Pension Committee, including the matters in paragraph 5 of the Terms of Reference for the Business Board that apply to the Pension Plans.

### **3. Composition of the Pension Committee**

I have concluded that the Pension Committee should have 16 members, 9 of whom will be appointed by the Governing Council and 7 of whom will be appointed by groups representing Plan members. Of these 7, 4 will be appointed by the Faculty Association one of whom shall be a retired member of one of the Plans. This degree of representation for the Faculty Association is reflective of the assets and liabilities of the Plan attributable to its members.

Some argument was addressed as to whether there should be a qualifications process for all appointees. I have concluded that there is no reason to doubt that all parties will appoint reasonably qualified persons able to fulfill their fiduciary obligations. Engaging in a qualifications process would be time consuming, costly and of no practical value.

### **Conflicts of Interest and Confidentiality**

Pension Committee members shall be bound by an appropriate Conflict of Interest Policy and an appropriate Confidentiality Policy. Both shall be developed by the Committee.

### **Fiduciary Standard of Care**

In carrying out its responsibilities on behalf of the Plan, each member of the Pension Committee shall act with the care, diligence and skill that a person of ordinary prudence would exercise in dealing with the property of another person. In addition, each member shall use all relevant knowledge and skill that the member possesses or, by reason of the member's profession, business or calling, ought to possess. The Pension Committee shall make orientation, fiduciary training and education opportunities available to all Pension committee members on an ongoing basis.

### **Chair and Vice-Chair**

The Pension Committee will have a Chair and a Vice-Chair. These positions will be for 2-year terms. The positions will alternate between a member of the Pension Committee selected from those appointed by the Governing Council and a member selected from among the other 7

members. The Pension Committee will select the persons to occupy these positions.

### **Funding**

The Faculty Association sought funding for the Committee for, among other things, to hire an Executive Director responsible only to the Pension Committee and to provide expert assistance. In particular, the Faculty Association submitted that its members on the Committee should be entitled as of right to such assistance.

There is no doubt that the Pension Committee is entitled to such assistance as it deems necessary to fulfill its mandate. Ordinarily, such assistance will be funded from the assets of the Pension Plan. Without limiting the generality of the foregoing, this would include legal, accounting and actuarial advice. In my opinion, it is the Pension Committee's responsibility to determine its needs and it would not be helpful for me to predict what may be required. Once the Pension Committee is established, it will have an opportunity to assess its needs in light of the challenges posed by the scope of its delegated responsibilities.

I also do not believe that it is helpful to provide a right in individual members or groups of members within the Pension Committee to obtain, advice and assistance. It is important to recall that the Pension Committee members owe fiduciary duties to the Plans' members. They owe no duty to the party who appoints them. The Pension Committee must function as a unit to fulfill its fiduciary obligations. Mechanisms which could promote divisiveness should be discouraged. No doubt, the Committee as a whole will be sensitive to individual requests for

advice and assistance. Bona fide requests for advice and assistance should be respected to ensure fulfillment of fiduciary obligations and meeting of the appropriate standard of care.

### **Committee Minutes**

Transparency is an important value. Therefore, the minutes of the Pension Committee meetings shall be provided to each of the parties unless the Pension Committee otherwise directs for reasons of confidentiality or because of other reasonable concerns. Openness should be the rule, secrecy the exception.

#### **4. What are Duties and Responsibilities of the Pension Committee**

Under the Pension Plans it is the responsibility of Governing Council to describe the delegated duties and responsibilities. I remain seized should any issues arise in this respect. To assist Governing Council in its task, I set out in general terms my expectation of the delegated duties and responsibilities for this Pension Committee.

- (a) To approve:
  - (i) the actuarial assumptions and methodologies to be used in the actuarial valuation reports from time to time;
  - (ii) actuarial valuation reports;
  - (iii) the Plan actuary and to oversee the actuary's performance;
- (b) To approve the University of Toronto Pension Master Trust Investment Policy as it relates to the Registered Plan, together with the amendments to the Policy and to review the annual reports on the investments of the Registered Plan, including

reviewing regular reports on the investment performance of the Registered Plan. Such recommendations may include, without limiting the generality of the foregoing, recommendations and reports concerning the development of risk and return targets, asset allocation strategies, fees and expenses incurred and terms of any delegation of authority to Governing Council-controlled asset management corporation or third party investment manager and investment manager oversight.

- (c) To oversee reports on the day-to-day administration of the Plan carried out by the University Administration. For clarity, day to day administration does not include collective bargaining strategy or negotiations.
- (d) To carry out such other responsibilities as may be assigned by the Governing Council from time to time.

## **5. Some Ancillary Matters**

Within the University's governance structures, Committees either approve, reject or refer back the recommendations brought before them. Where the recommendations are rejected or referred back, the Committee may provide comments and/or reasons for their rejection. In my opinion, it would be best to continue the same processes for the Pension Committee. Such processes shall not derogate from the Pension Committee's powers or legal obligations. These processes merely define the manner of their exercise. So, for example, with respect to the Plan's actuary, the Pension Plan Committee de facto chooses the actuary by either approving or not approving recommendations brought before it for the appointment of the actuary.

**Separate Pension Plan for Faculty and Librarians**

I reject the request to separate from the current Pension Plan the assets attributable to the Faculty and Librarians and to create a separate Plan. Such a process would be costly and not, so far as I am able to determine, of any advantage.

**UTAM Board of Directors**

The Faculty Association will be provided a seat on the Board of Directors of UTAM.

**CONCLUSION:**

As I have already noted, the participation of the Faculty Association in the governance of the Pension Plans accords with the Arthurs Report's recommendations for best practices. The success of the Pension Plan is in the best interests of all stakeholders. My expectation is that all parties will work together co-operatively to facilitate the Pension Plan's realization of its important objectives

I will remain seized.

DATED the 17th day of August, 2009.



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MARTIN TEPLITSKY, Q.C.  
Arbitrator