

**IN THE MATTER OF AN APPEAL FROM
THE DECISION OF THE PRESIDENT**

By: "The Appellant" to the
Appeals Sub-Committee

Heard: June 4, 2008 and October 3, 2008

DECISION

The Appellant brings this appeal from the decision of the President of OMERS, dated December 18, 2007, made pursuant to Section 41 of the OMERS Primary Plan (the "Plan"). By this appeal, the Appellant seeks a determination from the Appeals Sub-Committee (the "Committee") that she be permitted to receive a payment equal to the difference between the commuted value (the "CV") of her pension and the actuarial value transferred through the reciprocal transfer agreement in place between OMERS and the [◆] Pension Plan (the "◆PP") to the ◆PP. This appeal was a hearing *de novo* conducted by way of written submissions.

The background to this appeal is as follows:

1. The Appellant terminated her employment with [Employer 1] on June 18, 2002 after almost 15 years of service and thereby ceased to be an active member of the Plan.
2. On November 14, 2005, the Appellant became employed by [Employer 2] and began contributing as a member of the ◆PP. The Appellant exercised her rights under the Reciprocal Transfer Agreement (the "RTA"), effective July 18, 2002, between OMERS and ■ to request a transfer of her accrued pension credits under the Plan to the ◆PP in order to establish pensionable service under the ◆PP.
3. Under the provisions of the RTA, the calculation of the amount transferable to the ◆PP (the "Transfer Amount") was less than the CV of the Appellant's deferred pension as it would have been calculated for the purposes of applying subsection 42(1) of the *Pension Benefits Act*, R.S.O. 1990 c. P-8 (the "PBA").
4. Subsection 42(1) of the PBA requires a pension plan, at the request of a former member who is entitled to a deferred pension, to transfer an amount equal to the CV of the deferred pension,
 - (a) to the pension fund related to another pension plan, if the administrator of the other pension plan agrees to accept the payment;
 - (b) into a prescribed retirement savings arrangement; or
 - (c) for the purchase for the former member of a life annuity that will not commence before the earliest date on which the former member would

have been entitled to receive payment of pension benefits under the pension plan.

Subsection 42(3) of the PBA states that the above subsection does not apply if the former member is entitled to an immediate payment of a pension benefit from the pension plan unless the pension plan provides such an entitlement, which the Plan does not.

However, by virtue of Section 34 of the Plan, a member who is entitled to a deferred pension and who is not eligible for an early retirement pension may elect, in satisfaction of all rights under the Plan, to transfer the CV of the deferred pension to a registered pension plan, a retirement savings arrangement or a provider of a life annuity.

5. The RTA provides under Section 3: Transfers from OMERS to the [◆PP], clauses 6 and 8 as follows:
 - “6. The OMERS Board will direct that a payment be made into the Account in respect of an eligible employee the lesser of the OMERS Transfer Amount or the ■ Transfer Amount. This payment shall be made within 3 months from the date the Minister notifies the OMERS Board of the ■ Transfer Amount.”
 - “8. If the amount paid by the OMERS Board under Clause 6 is less than the commuted value that would have been calculated in respect of the eligible employee under the OMERS Plan, the difference shall be dealt with in accordance with the provisions of the OMERS Plan.”

6. When a member transfers his or her service pursuant to the RTA, the importing plan (◆PP) calculates the cost of establishing the same service in its plan. The exporting plan (OMERS) will then transfer the lesser of (i) the amount available from the Plan, or (ii) the amount required by ◆PP to establish the same service. In other words, the OMERS Administrative Corporation (the “AC”) may transfer less than the amount available, if the lesser amount provides the member with full service in the ◆PP. In such circumstances, the CV of a member’s deferred pension, as calculated for the purposes of applying subsection 42(1) of the PBA could potentially exceed the amount being transferred, but the member would still receive full service in the ◆PP. The converse is also possible. As recorded in paragraph 5 above, under the RTA where the amount paid by the AC under Clause 6 is less than the commuted value that would have been calculated in respect of the member under the Plan, the difference is dealt with in accordance with the provisions of the Plan.

7. In this appeal, the Appellant claims that the difference between the Transfer Amount and the CV of her deferred pension as calculated for the purposes of applying subsection 42(1) of the PBA, is a pension benefit to which she is

entitled and has requested that the excess must be paid out to her by the AC as a payment under Subsection 42(1) of the PBA.

8. The AC maintains that (i) transfers under the RTA and payments under Subsection 42(1) of the PBA are exclusive and that a member must choose one or the other, not a mixture of both; and (ii) the purpose of the Transfer Amount is not to quantify the current value of the pension for payout under Subsection 42(1) but instead to determine the value required to pay the full value of pensionable service in the ♦PP as provided by the RTA.
9. At the initial hearing on June 4, 2008, the Committee posed the following questions to the AC staff:
 - (a) “The January 1, 2000 change in practice which ceased payment of the excess between the OMERS CV and the transfer amount under any reciprocal transfer agreement – what is the basis of the practice, relevance of the January 1, 2000 date and availability/communication to Plan members?”
 - (b) What is the significance of the statement in the President’s decision where he states that under the RTA “service is acquired for a subsidized, lower price than an ordinary service purchase using CV”?

The responses to the questions by AC staff and by the Appellant were as follows:

- (a) *Staff Response:* No formal communication was made to OMERS members of this administrative practice either before or after 2000. The change was made in response to a 1999 review of the Major Ontario Pension Plans (“MOPPS”) RTA in which a number of “double-dipping” scenarios were discussed. In one situation, a member could transfer funds to a new plan, receive a payment of the excess CV and then receive a second CV payment from the new plan within a short period of time.
The Appellant’s Response: Because of my age, I am already vested in my position with [Employer 2] and would not be able to engage in the “double-dipping” scenario. If the reverse situation were to take place (i.e. a transfer from the ♦PP to OMERS), under the relevant ■ legislation, I would be paid the excess between CV and the transfer value.
- (b) *Staff Response:* Generally speaking, RTAs establish the cost of the service being transferred as of a certain point in time. They may use different actuarial assumptions which may result in a lower cost than if the member were to purchase the service outside of the RTA. Since it is the AC Staff’s understanding that the Appellant is unable to purchase service outside the RTA, the RTA provides her with an advantage.
The Appellant’s Response: I am able to purchase service outside the RTA, but my financial advisor recommended against this route. It is

unfair that OMERS should be able to benefit by being able to retain the excess amount of the CV if I choose one route over another.

10. Schedule "A" attached contains relevant provisions of the PBA, PBA Regulations and of the Plan.

DECISION

The appeal by the Appellant is dismissed for the following reasons:

- The Appellant was entitled to require OMERS to pay an amount equal to the CV of her entire deferred pension under the Plan to the pension fund of another pension plan, or to a prescribed RSP or to buy a life annuity pursuant to subsection 42(1) of the PBA.
- Another option was also available in addition to the options under subsection 42(1) of the PBA:

The Appellant elected to proceed by way of the RTA, and the value of the Transfer Amount was determined using the accepted actuarial formula for determining her accrued pension credits under the Plan in accordance with the RTA for her to receive full credit under the ♦PP.

- Having made the election to proceed by way of the RTA, the Appellant cannot also opt for a transfer to her of an amount representing a portion of her deferred pension.
- Subsection 19(1) of the PBA regulation states that a CV, for the purposes of applying subsection 42(1) of the PBA, must be calculated in accordance with the Canadian Institute of Actuaries ("CIA") standards and the CIA standards (section 3810.03) expressly state that they are not applicable to transfers under a reciprocal transfer agreement. A reciprocal transfer agreement is defined in the PBA (section 1) to mean an agreement related to two or more pension plans that provides for the transfer of money or credits for employment or both in respect of individual members.
- The RTA provides that where the value of the Transfer Amount is less than the CV that would have been calculated in respect of the Appellant under the Plan, the difference is dealt with in accordance with the Plan. The Plan does not provide for payment of any amounts to the Appellant in excess of that transferred under the RTA.
- The language of Section 42 of the PBA, in our view, does not require OMERS to pay any additional amount to the Appellant.
- Under the RTA election, the Appellant's Transfer Amount represented her full continuous service from the Plan to the ♦PP which is added to her continuous service under the ♦PP to form a single, continuous period of service with her new employer, as is the intention of the legislation.
- The administrative practice, or its reversal, regarding excess payments referred to in paragraph 9 above which was in place prior to 2000 was not communicated to Plan members, including the Appellant and therefore, the Appellant could not have relied on the former practice.

Accordingly, the Appellant's appeal is dismissed.

Dated this _____

By Order of the Appeals Sub-Committee

David S. O'Brien
Chair

John Goodwin
Vice Chair

John Weatherup

Cameron Weldon

Michael Power

SCHEDULE "A"

Pension Benefits Act, R.S.O. 1990, c. P-8

Interpretation

Definitions

1. (1) In this Act,

...

"commuted value" means the value calculated in the prescribed manner and as of a fixed date of a pension, a deferred pension, a pension benefit or an ancillary benefit; ("valeur de rachat")

...

"reciprocal transfer agreement" means an agreement related to two or more pension plans that provides for the transfer of money or credits for employment or both in respect of individual members; ("accord réciproque de transfert")

...

Transfer

42.(1) A former member of a pension plan who, on or after the 1st day of January, 1988, terminates employment or ceases to be a member of the pension plan and who is entitled to a deferred pension is entitled to require the administrator to pay an amount equal to the commuted value of the deferred pension,

(a) to the pension fund related to another pension plan, if the administrator of the other pension plan agrees to accept the payment;

(b) into a prescribed retirement savings arrangement; or

(c) for the purchase for the former member of a life annuity that will not commence before the earliest date on which the former member would have been entitled to receive payment of pension benefits under the pension plan. R.S.O. 1990, c. P.8, s. 42 (1).

Limitation

(2) The entitlement under subsection (1) is subject to the prescribed limitations in respect of the transfer of funds from pension funds. R.S.O. 1990, c. P.8, s. 42 (2).

Application of subs. (1)

(3) Subsection (1) does not apply to a former member whose employment is terminated and who is entitled to immediate payment of a pension benefit under the pension plan or under section 41, unless the pension plan provides such an entitlement. R.S.O. 1990, c. P.8, s. 42 (3).

Ontario Regulation 909, R.R.O. 1990 (to the PBA)

Commuted Value and Portability of Pension Benefits

19. (1) For the purposes of subsection 42 (1) of the Act, the commuted value of a pension, deferred pension or ancillary benefit shall not be less than the value determined in accordance with the Standard of Practice for Determining Pension Commuted Values issued by the Canadian Institute of Actuaries, with an effective date of February 1, 2005, available to the public from the Canadian Institute of Actuaries at Suite 800, 150 Metcalfe Street, Ottawa, Ontario K2P 1P1 or electronically on its website at www.actuaries.ca. O. Reg. 787/93, s. 1 (1); O. Reg. 386/04, s. 4.

(1.1) Subsection (1) does not apply if a pension plan is being wound up in whole or in part. O. Reg. 629/92, s. 1 (1).

(1.2) For purposes other than those of subsection 42 (1) of the Act and subsection 29 (2), the commuted value of a pension, deferred pension or ancillary benefit shall be calculated using methods and actuarial assumptions that are consistent with accepted actuarial practice. O. Reg. 144/00, s. 14.

20. (1) A member of a pension plan who makes an election under section 42 of the Act or a person who is entitled to make an election under subsection 51 (5) of the Act shall deliver a completed direction to the administrator within sixty days after termination of employment or, in the case of a person entitled to make an election under subsection 51 (5) of the Act, within sixty days after receipt of notice of termination. R.R.O. 1990, Reg. 909, s. 20 (1).

OMERS Plan, section 34

34. (1) A member who is entitled to a deferred pension under section 22 and who is not eligible for an early retirement pension under section 23 may elect, in satisfaction of all rights under this Plan, to transfer the amount described in subsection (3) to a registered pension plan, a retirement savings arrangement or a provider of a life annuity.

(2) Subsection (1) does not apply in respect of a pension entitlement under subsections 15(7), 15(8), 38(14) and 38(15).

(3) The amount is the commuted value of the deferred pension less the sum of any benefits paid to the member under this Plan. A payment under subsection 15(7), 15(8), 27(2), 27(3), 38(14) or 38(15) is not such a benefit.

(4) The transfer must meet the requirements of the Pension Benefits Act and the Income Tax Act (Canada).