

# ONTARIO MUNICIPAL EMPLOYEES RETIREMENT SYSTEM

## *In the Matter of an Appeal from the Decision of the President's delegate by "The Appellant" to the Appeals Sub-Committee*

### **Introduction**

The Appellant brings this appeal pursuant to Section 41 of the OMERS Primary Pension Plan (the "Plan") to a panel of the Appeals Sub-Committee of the OMERS Administration Corporation (the "Panel").

The Appellant appeals from the January 13, 2012 decision of the President's delegate wherein she concluded, based on the evidence and submissions before her, that the Appellant was not the eligible surviving spouse of [OMERS] Plan member [the "Member"] and that the Member's designated beneficiary [the "Member's Stepson"] was entitled to a refund of an amount equal to the minimum value of the Member's pension.

This appeal proceeded by way of a written hearing *de novo* held on May 31, 2012. That is, the Panel considered the matter afresh based on its review of all of the evidence and written submissions presented by the parties on the appeal and what was before the President's delegate.

### **Background**

On March 23, 2009, the Member, who was employed by [Employer], died prior to retirement.

The Appellant applied to OMERS for a survivor benefit claiming that she was the Member's common-law spouse.

The Member's Stepson, the designated beneficiary under [the Member's] OMERS pension, contested the Appellant's application.

### **Order of Entitlement to Pre-Retirement Survivor Benefits**

When a Plan member dies prior to retirement, survivor benefits are paid according to a specified order of entitlement as set out in Section 19 of the Plan.

Benefits are paid in the following order:

1. To the member's surviving spouse, if the member and the surviving spouse were not living separate and apart on the date of the member's death;
2. If the member does not have an eligible surviving spouse, to any eligible dependent children are entitled to a benefit for as long as they qualify;

3. If the member does not have an eligible surviving spouse or any eligible dependent children, the member's designated beneficiary will receive a death refund of the member's entitlement;
4. If there is no designated beneficiary on file with OMERS, then the member's estate will receive a death refund of the member's entitlement.

There is no dispute that the Member's Stepson is the designated beneficiary under the Member's OMERS pension.

What is disputed is whether the Appellant is the Member's surviving spouse and whether they were not living separate and apart on the date of the Member's death.

If the Appellant establishes, on a balance of probabilities, that she is the Member's surviving spouse and that she and the Member were not living separate and apart on the date of his death, then she is entitled to be paid a survivor benefit from the Member's OMERS pension because an eligible surviving spouse ranks higher on the order of entitlement than a designated beneficiary.

If the Appellant is not the Member's eligible surviving spouse then the Member's Stepson, as the designated beneficiary, is next in line in the order of entitlement. As such, he would be entitled to a refund of an amount equal to the minimum value of the Member's OMERS pension.

### **Eligible Surviving Spouse**

The phrase "surviving spouse" is defined in section 1 of the Plan as:

"surviving spouse" means the person who was the spouse of a member immediately before the member's death;

The term "spouse" is defined in section 1 of Plan as having the same meaning as that term is defined under the *Pension Benefits Act*, R.S.O. 1990 c. P.8. ("*PBA*").

Subsection 1(1) of the *PBA* provides:

"spouse" means either of two persons who,

- (a) are married to each other, or
- (b) are not married to each other and are living together in a conjugal relationship,
  - (i) continuously for a period of not less than three years, or
  - (ii) In a relationship of some permanence, if they are the natural or adoptive parents of a child, both as defined in the *Family Law Act*;

Because the Member and the Appellant were not married and they are not the natural or adoptive parents of a child, the definition in subsection (b)(i) applies.

Therefore, in order to establish that she is the Member's surviving spouse, the Appellant must establish to the Panel on a balance of probabilities that,

- (a) she and the Member were living together in a conjugal relationship;
- (b) the relationship was continuous; and

- (c) the relationship existed for at least three years prior to the date of the Member's death (i.e. the relationship commenced on or prior to March 23, 2006).

As discussed above, in order to be eligible for the benefit, the Appellant must also establish to the Panel on a balance of probabilities that she and the Member were not living separate and apart on March 23, 2009, the date of the Member's death.

### **Conjugal Relationship**

The Panel referred to *Molodowich v. Penttinen*, [1980] O.J. No. 1904 (Ont. Dist. Ct.), a decision of the Ontario District Court, defining a list of categories and questions decision makers should refer to when assessing whether a conjugal relationship exists. The *Molodowich* decision (which has been cited with approval by the Supreme Court of Canada) suggests that the following categories should be considered when assessing whether a conjugal relationship exists:

- (a) shelter
- (b) sexual and personal behaviour
- (c) services
- (d) social activities
- (e) economic support
- (f) children
- (g) societal perception of the couple.

The *Molodowich* decision states that these categories are not exclusive and that not every characteristic of a conjugal relationship needs to be present, or present in the same degree, in order for a conjugal relationship to be established. The facts will vary from case to case.

### **Evidence and Discussion**

There was evidence before the Panel suggesting that a continuous conjugal relationship may have existed between the Appellant and the Member from at least sometime in 2005 until the fall of 2007.

For example,

- During 2005 – The Member's [●] bank statement and the Appellant's [●] bank statement were delivered to the same address;
- 2005 to early 2007 – There are a variety of joint receipts for a trailer rented at [●] Inn;
- June 29, 2007 – Rental agreement for ["Address 1"] showing the Appellant and the Member as joint tenants;
- July 1, 2007 – Letter from [the "Landlord at Address 1"], authorizing installation of BellExpressVu service;
- July 19, 2007 – Hydro One bill for [Address 1] addressed to the Appellant at [Address 1]; and
- Sept. 1, 2007 – Rent receipt for [Address 1] paid by the Appellant.

On May 10, 2011 OMERS, while processing her claim, requested that the Appellant provide additional supporting documentation from the 2006-2009 timeframe. The request suggested that the Appellant provide bills in both names, joint accounts and suggested that the Appellant explain why Hydro bills had different addresses for her and the Member.

In her May 26, 2011 response, the Appellant explained that she had not kept any other receipts because she often only keeps receipts one month after paying bills. No supporting documents such as evidence of joint bank accounts or joint receipts for household invoices were provided for the 2008-2009 timeframe.

The evidence before the Panel for the time period after fall of 2007 suggests that, if the Member and the Appellant were in a conjugal relationship prior to this time, it did not continue.

For example,

- There are no joint bills or receipts in both the Appellant's and the Member's names after 2007;
- There is no evidence of joint bank accounts being established;
- The Member declared himself as single on his 2008 income tax return;
- An October 13, 2011 letter from the Landlord at Address 1 confirming that the Member resided by himself at [Address 1], Apt #[●], from November 1, 2007 until March 23, 2009;
- A July 19, 2007 hydro bill for the apartment at [Address 1] was addressed to the Appellant at [Address 1], but by January 6, 2009, the address on the hydro bill for [Address 1] had changed to be addressed to the Member at [Address 1];
- The maintenance of two residences [Address 1 and Address 2]; and
- The October 20, 2011 statement of [the "Landlord of Address 2"], confirming that the Appellant was the only tenant in that residence between November 2007 and November 2009.

The Appellant offers some explanations for the foregoing.

For example, in her December 12, 2011 submissions, the Appellant explains that she and the Member "kept quiet" about leaving the apartment on [Address 1]. The Appellant states that the apartment at [Address 1] was too small to accommodate her grandchildren that she says that she and the Member babysat almost every weekend.

However, the Appellant does not explain why the Landlord at Address 1 reported that the Member resided by himself at [Address 1] until his death on March 23, 2009.

Letters from numerous third-parties were submitted by both parties. These letters were clearly in conflict and thus did not provide the Panel with any conclusive evidence to support the merit of either claim.

The Panel noted that the Appellant remained the named beneficiary on the Member's Sun Life Financial employee group life insurance policy even though in her December 12, 2011 submissions, the Appellant states that the Member "left [the Member's Stepson] his life insurance from work". The Appellant also remained as a named dependent on the Member's extended health and dental benefit plan. Although these facts could be suggestive of the Member's intentions, the Panel finds that they are not conclusive.

The Panel also noted that the Appellant was approved for a CPP survivor's benefit. CPP's eligibility criteria for payment of a spousal survivor benefit is different than that of OMERS. Therefore, the Panel finds that the fact that the Appellant was approved for a CPP survivor's benefit is of little weight.

### **Conclusion and Decision**

Having carefully considered all of the evidence, including the evidence discussed above, the Panel finds that the Appellant has not established on a balance of probabilities that she and the Member were living together in a continuous conjugal relationship for at least three years as of the date of his death on March 23, 2009 or that she and the Member were not living separate and apart at the date of his death.

The Appellant's appeal is therefore dismissed.

The Panel orders that the Member's Stepson, as the designated beneficiary, is entitled to a refund of an amount equal to the minimum value of the Member's pension.

DATED at Toronto this \_\_\_\_\_ day of \_\_\_\_\_, 2012.

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David Carrington, Chair

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Fred Biro, Vice Chair

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Sheila Vandenberg, Member