

ONTARIO MUNICIPAL EMPLOYEES RETIREMENT SYSTEM

*In the Matter of an Appeal from the
Decision of the President
by "The Appellant" to the
OAC Appeals Sub-Committee*

Heard on June 16, 2010

DECISION

Introduction

The Appellant brings this appeal to the Appeals Sub-Committee of the OMERS Administration Corporation (“OMERS AC”) (the “Committee”) from the December 3, 2009 decision of the President of OMERS AC pursuant to Section 41 of the OMERS Primary Pension Plan (the “Plan”). By this appeal, the Appellant asks the Committee to order that OMERS AC pay him the \$[•] difference between the commuted value (“CV”) of his pension as calculated on a OMERS AC Benefit Application Form (“BAF”) that expired on January 11, 2008 and the CV of his pension as calculated on a OMERS BAF that expired on July 28, 2008. This appeal was considered in writing on June 16, 2010.

Background

The background to this appeal is as follows:

1. On December 11, 2006 the Appellant lost his employment with an OMERS employer.
2. On July 11, 2007 OMERS AC forwarded the Appellant a BAF outlining details of the termination options available to him. Option 4 was to take the CV of his OMERS pension benefit and move it to a locked-in retirement account (LIRA). Option 4 clearly indicated that the calculated value of the CV appearing on the BAF had an expiry date of January 11, 2008, after which the CV payment could increase or decrease.
3. On January 7, 2008, four days before the January 11, 2008 expiry date on the BAF, the Appellant phoned OMERS AC client services to inquire about his options under the BAF, including the details of what would happen if he let the CV deadline date expire. the Appellant spoke with [an] OMERS AC Client Services Agent. The parts of their conversation relevant to this appeal are:
 - a. The Appellant was told by the OMERS AC Client Services Agent that if he did not choose Option 4 by January 11, 2008, OMERS AC would issue a new BAF and the CV amount appearing on the new BAF would have to be recalculated. The

OMERS AC Client Services Agent cautioned the Appellant that the CV appearing on the new BAF could either increase or decrease over the CV appearing on the existing BAF, and told the Appellant that the outcome was uncertain.

- b. The Appellant asked the OMERS AC Client Services Agent what the recalculated CV would be. The OMERS AC Client Services Agent replied that it was not an easy calculation and she told the Appellant that there would be a 3-day turnaround to do the calculation.
 - c. The Appellant asked the OMERS AC Client Services Agent what factors affected calculation of the CV. The OMERS AC Client Services Agent told him that it was actuarial and that it “has something to do with CANSIM interest rates ... so if regular interest rates go down, right, your CV, your commuted value will go up, right, and vice versa”.
 - d. The Appellant tried to get the OMERS AC Client Services Agent to confirm that since interest rates were going down, his recalculated CV appearing in the new BAF would increase. The OMERS AC Client Services Agent refused to confirm this stating “It’s a matter of liability and I’m not going to go there because if it goes down – you’ll call next week and you’ll say, I talked to the OMERS AC Client Services Agent and she confirmed...everything’s fine right...” the Appellant replied: “Well – I wouldn’t but I guess there’s that danger. Okay.”
 - e. The Appellant then clarified “if rates are heading down then the commuted value will be going up you said” and the OMERS AC Client Services Agent replied “Right”.
 - f. The Appellant then asked the OMERS AC Client Services Agent to have a new BAF issued with a recalculated CV.
4. On January 28, 2008, OMERS AC sent the Appellant a new BAF, with a new guaranteed CV payment deadline of July 28, 2008. The CV calculated on the new BAF was \$[●] less than the amount in the original BAF.

5. This was not what the Appellant had expected since Bank of Canada interest rates had gone down in the previous half year.
6. On February 7, 2008, the Appellant wrote OMERS AC, advising that he had relied on what the OMERS AC Client Services Agent had told him and requesting an explanation of why his recalculated CV had gone down. Through a series of correspondence, representatives of OMERS AC explained to the Appellant how the CV of his pension benefit was calculated and why it had gone down in the second BAF.
7. On May 15, 2008, the Appellant requested that OMERS AC re-offer him the choice of receiving payment of his CV as calculated in the original, expired BAF (which was \$[●] higher). This request was denied.
8. A long series of correspondence then ensued between the Appellant and representatives of OMERS AC concluding with the Appellant requesting that the President of OMERS review the decision not to re-offer the Appellant the choice of receiving payment of his CV as calculated in the original, expired BAF. On December 3, 2009, the President denied the Appellant's request.
9. On December 28, 2009 the Appellant appealed the President's denial to the Committee.
10. On January 22, 2010 OMERS AC advised it would act as a party to this appeal by submitting documentation in support of management's position.
11. On March 16, 2010 all parties to the appeal were provided with a transcript of the January 7, 2008 conversation between the OMERS AC Client Services Agent and the Appellant.

The Appellant's Submissions

The Appellant claims that he relied on misinformation from an OMERS client services representative to his detriment. He asserts that his decision to allow the CV on the original BAF to expire was directly influenced by the telephone conversation he had with the OMERS client services representative and that OMERS must therefore take responsibility for the resulting lower CV.

OMERS AC Submissions

Relying on the decision of the Divisional Court in *Martin v. Ontario Municipal Employees Board*, [2002] O.J. No. 2286, OMERS AC took the position that the Committee had no authority to grant the relief that the Appellant was requesting, relief that OMERS AC characterized as damages for breach of fiduciary duty and misrepresentations. Based on this decision, OMERS AC characterized the Appellant's claim as a tort claim, falling outside the jurisdiction of the Committee. In the alternative, OMERS AC took the position that there was no misrepresentation and that the Appellant was not misled.

Analysis

After reviewing and considering all of the submissions of the parties, the Committee dismisses the Appellant's appeal on the basis that it has no jurisdiction to hear this appeal based on the binding authority of the *Martin* decision.

In the *Martin* decision, OMERS member Martin claimed that the mistake he made in cashing out his pension benefit years earlier was based on poor advice he received from an OMERS employee and he asked the Court, on judicial review, to quash a decision of the Committee denying Martin's request that OMERS allow him to reinstate the benefit that he had cashed out.

The Court conducted a detailed review of the Committee's authority under the relevant legislation and dismissed Martin's application.

In his reasons, Justice Pardu stated at paragraph 7 that "the Appeals Sub-Committee does not have jurisdiction to determine what are, in essence, tort claims advanced by members. The role of the tribunal hearing these appeals is to review the decision of the president, to 'determine whether or not a benefit is payable, the amount of a benefit that is payable, and to whom a benefit is payable' under the OMERS regulations, and applying the Ontario Municipal Employees Retirement System Act, as well as the Pension Benefits Act and its Regulations."

At paragraph 8, Justice Pardu stated “It is not appropriate to empower a subcommittee of the Board which governs the organization to decide tort claims against the same organization.” Justice Pardu goes on to state that such claims should be decided in the Courts.

The Committee finds the facts of this appeal sufficiently similar to the situation in the *Martin* decision. The substance of the Appellant’ appeal is that he relied to his detriment on what he claims is a misrepresentation made by OMERS AC. According to the *Martin* decision, this is a tort claim that the Committee has no jurisdiction to hear.

Accordingly, the Appellant’s appeal is dismissed.

DATED at Toronto this _____ day of _____, 2010.

John Goodwin, Chair

Eugene Swimmer, Vice Chair

Sheila Vandenberg, Member