

ONTARIO MUNICIPAL EMPLOYEES RETIREMENT SYSTEM

In the matter of an Appeal from the Decision of the

President By "the Appellant" to the

Appeals Sub-Committee

Heard July 22 and 23, 2008

DECISION

The Appellant brings this appeal from the decision of then President of OMERS dated April 13, 2006 made pursuant to Section 4(2) of Regulation 890, R.R.O. 1990 to the *Ontario Municipal Employees Retirement Act* ("OMERS Act"), R.R.O. 1990.

By this appeal, the Appellant seeks a determination from the Appeals Sub-committee (the "Committee") that she is entitled to spousal survivor benefits from the OMERS Primary Plan (the "Plan").

The appeal proceeded by way of an oral hearing *de novo* on July 22 and 23, 2008. The Committee considered the documentary evidence submitted by the Appellant and evidence submitted by OMERS Staff, including the evidence that was before the President. The Committee also heard the oral evidence of two witnesses, "Witness 1" and "Witness 2", who had previously sworn affidavits on behalf of the Appellant.

Section 1 of the Plan defines spouse as:

"spouse" has the same meaning as in the *Pension Benefits Act*.

Under subsection 1(1) of the *Pension Benefits Act*, R.S.O. 1990 c. P.8 (as amended) the term "spouse" is defined as:

"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.

The evidence submitted by the parties is set out below:

- On March 20, 2006, the Appellant in writing to then President & CEO requested survivor benefits from OMERS following the death of the Member on January 13, 2006.
- The Appellant in the aforementioned letter indicated that she and the Member had been in a common-law relationship since November of 2004, following a previous divorce. Attached to the letter was an affidavit from Witness 1 indicating that “I was aware that [the Appellant] and [the Member] were in contact with each other since early November 2004 ...”
- In a letter dated April 13, 2006, then President & CEO advised the Appellant that she did not meet the requirements for the definition of spouse under the *OMERS Act* and the *Pension Benefits Act*, in that she and the Member had not met the three-year test of a conjugal relationship as called for in the *Pension Benefits Act*.
- The Appellant requested the current President to reconsider the decision of then President & CEO in a letter dated December 11, 2007.
- In a letter dated December 20, 2007, the current President confirmed the decision of his predecessor.
- In a letter dated May 9, 2008, the Appellant, among other points attached an affidavit from herself dated May 12, 2008, indicating that she and the Member had been in a conjugal relationship since 2000. In addition, the Appellant attached an affidavit from Witness 2 dated April 29, 2008, indicating that “It is my knowledge and belief that they were in a conjugal relationship at all times since the year 2000”.
- Upon the death of Ms.*, the Member swore an affidavit, dated December 30, 2004, in support of his claim for spousal benefits under the Plan that he and Ms. * “cohabited like a married couple for 20 years and the relationship between [Ms. *] and myself was in exclusion of all others”. The Member was awarded spousal benefits under the Plan.

- The Appellant was provided with the affidavit of the Member and delivered additional evidence in response.
- The Member passed away on January 13, 2006.

The Appellant referred the Committee to *Molodowich v. Penttinen*, a decision of the Ontario District Court, defining the generally accepted characteristics of a conjugal relationship. The *Molodowich* decision states that not every characteristic 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. The Committee used the *Molodowich* decision to evaluate the evidence in this appeal.

The fact that the Member swore an affidavit that he and Ms. * were in a conjugal relationship for the 20 years preceding her death in October of 2004 and the fact that he collected survivor benefits on this evidence, seems to preclude the possibility that he and the Appellant were also in a conjugal relationship prior to the death of Ms. * in October of 2004.

The Appellant presented ample evidence that she and the Member were in a conjugal relationship following the death of Ms. * in October of 2004. The Appellant also presented evidence to suggest that the Member was not truthful in his affidavit that he was in a conjugal relationship with Ms. * until her death in October 2004. The Committee finds that this evidence does not assist the Appellant to establish that she and the Member were in a conjugal relationship prior to the death of Ms. * in October 2004.

After considering all of the evidence, the submissions of the parties, and the authorities submitted, the Committee finds that the Appellant did not establish that the relationship between her and the Member was a conjugal relationship as defined in the *Pension Benefits Act*. To do so, the Appellant had to prove that she was in a conjugal relationship with the Member prior to October of 2004 and the Committee finds that she did not do so.

For these reasons, the appeal of the Appellant is dismissed and the decision of the President is upheld.

Dated this ____3rd DAY of OCTOBER 2008_____

By Order of the Appeals Sub-Committee

[signed]

David S. O'Brien
Chair

[signed]

John Goodwin
Vice Chair

[signed]

John Weatherup

[signed]

Cameron Weldon

[signed]

Michael Power