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Superintendent of
Financial
Services



Surintendant des
services
financiers

IN THE MATTER OF the *Pension Benefits Act*, R.S.O. 1990, c. P.8, as amended (the “PBA”)

AND IN THE MATTER a Notice of Intended Decision of the Superintendent of Financial Services to Refuse to Make an Order under section 87(2)(a) of the *PBA* relating to the **OMERS Primary Pension Plan, Registration Number 345983**

TO:

SR

Applicant

AND TO:

Ms. Tracey Ball
Senior Pension Policy Analyst
OMERS Administration Corporation
1 University Avenue, Suite 700
Toronto, ON M5J 2P1

Administrator of the Plan

NOTICE OF INTENDED DECISION

I INTEND TO REFUSE TO MAKE AN ORDER in respect of the OMERS Primary Pension Plan, Registration Number 345983, (the “Plan”) under section 87(2)(a) of the *PBA*.

REASONS:

1. The Plan is a defined benefit pension plan created under the *OMERS Act, 2006* and its predecessors. The OMERS Administration Corporation (“OMERS”) is the administrator of the Plan.
2. The Plan member, PJR, died on January 13, 2006. At the date of his death, he was cohabiting with SR. The following is a chronology of the relevant personal history relating to PJR, SR and another former deceased member of the Plan, MH:

Event

Date:1979

PJR and SR are married and living conjugally. PJR adopts SR's biological child who was born in the 1960s.

Date:1984

PJR and SR divorce.

Date:1989 (on or about)

PJR and MH purchase a home together and begin cohabitation.

Date:2000

SR moves back to Ottawa at PJR's request.

Date:October 2004

MH predeceases PJR.

Date:November 2004

PJR applies for and is granted survivor benefits in respect of MH under the Plan.

Date:November 2004

SR commences cohabitation with PJR in the house that was owned jointly by MH and PJR.

3. On March 20, 2006, SR wrote to OMERS to apply for survivor benefits. She stated that she and PJR resumed their relationship on a common-law basis in November 2004 until the date of his death in January 2006 and that they had been previously married.
4. Section 20 of the Plan text governs the payment of survivor benefits. It provides that a survivor pension is payable to the person who was the spouse of the member immediately prior to the death of the member [the Plan sets out situations which displace this rule, but none are applicable in this case]. OMERS agrees that SR would be entitled to survivor benefits under the Plan if she can establish that she was a spouse of PJR at the time of his death.
5. Section 1 of the Plan text defines 'spouse' as having the same meaning as in the *PBA*. In Section 1 of the *PBA* spouse means, except where otherwise indicated in the *PBA*, 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*;
6. OMERS wrote to SR on April 13, 2006, informing her that she did not meet the definition of 'spouse' as the three year test for a conjugal relationship had not been established. As such, she was not eligible for survivor benefits. SR replied to OMERS, requesting a reconsideration of the decision. OMERS reconsidered her matter but confirmed its initial decision.
7. On January 8, 2008, SR wrote to OMERS, changing her application to state that she had been cohabiting with PJR in a conjugal relationship since February 2000. She stated that she used the November 2004 date in the original application because she had been told that the *Succession Law Reform Act* only required one year of cohabitation to qualify, and she had been hesitant to disclose the earlier period because she was aware of PJR's relationship with another woman, MH, until MH's death in October 2004. SR also submitted case law, photographs, affidavits and other additional documentation in support of her position that she had been cohabiting with PJR since February 2000.

8. MH was also a member of the Plan and when she died PJR submitted an application for survivor benefits as the spouse of MH. In his application he swore an affidavit that he and MH had cohabited like a married couple for 20 years. PJR was receiving survivor benefits from the Plan prior to his death. As indicated in the materials filed with FSCO, SR was aware that PJR and MH co-owned a house together since at least 1989.
9. Section 41 of the Plan text provides that an aggrieved party has the right to appeal a decision made under a provision of the Plan to the OMERS Board of Directors. The Board of Directors is required to establish an Appeals Sub-Committee ("Sub-Committee") to hear appeals, pursuant to section 2.3 of OMERS By-Law No. 4, the Appeals Process By-Law.
10. In light of SR's amended basis for claiming spousal status under the Plan, and the circumstances surrounding PJR's application for survivor benefits in respect of MH, OMERS notified SR that it would be proceeding with an appeal in which the Sub-Committee would consider her eligibility for the survivor benefits based on the revised 2000 date. OMERS stated that it would be forwarding to the Sub-Committee a copy of the information already submitted to OMERS by SR as well as a copy of the application made by PJR in November 2004 for the survivor benefits of MH.
11. In a hearing that took place on July 22 and 23, 2008, the Sub-Committee considered oral and written evidence concerning SR's eligibility for survivor benefits, and the legal authorities presented by SR on the characteristics of a conjugal relationship. SR called two witnesses to testify and she testified on her own behalf. She also made written submissions.
12. The Sub-Committee issued a written decision on October 3, 2008 dismissing SR's appeal, and upholding the previous OMERS' decisions. The Sub-Committee found that SR had not established that she and PJR were in a conjugal relationship for the requisite three year period. The Sub-Committee stated that PJR's relationship with MH prior to October 2004 seemed to preclude the possibility that he and SR were also in a relationship prior to that date. The Sub-Committee also found that the evidence submitted that suggests PJR was not truthful in his affidavit about his relationship with MH did not assist SR in establishing that she was in a conjugal relationship with PJR prior to the death of MH.
13. SR did not pursue judicial review of the Sub-Committee's decision.
14. On November 18, 2008, a submission was made to FSCO on behalf of SR containing a copy of SR's submissions to OMERS and to the Sub-Committee and requesting that FSCO assist SR in obtaining the survivor benefits from the Plan. SR continued to take the position that she had been living in a conjugal relationship with PJR since 2000. The submission also raised a new argument in support of her position that she is a surviving spouse under the Plan. SR argued that as she and PJR were the natural or adoptive parents of a child, she qualified as a spouse under subclause b(ii) of the definition of 'spouse'. The relevant child was SR's biological child born in the mid-1960s who PJR adopted while they were married from 1979 to 1984.
15. SR wrote to FSCO on November 28, 2011 requesting that the Superintendent issue an Order under section 87 of the *PBA* that, among other things, she was the spouse of PJR and was therefore entitled to survivor benefits from the Plan.
16. Section 87(2)(a) of the *PBA* states that the Superintendent may make an Order requiring an administrator to take or refrain from taking any action in respect of a pension plan or a pension fund if the Superintendent is of the opinion, upon reasonable and probable grounds, that the pension plan or fund is not being administered in accordance with the *PBA* or the pension plan.
17. OMERS has followed all of its procedures in determining the entitlement of SR to survivor benefits under the terms of the Plan including hearing oral evidence from SR in a hearing before the Sub-Committee. Although SR has established she was living in a conjugal relationship with PJR at the time of his death, she has not established that she was living in that relationship for the three year period required by subclause (1)(b)(i) of the definition

of spouse in the PBA. In addition, subclause (1)(b)(ii) of the definition of spouse is not applicable to SR because the child in question became the natural or adoptive child of SR and PJR during the period of a prior marriage, and not during the period in which SR is claiming she was a spouse for the purpose of qualifying for benefits. As a result, the Superintendent is not of the opinion that OMERS is not administering the Plan in accordance with the Plan terms or the *PBA*. There is therefore no basis to make an Order under section 87(2)(a) of the *PBA*.

18. Such further and other reasons as may come to my attention.

YOU ARE ENTITLED TO A HEARING by the Financial Services Tribunal (the “Tribunal”) pursuant to section 89(6) of the *PBA*. **To request a hearing, you must deliver to the Tribunal a written notice that you require a hearing, within thirty (30) days after this Notice of Intended Decision is served on you.**¹

YOUR WRITTEN NOTICE must be delivered to:

Financial Services Tribunal
5160 Yonge Street
14th Floor
Toronto, Ontario
M2N 6L9

Attention: The Registrar

FOR FURTHER INFORMATION on a Form for the written notice, please see the Tribunal website at www.fstontario.ca or contact the Registrar of the Tribunal by phone at 416- 590-7294, toll free at 1-800-668-0128, ext. 7294, or by fax at 416-226-7750.

IF YOU FAIL TO REQUEST A HEARING WITHIN THIRTY (30) DAYS, I MAY CARRY OUT THE INTENDED DECISION AS DESCRIBED IN THIS NOTICE.

DATED at Toronto, Ontario, this **8th** day of **August**, **2012**.

Original Signed By

K. David Gordon
Deputy Superintendent, Pensions

¹NOTE - Pursuant to section 112 of the *PBA* any Notice, Order or other document is sufficiently given, served or delivered if delivered personally or sent by regular mail and any document sent by regular mail shall be deemed to be given, served or delivered on the fifth day after the date of mailing.

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