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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, (the “PBA”);

AND IN THE MATTER OF a Notice of Intended Decision of the Superintendent of Financial Services to Refuse to Make an Order under section 87 of the PBA relating to the OMERS Primary Pension Plan, Registration Number 0345983.

TO:

LR

Applicant

AND TO:

**OMERS Administration Corporation
900 – 100 Adelaide Street West
Toronto ON M5H 0E2**

Attention:

**Ms. Erin Riess
Pension Policy Analyst
Case Resolution**

Administrator

NOTICE OF INTENDED DECISION

I INTEND TO REFUSE TO MAKE AN ORDER under section 87 of the PBA that the OMERS Primary Pension Plan, Registration Number 0345983 (the “Plan”), pay pre-retirement death benefits to the Applicant.

Si vous désirez recevoir cet avis en français, veuillez envoyer votre demande immédiatement à: Adjointe, audiences, Greffe, Commission des services financiers de l'Ontario, 5160 rue Yonge, boîte 85, Toronto ON M2N 6L9.

YOU ARE ENTITLED TO A HEARING before the Financial Services Tribunal (the “Tribunal”) pursuant to section 89(6) of the PBA. **A hearing before the Tribunal about this Notice of Intended Decision may be requested by completing the enclosed Request for Hearing (Form 1) and submitting it to the Tribunal within 30 days after this Notice of Intended Decision is served on you.**¹ A copy of that form is included with this Notice of Intended Decision. Additional copies of the enclosed Form 1 can be obtained by visiting the Tribunal's website at www.fstontario.ca.

If a Request for Hearing (Form 1) is submitted to the Tribunal within thirty (30) days after this Notice of Intended Decision is served on you, sections 89(8) and 89(9) of the PBA provide that the Tribunal shall appoint a time for and hold a hearing, and by order may direct the Superintendent of Financial Services (the “Superintendent”) to make or refrain from making the intended decision indicated in this notice and to take such action as the Tribunal considers the Superintendent ought to take in accordance with the PBA and the regulations, and for such purposes, the Tribunal may substitute its opinion for that of the Superintendent.

IF NO WRITTEN REQUEST FOR A HEARING IS MADE within thirty (30) days after this Notice is served on you, TAKE NOTICE THAT the Superintendent will carry out the Refusal pursuant to section 89(7) of the PBA.

A completed Request for Hearing form must be received by the Tribunal within 30 days of this Notice is served on you. The Request for Hearing form may be mailed, faxed or delivered to:

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

Attention: The Registrar
Fax: 416-226-7750

The hearing before the Tribunal will proceed in accordance with the Rules of Practice and Procedures for Proceedings before the Financial Services Tribunal made under the authority of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22. Those Rules are available at the website of the Tribunal at: www.fstontario.ca. Alternatively, a copy can be obtained by telephoning the Registrar of the Tribunal at 416-590-7294, or toll free at 1-800-668-0128 ext. 7294.

REASONS FOR INTENDED DECISION:

1. The Plan is a contributory defined benefit pension plan continued under the *Ontario Municipal Employees Retirement System Act, 2006*, and registered under the PBA.
2. The Plan is administered by the OMERS Administration Corporation (“OAC”).
3. The Applicant alleges that she was the spouse of a deceased member of the Plan (“JT”).
4. JT died on July 25, 2013.
5. Prior to his death, JT had not named the Applicant as his spouse for purposes of the Plan. The information on file with OAC shows that JT named his sister (“CP”) as his designated beneficiary.
6. The Applicant provided documents and information to OAC in support of her claim that she had a spousal relationship with JT.
7. JT’s designated beneficiary, CP, also provided documents and information to OAC in order to prove that JT and the Applicant were not in a spousal relationship.
8. Section 1 of the Plan text defines “spouse” as having the same meaning as in the PBA. Section 1 of the PBA defines “spouse” as follows:

“spouse” means, except where otherwise indicated in this Act, 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 parents of a child as set out in section 4 of the Children’s Law Reform Act; [emphasis added]

9. The Applicant alleges that she and JT lived together in a conjugal relationship continuously for a period of not less than three years.
10. After reviewing the documents and information provided to them, OAC staff and the President of OAC concluded that the Applicant did not satisfy the definition of “spouse” under the Plan text.
11. The Applicant sought to appeal that decision pursuant to section 41 of the Plan, which provides that an aggrieved person has the right to appeal an approval or other action to be taken under the Plan to the Board of Directors of OAC. The decision of the Board of Directors is final.
12. The appeals process (the “OAC Dispute Resolution Process”) is governed by OAC Amended and Restated By-law No. 4 (“OAC By-law No. 4”).
13. Pursuant to OAC By-law No. 4, the appeal was heard in writing by a panel of three members of the OAC Board (the “Panel”). A decision dated December 15, 2016, was rendered by the Panel (the “OAC Decision”).
14. Both the Applicant and CP provided sworn statements from friends and relatives of the Applicant and JT supporting their positions. The Panel found that there were inconsistencies and contradictions in the sworn statements and found it *“impossible to make a judgment on the accuracy or the validity of the statements provided by the Parties.”*
15. In the OAC Decision, the Panel stated that it made its decision based on what it believed to be objective and reliable documentary evidence provided by the Applicant and CP and concluded that the Applicant and JT were not in a common-law relationship based on the following facts:

“...[JT] paid over \$1,000 a month to maintain the Tobermory Apartment, that all his mail went there, that [the Applicant] and [JT] did not have a joint bank account, that there was no documentary evidence of any shared household expenses, that [JT] phoned [the Applicant] at her apartment late on many weeknights, and that in 2004, about ten years after he was supposedly living with [the Applicant] in her apartment, [JT] named his sister as beneficiary of his OMERS pension plan.”
16. The Panel concluded that the Applicant did not satisfy the definition of “spouse” under the Plan and the PBA and, therefore, was not entitled to survivor benefits.

“The Panel accepts that [the Applicant] and [JT] were involved in a long-term loving

relationship. However, based on all of the evidence before us but in particular the documentary evidence, the Panel is unable to find on a balance of probabilities (that is, what is more likely than not) that it constituted a common-law relationship according to the requirements outlined in the OMERS Plan text and the Pension Benefits Act....”

17. The Applicant wrote a letter to FSCO dated February 24, 2017, to challenge the OAC Decision.
18. Since the Applicant is asserting a claim to pre-retirement death benefits that is not consistent with the documents on file with OAC, the onus is on the Applicant to prove, on a balance of probabilities, that she lived with JT in a conjugal relationship continuously for a period not less than three years.
19. Both the Applicant and CP provided the Panel with statements from friends, family and others in support of their respective positions regarding the existence of a spousal relationship. Copies of those statements were provided to FSCO.
20. The Applicant provided the Panel and FSCO with documentary evidence to support her allegation. That evidence included the following:
 - a. JT designated the Applicant as his common law spouse for purposes of his extended health and dental benefits with the City of Toronto from December 31, 2005;
 - b. JT transferred a car to the Applicant and completed a spousal exemption declaration to the (then) Ministry of Revenue so that no sales tax would be payable;
 - c. JT and the Applicant had a spousal auto insurance policy with a group rate since March 31, 2011;
 - d. JT and the Applicant shared a Rogers cell phone plan since November 18, 2011, and it appears that JT paid the Applicant's cell phone bill;
 - e. JT's air miles notification went to the Applicant's email address;
 - f. the Applicant called JT's employer to advise of his absences from work;
 - g. the Applicant was listed as JT's "special friend" in his obituary immediately after his mother;
 - h. photos, signed greeting cards and testimonials indicated that the Applicant and JT were in a long-term loving relationship
21. The following evidence, provided to both the Panel and FSCO, supports a conclusion that the Applicant did not satisfy the definition of "spouse":
 - a. on June 21, 2004, JT designated his sister CP as the beneficiary of his Plan benefits;
 - b. records of late night phone calls from JT's cell phone to the Applicant's land line suggest that JT usually stayed at his apartment during the week and may have

stayed with the Applicant on weekends;

- c. both JT and the Applicant filed their income tax returns as single people and both had correspondence from CRA forwarded to their respective separate addresses;
- d. the Applicant alleged that JT maintained his own separate apartment just to “store materials and use as a workshop”. However, given that his income was approximately \$50,000 and the cost of maintaining the apartment was approximately \$1050 per month, it appears to have been a significant amount to pay for such a purpose;
- e. JT had official documents and bills forwarded to his apartment;
- f. JT obtained a visitor parking permit to park at the Applicant’s apartment from October 26-28, 2010; and
- g. JT’s sister was the executor of his estate and all funeral arrangements were made by CP and other members of JT’s family.

22. The Applicant did not provide any documentary evidence of:

- a. joint bank statements;
- b. joint lease agreements;
- c. property tax statements or household bills in both names;
- d. shared household expenses.

23. The Applicant also provided a decision of the Social Security Tribunal – General Division Income Security Section, dated April 6, 2017 (the “Social Security Tribunal Decision”), which held that the Applicant was entitled to a CPP survivor pension as a result of JT’s death. The Applicant’s claim had been denied previously by CPP staff.

24. The Social Security Tribunal Decision has limited weight in assessing the Applicant’s claim under the PBA, since the definition of “spouse” for CPP entitlement is not the same as under the PBA, as it requires only one year of cohabitation. Furthermore, the Social Security Tribunal Decision gives no indication that evidence contradicting the Applicant’s claim (i.e., from CP and others) was presented and/or considered.

25. FSCO staff also considered additional submissions from the Applicant dated July 30, 2018 (delivered by e-mail dated July 29, 2018), and September 25, 2018. In the September 25 letter the Applicant requested that the Superintendent issue an order in support of her claim to JT’s pre-retirement death benefits.

26. The case law on spousal relationships indicates that there are a number of generally accepted characteristics of a conjugal relationship, including shared shelter, sexual and personal behaviour, social activities, economic support, children and the societal perception of the couple.

27. The case law also indicates that “living together” does not necessarily require co-residence. Two people may be “living together” even though they may not be living under the same roof and, conversely, they may not be “living together” in the relevant sense

even if they are living under the same roof.

28. Overall, the case law on spousal relationships focuses on whether there is sufficient evidence to support a conclusion that a marriage-like relationship exists.
29. In this case, there is little objective evidence to support a conclusion that the Applicant and JT were in a marriage-like relationship in the three years preceding JT's death.
30. Overall, the evidence does not support a conclusion, on a balance of probabilities, that the Applicant and JT were in a spousal relationship as defined by the PBA.
31. Section 87(1) of the PBA states that the Superintendent may issue an order if the Superintendent is of the opinion, upon reasonable and probable grounds, that a pension plan is not being administered in accordance with the PBA or the pension plan, that the pension plan does not comply with the PBA, or that the administrator of the pension plan, the employer or other person is contravening the PBA.
32. The allegations made by the Applicant do not support a finding that the Plan is not being administered in accordance with the PBA, the regulations thereunder or the terms of the Plan.
33. The allegations made by the Applicant do not support a finding that the Plan does not comply with the PBA and the regulations thereunder.
34. The allegations made by the Applicant do not support a finding that OAC is contravening the PBA.
35. Accordingly, the preconditions for the issuance of an order under section 87 have not been met in this case and the Superintendent intends to refuse to issue the requested order under section 87(1).
36. Such further and other reasons as may come to my attention.

DATED at Toronto, Ontario, this 18th day of April, 2019.

Original Signed By

Lester J. Wong
Deputy Superintendent, Pensions
By delegated authority from the
Superintendent of Financial Services

1 NOTE - 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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