

FINANCIAL SERVICES TRIBUNAL

IN THE MATTER OF the *Pension Benefits Act*, R.S.O. 1990, c.P.8, as amended by the *Financial Services Commission of Ontario Act, 1997*, S.O. 1997, c.28 (the “*PBA*”);

AND IN THE MATTER OF the Registration of By-Law No. 7 of the OMERS Primary Pension Plan, Registration Number 0345983;

AND IN THE MATTER OF a Hearing in accordance with subsection 89(8) of the *PBA*;

B E T W E E N:

SUSAN MCGRATH

Applicant

-and-

SUPERINTENDENT OF FINANCIAL SERVICES, OMERS ADMINISTRATORS CORPORATION, OMERS SPONSORS CORPORATION, POLICE PENSIONERS ASSOCIATION OF ONTARIO and IATSE, LOCAL 58

Respondents

Pre-Hearing Conference: December 10, 2009

Before:

Elizabeth Shilton, Chair of the Panel and Member of the Tribunal

Appearances:

Anthony McGrath for the Applicant, Susan McGrath

Mark Bailey and Alena Thouin for the Superintendent of Financial Services (“Superintendent”)

Freya Kristjanson and Amanda Darrach for OMERS Sponsors Corporation (“SC”)

Jeff Galway and Audrey Mak for OMERS Administration Corporation (“AC”)

Gloria Motta in Person

Paul Bailey for the Police Pensioners Association of Ontario (“PPAO”)

Tim Taylor for the International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States, its Territories and Canada, Local 58 (“IATSE Local 58”)

Decision on Applications for Party Status and Motion for Written Hearing

The December 10, 2009 pre-hearing conference was originally scheduled to deal with applications for party status in this matter. On October 2, 2009 the Tribunal received a written request from the Applicant to convert this matter from an oral hearing to a written hearing, as provided under Tribunal Rule 21. The other parties filed written submissions in response to that request, and the Applicant filed submissions in reply. The Applicant's request for a written hearing was then set down to be dealt with at the December 10, 2009 pre-hearing conference together with the applications for party status. I issued oral decisions addressing both these matters at the pre-hearing conference, and am now providing brief written reasons for those decisions.

Applications for Party Status

Five applications for party status were before me on December 10, 2009. They were filed in response to a Notice of Hearing dated August 17, 2009 and issued to interested parties. The Notice spelled out clearly the issues before the Tribunal, and specified that applicants for party status who wished their applications to be considered were required to attend the December 10 pre-hearing conference in person. Three of the five applicants did attend in person and spoke to their applications. The first applicant, Gloria Motta, had filed an application and supporting material from which it appeared that she wished to address issues that do not arise out of this case. Her oral submissions confirmed that her issues do not relate to the issues set out in the Notice of Hearing. Accordingly, I dismissed her application. Two other individual applicants, Mary-Ann Zak and Randel Davy, did not appear in person. The applications they filed did not establish that either of these applicants met the criteria set out in Tribunal Rule 38.04 for party status, and accordingly, I dismissed their applications. The fourth applicant was the PPAO, a voluntary organization representing the interests of retired police personnel, many of whom are OMERS pensioners. The PPAO sought status on a limited basis; all parties consented to its participation on the basis sought. The fifth applicant was IATSE Local 58, a trade union with bargaining rights for certain members of OMERS. IATSE Local 58 also sought a limited right to participate, to which no party objected. I am satisfied that both these organizations meet the Rule 38.04 criteria, and I ordered that they be joined as parties on the following conditions, to which they agreed: (1) they will not seek to lead evidence or to cross-examine witnesses; (2) they will work within the timetable already agreed to by the parties; and (3) they will have the right to make oral or written submissions at the hearing, but will advise the parties and the Tribunal in advance if they intend to exercise that right.

Request to Convert the Hearing Format from an Oral Hearing to a Written Hearing

The matter before us arises out of a Notice of Appeal filed by the Applicant on October 8, 2008. It has proceeded to date on the basis that the hearing would be an oral hearing. A timetable for preparation for an evidentiary hearing has been agreed upon, and a Notice of Hearing has been extensively circulated to the effect that the matter would be heard by the Tribunal on January 18-21, and February 8-9, 2010. On October 2, 2009 the Applicant raised for the first time a request that the matter proceed as a written instead of an oral hearing. A contested application to change the hearing format in "midstream" is certainly unusual, and in view of the number of steps that have already been taken on the understanding that the hearing would be an oral one, there would ordinarily need to be compelling reasons to entertain a request for a change of format at this

stage. The Applicant, who is unrepresented, explained that she has raised the issue at this time because she has only recently become aware that there was any alternative to an oral hearing. No party had objected to the request solely on the basis of its timing, and I have dealt with it on its merits.

The Applicant essentially bases her request for a written hearing on the fact that she is unrepresented. She submits, through her lay representative Mr. Anthony McGrath, that she will be at a serious disadvantage if she is forced into the format of an oral hearing, requiring the examination and cross-examination of witnesses, including expert witnesses, and the possibility of having to deal with evidentiary objections as they arise, in competition with a battery of highly reputable, highly skilled and experienced pension lawyers. As Mr. McGrath eloquently characterized the Applicant's position in oral submissions, it's "a canoe against a battleship." The McGraths feel that the disadvantage arising from their lay status would be reduced if all of the evidence were filed in written form, followed by written submissions; this format would give them time to reflect, conduct research and prepare their arguments in writing, a process they have made very effective use of to date in dealing with various pre-hearing matters. Mr. McGrath also points out that the Applicant will be put to considerable expense if she is forced to have her expert witness in attendance at an oral hearing, both for cross-examination and to assist with the cross-examination of competing experts. The Applicant argues that because credibility is not an issue, there should be no need for cross-examination.

The Applicant's request is vigorously opposed by the Superintendent, as well as by both OMERS respondents. These respondents concede that the Tribunal has jurisdiction to order a written hearing. They argue, however that pursuant to s.5.1(2) of the *Statutory Powers Procedure Act*, the Tribunal may not substitute a written hearing for an oral hearing where it is persuaded that there is "good reason" not to. They argue that there are numerous "good reasons" in this case. First among them is the fact that important evidence is contested. They point out while some of the evidence has been agreed to, there is both expert and non-expert evidence which has not been agreed to. The parties have engaged in an extended process of pre-hearing 'discovery' in which they have exchanged documents, including expert reports and reply reports. On the basis of that process, I am advised that the expert evidence in particular is sharply contested. On behalf of OMERS Sponsors Corporation, Ms. Kristjanson takes the position that cross-examination will be crucial to the resolution of the core issues in the case. The opposing parties also assert that they would be prejudiced in a number of other ways by a written hearing in a case of this level of complexity; they argue that an oral hearing will be helpful to clarify the issues, and permit the Tribunal panel to ask questions of counsel and the witnesses. They also argue that at this late date, switching formats is likely to add to the expense and delay the proceedings.

At the pre-hearing conference, I dismissed the Applicant's request for written hearing. I am persuaded that the evidentiary concerns alone would constitute "good reason" to justify an oral hearing. As I understand it, this case does not turn solely on a point of law. The evidence, and particularly the expert evidence will be very important to a fair resolution, and that evidence is contested. Under these circumstances, to deprive opposing parties of their right to probe the evidence of the applicant's witnesses on cross-examination would be to deprive them of a fair hearing. In appropriate cases the need to facilitate access to the Tribunal for lay persons may outweigh some of the undoubted benefits to an oral hearing. I am not prepared to hold, however, that the objective of "levelling the playing field" for both unrepresented and represented parties

can outweigh the right to cross-examination in a case which may well turn on contested evidence.

It is important, however, to make the Tribunal's processes as accessible as possible to all parties, regardless of whether or not they have legal representation. The parties in this matter have already cooperated to a considerable extent in establishing pre-hearing procedures which will ensure that as much of the evidence as possible, documentary and otherwise, will be filed by agreement. I have encouraged them to continue this process. Expert reports and witness statements have been and will continue to be exchanged. In addition to the schedule already established, the parties agreed on December 10 to some additional pre-hearing procedures which I am recording here in lieu of a pre-hearing conference memorandum. Specifically:

- the AC/SC have agreed to provide to the Applicant (and other parties) no later than January 11, 2010 a full statement of the evidence of any non-expert witnesses they propose to call. The Applicant will advise them by January 13, 2010 whether she wishes to cross-examine on that evidence. If she chooses not to cross-examine, the statement will be filed in lieu of calling the witness to testify.
- The Applicant will advise the parties by January 11, 2010 whether she proposes to call her proposed expert witness, or if she will seek to file her expert report without producing the expert witness. [I note that at least some of the parties have already advised that they will oppose any effort to rely on the expert report without producing the expert witness for cross-examination].
- The Applicant will also advise the parties by January 11, 2010 whether she proposes to file any of the interrogatory material at the hearing.

These procedures, together with the preparation schedule already agreed upon, will go a long way to avoiding undue surprise at the hearing. The Applicant and her Representative have suggested that because of their lay status they may require additional accommodations at the hearing such as additional recesses and response times. Such accommodations are always available in appropriate cases. All parties have indicated in their submissions that they are sensitive to the concerns raised by the Applicant, and will cooperate to ensure that the Applicant has a fair hearing.

Dated at Toronto, Ontario, this 14th day of December, 2009.

“Elizabeth Shilton”
Elizabeth Shilton
Member, Financial Services Tribunal