

**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 ADMINISTRATION CORPORATION and OMERS SPONSORS CORPORATION**

**Respondents**

**-and-**

**POLICE PENSIONERS ASSOCIATION OF ONTARIO and IATSE, LOCAL 58**

**Added Parties**

**Before:**

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

David Short, Member of the Tribunal and of the Panel

Ralph Scane, Member of the Tribunal and of the Panel

**Appearances:**

Susan McGrath and Anthony McGrath for the Applicant Susan McGrath (the “Applicant”)

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

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

Jeff Galway and Rahat Godil for OMERS Administration Corporation (the “AC”)

## DECISION RE REQUESTS FOR CLARIFICATION AND REVIEW

On March 26, 2010, the Tribunal issued a decision in this matter. In that decision, we made an order dismissing the Application. The Applicant has now filed two additional requests. First, on March 31, 2010 the Applicant filed a document entitled “Suggestions for Clarifying Certain Issues in the Decision”, in which she proposes a number of revisions to the decision. Second, on April 7, 2010 the Applicant submitted a formal Request for Review of the Tribunal’s order.

In the normal course, once a Tribunal makes an order, that order is final and the Tribunal is *functus officio*: i.e. has discharged its duty and has no jurisdiction to deal with the matter further. There are two exceptions to this hard and fast rule. First, there is a recognized, although very limited continuing power at common law to correct clerical errors: (see *Jacobs Catalytic Ltd. v. International Brotherhood of Electrical Workers, Local 353, 2009 ONCA 749*, paras. 21-117). This power has been codified in the Tribunal’s *Rules of Practice and Procedure* in Rule 12.03, as follows:

The Tribunal may at any time correct a typographical error, error of calculation, misstatement, ambiguity, technical error or other similar error made in any order or direction issued by it, or in the written reasons for an order issued by it.

Second, s.21.2(1) of the *Statutory Powers Procedure Act* provides that:

A tribunal may, if it considers it advisable and if its rules made under section 25.1 deal with the matter, review all or part of its own decision or order, and may confirm, vary, suspend or cancel the decisions or order.

Part XI of the Tribunal’s *Rules of Practice and Procedure* set out a process for reviewing Tribunal orders.

The Part XI process commences with the filing of a Request for Review. On receiving such a request, the Tribunal considers whether or not, as a threshold matter, there are grounds for review. If the Tribunal determines that there are such grounds, a review is then conducted. The Rules contemplate that determinations under Part XI will be made by the panel or member who made the initial order, and that Requests for Review will be decided based on the material filed. If a review is found warranted, it will normally be conducted in writing, and may be decided together with the Request for Review, based on materials filed and supplemented where appropriate by the original record.

As noted above, the Applicant triggered the formal review process by its April 7, 2010 filing. In accordance with the Rules, parties than have seven days within which to file responding submissions. The Tribunal received submissions from the Superintendent and the AC, both taking the position that the Request for Review should be dismissed. Both sets of submissions addressed not only the formal Request for Review, but also the prior “Suggestions for Clarifying Certain Issues in the Decision”. They characterized this document as a request for supplementary reasons, and argued that the Tribunal had no jurisdiction to issue supplementary reasons once a final decision has been issued. The Tribunal also received a letter from counsel

for the SC concurring with the submissions of both the Superintendent and the AC. No submissions were received from other parties.

In this decision, we address both the Request for Review and the Suggestions for Clarifying Certain Issues in the Decision.

### **The Request for Review**

As part of the Part XI process, Rule 50.01 makes specific provision for matters that should be taken into account in determining whether an order, once issued, should be reviewed:

In deciding whether it is advisable to review all or part of its order, the panel or member may consider any relevant circumstances, including:

- (a) whether there is a material error of law or fact such that the panel or member would likely have reached a different decision but for that error;
- (b) the extent to which any party or any other person has relied on the order;
- (c) whether the order is under appeal or is the subject of a judicial review application; and
- (d) whether the public interest in finality of orders is outweighed by the prejudice to the requester.

The Request for Review here alleges material errors of fact and law. Ten such errors are alleged, consisting mainly of failures to accept the evidence of the Applicant's witnesses or to accept the Applicant's arguments on a variety of issues. The Applicant does not seek to proffer new evidence.

A Request for Review of a Tribunal order is not an opportunity to reargue the case. There is a strong public interest in the finality of orders. Accordingly, most Tribunals whose rules provide for review or reconsideration offer such an opportunity only on very narrow grounds. For example, the Ontario Labour Relations Board, which has a general statutory power of reconsideration, has issued an Information Bulletin (No.19) in which it provides the following general guideline to parties seeking review:

Generally, the Board will not reconsider its decision unless the requesting party has new evidence that would be practically conclusive of the case and that it could not have reasonably obtained earlier, or the party has new objections or argument that it had no opportunity to raise earlier. Because of the need for finality in labour relations matters, the Board does not treat its reconsideration power as either a tool for the party to repair the deficiency of its case nor as an opportunity to reargue it...If the requesting party relies on matters that could reasonably have been raised at the original hearing, the Board will normally not reconsider its decision.

There is a similar need for finality in pension matters. In our view, the Tribunal should take a similarly narrow approach to determining whether or not Requests for Review cross the threshold and warrant a review of a Tribunal order.

As noted above, the Applicant alleges material errors of law and fact. The arguments now put forward all rely on evidence filed at the hearing. Most of the arguments now put forward were made at the hearing and were not accepted by the Tribunal. In most cases, they were addressed in detail in the decision. While some of her arguments have been reframed as arguments interpreting the decision, they do not raise new issues; certainly they do not raise issues that could not have been raised at the original hearing. The Applicant clearly does not agree with how the Tribunal disposed of her evidence and her arguments, and now seeks another opportunity to argue her points through the review process. In our view, while the Applicant has put forward her position in her Request for Review with the same thoroughness and competence that characterized her presentation throughout the hearings, there is ultimately nothing in the Request for Review which brings it over the threshold and warrants the Tribunal reviewing its order. Her allegations of material error of fact and law are simply disagreements with how the Tribunal assessed the evidence and disposed of the arguments. The public interest in the finality of orders must prevail here.

We dismiss the Request for Review.

### **The Applicant's Suggestions for Clarifying Certain Issues in the Decision**

As noted above, in addition to its power to review its order, the Tribunal has the power under Rule 12.03 to correct errors similar to clerical errors in its orders and decisions. Following an earlier request of the Applicant, the Tribunal has already corrected one typographical error in a monetary amount (the figure \$261,000,000 was wrongly rendered \$261,000). One request made in the "Suggestions" is accepted by the responding parties as falling into the same category: on p.25, para. 3, line 2, the word "that" is redundant, and should be deleted. Accordingly, we will correct that error. We note that a written request from the SC was submitted on April 1, 2010 to correct the reference to the party calling Ms Wagman as a witness, made on p.10 of the decision below heading 6, from the AC to the SC. This is also a clear clerical error, and the correction will be made. These are the types of corrections contemplated by Rule 12.03.

However, the other matters raised by the Applicant do not fall into the category of "corrections" contemplated by Rule 12.03. They are more properly characterized, as argued by the responding parties, as a request for supplementary reasons. Indeed the Applicant herself does not attempt to characterize them as corrections; instead, she has argued that these suggested changes "would provide useful clarification of the issues raised in the Decision, in particular, for readers who did not participate in the hearing."

The Tribunal's decision was a final decision. Except as provided for by the Rules or by the narrow common law exceptions to the doctrine of *functus officio*, such decisions are not subject to revision, correction or clarification. The law is clear that the Tribunal has no jurisdiction to issue supplementary reasons after it has rendered a final decision: *Jacobs Catalytic Ltd. v.*

*International Brotherhood of Electrical Workers, Local 353, 2009 ONCA 749.* Accordingly, we are not in a position to respond favourably to the Applicant's request.

**Order**

The Applicants' Request for Review is dismissed. Likewise, with the exception of the correction of the clerical errors identified in the reasons above, the Tribunal will not revise its decision.

**DATED** at Toronto, Ontario, this 7th day of May, 2010

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"Elizabeth Shilton"

Elizabeth Shilton  
Member of the Tribunal and Chair of the Panel

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"David Short"

David Short  
Member of the Tribunal and of the Panel

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"Ralph Scane"

Ralph Scane  
Member of the Tribunal and of the Panel