

**COURT FILE NO.: 04-DV-001018**

**DATE: 20060626**

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**DIVISIONAL COURT**

**JUSTICES MATLOW, CUSINATO, JENNINGS JJ.**

**B E T W E E N:**

	)	
	)	
	)	Dougald E. Brown, for the Applicants
ONTARIO PROFESSIONAL FIRE	)	
FIGHTERS ASSOCIATION and	)	
FREDERICK LeBLANC	)	
	)	
Applicants	)	
	)	
- and -	)	
	)	
	)	
ONTARIO MUNICIPAL	)	Jeff Galway and Dera J. Nevin, for
EMPLOYEES RETIREMENT	)	the Respondents
BOARD	)	
	)	
Respondent	)	
	)	
	)	
	)	
	)	<b>HEARD: February 14, 2006</b>

**Cusinato and Jennings JJ.**

**Introduction**

[1] This is an application for judicial review whereby the applicant seeks a declaration that “contributory earnings” in s.1(1) the *Ontario Municipal Employees Retirement System Act (OMERS) R.R.O. (1990) Reg. 890*, as amended, includes therein all amounts paid to a firefighter in lieu of paid days off on public holidays

Page: 2

or on days substituted for public holidays, to the extent that the amounts paid are calculated at the individual's regular daily rate of pay.

[2] The following grounds extracted from the application set out in para. 2 are listed with particularity to those sub-paragraphs relating to the issue:

- (a) The *Ontario Municipal Employees Retirement System Act*, R.S.O., 1990 c.0.29, as am. ("the *OMERS Act*") and the *Regulations* thereunder establish a pension benefit system for employees of municipalities in Ontario;
- (b) virtually all-active firefighters in Ontario are members of OMERS;
- (c) pension benefits are based on two percent of the average of a member's best consecutive five years of earnings multiplied by the number of years of credited service to a maximum of 35 years;
- (d) a member's "contributory earnings" directly affects the determination of his or her pension benefit and also impacts on the amount of contributions paid by the member and his or her employer;
- ....
- (g) by means of this policy decision, OMERS has directed all participating municipal employers that amounts paid to firefighters in lieu of statutory holidays (public holidays) are not to be included in "contributory earnings";
- ....
- (i) in lieu of paid public holidays off, firefighters are compensated under arrangements which typically involve payments for additional days worked, either on a public holiday or on a day substituted for a public holiday;
- (j) such payments received are not normally calculated at premium or overtime rates and were for many years included in members "contributory earnings";

Page: 3

- (k) such payments are predictable, regular and recurring and are an integral component of compensation.

[3] With reference to the applicant's position, it is as outlined in the sworn affidavit of June 30, 2004, filed in support by Frederick LeBlanc, President of the Ontario Professional Fire Fighters Association, taken from para. 7 wherein he states:

**"OMERS is a defined benefit pension plan. The specific terms of the pension plan are set out in the *Regulations* made pursuant to the *OMERS Act*. Pension benefits are calculated as a percentage of "pensionable earnings". The determination of "pensionable earnings" is based on a member's "contributory earnings" in the member's final five years of service. As a result, the amount of a member's "contributory earnings" has a direct impact on the amount of his or her pension benefit."**

### Overview

[4] It is accepted firefighters are required to work on statutory holidays if their schedule demands it, said description or designated term, for "statutory holiday" also interchangeable with that used by the parties "public holidays".

[5] To compensate for this requirement, pursuant to a firefighter's negotiated Collective Agreement, which varies from municipality to municipality, a firefighter who is required to work on such holiday may fall into one of the following categories:

- (a) The firefighter may be required to take a day off with pay called a lieu day, to replace the public holiday he is required to work.
- (b) The firefighter may be given the election, depending on the language of the collective agreement to work a lieu day, which has been set out in the firefighter's schedule to replace the public holiday.
- (c) Depending on the municipality in which the firefighter is employed, and the number of firefighters available to meet the schedule, the Collective Agreement may provide that the firefighter is required to take a cash payment, for each designated holiday as set out in their agreement.

Page: 4

[6] “Contributory Earnings” is defined by section 1(1) by Reg. 890 to mean –

- (a) in the case of an employee who was a member before the 1<sup>st</sup> of January, 1978, the earnings of the member, and,
- (b) in the case of the employee who was a member on and after the 1<sup>st</sup> day of January, 1978, the earnings of the member exclusive of salary or wages paid for overtime, payments made with respect to unused sick leave credit gratuities and payments made as retirement bonuses or otherwise as a result of retirement or other termination of employment whether in respect of long service or otherwise,

....

[7] The term “earnings” is not defined in the *Regulations* but is defined in the *OMERS Act* as follows:

**“[I]n the case of an employee who is a member, means the salary or wages paid the employee by an employer including the value of any perquisites received from an employer and, in the case of a councillor who is a member, means any money paid to the councillor for his or her services as councillor;”**

“Overtime” and its meaning as it relates to the *Act* and *Regulations*, and how it is to be applied and interpreted as it relates to “contributory earnings” is not defined.

[8] It is the position of the applicants that statutory pay is included within the meaning of “contributory earnings”. The position of OMERS is that the definition of “contributory earnings” as it pertains to statutory holiday pay was very well set out to the applicants not only as to its purpose, but the policy reasons behind it, and OMERS right to make this determination within the statutory authority provided by the *Act* and the *Regulations*.

[9] The OMERS Board’s position confirming the actions of their senior pension policy analyst, was described in the following terms to the Director of Human Resources, City of Belleville, as it concerns firefighters that is equally applicable to the applicants:

**“Overtime pay or like overtime pay (in this case the additional monies received for working statutory holidays) should be excluded from contributory earnings in accordance with the contributory earnings definition. For pension purposes, an**

Page: 5

**individual cannot receive more than one day's pay for one day's work and any pay received for work over and above the "normal" work schedule is overtime. The statutory holiday pay should not be treated any differently than overtime (please refer to the *Employer Administration Manual, Earnings Section*). The same basic principles apply."**

[10] As confirmed herein the terms and conditions for public holidays varies among municipalities and depends on their Collective Agreement.

[11] By way of example taken from OMERS communication to the Director of Human Resources for Belleville as it concerns their firefighters, Carmelina Hyde (Hyde), a Senior Pension Policy Analyst stated their position in these terms:

**Based on the collective agreement excerpt you provided, all employees are remunerated 12 statutory holidays. (Referring to Belleville Collective Agreement – my words.) According to Article 9(c) 2, each employee has the option to take any or all statutory holidays via time off in lieu. Individuals who do not take the time off are given additional pay (i.e. over and above regular pay) to compensate for the statutory holidays worked. Therefore, any monies paid over and above regular pay must be excluded from contributory earnings for pension purposes."**

[12] The analyst went on to confirm in that communication:

**In essence, the payment (no matter what form it takes; i.e. lump sum or paid on an on-going basis) must not provide more than the payment the individual would have received during regular working time.**

[13] The position of OMERS staff in their implementation of this policy approved by the Board without the necessity of a vote is in reference to their statutory power.

[14] The exercise of OMERS right to make this determination is confirmed by OMERS to exist within the *Judicial Review Procedure Act (JRPA)* R.S.O. 1990, C.J.I as amended:

**"statutory power" – means a power or right conferred by or under a statute,**

Page: 6

- (a) to make any regulation, rule, by-law, or order, or to give any other direction having force as subordinate legislation,
- (b) to exercise a statutory power of decision,
- (c) to require any person or party to do or to refrain from doing any act or thing that, but for such requirement, such person or party would not be required by law to do or to refrain from doing.
- (d) to do any act or thing that would, but for such power or right, be a breach of the legal rights of any person or party;

**“statutory power of decision” – means a power or right conferred by or under a statute to make a decision deciding or prescribing,**

- (a) the legal rights, powers, privileges, immunities, duties or liabilities of any person or party, or
- (b) the eligibility of any person or party to receive, or to the continuation of, a benefit or licence, whether the person or party is legally entitled thereto or not,

**and includes the powers of an inferior court.”**

[15] For policy reasons, OMERS determined that to maintain equity among all contributors to the pension plan fund, in keeping with the defined pension benefits to be paid to its members, calculated and based on a normal work schedule included in “contributory earnings” is to exclude payments in excess of earnings, earned on a regular basis.

[16] In referring to the position of Senior Analyst Hyde and their equitable determination of policy fairness to all members of the pension plan, it is outlined in these terms in response not only to the inquiries by the Director of Human Resources for the City of Belleville, but which position was also set out to the President of the Ontario Professional Fire Fighters Association, the applicant Frederick LeBlanc:

**“The inclusion of contributory earnings for statutory holiday pay is to keep the member in line with the earnings he or she would have earned on a regular basis. The fact that one individual is paid over and above the regular earnings (i.e. like overtime) because he or she elects to take the monetary settlement versus a**

Page: 7

**day off in lieu of working the statutory holiday pay should not advantage that individual over the individual who takes another day off in lieu.”**

**Also, is important to keep in mind that the contributory earnings definition is derived from legislation - not negotiations between the employer and bargaining agents.”**

[17] The above position as provided to the Belleville Fire Fighters Association by OMERS Senior Analyst is the same position outlined to the applicant Frederick LeBlanc, President Ontario Professional Fire Fighters Association in a communique by Michael Beswick, (Beswick) Senior Vice-President Pensions (SVPP) for OMERS.

[18] To support the position of the respondent in the exercise of their statutory power, Beswick (SVPP), referred to their interpretation as to the meaning of “contributory earnings” what it was to include and how it was to be applied.

[19] OMERS defines how contributions to the plan are to be calculated.

[20] This calculation is based on a percentage of the members “contributory earnings” in each period for both continuous full-time (CFT) and other than continuous full-time (OTCFT) members.

[21] To calculate the contributions it is on the members gross “contributory earnings” before any other deductions such as employment insurance, Canada Pension Plan (CPP), Income Tax, and so on.

[22] These contributions shall include all regular recurring earnings as “contributory earnings” for all plan members, save councillors, and is based from time to time on a fixed percent contributed by the employee for which the employer must contribute a matching amount.

[23] In defining OMERS policy position as per their interpretive analysis of the *Act* and *Regulations*, it is that the extra pay received by firefighters for working on days in lieu of statutory holidays is “overtime” because it is pay received in addition to their regular rate of pay.

Page: 8

[24] As submitted by respondent's counsel as to OMERS aforementioned position and purpose extracted from their factum:

**OMERS position is that its interpretation of "contributory earnings" treats all of its approximately 355,000 pension plan members in a fair and consistent manner in terms of determining their pension entitlements. This interpretation is consistent with the language in the OMERS Act and OMERS Regulation, and permits an even-handed and consistent application of what constitutes "contributory earnings" by OMERS approximately 900 participating employers.**

[25] From OMERS interpretive definition of "contributory earnings" as given to the applicant by Beswick, Senior Vice President, Pension, (SVPP), it is well set out in the terms of these passages from his communiqué:

**...[i]s intended to ensure that only "regular" pay is included in 'contributory earnings and that pensions are based on one day's pay for one day's work. Pay earned over above an employee's regular wages for a particular day is a form of overtime (i.e. it is extra pay).**

**"Overtime pay" is pay that is supplementary to the established rate of pay (i.e. pay for any day over and above the "normal" rate of pay for that day). For example, a fire fighter may have "pay in lieu" because he or she works a statutory holiday. This "pay in lieu" is in addition to the normal pay received for working that day.**

**Some fire fighters accumulate "pay in lieu" either as a predetermined amount or based on how many actual statutory holidays are worked. During the year, if a day of vacation is taken in lieu of the statutory holiday, the pay for this may be subtracted from the accumulation.**

**At the end of the year, there may be some accumulation left. This accumulation is clearly overtime and does not qualify as contributory earnings.**

**Based on the above, extra pay received for working a statutory holiday cannot be included in contributory earnings for pension purposes. This has consistently been the rule from OMERS perspective since 1978." ...**

**Issue**

[26] The issue on this application is whether extra pay received by firefighters for working on days in lieu of statutory holidays is “overtime” as that term is used in *Reg. 890* as amended.

[27] The significance of this determination is that “overtime” is excluded from the definition of “contributory earnings” in the OMERS *Reg.*, which is the basis used to calculate a member’s pension benefit.

[28] Perhaps to put the issue in simpler terms, whether a payment to a firefighter pursuant to the terms of their Collective Agreement, in lieu of a statutory holiday as worked forms a part of “contributory earnings” in the calculation of pensionable earnings, or alternatively, is pay in lieu of public/statutory holidays “overtime” for the purposes of the OMERS *Regulation*?

**Jurisdiction**

[29] Neither counsel representing the respective parties has taken issue with the jurisdiction of this court.

[30] Counsel are in agreement that the policy determination of OMERS staff with the approval of the Board falls within the provisions of s. (2) and (6) of the *Judicial Review Procedures Act (JRPA)* as amended.

[31] For the purpose of easy reference upon which this court adopts jurisdiction pursuant to OMERS exercised power of decision to make a determination affecting the legal rights of any person s.2(1) of the JRPA sets out:

***Section 2******Applications for judicial review***

**s.2 (1) – On an application by way of originating notice, which may be styled “Notice of Application for Judicial Review”, the court may, despite any right of appeal, by order grant any relief that the applicant would be entitled to in any one or more of the following:**

- (1) Proceedings by way of application for an order in the nature of mandamus, prohibition or certiorari.**

Page: 10

- (2) **Proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power.**

*Error of Law*

- (2) **The power of the court to set aside a decision for error of law on the face of the record on an application for an order in the nature of certiorari is extended so as to apply on an application for judicial review in relation to any decision made in the exercise of any statutory power of decision to the extent it is not limited or precluded by the Act conferring such power of decision.**

....

*Power to set aside*

- (4) **Where the applicant on an application for judicial review is entitled to a judgment declaring that a decision made in the exercise of a statutory power of decision is unauthorized or otherwise invalid, the court may, in the place of such declaration, set aside the decision.**

...

[32] A more difficult question is whether in the application for the sought declaration the unincorporated Ontario Professional Firefighters Association (OPFA) has legal status or if such sought after declaration is appropriate only to the affected party, Frederick LeBlanc as applicant.

[33] In *Public Service Alliance of Canada v. Canada (Attorney General)* 62 O.R. (3d) 682, Justice Goudges' disposition has been submitted as authority that the sought after declaration may be confirmed on behalf of all members of an association affected.

Page: 11

[34] To take from the headnote p.684 concerning status:

**“The plaintiffs had standing to bring these actions as they had sufficient private or special interest in the federal pension legislation. The terms and conditions of employment of the plaintiffs’ members included the pension benefits owed to employees, the contribution made by employers and the employees’ rights, if any, to the surplus in those pension plans.”**

[35] This quoted reference was as to the right of Public Service Alliance of Canada, a Professional Institute acting on behalf of its members to have standing in the lawsuit. In the body of the judgment incorporated in para. 20 of Quicklaw, His Honour made this reference from the decision Osler J. in *Seafarers International Union of Canada v. Lawrence* (1977), 15 O.R. (2d) 226 as to an earlier position of the Ontario Courts:

**“It has been the practice in this Province for some years that a trade union seeking to litigate an issue before our Courts brings its action in the name of two or more officers ‘on their own behalf and on behalf of all other members of the blank union’.”**

[36] Following that archaic approach as reviewed by Goudge J., the Supreme Court of Canada in their decision of *Berry v. Pulley*, 2002 SCC 40, went on to canvass the legislation and the historical development of the legal status of unincorporated associations. Over time the courts, he adopts, have progressively accorded greater statutory rights to unions. Goudge J., in support of this view, refers to the Supreme Court and from his general analysis the court’s conclusion as taken from para.46 of the above decision, is stated in the following terms:

**“As the above cases in statutory provisions suggests, the world of labour relations in Canada has evolved considerably since the decision of this Court in *Orchard v Tooney* (1957) S.C.R. 436. We now have a sophisticated statutory regime under which trade unions are recognized as entities with significant rights and obligations. As part of this gradual evolution the view has emerged that, by conferring these rights and obligations on trade unions, legislatures have intended, absent express legislative provisions to the contrary, to bestow on these entities the legal status to sue and be sued in their own name. As such, unions are legal entities at least for the purpose of discharging their function and performing their role in the field of labour relations.”**

Page: 12

[37] It is our view that the application of this principle as to the issue before the court, may well apply to all members of the "Ontario Professional Fire Fighters Association", where the Association is able to identify a sufficient private and special interest on behalf of its members, in addition to the named applicant Frederick LeBlanc, whatever the court's determination.

[38] As confirmed by the above authorities, the right of legal status of an Association as bargaining agent for its members, must be carefully viewed in spite of the provisions of s.3(2) of *Rights of Labour Act* R.S.O. 1990 c. R.33, which prevents the Association from suing in its own name for its members.

[39] As confirmed by the authorities, with the continuous development of the common law, the court must determine whether there is clear prohibition for such legal status in every situation. As stated by the case authorities, this may in part be the *raison d'être* for the Association's existence.

[40] Whether under previous authority or as suggested by applicants' counsel, the law now exists as to the status of unincorporated bodies, for the declaration as sought to apply to all of its members, if the applicant LeBlanc is successful, the legal consequences of whether such an order may also apply for the benefit of the members may be of no import, since its effect for all members would likely be the same.

### **Standard of Review**

[41] From respondent counsels' perspective, it is submitted that the standard of review to be applied to the decision of OMERS staff and Board is one of reasonableness simpliciter. That their decision involves a matter that lies at the heart of the OMERS Board and OMERS staff's expertise in managing and administering the OMERS plan.

[42] That within OMERS application of their statutory interpretation, the staff and Board are entitled to deference.

[43] The applicant's position on this application is that because the issues herein involve statutory interpretation, any deference must be applied on a minimal scale.

[44] In this assessment, the court must have regard to the substance of the issue and the reasonableness of OMERS interpretation.

[45] With application to the authorities as to the standard of review and the question of deference, we may have regard to *Metropolitan Toronto Police Services Board et al v. Ont. Municipal Employees Retirement Board*, 45 O.R. (3d) 622, para. 13 and 19. These paragraphs are relevant to the standard of review of a decision of a Board and whether such assessment is based on reasonableness simpliciter providing the decision in itself is not unreasonable. To quote from Paragraph 13, as set out by Krever J.A.:

**“The first issue to be decided is that of the applicable standard of review for the decision of the OMERS Board. It is to be observed that the *Ontario Municipal Employees Retirement Systems Act* contains no privative clause. It also contains no right of appeal from decisions of the OMERS Board. The purpose of the Act is to make provision for pensions for employees after their retirement. Although the statutory board has a limited role in the creation of policy, it has much experience in managing and administering very large pension funds, justifying the recognition of expertise in this field.” ...**

And as stated in Paragraph 19:

**“Earlier in these reasons, I described the enumerated factors as they relate to the circumstances in this appeal. Applying the analysis in *Baker v. Canada, (Minister of Citizenship and Immigration)* 1999, 174 D.L.R. (4<sup>th</sup>) 193, they lead me to the conclusion that the standard of review is neither that of correctness nor patent unreasonableness but rather the intermediate standard of reasonableness *simpliciter*.”**

[46] The above principles, followed in other decisions of the Ontario Divisional Court, as authority both as to the standard of review, the issue of deference, and the principles in issue before us, particularly the application of the principles in *Pilotis* infra are the following:

*“Pilotis et al v. OMERS* [unreported] decision released January 14, 2005, Court File No.1403 (*Pilotis*).

*“Martin v. OMERS* (2002) 47 Administrative L.R. (3d) 100 Ont. Div. Ct.

[47] Having regard to all of the above decisions, the court in each instance determined that the appropriate standard of review is reasonableness simpliciter.

[48] In the Divisional Court case of *Piliotis* the Divisional Court accepted OMERS argument that the appropriate standard of review of the OMERS Board decision was whether OMERS interpretation of “contributory earnings” in reference to the facts of this case was reasonable. In this regard, the court held at para. 15 of the decision:

**“Factual findings as to the nature of payments made to employees and interpretation of “contributory earnings” lie at the heart of the Board’s expertise in managing and administering pension funds. The *Ontario Municipal Employees’ Retirement System Act* does not contain a privative clause, but there is no right of appeal. The context of this dispute does not justify a different standard of review than was appropriate in *Metropolitan Toronto Police Services Board v. Ontario Municipal Employees’ Retirement Systems* and *Martin v. Ontario Municipal Employees’ Retirement System*, namely “reasonableness”.**

The court concluded at Para. 17 of that decision:

**“In our view, the decision of the Ontario Municipal Employees’ Retirement System Board that the early retirement incentive payments equivalent to 18 and 9 months pay, but paid in the form of an increased salary over the last months of the applicants’ employment were “payments made as retirement bonuses or otherwise as a result of retirement” was reasonable. The Ontario Municipal Employees’ Retirement System Board is bound to administer the pension plan fairly for the benefit of the membership as a whole, and it does not err in looking at the true nature and substance of the salary arrangements as opposed to their form.”**

### **Disposition**

[49] For the same reasons as above expressed by the authorities, and in accord with the reasons herein outlined specifically articulated in *Piliotis* we conclude that the decision of OMERS staff and the Board in this case is entitled to deference.

[50] The OMERS staff and the OMERS Board’s interpretation of the term “overtime” as used in the OMERS *Regulation* involves a contextual and factual assessment as set out by the respondent’s counsel and as suggested goes to the heart of OMERS expertise in managing and administering its pension fund.

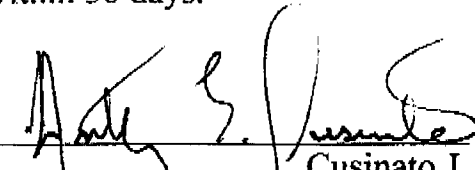
Page: 15

[51] With this position, and the interpretive analysis of OMERS as to its policy of what is included and excluded from "contributory earnings" we agree, specifically in their determination that the remuneration paid in excess of their normal earnings, incorporated as payment for public holidays is properly excluded.

[52] For these reasons the application for a declaration is dismissed.

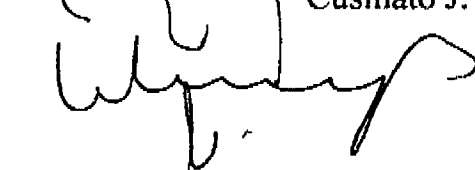
### **Costs**

[53] On the question of cost, if the parties are unable to agree on a disposition between themselves, then in such event, from receipt of delivery of these reasons, written submissions may be provided to the court within 30 days.



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Cusinato J.



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Jennings J.

### **MATLOW J. (Dissenting)**

[54] With respect, I disagree with the majority's disposition of this application for judicial review. I would grant the relief sought and set aside the decision of the respondent reflected by its interpretation of "contributory earnings" in section 1 (1) of the OMERS Regulation, R.R.O. 890, as amended, and direct that it interpret that term, as it pertains to firefighters in Ontario, to provide that it includes all amounts paid to a firefighter within the meaning of section 4(1) of the Fire Protection and Prevention Act, S.O. 1997. c.21, as amended, in lieu of paid days off on public holidays or on days substituted for public holidays, to the extent that the amounts are calculated at the individual's regular daily rate of pay. This is the relief claimed by the applicants. I would further invite counsel to exchange and deliver written submissions regarding costs within one month from the date of release of these reasons.

[55] Counsel for the respondent acknowledged that the issue raised in this application is properly the subject of judicial review and both counsel expressed the desire that the issue be determined by us now.

[56] The sole issue in this application is whether pay in lieu of public holidays paid to firefighters is included in their contributory earnings for the purposes of the Ontario Municipal Employees Retirement System ("OMERS"). OMERS is a contributory defined benefit pension plan for municipal employees in Ontario administered by the respondent. It is also the role of the respondent to develop policies and administrative guidelines to instruct employers how to calculate the contributions required of both employers and employees.

[57] The issue arises in the context of the employment of firefighters who, because of the nature of their work, are excluded from the minimum statutory entitlements set out in Part X of the Employment Standards Act. In place of those statutory guarantees, collective agreements for firefighters in Ontario establish alternative arrangements for firefighters. All of these alternative arrangements recognize that some firefighters must work on all public holidays and, if the shift of a firefighter happens to fall on a public holiday, that firefighter must work during that holiday. In return, he or she is entitled to receive compensation in accordance with the provisions of the specific collective agreement that applies to his or her employment.

[58] There are differences in the manner in which the issue of pay in lieu of public holidays is treated in the collective agreements. However, what is common is that a firefighter is entitled to a certain number of days off with pay for working on public holidays and that, at the firefighter's option, in some instances subject also to the fire chief's discretion, he or she is also entitled to work on a certain number of those days and be paid an additional amount at the firefighter's regular rate of pay.

[59] OMERS is governed by the Ontario Municipal Employees System Act ("the OMERS Act") and the specific terms of the OMERS plan are set out in regulations made pursuant to the OMERS Act. Pension benefits are calculated as a percentage of "pensionable earnings". The determination of "pensionable earnings" is based on a member's "contributory earnings" in a member's final five years of service. Members are required to contribute a percentage of their contributory earnings to the pension fund and employers are required to make a matching contribution. As

a result, the determination of the how a member's "contributory earnings" is calculated has a direct impact of the level of his or her pension benefits.

[60] The respondent, which is responsible for informing employers what to include in the calculation of an employee's contributory earnings, has determined that pay in lieu of public holidays paid to firefighters is paid to them for "overtime" and is, therefore, excluded from "contributory earnings". The effect of that decision is to diminish firefighters' pension benefits from what they would otherwise be.

[61] The term "contributory earnings" is defined in section 1 (1) of the OMERS Regulation to mean, in part,

**"the earnings of the member exclusive of salary or wages paid for overtime".**

It is because of this definition that it becomes critical to determine whether or not pay in lieu of public holidays paid to firefighters is included in "contributory earnings".

[62] The term "earnings" is defined in section 1 (1) of the OMERS Act as follows:

**"earnings", in the case of an employee who is a member, means the salary or wages paid to the employee by an employer including the value of any perquisites received from an employer and, in the case of a councilor who is a member, means any money paid to the councilor for his or her services as a councilor."**

[63] The term "overtime", as used in the definition of "contributory earnings" in the OMERS Regulation, is not defined in either the OMERS Act or the OMERS Regulation. However, in every firefighters collective agreement, overtime pay is dealt with separately from pay in lieu of public holidays. The collective agreements provide that overtime pay must be paid to firefighters who work in excess of a certain number of hours per week because they have been recalled to duty outside of their regular shift.

[64] "Overtime" is defined in the Dictionary of Canadian Law, 3<sup>rd</sup> edition, as "hours of work in excess of standard hours of work". It is defined in the Concise

Oxford Dictionary, 10<sup>th</sup> edition, as "time worked in addition to one's normal working hours".

[65] To these definitions, which I adopt, I would further add the element that, to qualify as "overtime" pay, the additional work must ordinarily be done in response to the employer's request, usually made when the amount of work that the employer seeks to have performed exceeds the available supply of work that would be provided if employees were to work only their normal hours.

[66] With respect to firefighters, I would not characterize pay in lieu of public holidays as "overtime" pay. The right of a firefighter to work on an acquired day off is a special right given to compensate him or her for having to work on one or more public holidays. It is not given because of any request by the employer in order to meet its manpower requirements. Rather, it is given to compensate firefighters for an eventuality which is not unexpected or unforeseen. It is inevitable, and therefore foreseeable, that some firefighters will work on public holidays. In order to deal with this appropriately, the collective agreements, in their provisions respecting pay in lieu of public holidays, simply address this issue by providing for special compensation to be paid to them. If the exercise of the right results in a firefighter working more hours in a particular time period which would otherwise be recognized as normal and being paid extra for it, it should not result in his or her compensation for working on one or more public holidays being treated as "overtime" pay. The special payment made should be regarded as part of that firefighter's normal pay.

[67] In my view, the amounts paid to firefighters in such circumstances fall squarely within the definition of "contributory earnings" set out in paragraph 61 above.

[68] The conflicting determination made by the respondent is, in my view, in conflict with the statutory definition of "contributory earnings". I would, respectfully, not defer to the respondent's view and permit its interpretation to prevail. Its interpretation is unreasonable and fails to meet the standard of review of reasonableness which both parties agree, and I accept, is the applicable standard of review in this case.

  
Matlow J.

Released: June 26, 2006

**COURT FILE NO.:** 06/DV/001018  
**DATE:** 20060626

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
DIVISIONAL COURT  
JUSTICES MATLOW, CUSINATO,  
JENNINGS JJ.**

**B E T W E E N:**

ONTARIO PROFESSIONAL FIRE  
FIGHTERS ASSOCIATION and  
FREDERICK LeBLANC  
**Applicants**

- and -

ONTARIO MUNICIPAL EMPLOYEES  
RETIREMENT BOARD  
**Respondent**

**HEARD:** February 14, 2006

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**REASONS FOR JUDGMENT**

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**Cusinato and Jennings, JJ.  
Matlow, J. (dissenting)**

**Released:** June 26, 2006