COURT FILE NO.: 155/07
DATE: 20080529

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

PITT, MOLLOY, MURRAY JJ.

B E T W E E N:	)	
	)	
SYLVIA CLIFFORD	)	John Legge, for the Applicant
	)	
	)	
Applicant	)	
	)	
	)	
- and -	)	
	)	
	)	
THE ATTORNEY GENERAL OF ONTARIO, THE ONTARIO MUNICIPAL EMPLOYEES RETIREMENT SYSTEM, and BERNADETTE CAMPBELL	)	M. Paul Michell and Daniel Schwarrtz, for the Respondent, The Ontario Municipal Employees Retirement System
	)	
	)	Sheila Holmes, for the Respondent Bernadette Campbell
Respondents	)	
	)	
	)	**HEARD:** February 22, 2008

MOLLOY J.

REASONS FOR JUDGMENT

Introduction

[1] Sylvia Clifford applies for judicial review of a decision of the Ontario Municipal Employees Retirement System ("OMERS") Appeal Sub-Committee ("the Tribunal") dated March 8, 2007. In that decision, the Tribunal determined that Bernadette Campbell was the common-law spouse of the late Tony Clifford at the time of his death and that, as such, she was entitled to his OMERS pension death benefits. Sylvia Clifford is the former spouse of Tony Clifford and was the named beneficiary under his pension plan. She seeks to have the Tribunal's decision set aside on the grounds that: (a) the Tribunal breached rules of natural justice by not

ordering full disclosure of documents by Bernadette Campbell, not ordering oral discovery, and failing to issue summonses in a timely manner; (b) the Tribunal's questioning of witnesses gave rise to a reasonable apprehension of bias; (c) the Tribunal's decision finding Bernadette Campbell to be a common-law spouse was unreasonable in light of the evidence; (d) the Tribunal erred in failing to apply the rule requiring corroboration of Bernadette Campbell's evidence, given the death of Tony Clifford; (e) the Tribunal erred in failing to draw an adverse inference from Bernadette Campbell's failure to produce relevant documents; and (f) the Tribunal erred in failing to consider the affidavit evidence filed by Tony Clifford in the matrimonial proceedings, in which he described himself as the "tenant" of Bernadette Campbell.

Standard of Review

[2] There is no need to undertake an assessment of the standard of review with respect to matters that involve a breach of natural justice. Where requirements of natural justice and procedural fairness have not been met, a tribunal has exceeded its jurisdiction and this court will intervene: *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193; *Gismondi v. Ontario (Human Rights Commission)*, [2003] O.J. No. 419, 169 O.A.C. 62 (Div.); *R. v. Forestall v. Toronto Services Board*, [2007] Carswell Ont. 5073 (Div.Ct.).

[3] The Tribunal was required to make two key findings: (1.) whether Bernadette Campbell and Tony Clifford had been in a common-law relationship for at least three years prior to his death; and (2.) if so, whether that relationship was still continuing at the time of his death. These are issues of mixed fact and law. At the hearing before us, counsel for all parties accepted that the standard of review we should apply is that of reasonableness *simpliciter*. That position was based on the factors established by the Supreme Court of Canada in cases such as *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*,[1998] 1 S.C.R. 982, and *Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247. There is also ample authority adopting that standard as applicable to OMERS decisions: *Martin v. Ontario Municipal Retirement Board*, [2002] O.J. No. 2286 (Div.Ct.); *Metropolitan Toronto Police Services Board v. Municipal Employees Retirement Board*, [1999] O.J. No. 3181 (C.A.); *Ontario Professional Firefighters Assn. v. Ontario (Municipal Employees Retirement Board)*, [2006] O.J. No. 2359 (Div.Ct.).

[4] Since the argument of this appeal, the Supreme Court of Canada released its decision in *Dunsmuir*, (2008) S.C.J. No. 9, which fundamentally changes the approach to determining the standard of review. Previously, there were three standards of review: correctness; reasonableness *simpliciter*, and patent unreasonableness. Now, the patently unreasonable standard has been eliminated and all tribunal decisions must be reviewed on either a correctness or simple reasonableness standard. Instead of a "pragmatic and functional approach" in determining the appropriate standard, courts are now to conduct a "standard of review analysis", which is to be contextual in approach: *Dunsmuir* at paras 63-64. Bastarache and Lebel JJ., writing for the majority, held at para 64:

> The analysis must be contextual. As mentioned above, it is dependent on the application of a number of relevant factors, including: (1) the presence or absence of a privative clause; (2) the purpose of the tribunal as determined by the interpretation of the enabling legislation; (3) the nature of the question at issue; and (4) the expertise of the tribunal. In many cases, it will not be necessary to consider all the factors, as some of them may be determinative in the application of the reasonableness standard in a specific case.

[5] Based on the criteria established in *Dunsmuir*, it is clear that the applicable standard of review for this case will continue to be one of reasonableness. It cannot be the case that by eliminating the patent unreasonableness test, the Supreme Court was sanctioning a move to a correctness standard for questions of fact or questions of mixed fact and law. The Supreme Court emphasized in *Dunsmuir* that in adapting the standards of review it was not seeking to move away from the long tradition of deference to administrative tribunals already established in the case law, but merely to simplify the standard of review. The Court further stated that questions of fact and questions where the facts and law are inextricably interwoven, will continue to be reviewed on the reasonableness standard: *Dunsmuir* at paras 51 and 53. Accordingly, the decision in *Dunsmuir* has no impact on the standard of review applicable to ultimate determinations of the Tribunal this case; the standard is one of reasonableness.

[6] In defining what a "reasonableness" review entails, the majority held, at para 47:

> . . . A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of acceptable outcomes which are defensible in respect of the facts and law.

Natural Justice and Procedural Fairness

[7] The duty of procedural fairness is flexible and will vary, based on the circumstances of the particular tribunal and particular issue involved. In determining the content of the duty of fairness it is relevant to consider: (1) the nature of the decision and the process followed in making it; (2) the nature of the legislative scheme and the decision maker; (3) the importance of the decision to the individual affected: (4) the legitimate expectations of the person challenging the decision; and (5) respect for the choice of procedure made by the tribunal itself: *Knight v. Indian Head School Division No. 19.*, [1990] 1 S.C.R. 653; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras 18-28. The closer a tribunal is to exercising court-like functions, the greater will be the procedural protections required to accord fairness to the parties: *Baker* at para 23.

[8] In this case, the Tribunal was an arms-length neutral arbiter determining the rights of two competing claimants to a substantial amount of money. The process of the decision-making was a formal hearing, akin to a trial in a civil court. The issues at stake were important to the claimants, not only because of the financial amounts involved, but because the central factual dispute was the nature of the relationship between the deceased and the person who now claimed to be his common-law spouse. The former spouse of the deceased expected to have full disclosure of the case she was required to meet prior to embarking on the hearing. That was a reasonable expectation on her part, given the nature of the process and what was involved.

[9] The Tribunal in this case did direct its mind to its duty of procedural fairness and recognized that fairness required the parties to know the case they had to meet. The Tribunal made pre-hearing orders requiring the parties to exchange all relevant documents prior to the hearing. The Tribunal did not require the parties to deliver sworn affidavits of documents in the same form as would be required in the civil courts, and refused to order full oral discovery of witnesses under oath prior to the hearing. The parties were, however, required to exchange witness statements prior to the hearing.

[10] A tribunal is the master of its own procedure. It is not required to adopt the procedural rules of the civil court system in order to achieve fairness. Tribunals are not courts, and are fully entitled to streamline their disclosure procedures in keeping with their objective to provide a timely and cost-effective adjudication of the rights of the parties. A right to prior oral discovery is not an essential ingredient for a fair hearing. Even courts do not always provide a right of prior oral discovery. (See *Howe v. Institute of Chartered Accountants of Ontario* (1994), 19 O.R. (3d) 483, (1994) 118 D.L.R. (4th) 129 (C.A.).)

[11] In this case, the parties had ample disclosure of the issues and the evidence they could expect to meet at the hearing. There was no “trial by ambush”. They knew the case they had to meet. The pre-hearing disclosure process adopted by the Tribunal was fair and reasonable.

[12] If there were documents that should have been produced, and were not, it would have been open to counsel for Mrs. Clifford to seek an order from the Tribunal for its production and, if necessary, an adjournment of the hearing so that the document could be produced. He did not do so, electing instead to invite the Tribunal to draw an adverse inference from the failure of the witness to produce the document. That was a judgment call, and may well have been the right strategic move. However, the absence of particular documents that counsel speculates must exist, does not make the hearing process itself unfair.

[13] There is no merit to the argument that the Tribunal failed to issue summonses in a timely way. The Tribunal acted expeditiously when the proper procedures were eventually used by counsel. In any event, if there had been prejudice as a result of the late issuance of the

summonses (which has not been shown on the evidence), it could easily have been remedied by an adjournment, which was never requested.

[14] I have reviewed the entire transcript of the Tribunal hearing. There were very few interjections by the Tribunal members, except to seek clarification of a point. Any such questioning was always relevant, courteous and appropriate. There is no merit whatsoever to the submission that the Tribunal's interventions gave rise to a reasonable apprehension of bias.

The Decision of the Tribunal

[15] The Tribunal's decision is very brief, comprising approximately three typed pages.

[16] First the Tribunal correctly cited the definition of "spouse" from the relevant legislation. The Tribunal next set out three paragraphs containing a summary of some, but not all, of the evidence as to whether Ms Campbell and Mr. Clifford had been living together as "spouses". The Tribunal then stated, "Based on the totality of all of the evidence, [the tribunal] finds that Ms Campbell and Mr. Clifford were in a common-law relationship as defined by [the legislation]"

[17] The Tribunal next considered whether that relationship was still in existence at the time of Mr. Clifford's death and summarized some, but not all, of the evidence on that point over the course of five paragraphs. The Tribunal then stated, "Based on all of the evidence before us including the evidence of Hugh Doherty and Keith Clifford, we are not persuaded that the conjugal relationship between Ms Campbell and Mr. Clifford had terminated at the time of his death, and accordingly we dismiss the appeal of Ms. Clifford."

Was the Decision "Reasonable"?

[18] I am unable to determine whether the Tribunal's decision in this case meets the reasonableness standard. As the Supreme Court stated in *Dunsmuir*, reasonableness is "mostly" concerned with "justification, transparency and intelligibility".

[19] If the only concern was whether the decision "falls within a range of acceptable outcomes which are defensible in respect of the facts and law", it might be possible to say the test was met. However, I could reach that conclusion without any reference to the Tribunal's reasons. There was evidence, which if accepted by the Tribunal, could lead it to the rational conclusion that the legal test for common-law status was met and that it was still in existence at the time of death. However, there was also evidence, which if accepted by the Tribunal, could lead it to the rational conclusion that Mr. Clifford and Ms Campbell had never considered themselves to be common-law spouses and that the legal test for such status was not met. Further, there was considerable evidence, which if accepted by the Tribunal could lead it to the conclusion that even if a spousal

status had existed at one point, it had completely broken down in January or February, 2005 and was not in existence at the time of Mr. Clifford's death on February 20, 2005.

[20] Rationality of the result is not the only consideration of the reasonableness standard of review. The question is not solely whether the result is a rational one, but whether the Tribunal acted reasonably and rationally in reaching that conclusion. That is a question that can only be answered by reviewing the Tribunal's reasons. In this case, the Tribunal heard conflicting evidence on many points. However, in its decision it makes no findings of credibility or reliability. If it chose to accept the evidence of one witness over another, that can only be gleaned by the ultimate decision reached. No reasons are provided as to how that decision was reached.

[21] This is not a situation in which the nature of the evidentiary analysis undertaken by the Tribunal is obvious by virtue of the result reached. For example, it could be argued that to have reached the conclusion it did, the Tribunal must have believed the testimony of Ms Campbell and that her testimony is sufficient to support the result. However, what is unclear is whether the Tribunal members appreciated the potential credibility issues with her evidence but nevertheless were satisfied as to her truthfulness, or whether they misapprehended the evidence to the contrary, or whether they disbelieved the witnesses who provided evidence to the contrary, or whether they misapprehended the testimony of those witnesses, or whether they misapplied the law.

[22] The Tribunal did not articulate what the test for common-law status that it applied. It is therefore unclear whether the Tribunal appreciated that the test for common-law status has both a subjective and objective element: *Glen v. Kirby-MacLean Estate*, [2006] O.J. No. 520 (S.C.J.) and cases referred to therein. It is not just a matter of common residence or what outsiders to the relationship, such as the neighbours who testified, may have thought. It is very much an issue of how the two people in the relationship regarded the relationship and each other. In that regard, it would have been relevant for the Tribunal to consider that:

- Tony Clifford filed an affidavit in his divorce proceedings in 2003 in which he referred to paying "rent" to Ms Campbell as his landlord;

- Tony Clifford filed income tax returns in which he described himself as "separated" rather than as living in a spousal relationship for the years in question.

- When Tony Clifford's employment as a firefighter ended by negotiated resignation as a result of his chronic alcohol abuse, he reviewed all of his entitlements including his pension and did not change the designation of his former wife as his beneficiary.

- Tony Clifford's son testified that his father told him that his mother would receive his pension benefit when he died.

- Hugh Doherty (the union labour-relations person who dealt with Mr. Clifford) testified that when at one of his meetings with Mr. Clifford when his employment was being terminated in January 2005, Ms Campbell said none of her money would be going to support him or his ex-wife.

- Ms Campbell paid no part of the funeral expenses.

- Ms Campbell did not file any income tax returns for the period in question, but she would have completed other forms that required her to state her marital status, none of which were produced, although she was ordered to do so. This could give rise to an adverse inference that in those forms she did not describe herself as being in a spousal relationship.

- Ms Campbell initially testified before the Tribunal that she had named Tony Clifford as beneficiary on her teacher's pension plan, but when pressed on the issue stated that she had designated her estate.

[23] It is possible the Tribunal considered these factors, and nevertheless concluded that both the subjective and objective aspects of the test for common-law status were met. It is equally possible that the Tribunal did not appreciate the nature of the test, or did not consider the relevant evidence on the point at all. It is possible the Tribunal considered drawing an adverse inference from the failure of Ms Campbell to produce any of her personal documents relating to spousal status, but declined to do so, for valid reasons. It is possible, the Tribunal drew the adverse and nevertheless concluded that such documentation was not determinative of status. It is equally possible that the Tribunal believed incorrectly that such documents were irrelevant to the question before it or believed incorrectly that the law did not permit such an inference to be drawn. It is simply impossible to tell from the reasons.

[24] Likewise, on the issue of whether the relationship had ended prior to Mr. Clifford's death, it would have been relevant for the Tribunal to consider that:

- Hugh Doherty testified that in the first week of February he went to Ms Campbell's home (where Mr. Clifford had been residing) to return some of his belongings. He said not only that Ms Campbell did not take the belongings but that she told Mr. Doherty that Tony was not living there.

- Mr. Doherty testified that later in February, he met with Mr. Clifford at a coffee shop and that Mr. Clifford appeared to have everything all packed up in his van.

- Tony Clifford's son testified that he had dinner with his father in January 2005 at which time he said he was living out of his van and occasionally in hotels. He had boxes of clothing and other things piled in the van. He also was looking for an apartment and had a newspaper with apartments for rent circled.

- Tony Clifford's brother, also a firefighter, coincidentally bumped into Ms Campbell on the street where he was called to the scene of a car accident and she had been a witness to the accident. This occurred on Sunday, February 13, 2005. He testified that Ms Campbell had told him she had had enough, that she was not going to support Tony Clifford without him having a job and that she had asked him to leave. He testified that Ms Campbell told him that Tony was moving out that very day.

[25] Ms Campbell disputed some of the evidence listed above. It was open to the Tribunal to prefer her evidence over the evidence of others if it had valid reasons for doing so. However, since the Tribunal made no findings of fact and no findings of credibility, it is not possible to tell if that was the conclusion it reached, or if it simply failed to properly consider the nature of this evidence. It is possible the Tribunal accepted Ms Campbell's testimony that Mr. Clifford's unexplained absence from her home for a period of over a week prior to his death (even on her own evidence) was merely another one of his drinking binges from which he would eventually return to her as before. It is equally possible that the Tribunal completely misapprehended the test. It is simply not possible to discern this from the reasons.

[26] Finally, and of fundamental concern, it is possible, indeed probable, that the Tribunal misapplied the onus of proof with respect to whether the spousal relationship was still in existence at the time of death. The Tribunal's entire reasons on this point state, "Based on all of the evidence before us including the evidence of Hugh Doherty and Keith Clifford, we are not persuaded that the conjugal relationship between Ms Campbell and Mr. Clifford had terminated at the time of his death, and accordingly we dismiss the appeal of Ms. Clifford." The onus should have been placed on Ms Campbell to prove that the conjugal relationship was still in existence. The Tribunal appears to have incorrectly placed the onus on Mrs. Clifford to persuade it that the conjugal relationship had terminated, and because she did not persuade the Tribunal of that, they decided the case against her. Where the onus lies was not an unimportant consideration in this case. As I have noted above, there was evidence to support both sides of the issue. Incorrectly placing the onus on Ms Clifford might have completely changed the result.

[27] It is, of course, possible that the Tribunal simply worded this awkwardly and in its deliberations did place the onus on the proper party. However, in the absence of any reasons beyond this one sentence, it is simply not possible to determine whether this is the case.

[28] The requirement of providing reasons for a decision is part of the Tribunal's obligation to comply with principles of natural justice and procedural fairness. The Supreme Court of Canada held in *Baker* at para 43:

> In my opinion, it is now appropriate to recognize that, in certain circumstances, the duty of procedural fairness will require the provision of a written explanation for a decision. The strong arguments demonstrating the advantages of written reasons suggest that, in cases such as this where the decision has important significance for the individual, when there is a statutory right of appeal, or in

> other circumstances, some form of reasons should be required. . . . It would be unfair for a person subject to a decision such as this one which is so critical to their future not to be told why the result was reached.

[29] It is not sufficient for the Tribunal to simply summarize the positions of the parties and baldly state its conclusions. Reasons are required; not merely conclusions: *Megens v Ontario Racing Commission* (2003) 64 O.R. (3rd) 142 (Div.Ct.). As was stated by the Ontario Court of Appeal in *Gray v. Ontario (Disability Support Program, Director)* (2002), 59 O.R. (3d) 364 at 374-375, 212 D.L.R. (4th) 353 at 364 (C.A.):

> The obligation to provide adequate reasons is not satisfied by merely reciting the submissions and evidence of the parties and stating a conclusion. Rather the decision maker must set out its findings of fact and the principal evidence upon which those findings were based. The reasons must address the major points in issue. The reasoning process followed by the decision maker must be set out and must reflect consideration of the main relevant factors.

[30] For a tribunal such as this one, on issues of the importance involved here, the failure to provide meaningful reasons supporting its decision is itself a breach of the principles of natural justice that will warrant quashing the tribunal's decision: *Baker*; *Megens v. Ontario Racing Commission.* This is particularly the case in light of the conflicts in the evidence and the apparent failure of the Tribunal to place the onus on the correct party.

[31] In *Dunsmuir*, the Supreme Court of Canada noted that "reasonableness" is not merely a function of outcome, but also refers to "the process of articulating the reasons". The Court also held that the concept of reasonableness requires "justification, transparency and intelligibility within the decision-making process". In the absence of reasons setting out what the Tribunal's decision-making process was, the Tribunal's decision cannot be said to be "justified" or "transparent" or "intelligible". It is incumbent on the Tribunal, particularly in a case of this nature, to articulate its reasons so that the parties will know the basis upon which the case was decided and the reviewing court can determine whether the decision is a "reasonable" one. The reasons in this case do not enable that process to be carried out. Accordingly, the decision is not a "reasonable one" and is also not in accordance with principles of natural justice and procedural fairness.

Conclusion

[32] The decision of the Tribunal is quashed. This matter is remitted to the Tribunal for a new hearing, before a differently constituted panel. If the parties are unable to agree on costs, brief written submissions may be forwarded to the Court, supported by dockets and documentation, within thirty days of the release of this decision.

MOLLOY J.

MURRAY J.

PITT J. (dissenting):

[33] The applicant**,** Sylvia Clifford**,** seeks judicial review of the decision of the Ontario Municipal Employees Retirement System ("OMERS") Appeals Sub-Committee ("the Tribunal") dated March 8, 2007. Sylvia Clifford asks this Court to grant an order compelling OMERS to make her the sole recipient of the late Tony Clifford's pension death benefits, on the grounds that the Tribunal denied her procedural fairness and that the Tribunal's decision was unreasonable.

Background

[34] The deceased, Tony Clifford, was a veteran firefighter with the Toronto Fire Services. Due primarily to his severe alcoholism, Clifford signed an agreement with the Toronto Fire Services dated January 5, 2005, which provided that he would resign his employment on October 31, 2006. Paragraph 6 of this agreement preserved his retirement pension and benefits under the Collective Agreement.

[35] Tony and Sylvia Clifford were married in 1980 and separated in 1996 although they were not divorced until February 29, 2004. Paragraph 3(i) of the Divorce Order provided that if Tony Clifford was obligated to pay support to Sylvia Clifford at the time of his death, such an obligation would apply to his estate as well. The Final Order stipulated at paragraph 3(a) that Tony Clifford was to pay $1100 per week in spousal support. Tony Clifford was still bound by this order at the time of his death.

[36] The respondent Bernadette Campbell **("**Campbell**")** claimed that she and Tony Clifford commenced a common-law relationship, cohabiting as spouses from 1999 to the date of his death. There was evidence to support that allegation.

[37] Tony Clifford died intestate on February 20, 2005.

[38] Sylvia Clifford claimed that Tony Clifford died intestate with no eligible spouse or child, and that since she was the named beneficiary under his OMERS pension, a lump sum refund should be payable to her**.** She further claimed the terminal pension benefit on the basis of the support obligation in their divorce settlement.

[39] Due to the competing claims, OMERS invited submissions by the two claimants and accepted the evidence that Campbell and Tony Clifford were co-habiting as spouses**.** OMERS decided that Campbell qualified as the eligible surviving spouse under the OMERS plan.

[40] Sylvia Clifford then appealed the OMERS decision to the Tribunal, which held a hearing on November 1, 2006 and released its decision on March 8, 2007.

[41] The Tribunal found as follows:

(a) Tony Clifford and Campbell co-habited together in a conjugal relationship for a period of at least three years based on the evidence of several witnesses; and

(b) They were still cohabiting in a conjugal relationship at the time of Tony Clifford's death.

There was evidence that in early February, 2005 Tony Clifford had periodic absences from Campbell's home**.** However, the Appeals Sub-Committee accepted Campbell's evidence that Tony Clifford occasionally stayed overnight in motels when he was drinking and that he always returned to her following his binges.

[42] The Tribunal dismissed Sylvia Clifford's appeal accordingly.

Key Issues

[43] The issues raised by the applicant are as follows:

(a) What is the appropriate standard of review?

(b) Were the proceedings before the Tribunal conducted in such a manner that a denial of natural justice resulted?

(c) Did the Tribunal generally fail to consider the oral and documentary evidence before it so as to constitute a denial of natural justice?

(d) Was the Tribunal's application of the law reasonable?

(e) Did the conduct of the Tribunal hearing give rise to a reasonable apprehension of bias?

The Statutory Scheme

[44] The relevant statutory authority in this case comes from the *OMERS General Regulations*, R.R.O. 1990, Reg. 890 made pursuant to s. 14 of the *Ontario Municipal Employees Retirement System Act*, R.S.O. 1990, c. O.29 (repealed). This was the regime in place at the time of Bernadette Campbell's application to OMERS for Tony Clifford's terminal pension benefit in 2006.

[45] The procedure for appealing a decision of the OMERS President is set out in s. 4 (2) of the *Regulations*:

> 4 (1) The president […] **(e)** shall determine whether or not a benefit is payable, the amount of a benefit that is payable, and to whom a benefit is payable under this Regulation;
>
> […]
>
> (2) Any person aggrieved by a determination made by the president or by the failure of the president to make a determination under clause (1)(e) or (f) **…** may appeal to the Board from such determination or failure to make a determination and the decision of the Board is final.

Standard of Review

[46] The applicant takes the view that, with respect to procedural defects, a resulting denial of natural justice is an excess of jurisdiction and that an assessment of the standard of review is unnecessary: *Forestall v. Toronto Police Services Board*, 2007 CarswellOnt 5073 (Div. Ct.) at para. 38.

[47] The respondent takes the view that the applicable standard of review is reasonableness, and that there are no issues with respect to procedural justice or jurisdiction in this case.

[48] Since this matter was heard, the Supreme Court of Canada released its decision in *Dunsmuir v. New Brunswick*, [2008] S.C.J. No. 9, collapsing the two variants of reasonableness review resulting in a system comprising two standards – correctness and reasonableness.

[49] The Standard of Review did not loom large in the submissions of either party. To the extent that the parties argued that the issue is the Tribunal's substantive decision, they agreed that the appropriate standard of review is reasonableness.

[50] With respect to the issues of procedural fairness and bias, I agree with the applicant's view set out in paragraph 14 above. With respect to substantive review of the decision, the majority in *Dunsmuir, supra*, held at para. 62 that if the appropriate degree of deference has already been determined, there is no need to re-evaluate it. I agree that the appropriate standard of review has been previously held to be, and in this case is reasonableness. See, e.g., *Ontario Professional Fire Fighters Assn. v. Ontario (Municipal Employees Retirement Board)*, [2006] O.J. No. 2539 (Div. Ct.).

Analysis

Procedural fairness

[51] The applicant submits that that the Tribunal denied the applicant natural justice by failing to order Campbell to produce such documents, to attend discovery for productions, **or to** provide corroborating evidence for her testimony. The applicant argues that an adverse inference should have been drawn against Bernadette Campbell because she has admitted that documents exist that are relevant to spousal status that she did not produce.

[52] The applicant also submits that the Tribunal erred by refusing to consider the affidavit evidence sworn by the deceased in a prior family law proceeding. In this affidavit, he represents himself as a "tenant" of Bernadette Campbell.

[53] Campbell submits that minor procedural lapses which do not result in unfairness to the parties are not sufficient to warrant overturning the Tribunal's decision**,** as there is a presumption that the procedures adopted by the tribunal are fair. OMERS submits that the Tribunal's decision to deny the applicant's request for delivery of formal affidavits of documents is within its jurisdiction.

[54] In the final analysis it is, in my view, abundantly clear that the applicant's approach to the proceeding was overly formalistic. What is more, although the applicant made several pre-hearing demands, she did not seek the orders that were available to her to satisfy those demands.

[55] Of more importance is that several of the demands made by the applicant were of peripheral significance. The applicant was adamant that the Tribunal should focus on documentary evidence. As an example, the applicant objected to the production of only a part of a passport on the ground that the part that was not produced would have revealed who Mr. Clifford regarded as his next-of-kin. There is good reason to believe that passports do not include such information, or whether, if they did, such information would be of any significance.

[56] The applicant also demanded tax returns for several years that were not provided because the respondent testified that she had not filed for the relevant years. Another example was the complaint arising from Campbell's failure to provide documentary evidence of the beneficiary of her own pension plan.

[57] The Tribunal's task was to engage in a fact-intensive exercise to determine whether Tony Clifford and Bernadette Campbell had lived continuously as spouses for a period of three years to the date of his death. Simply put, the applicant demanded documents that were declaratory of spousal status, without any recognition of the notorious fact that a common-law relationship is by its very nature generally undocumented.

[58] Furthermore, the Tribunal's reasons do not reflect a failure to consider evidence before it. In its reasons, the Tribunal set out the evidence on which it based its finding of a common law relationship, and addressed, albeit only in passing, the assertion that Tony Clifford was a "tenant." The Tribunal then focused on the considerable corroborative testimony from several reliable witnesses, e.g. two practicing lawyers about their personal knowledge of the relationship between Tony Clifford and Bernadette Campbell, including, Paul Calarco (Campbell's neighbour), Hugh Doherty (a firefighter's union representative and acquaintance of Tony

Clifford), and Vivian Ropchan (another neighbour of Campbell's), the very best kind of evidence to prove such a relationship.

[59] What is more, the Tribunal had undisputed evidence that Tony Clifford and the applicant had been living separate and apart since sometime in 1996, although they had only been divorced in 2004. This was not a contest to determine which of a spouse or common-law spouse should be preferred. The only issue to be determined was whether Campbell was or was not a common-law spouse.

[60] The Tribunal also had evidence that Tony Clifford had moved into Campbell's home in 1999, although the common-law relationship commenced sometime later.

[61] Frankly, the only evidence that might have troubled the Tribunal to a minor degree was the evidence from which an inference could possibly have been drawn that sometime in early February, 2005, Tony had been periodically absent from the home for some short period as a result of Bernadette Campbell's decision to exclude him from the home.

[62] Evidently, the Tribunal accepted Campbell's evidence that Tony Clifford occasionally stayed overnight in motels when he was drinking, that he always returned to her following his binges, and that she did not exclude him from the home. Deference is owed to these factual findings.

[63] In *Kalin v. Ontario College of Teachers* (2005), 75 O.R. (3d) 523 at paras. 58-60 (Div. Ct.), this Court held that a decision maker must set out its findings of fact and the principal evidence upon which those findings were based, and that the reasons must address the major points in issue. Procedural fairness does not require the Tribunal to recite all of the evidence in its reasons.

[64] The applicant also argues that the Tribunal erred by failing to issue summonses to the applicant in a timely enough manner for her to be properly prepared. Campbell and OMERS submit that the summonses were issued in a timely fashion. Additionally, OMERS submits that the delays, to the extent that there were delays, lie at the applicant's feet.

[65] The summonses were requested by the applicant beginning on September 20, 2007 and were issued on October 27, 2007. I agree that the delay was not excessive, and in any event, that the applicant delayed in demonstrating that the witnesses had relevant evidence.

Application of the law

[66] The applicant argues that the Tribunal's decision was unreasonable because it did not apply the relevant legal tests for determining spousal status.

[67] Campbell submits that the Tribunal properly considered all of the aspects of the spousal co-habitation criteria set out in *M. v. H.*, [1999] 2 S.C.R. 3 at para. 59**,** and that there was

sufficient evidence to support their conclusion that there was a spousal co-habitation between Tony Clifford and Campbell at the time of Tony Clifford's death.

[68] With respect to continuity**,** I believe that the correct statement of the law set out in paragraph 44 of the respondent Campbell's Factum reflects sound common sense and experience.

> "44. The case law confirms that the test for "continuity of cohabitation" should be realistic and flexible enough to recognize that a brief cooling off period does not bring the relationship to an end. The relationship would only be considered to have ended where either party demonstrates by his or her conduct "in a convincing manner" that this state of mind is a settled one. In *Sanderson v. Russell* a fight and brief separation did not convincingly demonstrate a settled state of mind that the relationship was at an end sufficient to interrupt its continuity.
>
> ***Ref:*** ***Sanderson v. Russell,*** **[1979] O.J. No. 429 (Ont. C.A.) at para. 8, 9 – Tab 11 of Bernadette Campbell's Casebook**
>
> ***Ringler v. Dodds,*** **[2002] O.J. No. 949 (S.C.J.) at para. 46 and 50 – Tab 12 of Bernadette Campbell's Casebook"**

[69] Though the Tribunal did not explicitly set out the spousal co-habitation criteria, it reviewed evidence that indicated several of the criteria were met. On the basis of considerable evidence, the Tribunal's conclusion that a conjugal relationship existed was reasonable.

Reasonable apprehension of bias

[70] The applicant argues that the conduct of the Tribunal and the procedures it adopted demonstrated a reasonable apprehension of bias. Specifically, the applicant argues that the lack of production and discovery unfairly restricted counsel for Sylvia Clifford in their efforts to cross-examine, and that the Tribunal's cross-examinations at large compounded this reasonable apprehension of bias.

[71] The reasonable apprehension of bias argument is predicated on the argument that there was a lack of procedural fairness. As I have found no breach of procedural fairness, no reasonable apprehension of bias can arise from a lack of fairness. I find no other basis to conclude that the Tribunal was in any way biased.

Conclusion

[72] I am satisfied that there is no basis for the applicant's claim that she was denied procedural fairness or natural justice. The Tribunal handled the proceeding in a fair manner, given the issue it was called upon to determine, and its application of the law was reasonable. I would have dismissed the application.

PITT, J.

Released: May 29, 2008

COURT FILE NO.: 155/07
DATE: 20080529

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

PITT, MOLLOY and MURRAY JJ.

B E T W E E N:

SYLVIA CLIFFORD

Applicant

- and -

THE ATTORNEY GENERAL OF ONTARIO, THE ONTARIO MUNICIPAL EMPLOYEES RETIREMENT SYSTEM, and BERNADETTE CAMPBELL

Respondents

REASONS FOR JUDGMENT

PITT J.
MOLLOY J.
MURRAY J.

Released: May 29, 2008