

**Date: 200608010**

**Docket: T-957-05**

**Citation: 2006 FC 964**

**Toronto, Ontario, August 10, 2006**

**PRESENT: Madam Prothonotary Milczynski**

**BETWEEN:**

**ISAC SCHENKMAN**

**Plaintiff**

**and**

**HER MAJESTY THE QUEEN IN RIGHT OF CANADA**

**Defendant**

**REASONS FOR ORDER AND ORDER**

[1] This is a motion to dismiss the action, pursuant to Rule 221 (1) of the *Federal Courts Rules*.

For the reasons below, the motion is granted and the claim struck, on the grounds that the proceeding to challenge and set aside the decision finding that the Plaintiff received a pension overpayment and recovery of that overpayment, ought to have been commenced by way of application for judicial review, and not by way of action.

## **Background**

[2] The Plaintiff in this action, Mr. Isac Schenkman, is a former employee of the Federal Public Service. Mr. Schenkman was a Project Manager for Public Works and Government Services Canada, and commenced his employment with Public Works in June of 1982.

[3] Mr. Schenkman was terminated from his employment on January 6, 1999. Public Works and Government Services alleged just cause for Mr. Schenkman's termination. Mr. Schenkman, however, filed a grievance and was ultimately successful in being awarded reinstatement by the Public Service Staff Relations Board, with full compensation and benefits. The period of time for which he received this full compensation was from the date of his termination in January, 1999 to August 28, 2002.

[4] Following his termination, but prior to the resolution of his grievance, Mr. Schenkman applied for and received, among other things, his pension benefit from the Public Service Superannuation Plan.

[5] Upon or around the time of Mr. Schenkman's reinstatement, Public Works generated a number of statements setting out the reconciliation of amounts owed to or owing by Mr. Schenkman. This prompted a further grievance, filed in September of 2002 and a further award from the PSSRB to clarify the retroactive entitlements and Mr. Schenkman's claim for interest (which was denied).

[6] There were further meetings and discussions regarding Mr. Schenkman's entitlements, his reinstatement and duties – during which time, according to the evidence of Public Works, it was raised with Mr. Schenkman that he would be required to repay the amount of the pension benefits he received prior to his reinstatement in light of the fact that he was made whole for his lost salary and benefits. Mr. Schenkman denies that these discussions took place. Nevertheless, it is clear and not in dispute that he did not receive any formal notice or demand for repayment; there was nothing in writing provided to Mr. Schenkman around the time of his reinstatement or immediately thereafter, either by Public Works or by the Superannuation Directorate in Shediac, New Brunswick, that set out the precise amount that was said to be owing, the basis for the claim, or options for how the amount could be repaid.

[7] In fact, nothing was done about the repayment of pension benefits for quite some time - even though there were opportunities, unfortunately many not under the best of circumstances. On May 8, 2003, Mr. Schenkman commenced an action in the Ontario Superior court seeking damages for a number of employment related matters. He also filed complaints to the Canadian Human Rights Commission. Throughout this time, neither the employer nor the pension plan administrator took any steps to give Mr. Schenkman written notification of the amounts that were asserted to be owed. The Defendant's position is that the onus was somehow on Mr. Schenkman to raise the matter of the pension overpayment either prior to or in the course of these proceedings, to ask for clarification, or ask for specific information on the amounts owing, and how they were to be repaid.

[8] The Ontario Court action and the Canadian Human Rights complaints were all settled through a global mediation conducted by George Adams. As part of the settlement, Mr. Schenkman

resigned from Public Works and Government Services Canada effective September 10, 2004 and he applied to receive his pension benefit from the Public Service Superannuation Plan.

[9] Shortly thereafter, in correspondence dated September 13, 2004, Mr. Schenkman received what the Defendant describes as “the standard information package for prospective retirees”. Part of the package addressed insurance matters, but, subject to the usual disclaimer, it also clearly set out the amount of Mr. Schenkman’s immediate annuity entitlement, expressed in annual and monthly amounts, (\$41,354.04 and \$3,446.17 respectively). Nothing was stated regarding any overpayment.

[10] In that respect, Mr. Schenkman received two letters, each dated November 1, 2004, and each from Ms. Barbara Sowerby of the Superannuation, Pension Transition and Client Services Sector in Shediac, New Brunswick. One letter enclosed his pension statement with information regarding the amount of his monthly pension benefit. The second letter made reference to his re-employment in the Public Service in August 2002 with full reinstatement retroactive to January 7, 1999. It stated that because Mr. Schenkman had been compensated for all lost salary and benefits, the amount of pension benefit he received in that timeframe was an overpayment and had to be repaid.

[11] The total lump sum amount of the overpayment was stated at \$73,515.01, which Mr. Schenkman was advised he could pay in a single lump sum or in monthly deductions from his pension benefit in the amount of \$585.96 (an amount that included a charge for a life insurance policy taken out by Public Works for the amount of the overpayment). Mr. Schenkman was

required to respond within thirty days, or else it would be assumed that he had chosen the latter option.

[12] Mr. Schenkman's counsel wrote to Ms. Sowerby on November 10, 2004 inquiring as to the legal basis in any legislation which authorized the demand and the unilateral deduction of any amount from Mr. Schenkman's monthly benefit. Counsel also made reference to the settlement before George Adams that he thought had resolved all matters between the parties and involved the resignation of his client and the release of all claims. No response was received, and Mr. Schenkman himself wrote on February 8, 2005.

[13] On March 10, 2005, a response was received from Ms. Melissa Soucoup, Policy & Legislation Advisor at Public Works and Government Services Canada – Superannuation, Pension Transition and Client Services Sector. The letter states as follows:

...According to Section 29 of the *Public Service Superannuation Act* (PSSA), when a person who is entitled to an annuity becomes re-employed in the Public Service and a contributor under the PSSA, whatever right or claim that he may have to the annuity shall be terminated without delay. Since the Public Service Staff Relations Board Decision of July 18, 2002, reinstated Mr. Schenkman's employment and he, therefore, became a contributor under the PSSA, he is no longer entitled to any annuity under the PSSA, retroactive to the date of his reinstatement of employment. This resulted in an overpayment of Mr. Schenkman's pension in the amount of \$73,510.01.

According to Subsections 6(1) of the *Public Service Superannuation Regulations* (PSSR), where an amount has been paid in error under the Act to any person on account of any annuity or annual allowance, the Minister shall forthwith demand payment from that person of amount equal to the amount paid in error. Further, subsections 6(2)

and (3) of the PSSR state that where a person does not elect to pay the amount of the overpayment in a lump sum within 30 days from the date on which the repayment is requested, he shall be assumed to have chosen a monthly, life insured, form of recovery. Although Mr. Schenkman's pension was not initially paid in error, it was later deemed to have been paid in error as a result of the reinstatement of his employment, as a person cannot be a contributor under the PSSA and at the same time be in receipt of a pension under the Act.

Mr. Schenkman commenced this action on June 2, 2005. The claim seeks an interim and permanent injunction restraining Public Works from making monthly deductions from Mr. Schenkman's pension; reimbursement of all monies Mr. Schenkman states were wrongfully deducted, and damages for bad faith and breach of fiduciary duty in the amount of \$250,000.00.

### **Discussion**

[14] Whether or not there was a pension overpayment that Mr. Schenkman is obliged to repay is not the issue on this motion. That Public Works, however, waited until after Mr. Schenkman retired to make the claim is unfortunate. It creates the most hardship. The claim for repayment could arguably have been made at the time of Mr. Schenkman's reinstatement and simply deducted from amounts owing to him for lost wages. The demand could also have been made while Mr. Schenkman was re-employed, and earning a higher income. The claim for pension overpayment could also have been addressed in the mediation before George Adams. If the claim had been made at any of these junctures, Mr. Schenkman could, if he disputed the claim, have had access to the grievance procedure. As a former employee and retiree, his rights to the union's representation and grievance procedure is not clearcut, but rather doubtful.

[15] Instead, Public Works waited until after Mr. Schenkman's resignation, and even then did not mention any claim for overpayment in the initial communication with him in September of 2004 regarding his retirement benefits. The first written notification of the exact amount said to be owing and demand for repayment was made in November of 2004, some two and a half years after Mr. Schenkman's reinstatement.

[16] As noted above, the evidence submitted by the Defendant, through the affidavit of Ms. Linda Bellissimo who is a Supervisor, Compensation Services, Ontario Region, Public Works and Government Services Canada, puts the burden on Mr. Schenkman to make the inquiries and ask the right questions, yet for all the communications Public Works had with Mr. Schenkman regarding his salary, benefits and terms of reinstatement that detailed retroactive salary payments, superannuation deficiencies (contributions), reimbursement of Mr. Schenkman for dental care premiums and the like, Ms. Bellissimo states at paragraph 25 of her affidavit, that she "did not mention the superannuation repayment requirement as [she] was unaware of the amount thereof, which was being dealt with by Superannuation".

[17] There does not appear to be an appreciation of the obligations an employer and pension plan administrator have to give plan members full, accurate and timely disclosure of their benefits, entitlements and obligations. For his part, Mr. Schenkman appears to be under the impression that he is entitled to receive a pension for the same period of time for which he has been awarded full pay and for which he has made pension contributions and accrued pensionable service.

[18] In any event, however Mr. Schenkman's file may have been administered, the proper proceeding to seek an order essentially setting aside the decision to deem an overpayment and stop the steps to recover the overpayment, is an application for judicial review. The basis for the decision deeming the overpayment and the authority to enforce repayment is found in the *Public Service Superannuation Act and Regulations*, as referred to in the letter to Mr. Schenkman's counsel of March 10, 2005. Whether or not that basis is valid and whether or not the enforcement of repayment is authorized, are issues that can only be determined in this case in an application for judicial review.

[19] As stated by the Federal Court of Appeal in *The Queen v. Grenier*, 2005 F.C.A. 348, a plaintiff must challenge an administrative decision by way of an application for judicial review in an attempt to have the administrative decision invalidated, as opposed to an action. To permit otherwise would be to permit indirect or collateral attacks on decisions made under statutory authority. In that respect, the manner of proceeding is not simply a matter of form - there is a public interest in precluding the use of tort claims to engage in collateral attacks on decisions that are or should be final and that may be reviewed against the proper and applicable standard of review. To permit a collateral attack on a decision by way of action could encourage conduct contrary to a statute's objects and would tend to undermine the statute's effectiveness.

[20] As in *Michaud v. Canada (Attorney General)*, [2000] F.C.J. No.1999 (T.D.), having selected the wrong procedure, the only recourse at this juncture is for Mr. Schenkman to move for an extension of time to commence an application, with valid reasons to explain the delay.



**ORDER**

**THIS COURT ORDERS that**

1. The statement of claim is struck, and the action is dismissed.
2. If the parties cannot agree on costs they may, within thirty days of the date of this Order, file written submissions, no longer than three pages in length, to address the matter of costs.

“Martha Milczynski”  
\_\_\_\_\_  
Prothonotary

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** T-957-05

**STYLE OF CAUSE:** ISAC SCHENKMAN v. HER MAJESTY THE QUEEN  
IN RIGHT OF CANADA

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** December 13, 2005

**REASONS FOR ORDER  
AND ORDER:** Milczynski P.

**DATED:** August 10, 2006

**APPEARANCES:**

Mr. Morris Cooper FOR THE PLAINTIFF

Ms. Lois Lehmann FOR THE DEFENDANT

Mr. Roy Lee

**SOLICITORS OF RECORD:**

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