Docket: 2006-1736(IT)G

BETWEEN:

MIKE SCHEWE,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Appeal heard on October 27, 2009, at Kelowna, British Columbia

Before: The Honourable Justice T.E. Margeson

Appearances:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Elizabeth McDonald

JUDGMENT

The appeal from the assessment made under the *Income Tax Act* for the Appellant's 2001 taxation year is allowed, without costs, and the assessment is referred back to the Minister of National Revenue for reconsideration and reassessment on the basis that the amount in question was not a retiring allowance under subsection 248(1) of the *Act* and was not taxable in the year in question under the provisions of subparagraph 56(1)(*a*)(ii) of the *Act*.

There will be no costs.

Signed at Winnipeg, Manitoba, this 26th day of January 2010.

"T.E. Margeson"

Margeson J.

Citation: 2010 TCC 47
Date: 20100126
Docket: 2006-1736(IT)G

BETWEEN:

MIKE SCHEWE,

Appellant,

and

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Respondent.

REASONS FOR JUDGMENT

Margeson J.

[1] This appeal is from an assessment by the Minister of National Revenue, by which he added $90,000.00 to the income of the Appellant for the 2001 taxation year which the Appellant received as an award for the breach of his contract of employment with Okanagan University College ("OUC"). OUC issued a T4A information slip for that amount.

[2] The Minister issued an arbitrary assessment on March 11, 2004 for ninety thousand dollars, taking the position that this amount constituted a "retiring allowance" as defined in subsection 248(1) of the *Income Tax Act* (the "*Act*"), as it was

> … an amount received…
>
> (b) in respect of a loss of an office or employment of a taxpayer, whether or not received as, on account or in lieu of payment of, damages or pursuant to an order or judgment of a competent tribunal…

and must be included as income pursuant to subparagraph 56(1)(*a*)(ii) of the *Act*.

Facts

[3] The parties filed an agreed statement of facts as follows:

2. The Appellant began employment with the Okanagan University College (the "University") in 1981 as an instructor.

3. In the fall of 1990, the Appellant was appointed part-time Assistant Dean, Vocation Programs at the University, effective January 2, 1991.

4. On December 31, 1990, the Appellant was appointed Dean of Vocational Programs at the University. A copy of the letter of appointment dated December 31, 1990 is attached as **Appendix 1** to the Statement of Facts.

5. In 1993, amendments were made by the University to their Policy for Administrative Staff (the "Policy"), which governed the Appellant's position as Dean. A copy of the Policy is attached as **Appendix 2** to the Statement of Agreed Facts.

6. In 1995, the Appellant, at his option under the amendments to the Policy, requested an assessment from the University of his eligibility to qualify for an instructor's position in addition to the position as Dean.

7. By letter dated April 21, 1995, the Selection Committee for the University unanimously recommended that the Appellant's position as Dean have a full-time continuing position of Instructor attached to it (the "Instructor Position"). A copy of the letter dated April 21, 1995, including schedule "C", is attached as **Appendix 3** to the Statement of Agreed Facts.

8. The University terminated the Appellant's employment and it offered him severance of certain lump sum payments, which the Appellant did not accept.

9. The Appellant received no payment from the University concurrent with his termination.

10. The Appellant commenced a suit in the Supreme Court of British Columbia against the University for wrongful dismissal and breach of contract.

11. Mr. Justice Brooke of the British Columbia Supreme Court issued a judgment in favour of the Appellant on March 6, 2001 [*Schewe v. Okanagan University College*, 2001 BCSC 343, 103 A.C.W.S. (3d) 747].

12. After the judgment was rendered, the University paid the Appellant the $90,000.00 in damages for breach of contract, as ordered.

13. The Appellant's counsel requested pre-judgment interest from the University on the $90,000.00 award for breach of contract, but that request was refused. A copy of the March 13, 2001 letter from counsel for the University to counsel for the Appellant concerning pre-judgment interest is attached as **Appendix 4** to the Statement of Agreed Facts.

14. The Appellant's 2001 taxation year was arbitrarily assessed by the Minister of National Revenue on March 11, 2004 to include the $90,000.00 received from the University in the Appellant's income as a retiring allowance.

15. The Appellant's 2001 taxation year was subsequently reassessed by the Minister of National Revenue on November 29, 2004, following an objection by the Appellant, to allow the Appellant a deduction of $26,103 for legal fees.

[4] Additional evidence was given by Cynthia Borch who was an auditor for CRA. She has taken courses in Business Administration and Accounting.

[5] In 2004, she handled the assessment of the Appellant and considered his objection. She received the T4A issued by OUC. This was admitted into evidence as Exhibit R3. The Appellant did not file a T1 return, thus the arbitrary assessment.

[6] She allowed a deduction of $26,103 for legal fees. No deductions were made by OUC from the payment.

Argument of the Respondent

[7] In written and oral argument, counsel for the Respondent said that the Appellant had the right of a full-time continuing position as instructor in addition to his position of Dean. There was a gap in time between the time where the Appellant was assessed (November 1, 1999) and the time when he intended to return to the workforce as an instructor (July 1, 2001).

[8] However, the factual findings of the Court to determine the terms of the employment contract, and to determine whether or not there had been a breach, indicate that the employment as Dean, and the attached instructor position were inextricably linked. This brings the present case outside of the case of *Schwartz v. The Queen*, 96 D.T.C. 6103 (S.C.C.).

[9] Here there was impending employment in the future. Thereby a continuing relationship and that makes the Appellant's receipt here, taxable.

[10] The Appellant's seniority in relation to determining the damages from the loss of the instructor position was tied to the date when the continuing instructor position attached to his position of Dean.

[11] The Court found that Appendix "C" to the Policy for Administrative Staff formed part of the Appellant's employment contract. That policy indicated that the instructor position was available by a Dean upon the giving of proper notice.

[12] Nothing in the language of Appendix "C" required a Dean electing to assume an attached continuing position of College instructor to go without employment or pay for any period of time prior to the change becoming effective. The Appellant did not elect to take up the attached instructor position until November 22, 1999.

[13] The award in issue was ordered to be paid as damages for the loss of the instructor position, in respect of the Appellant's loss of employment, and was intended to compensate him for loss of employment and benefits (see *Tremblay v. Her Majesty the Queen*, 2009 TCC 437, 2009 D.T.C. 1284 at para. 35 and 46). At the time, the University breached the employment contract with respect to allowing the Appellant to take up the attached instructor position, the Court found that:

> While the Plaintiff was summarily dismissed effective November 1, 1999, he retained his status to claim benefits throughout the period of notice of at least three months [*Schewe v. Okanagan University College*, 2001 BCSC 343, 103 A.C.W.S. (3d) 747].

[14] Therefore, it is clear that the damages awarded to the Appellant clearly related to his past service with the University and specifically related to the benefit he had elected to assure (i.e. the attached instructor position) while he was entitled to do so.

[15] Counsel maintained that there were four specific factors that made it clear that the award for loss of the attached instructor's position was a retiring allowance and not an award for loss of "prospective" or "intended employment":

(a) The instructor position elected for by the Appellant attached to his ongoing contract of employment as Dean years earlier in 1995;

(b) The instructor position which attached to the contract of employment was a benefit granted to the Appellant during the continuance of employment, the loss of which warranted compensation in damages.

(c) The Appellant exercised, in 1999, his right to take the instructor position in accordance with Appendix "C" at a time when he retained his status to claim benefits under the employment contract; and

(d) The Appellant's seniority for the instructor's position (which the Court considered in calculating the damages accrued) extended back in time to l995 when the instructor position actually attached to the Appellant's position as Dean.

[16] These factors, together with all of the findings of Brooke J. in *Schewe v. Okanagan University College, supra*, make it clear that the case at bar is not a situation where the terminated employee had no existing employment relationship with, nor obligation to provide services to the employer as in *Schwartz v. R., supra.*

[17] Counsel relied upon the case of *Anderson v. The Queen* 98 D.T.C. 1190 (T.C.C.) and said that in the case at bar as there, there was a nexus between the damages and the loss of employment.

[18] She reiterated that nothing in the agreement required that there be a gap in the employment. It only happened that way because of the way that the election was made.

[19] The Appeal should be dismissed.

Argument of the Appellant

[20] In written and oral submissions the Appellant said that the appeal should be allowed. The trial judge in the Supreme Court decided two different issues [*Schewe v. Okanagan University College, supra]*:

(1) The institution was required to pay the Appellant compensation for lack of notice and appropriate severance pay, and

(2) The institution was required to pay compensation of $90,000.00 for denying the right to further employment on the basis of his contractual instructional position.

[21] The institution refused to pay interest on the outstanding $90,000.00 owed by taking the position that it was awarded as damages for breach of contract, which

contract would have allowed him the right to take up the instructional position and it was not subject to interest.

[22] There was no monetary value to moving the instructor's position attached to his position as Dean. It required a selection process as if he were starting all over again. It had no bearing on his position as Dean.

[23] The attached position does not guarantee future employment. However, there was a termination provision in the administrative policy.

[24] The position of Dean could be terminated at any time without cause and without relief. It was immaterial that he had no attached position.

[25] Proper notice was given of the intention to take up the position of instructor effective July 1, 2001. He was told that it was not an attached position to Dean and so he sued.

[26] The judgment said two distinct parts: (1) Wrongful dismissal as Dean and (2) he was paid nine months salary and paid tax on it.

[27] The award of $90,000.00 was for the attached position, much like that in *Schwartz v. R., supra*.

[28] He took the position that when you have regard to subsection 248(1), it does not define when someone becomes an employee. We all may have a contract of employment, but he was not being paid as an employee. The employment had not yet begun. The contract covered future employment. He was prepared to start his employment under the contract of employment on July 1, 2001. He was prepared to access the position of instructor as of that date and the university said no.

[29] The Court awarded the $90,000.00 for damages for breach of contract for that position. It recognized that there would be a gap in time when the university would not have to employ him. According to the income tax bulletins where the award is for the breach of a pre-employment contract, it is not taxable.

[30] As in *Schwartz v. R., supra*, it was not a retirement allowance because the award was not with respect to a loss of employment under subsection 248(1). One must consider the starting point. One must be in the service. This excludes prospective or intended employment.

[31] The Appellant opined that the other cases cited by counsel for the Respondent involved people who were working.

[32] The employment does not start when the contract is signed. Subsection 248(1) refers to words of employment, loss of office or employment. The taxpayer must be an employee.

[33] In Income Tax Bulletin IT-337R4 (consolidated) the words loss of employment or office are discussed and two questions are added to determine whether a connection exists for purposes of a retiring allowance which are as follows:

> 1 – But for the loss of employment would the amount have been received? And
> 2 – Was the purpose of the payment to compensate a loss of employment?
>
> Only if the answer to the first question is "no" and the answer to the second question is "yes" will the amount received be considered a retiring allowance.

[34] In this case, the answer to the first question is "yes" and the answer to the second question is "no". Therefore, it was not a "retiring allowance" as defined.

[35] The award here was for something occurring after the date of the judgment.

[36] The appeal should be allowed.

Analysis and Decision

[37] The parties have correctly identified the sole issue in this case. The resolution of this issue calls for the consideration of subparagraph 56(1)*(a)*(ii) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th supplement), as amended, and the definition of "retiring allowance" in subsection 248(1) of the *Act*. If the amount in question is determined to be a "retiring allowance" under subsection 248(1) of the *Act*, then it is taxable in the hands of the Appellant under subparagraph 56(1)*(a)*(ii) of the *Act*.

[38] Subsection 248(1) of the *Act* defines "retiring allowance" as follows:

> "retiring allowance" means an amount (other than a superannuation or pension benefit, an amount received as a consequence of the death of an employee or a benefit described in subparagraph 6(1)*(a)*(iv)) received

> (a) on or after retirement of a taxpayer from an office or employment in recognition of the taxpayer's long service, or
>
> (b) in respect of a loss of an office or employment of a taxpayer, whether or not received as, on account or in lieu of payment of, damages or pursuant to an order or judgment of a competent tribunal,
>
> by the taxpayer or, after the taxpayer's death, by a dependant or a relation of the taxpayer or by the legal representative of the taxpayer.

[39] To determine the nature of the payment we must consider the judgment of Brooke J. as indicated in the judgment in favour of the Appellant of March 6, 2001 [*Schewe v. Okanagan University College*, *supra*].

[40] When considering whether the attached position formed part of the contract of employment, he said at page 9 of the judgment,

> I find that the attached position does form part of the contract of employment. While it did not form part of the contract at the time it was entered into between the parties, it is like a benefit given by an employer to an employee during the continuance of the employment.

[41] The learned trial judge went on to find that the Appellant's counsel correctly invoked the request for the attached instructional position effective July 1, 2001. Later on, at paragraph 15 he said:

> … The defendant deprived the plaintiff of something of value. The question then is what damages reasonably flow from this aspect of the defendant's breach of the contract of employment?

[42] The learned trial judge obviously did not have income tax implications in mind when he made this statement or he may have gone to greater pains to describe the award.

[43] However, as the Appellant pointed out in his argument, the Court also found that the Appellant was wrongfully dismissed and awarded damages to him based upon nine months salary.

[44] At paragraph 24 of the judgment, the Court said:

> For the loss of the attached position, I award the plaintiff $90,000. I do so taking into account the uncertain value of a return to the Bargaining Unit as the junior member

> of that bargaining unit "for "layoff purposes", as well as the risks of a dispute with the union or litigation that the defendant would have faced had it terminated the plaintiff after one year.

[45] This Court is satisfied that the trial judge was talking about a contract of employment which would have been acted upon in the future, for example, after July 1, 2001 in accordance with the Appellant's notice.

[46] This Court accepts the Appellant's argument in that regard.

[47] This Court does not accept the Respondent's submission that the employment as a Dean and the "attached position" were inextricably linked. They were linked in the sense that while the Appellant was Dean he had satisfied the college that he was qualified to hold the attached position of instructor; but that the two jobs were distinct; and, in order to obtain the instructor's position the Appellant had to follow certain procedures, which he did.

[48] This Court accepts the argument of the Appellant that the Court awarded the $90,000 for breach of contract for the attached position, which was, in essence, a contract for future employment.

[49] It is satisfied, on the basis of all of the evidence that the award for damages for the loss of the instructor position was not directly related but was extraneous to the loss of the employment as Dean. It is satisfied that the damages awarded to the Appellant clearly did not relate to his past service but for the loss of a future position, for future employment that he had elected to pursue.

[50] In so concluding, the Court is not unmindful of the Respondent's position that the instructor position attached to this ongoing contract of employment as Dean years earlier in 1995. However, he was employed as Dean during that time and he had no contract of employment as instructor because he had not yet elected to take up that position.

[51] Again, the right to take up the instructor position was a benefit but it had nothing to do with his position as Dean, from which he could have been dismissed at any time.

[52] The fact that the award took into account the seniority of the position back to 1995 is not determinative of the issue nor is the fact that the Appellant exercised, in 1999, his right to take up the instructor position in accordance with Appendix "C" at

a time when he retained his status to claim benefits under the employment contact (as Dean). He would have no rights under the instructor position until he took up that position in the future.

[53] In the case of *Schwartz v. The Queen, supra*, Rip J., as he then was, concluded that:

> What the appellant lost when the contract was cancelled, […] was not his employment or his position, but the legal right entitling him to employment in the future.

[54] As argued by the Appellant in the case at bar, that was his situation. He was prepared to start his contract on July 1, 2001, but the university said no. The Court accepts the Appellant's argument that the award was for something occurring after the date of the judgment.

[55] The Court agrees with the Appellant that the answer to the question, but for the loss of employment would the amount have been received is "yes" and the answer to the second question, was the purpose of the payment to compensate a loss of employment is "no".

[56] In the end result, the Court finds that the award received by the Appellant was not a "retiring allowance" under the definition found in subsection 248(1) of the *Act* and was not taxable in the year in question under subparagraph 56(1)*(a)*(ii) of the *Act.*

[57] The appeal is allowed and the matter remitted to the Minister for reassessment and reconsideration based upon these findings.

[58] The Appellant was not represented by counsel and the parties were able to agree upon the facts. There will be no costs.

Signed at Winnipeg, Manitoba, this 26th day of January 2010.

"T.E. Margeson"

Margeson J.

CITATION:	2010 TCC 47
COURT FILE NO.:	2006-1736(IT)G
STYLE OF CAUSE:	MIKE SCHEWE and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Kelowna, British Columbia
DATE OF HEARING:	October 27, 2009
REASONS FOR JUDGMENT BY:	The Honourable Justice T.E. Margeson
DATE OF JUDGMENT:	January 26, 2010

APPEARANCES:

For the Appellant:	The Appellant himself
Counsel for the Respondent:	Elizabeth McDonald

COUNSEL OF RECORD:

For the Appellant:

Name:	N/A
Firm:	

For the Respondent:	John H. Sims, Q.C. Deputy Attorney General of Canada Ottawa, Canada