



# In The Supreme Court of Bermuda

CIVIL JURISDICTION

2015: No. 385

**BETWEEN:-**

**HIRAM EDWARDS**

**Plaintiff**

**-and-**

**THE MINISTER OF FINANCE**

**First Defendant**

**-and-**

**THE ATTORNEY GENERAL**

**Second Defendant**

## **JUDGMENT**

**(In Court)**

*Action to enforce declaration – whether decision of Accountant General to withhold pension payments pursuant to Public Treasury (Administration and Payments) Act 1969 s 9 was lawful – whether Accountant General could reconsider administrative decision – whether res judicata or abuse of process*

Date of hearing: 11<sup>th</sup> April 2016

Date of judgment: 15<sup>th</sup> April 2016

Mr Kenrick L James, James & Associates, for the Plaintiff

Ms Shakira J Dill, Attorney General's Chambers, for the First and Second Defendants

## **Background**

1. By a generally endorsed writ of summons dated 21<sup>st</sup> September 2015, the Plaintiff claims payment of \$154,527.37 from the First Defendant, together with interest, and/or a declaration that the First Defendant has unlawfully withheld that sum from him.
2. The Plaintiff's professed intention in bringing this action is to enforce a declaration granted to him by the Court of Appeal on 24<sup>th</sup> March 2014 in Edwards v Minister of Finance No 1<sup>1</sup> [2014] Bda LR 29 at para 13 ("the Declaration"):

*"The [First Defendant] unlawfully deducted payments from the [Plaintiff's] pension under Section 12 of the 1969 Act between May 2000 and May 2004 in a total sum to be agreed between the parties or in default of agreement to be determined by the trial judge."*

3. The deductions, which were made by the Accountant General, for whose actions the First Defendant has ministerial responsibility, were to recover the amount of pension overpaid to the Plaintiff while he was reemployed by the Government of Bermuda as a Temporary Assistant Telecommunications Inspector. The deductions were made pursuant to section 12 of the Public Treasury (Administration and Payments) Act 1969 ("the 1969 Act"), which provides in material part:

*"(1) This section shall have effect with respect to the payment out of the Consolidated Fund of sums –*

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<sup>1</sup> The present case being Edwards v Minister of Finance No 2.

*(b) in respect of pension payable to any person under the Public Service Superannuation Act 1981...*

*(4) Notwithstanding anything in the foregoing provisions of this section, where payment in respect of any of the matters specified in subsection (1) is made to any person in excess of the rate appropriate in the circumstances then (without prejudice to any other lawful remedy which may be taken by any person) the Accountant-General may withhold from the person to whom the overpayment was made the payment in whole or in part of any sums falling to be paid to that person out of public funds until the amount of the payments withheld equals the amount originally overpaid to that person, ...”*

4. However the deductions were made unlawfully because in breach of the requirements of natural justice the Plaintiff was not given an opportunity to make representations as to whether, and if so, at what rate, they should have been made.

5. Baker JA, giving the judgment of the Court of Appeal, explained the matter thus at para 6:

*“The Accountant-General was exercising an administrative power to interfere with the appellant’s statutory right to payment of a pension. Although the amount to be deducted was an arithmetical calculation, the decision whether to make a deduction and, if so the amount to be repaid each month, was a matter for the Accountant-General’s discretion. The Accountant-General should have given the appellant an opportunity to make representations against this discretionary decision. His failure to do so meant that his decision to withhold pension payments, which would otherwise have been due to the appellant, was made unlawfully. Against this decision there is no appeal by the Accountant-General.”*

6. The Court of Appeal remitted the matter back to this Court to assess the amount payable under the Declaration. At a hearing on 29<sup>th</sup> August 2014 the Court assessed the total amount owing to the Plaintiff as \$457,722.84, of which \$114,192.17, plus 33 days interest at a daily rate of \$21.90 per day, represented the unlawfully deducted payments. The figures, which were calculated by the Plaintiff, were by consent. The balance was made up of other categories of loss which had been awarded to the Plaintiff at first instance.

7. Meanwhile, on 9<sup>th</sup> and 28<sup>th</sup> May 2014, the Accountant General wrote to the Plaintiff to inform him that he was considering making a fresh decision to withhold the amount of the overpayment, which he calculated as amounting to \$154,525.37, but inviting the Plaintiff to make representations before any such decision was taken. In other words, the Accountant General now sought to do, as he saw it, lawfully what he had previously done unlawfully.
8. The Court was informed of the Accountant General's position at the hearing on 29<sup>th</sup> August 2014. The Plaintiff through his counsel submitted that, by reason of the Court of Appeal's 24<sup>th</sup> March 2014 decision, the course of action proposed by the Accountant General was unlawful. The Court took the view that it was not seised of the issue, as the matter had been listed purely for the assessment of the amount payable under the Declaration, and therefore made no ruling upon it.
9. However the Court invited the First Defendant to give the Plaintiff a further 14 days to make representations to the Accountant General. This was on the basis that the Plaintiff's response would be without prejudice to his primary contention that the Accountant General could not lawfully recoup the overpaid pension.
10. The Plaintiff did not avail himself of the opportunity to make representations to the Accountant General. This was despite a chasing letter from the Second Defendant's Chambers dated 16<sup>th</sup> September 2014. He took the view that there was no need because the course of action being taken by the Accountant General was unlawful.
11. On 30<sup>th</sup> September 2014 the Accountant General wrote to the Plaintiff stating that in the circumstances:

*"I therefore write to advise you that I have decided to exercise my discretion and withhold the sum of \$154,525.37 from the \$457,722 plus interest which is due to you from public funds, pursuant to section 12 of the Public Treasury (Administration and Payments) Act 1969. You have not provided any representations as to why I should not exercise my discretion in relation to the overpayment. Neither have you shown how such*

*withholding would affect you in any way, nor that you relied on the overpayment to your detriment.”*

12. At the Court’s suggestion, both parties wrote to the Court of Appeal, c/o the Registrar, seeking clarification as to whether its judgment prohibited the Accountant General from his proposed course. By a letter dated 25<sup>th</sup> March 2015 the Registrar advised the parties that Baker JA, who was by now the President of the Court of Appeal, had asked her to advise counsel of the following:

*“The Court was not invited to rule and did not rule on any subsequent exercise or purported exercise of the Minister’s discretion under section 12 of the Act. Any rise as to the lawfulness of the action described in the Accountant General’s letter of 30 September 2014 is a separate matter between the parties.”*

### **Discussion**

13. The decision of the Accountant General to withhold monies from the Plaintiff was a decision made in the exercise of an administrative power. See the judgment of Baker JA at para 6, quoted above. An administrator can generally reconsider his decision, should he wish to do so. As Kawaley J (as he then was) stated in Smith v Minister of Culture and Rehabilitation [2011] Bda LR 7 at para 17:

*“The principle of *functus officio*, the rule that a body which has discharged its statutory functions in respect of a particular decision has no jurisdiction to further consider the matter having rendered its decision (unless the decision is set aside by a higher court or tribunal), only applies in relation to judicial or quasi-judicial tribunals.”*

14. Lord Reid put the point succinctly in Ridge v Baldwin [1964] AC 40 HL at 79:

*“I do not doubt that if an officer or a body realises that it has acted hastily and reconsiders the whole matter afresh, after affording every person affected a proper opportunity to present his case, then its later decision will be valid.”*

15. This principle would not apply if the statute or statutory instrument which conferred the power to make the relevant decision provided that the decision

could not be retaken. There is no such provision in section 12 of the 1969 Act.

16. I am satisfied that there is therefore nothing in the nature of the statutory power conferred upon the Accountant General to withhold payment of pension monies which precluded him from taking a fresh decision to withhold the amount of the overpayment from the Plaintiff.
17. Turning to Edwards v Minister of Finance No 1, the Court of Appeal: (i) granted the Plaintiff a declaration that the Accountant General had acted unlawfully in that he had decided to make a deduction without first giving the Plaintiff an opportunity to make representations as to why no deduction should be made; and (ii) remitted the matter to this Court to quantify the amount which had been unlawfully withheld. It did not find expressly or by implication that the Accountant General was therefore prohibited from taking a fresh decision after giving the Plaintiff the opportunity to make representations. Ie the Court did not find that in the Plaintiff's case the principle stated by Lord Reid in Ridge v Baldwin did not apply.
18. In the circumstances, and contrary to the Plaintiff submissions, the Accountant General's second decision to recover the amount of pension overpaid to the Plaintiff did not offend against the principle of *res judicata* and was not an abuse of process.
19. The Plaintiff has now had ample opportunity to make representations as to why the Accountant General should not have exercised his discretion to withhold the amount of the overpayment. He could have argued, had the facts so permitted, that as a result of the payment he had altered his position to his detriment, such that it would be unfair to recover the monies. Or he could have argued that at this remove in time he was not in a position to make the representations which he would or might have made had the Accountant General sought them when first considering whether to exercise his discretion. But the Plaintiff did not do so. He has shown no good reason why he should be permitted to keep a windfall at the expense of the public purse. The obvious inference is that there is none.

20. The Plaintiff's claim is dismissed. I shall hear the parties as to costs.

Dated this 15<sup>th</sup> day of April, 2016

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Hellman J