Federal Court  Cour fédérale

Date: 20211229

Docket: T-114-21

Citation: 2021 FC 1480

Ottawa, Ontario, December 29, 2021

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

SATNAM DHALIWAL

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the decision of a Final Level Adjudicator in the Royal Canadian Mounted Police ("RCMP") grievance system. The RCMP member submitted receipts for "medical assisted procreation male/female" as a result of his male factor infertility. The adjudicator found that he would be reimbursed only for the portion relating to intra-cytoplasmic sperm injection ("ICSI"), but denied the Applicant reimbursement for costs

associated with in-vitro fertilization ("IVF"). The reason he was denied was because the procedures were performed on his non-member spouse decision-maker.

II. Background

[2] The Applicant, Cpl. Dhaliwal, is a member of the RCMP. He is married, and his spouse is not an RCMP member. In 2012, the Applicant learned that he suffered from male factor infertility. His doctor recommended that the Applicant and his spouse pursue medically-assisted fertility treatments. They used the medically-assisted procreation method of IVF using the ICSI.

[3] In 2017, the Applicant submitted expense claims totalling $35,710 for the costs of the fertility treatment, seeking reimbursement. $28,400 of the costs were associated with IVF, and $6,770 were associated with ICSI performed on the Applicant. On June 27, 2017, the RCMP notified the Applicant that $6,770 was approved for reimbursement which was the cost of the ICSI procedures performed on him but no reimbursement was approved for the cost of the IVF procedures.

[4] On July 17, 2017, the Applicant submitted a grievance at the initial level. He argued that the denial of his reimbursement for IVF was inconsistent with RCMP policy, which covers "medically-assisted procreation male/female." In the alternative, he submitted that if the policy is interpreted as excluding reimbursement for IVF to male members, the policy was in contravention of the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6) by discriminating on the basis of sex and disability. He also argued that ICSI and IVF are interrelated procedures as you

cannot have procreation without a male and female so the policy should be interpreted as paying for all the costs related to procreation.

[5] On February 10, 2020, an Initial Level Adjudicator dismissed the grievance. The Initial Level Adjudicator's rationale was that the Applicant had not established, on a balance of probabilities, that the denial of reimbursement was inconsistent with the applicable legislation and policies (pointing to the fact that the Regulations barred coverage for procedures performed on a non-member spouse), and that he suffered a prejudice as a result, citing the *RCMP* Regulations and case law for this conclusion.

[6] On February 21, 2020, the Applicant referred his grievance for consideration at the final level of the grievance process. On December 11, 2020, the Final Level Adjudicator confirmed the Initial Adjudicator's decision, and dismissed the Applicant's grievance.

III. Issue

[7] A preliminary issue is whether or not to accept a document attached as an exhibit to the Applicant's affidavit that was not in the record.

[8] The issue in this case is whether the decision made by the Final Level Adjudicator was reasonable and procedurally fair.

IV. Standard of Review

[9] As set out by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], at paragraph 23, "where a court reviews the merits of an administrative decision … the starting point for the analysis is a presumption that the legislature intended the standard of review to be reasonableness." I see no reason in this case to deviate from this general presumption. As such, the standard of review in this case is that of reasonableness.

[10] In conducting reasonableness review, a court is to begin with the principle of judicial restraint and respect for the distinct role of administrative decision-makers (*Vavilov* at para 13). When conducting reasonableness review, the Court does not conduct a *de novo* analysis or attempt to decide the issue itself (*Vavilov* at para 83). Rather, it starts with the reasons of the administrative decision-maker and assesses whether the decision is reasonable in outcome and process, considered in relation to the factual and legal constraints that bear on the decision (*Vavilov* at paras 81, 83, 87, 99).

[11] A reasonable decision is one that is justified, transparent, and intelligible to the individuals subject to it, reflecting "an internally coherent and rational chain of analysis" when read as a whole and taking into account the administrative setting, the record before the decision-maker, and the submissions of the parties (*Vavilov* at paras 81, 85, 91, 94-96, 99, 127-128).

[12] As for the standard of review for procedural fairness, the standard of review is, essentially, correctness, though that is not a perfect way to phrase it. As Justice Little succinctly summarized in *Garcia Diaz v Canada (Citizenship and Immigration)*, 2021 FC 321:

> On issues of procedural fairness, the standard of review is correctness. More precisely, whether described as a correctness standard of review or as this Court's obligation to ensure that the process was procedurally fair, judicial review of procedural fairness involves no margin of appreciation or deference by a reviewing court. **The ultimate question is whether the party affected knew the case to meet and had a full and fair, or meaningful, opportunity to respond**… In *Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196, de Montigny JA said "[w]hat matters, at the end of the day, is whether or not procedural fairness has been met" (at para 35).
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> [Emphasis added]

V. Analysis

A. *Respondent*

[13] The Respondent indicated that they need guidance on how to deal with these types of cases, as all they have is the case of *Canada (Attorney General) v Buffett*, 2007 FC 1061 [*Buffett*] by Justice Harrington.

[14] In this instance, I do not see *Buffett* as helpful given the legislation related to coverage within the Canadian Forces is completely different that the RCMP Regulations. The Canadian Forces ties its coverage for procreation assistance to the province's laws where the procedure is performed, which is not the case for the RCMP Regulations. As well, it is important to note that

the area of medically-assisted procreation has advanced considerably since the time of *Buffett*, which began in 1996.

[15] Unfortunately, as you will see from the reasons below this is not the case that will give them the guidance needed.

B. *Preliminary Issue*

[16] The Applicant filed his own affidavit in this matter, containing a decision of the RCMP Initial Level Adjudicator pertaining to the medical expenses of a Corporal X (name anonymized and hereafter referred to as "*Corporal X*") dated January 25, 2016 and attached as Exhibit H of the Applicant's affidavit. The Applicant's affidavit at paragraph 14 states that "In December 2020, I became aware of an earlier decision in which the RCMP had granted a male members' IVF claims…." *Corporal X* being paid for the same medical procedures is critically important to the Applicant's grievance.

[17] The Respondent, in their written submissions, brought to the Court's attention that the contents of the affidavit were not before the decision-maker, and do not meet the recognized exceptions allowing new evidence on judicial review, as set out by Justice Stratas in *Association of Universities and Colleges of Canada v Access Copyright*, 2012 FCA 22 [*Association of Universities*], and therefore should not be allowed.

[18] The Respondent at the hearing pointed out that we only have the initial level decision of *Corporal X*, but provident evidence or submissions to inform the court if there is a final level of

Corporal X's grievance or any other information. The Respondent at the hearing did express their position that the decision of *Corporal X* is not evidence.

[19] The Applicant confirmed at the hearing that *Corporal X* only came to their attention in December, and the decision came out December 11, 2020. The Applicant submitted that they are not using it as evidence *per se*, but rather to show the unfairness occurring in the different treatment of members of the same health benefit. The Applicant did not provide how *Corporal X* came to their attention.

[20] I have no evidence about the distribution or publication of grievance decisions. However, I do have before me a decision (*Corporal X*) that is directly on point with the instant case. To summarize, in *Corporal X* the male member was diagnosed with male-factor infertility and used the ICSI and IVF procedure for medically-assisted procreation. In a very well-reasoned decision, the RCMP paid the male member's bills for both the ICSI and IVF procedures. Some findings that seem particularly apt to our situation are quoted below:

> [12] … the ICSI procedure is not a stand-along procedure and IVF is an essential component of the ICSI and is not unique to gender. The Respondent has not substantiated the fact that IVF should be considered solely a female procedure. **Given that conception, whether it occurs naturally or through medical intervention, requires both genders, this distinction is irrelevant**.
>
> [42] In my opinion, this excerpt from policy supports the Grievor's position. **The AM clearly states that a male or female member is entitled to medically-assisted procreation to the extent that the treatment is not covered through the member's provincial/territorial health care plan and subject to the limitation outlined in the RCMP Benefits Grid. The term medically-assisted procreation includes all the methods or techniques available to allow infertile couples to conceive a child. This goal would not be reached for a male member if only the ICSI treatment would be paid under the RCMP**

> **health care program. Indeed, this procedure alone does not lead to the conception of a child. ICSI is part of the whole IVF process**.
>
> [56] The Grievor has successfully argued that infertility negatively impacts his reproductive rights, which are recognized as a fundamental right by the United Nations' universal declaration of human rights. Furthermore, as a member of the United Nations, Canada is "required to promote, protect, and ensure the full enjoyment of human rights by persons with disabilities and to ensure that they enjoy full equality under the law". The CHRA is Canada's commitment to "extend the laws of Canada to give effect to the principle that every individual should have an equal opportunity with other individuals to live his or her own life without being hindered by discriminatory practices […] [based] on prohibited grounds of discrimination".
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> [Emphasis added]

[21] *Association of Universities* is the leading case to examine when determining the record upon which to judicially review a matter. That case dealt with a motion to strike an affidavit that contained evidence that was not before Copyright Board which went to the merits of the matter before the Copyright Board. Justice Stratas, writing for the Federal Court of Appeal held that "…the differing roles played by this Court and the Copyright Board must be kept front of mind. Parliament gave the Copyright Board – not this Court – the jurisdiction to determine certain matters on the merits, such as whether to make an interim tariff, what its content should be, and any permissible terms associated with it…" (para 17).

[22] Justice Stratas instructed that, as a general rule, "…the evidentiary record before this Court on judicial review is restricted to the evidentiary record that was before the board" (para 19). However, he went on to note that there are a few recognized exceptions that "tend to facilitate or advance the role of the judicial review court without offending the role of the

administrative decision-maker." These are exceptions to the general rule against this Court receiving evidence in an application for judicial review. Justice Stratas first noted that "the list of exceptions **may not be closed**," (emphasis added) and then noted three such exceptions:

> (a) Sometimes this Court will receive an affidavit that provides general background in circumstances where that information might assist it in understanding the issues relevant to the judicial review: see, e.g., *Estate of Corinne Kelley v. Canada*, 2011 FC 1335 at paragraphs 26-27*; Armstrong v. Canada (Attorney General),* 2005 FC 1013 at paragraphs 39-40; *Chopra v. Canada (Treasury Board)* (1999), 1999 CanLII 8044 (FC), 168 F.T.R. 273 at paragraph 9. Care must be taken to ensure that the affidavit does not go further and provide evidence relevant to the merits of the matter decided by the administrative decision-maker, invading the role of the latter as fact-finder and merits-decider…
>
> (b) Sometimes affidavits are necessary to bring to the attention of the judicial review court procedural defects that cannot be found in the evidentiary record of the administrative decision-maker, so that the judicial review court can fulfil its role of reviewing for procedural unfairness: e.g*. Keeprite Workers' Independent Union v. Keeprite Products Ltd*. (1980) 1980 CanLII 1877 (ON CA), 29 O.R. (2d) 513 (C.A.). For example, if it were discovered that one of the parties was bribing an administrative decision-maker, evidence of the bribe could be placed before this Court in support of a bias argument.
>
> (c) Sometimes an affidavit is received on judicial review in order to highlight the complete absence of evidence before the administrative decision-maker when it made a particular finding: *Keeprite*, *supra*.
>
> *Access Copyright,* at para 20

[23] Applying these principles to the document attached to the affidavit is difficult. The difficulty stems from the fact that, though this information is critical and relevant to the decision-making process, it was not in the record. This document is also information that was seemingly only in the Respondent's possession and not available to the Applicant. I do understand that the onus is on the Applicant to adduce evidence before the decision-maker, and that they cannot later

bootstrap their judicial review application with material not before the decision-maker. However, this material may fall into one of the *Access Copyright* exceptions.

[24] To summarize where we are at this point, the Applicant has been denied coverage of a health benefit. As part of his application, he adduced a material document (disputed whether it could be called evidence) which was not before the initial decision-maker. In the factually identical situation a male RCMP member was paid in full (i.e. reimbursement for IVF and ICSI) for the same procedure that the Applicant is seeking reimbursement for. As such, the question before me is whether the *Corporal X* grievance decision can be considered on this judicial review.

[25] On the first question – whether it fits into an *Access Copyright* exception to the general inadmissibility of new evidence on judicial review – I answer in the affirmative as I find it procedurally unfair that it was not before the decision maker.

[26] I think it is clear that the grievance decision of *Corporal X* does not fall into the first exception of providing general background information to assist the Court. I find that the *Corporal X* decision is not general background information.

[27] However, I am of the view that the *Corporal X* grievance falls within the second exception regarding procedural unfairness. In my view, it is necessary for me to consider the documents attached to the affidavit, as there is an underlying procedural unfairness associated with the *Corporal X* grievance not forming part of the evidentiary record before the decision-

maker. As such, in line with exception (b) in *Access Copyright,* I find that it is necessary for me, in these highly limited and fact-specific circumstances, to accept the *Corporal X* decision on this judicial review, despite it not being before the decision-maker, in order for this Court to fulfill its role of reviewing for procedural unfairness.

[28] I do not intend for this to, nor should it, create or broaden the limited exceptions categories found in *Access Copyright*. The circumstances I am dealing with are deeply fact-specific. From the information I have before me it is certain that the decision-maker did not take *Corporal X* into consideration when it was within their knowledge and control, and was likely not public knowledge. I say likely because given privacy interests, it is certainly unlikely that this information is available to other members or the public. Additionally there was no information before the court as to whether the Initial or Final Level Adjudicators would have access to previous decisions. But again it is more than likely Adjudicators would as those documents were within the Respondent's control and part of the grievance system of the RCMP.

[29] As stated earlier, I do not have evidence on the distribution of these grievance decisions or accessibility which would have been very helpful. As a result, I am inferring this is the situation, and in future decisions this inference may be rebutted with the proper factual basis.

[30] Of course, it is clear from *Vavilov* (at para 129) that administrative decision-makers are not bound by their previous decision in a stare decisis manner. However, the Supreme Court of Canada in that case also notes that "administrative decision-makers and **reviewing courts alike must be concerned with the general consistency of administrative decisions. Those affected**

by administrative decisions are entitled to expect that like cases will generally be treated alike and that outcomes will not depend merely on the identity of the individual decision-maker — expectations that do not evaporate simply because the parties are not before a judge" (*Vavilov* at para 129) [emphasis added].

[31] In the instant case, the issue of what procedures should be reimbursed is essentially identical to *Corporal X.* As such, while the decision-maker is not bound by *Corporal X*, it strikes me that this deviation may bring into doubt whether this decision lives up to the standard in *Vavilov* of general consistency in administrative decisions and the expectation that like cases will generally be treated alike. That is, all members should be treated the same when seeking payment of their health benefits. The outcome of what procedures are reimbursed should not, as stated in *Vavilov* at paragraph 129, "depend merely on the identity of the individual decision-maker."

[32] The decision-maker in the instant case said that the Applicant provided them with no evidence that they reimburse female members for both ICSI and IVF. *Corporal X* is an example that is even stronger reason to reimburse for all the procedures. However, by its very nature – and by virtue of the private nature of these matters – this evidence (reimbursing a female member for ICSI and IVF) would be solely in the hands of the decision-makers. As such, in my view, it is procedurally unfair to make such a statement when this evidence may solely be within the possession or knowledge of the decision-maker so the Applicant could never produce this type of evidence unless another member gave it to them.

[33] This statement made above is, of course, complicated by the lack of evidence as to what the procedure or availability of such decisions is, which is something that ought to be made clear upon reconsideration. As well I have no idea how *Corporal X*'s decision came into the Applicant's hands in December and if he could have obtained it sooner. All that is clear is that the Applicant did not have the *Corporal X* case to provide to the decision-maker or to use in his submissions. In this case, the Applicant only obtained it in December, and the decision in his matter was given December 11, 2020; as such, he simply had no opportunity to present it in his submissions.

[34] While the *Corporal X* decision is clearly not a precedent nor does it need to be followed in a manner of stare decisis, it is, in my view, information that the adjudicator should canvass in order to consistently apply the policy of benefits paid to members. Given the facts here – that the decision-maker said he did not provide evidence that others in his position or female members are being reimbursed, all the while being the only party in the proceedings who could possibly have been aware that there are other such cases make this case exceptional. I find the adjudicator is required to apply the policy consistently, and as such, the affidavit and its attachments must be admitted in order to avoid procedural unfairness.

[35] As well, it may be possible that *Corporal X*, could fall into the third exception; namely, that *Corporal X* could be used to highlight the complete absence of evidence before the administrative decision-maker when it made a particular finding. The finding at issue is that there is no evidence that they ever pay female members for ICSI and IVF, unless both procedures are performed on the member that is claiming it. The fact that *Corporal X* – a male

member – was paid for the ICSI and IVF treatments, despite only the ICSI being performed on him (as was the case for the Applicant) shows that the particular finding was made in absence of any evidence. The absence of evidence was because the Respondent did not apply the evidence that they had within their knowledge of other members being reimbursed for both ICSI and IVF whether they are male or female as per the policy that states the coverage is for "medically-assisted procreation male/female".

C. *Analysis*

[36] Having admitted this affidavit and the case of *Corporal X*, I now will examine whether the decision by the Final Level Adjudicator was unreasonable or procedurally unfair.

[37] In the time since *Access Copyright* in 2012, *Vavilov* was decided (in 2019). While *Vavilov* does not contradict *Access Copyright*, it does opine as to consistency in administrative law. As quoted earlier, *Vavilov* at paragraph 129 reads as follows:

> Administrative decision makers are not bound by their previous decisions in the same sense that courts are bound by stare decisis. As this Court noted in Domtar, "a lack of unanimity is the price to pay for the decision making freedom and independence" given to administrative decision makers, and the mere fact that some conflict exists among an administrative body's decisions does not threaten the rule of law: p. 800. **Nevertheless, administrative decision makers and reviewing courts alike must be concerned with the general consistency of administrative decisions. Those affected by administrative decisions are entitled to expect that like cases will generally be treated alike and that outcomes will not depend merely on the identity of the individual decision maker — expectations that do not evaporate simply because the parties are not before a judge.**" [Emphasis added]

[38] In my view, required under the *Vavilov* principles of general consistency of administrative decisions and like cases being treated alike, is the idea that an administrative decision-maker should be careful not to make factual determinations that flatly contradict information within its possession, or which ought to be within its possession, as well as to appropriately explain, differentiate, or address highly factually similar decisions with contradictory outcomes. As mentioned, this is far from a *stare decisis* requirement, and I am mindful that it must not be one. However, in a circumstance such as this where two alike factual circumstances are not being treated similarly, and wherein the Applicant – or those in their position – would not and could not be aware of this differential treatment, such treatment runs afoul of procedural fairness or could be seen as unreasonable because of it being unjustifiable.

[39] This analysis began with the question of whether or not to admit a document that was not before the decision-maker. Yet, part-and-parcel with this is the question of whether the fact this particular document not being before – and considered by – the decision-maker made the decision procedurally unfair or unjustifiable (unreasonable) on these specific facts. To both questions, I find in the affirmative. I am of the view that this affidavit and the information attached falls into the second exception (and possibly the third as well) from *Access Copyright.* Based on *Corporal X* not being before the decision-maker, I am of the view that it creates a situation where the Final Level Adjudicator's decision is a breach of procedural fairness not to have Corporal X in the record available to have submissions on

[40] In this very unique case, where a document which was or ought to have been within the knowledge and possession of the decision-maker was not part of the deliberation, and when the

decision flatly contradicted the document, it is both contrary to the procedural fairness to be afforded to the Applicant, as well as unreasonable. The unreasonableness of it is by virtue of departing from an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker (*Vavilov* at para 85).

[41] This is determinative of the matter. I am granting this application and sending it back to be re-determined by a different decision-maker with further submissions by the parties.

[42] I will not address the other issues given that the record before me was not complete enough to reach an appropriate determination (as has been discussed at length in this decision). Opining on the very important issues in play in this situation can only be done with the further information that is not currently before the Court.

[43] The Respondent wished to have guidance on these cases but this is not the case in which to provide the legal guidance on by delving in to the actual issues as it has been sidetracked by an incomplete record.

D. *Costs*

[44] The parties reached an agreement that costs should be awarded in the amount of $2,500.00. I agree, and will order the Respondent pay costs to the Applicant in that amount.

JUDGMENT IN T-114-21

THIS COURT'S JUDGMENT is that:

1. The Application is granted and sent back for re-determination before a different decision-maker, with the parties being able to provide further material and submissions;

2. Costs are awarded forthwith to the Applicant payable by the Respondent in the amount of $2,500.00.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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