



[2021] 4 F.C.R. D-14

RCMP

See also: Administrative Law

Judicial review of decision of Final Level Adjudicator in Royal Canadian Mounted Police (RCMP) grievance system — RCMP member submitted receipts for “medical assisted procreation male/female” as result of his male factor infertility — Adjudicator determining that applicant would be reimbursed only for portion relating to intra-cytoplasmic sperm injection (ICSI), but denied applicant reimbursement for costs associated with in-vitro fertilization (IVF) because procedures were performed on his non-member spouse decision maker. — Applicant, member of RCMP — Married, his spouse is not RCMP member — In 2012, applicant learned that he suffered from male factor infertility — Applicant, his spouse pursued medically-assisted fertility treatments — They used medically-assisted procreation method of IVF using ICSI — Applicant submitted expense claims totalling \$35,710 for costs of fertility treatment, seeking reimbursement – \$28,400 of costs associated with IVF while, \$6,770 associated with ICSI performed on applicant — RCMP notified applicant that \$6,770 was approved for reimbursement which was cost of ICSI procedures performed on him but no reimbursement was approved for cost of IVF procedures — Applicant submitted grievance at initial level — Argued that denial of his reimbursement for IVF was inconsistent with RCMP policy, which covers “medically-assisted procreation male/female” — In alternative, submitted that if policy interpreted as excluding reimbursement for IVF to male members, policy in contravention of *Canadian Human Rights Act*, R.S.C., 1985, c. H-6 by discriminating on basis of sex, disability — Initial Level Adjudicator dismissed grievance on ground applicant had not established, on balance of probabilities, that denial of reimbursement was inconsistent with applicable legislation, policies; that he suffered prejudice as result — Applicant referred grievance for consideration at final level of grievance process where Initial Adjudicator’s decision confirmed — Preliminary issue whether to accept document attached as exhibit to applicant’s affidavit that was not in record; main issue whether decision made by Final Level Adjudicator reasonable, procedurally fair — Applicant filed own affidavit in present matter, containing decision of RCMP Initial Level Adjudicator pertaining to medical expenses of *Corporal X* dated January 2016, attached as Exhibit H of applicant’s affidavit — Applicant’s affidavit stating that in December 2020, applicant became aware of earlier decision in which RCMP had granted male members’ IVF claims; Corporal X being paid for same medical procedures critically important to applicant’s grievance — Respondent arguing that contents of affidavit not before decision maker, not meeting recognized exceptions allowing new evidence on judicial review, as set out in *Association of Universities and Colleges of Canada v. Access Copyright*, 2012 FCA 22 (*Access Copyright*), therefore should not be allowed — *Corporal X* decision directly on point with instant case — *Association of Universities* leading case to examine when determining record upon which to judicially review matter — While, as general rule, evidentiary record before Court on judicial review restricted to evidentiary record that was before board, some exceptions existing to general rule against Court receiving evidence in application for judicial review — Applying these principles to document attached to applicant’s affidavit here difficult since, although such information critical, relevant to decision-making process, was not in record — Also, information was seemingly only in respondent’s possession, not available to applicant — *Corporal X* grievance decision fitting into *Access Copyright* exception to general inadmissibility of new evidence on judicial review since was procedurally unfair decision not before decision maker — *Corporal X* grievance decision falling within exception regarding procedural unfairness; thus,

necessary to consider document attached to affidavit since underlying procedural unfairness existing associated with *Corporal X* grievance not forming part of evidentiary record before decision maker — As such, necessary in such highly limited, fact-specific circumstances, to accept *Corporal X* decision on present judicial review, despite it not being before decision maker, for Court to fulfill its role of reviewing for procedural unfairness — Based on information herein, certain that decision maker not taking *Corporal X* into consideration when was within their knowledge, control, was likely not public knowledge — Although administrative decision makers not bound by their previous decision in *stare decisis* manner as *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 establishing, administrative decision makers, reviewing courts alike must be concerned with general consistency of administrative decisions — Those affected by administrative decisions entitled to expect that like cases will generally be treated alike; that outcomes will not depend merely on identity of individual decision maker — In instant case, issue of what procedures should be reimbursed essentially identical to *Corporal X* — As such, while decision maker not bound by *Corporal X*, such deviation may bring into doubt whether this decision lives up to standard of general consistency in administrative decisions, expectation that like cases will generally be treated alike — While *Corporal X* decision clearly not precedent nor needing to be followed in manner of *stare decisis*, is information that adjudicator should canvass to consistently apply the policy of benefits paid to members — Given facts here, adjudicator required to apply policy consistently; as such, affidavit, its attachments having to be admitted to avoid procedural unfairness — *Corporal X* could fall into another exception; namely, could be used to highlight complete absence of evidence before administrative decision maker when it made particular finding, being that no evidence that female members for ICSI, IVF ever paid unless both procedures performed on member claiming it — Fact that *Corporal X* – male member – was paid for ICSI, IVF treatments, despite only ICSI being performed on him (as was case for applicant) showing that particular finding was made in absence of any evidence — Regarding Final Level Adjudicator’s decision, required under *Vavilov* principles of general consistency of administrative decisions, like cases being treated alike, is idea that administrative decision maker should be careful not to make factual determinations that 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 — In circumstance such as this where two alike factual circumstances not being treated similarly, wherein applicant – or those in their position – would not, could not be aware of differential treatment, such treatment running afoul of procedural fairness or could be seen as unreasonable because of it being unjustifiable — Fact *Corporal X* not before decision maker creating situation where Final Level Adjudicator’s decision constituting breach of procedural fairness because no submissions could be made in regard to *Corporal X* — In this very unique case, where document which was or ought to have been within knowledge, possession of decision maker not part of deliberation, when decision flatly contradicting document, was both contrary to procedural fairness to be afforded to applicant, as well as unreasonable — Unreasonableness is by virtue of departing from internally coherent, rational chain of analysis, that is justified in relation to facts, law that constrain decision-maker — Finding determinative of matter, which was sent back for re-determination by different decision maker with further submissions by parties — Application allowed.

DHALIWAL V. CANADA (ATTORNEY GENERAL) (T-114-21, 2021 FC 1480, McVeigh J., reasons for judgment dated December 29, 2021, 17 pp.)