Federal Court Cour fédérale

Date: 20221024

Docket: T-540-21

Citation: 2022 FC 1450

Ottawa, Ontario, October 24, 2022

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

MARK STENTAFORD

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Constable Mark Stentaford, is a member of the Royal Canadian Mounted Police [RCMP]. The Applicant suffers from malefactor infertility. The Applicant and his wife underwent fertility treatments in order to conceive their two children. While a portion of the fertility treatments were pre-approved and reimbursed by the RCMP, the portion of the

treatments related to in vitro fertilization [IVF] were denied. The Applicant filed a grievance for the denial of the IVF portion of his expense claim.

[2] The Applicant seeks judicial review of a Level II adjudicator's decision by the Commissioner of the RCMP [Commissioner] dated January 23, 2021 [Decision], denying the expenses related to IVF on the basis that the procedure was performed on the Applicant's spouse, who is not a member of the RCMP. The Commissioner stated that she was sympathetic to the Applicant's situation, however, "[u]nfortunately, the RCMP does not have the authority to provide coverage for IVF expenses with respect to non-members, including the Grievor's spouse".

[3] The Applicant submits that the Decision is unreasonable on the basis that the Commissioner failed to: (i) address prior inconsistent decisions providing IVF coverage to male members; and (ii) conduct a fulsome discrimination analysis. On the other hand, the Respondent submits that the Decision is reasonable because: (i) it is in fact consistent with the vast majority of the prior decisions; and (ii) the Commissioner reasonably relied on established precedent.

[4] Like the External Review Committee and the Commissioner, I am sympathetic to the Applicant's situation. As will be detailed below, however, if a decision bears the hallmarks of reasonableness, it is not for the reviewing court to substitute the outcome it would prefer. Provided the Decision is based on an internally coherent and rational chain of analysis that is justified in relation to the facts and the law, which I find it is, I am required under a

reasonableness review to defer to the Commissioner's Decision. Accordingly, for the reasons that follow, this application for judicial review is dismissed.

II. Background

[5] The Applicant is a member of the RCMP, while his wife is not. As the Applicant suffers from malefactor infertility, the Applicant's doctor recommended fertility treatments. On February 14, 2011, the Applicant submitted a claim for pre-approval of expenses for the treatments, namely a testicular biopsy [PESA], intracytoplasmic sperm injection [ICSI] and IVF.

[6] The RCMP paid for the PESA and ICSI procedures, which cost $4,021.20 cumulatively, but did not pay for the IVF procedure, which cost $6,137.96. On March 28, 2011, the RCMP explained that while members are covered for fertility treatments, non-members are not. The RCMP considered that the PESA and ICSI treatments were performed on the member, the Applicant, while the IVF was performed on his non-member spouse.

[7] As a result of the decision to deny coverage for the IVF expenses, on April 21, 2011, the Applicant filed a Level I grievance. As this grievance was filed prior to 2014, the grievance process has followed a legacy process that differs from the process currently in place [Legacy Process]. The Applicant argued that he suffered discrimination on the basis of sex and thus suffered prejudice as a result. He submitted that female RCMP members were receiving the majority of the benefits. The Applicant sought reimbursement for expenses in a manner he believes would be consistent with what a female RCMP member would receive. He requested that the RCMP, in compliance with the *Canadian Human Rights Act*, RSC 1985, c H-6, review

and amend its policies. He also sought IVF coverage by the RCMP for all members equally regardless of sex. The Applicant submitted that fertility procedures differ from other medical procedures in that, by necessity, two individuals must be involved.

[8] On September 3, 2013, the Level I adjudicator denied the grievance on the basis that the Applicant had failed to establish that the refusal of his claim was inconsistent with applicable legislation or RCMP policies. The adjudicator found that the Applicant's spouse was not entitled to the IVF treatments because she is not covered under the RCMP health care program. Turning to the Applicant, the adjudicator found that the applicable policy distinguishes between treatments as they relate to males and females. The adjudicator stated that female members are eligible for IVF treatments, while male members are eligible for PESA and ICSI treatments, finding that the former relates to the female anatomy while the latter relates to the male anatomy.

[9] In support, the adjudicator relied on *Canada (Attorney General) v Buffett*, 2007 FC 1061 [*Buffett*], in which Justice Harrington found that the Canadian Forces, having decided to provide female members with the benefit of IVF, cannot deny male members the benefit of ICSI. It was further decided that while a male member should not be denied the costs relating to his sperm, the costs relating to "the egg and the womb", being IVF, would not be covered (*Buffett* at para 62).

[10] The Applicant filed a Level II grievance challenging the decision of the Level I adjudicator. Under the Legacy Process, the Level II is the final level and the Commissioner of the RCMP, or their delegate, is the Level II decision maker. As part of the Legacy Process, the

grievance went to the RCMP's External Review Committee [ERC] for an independent review prior to adjudication by the Commissioner. The ERC is an independent agency that reports directly to Parliament and provides non-binding findings and recommendations to the Commissioner. While the ERC's recommendations are non-binding, subsection 32(2) of the *Royal Canadian Mounted Police Act*, RSC 1985, c R-10, as it was then, required that should the Commissioner depart from the ERC's findings and recommendations, the Commissioner was obliged to provide an explanation for doing so in the decision on the disposition of the grievance.

[11] On December 11, 2020, the ERC issued its findings and recommendations. The ERC recommended that the grievance be denied on the basis that the RCMP's decision was consistent with RCMP policy as well as this Court's decision in *Buffett*. The ERC rejected the Applicant's argument that *Buffett* was no longer good law. The ERC further found that there was no discrimination under Section 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c 11, being of the view that the relevant consideration was "the fact that both male and female members are entitled to coverage for infertility treatments in accordance with Section 3 of the [policy]." The ERC relied on *Buffett* to find that "discrimination cannot be claimed because a particular treatment costs more than another". The ERC ultimately determined that the relevant factor is not whether the male or the female member has the infertility issue, rather it is the fact that fertility treatments performed on members, whether male or female, are covered.

III. The Decision Under Review

[12] Under the Legacy Process, a Level II adjudicator conducts a *de novo* analysis, with no deference owed to the Level I adjudicator (*Commissioner's Standing Orders (Grievances)*, SOR/2003-181). In conducting a fresh analysis, however, the Commissioner does so with the benefit of the ERC's findings and recommendations.

[13] On January 23, 2021, the Commissioner issued the Decision. She stated that "the outstanding issue for determination is whether the Grievor is entitled to payment of expenses for IVF which would be performed on his spouse, who is not a member of the RCMP."

[14] The Commissioner adopted the ERC's recommendation that the grievance be dismissed, finding at paragraph 77 that:

> The Grievor argued that the cost of IVF, to be performed on his spouse, should be covered by the RCMP. However, I am not persuaded by his argument. Although the Grievor, at the relevant time, was making efforts to grow his family using medical technologies, the IVF costs in question would not be incurred, or performed, specifically in relation to him. Like the ERC, I adopt the Federal Court's reasoning in *Buffett*, which demonstrates that 'costs related to the egg and womb' should not be covered with respect to male members.

[15] The Commissioner further found that the RCMP's decision was consistent with RCMP policies in that coverage of IVF expenses is not provided to non-members. Regarding the discrimination claim, the Commissioner stated that she remained unconvinced as, per the ERC Report, "discrimination cannot be claimed because a particular treatment costs more than another."

[16] The Commissioner concluded that the RCMP does not have the authority to provide coverage for IVF expenses with respect to non-members.

IV. Issues and Standard of Review

[17] The issues in this application for judicial review are:

- Was the Commissioner's Decision reasonable in light of the prior RCMP grievance decisions on the issue of coverage for fertility treatments performed on non-member spouses?
- Was the Commissioner's treatment of the Applicant's discrimination claim unreasonable?

[18] The parties submit, and I agree, that the applicable standard of review is reasonableness as set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). It is the Applicant, the party challenging the Decision, who bears the burden of demonstrating that it is unreasonable (*Vavilov* at para 100). In conducting a reasonableness review, the Court must determine whether the Decision is "based on an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at paras 85-86).

[19] The focus must be on the decision actually made, including the justification offered for it, and not the conclusion the Court itself would have reached in the administrative decision

maker's place. The standard of reasonableness is rooted in the principle of judicial restraint and deference, and requires reviewing courts to show respect for the distinct role that Parliament has chosen to confer on administrative decision makers rather than on the courts (*Vavilov* at paras 13, 46, 75).

V. Analysis

A. *Was the Commissioner's Decision reasonable in light of the prior RCMP grievance decisions?*

[20] The issue is whether the Commissioner's Decision is reasonable in light of prior decisions by the RCMP on the question of coverage for fertility treatments performed on non-member spouses. The Applicant's record includes an affidavit from Rebecca Morin, Acting Manager of Operations and Team Lead in the RCMP Office for the Coordination of Grievances and Appeals [Morin Affidavit], which attests to the fact that the issue of coverage for fertility treatments for non-member spouses has been the subject of eleven grievance decisions. The first decision was rendered in 2011 and the most recent in 2021. All eleven decisions are referenced in the Morin Affidavit, and are either exhibited to the Morin Affidavit or found elsewhere in the record.

[21] Four of the eleven decisions were rendered under the Legacy Process (Level I / Level II), and seven under the current process (Initial Level / Final Level). Eight of the decisions were Level I or Initial Level decisions, while the remaining three decisions are Level II or Final Level decisions. All of the grievors are male. Ten decisions were in relation to the coverage of IVF and one in relation to the coverage of intrauterine insemination. In all the cases, the RCMP refused

coverage. In nine of the eleven cases, the grievances were dismissed. In the remaining two cases, the grievances were upheld and coverage was permitted for IVF. Where a grievance is upheld at Level I or the Initial Level, the RCMP as the respondent does not have a right to appeal or challenge that decision to Level II or the Final Level.

[22] The Applicant submits that the Commissioner's failure to address conflicting decisions on the issue renders her Decision unreasonable. The Applicant relies on the instructions of the Supreme Court in *Vavilov*, that individuals "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." (*Vavilov* at para 129). The Applicant pleads that the Commissioner, in departing from earlier decisions, was obliged to explain her reasons for that departure (*Vavilov* at para 131).

[23] The Applicant relies on a recent decision from my colleague Justice Glennys L. McVeigh, *Dhaliwal v Canada* 2021 FC 1480 [*Dhaliwal*], where she considered a decision from a Final Level adjudicator of the RCMP denying a male applicant's claim for IVF procedures performed on his non-member spouse. The Applicant submits that, on the authority of *Dhaliwal*, the present matter ought to be sent back for redetermination.

[24] In *Dhaliwal*, the applicant filed an affidavit containing a decision of an Initial Level adjudicator permitting coverage for IVF performed on a non-member spouse. Justice McVeigh was therefore presented with the decision at issue in her matter and a contrary decision. It bears mention that Justice McVeigh only had access to two decisions, unlike the present matter where

there are eleven decisions in the record. Justice McVeigh, relying on *Vavilov*, expressed concerns about the general consistency of administrative decisions (at para 38) and found that it was both procedurally unfair and unreasonable that the contrary decision was not part of the record for the applicant to make submissions on given the decision under review contradicted the earlier one (at para 40). Justice McVeigh declined to address any further issues on the basis that the record was not sufficiently complete to do so and "[o]pining 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." (at paras 42-43). Justice McVeigh noted that the respondent wished to have guidance on such cases, but concluded that it was not appropriate as the matter had "been sidetracked by an incomplete record" (at para 43) and sent the matter back for redetermination.

[25] In sum, the Applicant submits that it was open to the Commissioner to prefer or distinguish prior decisions, but her failure to address them, effectively ignoring them, was unreasonable.

[26] The Respondent submits that the Commissioner's Decision is in fact consistent with the vast majority of the previous decisions on the issue. Nine out of eleven decisions dismissed the grievances. All of the Level II and Final Level decisions also dismissed the grievances. The Respondent also argues that the Commissioner was not obliged to address the two Level I / Initial Level decisions in her reasons as they were outliers.

[27] The Respondent further submits that the present matter differs from *Dhaliwal* in that Justice McVeigh was faced with only two seemingly contradictory decisions and she was

concerned about the applicant not having had access to the second decision while the decision maker would have. Consequently, she sent the matter back for redetermination on that basis.

[28] I find that, based on the record before me, the Applicant has failed to demonstrate a significant shortcoming in the Decision based on a failure to treat like cases alike or by departing from a longstanding practice. The Supreme Court instructs that a reviewing court performing a reasonableness review should consider consistency with an administrative body's past decisions and where "a decision maker does depart from longstanding practices or established internal authority, it bears the justificatory burden of explaining that departure in its reasons." (*Vavilov* at para 131).

[29] The two Level I / Initial Level decisions that allowed claims for IVF by male members, as contrasted with the nine decisions that dismissed such claims, do not represent established internal authority, longstanding practice or an interpretive consensus such that the Commissioner was obliged to provide a justification for departing therefrom in her Decision (*Vavilov* at para 131; C*anada (Attorney General) v Karas*, 2021 FC 594 at paras 63-64).

[30] The Applicant submits that inconsistencies exist in the body of RCMP decisions, both in their outcome and in their reasoning. Thus, the Applicant argues, the present matter should be remitted in line with the outcome in *Dhaliwal*. I agree with the Respondent that the circumstances in the present matter differ from those before Justice McVeigh in *Dhaliwal*. The record also shows that the eleven decisions were rendered over a time period of ten years and with varying RCMP Benefits Grids. As such, I would not expect the decisions to be identical.

Rather, the material question is whether the prior decisions are generally consistent. Based on the record, I find that they are.

[31] Accordingly, I am not persuaded that the Commissioner erred in failing to address the two prior inconsistent decisions in her Decision.

B. *Was the Commissioner's treatment of the Applicant's discrimination claim unreasonable?*

[32] The Applicant submits that the Commissioner's Decision dismissing his discrimination claim was unreasonable in both its reasoning and its outcome, and requests that the Court make a finding of discrimination. Specifically, the Applicant argues that: (i) the Commissioner failed to conduct a fulsome discrimination analysis; (ii) the Health Care Entitlements and Benefits Programs [Health Care Policy] do not preclude coverage for procedures performed on third parties; (iii) *Buffett* is no longer applicable following the decision in *Dhaliwal*; and (iv) the Applicant meets the test for *prima facie* discrimination.

[33] The Respondent submits that: (i) the Commissioner's decision to rely on *Buffett* was entirely reasonable; (ii) there was no need to conduct a more fulsome analysis given that there was clear and applicable precedent; and (iii) the Commissioner's interpretation of the Health Care Policy was reasonable.

[34] I turn first to the decision in *Buffett*, discussed in section II of this judgment. The Applicant states that the Commissioner and the ERC unduly relied on *Buffett*, which is no longer

applicable. The Applicant highlights Justice McVeigh's comment in *Dhaliwal* that *Buffett* was not helpful and that "the area of medically-assisted procreation has advanced considerably since the time of Buffett, which began in 1996." (para 14). In response, the Respondent highlights the fact that Justice McVeigh's comment is ultimately obiter as she never dealt with the merits of the matter, rather referring the matter back on the basis of an incomplete record.

[35] In *Dhaliwal,* Justice McVeigh's comments on *Buffett* were in response to the respondent's request to provide guidance on the law, given that *Buffett* dated from 2007. After briefly commenting, Justice McVeigh declined to provide the requested guidance, concluding that "[u]nfortunately, as you will see from the reasons below this is not the case that will give them the guidance needed." (para 15). Given this context, I am not persuaded that *Dhaliwal* overturns or renders *Buffett* inapplicable, or renders the Commissioner's decision to rely on *Buffett* unreasonable. Furthermore, there is no evidence in the record that, in relation to the procedures at issue, medically-assisted procreation has advanced considerably since *Buffett*. In *Buffett*, the procedures at issue were IVF and ICSI (paras 1 – 10), which are the very same procedures at issue in the matter at hand.

[36] In addition, the Commissioner considered the Applicant's argument that *Buffett* is no longer good law, however, found the facts and circumstances to be comparable to the Applicant's situation. The Commissioner decided that *Buffett* remains good law, is a binding precedent on the ERC and the Commissioner, and that the RCMP decision was consistent with *Buffett*. Based on the record, I am not persuaded that the Commissioner erred in relying on the

reasoning in *Buffett*. A reasonableness review is rooted in the principle of judicial restraint (*Vavilov* at para 13) and I find that no intervention by this Court on this point is warranted.

[37] Turning to the Commissioner's discrimination analysis, the Applicant submits that she failed to conduct a fulsome analysis as she blindly relied on *Buffett* and she misinterpreted Section 3 of the Health Care Policy. On the other hand, the Respondent argues that the Commissioner's analysis was reasonable, as was her reliance on *Buffett* and her interpretation of Section 3. The Respondent submits that both *Buffett* and the Decision are consistent with Supreme Court jurisprudence relating to differential treatment based on biological differences between sexes.

[38] The Commissioner considered the Applicant's argument that he was discriminated against on the basis of sex and pay equity. She agreed with the ERC who had relied upon Supreme Court jurisprudence and *Buffett* to find that the concept of substantive equity does not necessarily mean identical treatment and that discrimination cannot be claimed because a particular treatment costs more. The ERC had determined that what was relevant was the "fact that both male and female members are entitled to coverage for infertility treatments in accordance with Section 3 of the [Health Care Policy]". The Commissioner emphasized that discrimination cannot be claimed because a particular treatment is more costly, and found that the relevant policy was clear that non-members of the RCMP are not eligible for such coverage.

[39] I am not persuaded that the Commissioner's treatment of the Applicant's discrimination claim is unreasonable. While the Applicant seeks a more fulsome analysis, the Commissioner's

reasoning process does not warrant this Court's intervention. As previously found, the Commissioner did not err by relying on *Buffett*. As to the interpretation of Section 3 of the Health Care Policy, I am mindful of the instructions of the Federal Court of Appeal, relying on *Vavilov*, as to the role of this Court when conducting a reasonableness review. It is not for this Court to second-guess the exercise of an administrative decision maker's discretion nor should the Court proceed with its own interpretation of a decision maker's home statute or regulations (*Safe Food Matters Inc v Canada* (Attorney General), 2022 FCA 19 [*Safe Food*] at paras 38-39). As long as a decision maker's interpretation of its home statute and regulations "is reasonable, and the reasons it provides for its decision are justifiable, clear and intelligible, we owe deference and should not interfere." (*Safe Food* at para 39; *Vavilov* at paras 75, 83, 85-86).

[40] Section 3 of the Health Care Policy provides that regular members and special constable members do not receive health care under the *Canada Health Act*, RSC 1985, c C-6, as do most private citizens, and thus these members receive health care under the authority of the *Royal Canadian Mounted Police Regulations, 2014*, SOR/2014-281. The Commissioner found, relying on *Buffett*, that because the IVF costs were not performed specifically in relation to the Applicant, namely they were costs related to the egg and the womb, the costs were not covered for the Applicant and his non-member spouse was not covered.

[41] The Applicant submits that the Commissioner's interpretation of the Health Care Policy is unreasonable because coverage for third parties is not precluded under the Health Care Policy, and in any event the material issue is that the Applicant's spouse did not have any fertility issues, and while the IVF is not performed on the member per se, it is performed for his benefit and as a

result of his fertility issues. On the other hand, the Respondent submits that an interpretation that non-members are not covered, and thus IVF procedures performed on a non-member spouse are not reimbursable, is consistent with the text, context and purpose of the Health Care Policy.

[42] I have considered the parties' arguments, along with the provisions of the Health Care Policy and the Supplemental Health Care Benefits Policy upon which the parties relied, and have determined, in line with the instructions of the Court of Appeal, that deference is owed to the Commissioner, having found that her reasons are justifiable, clear and intelligible (*Safe Food* at para 39). I agree with the Applicant that the issue of reproduction is emotive and complex, and this matter has no doubt been a source of stress and frustration. It is not, however, for this Court, on the record currently before me and sitting in judicial review of the Commissioner's Decision, to pronounce on whether fertility treatments should be covered by the RCMP based on if it is the member who suffers the fertility issue or address whether having a gender-based approach is outdated, i.e. characterizing the procedure as a male or female related procedure.

[43] Consequently, I do not find that the Commissioner's treatment of the Applicant's discrimination claim, based on *Buffett* and Section 3 of the Health Care Policy, to be unreasonable.

VI. Conclusion

[44] For the foregoing reasons, this application for judicial review is dismissed.

[45] The Respondent seeks costs. Considering the facts of the matter, and my discretion pursuant to Rule 400 of the *Federal Courts Rules*, SOR/98-106, costs in the amount of $500.00 should be awarded to the Respondent.

JUDGMENT in T-540-21

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed; and

2. Costs in the amount of $500.00 is allowed to the Respondent.

"Vanessa Rochester"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	MARK STENTAFORD v ATTORNEY GENERAL OF CANADA
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