

Federal Court



Cour fédérale

**Date: 20201027**

**Docket: T-1412-19**

**Citation: 2020 FC 1010**

[ENGLISH TRANSLATION]

**Ottawa, Ontario, October 27, 2020**

**PRESENT: The Honourable Madam Justice Roussel**

**BETWEEN:**

**OUASSIM MEGUELLATI**

**Applicant**

**and**

**THE ATTORNEY GENERAL OF CANADA**

**Respondent**

**JUDGMENT AND REASONS**

I. Introduction

[1] The applicant, Ouassim Meguellati, is seeking judicial review of a decision by the Associate Deputy Minister of Employment and Social Development [ESDC], dated July 30, 2019. In that decision, the Associate Deputy Minister rejected at the final level Mr. Meguellati's

grievance challenging the decision of ESDC to permanently staff his position while on leave without pay to care for his family.

[2] For the reasons that follow, the application for judicial review is dismissed.

## II. Background

[3] Mr. Meguellati is an employee in the federal public service. Since 2014, he has been Director General, Enterprise Planning and Performance Management at ESDC. His position is classified at the EX-03 group and level.

[4] In 2017, health problems forced Mr. Meguellati to take sick leave. He first took sick leave with pay from July 17, 2017, to April 30, 2018. Having exhausted the balance of his accrued sick days and still not able to return to work, Mr. Meguellati was granted permission to use the balance of his annual leave. From May 1, 2018, to June 15, 2018, he used the balance of his accumulated vacation days. On June 4, 2018, Mr. Meguellati requested leave without pay starting June 16, 2018. The Chief of Staff of the Senior Assistant Deputy Minister, Caroline Fradette, replied that as of June 18, 2018, he would be considered on sick leave without pay.

[5] On June 7, 2018, Mr. Meguellati informed Ms. Fradette that he would rather take leave without pay to care for a member of his family who needed his support. He asked whether he could shorten the leave if the situation improved and if there was [TRANSLATION] “a leave without pay that executives could take once in their career”. On June 13, 2018, Ms. Fradette replied that leave without pay was allowed to be shortened and that the leave without pay

available once during the course of a career did not apply to senior managers. He could, however, be granted leave without pay to care for his family for a minimum period of three (3) weeks to a maximum of five (5) years. Ms. Fradette invited Mr. Meguellati to confirm his request for leave by completing the leave form sent to him.

[6] On June 17, 2018, Mr. Meguellati submitted his request for leave without pay to care for his family from June 18, 2018, to June 21, 2018.

[7] On July 13, 2018, Catherine Adam, Senior Assistant Deputy Minister, wrote to Mr. Meguellati asking him to clarify the reason for his absence. He had submitted a sick leave substantiation form on July 9, 2018, whereas he had requested leave without pay on June 17, 2018, to care for his family. She also asked whether the dates indicated on his leave request, June 18 to June 21, 2018, were correct considering that the period requested was only four (4) days.

[8] On July 25, 2018, Mr. Meguellati returned a new form stating that his request for family leave without pay covered the period from June 18, 2018, to June 21, 2019, a period of one year and four (4) days. Mr. Meguellati indicated on the same form that leave could be shortened if his family situation improved.

[9] On August 16, 2018, Ms. Adam signed the request for leave without pay.

[10] August 25, 2018, Mr. Meguellati received a letter entitled [TRANSLATION] “Care of Family Leave Without Pay” in which Ms. Adam informed him that his leave was approved in

accordance with the Directive on Executive Compensation and that it would take effect on June 18, 2018, and end on June 21, 2019. She also explained that, according to the policy established by the Treasury Board of Canada Secretariat [TBS], an employee on leave without pay may be replaced by a person appointed for an indefinite period if the duration of the leave or consecutive periods of the same type of leave exceeds one (1) year. Ms. Adam advised Mr. Meguellati that she intended to fill his position on an indeterminate basis since the leave exceeded one (1) year.

[11] Mr. Meguellati's position was filled on January 11, 2019.

[12] On February 8, 2019, Mr. Meguellati advised ESDC that his family situation had improved and that he intended to return to work in mid-March.

[13] By letter dated February 22, 2019, Ms. Adam informed Mr. Meguellati that his position had been filled for an indeterminate period as of January 11, 2019, and that, as an employee on leave of absence, he was eligible for priority for appointment pursuant to paragraph 41(1)(a) of the *Public Service Employment Act*, SC 2003, c 22, until June 21, 2020.

[14] On April 8, 2019, Mr. Meguellati informed the Human Resources Services Branch of ESDC that he had received an interpretation from the TBS that confirmed that ESDC should not have filled his position. He advised them of his intention to present a formal grievance and to request his reinstatement from the date he had requested to cut short his leave without pay and return to work.

[15] On April 16, 2019, Mr. Meguellati sent a letter by email to the Deputy Minister of ESDC requesting a meeting with her to discuss his situation, which he considered unfair. Upon receipt of this letter, ESDC initiated the formal grievance procedure.

[16] On May 21, 2019, a second level grievance hearing was held before Ms. Adam and the Deputy Director of Labour Relations at ESDC. Mr. Meguellati, accompanied by his representative, asked for (1) explanations regarding the decision to fill his position; (2) the conversion of his leave for family-related responsibilities to special leave of up to 130 days, as provided for in section 6.3 of Appendix C to the Directive on Executive Compensation; and (3) his reinstatement in his position.

[17] On June 20, 2019, Ms. Adam informed Mr. Meguellati that his grievance was dismissed. She stated that the decision to fill the position had been taken because of operational requirements and that no information presented allowed her to conclude that another type of leave should have been granted. According to Ms. Adam, the employer granted him leave that was tailored to his situation under the TBS's Directive on Executive Compensation. She concluded that Mr. Meguellati had been treated in accordance with the provisions of that Directive.

[18] In a letter to Ms. Adam dated June 27, 2019, Mr. Meguellati disagreed with the decision and asked whether he could bypass the final level of the grievance procedure to speed up the process. On July 4, 2019, the Deputy Director of Labour Relations at ESDC refused Mr. Meguellati's application. She informed him that his application would be treated as a request

to proceed to the final level of the grievance procedure and presented him with three (3) options to speed up the process: (1) request a hearing before the Associate Deputy Minister; (2) provide written representations for consideration by the Associate Deputy Minister; and (3) proceed on the basis of the information available on the record, including representations made at the second grievance level. In order to speed up the process, Mr. Meguellati chose the third option.

[19] On July 22, 2019, the Senior Human Resources Advisor, Labour Relations, at ESDC prepared a document titled [TRANSLATION] “Overview of the Final Level Grievance”

[Overview], in which she outlined the context of the grievance and Mr. Meguellati’s position, analyzed the grievance and then recommended that it and the requested corrective measures be rejected.

[20] On July 30, 2019, the Associate Deputy Minister of ESDC dismissed Mr. Meguellati’s grievance. He concluded that (1) Mr. Meguellati’s position had been filled because of operational requirements, in accordance with the provisions of the TBS Directive on Leave and Special Working Arrangements; (2) efforts were made to support Mr. Meguellati in his job search in accordance with the same directive; and (3) ESDC granted the leave that Mr. Meguellati had requested, which was best tailored to his personal situation.

[21] Mr. Meguellati argued before this Court that the Associate Deputy Minister’s decision was unreasonable because (1) the Directive on Leave and Special Working Arrangements did not allow Mr. Meguellati’s position to be staffed before the one-year expiry date; and (2) it did not

take into account his argument that ESDC failed to fulfill its obligation to act in good faith and in fairness.

### III. Analysis

#### A. *Standard of review*

[22] The parties agree that the applicable standard of review is reasonableness (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 16-17 [*Vavilov*]).

[23] Where the standard of reasonableness applies, the Court shall examine “the decision actually made by the decision maker, including both the decision maker’s reasoning process and the outcome” (*Vavilov* at para 83). It must ask itself “whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision” (*Vavilov* at para 99). It does not ask “what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the ‘range’ of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the ‘correct’ solution to the problem” (*Vavilov* at para 83). “The burden is on the party challenging the decision to show that it is unreasonable” (*Vavilov* at para 100).

[24] Finally, although the judicial review is related to the decision of the Associate Deputy Minister, it is important to recall that it is permitted to examine the reasons set out at the previous levels of the grievance procedure to fully understand the basis of the contested decision.

Furthermore, it is recognized that internal memorandums or briefs containing recommendations to the decision maker may serve as reasons (*Veillette v Canada (Revenue Agency)*, 2020 FC 544 at para 27; *Wilkinson v Canada (Attorney General)*, 2016 FC 1062 at para 15; *Wanis v Canadian Food Inspection Agency*, 2013 FC 963 at para 21). In this case, the content of the Overview can therefore be considered as being part of the reasons for the decision.

B. *Power to replace employee on long-term leave*

[25] Section 1.4 of Appendix B to the TBS's Directive on Leave and Special Working

Arrangements reads as follows:

<p>With the exception of persons on leave without pay to serve in the Canadian Forces Reserve, identified in Section 2.5. in this Appendix, a person appointed to the core public administration on leave without pay can only be replaced on an indeterminate basis <u>if the period of leave or consecutive periods of the same type of leave exceeds one year</u>. Periods of different types of leave cannot be combined for the calculation of the one year period. If the person is replaced, the person with the delegated authority is to make every effort to provide suitable employment for the person following the leave of absence. [Emphasis added.]</p>	<p>Exception faite d'une personne en congé non payé pour servir dans la Réserve des Forces canadiennes (disposition 2.5 de la présente annexe), la personne nommée à l'administration publique centrale qui est en congé non payé ne peut être remplacée par voie de nomination pour une période indéterminée <u>que si le congé est constitué d'une période ou de périodes consécutives de congé du même type de plus d'un an</u>. On ne peut cumuler les périodes de congés de types différents aux fins de ce calcul. Si la personne est remplacée, la personne ayant le pouvoir délégué doit s'efforcer de lui trouver un emploi approprié lors de son retour.</p>
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[Soulignement ajouté.]



[26] Mr. Meguellati argued that the Associate Deputy Minister's decision was unreasonable since ESDC had neither the discretion nor the authority to replace him before a one-year period of leave without pay had elapsed.

[27] He first alleged that ESDC should not have started counting the leave for family-related responsibilities before August 1, 2018, having acknowledged in a letter dated July 13, 2018, that he was on sick leave without pay until that date. However, according to section 1.4 of Appendix B of the Directive on Leave and Special Working Arrangements, ESDC could not count two (2) different types of leave in its calculation of the one-year period.

[28] This argument is groundless. In his form titled [TRANSLATION] "Leave Application and Absence Report" provided to ESDC, Mr. Meguellati clearly stated that he would be on leave without pay for family reasons from June 18, 2018. This date was subsequently confirmed by Ms. Adam when she approved the leave. He cannot now blame the employer for miscounting the period of leave applicable for the purposes of applying section 1.4 of Appendix B to the Directive on Leave and Special Working Arrangements.

[29] Mr. Meguellati then argued that ESDC should have come to a different interpretation of section 1.4 by taking into account the literal meaning of the words used. According to him, the appropriate interpretation is that ESDC cannot fill the position of an absent employee until a period exceeding one year of leave has elapsed. He submitted that if the TBS had wanted a position to be filled before the complete leave period had even elapsed, they would have used the terms [TRANSLATION] "planned period of leave . . . exceeds one year" or "leave for a set period

. . . exceeds one year” rather than “period of leave . . . exceeds one year”. He was also of the view that a reading of the English version of section 1.4 supported his proposed interpretation. The term “period of leave”, he argued, translates to “période d’absence”, and this is therefore an interval of time during which the employee is actually absent.

[30] In support of his argument, he cited *Malhi v Treasury Board (Department of Employment and Social Development)*, 2016 PSLREB 2, where ESDC had already endorsed this interpretation in the past.

[31] The Court notes that its role is to conduct a judicial review of the decision at issue. The fact that Mr. Meguellati could propose a different reasonable interpretation does not necessarily mean that the Associate Deputy Minister’s interpretation was unreasonable. Whether in the English or French version of the text, the language used in the provision does not specify that the one-year period must have elapsed before the employer can proceed to appoint a replacement. It only indicates that the leave must consist of a period of leave or consecutive periods of the same type of leave exceeding one year. However, a period of leave may be prospective, as was the case here. It is understandable how an employer, once informed of an employee’s absence for a period exceeding one year, would wish to ensure that they can meet the operational requirements of the department and, if they consider it necessary, to fill the position of the absent employee.

[32] At the hearing, Mr. Meguellati argued that the Associate Deputy Minister did not develop his reasoning with respect to his interpretation of section 1.4 in the reasons for his decision. He

merely concluded that the position had been filled in accordance with the provisions of the Directive on Leave and Special Working Arrangements.

[33] The Court recognizes that it would have been preferable for the Associate Deputy Minister's reasons to be more detailed. However, as noted above, in order to determine whether the decision is reasonable, the Court may consider not only the reasons he provided in support of his decision, but also the Overview prepared in relation to that decision by the Senior Human Resources Advisor.

[34] In this case, the advisor noted Mr. Meguellati's arguments according to which the employer could staff a position only when the employee had been on leave for more than (12) twelve months and that the employer knew from the outset that there was a possibility the leave could be cut short.

[35] The advisor stated that she had received an interpretation from the TBS confirming that ESDC could fill the position if the initial request for leave without pay was for a period exceeding one year. She acknowledged that Mr. Meguellati had indicated on two (2) occasions that there was a possibility that his leave would be cut short. However, she stated that when Mr. Meguellati learned on August 25, 2018, that ESDC intended to fill his position, he did not contact the employer. It was not until February 8, 2019, that he indicated his intention to return to his position. At that time, the position had already been filled. She noted that Mr. Meguellati had a responsibility to contact the employer immediately in order to take the measures to prevent his position from being filled.

[36] Given the wording of the provision, which lends itself to different interpretations, and considering that the Associate Deputy Minister had before him a confirmation from the TBS that the Department's interpretation was consistent with its policies, the Court cannot conclude that the Associate Deputy Minister's interpretation was unreasonable.

C. *Obligation to act in good faith and with fairness*

[37] Mr. Meguellati alleged that he had received erroneous information concerning the availability of discretionary sick leave under section 6.3 of Appendix C to the Directive on Executive Compensation. He was of the opinion that he was entitled to a correct answer when he sought information on the different types of leave that could apply to his situation, including the (6) six-month leave offered to senior managers once during the course of their career. He also considered that, in addition to providing erroneous answers to his questions, ESDC failed to inform him of the consequences of applying for leave for a period exceeding one year.

[38] According to Mr. Meguellati, ESDC had an obligation, in accordance with the TBS directives and policies, to provide him with accurate, consistent and timely information regarding his employment conditions. Failure to meet these standards of fairness is a breach of the employer's obligation to act in good faith and with fairness. He maintained that the Associate Deputy Minister rendered an unreasonable decision by failing to justify why his arguments in relation to those obligations were rejected.

[39] The Court cannot agree with Mr. Meguellati's submissions.

[40] In his decision, the Associate Deputy Minister concluded that Mr. Meguellati's position had been filled due to operational requirements, in accordance with the provisions of the TBS Directive on Leave and Special Working Arrangements. He also concluded that the employer had granted Mr. Meguellati the leave that he had requested and that the leave was tailored to his personal situation under the TBS Directive on Executive Compensation.

[41] In the Overview, the advisor referred to Mr. Meguellati's argument contained in the letter of June 27, 2019, that the employer failed to inform him of the possibility of obtaining a (6) six-month leave with pay to which senior managers are entitled.

[42] The advisor responded to this argument in her analysis. She first noted that the employer granted Mr. Meguellati the leave best tailored to his situation and that other types of leave with pay and without pay could not be applied in Mr. Meguellati's specific context. She explained that Mr. Meguellati did not apply for special sick leave that could be granted to senior management and that, to obtain it, Mr. Meguellati would have had to support his application with a valid medical certificate. However, Mr. Meguellati's attending physician had stated that Mr. Meguellati was able to return to work no later than August 1, 2018. Considering that this type of leave is discretionary, there is nothing to indicate that Mr. Meguellati would have obtained it. She also mentioned that on April 24 and June 6, 2018, Mr. Meguellati was informed that he had to provide justification to support his request for leave without pay. Despite this information, Mr. Meguellati did not request this special leave. Furthermore, she pointed out that Mr. Meguellati's personal situation did not meet the requirements for such leave, as he had

repeatedly indicated that he wished to obtain leave without pay to care for a member of his family.

[43] Finally, in response to Mr. Meguellati's argument that he did not have the employer's support before or after his request for leave and that he was not familiar with the Directive, the advisor noted that he received ample correspondence explaining the steps required to manage his absences. She also pointed out that prior to his departure, Mr. Meguellati held the position of Director-General (EX-03) and had four (4) employees at the EX-01 level under his direct supervision. As an EX-03, he had the authority to approve leave requests under the Directive on Executive Compensation and should have been aware of it.

[44] A review of the reasons for the Associate Deputy Minister's decision, read in conjunction with the Overview, shows that all of Mr. Meguellati's complaints had been considered and that the resulting conclusions were based on reasoning that met the reasonableness criteria.

[45] Furthermore, the Court notes that when he informed himself of the leave available, Mr. Meguellati presented his question as follows:

[TRANSLATION]

Q2. I've heard of a leave without pay that executives can take once in their career. But I do not see this type of leave in the directive?

[Emphasis added.]

[46] It is in the same email that Mr. Meguellati indicated that he wished to take leave to care for a family member.

[47] Taking into account the information received, Ms. Fradette replied as follows:

[TRANSLATION]

A2. Leave without pay once during the course of a career does not apply to senior managers. The directive states that EXs can benefit from leave without pay to care for their immediate family for a period between three weeks and five years. Leave should be granted if the employee wishes to take such leave to care for a member of his or her immediate family, more specifically to: . . .

[Emphasis added.]

[48] The leave provided for in section 6.3 of Appendix C to the Directive on Executive Compensation provides for sick leave with pay and not leave without pay to care for family. In view of the question raised and the context, the Court considers that Mr. Meguellati cannot blame ESDC for providing him with incorrect information. Moreover, as a manager himself responsible for approving the leave of senior managers under his leadership, it was not unreasonable to believe that Mr. Meguellati was aware of the existence of this directive.

[49] In his written submissions to this Court, Mr. Meguellati referred to certain provisions of the TBS's Directive on Executive Compensation, the Directive on Leave and Special Working arrangements, the Policy on Terms and Conditions of Employment and the Directive on Terms and Conditions of Employment to support his argument that ESDC had not complied with its obligation to provide him with accurate, consistent and transparent information. However, it appears from the record that Mr. Meguellati's arguments concerning these provisions had not been raised in the context of the grievance procedure. The Court cannot therefore criticize the Associate Deputy Minister for not having ruled on their application.

[50] Finally, although it recognizes that Mr. Meguellati's circumstances may seem unfair considering that the leave requested exceeded the one-year period by only a few days, the Court considers that Mr. Meguellati is in a way responsible for his own misfortune. The letter received by Mr. Meguellati on August 25, 2018, provided relevant information concerning ESDC's intention to fill Mr. Meguellati's position. This information was communicated to him in a timely manner before ESDC took action. Mr. Meguellati had time to ask questions and could have asked to change the leave period before the position was staffed. Unfortunately, he failed to respond to the letter.

[51] In view of the foregoing, the application for judicial review is dismissed.

[52] With respect to costs, the Attorney General of Canada stated that he was not seeking any costs. No costs will be awarded.



**JUDGMENT in T-1412-19**

**THIS COURT'S JUDGMENT** is as follows:

1. The application for judicial review is dismissed.
2. No costs are awarded.

“Sylvie E. Roussel”

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Judge

Certified true translation  
Michael Palles, Reviser

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1412-19

**STYLE OF CAUSE:** OUASSIM MEGUELLATI v THE ATTORNEY  
GENERAL OF CANADA

**PLACE OF HEARING:** BY VIDEOCONFERENCE BETWEEN OTTAWA,  
ONTARIO AND GATINEAU, QUEBEC

**DATE OF HEARING:** OCTOBER 15, 2020

**JUDGMENT AND REASONS:** ROUSSEL J.

**DATED:** OCTOBER 27, 2020

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