Federal Court  Cour fédérale

Date: 20231222

Docket: T-482-23

Citation: 2023 FC 1748

Ottawa, Ontario, December 22, 2023

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

DAVID BROWN

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Summary

[1] As a preliminary issue, the style of cause is amended to name the Attorney General of Canada as Respondent.

[2] This is an application for judicial review pursuant to section 18.1 of the *Federal Courts Act*, RSC 1985, c F-7, of a grievance decision by the third and final level delegated decision-maker of the Treasury Board Secretariat [TBS] dated February 10, 2023 [Decision] denying the

Applicant's request to covert paid sick leave into paid discretionary leave under Code 699 for the period May 1, 2020 to November 9, 2020. He comes to this Court because he is an unrepresented public servant who, as such, does not have access to adjudication.

[3] In broad strokes, the Applicant had an underlying mental health condition that was exacerbated by the COVID-19 pandemic to such a serious extent he was unable to work as of May 1, 2020 and for some time thereafter. His departmental employer, TBS, required him to use up his accumulated sick leave notwithstanding a direction from TBS dated April 10, 2020, that "all employees (i.e. critical and non-critical employees who are working remotely or on-site), who are unable to work because of a COVID-19-related illness, will no longer be required to take sick leave and instead will be eligible for 'Other leave with Pay (699)". He unsuccessfully grieved this determination to the third level.

[4] The dispute involves the interpretation and application of the Economics and Social Sciences [EC] Collective Agreement [EC Collective Agreement], and of two special COVID-19 related directions issued by TBS:

- Guide on use of Code 699 Related to COVID-19 Effective April 10, 2020 [April 10 Direction], and
- COVID-19: 'Other Leave With Pay (699)' Guidance, dated October 22, 2020 and effective November 9, 2020 [November 9 Direction].

[5] Judicial review is granted and the Decision below is sent back for redetermination, essentially because the Decision focussed and was based on the November 9 Direction instead of the April 10 Direction which applied to the dates in respect of which the Applicant requested

consideration under Code 699. The November 9 Direction did not apply to the dates in issue in this case.

[6] The only issue is whether the Decision is reasonable. The Court is not asked to decide if the Decision is right or wrong. The tests for reasonableness are well established and set out below.

II. Standard of Review

[7] The standard of review in this case is reasonableness. With regard to reasonableness, in *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post*], issued at the same time as the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 [*Vavilov*], the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] A reasonable decision is "one that is based on 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). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
>
> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "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, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
>
> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
>
> [Emphasis added]

[8] In the words of the Supreme Court of Canada in *Vavilov*, a reviewing court must be satisfied the decision-maker's reasoning "adds up":

> [104] Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".
>
> [105] In addition to the need for internally coherent reasoning, a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision: *Dunsmuir*, at para. 47; *Catalyst*, at para. 13; *Nor-Man Regional Health Authority*, at para. 6. Elements of the legal and factual contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers.
>
> [Emphasis added]

[9] *Vavilov* requires the reviewing court to assess whether the decision subject to judicial review meaningfully grapples with the key issues:

> [128] Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker's failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker,* at para. 39.
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> [Emphasis added]

III. The Applicant

[10] The Applicant at all material times was employed in the Federal Public Service as a Senior Policy Analyst with TBS. The Applicant is part of a group of employees who are not represented by a union. As such, his terms and conditions of employment follow the EC Collective Agreement. He represented himself at the hearing and throughout. He does not have access to adjudication and hence comes to this Court from the final level grievance Decision.

[11] It is not disputed the Applicant had an underlying mental health condition at all material times. It is not disputed his mental health condition was exacerbated by the COVID-19 pandemic to the extent that he was unable to work as of May 1, 2020 and for many months thereafter including the material times. To this effect, the Applicant provided a letter from his physician stating "due to a medical condition exacerbated by the COVID-19 pandemic, [the Applicant] will

not likely be able to work for periods of time for up to one month." The initial one month period was subsequently extended.

[12] In my respectful view, the Applicant's mental health situation was extremely serious. In accordance with a doctor's note dated May 1, 2020, the Applicant's situation had so deteriorated that he had suicidal thoughts and required immediate medical treatment. At that point his mental health condition was so serious he was no longer able to work. The Respondent does not dispute his underlying mental illness was exacerbated by the facts of the COVID-19 pandemic and particularly its threat to the health of his family and to the broader public in Quebec. His mental health situation was diagnosed by a medical doctor who certified that due to a medical condition exacerbated by the COVID-19 pandemic, he would not be able to report to work.

[13] From May 1, 2020 to September 21, 2020, he was on paid sick leave at which time he attempted but was not able to complete a gradual return to work. After a short time, he returned to paid sick leave in October 2020. The Applicant exhausted his allotment of sick leave on October 20, 2020. At that time, he was placed on sick leave without pay until he started a gradual returned to work December 23, 2020.

[14] The Applicant only claims for the period May 1, 2020 to November 9, 2020.

[15] That said, the seriousness of his mental health conditions is illustrated by the fact he was not able to fully return to work for a considerable period of time. In this connection, he received a long-term disability [LTD] "top up" for any hours he did not work during his progressive return to work between December 2020 and July 2021. The Applicant then received full LTD

benefits from July 2021 to July 2022. Upon his subsequent progressive return to work in July 2022, the Applicant again received the top up for any hours not worked from July 2022 to January 2023.

IV. The framework: EC Collective Agreement, April 10 and November 9 Directions regarding Code 699 leave with pay

A. *EC Collective Agreement: Leave with pay per Section 21.17 (Code 699) and Sick Leave under Section 22.02*

[16] Under the EC Collective Agreement and in normal circumstances, a person in the Applicant's position, in the appropriate circumstances, may have to access to leave with pay "for other reasons" under section 21.17 (coded under Code 699), or to "sick leave with pay" under section 22.02.

[17] Section 21.17 of the EC Collective Agreement leave with pay "for other reasons" (coded under Code 699) states:

> At its discretion, the Employer may grant:
>
> a. leave with pay when circumstances not directly attributable to the employee prevent his or her reporting for duty. Such leave shall not be unreasonably withheld;
>
> b. leave with or without pay for purposes other than those specified in this agreement.

[18] Notably, *leave with pay* under section 21.17 is coded Code 699 for payroll purposes under the EC Collective Agreement. Such leave, sometimes called snowstorm leave, is also contained in a great number of other collective agreements across the Government of Canada.

[19] On the other hand, section 22 of the EC Collective Agreement provides for "sick leave with pay", which is not coded under Code 699:

> Granting of sick leave
>
> 22.02 An employee shall be granted sick leave with pay when the employee is unable to perform his or her duties because of illness or injury provided that:
>
> a. the employee satisfies the Employer of this condition in such a manner and at such a time as may be determined by the Employer, and
>
> b. the employee has the necessary sick leave credits.

B. *April 10 Direction*

[20] Shortly after the onset the global pandemic COVID-19, TBS in its capacity as the employer of federal public servants across Canada, including the Applicant, and to make the use of Code 699 "more expansive," issued a special direction on the use of leave code 699 (Other Paid Leave) and how it applies to employees impacted by COVID-19, namely: *Guide on use of Code 699 Related to COVID-19 Effective April 10, 2020* [the April 10 Direction].

[21] In my view, the purposes of the April 10 Direction was to make the availability of leave with pay under Code 699 more expansive for those impacted by COVID-19. This direction started with the words: "This guide provides direction on the use of leave code 699 (Other Paid Leave) and how it applies to employees impacted by COVID-19." To this end, the April 10 Direction itself stated that "the use of Code 699 will be more expansive for employees or individuals employed in the public service."

[22] Counsel indicated TBS's April 10 Direction applied to approximately 200,000 employees, across 80 organizations, and 40 occupational groups, including the Applicant.

[23] Notably, the April 10 Direction provided, among other things: "Effective immediately, all employees (i.e. critical and non-critical employees who are working remotely or on-site), who are unable to work because of a COVID-19-related illness, will no longer be required to take sick leave and instead will be eligible for 'Other leave with Pay (699)'."

[24] The April 10 Direction, in addition to requiring the more expansive use of Code 699, identified five categories where Code 699 leave with pay was to be available. Only the last is relevant here, but it reads: "the use of Code 699 will be more expansive for employees or individuals employed in the public service." It will be available in situations where an individual is unable to work because of:

- COVID Illness
- o This is where an employee has tested positive for COVID-19 or displays symptoms of COVID-19;
- COVID Family care
- o This is for school and daycare closures with no alternative arrangements available;
- o This is for employees that care of family members that are unable to work remotely;
- COVID Technology
- o This is for limitation of employee technology, including VPN access or lack of work equipment/tools to perform the duties from home;
- COVID Work Limitation

> - o This is due to the employing department/agency's limited work time due to Business Continuity plans being restricted to critical employees only.
>
> - COVID Other
>
> - o If there are other circumstances directly related to COVID-19 preventing the employee from reporting to work. [Emphasis added]
>
> …
>
> **Note**: Illness other than COVID 19 will need to be tracked using normal Sick Leave codes."

[25] On May 5, 2020, TBS issued a FAQ [Frequency Asked Questions] providing on Code 699 other leave with pay. One Q&A was:

> 5. **If COVID-19 is causing me stress and anxiety, can I be entitled to use leave code 699**?
>
> Unfortunately no, mental health issues related to COVID-19 are covered by sick leave.

C. *November 9 Direction*

[26] On October 22, 2020, the Chief Human Resource Officer through TBS issued a further direction in connection with Code 699 leave with pay, namely '*Other Leave With Pay (699)'Guidance, dated October 22, 2020*. This direction became effective November 9, 2020 [November 9 Direction].

[27] The stated objective of the "clarifying" November 9 Direction was: "To support you in these efforts, we are clarifying the guidance around the use of 'Other Leave With Pay (699)'. This updated guidance, which will be effective November 9, 2020, emphasizes that this leave

should be granted on a case-by-case basis, and only after remote or alternate work, or flexible work hours have been considered, and generally only after other relevant paid leave has first been used by the employee." [Emphasis added.]

[28] As seen from the above, the November 9 Direction reversed the April 10, 2020 Direction and instead required employees such as the Applicant to draw down their accumulated sick leave *before* they could access leave with pay under Code 699. This was emphasized in a document entitled *Questions and Answers for Managers and Human Resources 'Other Leave With Pay (699)'* from the Chief Human Resource Officer October 22, 2020, also effective November 9, 2020.

[29] In particular, the following Q&As form part of the November 9 Direction:

> 22. An employee has been calling in sick frequently and the manager is noticing that they are less punctual than usual and stop working early. The employee expresses that they are feeling stressed and anxious about the COVID-19 pandemic and is now asking for 'Other Leave With Pay (699)' What should the manager do?
>
> 23. An employee's performance has deteriorated since March 2020. What can the manager do?
>
> 24. An employee's behaviour has changed since the onset of the pandemic in March 2020. What can the manager do?

[30] In response to each question the answer given is:

> If the employee is not well enough to work, they would use their sick leave credits. In accordance with the provisions of the collective agreement or relevant terms and conditions of employment, the manager may ask the employee to provide documentation to satisfy this requirement.

> [Emphasis added.]

[31] For the first time, and of some note, the November 9 Direction said that "guidance on the use of 'Other Leave With Pay (699)' at the onset of the pandemic [i.e., the April 10 Direction, ed.] was an important measure to help prevent the rapid spread of COVID-19 and ensure the health and safety of federal employees."

[32] With respect, the April 10 Direction did not say its purposes was the prevention of the rapid spread of COVID-19, or to the health and safety of federal employees. Instead, its purpose on its face and in the words it used, was to provide "more expansive" use of leave with pay coded for payroll purposes under Code 699 for those impacted by COVID-19.

V. Request for consideration under April 10 Direction

[33] On November 6, 2020, the Applicant requested leave with pay coded Code 699 under the April 10 Direction. By then, the Applicant had used up all his accumulated sick leave credits which ran out October 21, 2020 (per email to Applicant dated December 15, 2020).

[34] The November 6, 2020 email from the Applicant states:

> The start date of my leave was May 1st, 2020, but I worked 22 hours when I attempted a gradual return to work. The break down of 22 hours is as follows:
>
> - 5 hours on Sept. 22, 2020
> - 5 hours on Sept. 24, 2020
> - 6 hours on Sept. 29, 2020

> - 6 hours on Oct. 1, 2020
>
> As per the doctor's notes attached, my condition was triggered and exacerbated by the COVID-19 situation so if any of this leave could be covered under code 699, it would be greatly appreciated. I needed to take care of and home school my children who were forced to be at home until the end of their school on June 19, 2020. Mental health impacts of COVID-19 should be treated in the same fashion as the physical health and family support that is covered by those impacted by COVID-19.

[35] The Applicant had previously requested leave with pay under section 21.17 of the EC Collective Agreement for the period from May 1, 2020 to the end of June 2020. In an email to his manager on August 11, 2020, he stated:

> With regards to your question about sick leave, yes I believe I have a great deal of sick leave banked. My understanding though is that this leave at least in part would be covered by the special code for Covid related leave.

[36] This request was rejected via email on August 16, 2020. The email stated:

> I checked with HR and the leave code 699 will not cover your leave. Leave 699 is to be used for very specific situations related COVID-19 such as network access, care of family members and having tested positive with COVID-19 to name a few. It does not cover certified sick leave. The appropriate leave is certified sick leave and your banked sick leave is to be used to cover it.

[37] The Applicant's director re-communicated the above on December 15, 2020 via email that sick leave under the EC Collective Agreement was appropriate for this period because the Applicant was unable to work due to illness. It stated:

> Unfortunately, as communicated earlier in the Summer, your leave will need to be inputted as sick leave and not paid leave code 699. I have confirmed with senior management and they are in

> agreement with this approach as it is inline with the Department's approach to leave 699.
>
> Given that your sick leave credits have run out, you are currently in an overpayment situation since October 21, 2020. The insurance benefits, if approved, should cover most of the amount you will owe but we do need to rectify your leave situation at this time and not delay further. This means we will need to cut your pay. We have prepared leave forms for you reflecting these leave dates (see attached).

[38] No reference was made in either the August 16 or December 15, 2020 email determinations to the April 10 Direction.

[39] In February 2021, the Applicant grieved the denial of his request to convert paid sick leave into leave with pay per Code 699. His Grievance Presentation stated:

> My grievance relates to the utilization of other leave with pay (code 699) that has been instituted during the COVID 19 epidemic. As per the EC collective agreement section 21.17, "at its discretion, the Employer may grant leave with pay when circumstances not directly attributable to the employee prevent his or her reporting for duty. Such leave shall not be unreasonably withheld." I will endeavour to demonstrate that other leave with pay should not be unreasonably be withheld from me as I suffered from a mental health crisis that was triggered by the COVID 19 epidemic.
>
> …
>
> …I enjoin upon senior management to reconsider this decision and support me and others in a similar situation with other leave with pay for mental health related impacts of Covid 19 that have been confirmed by a qualified physician. It only seems fair and reasonable that they be treated in the same way as physical illness related to Covid.
>
> *Date on which each act, omission or other matter giving rise to the grievance occurred*:
>
> > May 1, 2020 is when I started my sick leave. I endeavoured to proceed with a gradual return to

> work in September but was unsuccessful. I started my current gradual return to work On December 23, 2020.
>
> *Corrective action requested*
>
> To be supported with other leave with pay as someone who is physically ill with Covid would be supported. If I need to use some or all of my sick leave as someone who is ill or has complications related to physical illness caused by Covid then that is acceptable. I simply ask for fairness to be treated in the same way.

[40] The Applicant's grievance was under the April 10, 2020 Direction. In particular he relied on the last of the five situations in which Code 699 was more expansively made available for those impacted by COVID-19, i.e., "in other circumstances directly related to COVID-19 preventing the employee from reporting to work":

- COVID Other
- o If there are other circumstances directly related to COVID-19 preventing the employee from reporting to work.

VI. Decision and Analysis

[41] The First Level Grievance response was issued March 17, 2021, where the refusal to convert sick leave to Code 699 leave with pay was "found to have been applied within the guidelines set out by the Office of the Human Resources Officer." This refers to the November 9 Direction. However, and with respect I note the November 9 Direction did not apply to the period in respect of which Code 699 was requested, all of which was before November 9, 2020. For the period in issue, May 1 to November 9, 2020 it was the April 10, 2020 Direction that applied, which provide that "all employees (i.e. critical and non-critical employees who are

working remotely or on-site), who are unable to work because of a COVID-19-related illness, will no longer be required to take sick leave and instead will be eligible for 'Other leave with Pay (699).'"

[42] The Second Level Grievance response was issued April 7, 2022. It was also negative. As with the First, I note it did not consider application of the April 10 Direction but instead applied the November 9 Direction, which did not apply during the period in issue namely May 1, 2020 to November 9, 2020. The Second level decision concluded: "The use of Paid Leave for Other Reasons can be applied when there are no other applicable provisions in the collective agreement. The decision to deny your request for Leave with Pay for Other Reasons (Code 699), as per Clause 21.17 of the EC Collective Agreement, is found to have been applied within the guidelines set out by the Office of the Human Resources Officer."

[43] The final and Third Level Grievance was issued February 10, 2023, and is the Decision under judicial review. The Decision states:

> A final level consultation took place on January 24, 2023, with both yourself and Mr. Alfred Macleod as a person of your choice to assist you, in attendance. Prior to rendering a decision, I carefully reviewed and considered all the information provided, as well as the circumstances giving rise to your grievance.
>
> I noted that during the final level consultation, you brought to my attention that management's decision has been taxing for you, and that you feel that you were discriminated against, from a mental health perspective. Also, in your view, because the Covid-19 pandemic was responsible for your medical condition, you should have been allowed to use Code 699 instead of sick leave. In addition, you alleged that the Government policy on Code 699 and its application during the Covid-19 pandemic "contravened to the Canadian Charter of Human Right and Freedoms."

I have assessed your allegations, and, upon careful consideration of the matter, I have noted that between May 1 and August 16, 2020, you requested and were approved by management to use sick leave; this leave was supported with medical notes. You stated that your condition was exacerbated by the Covid-19 pandemic. At the time, you were provided with information on accessing mental health supports available departmentally (e.g. Employee Assistance Program) and government-wide (e.g., Mental Health and COVID-19 for Public Servants hub).

After attempting a gradual return to work from September 21 to October 1, 2020, you returned on sick leave. On November 6, 2020, you requested retroactive approval of Code 699 from May 1 to the end of June 2020, for homeschooling your children, a period of time that you were on approved sick leave. At the time of your request, management confirmed that sick leave was the appropriate leave for that time-period, in accordance with the Department's approach under these circumstances.

I am satisfied that the decision to deny your request for Code 699, as per Clause 21.17 of the EC Collective Agreement, was reasonable and was applied within the guidelines set out by the Office of the Human Resources Officer (OCHRO):

> *"If the employee is not well enough to work, they would use their sick leave credits. In accordance with the provisions of the collective agreement or relevant terms and conditions of employment, the manager may ask the employee to provide documentation to satisfy this requirement."* (OCHRO 2020).

Additionally, the Federal Public Sector Labour Relations and Employment Board (FPSLREB) recently confirmed with respect to the application of Code 699 that "an employee who is sick and unable to work is expected to use sick leave". (*Public Service Alliance of Canada v. Treasury Board,* 2022 FPSLREB 12, paragraph 209).

The policy guidance on Code 699 usage in the public service was a Government of Canada's exceptional measure to curb the COVID-19 pandemic and to protect the health and safety of its employees and the broader population. This guidance emphasized that the Code 699 leave was to be granted on a case-by-case basis, where other leave for those circumstances was not available.

> I find no evidence that you have been disadvantaged or discriminated against as a result of management's decision or the application of the policy guidance on Code 699.
>
> For these reasons, your grievance and the requested corrective action are denied.
>
> If you disagree with this decision, you may have recourse to the Federal Court by filing an application for judicial review; further information is available at Federal Court - Home (fct-cf.gc.ca).

[44] In my view the third and final Decision failed to meaningfully grapple with the issue raised by the Applicant, namely his claim for consideration under the April 10 Direction. Instead it focussed on and was based on the later November 9 Direction.

[45] In my very respectful opinion, the Decision failed to respect the legal and factual constraints in this case as set out by *Canada Post* at paragraph 31, and *Vavilov* at paragraph 128 both cited above.

[46] I come to this conclusion for several reasons.

[47] First, in the fifth paragraph of the Decision, the decision-maker specifically refers not to the April 10 Direction, but to the later November 9 Direction issued by the Chief Human Resources Officer. As noted already, the November 9 Direction was effective November 9, 2020 and did not apply to the Applicant's request for leave with pay under Code 699 from May 1 to November 9, 2020.

[48] Second, the sixth full paragraph of the Decision refers to an adjudication by the Federal Public Sector Labour Relations and Employment Board [FPSLREB] with respect to the

application of Code 699 which concluded that "an employee who is sick and unable to work is expected to use sick leave": *Public Service Alliance of Canada v Treasury Board,* 2022 FPSLREB 12 [*PSAC*], at paragraph 209. However and with respect, that adjudication also turned on the November 9 Direction which did not apply in this case.

[49] I also note the seventh full paragraph of the Decision quotes from and applies the November 9 Direction instead of the April 10 Direction actually applicable on the facts and legal situation before them.

[50] The Respondent argues the Applicant is not entitled under the April 10 Direction in any event, stating at paragraph 17 of their memorandum:

> 17. There was also no ambiguity in the guidance documents for 699 leave regarding the Applicant's circumstances. The guidance on mental health issues related to COVID-19 throughout this period was that they were not covered by 699 leave, they were covered by sick leave. Specifically, the May 1, 2020 FAQ stated that employees experiencing mental health issues could not claim 699 leave for that purpose and "mental health issues related to COVID-19 are covered by sick leave.

[51] In this respect the Respondent relies not on the April 10 Direction, but on a FAQ issued May 5, 2020:

> **5. If COVID-19 is causing me stress and anxiety, can I be entitled to use leave code 699?**
>
> Unfortunately no, mental health issues related to COVID-19 are covered by sick leave.
>
> [Emphasis in original.]

[52] With respect, in this submission the Respondent is asking the Court to make a determination the decision maker did not make. It is well known that on judicial review the Court is not entitled to write reasons the decision maker could have but did not make. While the Court is entitled to connect the dots where there are sufficient dots to connect, in my view this is not the case here: see *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 at para 11, and *Vavilov*, at para 97.

[53] Instead, I have a Decision dealing with leave taken between May and November 2020 (when Code 699 was to be more expansively available to those impacted by COVID-19, and which no longer required sick leave to be used first per April 10 Direction), but which unreasonably applied the narrower November 9 Direction which required employees to draw down sick leave before using the general "snowstorm" leave with pay provisions. With respect, I am unable to see any meaningful grappling in this case on any basis except the unreasonable application of the November 9 Direction, which did not reasonably respect the relevant factual and legal constraints.

[54] The Respondent submits that where a collective agreement has two provisions each of which might apply in a given situation, the more specific should apply. Thus the Respondent says the Applicant is restricted to the *sick leave* with pay provisions of the EC Collective Agreement (Section 22.02) which must be applied instead of the more general *other reasons* leave with pay provisions in Section 21.17 (coded Code 699).

[55] In this respect, the Respondent relies on *Lévesque v Canada Customs and Revenue Agency*, 2005 PSLRB 154, at para 53, *Clark v Treasury Board (Transport Canada)*, [1994]

CPSSRB No. 45, *Bitar v Treasury Board (Statistics Canada)*, 2020 FPSLREB 2, *PSAC*, at para 194, and, *McGill University Health Centre (Montreal General Hospital) v Syndicat des employés de l'Hôpital général de Montréal*, 2007 SCC 4.

[56] With respect, and while I agree the specific should override the general unless a contrary intent is shown, I do not find this a persuasive argument in assessing the reasonableness of this Decision.

[57] It seems to me this is not a case of *two* rules within one specific collective agreement as was the case in most if not all of the cases just cited. Instead and in my respectful view, there are *three* rules applicable in this case: 1) general *sick leave* with pay under 22.02 of the EC Collective Agreement, 2) general *other reasons* (snowstorm) leave with pay namely 21.17 engaging Code 699, and 3) the new April 10 Direction regarding those impacted by COVID-19 to for whom more expansive use of Code 699 was made available without requiring sick leave to be drawn down applicable to those impacted by COVID-19.

[58] Of these three possible rules, and with respect, it seems to me the third is the most specific. The April 10 Direction provided that "[e]ffective immediately, all employees (i.e. critical and non-critical employees who are working remotely or on-site), who are unable to work because of a COVID-19-related illness, will no longer be required to take sick leave and instead will be eligible for 'Other leave with Pay (699).'" That, with respect, reasonably included the Applicant but was not considered.

[59] In addition one might find reliance on the referenced May 5, 2020 FAQ unreasonable in the Applicant's case in that it appears his situation was not simply one of having stress and anxiety, but of having a medical condition so serious as to entail suicidal ideations and related conduct disclosed in the record, that is, harm so serious that it exacerbated underlying mental health conditions and rendered him unable to return to work for many months. But I need not decide this point.

[60] Moreover, if I had to decide the matter, the Applicant might reasonably be considered to fall into the situation covered by the fifth bullet in the April 10 Direction because the exacerbation of his condition by COVID-19 might reasonably be considered as a circumstance "directly related to COVID-19 preventing the employee from reporting to work." The fifth bullet said:

- COVID Other
- o If there are other circumstances directly related to COVID-19 preventing the employee from reporting to work.

[61] However, the foregoing is *obiter* and I will say no more given judicial review will be granted such that these matters are for a different decision maker.

[62] Before closing, I should note that a difficulty in this case is that the Applicant while filing and pursuing his grievance, was at the same time making submissions to various officials within the Treasury Board and Government of Canada. Essentially he was asking that employees whose mental health was so negatively affected by COVID-19 that they were unable to work, should be treated under the April 10 Direction in the same manner as those whose physical health was so

negatively affected that they were unable to work. He saw the alternative as discrimination against those with mental health issues.

[63] In my view it is not necessary to deal with either what a different policy might have looked like, nor whether the Applicant was discriminated against, given judicial review is granted and his grievance redetermined.

VII. Conclusion

[64] The Decision is unreasonable and therefore will therefore be set aside.

VIII. Costs

[65] The Applicant seeks $100 in costs. The Respondent seeks no costs. Given the Applicant's success he will be awarded $100.00 all inclusive costs payable by the Respondent.

JUDGMENT in T-482-23

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended with immediate effect to show the Attorney General of Canada as Respondent.
2. Judicial review is granted, the Decision is set aside, and this matter is remanded to a different decision maker for reconsideration on the basis of the April 10 Direction.
3. The Respondent shall pay the Applicant his costs in the all inclusive amount of $100.00.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-482-23
STYLE OF CAUSE:	DAVID BROWN v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	DECEMBER 4, 2023
JUDGMENT AND REASONS:	BROWN J.
DATED:	DECEMBER 22, 2023

APPEARANCES:

David Brown	FOR THE APPLICANT (ON HIS OWN BEHALF)
Richard Fader Larissa Schieven	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT