Federal Court  Cour fédérale

Date: 20201102

Docket: T-1599-19

Citation: 2020 FC 1023

Ottawa, Ontario, November 2, 2020

PRESENT: Madam Justice Strickland

BETWEEN:

ROBYN YOUNG

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Robyn Young, is a retired member of the Canadian Armed Forces [CAF]. She seeks judicial review of a decision concerning the implementation of a favourable grievance decision.

Background

[2] The Applicant was a member of the CAF from May 30, 2007 until December 31, 2015, when she was medically released from service.

[3] By letter of January 5, 2015, the Applicant requested reimbursement for next of kin [NOK] travel for her mother. The Applicant stated that her mother had made four trips from Windsor, Ontario to Victoria, British Columbia between June 11, 2014 and September 27, 2014 to be with the Applicant while she was hospitalized and recovering from brain surgery. The Applicant requested "the max benefits" in accordance with the governing policy.

[4] On July 6, 2015 the Applicant submitted a grievance regarding her NOK travel benefit request. This was denied by the Military Grievances External Review Committee [Committee].

[5] However, by decision of March 6, 2018, General J.H. Vance [General Vance], Chief of Defence Staff, advised the Applicant that, after conducting a *de novo* review, and although he believed that the Applicant was treated in accordance with the applicable policy, he found that she was aggrieved. He stated that he was prepared and able to grant the redress that she sought.

[6] In his decision, General Vance referred to the Compensation and Benefits Instructions [CBI] 211.07 – Next of Kin Travel Benefit [CBI 211.07], the Treasury Board approved policy on reimbursement for NOK travel. General Vance agreed with the Committee that the Applicant's grave illness met the CBI 211.07 criteria to be eligible for the NOK travel benefit. General

Vance noted that, for the Committee, the eligibility criteria issue had been that the Applicant had listed only her father on a NOK form but the Applicant's mother had travelled to be with her. However, General Vance found that the fact that the Applicant's mother was not listed on the NOK form was not relevant and that it was entirely reasonable, understandable and desirable for the Applicant's mother to have travelled to be with the Applicant during her medical crisis. He stated that the purpose of the NOK travel benefit is to ensure that a loved one can be bedside at times of medical crises and he was satisfied that the Applicant's mother travelling to her in her time of need met that intent. General Vance declared that the Applicant's mother was her NOK, despite not being listed on the relevant form. He found that his declaration rendered the Applicant eligible for the NOK travel benefit for her mother's NOK travel expenses, in accordance with the provisions of CBI 211.07, and directed that she be reimbursed accordingly.

[7] On March 14, 2018, General Vance's decision was forwarded by way of email to the Command Military Personnel unit and the Applicant's home unit, HMCS Malahat for implementation.

[8] On June 20, 2018, the Applicant submitted a Next of Kin Travel Benefit Worksheet [NOK Travel Benefit Worksheet] to the CAF Joint Personnel Support Unit [JPSU] claiming a NOK travel benefit totalling $51,701.80. She also submitted a Statutory Declaration pertaining to an attached list of 22 expenses. The JPSU reviewed the Applicant's NOK Travel Benefit Worksheet and reduced her allowable benefits to $13,676.01. By letter to the Applicant dated July 31, 2018, the JPSU explained that between June 11 and September 27, 2014 the Applicant's mother had made four trips at her own expense to be with the Applicant during her

hospitalization and recovery. On September 27, 2014, the Applicant moved back to Windsor, Ontario. The NOK travel benefit entitlement therefore ended on September 28, 2014. Any expenses incurred on or after September 28 had been removed from the Worksheet and would not be compensated. A cheque for $13,676.01 from the Canadian Armed Forces Central Fund was enclosed with the letter.

[9] The Applicant replied to the JPSU's July 31, 2018 letter, by letter on August 9, 2018. The Applicant took the position that the CBI does not define the termination of the benefit or the term "move" or address relocation by the injured member but that it does define the entitlement. She submitted that General Vance had approved the NOK travel benefits for a total of 300 days (120 days as well as an additional 180 days which she stated had been authorized by General Vance). She enclosed the NOK Travel Benefit Worksheet and Statutory Declaration and returned the cheque. By email of August 27, 2018, to General Vance and others, the Applicant stated the JPSU was still denying General Vance's direction.

[10] On September 7, 2018, Lieutenant-General C.A. Lamarre, Commander, Military Personnel Command, wrote to the Applicant responding to her email of August 27, 2018. He pointed out that CBI 211.07 is meant to reimburse a NOK's travel. Following General Vance's decision, the understanding was that the CAF would, in accordance with the policy, reimburse the Applicant for travel costs incurred by her mother, as her NOK. However, the Applicant was also requesting to be reimbursed for a period of time during which she was co-located with her mother, which was not the intent of the CBI 211.07 policy, nor a travel benefit endorsed by General Vance. Further, that review of the Applicant's NOK Travel Benefit Worksheet indicated

that all travel occurred between June 11 and September 27, 2014 and March 12-17, 2015. During the additional period for which the Applicant was seeking NOK travel benefits, between September 28, 2014 and April 30, 2015 (not inclusive of March 12-17, 2015 in which the Military Family Fund had provided reimbursement), there was no travel as the Applicant was located with her mother. Therefore, there was no entitlement under CBI 211.07(3).

[11] Lieutenant-General Lamarre stated that the cheque previously provided, in the amount of $13,676.01 from Support our Troops [SOT], was to cover all remaining NOK travel costs and was meant to completely reimburse the Applicant with respect to her mother's NOK travel. In addition, the funds from SOT met the intent of the Final Authority (General Vance's) decision to grant the Applicant the redress that she sought in accordance with the policy, as the amount is specifically intended for travel and living expenses. Lieutenant-General Lamarre stated that he wanted to assure the Applicant that the NOK travel costs were covered in accordance with her previous request and asked that she confirm that she wished for a cheque in the amount of $13,676.01 to be reissued.

[12] By email of September 25, 2018, the Applicant expressed her view that General Vance supported the whole of her claim, for the reasons she set out. She advised that she would not accept a payment of $13,676.01 and stated "[t]he Final Authority (General Vance) needs to specify his grant to me".

[13] By letter of December 12, 2018, General Vance wrote to the Applicant to respond to her concerns regarding the NOK travel benefit. He stated that following his determination letter it

had been brought to his attention that, as a member of the Class A Reserve, the Applicant was not entitled to benefits under CBI 211.07. Nevertheless, he felt that the Applicant should be provided with some sort of financial assistance for the expenses that her mother incurred. In that regard, a cheque for $13,676.01 representing non-public SOT funds had been provided to the Applicant. General Vance stated that he assessed that amount as fulfilling his intent with respect to his prior decision made in support of the Applicant's grievance. Further, that he had confirmed that the amount offered and enclosed with that letter was the maximum reimbursement that the Applicant would have been entitled to under CBI 211.07.

[14] The Applicant filed a notice of application for judicial review challenging General Vance's letter of December 12, 2018. On May 21, 2019, this Court granted a Judgment on Consent quashing the December 12, 2018 decision of General Vance because a breach of procedural fairness occurred during the decision making process. Costs in the amount of $1250.00 were awarded to the Applicant.

[15] By email of August 28, 2019, to various CAF members and others, the Applicant stated that the CAF's discrimination and lack of respect were no longer acceptable and demanded that the funds owed to her be paid within 30 days, failing which she would be filing another application for judicial review with this Court. The Applicant attached to the email her NOK Travel Benefit Worksheet and statutory declaration originally submitted on June 20, 2018 and other documents including the Judgment on Consent.

[16] By letter to the Applicant dated September 28, 2019, Vice-Admiral Haydn C. Edmundson [Vice Admiral Edmundson], Commander, Military Personnel Command, restated the background facts pertaining to the Applicant's grievance and her request that she be granted NOK travel benefits. The letter noted that she had cashed the cheque for $13,676.01 from SOT on January 21, 2019, thus signifying her acceptance of the closure of the matter and that she would not seek any further redress or remedy on the subject. Vice-Admiral Edmundson stated that he was satisfied that General Vance's decision of March 6, 2018 had been implemented and that the matter was now closed. Any other recourse would have to be exercised through judicial review before this Court.

[17] On September 30, 2019, the Applicant filed a notice of application seeking judicial review of Vice-Admiral Edmundson's September 28, 2019 decision.

Decision under review

[18] The September 28, 2019 letter from Vice-Admiral Edmundson to the Applicant states as follows:

> GRIEVANCE DECISION IMPLEMENTATION
> REIMBURSEMENT FOR NEXT OF KIN TRAVEL
> LEADING SEAMAN (RETIRED) ROBYN YOUNG
>
> References: A, CDS 5080-1-15-y-104854 6 March 2018
> B. Memorandum from LS Young 1000-1 dated 5 January 15
>
> At reference A, after considering your grievance, the Chief of the Defence Staff (CDS) found that you were aggrieved and was prepared to grant you redress. In your Redress of Grievance you requested that you be granted the Next of Kin Travel Benefit (NKTB) for your mother.

> Your grievance file reveals that your mother made four return trips between Windsor, Ontario, and Victoria, British Columbia, at her own expense, to be with you between 11 June 2014 and 27 September 2014. The costs associated with that travel amount to $13, 676.01.
>
> On 27 September 2014, you moved back to Windsor, Ontario, to live with your mother. During the periods of 28 September 2014 to 11 March 2015 and 18 March 2015 to 30 April 2015, for which you are seeking reimbursement for NKTB, no travel occurred as you were co-located with your mother. Consequently there was no associated Next of Kin travel expense.
>
> Based on your travel submission and statutory declarations, a cheque from Support Our Troops (SOT) dated 14 November 2018 (# 372829) in the amount of $13,676.01, to cover the Next of Kin Travel costs incurred by your mother during the period of 11 June 2014 to 27 September 2014, was sent to you.
>
> This cheque was cashed by you on 21 January 2019. This signifies your acceptance of the closure of this matter and that you will not seek any further redress or remedy on this subject.
>
> I am satisfied that the CDS decision at reference A has been implemented and that the matter is now closed; any other recourse on this matter must be exercised through Judicial Review under the *Federal Courts Act*.
>
> In closing, I want to thank you for your service to the Canadian Armed Forces and wish you the best in your future endeavours.

Legislative scheme

[19] The policy at issue in this matter is the Compensation and Benefits Instructions for the Canadian Forces, or CBI, Chapter 211 – Service Benefits for Ill and Injured Members of the Canadian Armed Forces, the most relevant provisions of which are as follows:

> 211.07 – NEXT OF KIN TRAVEL BENEFIT
>
> 211.07(1) (**Purpose**) The purpose of the Next of Kin Travel Benefit is to pay or reimburse an ill or injured member for the travel and living expenses of the next of kin and travel assistants.

211.07(2) (**Definitions**) The following definitions apply in this instruction:

"next of kin" has the same meaning as in article 1.02 (Definitions) of the QR&O (*plus proche parent*)

"NKTB" means the payment or reimbursement of the travel and living expenses of the next of kin and travel assistants of an ill or injured member. (*PDPPP*)

"travel and living expenses" has the same meaning as in article 209.01 (Interpretation) of QR&O. (*frais de déplacement et de séjour*)

"travel assistant" means a person who in respect of a next of kin meets the requirements of subparagraphs (3)(a) or (b) of article 209.02

211.07(3) (**Entitlement**) A member is entitled to the NKTB if all of the following conditions are satisfied:

(a) a medical officer is of the opinion that,

(i) the member has a serious, catastrophic, or life-threatening impairment, and

(ii) the presence of the member's next of kin is immediately required at the member's location; and

(b) the Chief of the Defence Staff — or an officer designated by the Chief of the Defence Staff — determines that there is no operational or security reason that prevents the next of kin — and a travel assistant, as the case may be — being at the member's location; and

(c) the next of kin — and a travel assistant, as the case may be — travel to the member's location

211.07(4) (Number — Persons) The NKTB is authorized for a maximum of four persons, including travel assistants.

211.07(5) (Travel — Duration) The NKTB is authorized for a maximum of 120 days in respect of the total number of persons who travel and as divided among those persons by the member, if the member is competent, or by the member's adult primary NOK, if the member is incompetent. Upon the authority of the Chief of the Defence Staff, an additional period of travel not exceeding a maximum of 180 days may be authorized for one person, if in the

> opinion of the medical officer, additional attendance of the NOK is required.
>
> (TB, effective 7 June 2012)

[20] "Next of kin" and "Travel and living expenses" for the purposes of the NOK travel benefit are defined in chapters 1.02 and 209.01, respectively, of the *Queen's Regulations and Orders for the Canadian Forces* [QR&O], as follows:

> **1.02 – DEFINITIONS**
>
> In QR&O and in all orders and instructions issued to the Canadian Forces under the *National Defence Act*, unless the context otherwise requires:
>
> "next of kin" in respect of an officer or non-commissioned member, means persons designated, in order of preference, as next of kin by the officer or non-commissioned member, on a form that is approved by the Chief of the Defence Staff for that purpose; (*plus proche parent*)
>
> **Section 1 – Travel and Living Expenses**
>
> **209.01 – INTERPRETATION**
>
> …
>
> (2) For the purpose of this section "travel and living expenses" are the following expenses that shall be paid or reimbursed out of public funds, at the same rates and under the same conditions as those established for a General Service Officer holding the rank of lieutenant-colonel travelling on temporary duty:
>
> a. the actual and reasonable costs of transportation;
>
> b. the actual and reasonable costs of accommodation;
>
> c. a meal allowance; and
>
> d. an incidental expense allowance.
>
> **(G) [P.C. 2012-0767 effective 7 June 2012; P.C. 2014-933 effective 15 September 2014]**

Issues

[21] In her written submissions, the Applicant, who is self represented, identified the issues as being whether the "CDS" acted contrary to the law; based his decision on an erroneous finding without regard for the material before him; failed to observe a principle natural justice and procedural fairness; and refused to exercise his jurisdiction.

[22] Conversely, the Respondent submits that there is only one issue on the merits in this application for judicial review, being whether the decision of Vice-Admiral Edmundson Commander, Military Personnel Command, is reasonable.

[23] Given that the submissions of the parties pertain to different decision makers and different decisions, at this juncture it is necessary to address whose decision is properly under review before moving forward with an analysis on the merits.

[24] In her Notice of Application, the Applicant identifies the decision under review as the September 28, 2019 decision of Vice-Admiral Edmundson, who she identifies as the "Chief of Defence Staff [CDS]". The Applicant also states in her Notice of Application that Vice-Admiral Edmundson's decision reneged on the March 6, 2018 final and binding decision of General Vance, and neglected the May 21, 2019 Judgment on Consent:

> The decision of Vice-Admiral Haydn C. Edmundson Chief of the Defence Staff [CDS] on 28 September 2019, to renege the previous final and binding decision (approval) of General J.H. Vance on 06 March 2018 (with respect to the Next of Kin Travel Benefit [NOKB] that was approved through a Redress of Grievance [ROG]) and

> neglecting the Judgement made on 21 May 2019 in the Federal Court of Canada by the Deputy Attorney General of Canada.

[25] I note that although the Applicant above identifies Vice-Admiral Edmondson as the "CDS", it is clear from the record before me that Vice-Admiral Edmundson made the September 28, 2019 decision in his capacity as Commander, Military Personal Command. It is also clear that General Vance, as Chief of Defence Staff, made the prior March 6, 2018 NOK travel benefit entitlement decision.

[26] In her written submissions, the Applicant states that this is an application for judicial review regarding the "continuing retraction to implement the final and binding decision (grant) of the Final Authority [FA], General J.H. Vance, Chief of the Defence Staff [CDS], made on 06 March 2018, with regards to the financial entitlement of the Next of Kin Travel Benefit [NOKTB]".

[27] Despite indicating that her judicial review concerns the implementation of General Vance's decision, in her written representations the Applicant identified the issues as pertaining to the "CDS".

[28] In that regard, the Applicant submits that the "CDS" acted in "any other way that was contrary to law" when he reviewed his original decision made on March 6, 2018 by subsequently "completing briefings"; when he made a new decision on December 12, 2018; when he allowed the JPSU to review and revise the Applicant's NOK travel benefit entitlement; when he allowed the Vice-Admiral Edmundson to make a new decision on September 28, 2019; and, when he

found that the Applicant's reimbursement had been implemented by the cheque issued from SOT funds.

[29] The Applicant further submitted that the "CDS" based his decision on erroneous findings without regard for the material before him when "military staff outside the authority of DGCFGA completed a review on 12 November 2018, using discriminatory criteria that is not in accordance with any documents of military law and regulations".

[30] And, that the "CDS" failed to observe a principle of natural justice and procedural fairness: "when completing reviews post final and binding decision made on 06 March 2018"; when the JPSU completed a review and revision with regard to the Applicant's entitlement to the NOK travel benefit; when Vice Admiral Edmundson made a new decision on 28 September 2019; and when criteria irrelevant to the entitlement was presented to the "CDS".

[31] The Applicant also identified as an issue that the "CDS" refused to exercise his jurisdiction: "when implementing his final and binding decision made on 06 March 2018"; when military personnel outside the authority of the DGCFGA completed reviews with regard to the Applicant's NOK travel benefit entitlement; and "when the Applicant received a Judgment on Consent on 21 May 2019 for the previous Judicial Review".

[32] From these submissions, it is apparent that the Applicant is taking issue with the implementation of the March 6, 2018 decision of General Vance and, in that regard, she attributes all of the actions related to the implementation to General Vance. Presumably, this is

because of his role as Chief of Defence Staff, the final authority in the military chain of command. However, General Vance's March 6, 2018 decision is not the decision under review before me. Nor is the September 28, 2019 decision of General Vance, set aside by Judgment on Consent, before me. The record before me also does not support that General Vance was involved in the actual implementation of his March 6, 2018 decision.

[33] The only decision under review in this matter is the September 28, 2019 decision of Vice-Admiral Edmundson. When appearing before me the Applicant acknowledged that her written submissions missed the mark, given that the decision for which she is seeking judicial review is Vice-Admiral Edmundson's decision. She accordingly revised her oral submissions, as will be discussed below, to focus on the reasonableness of that decision.

[34] The final determination of the implementation of General Vance's decision was by way of the September 28, 2019 decision letter of Vice-Admiral Edmundson. Accordingly, and having reviewed the whole of the materials before me, I agree with the Respondent that this application for judicial review really raises one issue on the merits and that is whether Vice-Admiral Edmundson's decision is reasonable.

[35] Finally, to the extent that the Applicant is asserting in her written submissions that she was denied procedural fairness with respect to Vice-Admiral Edmondson's decision, she has failed to explain, in any way, the basis for that assertion.

Standard of review

[36] The Applicant makes no submission as to the applicable standard of review. The Respondent submits, and I agree, that the presumptive standard of review of reasonableness applies (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 12, 25, 91, 97 100,102 and 116 [*Vavilov*]).

[37] A reviewing court "asks 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 paras 15, 99). When a decision is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and the law that constrain the decision maker, it is reasonable and is to be afforded deference by a reviewing court (*Vavilov* at para 85).

Preliminary Issues

i. *Admissibility of Applicant's affidavit*

[38] The Respondent submits that portions of the Applicant's affidavit sworn on November 13, 2019 and filed in support of her application for judicial review contain argument and opinion, contrary to the requirements to Rule 81(1) of the *Federal Courts Rules*, SOR/98-106 [Rules] and jurisprudence holding that the purpose of an affidavit is to adduce facts relevant to the dispute "without gloss or explanation" (*Canada (Attorney General) v Quadrini*, 2010 FCA 47 at para 18). The Respondent points specifically to paragraphs 5, 9, 11, 13 and 20 as being in whole or

part argument or opinion. Accordingly, that those paragraphs should be found to be inadmissible or afforded little weight.

[39] The Respondent's representation of the Rules and the relevant law is correct and, to the extent that the content of the impugned paragraphs is argument or opinion, I will afford it no weight.

ii. *Admissibility of new evidence*

[40] The Respondent submits that the document found at Tab 4 of the Applicant's motion record is not properly before the Court and that the Applicant has not sought leave of the Court to file an additional affidavit. The Respondent submits that the document should be struck out or, in the alternative, given no weight.

[41] The contested document is found at Tab 4 of the Applicant's motion record, entitled "Applicant's Additional Record". The Applicant describes the document as having been written by her to the Final Authority (General Vance) in the final stage of the redress of grievance, prior to the Final Authority's final and binding decision. The document is dated February 2015. It is not referenced in or appended as an exhibit to the Applicant's affidavit. Nor is it found in the Amended Certified Tribunal Record [CTR].

[42] Pursuant to Rule 312, with leave of the Court, a party may file affidavits additional to those filed in support of the application for judicial review or file a supplementary record. To obtain leave under Rule 312, an applicant must satisfy two preliminary requirements: 1) the

evidence must be admissible on the application for judicial review; and 2) the evidence must be relevant to an issue that is properly before the reviewing court (*Forest Ethics Advocacy Assn. v. National Energy Board*, 2014 FCA 88 at paras 4-6; see also *GCT Canada Limited Partnership v. Vancouver Fraser Port Authority*, 2020 FC 348). Additional evidence will only be permitted where: it is in the interests of justice; it will assist the court; admitting the evidence will not cause substantial or serious prejudice to the other party; and, the evidence was not available when original evidence was filed (*Tsleil-Waututh Nation v. Canada (Attorney General),* 2017 FCA 128 from paras 10 – 16).

[43] Here, the Applicant has not sought to submit the contested document by way of an additional affidavit. Nor has she sought leave to file an additional record.

[44] As noted above, the document also is not found in the CTR, and therefore it can be assumed that it was not before the decision maker. In the normal course, and with certain exceptions, evidence that was not before the administrative decision maker is not admissible on judicial review (see, for example, *Bernard v. Canada Revenue Agency*, 2015 FCA 263 at para 35; *Association of Universities and Colleges of Canada v. Canadian Copyright Licensing Agency*, 2012 FCA 22 at para 19).

[45] In any event, and having reviewed the document, it is my view that even if the Applicant had sought leave, it would not be admissible. While the document was relevant to the determination of the Applicant's grievance, as decided by General Vance is his March 6, 2018 decision, that decision is not the subject of this application for judicial review. The decision at

issue is Vice-Admiral Edmundson's September 28, 2019 implementation decision. Accordingly, the document is not relevant to, nor would it assist the Court, in determining the reasonableness of Vice-Admiral Edmundson's decision. Further, since the document was apparently written in 2015, it would have been available at the time the application for judicial review was filed.

[46] Finally, I note that the Applicant relies on the document only once, at paragraph 11 of her written representations. She does so to support the fact that she requested the maximum financial reimbursement for her mother under the NOK travel benefit. In that regard, the Applicant's January 5, 2015 letter requesting NOK travel benefit for the expenses incurred by her mother, listing the four trips made by her mother, and "requesting the max benefits" is found in the CTR and is also referred to in the affidavit of Captain Rodney Summerton, filed by the Respondent in this application for judicial review. The Respondent does not dispute the fact that the Applicant claims that she sought the maximum benefit. What is at issue is whether Vice-Admiral Edmundson reasonably determined which of the expenses that she asserts are covered by the benefit are actually reimbursable according to the CBI 211.07 and General Vance's direction.

[47] Thus, even though the subject document is not admissible, this does not negatively impact this aspect of the Applicant's case.

iii. *Grounds for the application*

[48] The Respondent submits that the Applicant's written representations contain a ground that was not included in the Applicant's Notice of Application. Specifically, the Applicant adds the issue of the JPSU's "delegated authority" to determine the amount of the NOK travel benefit.

Rule 301(e) requires notices of application for judicial review to include a complete and concise statement of the grounds intended to be argued, including reference to any statutory provision or rule to be relied on. Absent certain circumstances, applicants cannot present new grounds in their written representations, even if the respondent has not been prejudiced (*TI 'azt'en Nation v Sam*, 2013 FC 226 at paras 6-7 [*TI 'azt'en Nation*]). The Respondent submits that the grounds set out in the Applicant's Notice of Application do not include the authority of the JPSU to assess the Applicant's supporting documentation and to revise the Applicant's NOK Travel Benefit Worksheet. Nor is this addressed in the evidentiary record. The Respondent submits that it is prejudiced by the addition of this ground, as it did not have the opportunity to file evidence on the issue.

[49] As indicated by the Respondent, in *TI 'azt'en Nation* this Court stated:

> [6] Applicants for judicial review must set out in their notices of application the grounds on which they rely, and cannot present new grounds in their memoranda of fact and law, even if the respondent has not been prejudiced (*Federal Courts Rules*, SOR/98-106, s 301(*e*) (see Annex); *Arora v Canada (Minister of Citizenship and Immigration)*, [2001] FCJ No 24 (FCTD) at para 9; *Williamson v Canada (Attorney General of Canada)*, 2005 FC 954; *Spidel v Canada (Attorney General of Canada)*, 2011 FC 601).
>
> [7] However, there is some room for discretion where, for example, relevant matters have arisen after the notice was filed; the new issues have some merit, are related to those set out in the notice, and are supported by the evidentiary record; the respondent would not be prejudiced; and no undue delay would result (*Al Mansuri v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 22 at paras 12-13).

[50] In this case, the Applicant asserts in the "Overview of Events" section of her written representations that, in accordance with CBI 211, Chapter 1, section 1.20, "Authority – Treasury

Board", the JPSU does not have the delegated authority to determine and regulate payments by way of reimbursement to travel and other expenses. The Applicant does not include the JPSU's alleged lack of authority in her list of issues. However, within her identified issue asserting that the "CDS acted in any other way that was contrary to law" the Applicant submits that the "CDS" acted unlawfully when he allowed "the JPSU to complete a review and make revisions with regards to the Applicant's entitlement to the NOKTB".

[51] As indicated above, I agree with the Respondent that the only decision subject to review is Vice-Admiral Edmundson's September 28, 2019 decision, and that the only issue is whether that decision was reasonable. Therefore, the issue of the "CDS" (General Vance) delegating implementation authority to the JPSU is not properly an issue before the Court.

[52] And, to the extent that the Applicant is asserting more generally that the JPSU lacks delegated decision making authority, she has not supported this with argument or evidence. She refers only to CBI 211, s 1.02 which states as follows:

> **1.02 – AUTHORITY – TREASURY BOARD (TB)**
>
> Section 35 of the National Defence Act, ("NDA") provides:
>
> 35(1) The rates and conditions of issue of pay of officers and non-commissioned members, other than military judges, shall be established by the Treasury Board.
>
> (2). The payments that may be made to officers and non-commissioned members by way of reimbursement for travel or other expenses and by way of allowances in respect of expenses and conditions arising out of their service shall be determined and regulated by the Treasury Board.

[53] In my view, CBI 211, s 1.02 simply acknowledges that the Treasury Board determines rates of pay and the payments that can be made for reimbursement of travel and other expenses. How travel expenses are assessed and by whom is not addressed in that section and there is no evidence before me as to the composition of the JPSU or its specific duties and delegated authority. Thus, even if this issue had been properly raised, it could not succeed as the assertion is not grounded or established by the Applicant's evidence and submissions.

[54] In that regard, I observe that the record contains a June 11, 2018 email to the Applicant's mother, responding to her question of why the JPSU was involved in determining the quantum of the Applicant's benefit. There, it was explained that while General Vance approved the relief sought in the Applicant's grievance, it is JPSU HQ that is the signing and approval authority for the actual NOK travel benefit claim. While General Vance approved the application of the NOK travel benefit to the Applicant's situation, he did not determine the actual amount of the claim. The email identified the JPSU as the unit responsible for assessing and approving the quantum of benefit based on the NOK travel benefit policy. There is no evidence before me to support that the JPSU did not have the authority to do so.

ISSUE 1: Was Vice-Admiral Edmundson's September 28, 2019 decision reasonable?

Applicant's position

[55] As indicated above, the Applicant in her written submissions did not take a position on the reasonableness of the decision. Rather, the Applicant submits that the "CDS" (General Vance) acted contrary to the law, that the "CDS" based his decision on erroneous findings

without regard to the material before him, and that the "CDS" refused to exercise his jurisdiction. All of these submissions relate the implementation of General Vance's March 6, 2018 decision, but do not address the decision under review in this matter, that of Vice-Admiral Edmundson.

[56] However, when appearing before me, the Applicant submitted that General Vance's March 6, 2018 decision granted her the maximum benefits that were potentially available to her under CBI 211.07. This included travel, accommodation, meals and other expenses for 300 days for her mother as the Applicant's NOK. And even though the Applicant returned to Windsor, Ontario on September 27, 2014, she resided by herself, not with her mother. As her mother continued to care for her during that time, her mother should be entitled to all NOK travel benefits. The Applicant submitted that she had submitted information in support of the extended claim in her application for judicial review of General Vance's December 12, 2018 decision that was set aside by the Judgment on Consent. However, she did not realize that she needed to submit the information again in support of this application for judicial review and asked if an adjournment would be possible to submit new evidence. The Applicant also submits that because the payment received was from SOT, non-public funds, she did not receive the correct benefit to which she was entitled.

Respondent's position

[57] The Respondent submits that legislation and "near legislation" must be read harmoniously and in context with the whole, and that Vice-Admiral Edmundson's interpretation of the CBI, read together with the QR&O, is sound.

[58] The Respondent submits that the Applicant's submission that, because she sought the "max benefit" and because General Vance found her to be aggrieved, she is entitled to travel related allowances for 300 days is unreasonable. First, nowhere in his March 6, 2018 grievance decision does General Vance state that the Applicant is entitled to payment for travel undertaken during a 300 day period. Second, even if General Vance had found that the Applicant is entitled to reimbursement for travel undertaken during a 300 day period, the Applicant's mother travelled to Victoria for a total of only 41 days during four trips between June 11 and September 27, 2014. On September 27, 2014, the Applicant then moved to Windsor, Ontario to reside with her mother.

[59] The Respondent submits that the CBI makes it clear that the NOK travel benefit is available only in relation to travel actually undertaken by NOK "to the member's location". Article 211.07(05), which authorizes reimbursement for travel up to 300 days, read in its ordinary and grammatical sense, does not alter the entitlement to the NOK travel benefit under article 211.07(3), which states that reimbursement is conditional on a member's NOK travelling to the member's location. Therefore, once the Applicant relocated to Windsor, her mother, as her NOK, was no longer travelling to the member's location, as required by article 211.07(3), and was no longer eligible for the NOK travel benefit.

[60] Finally, the Respondent submits that the NOK travel benefit is only meant to reimburse a NOK for actual and reasonable travel expenses, as demonstrated by the legislative and policy scheme, and is not meant to be a windfall. Vice-Admiral Edmundson reasonably concluded that

the Applicant had received and accepted the amount she was entitled to under the NOK travel benefit, $13,676.01, and that she is entitled to no further reimbursement under the CBI.

Analysis

i. Reasonableness of the decision

[61] The Applicant disagrees with the Vice-Admiral Edmundson's interpretation of CBI 211.07 with respect to her entitlement to the NOK travel benefit and his determination, based on that interpretation, that her grievance had been implemented. This disagreement is based on her view that by his March 6, 2018 decision General Vance granted her the full benefit potentially available under CBI 211.07. Her assessment is that the maximum benefit, in her case, should be $51,701.80. This, in essence, interprets CBI 211.07 to entitle her to a NOK per diem benefit for her mother even after the Applicant's return to Windsor, Ontario. In the Applicant's view, it was not open to Vice-Admiral Edmundson, based on JPSU's assessment of allowable quantum, to find that her entitlement was less than the maximum benefit.

[62] In my view, the question to be answered is whether it was reasonable for Vice-Admiral Edmundson to conclude that the cheque for $13,676.01 served to reimburse the Applicant for the NOK travel benefit which General Vance found her to be eligible to receive under CBI 211.07.

[63] At its core, this is a question of statutory or policy interpretation. As stated by the Supreme Court of Canada in *Vavilov* regarding an administrative decision maker's interpretation process:

> [120] But whatever form the interpretive exercise takes, the merits of an administrative decision maker's interpretation of a statutory provision must be consistent with the text, context and purpose of the provision. In this sense, the usual principles of statutory interpretation apply equally when an administrative decision maker interprets a provision. Where, for example, the words used are "precise and unequivocal", their ordinary meaning will usually play a more significant role in the interpretive exercise: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10. Where the meaning of a statutory provision is disputed in administrative proceedings, the decision maker must demonstrate in its reasons that it was alive to these essential elements.
>
> [121] The administrative decision maker's task is to interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue. It cannot adopt an interpretation it knows to be inferior — albeit plausible — merely because the interpretation in question appears to be available and is expedient. The decision maker's responsibility is to discern meaning and legislative intent, not to "reverse-engineer" a desired outcome.

(see also *King v Canada*, 2017 FC 975 at paras 16, 19).

[64] In my view, Vice-Admiral Edmundson's interpretation of CBI 211.07, and his interpretation of General Vance's entitlement decision, are reasonable. Accordingly, Vice-Admiral Edmundson's decision that General Vance's decision granting a NOK travel benefit to the Applicant had been implemented is also reasonable.

[65] CBI 211.07(1) states that the purpose of the NOK travel benefit is to pay or reimburse an ill or injured member for their NOK's travel and living expenses. "Travel and living expenses", for the purposes of CBI 211.07, are defined in QR&O 209.01 and include "the actual and reasonable costs of transportation" and "the actual and reasonable costs of accommodation". In my view, it is clear from this that the intent of the benefit is to reimburse actual travel and living

expenses in the event that a member's NOK travels to be with an ill or injured member. This is also demonstrated by the text of the entitlement provision, s 211.07(3). This provision provides that a member is entitled to the NOK travel benefit if the three specified conditions are met: a medical officer is of the opinion that the member incurred a serious injury and the NOK's presence is immediately required at the member's location; there is no operational or security reasons preventing the NOK from travelling to the member's location; and the next of kin "travels to the member's location".

[66] While these three requirements are conjunctive, in the context of this matter only the third condition, 211.07(3)(c), is at issue. Vice-Admiral Edmundson's decision notes that the Applicant's grievance indicated that the Applicant's mother made four return trips between Windsor, Ontario and Victoria, British Columbia, to be with the Applicant between June 11, 2014 and September 27, 2014 and that the costs associated with that travel amounted to $13,676.01. On September 27, 2014, the Applicant moved back to Windsor. Thus, during the periods of September 28, 2014 to March 11, 2014 and March 18, 2015 to April 30 2015, for which the Applicant was seeking reimbursement, no travel occurred because the Applicant was co-located with her mother. Consequently, there was no associated NOK travel expense incurred during that period.

[67] In my view, it was reasonable to conclude that because the Applicant's NOK did not travel from September 28, 2014 – March 11, 2015 and March 18 – April 30, 2015, that the Applicant did not meet the entitlement criteria in 211.07(3)(c). Such interpretation is consistent with the text, context, and purpose of the provision and the statutory scheme.

[68] The Respondent submits, and I agree, that CBI 211.07(5) does not alter the ordinary meaning and application of CBI 211.07(3). CBI 211.07(5) provides that the NOK travel benefit is available for a period of up to 120 days, a maximum that can be extended by a further 180 days with the Chief of Defence Staff's authorization (to a total of 300 days).

[69] However, the Applicant submits that based on General Vance's March 6, 2018, decision she is entitled to the maximum CBI benefit, which the Applicant interprets to mean reimbursement for travel, meals, accommodations and incidental expenses incurred by her mother, as her NOK, for a 300 day period. On the Applicant's interpretation, she would be entitled to the NOK travel benefit on a per diem basis even if no travel or accommodation costs were incurred. I cannot agree.

[70] As indicated above, the fact that the duration of the benefit can be extended to 300 days does not eliminate the requirement in CBI 211.07(3)(c) that the entitlement is contingent upon actual travel to the member's location (and incurring travel related expenses) by the NOK. Further, pursuant to CBI 211.07(5), the NOK travel benefit is authorized for a maximum of 120 days with respect to the total number of NOK "who travel". Upon the authority of the Chief of Defence Staff, "an additional period of travel not exceeding a maximum of 180 days may be authorized for one person, if in the opinion of the medical officer, additional attendance of the NOK is required". The extension contemplated by CBI 211.07(5) pertains to travel expenses incurred within the extended period. In the absence of such travel by the Applicant's mother, as her NOK, during the disputed period, Vice-Admiral Edmundson reasonably found that the $13,676.01 provided covered the costs actually incurred and claimed by the Applicant's mother.

[71] Moreover, pursuant to CBI 211.07(5) an "additional period of travel" of up to 180 days may be available upon the authority of the Chief of Defence Staff "if in the opinion of the medial officer, additional attendance of the NOK is required". In his March 6, 2018 decision, General Vance effectively deemed the Applicant's mother to be her NOK so that the Applicant would be eligible for the NOK travel benefit. However, nowhere in that decision does General Vance explicitly authorize the extension of the NOK travel benefit for an additional 180 days, as would be necessary pursuant to CBI 211.07(5), to permit the extension of the time period of availability for that benefit. Nor does the record before me contain an opinion of a medical officer upon which such authorization would be contingent.

[72] Rather, General Vance references CBI 211.07(1), (2) and (3) and notes that between June 11 and September 27, 2014 the Applicant's mother made four round trips between Windsor, Ontario and Victoria, British Columbia, at her own expense to support the Applicant during her hospitalization and recovery. Further, that on January 5, 2015, the Applicant had submitted a claim for reimbursement of those travel expenses under the NOK travel benefit which had been denied because the Applicant had not included her mother on her NOK form. General Vance stated that his declaration that the Applicant's mother was her NOK rendered the Applicant eligible for the NOK travel benefit for her mother's travel expenses "in accordance with the provisions of CBI 211.07, and I will direct that you be reimbursed accordingly".

[73] Further, in her January 5, 2015 NOK travel benefit request, which was before General Vance, the Applicant claimed only the specified four trips, albeit also requesting "the max benefits". My point being that General Vance's decision was made prior to the Applicant

submitting her Travel Benefit Worksheet in which she claimed additional benefits for a 300 day period. General Vance made no reference to CBI 211.07(5) and would not have had reason to consider that aspect of her claim.

[74] In my view, nothing in General Vance's decision supports the Applicant's view that he granted her not only an extension of the travel period by an additional 180 days but an entitlement to claim for days within the extended period within which no NOK travel occurred.

[75] I am somewhat troubled by the Applicant's assertion that she submitted materials in her first application for judicial review that supported her expanded claim, but that this does not appear in the CTR. It was, of course, her responsibility as the Applicant to include all documentation that she wished to rely on to support her claim in her Application Record. That said, if there was other relevant documentation before the decision maker, it should have been included in the CTR. However, even if the Applicant did include other submissions in the prior application for judicial review, this does not mean that these were before Vice-Admiral Edmundson when he made his decision.

[76] Further, while the CTR confirms that the Applicant provided her NOK Travel Benefit Worksheet and Statutory Declaration on a number of occasions, including on August 28, 2019, just before commencing her application for judicial review, the CTR does not contain any further documentation submitted by the Applicant in support of her claim. That is, there is no documentation supporting that her mother incurred any actual expenses – travel, accommodation

or otherwise – during the contested time period when the Applicant and her mother were both situate in Windsor, Ontario.

[77] And, even if the Applicant did submit another letter contesting the interpretation and application of CBI 211.07 to her case, it is not clear to me how this would alter Vice-Admiral Edmundson's analysis and conclusion that, in the absence of any further travel by her NOK, the Applicant was not entitled to the NOK travel benefit. Accordingly, I am not persuaded that it would be appropriate to adjourn this matter to permit the Applicant to submit new evidence.

[78] In his September 28, 2019 decision, Vice-Admiral Edmondson referenced General Vance's decision as well as the Applicant's letter of January 5, 2015. Like General Vance, he made specific reference to the four trips actually made by Applicant's mother. He also mentioned the Applicant's travel submission and statutory declaration. He concluded that the Applicant was only entitled to reimbursement for those four trips. In my view, this finding was consistent with General Vance's decision.

ii. Impact of source of funds

[79] The record indicates that, at some point, a question arose as to whether the Applicant, as a Class A Reservist, was entitled to CBI 211.07 NOK travel benefits.

[80] In his March 6, 2018 decision, General Vance noted that initially, due to the Applicant's status as a Class A Reservist at the time of her diagnosis, she was not eligible for several types of CAF medical related benefits. However, that this had subsequently been rectified and that she

had received a wide range of support including medical care, rehabilitation services and various travel-related benefits. As such, her grievance related only to the NOK travel benefit. General Vance stated that he had to determine if the decision to deny her NOK travel benefit claim "was necessary" and that by declaring the Applicant's mother to be her NOK this rendered the Applicant eligible for the NOK travel benefit in accordance with CBI 211.07 and that he would direct that she be reimbursed accordingly.

[81] As the Applicant correctly points out, General Vance's December 12, 2018 decision in which he stated that it had come to his attention after he made his March 6, 2018 decision that the Applicant, as a member of the Class A Reserve, was not entitled to the benefits under CBI 211.07, was quashed by this Court. She submits that Vice-Admiral Edmundson's decision essentially makes the same finding.

[82] I would first point out that this Court made no finding on the merits of General Vance's December 12, 2018 decision. There was no hearing and the Judgment on Consent states only that the decision was set aside due to a lack of procedural fairness. In this matter, the Applicant has made no substantive submissions as to any alleged breach of procedural fairness regarding Vice-Admiral Edmundson's decision.

[83] Further**,** Vice-Admiral Edmundson's letter carefully sidesteps the issue as to as whether, as a Class A Reservist, the Applicant was entitled to CBI 211.07 NOK travel benefits. He states that, based on the Applicant's travel submission and statutory declarations, a cheque from SOT dated November 14, 2019 for $13,676.01 to cover the NOK travel costs incurred by the

Applicant's mother during the period of June 11- September 27, 2014 was sent to the Applicant and was cashed by her. Vice-Admiral Edmundson states that he was satisfied that General Vance's decision had been implemented.

[84] The Applicant points out that QR&O 209.01 states that "travel and living expenses" are the listed expenses "that shall be paid or reimbursed out of public funds" but that she was not paid out of public funds. She submits that because the funds paid to her are not public funds, General Vance's March 6, 2018 decision has not been implemented and that while she received a charitable gift, she has not been reimbursed under the policy.

[85] The Respondent notes that under the *National Defence Act,* RSC 1985, c N-5, the SOT fund, a charitable fund, falls within the s 2(1) definition of "non-public property":

> ***non-public property*** means
>
> **(a)** all money and property, other than issues of materiel, received for or administered by or through messes, institutes or canteens of the Canadian Forces,
>
> **(b)** all money and property contributed to or by officers, non-commissioned members, units or other elements of the Canadian Forces for the collective benefit and welfare of those officers, non-commissioned members, units or other elements,
>
> **(c)** by-products and refuse and the proceeds of the sale thereof to the extent prescribed under subsection 39(2), and
>
> **(d)** all money and property derived from, purchased out of the proceeds of the sale of, or received in exchange for, money and property described in paragraphs (a) to (c)

[86] In my view, in this application for judicial review, the Applicant has not raised the issue of whether or not, as a Class A Reservist, she was entitled to CBI 211 NOK travel benefits. In

any event, what is apparent from the record is that the first cheque was sent to the Applicant by JPSU on July 31, 2018, and was from the Canadian Forces Central Fund. The Applicant returned that cheque. A replacement cheque was enclosed with General Vance's December 12, 2018 letter. General Vance stated that these were non-public funds provided by SOT. The Applicant cashed that cheque on January 21, 2019. What is also apparent from the record is that the Applicant's travel benefit request was assessed and determined pursuant to the provisions of CBI 211.07. This was made clear in Lieutenant-General Lamarre's letter of September 2018 in which he also explained that the cheque was meant to completely reimburse the Applicant for any financial hardship she may have incurred with respect to her mother's NOK travel. And "[i]n addition, the funds from SOT meet the intent of the Final Authority decision to grant you redress that your sought in accordance with the policy as the amount is specifically intended for travel and living expenses".

[87] Thus, regardless of the source of the funds paid, based on General Vance's decision granting her grievance, the quantum of her claim was assessed as if the CBI 211.07 NOK travel benefit was available to her.

[88] In my view, the Applicant's challenge in this matter is not really with the source of the funds paid to her, it is with the assessment of the quantum of the funds available pursuant to CBI 211.07. If, as a Class A Reservist, the Applicant is not entitled as of right to the travel benefit, then the funds paid to her need not be sourced from pubic funds. If Class A Reservists are entitled to the benefit then, although the funds in that instance would have been required to be paid from public funds, in these circumstances, the amount would be the same. Further, the

Applicant cashed the provided cheque, knowing the quantum of the funds was assessed on the basis of CBI 211.07, but that the funds were provided by the SOT and having been advised of the military's view that, based on the CBI 211 NOK travel benefit assessment, no further amounts are due to her. Accordingly, in these circumstances and although the Applicant does not agree with that assessment, the spirit and intent of General Vance's March 6, 2018 decision was implemented.

Conclusion

[89] In conclusion, Vice-Admiral Edmundson reasonably found, in light of both his interpretation of the statutory scheme and General Vance's decision, that the $13, 676.01 paid to the Applicant served to fully implement that decision.

Costs

[90] The Respondent advised when appearing before me that although it had initially sought costs, it was not pursuing that request.

JUDGMENT IN T-1599-19

THIS COURT'S JUDGMENT is that

1. The Application for Judicial Review is dismissed;

2. There shall be no order as to costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1599-19
STYLE OF CAUSE:	ROBYN YOUNG v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	BY VIDEOCONFERENCE USING ZOOM
DATE OF HEARING:	OCTOBER 26, 2020
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	NOVEMBER 2, 2020

APPEARANCES:

Robyn Young	FOR THE APPLICANT (ON HER OWN BEHALF)
Maia McEachern	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Department of Justice Vancouver, British Columbia	FOR THE RESPONDENT