Federal Court of Appeal | Cour d'appel fédérale

Date: 20200428

Docket: A-406-18

Citation: 2020 FCA 81

CORAM: **BOIVIN J.A.**
GLEASON J.A.
RIVOALEN J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

ALLAN BRADLEY ZALYS

Respondent

Heard at Vancouver, British Columbia, on January 15, 2020.

Judgment delivered at Ottawa, Ontario, on April 28, 2020.

REASONS FOR JUDGMENT BY:	BOIVIN J.A.
CONCURRED IN BY:	RIVOALEN J.A.
DISSENTING REASONS BY:	GLEASON J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20200428

Docket: A-406-18

Citation: 2020 FCA 81

CORAM: **BOIVIN J.A.**
GLEASON J.A.
RIVOALEN J.A.

BETWEEN:

THE ATTORNEY GENERAL OF CANADA

Appellant

and

ALLAN BRADLEY ZALYS

Respondent

REASONS FOR JUDGMENT

BOIVIN J.A.

[1] I have had the benefit of reading the reasons drafted by my colleague, Gleason J.A. I agree with the facts as she has set out, as well as her conclusion that the style of cause should be amended as the appellant requests. However, and with respect, I am unable to agree with her that the appeal should be allowed only in part with costs to the respondent.

[2] The appellant appeals from the judgment of the Federal Court in *Zalys v. Canada (Royal Mounted Police)*, 2018 FC 1122, 298 A.C.W.S. (3d) 863, which granted the respondent's application for judicial review of the June 8, 2017 decision of a Level II Adjudicator (the Adjudicator) appointed under the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10 (as it read prior to November 28, 2014). The Adjudicator denied the respondent's grievance in which he sought to have service pay included in the lump sum payout of annual leave he received when he retired from the RCMP. The respondent then sought judicial review before the Federal Court. The Federal Court found that the Adjudicator's decision was unreasonable and remitted the matter back with directions for the Adjudicator to "adopt an interpretation upholding the [respondent's] position" (Federal Court's Reasons at paras. 26, 69-70).

[3] For the following reasons, I would allow the appeal with costs, set aside the judgment of the Federal Court, dismiss the application for judicial review, and restore the decision of the Adjudicator.

[4] On an appeal of a judicial review decision, as stated by my colleague, our Court must determine whether the Federal Court appropriately selected and properly applied the standard of review: *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paragraphs 45-47; *Canada Revenue Agency v. Telfer*, 2009 FCA 23, 386 N.R. 212 at paragraph 18. The standard of review in this application for judicial review is reasonableness. Our Court must therefore focus on the decision of the Adjudicator and determine whether, in reviewing it, the Federal Court identified reasonableness as the standard of review and applied it correctly.

[5] In assessing the Adjudicator's decision, I am guided by the Supreme Court's teachings in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 [*Vavilov*]. When the Court determines that the applicable standard is reasonableness, the Court "must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified" (*Vavilov* at para. 15). While the majority reasons in *Vavilov* describe reasonableness review as "robust", they also reiterate that it involves deference. Reasonableness review "finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers" and is "meant to ensure that courts intervene in administrative matters only where it is truly necessary […] to safeguard the legality, rationality and fairness of the administrative process" (*Vavilov* at paras. 12-13). The reasons themselves need "not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred" (*Vavilov* at para. 91, citing *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 at para. 16). What distinguishes reasonableness review from correctness review is the court's focus on the administrative decision and the justification offered for it, "not on the conclusion the court itself would have reached in the administrative decision maker's place" (*Vavilov* at paras. 15, 83). It is, furthermore, only appropriate to quash a decision on the reasonableness standard where "any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para. 100).

[6] Turning to the substance of the Adjudicator's decision before us, I am of the view that it is reasonable. Although it would have been preferable for the Adjudicator to acknowledge the

definition of "allowance" in finding that service pay was an "allowance" that is excluded from the definition of "salary", this alleged shortcoming, on its own, does not justify finding that the decision is unreasonable as a whole. Not only does the record demonstrate that the definition of "allowance" was not central to the respondent's submissions at the administrative stage, but it is, more importantly, not determinative of the matter. Whether service pay is considered to be an "allowance" that is excluded from the definition of "salary" or not, the Adjudicator was still required to address the effect of the term "substantive" in section 7.1 of the RCMP's Administration Manual. The Adjudicator did just that, making other findings that are independent from the notion that service pay is an "allowance" and that justify her ultimate conclusion that the respondent did not demonstrate that the payout he received was inconsistent with the relevant legislation and policies.

[7] Indeed, on the basis of the record that was before her, the Adjudicator appropriately observed that "[t]he crux of the dispute" concerned the definition of "substantive salary" in section 7.1 of Chapter 19.1 of the RCMP's Administration Manual and signalled her focus on this chapter, which pertains to annual leave (Adjudicator's Reasons at paras. 38, 55, 61). Instead of relying on her finding that service pay was an "allowance", the Adjudicator went on to address the impact of the word "substantive" in section 7.1. In circumstances where "substantive salary" was not defined in the applicable policy manuals or enabling legislation at the relevant time, she reasonably concluded that the term "substantive" had a restrictive connotation and "denote[d] a basic salary void of any other form of compensation" (Adjudicator's Reasons at paras. 62, 64-65; Appeal Book, vol. II at pp. 345, 471, 489).

[8] The Adjudicator was also responsive to the respondent's argument that excluding service pay from "substantive salary" in section 7.1 of Chapter 19.1 of the RCMP's Administration Manual created an inequity. She disagreed with his contention for two reasons. First, she found that retiring members could choose to receive service pay by taking their remaining leave as vacation prior to retiring, or they could choose to receive their annual leave in a lump sum payout without service pay (Adjudicator's Reasons at paras. 66, 68-69, 73). Second, she considered how members in the officer cadre of the RCMP receive payouts of annual leave when their annual leave exceeds their carry-over entitlement, according to the RCMP's Administration Manual. She noted that in the provisions she consulted, "substantive" denoted "that the payout must be based on the member's base salary, void of any allowances or other forms of compensation" and suggested that excluding service pay from "substantive salary" in section 7.1 would allow for a consistent application of annual leave payout policy for serving and retiring members (Adjudicator's Reasons at paras. 70-71, 73).

[9] Furthermore, the Adjudicator provided a coherent and intelligible explanation for why service pay is not tied to annual leave, but to a member's bi-weekly salary instead, which a discharged member no longer receives (Adjudicator's Reasons at paras. 67-68).

[10] None of these additional findings depend on the notion that service pay is an "allowance". Instead, they demonstrate an appropriate analysis of section 7.1 of the RCMP's Administration Manual in context, leading to a transparent, intelligible, and justifiable conclusion that the payout of annual leave the respondent received was appropriately calculated to exclude service pay in accordance with the relevant legislation and policies.

[11] Unlike my colleague, I also remain unconvinced that the Adjudicator was required to explicitly address, in her reasons, an amendment to the RCMP's National Compensation Manual subsequent to the respondent's retirement regarding service pay. This omission is relatively insignificant because the amendment does not clearly militate in favour of the respondent's position, any assertion regarding the motivation for this amendment, on the basis of the record, is speculative, and the amendment does not detract from the soundness of the Adjudicator's analysis of section 7.1 of the RCMP's Administration Manual that led her to conclude that service pay was excluded from "substantive salary" at the relevant time. In my opinion, finding that the Adjudicator was required to explicitly address the amendment in her reasons runs counter to the observation of the majority in *Vavilov* at paragraph 128 that:

> 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. […]

[12] In addition, I find that the record does not support the contention that the respondent noted the difference in wording between section 7.1 of Chapter 19.1 of the RCMP's Administration Manual and sections 6.1.1 and 6.2.2, which address payout of annual leave to RCMP members in the officer cadre, at the administrative stage of this matter. While the respondent raised arguments about the difference in wording between these provisions before this Court, there was no reference to sections 6.1.1 and 6.2.2 in the respondent's submissions at the administrative stage. By raising this argument before this Court, the respondent is in fact attempting to reargue his case.

[13] Finally, the Adjudicator's finding that the respondent bore the burden of establishing his claim was reasonable. It accords with past practice of RCMP adjudicators and the record does not suggest that the appellant failed to provide information to which only it had access (See e.g. *Marsh v. Zaccardelli*, 2006 FC 1466, 305 F.T.R. 303 at para. 59).

[14] Applying the teachings of *Vavilov* to the present case, the Adjudicator's decision is reasonable and her reasons demonstrate as much. More specifically, her reasons explain that the term "substantive salary" in section 7.1 of Chapter 19.1 of the RCMP's Administration Manual, undefined in the relevant RCMP policies, does not include service pay because: the word "substantive" denotes the "essential part of the salary", not a salary that includes allowances or other forms of compensation; service pay is tied to the receipt of a member's salary, not to annual leave; retiring members can choose the option upon retiring that allows them to receive service pay if they want it; and compensation in addition to base salary, such as service pay, is not paid out to active members when they receive a lump sum payout of annual leave that exceeds their carry-over entitlement (Adjudicator's Reasons at paras. 63-64, 67-68, 71).

[15] For its part, the Federal Court correctly identified the applicable standard of review as reasonableness (Federal Court's Reasons at para. 13). However, it conducted its own analysis of how the relevant provisions of the RCMP's Administration Manual and National Compensation Manual should be interpreted (Federal Court's Reasons at paras. 27-37, 39, 45-50). Consequently, it was insufficiently deferential and clearly engaged in a disguised correctness review, erroneously focused on its own interpretation of the RCMP's policy manuals, and compared that interpretation to that of the Adjudicator, using its own interpretation as a

"yardstick to measure what the [Adjudicator] did" (*Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171 at para. 28; See also *Canada (Attorney General) v. Heffel Gallery Limited*, 2019 FCA 82, [2019] 3 F.C.R. 81at para. 49).

[16] For the foregoing reasons, I would allow the appeal in full, set aside the judgment of the Federal Court dated November 8, 2018 in file T-1635-17 (2018 FC 1122), dismiss the respondent's application for judicial review, and restore the decision of the Adjudicator dated June 8, 2017. I would grant costs to the appellant in the agreed-upon amount of $5,300.00, and I would also amend the style of cause in the manner the appellant has requested. The style of cause on this document and on the judgment of this Court in file A-406-18 reflect this proposed amendment.

"Richard Boivin"

J.A.

"I agree.
Marianne Rivoalen J.A."

GLEASON J.A. (Dissenting)

[17] The appellant appeals from the judgment of the Federal Court in *Zalys v. The Royal Canadian Mounted Police et al.*, 2018 FC 1122, in which the Federal Court (*per* Annis, J.) granted an application for judicial review of the June 8, 2017 decision of a Level II Adjudicator appointed under the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10 (as it read prior to November 28, 2014) (the RCMP Act). In that decision, the Adjudicator denied the respondent's grievance seeking service pay on the accrued annual leave that the Royal Canadian Mounted Police (RCMP) paid out to him as a lump sum when he retired from the Force. The appellant also requests that the style of cause in this appeal be amended to name as the appellant the Attorney General of Canada, as opposed to the RCMP, P. Lebrun and Supt. Jennie Latham.

[18] For the reasons that follow, I would amend the style of cause in the way the appellant requests and would allow the appeal, but only to the extent of varying a portion of the order made by the Federal Court. As I would accordingly conclude that the respondent has been substantially successful in this appeal, I would grant him costs, fixed in the all-inclusive agreed-upon amount of $4,700.00.

I. The Proper Appellant

[19] Turning first to the request to amend the style of cause, in an application for judicial review seeking to set aside a decision of an adjudicator under the RCMP Act, the proper respondent is the Attorney General of Canada. Thus, the Attorney General of Canada should be substituted as the appellant in this appeal.

[20] Rules 303(1) and (2) of the *Federal Courts Rules*, SOR/98-106, provide as follows regarding respondents to judicial review applications:

303 (1) Subject to subsection (2), an applicant shall name as a respondent every person	303 (1) Sous réserve du paragraphe (2), le demandeur désigne à titre de défendeur :
(*a*) directly affected by the order sought in the application, other than a tribunal in respect of which the application is brought; or	*a*) toute personne directement touchée par l'ordonnance recherchée, autre que l'office fédéral visé par la demande;
(*b*) required to be named as a party under an Act of Parliament pursuant to which the application is brought.	*b*) toute autre personne qui doit être désignée à titre de partie aux termes de la loi fédérale ou de ses textes d'application qui prévoient ou autorisent la présentation de la demande.
(2) Where in an application for judicial review there are no persons that can be named under subsection (1), the applicant shall name the Attorney General of Canada as a respondent.	(2) Dans une demande de contrôle judiciaire, si aucun défendeur n'est désigné en application du paragraphe (1), le demandeur désigne le procureur général du Canada à ce titre.

[21] P. Lebrun was the RCMP's National Compensation Services representative, who made submissions to the Adjudicator, and Supt. Jennie Latham was the Adjudicator, who rendered the decision under review, acting as the delegate of the Commissioner of the RCMP pursuant to subsections 5(2) and 32(1) of the RCMP Act. Neither are proper respondents to an application for judicial review.

[22] Rule 303(1)(*a*) prohibits naming the decision-maker whose decision is being reviewed as a respondent to a judicial review application, and an individual who made representations before the Adjudicator or who acted on behalf of an employer in the grievance process is not directly

affected by an order sought in a judicial review application and thus should not be named as a respondent under Rule 303(1)(*a*). Thus, neither P. Lebrun nor Supt. Jennie Latham should have been named as respondents and should therefore be removed as appellants.

[23] The propriety of naming the RCMP as a respondent is perhaps less clear-cut. There are many cases where the RCMP has been named as a respondent in judicial review applications seeking to challenge a decision made by an adjudicator under the RCMP Act (see, for example, *Marsh v. Zaccardelli*, 2006 FC 1466, 305 F.T.R. 303 (naming RCMP Commissioner Zaccardelli, the RCMP, and the Attorney General of Canada as respondents); *Smiley v. Royal Canadian Mounted Police*, 2007 FC 29, 155 A.C.W.S. (3d) 202 (naming the RCMP as respondent); *Lee v. Canada (Royal Canadian Mounted Police)* (2000), 184 F.T.R. 74, [2000] F.C.J. No. 887 (QL) (F.C.T.D.) (naming Her Majesty the Queen (Royal Canadian Mounted Police) and RCMP Commissioner Murray as respondents)). However, the issue of how the respondent should be named appears not to have been raised in these cases and, accordingly, the style of cause was set by the parties in their pleadings and not questioned before the Court.

[24] While the RCMP is undoubtedly affected by the order sought in this application, subsection 23(1) of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, Part II prohibits naming the RCMP as the respondent. That subsection provides:

Proceedings against the Crown may be taken in the name of the Attorney General of Canada or, in the case of an agency of the Crown against which proceedings are by an Act of Parliament authorized to be taken in	Les poursuites visant l'État peuvent être exercées contre le procureur général du Canada ou, lorsqu'elles visent un organisme mandataire de l'État, contre cet organisme si la législation fédérale le permet.

> the name of the agency, in the name of that agency.

[25] There is nothing in the RCMP Act or other legislation that authorizes the taking of proceedings like the present against the RCMP in its name. As this Court noted at paragraph 38 in *Gingras v. Canada* (1994), 113 D.L.R. (4th) 295, 165 N.R. 101 (Fed. C.A.), the RCMP is a division of the federal public administration and is a "department" within the meaning of section 2 and Schedule I.1 of the *Financial Administration Act*, R.S.C. 1985, c. F-11. This Court has held that government departments do not have legal personalities separate from the Crown (*Canada (Office of the Information Commissioner) v. Calian Ltd*., 2017 FCA 135, 414 D.L.R. (4th) 165, at para. 63). It follows that as departments are not separate legal entities, they are not appropriately named as respondents in a judicial review application, unless legislation directs otherwise (see for example, *Enniss v. Canada (Human Rights Commission)*, [1995] F.C.J. No. 1593 (QL), 104 F.T.R. 145 (F.C.T.D.) at paras. 7-9; and *Gravel v. Canada (Attorney General)*, 2011 FC 832, 393 F.T.R. 219 at para. 6). Similar reasoning applies to the RCMP.

[26] Because the RCMP ought not have been named as a respondent, Rule 303(2) of the *Federal Courts Rules* provides that the Attorney General of Canada should have been named as the respondent in the Federal Court. The style of cause should therefore be amended to substitute the Attorney General of Canada as the appellant before this Court.

II. Background

[27] Turning to the merits of this appeal, it is useful to next briefly review the relevant background to the respondent's grievance. The respondent was a regular member of the RCMP.

At the time of his retirement, he had 37 years of service with the Force and held the rank of staff sergeant, a non-commissioned officer rank within the RCMP.

[28] When employed, the respondent was entitled to paid annual leave and to service pay. The latter is an amount paid to entitled RCMP members on each bi-weekly pay cheque and is based on their length of service. At the time of his retirement, the respondent was receiving service pay at the maximum rate of 10.5% of his staff sergeant's salary.

[29] When the respondent decided to retire in 2012, he had accumulated 1,398 hours of annual leave that he had not been able to use during his career. The RCMP offered the respondent the option of either taking the leave and postponing his retirement date until after his leave credits were exhausted or retiring and electing to be paid out the unused annual leave in a lump sum. The respondent elected the latter option. Had the respondent instead chosen to remain on the payroll, the RCMP would have paid him service pay for each hour of annual leave he took.

[30] Following the respondent's retirement and discharge from the Force, the RCMP paid him the value of his accumulated annual leave credits, but did not add an amount for service pay on the annual leave. Had it done so, the gross amount of the lump sum payment would have been increased by $7,257.01.

[31] The RCMP's Administration and National Compensation Manuals set out the terms and conditions of service for RCMP members. The key provision in this appeal is section 7.1 in chapter 19.1 of the Administration Manual, which provided as follows at the relevant time:

> 7. Payout of Annual Leave on Discharge/Death
>
> 7.1 When a member is discharged from the RCMP or dies, the member or his/her estate will be paid an amount equal to the number of days of earned but unused annual leave to the member's credit, **calculated at his/her substantive salary** on the date of discharge or death.
>
> [emphasis added]

[32] The terms "substantive salary" and "substantive" are not defined in either Manual. However, as the respondent notes, the term "substantive" is a term of art used in the Federal Public Service to denote the permanent position to which the employee has been appointed, as opposed to an acting assignment, as was noted by this Court in *Sinclair v. Canada (Treasury Board)* (1991), 137 N.R. 345, 92 C.L.L.C. 14,008 (Fed. C.A.) [*Sinclair*] and *Attorney General of Canada v. Dupuis* (1991), 137 N.R. 349, 30 A.C.W.S. (3d) 1009 (Fed. C.A.) [*Dupuis*].

[33] The RCMP's National Compensation Manual, at the relevant time, provided in the "Definitions" section that the term "salary" means "an annual **rate of pay; not an allowance** or any other compensation […]" [emphasis added].

[34] In addition, the National Compensation Manual, at the time of the respondent's retirement, contained the following definitions within the "Definitions" section which are of relevance to this appeal:

> Allowance – the remuneration payable in respect of a position, **by reason of duties of a special nature, or for duties that the employee is required to perform** in addition to his/her regular duties.
>
> [emphasis added]

> Compensation – the pay and non-pay remuneration provided to an employee for services rendered, and includes, but is not limited to: salary and other compensation, e.g. performance awards; pension and insurance benefits; paid time off; **various allowances, e.g.** senior constable provisional allowance, **service pay**, bilingual bonus; and, compensation for the costs of serving in difficult environments […]
>
> [emphasis added]
>
> Daily rate of pay – a salary divided by 260.88, which is the average number of working days in a year […]
>
> Premium pay – a non-pensionable sum of money paid in addition to salary.
>
> Remuneration – pay and/or allowances.

[35] The RCMP's Administration Manual at the relevant time also contained provisions governing the payout of annual leave to commissioned officers prior to retirement. The relevant portions of these provisions in chapter 19.1 stated:

> 6.1 On Mar. 31, a member in the officer cadre whose annual leave bank exceeds his/her yearly annual leave entitlement will be automatically paid the excess leave credits to a maximum of one year's entitlement.
>
> 6.1.1 The payout [of annual leave credits] is calculated using the member's **base substantive salary** in effect on Mar. 31 of the current leave year. This does **not include** performance awards or **allowances**.
>
> 6.2 With the approval of his/her supervisor, a member in the officer cadre can cash out his/her earned but unused annual leave credits at any time during the leave year.
>
> […]
>
> 6.2.2 The voluntary payout [of annual leave credits] is calculated using the member's **base substantive salary** in effect on Mar. 31 of the previous leave year. This does **not include** performance awards or **allowances**.
>
> [emphasis added]

[36] Finally, section 7.2 of chapter 19.1 of the RCMP's Administration Manual provided at the relevant time:

> 7.2 If the termination of employment is for reasons other than a medical discharge or death, when unearned annual leave credits have already been used by the member, the employer will recover an amount equivalent to the unearned annual leave credits from any monies owed to the member, calculated at the member's substantive salary on the date of discharge.

[37] The respondent filed a grievance in which he sought, among other things, payment of the disputed service pay. At the time, the RCMP Act and the *Commissioner's Standing Orders (Grievances)*, SOR/2003-181 (CSO (Grievances)) provided for a two-level grievance process, where second level hearings were conducted on a *de novo* basis, pursuant to subsections 31(1) and 32(1) of the RCMP Act and sections 13 and 17 of the CSO (Grievances). As is more fully discussed below, the respondent advanced before the grievance adjudicators some – but not all – of the arguments he made before this Court regarding the import of the foregoing provisions in the two RCMP Manuals.

III. The Decision of the Level II Adjudicator

[38] As the Level II Adjudicator proceeded on a *de novo* basis, albeit based on the written submissions made at both levels of the grievance procedure, it is only necessary to review the Level II Adjudicator's decision. Before her, the respondent pursued only the request for service pay on the payout of his annual leave credits. (His original grievance had sought additional relief.) The Adjudicator denied the grievance, finding that the RCMP's decision to exclude

service pay on the lump sum payout was not inconsistent with legislation or applicable RCMP and Treasury Board policies.

[39] The Adjudicator commenced her analysis at paragraph 54 by noting that, pursuant to Part III of the RCMP Act, a grievor "is required to present evidence capable of supporting the facts alleged in order to satisfy the Adjudicator, on a balance of probabilities, of the merit of the grievance".

[40] She continued by stating that the crux of the dispute related to the definition of "substantive salary" as used in section 7.1 of the RCMP's Administration Manual and centred on whether that term includes allowances. The Adjudicator noted that the definitions of "salary" and "compensation", contained in the RCMP's National Compensation Manual, were helpful. She stated that the definition of "salary" excludes allowances and that the "compensation" definition makes it clear that service pay is a form of allowance. From this, she reasoned that service pay was not salary.

[41] She then queried whether this conclusion was impacted by the use of the word "substantive" in section 7.1 of the Administration Manual. In answering this query, the Adjudicator turned to the Oxford Dictionary definition of "substantive" and relied on the meaning of "having separate and independent existence". She reasoned that, when so used as an adjective, the term "substantive" suggests a restrictive connotation, rather than a broadening of the noun it describes. She went on to give the example of the term's being used to describe a rank or position, where it relates to a permanent as opposed to a temporary position, akin to an

acting role. She continued by stating at paragraph 64 that the term relates to one's basic right and, if "assigned the same relationship to salary, substantive can only denote the essential part of the salary or the base salary, rather than one that is dependent on the amount of allowances attributed to each individual employee".

[42] The Adjudicator went on to dismiss the respondent's argument that this interpretation resulted in inequitable treatment as compared to the treatment offered to those who elect to take their accrued leave as vacation, stating at paragraph 73 that, "[t]he choices provided are not offered as equitable options, but rather as options for individual consideration".

[43] The Adjudicator finally noted that her interpretation was consistent with the treatment afforded to members in the officer cadre under articles 6.1.1 and 6.2.2 of chapter 19.1 of the Administration Manual, which expressly provide that payouts of accrued annual leave are based on the individual's base salary and therefore exclude service pay.

[44] As a consequence, the Adjudicator denied the respondent's grievance.

IV. The Federal Court's Decision

[45] The Federal Court intervened, finding the Adjudicator's decision unreasonable, and remitted the grievance for redetermination in accordance with prescriptive directions regarding the meaning to be attributed to the relevant provisions in the RCMP's Manuals. The Federal Court found that the Adjudicator's decision was unreasonable for several reasons.

[46] First, the Federal Court held that the Adjudicator unreasonably placed the onus on the respondent to demonstrate that the impugned payment violated the applicable legislation or policies. The Federal Court found that it was rather the RCMP that bore the burden of clearly explaining to members how the relevant policies operated.

[47] Second, the Federal Court held that the Adjudicator's contextual interpretation of "substantive salary" in section 7.1 of chapter 19.1 of the Administration Manual was unreasonable as the Adjudicator failed to consider and reconcile articles 6.1.1 and 6.2.2 of that same chapter, which used the term "base substantive salary". The absence of the word "base" in section 7.1 was a matter that, according to the Federal Court, the Adjudicator was required to address as the provisions, when read together, more reasonably support a conclusion opposite to the one reached by the Adjudicator.

[48] Third, the Federal Court held that the Adjudicator unreasonably relied on a dictionary definition of the term "substantive" and failed to consider what that term means in the context of the public service and statutes governing the RCMP, where the term "substantive" denotes a member's permanent, as opposed to a temporary, position.

[49] Fourth, the Federal Court found the Adjudicator's interpretation unreasonable as it results in an unfair disparity of treatment, that was especially troubling for members who died and who could not elect to use their accrued annual leave and were thus were denied the opportunity of electing to be paid service pay on the annual leave.

[50] Finally, the Federal Court held that the RCMP had failed in its duty to inform members that they would not be paid service pay if they elected the lump sum payout option and this failure meant that the grievance had to be allowed.

[51] The Federal Court accordingly set aside the Adjudicator's decision and remitted the respondent's grievance to the Level II Adjudicator, with a direction at paragraph 70 that the Adjudicator was:

> […] to declare that the term 'substantive salary' in section 7.1 of Chapter 19.1 of the [National Compensation Manual] or [Administration Manual] includes the accumulated service pay allowance, based on the permanent position rather than any temporary position of the member payable on the date of member's death or discharge.

V. Issues

[52] With this background in mind, I turn now to the various arguments made by the parties.

[53] Both agree that the applicable standard of review is reasonableness. They also concur that the approach to be taken by this Court on appeal of a judicial review decision of the Federal Court is as set out in *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 (*Agraira*). They more specifically agree that *Agraira* remains undisturbed by the recent decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, 441 D.L.R. (4th) 1 (*Vavilov*), where that Court set out a somewhat revamped paradigm for review of administrative decisions.

[54] In accordance with *Agraira*, an appellate court in an application for judicial review is required to step into the shoes of the court below and determine whether it selected the appropriate standard of review and whether it applied that standard correctly. Thus, in effect, on appeal, the appellate court is required to re-conduct the judicial review analysis.

[55] The parties part company on how the Federal Court applied the reasonableness analysis.

[56] The appellant asserts that the Federal Court was far too interventionist and, in effect, engaged in correctness as opposed to reasonableness review, which is inappropriate as the Supreme Court of Canada recently underscored in *Vavilov* at paragraph 83.

[57] The appellant more specifically submits that the Adjudicator's decision is reasonable because it offers a logically coherent and reasonable interpretation of the relevant provisions in the RCMP's Manuals. The appellant says in this regard that the Adjudicator reasonably (and indeed correctly) determined that service pay was an "allowance" due to its being listed as an example of an "allowance" in the definition of "compensation" contained in the National Compensation Manual. And, as "salary" is defined in that same Manual as including "pay", but as excluding "allowances", it was open to the Adjudicator to conclude that service pay does not form part of salary and therefore is not to be paid out under section 7.1 of chapter 19.1 of the Administration Manual.

[58] The appellant continues by submitting that, in the absence of a definition of "substantive" in either Manual, it was reasonable for the Adjudicator to look to dictionary definitions and that

the dictionary meaning selected by the Adjudicator is reasonable and provides support for her conclusion.

[59] The appellant further contends that there is nothing unfair in the manner in which the RCMP approached these issues as those who elect to take their accrued annual leave may be called in to work and thus are entitled to service pay whereas those who elect to be paid a lump sum, or who die while in service, are not so available. Likewise, according to the appellant, there is nothing untoward in those who have borrowed leave credits and who leave the Force before earning them not being required to repay their service pay under section 7.2.2 of chapter 19.1 of the Administration Manual as such individuals were on call and thus entitled to service pay when they took time off before they earned the entitlement to vacation pay. In short, according to the appellant, service pay in all instances is tied to being in service and on call.

[60] Finally, the appellant says that the Adjudicator's reliance on the articles 6.1.1 and 6.2.2 in chapter 19.1 of the Administration Manual was reasonable as similar treatment is afforded to commissioned officers who take payouts of their accrued leave. The appellant adds that it was not necessary for the Adjudicator to have commented on the use of the term "base substantive salary" in these paragraphs.

[61] The respondent, on the other hand, asserts that the Adjudicator's decision was unreasonable, although for somewhat different reasons from those offered by the Federal Court.

[62] According to the respondent, the Supreme Court of Canada in *Vavilov* has invited a more invasive approach to reasonableness review than has previously been applied, directing that such review should be "robust" *(Vavilov* at paragraphs 12-13, 67, 72). The respondent further says that the Supreme Court in *Vavilov* outlines two ways in which a decision, for which reasons are offered by the administrative decision-maker, might be unreasonable. As the majority of the Supreme Court noted at paragraph 101 of *Vavilov*, on one hand, there might be "a failure of rationality internal to the reasoning process". On the other hand, the decision might be "in some respect untenable in light of the relevant factual and legal constraints that bear on it".

[63] The respondent says that the Adjudicator's decision in the instant case runs afoul of the second of the two as it ignores the relevant case law and interpretive principles that the Adjudicator was bound to apply. On the latter point, the respondent asserts that principles of contractual interpretation are akin to rules of statutory interpretation and submits that, in *Vavilov*, at paragraph 120, the Supreme Court of Canada directs reviewing courts to determine whether the administrative decision-maker's interpretation is "consistent with the text, context and purpose of the provision". The respondent also points to paragraph 111 in *Vavilov*, where the Supreme Court stated that, "[w]here a relationship is governed by private law, it would be unreasonable for a decision maker to ignore that law in adjudicating parties' rights within that relationship". From the foregoing, the respondent says that this Court, in reviewing the Adjudicator's decision post-*Vavilov*, must determine whether she appropriately applied the relevant rules of contractual interpretation in considering the meaning of section 7.1 of chapter 19.1 of the RCMP's Administration Manual. This, in effect, invites us to engage in something akin to correctness review.

[64] The respondent submits that the Adjudicator did not appropriately apply the relevant rules of contractual interpretation for several reasons.

[65] First, according to the respondent, the Adjudicator failed to follow the applicable case law and ignored the relevant context in turning to dictionary definitions for the term "substantive". The respondent submits that, under a proper interpretation, the term "substantive" means merely the salary applicable to a member's full-time position and that the term is irrelevant to the inquiry concerning whether the term "salary" as used in section 7.1 includes service pay.

[66] Second, according to the respondent, the Adjudicator failed to apply the rule against redundancy. The respondent says that such rule required the Adjudicator to look to the difference in wording between articles 6.1.1 and 6.2.2 versus section 7.1 of chapter 19.1 of the Administration Manual. The respondent further submits that the absence of the word "base" in section 7.1 meant that "substantive salary" for payout purposes is something other than a former member's base substantive salary, *i.e.*, it must include his or her base salary plus service pay.

[67] Third, the respondent says that the Adjudicator failed to apply the rule of contractual interpretation that mandates that a more specific provision should take precedence over a more general one. Had this rule been applied, according to the respondent, the Adjudicator would have been required to find that the definition of "allowance" in the National Compensation Manual governed how that term is defined, not the mention of what may constitute an allowance in the definition of "compensation" in the National Compensation Manual. And, the definition of

"allowance", according to the respondent, makes it clear that service pay cannot be an allowance as service pay is unrelated to the duties that a member performs and is instead solely based on length of service. Because it is not an allowance, according to the respondent, service pay must be viewed as being included in salary. The respondent also notes the inclusion of an additional provision in section 2.8.7.1.4.3 of the National Compensation Manual, inserted after his retirement, which provides that service pay does not form part of salary. The respondent argues that the absence of such a provision in the Manuals at the times relevant to his grievance favours his interpretation of the provisions then in force.

[68] Fourth, the respondent says that the Adjudicator erred in failing to consider the principle of *contra proferentem*, which would require the Adjudicator to resolve any ambiguity in the RCMP's policies in favour of the respondent as the RCMP unilaterally promulgated the policies.

[69] Fifth, the respondent says that the Adjudicator failed to consider the interpretive principle that provides that an interpretation that leads to absurdities or unfair results should be avoided. The respondent contends that the Adjudicator's interpretation leads to two absurdities or inequities. First, it is unfair that deceased members cannot ever be paid service pay on their accumulated leave credits as they cannot opt to take their unused vacation credits in time off. Second, it is absurd to think that members who borrow leave credits and cease employment before they have earned the entitlement to the leave would not be required to pay back both the service pay and leave credits they were not entitled to receive. Under section 7.2 of chapter 19.1 of the RCMP's Administration Manual, the RCMP is entitled to recover "unearned annual leave credits [...] calculated at the member's substantive salary on the date of discharge". The

respondent contends that the terms “substantive salary” must be given the same meaning in sections 7.1 and 7.2 and that the Adjudicator’s interpretation leads to an absurd result of allowing discharged members to keep a windfall.

[70] Finally, the respondent contends that, under an appropriate application of the relevant interpretive principles, there can be only one outcome, namely, that the respondent was entitled to service pay on his accumulated leave payout. The respondent therefore asks that the appeal be dismissed.

[71] As noted, the respondent, who was not represented by counsel at either level of the adjudication, advanced some, but not all, of the foregoing arguments that his counsel made to this Court. More particularly, the respondent made submissions regarding the impact of the definition of “allowance” in force at the date of his retirement in the National Compensation Manual in the materials he filed with the Level I Adjudicator. He submitted that under that definition “service pay” was not an “allowance” and therefore was not excluded from the definition of “salary” or “substantive salary”. He also noted that the subsequent amendment to the provisions, mentioned above, was not in force when his release became effective. These submissions were put before the Level II Adjudicator, who proceeded on a *de novo* basis, and who had before her all the materials that were before the Level I Adjudicator as well as the additional submissions made at Level II.

[72] As is more fully explained below, I conclude that the fact that the Level II Adjudicator did not consider these arguments renders her decision unreasonable under the principles recently enunciated by the Supreme Court of Canada in *Vavilov*.

VI. Analysis

[73] In *Vavilov*, the Supreme Court undertook a certain recalibration of the law concerning the judicial review of the substantive merits of administrative decision-making. It is necessary in this appeal to consider only three issues arising from *Vavilov*, namely: whether the decision mandates the more invasive form of review the respondent urges; second, whether the Adjudicator's failure to consider some of the respondent's arguments renders the Adjudicator's decision unreasonable, and, finally, what remedy is appropriate.

A. *Does Vavilov mandate the type of more invasive review the respondent urges?*

[74] While the Supreme Court's decision in *Vavilov* may well require more invasive review than had previously been required by some of the previous jurisprudence, it does not require this Court to engage in what in effect amounts to correctness review in the way the respondent urges. In my view, the respondent's reliance on the Supreme Court's characterization of reasonableness review as being "robust" for the assertion that henceforth such review requires reviewing courts to consider if administrative decision-makers have correctly interpreted employer policies is misplaced.

[75] When the majority of the Supreme Court utilized the term “robust” in paragraphs 12 and 13 of its reasons, it did not use the term in isolation. The majority rather indicated that reasonableness review is *both* appropriately deferential to administrative decisions *and* robust. The latter comment was offered to address the concern expressed by some of the interveners before the Court that reasonableness review results in lesser justice for those whose rights are governed by administrative regimes. The majority of the Court put the matter this way at paragraphs 11 to 15 of the reasons:

> [11] […] The Court has heard concerns that reasonableness review is sometimes perceived as advancing a two-tiered justice system in which those subject to administrative decisions are entitled only to an outcome somewhere between “good enough” and “not quite wrong”. […]
>
> [12] These concerns regarding the application of the reasonableness standard speak to the need for this Court to more clearly articulate what that standard entails and how it should be applied in practice. Reasonableness review is methodologically distinct from correctness review. It is informed by the need to respect the legislature’s choice to delegate decision-making authority to the administrative decision maker rather than to the reviewing court. In order to fulfill *Dunsmuir*’s promise to protect “the legality, the reasonableness and the fairness of the administrative process and its outcomes”, reasonableness review must entail a sensitive and respectful, but robust, evaluation of administrative decisions: para. 28.
>
> [13] Reasonableness review is an approach meant to ensure that courts intervene in administrative matters only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process. It finds its starting point in the principle of judicial restraint and demonstrates a respect for the distinct role of administrative decision makers. However, it is not a “rubber-stamping” process or a means of sheltering administrative decision makers from accountability. It remains a robust form of review.
>
> [14] On the one hand, courts must recognize the legitimacy and authority of administrative decision makers within their proper spheres and adopt an appropriate posture of respect. On the other hand, administrative decision makers must adopt a culture of justification and demonstrate that their exercise of delegated public power can be “justified to citizens in terms of rationality and fairness”: the Rt. Hon. B. McLachlin, “The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law” (1998), 12 *C.J.A.L.P.* 171, at p. 174

> (emphasis deleted); see also M. Cohen-Eliya and I. Porat, "Proportionality and Justification" (2014), 64 *U.T.L.J.* 458, at pp. 467-70.
>
> [15] In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified. What distinguishes reasonableness review from correctness review is that **the court conducting a reasonableness review must focus on the decision the administrative decision maker actually made, including the justification offered for it, and not on the conclusion the court itself would have reached in the administrative decision maker's place**.
>
> [emphasis added]

[76] The foregoing, as well as the comments made by the majority in subsequent paragraphs of the reasons in *Vavilov*, make it clear that the Supreme Court has not mandated a wholesale jettisoning of deference in the way the respondent submits and has not abandoned the notion that grievance adjudicators are entitled to considerable deference in respect of their contractual interpretations. Far from it.

[77] For example, at paragraph 75 of *Vavilov*, the majority wrote:

> [75] We pause to note that our colleagues' approach [*i.e.*, Justices Abella and Karakatsanis in their concurring reasons] to reasonableness review is not fundamentally dissimilar to ours. Our colleagues emphasize that reviewing courts should respect administrative decision makers and their specialized expertise, should not ask how they themselves would have resolved an issue and should focus on whether the applicant has demonstrated that the decision is unreasonable: paras. 288, 289 and 291. We agree. As we have stated above, at para. 13, reasonableness review finds its starting point in judicial restraint and respects the distinct role of administrative decision makers. […]

[78] The majority continued in similar vein at paragraph 83 of *Vavilov*:

> [83] It follows that the focus of reasonableness review must be on the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome. The role of courts in these circumstances is to *review*, and they are, at least as a general rule, to refrain from deciding the issue themselves. **Accordingly, a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the "range" of possible conclusions that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the "correct" solution to the problem.** The Federal Court of Appeal noted in *Delios v. Canada (Attorney General)*, 2015 FCA 117, 472 N.R. 171, that, "as reviewing judges, we do not make our own yardstick and then use that yardstick to measure what the administrator did": at para. 28; see also *Ryan*, at paras. 50-51. Instead, the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable.
>
> [emphasis added]

[79] In fact, the Supreme Court emphasized that where the evidence before an administrative decision-maker permits a number of outcomes, the administrative decision-maker draws upon expertise, such as knowledge, experience and familiarity with the dynamic of labour relations, and there is relatively little in the way of constraining legislative language, the administrative decision-maker will have a large permissible space for acceptable decision-making: see *Vavilov* at paragraphs 31, 111-114 and 125-126. Many decisions by labour adjudicators, including the one here, will fall into this category.

[80] It therefore follows that it is not for this Court to re-conduct the interpretation of the relevant provisions in the RCMP's Administration and National Compensation Manuals based on the arguments advanced to us regarding how those provisions ought to be interpreted. Thus, the issue is not how the Manuals should be interpreted but, rather, whether the interpretation

offered by the Adjudicator was reasonable. Accordingly, our focus must be on the Adjudicator's decision, which is to be considered in light of the relevant factors outlined in *Vavilov*.

[81] Depending on the context, those may include the content of relevant statutes governing the decision and decision-maker, the relevant common law, international law, the evidence before the decision-maker, the submissions made to the decision-maker, relevant administrative precedents and the impact of the decision on the individual.

[82] Contrary to what the respondent asserts, I do not read the Supreme Court's invocation of relevant common law principles and statutory provisions in *Vavilov* as an open invitation to a reviewing court to re-conduct the required contractual analysis based upon arguments that were not even advanced to the administrative decision-maker, especially where, as here, the contractual provisions at issue are ambiguous. Re-conducting the contractual analysis is delving into the merits of the decision, something that Parliament has given to the Adjudicator, not this Court, which is restricted to only a review function: *Vavilov* at paragraph 83.

[83] On one hand, the definitions of "salary" and "compensation" contained in the National Compensation Manual support the Adjudicator's interpretation. On the other hand, the definition of "allowance" contained in the National Compensation Manual and articles 6.1.1 and 6.2.2 of chapter 19.1 of the Administration Manual lead to an opposite conclusion as do the other arguments advanced by the respondent before this Court.

[84] It is simply not open to this Court, in the context of reasonableness review of a decision such as this, to decide on the meaning to be given to these provisions, particularly in the absence of any previously-decided case law interpreting these provisions. Were we to do so, we would be engaging in correctness review and departing from firmly-established precedent that recognizes that grievance arbitrators are entitled to considerable deference in their contractual interpretations (see, for example *C.U.P.E. v. N.B. Liquor Corporation*, [1979] 2 S.C.R. 227, 26 N.R. 341 at pp. 235-236; *Canada Safeway Ltd. v. RWDSU, Local 454*, [1998] 1 S.C.R. 1079, 226 N.R. 319 at paras. 26-29; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at para. 68; *Canada (Attorney General) v. Gillis*, 2007 FCA 112, 361 N.R. 301 at paras. 24-30; *Laurentian Pilotage Authority v. Pilotes du Saint-Laurent Central Inc.*, 2018 FCA 117, 299 A.C.W.S. (3d) 235 at para. 45). Indeed, the majority in *Vavilov*, itself, citing from that Court's earlier decision in *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616 at para. 113 of the majority reasons, recognized that grievance arbitrators are not "necessarily […] required to apply equitable and common law principles in the same manner as courts for their decisions to be reasonable".

[85] Thus, as opposed to adopting the approach urged by the respondent before us, we must instead assess whether the interpretation offered by the Adjudicator was reasonable in light of those of the factors listed in *Vavilov* that pertain in the instant case.

B. *Does the Adjudicator's failure to consider some of the respondent's arguments render the Adjudicator's decision unreasonable?*

[86] Key among these factors is the degree to which the Adjudicator's decision responds to arguments made to her. In *Vavilov*, the Supreme Court heightened the role an administrative decision-maker's reasons play in reasonableness review and held that a decision-maker's failure to address key arguments of the parties may often render a decision unreasonable. The majority wrote as follows at paragraphs 127-128:

> [127] The principles of justification and transparency require that an administrative decision maker's reasons meaningfully account for the central issues and concerns raised by the parties. The principle that the individual or individuals affected by a decision should have the opportunity to present their case fully and fairly underlies the duty of procedural fairness and is rooted in the right to be heard: *Baker*, at para. 28. The concept of responsive reasons is inherently bound up with this principle, because reasons are the primary mechanism by which decision makers demonstrate that they have actually *listened* to the parties.
>
> [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.
>
> [emphasis added]

[87] Earlier in its reasons, the majority stated that the failure to address a key issue raised by the parties, where it is impossible from the record to ascertain how the decision-maker might

have decided that issue, is sufficient to render an administrative decision unreasonable. The majority wrote as follows at paragraphs 96-98 of *Vavilov*:

> [96] Where, even if the reasons given by an administrative decision maker for a decision are read with sensitivity to the institutional setting and in light of the record**, they contain a fundamental gap** or reveal that the decision is based on an unreasonable chain of analysis**, it is not ordinarily appropriate for the reviewing court to fashion its own reasons in order to buttress the administrative decision**. **Even if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome:** *Delta Air Lines*, at paras. 26-28. **To allow a reviewing court to do so would be to allow an administrative decision maker to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion. This would also amount to adopting an approach to reasonableness review focused solely on the outcome of a decision, to the exclusion of the rationale for that decision. To the extent that cases such as *Newfoundland Nurses* and *Alberta Teachers* have been taken as suggesting otherwise, such a view is mistaken.**
>
> [97] Indeed, *Newfoundland Nurses* is far from holding that a decision maker's grounds or rationale for a decision is irrelevant. It instead tells us that close attention must be paid to a decision maker's written reasons and that they must be read holistically and contextually, for the very purpose of understanding the basis on which a decision was made. We agree with the observations of Rennie J. in *Komolafe v. Canada (Minister of Citizenship and Immigration*), 2013 FC 431, 16 Imm. L.R. (4th) 267, at para. 11:
>
> > *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn . . . .
>
> [98] As for *Alberta Teachers*, it concerned a very specific and exceptional circumstance in which the reviewing court had exercised its discretion to consider

> a question of statutory interpretation on judicial review, even though that question had not been raised before the administrative decision maker and, as a result, no reasons had been given on that issue: paras. 22-26. Furthermore, it was agreed that the ultimate decision maker — the Information and Privacy Commissioner's delegate — had applied a well-established interpretation of the statutory provision in question and that, had she been asked for reasons to justify her interpretation, she would have adopted reasons the Commissioner had given in past decisions. In other words, the reasons of the Commissioner that this Court relied on to find that the administrative decision was reasonable were not merely reasons that *could* have been offered, in an abstract sense, but reasons that *would* have been offered had the issue been raised before the decision maker. Far from suggesting in *Alberta Teachers* that reasonableness review is concerned primarily with outcome, as opposed to rationale, this Court rejected the position that a reviewing court is entitled to "reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result": para. 54, quoting *Petro-Canada v. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396, 276 B.C.A.C. 135, at paras. 53 and 56. In *Alberta Teachers*, this Court also reaffirmed the importance of giving proper reasons and reiterated that "deference under the reasonableness standard is best given effect when administrative decision makers provide intelligible and transparent justification for their decisions, and when courts ground their review of the decision in the reasons provided": para. 54. **Where a decision maker's rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will generally fail to meet the requisite standard of justification, transparency and intelligibility**.
>
> [emphasis added]

[88] Here, as noted, the respondent raised the implications of the definition of "allowance" in the National Compensation Manual and the subsequent amendment to the relevant provisions in his submissions that were placed before the Adjudicators. He argued that the definition of "allowance" in force at the times relevant to his grievance did not include service pay and therefore asserted that service pay was included in "substantive salary" payable under section 7.1 of chapter 19.1 of the Administration Manual, thereby entitling him to the payment he sought. He also noted the need for the subsequent amendment to relevant provisions. Neither the Level I nor the Level II Adjudicator addressed these arguments in their decisions.

[89] Moreover, and crucially, the Level II Adjudicator premised her decision in large part on the conclusion that service pay is an "allowance" and therefore excluded from "salary" and "substantive salary" in section 7.1 of chapter 19.1 of the Administration Manual. A key point in her chain of reasoning was the determination that service pay is an allowance, based on its mention as an allowance in the "compensation" definition. However, in reaching this conclusion she failed to address the "allowance" definition, highlighted by the respondent, which leads to an opposite conclusion. She also failed to consider the need for the clarifying amendment to the provisions made after the respondent's retirement from the Force, which highlight the ambiguity inherent in these provisions and the need to reconcile the definition of "allowance" with that of "salary". There is therefore a meaningful gap in the Level II Adjudicator's reasons as these arguments wholly undercut her chain of analysis.

[90] This is not an instance of a decision-maker simply deciding not to address an argument of limited or no consequence: an analysis of this matter was key and may well have resulted in a favourable interpretation for the respondent under the Adjudicator's own reasoning. This is what makes the failure to address the issue important – the respondent's unaddressed arguments undercut one of the essential building blocks in the Adjudicator's chain of analysis.

[91] In my view, the Adjudicator's failure to grapple with the foregoing arguments advanced by the respondent in the circumstances of the present case "call[s] into question whether the decision maker was actually alert and sensitive to [these particular issues]" (*Vavilov* at paragraph 128). The failure of the Level II Adjudicator to address these issues therefore, in my view, renders her decision unreasonable as, to use the wording of the majority of the Supreme

Court of Canada in *Vavilov*, it constitutes a "fundamental gap" in the reasons as the issues' determination could well have led to an opposite conclusion and, given the wording in the relevant policies, there is no way to infer from the rest of the Adjudicator's reasons or from the record how the Adjudicator would have reconciled the conflicting provisions in the RCMP's National Compensation and Administration Manuals. Thus, I believe that the failure to address these arguments, as mandated by *Vavilov*, means that the Adjudicator's decision must be set aside.

[92] I have had the opportunity to read the reasons of my colleague, Boivin J.A., in draft and, with respect, disagree that the impact of a failure to address an argument made to an administrative decision-maker turns only on the vigour and clarity with which that argument was made to the decision-maker. Rather, it seems to me that an equally important consideration must be the relevance of the argument to the outcome reached by the administrative decision-maker. This is especially so where, as here, a party is not represented by counsel before the decision-maker and therefore lacks the ability to make legal arguments in as crisp a fashion as a lawyer would.

[93] Thus, for me, in determining whether the failure to address an argument renders a decision unreasonable, it is as much the relevance and potential merit of an unaddressed argument as the way it was made that is relevant.

[94] Indeed, the majority in *Vavilov*, at paragraph 128, after making the comments my colleague refers to in paragraph 11 of his draft reasons, noted that "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" (emphasis added).

[95] In drawing a distinction between key issues and central arguments, I read this passage as indicating that it is *both* the relevance and potential merit of the unaddressed argument *as well as* the force and clarity with which unaddressed arguments were made to the administrative decision-maker that may mean that the failure to address them renders an administrative decision unreasonable.

[96] Here, counsel for the respondent made the unaddressed arguments more clearly to the Court than they were made by his client to the Adjudicators. This is not surprising. The fact remains, though, that these arguments were advanced, were made in a clear enough fashion to the Adjudicators so as to be understandable and wholly contradict the Level II Adjudicator's reasoning.

[97] Contrary to the views of Boivin J.A., the Level II Adjudicator's consideration of the meaning to be given to the term "substantive" and consideration of dictionary definitions of that term are entirely irrelevant to the issues the Adjudicator was called upon to decide. The term "substantive" is a term of art used in the Federal Public Service to denote the permanent position to which the employee has been appointed, as opposed to an acting assignment, as was held by this Court in *Sinclair* and *Dupuis* (cited at paragraph, 32, above). Given this, the term "substantive" can have no other reasonable meaning and has no bearing whatsoever on whether

the salary attributable to a retiring RCMP member's substantive position includes service pay or not. All the term "substantive" means in the context of the relevant provisions in the RCMP Manuals is that the salary to be paid out on retirement is that applicable to the retiring member's permanent or substantive position. This leaves unanswered the question that was the crux of the issue before the Adjudicator, namely, whether salary for such position includes service pay or not.

[98] Central to this key issue are the questions the Adjudicator failed to grapple with, namely, how you go about reconciling the conflicting definitions in the Manuals of "salary" and "allowance", one of which would include service pay in substantive salary, and the other of which would not. The failure to grapple with this conflict – which was raised by the respondent – renders the Level II Adjudicator's decision unreasonable. In short, it is simply not open to a reviewing court, post-*Vavilov*, to uphold an administrative decision where the decision-maker fails to grapple with a key issue raised by a party where, as here, such issue required determination and the record provides no guidance on how that issue would have been settled by the decision-maker.

[99] It therefore follows that the Adjudicator's decision must be set aside.

C. *What remedy is appropriate?*

[100] Which brings me to the issue of remedy.

[101] For much the same reasons as it is inappropriate for this Court to uphold the Adjudicator's decision in light of the ambiguity contained in the Manuals, it is similarly inappropriate for this Court to issue directions on how the Manuals are to be interpreted. Contrary to the approach taken by the Federal Court, I am of the view that there is not a single way in which the relevant provisions can be read because they are inherently ambiguous. The issue of their interpretation must therefore be remitted to an adjudicator for reconsideration.

[102] Although the RCMP's internal grievance procedure has been amended in the time since this grievance was heard, section 68 of the *Enhancing Royal Canadian Mounted Police Accountability Act*, S.C. 2013, c. 18 provides that the former grievance process applies to any grievance presented prior to November 28, 2014. Therefore, the grievance may be remitted to a Level II Adjudicator for redetermination.

[103] While conceding that redetermination is usually the appropriate remedy in a successful judicial review application – and that the Supreme Court of Canada endorsed this as the typical approach in *Vavilov* – the respondent nonetheless submits that this is an exceptional situation and that the delay that has transpired since the grievance was filed should lead this Court to exercise its discretion and instead settle how the Manuals are to be interpreted.

[104] I decline to do so for three reasons. First, the threshold for declining to remit an issue to an administrative decision-maker where there is an issue to be resolved is high, as this Court noted in *Canada (Public Safety and Emergency Preparedness) v. LeBon*, 2013 FCA 55,

444 N.R. 93 and *D'Errico v. Canada (Attorney General)*, 2014 FCA 95, 459 N.R. 167 at paras. 14-17. Such threshold has not been reached in this case.

[105] Second, while there has been considerable delay in the determination of these issues in the RCMP's grievance process, this Court can ensure there is limited unnecessary additional delay by placing a time limit on the redetermination. I would accordingly afford the Level II Adjudicator, to whom the grievance is remitted, 120 days from the date normal operations at the RCMP are resumed at the conclusion of the COVID-19 pandemic in Canada within which to render a decision on the redetermination.

[106] Finally, to a certain extent, *Vavilov* has altered how judicial review is to be conducted through its greater emphasis on the importance of reasons. In light of this, it is best to allow a Level II Adjudicator an opportunity to re-examine these issues, this time through the lens that reasons must adequately address all key issues, as mandated by *Vavilov*.

[107] Given the additional issues raised by counsel for the respondent before this Court and their potential impact on the outcome of the grievance, all the key arguments advanced by the respondent, as reflected in these reasons, should be addressed by the Adjudicator in the redetermination decision. In addressing them, it may be that the Adjudicator need not say much, as *Vavilov* emphasized at paragraphs 91-98, and 127-128. However, failure to address these issues at all would render the decision liable to being set aside a second time, under the principles in *Vavilov*. As some of these arguments were not previously made before the Adjudicator, the parties should be afforded the opportunity to make additional submissions to the

Level II Adjudicator to whom the grievance is remitted, the timing and length of which I leave to the Adjudicator to determine.

[108] Finally, as to the issue of costs, they should follow the event. As the respondent was largely successful in this appeal, he should be awarded costs. The parties concurred that, if the Court were to award the respondent his costs, they should be fixed in the all-inclusive amount of $4,700.00. I concur that this amount is appropriate and thus would so award.

VII. Proposed Disposition

[109] In conclusion, I would substitute the Attorney General of Canada as the appellant in this appeal. I would also allow this appeal in part, set aside the judgment of the Federal Court, and, rendering the decision that it ought to have made, would allow the respondent's application for judicial review and remit the respondent's grievance to a Level II Adjudicator for redetermination, in accordance with the reasons of this Court, on the basis that the redetermination decision must be rendered within 120 days from the date normal operations at the RCMP are resumed at the conclusion of the COVID-19 pandemic in Canada. As I would find the respondent to have been largely successful in this appeal, I would grant him costs in the all-inclusive agreed-upon amount of $4,700.00.

"Mary J.L. Gleason"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-406-18
STYLE OF CAUSE:	THE ATTORNEY GENERAL OF CANADA v. ALLAN BRADLEY ZALYS
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	JANUARY 15, 2020
REASONS FOR JUDGMENT BY:	BOIVIN J.A.
CONCURRED IN BY:	RIVOALEN J.A.
DISSENTING REASONS BY:	GLEASON J.A.
DATED:	APRIL 28, 2020

APPEARANCES:

Susanne Pereira Courtenay Landsiedel	FOR THE APPELLANT
Christopher C. Rootham	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nathalie G. Drouin Deputy Attorney General of Canada	FOR THE APPELLANT
Nelligan O'Brien Payne LLP Ottawa, Ontario	FOR THE RESPONDENT