Federal Court  Cour fédérale

Date: 20210106

Docket: T-176-19

Citation: 2021 FC 14

[ENGLISH TRANSLATION]

Ottawa, Ontario, January 6, 2021

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

ALUMINERIE DE BÉCANCOUR INC.

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

[1] The applicant is challenging the legality of a final decision of the Employment Insurance Commission [Commission] dismissing its appeal against a non-entitlement decision made by a Plan Determination Officer [officer]. The officer ruled that the applicant was not entitled to a reduction of the Employer's Premium Rate for the year 2015 because it failed to discharge its

burden of demonstrating that its disability plan meets the requirements of the *Employment Insurance Regulations*, SOR/96-332 [Regulations].

[2] The impugned decision was made under the authority of section 75 of the Regulations, which allows a non-entitlement decision to be appealed to the Commission. It is not in dispute that the officer had the authority under section 72 of the Regulations to decide whether the applicant met—or continued to meet—any regulatory requirement to obtain a reduction—or continuation of the reduction—in the employer's premium rate. In this case, the standard of reasonableness applies to the judicial review of the impugned decision dismissing the applicant's appeal (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[3] For the reasons that follow, this Court is satisfied that the impugned decision was reasonable having regard to the applicable statutory and regulatory requirements, the reasoning followed by the decision maker, the history and context of the proceedings, the evidence on the record, the employer's submissions and all relevant elements (*Vavilov* at paras 83, 85, 94, 99, 102 in particular).

Statutory and regulatory framework

[4] Under the *Employment Insurance Act*, SC 1996, c 23 [Act], and its Regulations, the Commission administers an employment insurance program that provides insured employees with access not only to unemployment benefits, but also to special benefits for up to 15 weeks in the event of illness, injury or quarantine (paragraph 12(3)(c) of the Act). To ensure proper funding of the employment insurance program, the Commission sets the premium rate for each

year (section 66 of the Act). The employee's premium is based on their salary (section 67 of the Act); the employer's premium is 1.4 times the employees' premiums (section 68 of the Act). However, an employer may obtain a reduction in the employer's premium rate if it provides employees with an eligible wage-loss insurance plan that meets all applicable statutory and regulatory requirements.

[5] The Premium Reduction Program for Employers with Wage Loss Replacement Plans [reduction program] is established and administered by the Commission under Part III of the Regulations. Its objective is to eliminate or reduce claims for employment insurance benefits paid under the Act in cases of short-term disability. In order to obtain an employer premium reduction, the plan must, among other things, provide at least 15 weeks of benefits that are equal to or greater than those available under the Employment Insurance Program; insured persons must benefit from the employer premium reduction in amount at least equal to five-twelfths of the reduction (subsection 69(1) of the Act; section 63 of the Regulations; Guide to the Employment Insurance Premium Reduction Program, available on the Government of Canada website).

[6] In this case, subparagraph 63(c)(ii) of the Regulations is particularly relevant because, as will be discussed below, the disability plan set out in the collective agreements provides for a reduction in benefits paid to the applicant's employees:

63 A Weekly Indemnity Plan shall meet the following requirements:	63 Le régime d'indemnité hebdomadaire doit satisfaire aux exigences suivantes :
. . .	. . .

(c) benefits are paid in full under the plan regardless of	c) les indemnités sont versées intégralement compte non tenu :
. . .	. . .
(ii) the amount of the benefits, payable from any other source, that do not constitute earnings under section 35;	(ii) du montant des indemnités provenant d'autres sources qui ne constituent pas une rémunération aux termes de l'article 35;
. . .	. . .
[Emphasis added.]	[Je souligne.]

[7] In addition, proof of a formal written commitment to provide insured employees with a disability plan that meets the regulatory requirements (sections 63, 64, 65 or 66 of the Regulations) is also required (section 67 of the Regulations). As will also be discussed below, both the officer and the Commission (on appeal) consider that the unilateral assurance by the applicant that it complies in practice with the requirements of subparagraph 63(c)(ii) of the Regulations is not sufficient to authenticate the disability plan provided for in the collective agreements. They rely on subsection 67(1) of the Regulations, which states:

67(1) A plan that meets the requirements of section 63, 64, 65 or 66 shall be evidenced by a formal written commitment, including one or a combination of any of the following:	67(1) Tout régime conforme aux exigences des articles 63, 64, 65 ou 66 est authentifié par un engagement officiel écrit se présentant, notamment, sous l'une ou plusieurs des formes suivantes :
(a) a union or association agreement;	a) une convention avec un syndicat ou une association;

(b) an industry-wide plan;	b) un régime applicable à l'ensemble d'un secteur d'activité;
(c) a private carrier insurance policy;	c) une police d'assurance souscrite par un assureur privé;
(d) an undertaking contained in an employees' handbook;	d) un engagement contenu dans un guide à l'intention des employés;
(e) a board of directors' resolution that has been implemented;	e) une résolution du conseil d'administration qui a été mise à exécution;
(f) an undertaking contained in a personnel policy bulletin; or	f) un engagement contenu dans un bulletin énonçant les lignes de conduite relatives au personnel;
(g) a memorandum or other document addressed to employees by their employer.	g) une note de service ou tout autre document rédigés par l'employeur à l'intention de ses employés.
[Emphasis added.]	[Je souligne.]

[8] What is more, before proceeding to the specific facts of this case, in order for an eligible plan to be registered under the reduction program, the employer must complete a written application for a reduction, or an application to maintain the reduction following the amendment or replacement of the plan, and provide the Commission with all the required information and documents (subsection 68(1) of the Regulations). In particular, in addition to the information necessary to determine whether the plan meets or continues to meet the regulatory requirements (paragraph 68(1)(a) of the Regulations) and a commitment that the insured persons will benefit in an amount at least equal to five twelfths of the reduction in the employer's contribution

(paragraph 68(1)(c) of the Regulations), the employer must also provide a copy of the documents constituting the formal written commitment referred to in subsection 67(1) of the Regulations or, if the application is for the continuation of a reduction, a copy of the documents that have been amended or replaced (paragraph 68(1)(b) of the Regulations). Finally, where the application is incomplete or where the Commission requires further information or documentation in order to make its decision, the employer must, at the request of the Commission, submit the necessary information or documentation to the Commission within 30 days of the request; otherwise, an officer of the Commission must make a decision based on the existing information or documentation (subsection 68(2) of the Regulations).

Factual background

[9] In 1985, the applicant registered for the reduction program. But as we will now explain, after 2014, it was no longer eligible for a reduction of the employer's premium rate.

[10] In this case, the disability plan offered by the applicant to its employees finds its legal basis in the provisions contained in **Annex "A" - INCOME PROTECTION PLAN FOR DISABILITY - SHORT TERM** of the collective agreements which have been signed over the years between Aluminerie de Bécancour Inc. [employer] and the United Steelworkers, Local 9700 [union], covering respectively the "Operation and Maintenance" and "Laboratory and Environment" groups [insured employees].

[11] A plan that meets the requirements of section 63 of the Regulations may be evidenced by, among other things, an agreement with a trade union or association (paragraph 67(1)(a) of the

Regulations). However, what has been a problem for some fifteen years in the case under review is the so-called "coordination of benefits" clause, which evidently still appears in Annex A to the collective agreements. It provides for a proportionate reduction in the disability benefits paid by the employer under the plan if the employee is eligible for benefits from other sources—which is clearly contrary to the requirement of subparagraph 63(c)(ii) of the Regulations.

[12] The disputed clause in the collective agreements reads as follows:

> [TRANSLATION]
>
> If the Employee is eligible for disability benefits from other sources (e.g., personal insurance, group insurance plan or government plan), short-term disability benefits paid by the Company are coordinated so that the Employee's total income does not exceed one hundred percent (100%) of his or her salary at the time of commencement of his or her disability absence.

[13] In 2005, the applicant was formally advised by the Commission that the disability plan provided for in Annex A to the collective agreements did not comply with the Regulations. However, the Commission agreed to provisionally maintain the plan's registration in the reduction program on the condition that the defective clause in the collective agreements be amended upon renewal, and that the applicant administer the plan on an interim basis in accordance with the criteria of the Regulations. The applicant agreed to these conditions.

[14] In 2009, when the collective agreements expired, the Commission reminded the applicant that the disability plan needed to be amended to bring it into compliance with section 63 of the Regulations. Having been informed in the meantime that the parties had agreed to extend the term of the collective agreements for an additional three years, bringing their expiry date to

2012, the Commission agreed, once again, to provisionally maintain the registration of the reduction program under the same terms and conditions.

[15] Although the applicant assured the Commission that disability benefits were paid to insured persons regardless of disability benefits from personal insurance or the public employment insurance plan, the Commission nevertheless considered that this assurance was insufficient in this case and that the plan provided for in Annex A would have to be mandatorily modified at the time of renewal of the collective agreements to correct the deficiency in question. However, the collective agreements subsequently signed between the employer and the union did not remedy the fundamental deficiency already noted by the Commission.

[16] On February 18, 2014, the applicant applied for a continuation of its registration in the reduction program for the year 2015 and submitted in support of its application a copy of the disability plan contained in Annex A to the collective agreement dated November 23, 2012, for the Operations and Maintenance group (the other agreement also dated November 23, 2012, for the Laboratory and Environment group would be submitted in December 2014).

[17] On December 31, 2014, the Plan Valuation Officer formally notified the applicant in writing that in order to continue receiving a reduction in the employer's premium rate, Annex A to the collective agreements would have to be adjusted so that benefits under the plan are paid, in a proportion that is at least 55% of the employee's insurable earnings, regardless of the amount of benefits payable from any other source that do not constitute earnings under section 35 of the Regulations. In the interim, to meet the requirements of the reduction program, the applicant had

to send the Commission a copy of the agreement in principle, signed and dated by the employer and the union, indicating the required amendments and/or additions to the plan. The agreement in principle had to be sent no later than February 10, 2015. The applicant was then required to provide the Commission with a copy of the new collective agreements incorporating the amendments to the plan once they had been signed.

[18] On February 18, 2015, having received no response from the employer to the December 31 letter, a reminder letter was sent to the applicant; documentation was now required to be provided by March 23, 2015. It should be noted in passing that, at the same time, the Commission was investigating a complaint from the union that the applicant was not returning five twelfths of the employer's premium reduction to the insured—a fact that was denied by the applicant, who claimed that this portion had been returned in the form of social events.

[19] On April 22, 2015, the officer received a telephone call from Olivier Paradis, the applicant's human resources advisor. He informed the officer that the employer was still in discussions with the union and requested more time to provide the letter of agreement. The officer extended the deadline to May 25, 2015.

[20] On May 12, 2015, the officer received an email, with a letter from Mr. Paradis attached, stating the following:

> [TRANSLATION]
>
> This is to confirm that short-term disability benefits are paid to all of our employees, unionized or not, without regard to personal insurance and employment insurance benefits payable.

> Aluminerie de Bécancour is committed to maintaining this practice and to amending, at the time of the next renewal, Annex A to our collective agreement in order to reflect this practice.
>
> . . .

[21] On May 13, 2015, the officer advised Mr. Paradis that the letter dated May 12, 2015, was not acceptable and that he would have to submit, as a formal written commitment, a letter of agreement from both parties, as requested in the letter dated December 31, 2014, no later than May 25, 2015, if the employer wished to benefit from a reduction in the employer's premium rate for the year 2015. Mr. Paradis then informed the officer that the union was not prepared to discuss this matter and requested that his letter dated May 12, 2015, be treated as evidence under section 67 of the Regulations that the employer's disability plan meets the requirements under section 63 of the Regulations.

[22] On April 25, 2016, a notice of non-entitlement for the year 2015 was sent to the applicant on the basis that the employer had not provided documentation required by the officer within the prescribed time limit that would satisfactorily demonstrate that its disability plan met the requirement referred to in paragraph 63(c)(ii) of the Regulations [non-entitlement decision].

[23] On January 24, 2017, the applicant filed an appeal with the Commission. The applicant was seeking the reversal of the non-entitlement decision and the continuation of the employer's premium reduction retroactively (for the years 2015, 2016 and 2017). The applicant further committed to providing [TRANSLATION] "a copy of the new agreement (Amended Annex A) as soon as it is signed". The November 23, 2012, collective agreements had now expired, and the

parties were in negotiations to renew them. One year later, the applicant's employees found themselves locked out.

[24] On April 6, 2018, the Commission reiterated that it was still possible for the applicant to meet the requirements of the reduction program. The Commission indicated that it was prepared to wait until after the lockout had been resolved before making its decision on appeal. However, six months later, on October 4, 2018, while the employees were still locked out, the Commission had to reconsider its decision. The Commission had to make a final decision before December 31, 2018, given the three-year limitation period set out in subsection 85(3) of the Act. This was because the Canada Revenue Agency could not legally establish an assessment more than three years after the end of the year in which it should have been paid or refunded. Consequently, the Commission gave the applicant 30 days to provide the Commission with additional comments and submissions.

[25] On November 23, 2018, the applicant sent its written submissions to the Commission. It argued that, while the language of Annex A to the collective agreements did not meet the requirements of the program, it had never applied the coordination clause, and its reduction practice met the requirements of the reduction program. The employer alleged that employees who were absent for medical reasons had never received employment insurance benefits. The applicant also submitted that the Commission was wrong to focus solely on the current language of the collective agreements, without considering past practice. The applicant informed the Commission that, because of the labour dispute, it was unable to discuss these considerations

with the union, but committed to amending the plan in accordance with the practice established when the collective agreements were renewed.

[26] On December 20, 2018, the Commission issued the impugned decision dismissing the applicant's appeal, hence this application for judicial review.

Present application for judicial review

[27] On January 24, 2019, the applicant filed the present application for judicial review. On November 6, 2019, the parties asked this Court to adjourn the hearing originally scheduled for November 13, 2019, to allow them to continue [TRANSLATION] "serious settlement discussions that could likely render the issues raised by this application for judicial review moot". The matter was therefore adjourned for a period of one year by the Court.

[28] When the virtual hearing resumed on December 9, 2020, during the pandemic, the Court was informed that, although a tentative agreement in principle had indeed been reached in July 2019 between the employer and the union regarding the renewal of the collective agreements (which are now set to expire in July 2025), there were still issues with the amendment of the current language of Annex A to the collective agreements. This application for judicial review is therefore not moot.

[29] The applicant's arguments are set out in its written submissions dated May 29, 2019; the respondent's arguments are set out in its written submissions dated June 26, 2019. These were taken up in substance orally by counsel at the virtual hearing.

[30] Before this Court, the applicant questioned the intelligibility of the reasons for dismissing the appeal and argued that the impugned decision was unreasonable. Despite the current wording of Annex A to the collective agreements, the applicant has adopted a practice of paying out compensation that is consistent with subparagraph 63(c)(ii) of the Regulations. On appeal, the Commission did not consider, or it arbitrarily disregarded, the tables provided to it in November 2018, which set out the benefits paid to employees on sick leave in the years 2016, 2017 and 2018 (Exhibit E-1), as well as certain pay slips (Exhibit E-2). This practice created an "estoppel" (Louise Verschelden, *La preuve et la procédure en arbitrage de grief*, Montréal, Wilson and Lafleur, 1994, pp 62–63). Considering the employer's assurances in the letter of May 12, 2015, it was therefore unreasonable for the Commission to conclude that the plan set out in the collective agreements still failed to meet the requirements of subparagraph 63(c)(ii) of the Regulations and that the plan was not properly evidenced under subsection 67(1) of the Regulations. As such, this resulted in the Commission adding a limitation to the language of subsection 67(1) of the Regulations, which uses the word "including", when it decided that the employer's undertaking to comply with the Regulations was insufficient to prove that the plan meets the requirements.

[31] The respondent, on the other hand, argues that the Commission's decision was reasonable since the letter of May 12, 2015, was not a formal written commitment within the meaning of subsection 67(1) of the Regulations. Indeed, although the formal commitment need not take one of the forms set out in subsection 67(1) of the Regulations, the undertaking provided must be of the same nature as those set out in the Regulations. The types of formal commitment contained in subsection 67(1) of the Regulations all involve a third party. However, the letter of May 12,

2015, is a unilateral commitment by the applicant not to abide by the language of its collective agreements and was not addressed to its employees, and therefore could not be considered a formal commitment. Given the failure to provide an amended text of the collective agreements, in the interim, it was not unreasonable in this case to require the production of an agreement in principle, signed by the employer and the union, since the latter was the exclusive bargaining agent for the employees. Moreover, relying on *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, the respondent submits that the applicant's estoppel argument is not valid since the Commission's leniency could not grant the applicants substantive rights outside the procedural domain.

[32] There is no need to intervene in this case. The Court agrees with the respondent's arguments for dismissal, noting the following.

Intelligibility and rationality of decision maker's reasons

[33] To begin with, any suggestion by the applicant that the impugned decision is not intelligible, rational or consistent must be dismissed out of hand. In confirming the validity of the non-entitlement decision, the Commission wrote:

> [TRANSLATION]
>
> This follows the appeal of the Premium Reduction Program's decision rendered on April 25, 2016, that Aluminerie de Bécancour Inc.'s plan does not meet the requirements to obtain a reduction under the *Employment Insurance Regulations* and, consequently, that it is not eligible for the reduction in the employer's premium rate for the year 2015.
>
> Having carefully examined all the circumstances related to this case, including the additional arguments and representations

> submitted on November 23, 2018, the Commission decided by a majority to reject the appeal of Aluminerie de Bécancour Inc.
>
> The Commission concluded that despite the arguments raised, the plan still fails to comply with the requirements of subparagraph 63(c)(ii) of the *Employment Insurance Regulations*. These arguments do not constitute a formal written commitment as required by subsection 67(1) of the *Employment Insurance Regulations*, and therefore cannot serve as evidence that the plan meets the program's requirements.
>
> It is unfortunate that the decision rendered is not more favourable to you, but we assure you that the appeal filed by Aluminerie Bécancour Inc. has received all possible attention.

[34] The reasons above should be read in light of the record as a whole, including the notes and recommendations of the Appeals Committee and the officials involved in the decision-making and appeal process (*Vavilov* at para 94).

[35] At the outset, it should be understood that the officer's non-entitlement decision was based on the fact that the employer had not submitted the documentation required in the letter dated December 31, 2014 (reminders dated February 18 and April 22, 2015), demonstrating satisfactorily that its plan did in fact meet the requirement set out in subparagraph 63(c)(ii) of the Regulations.

[36] In the July 11, 2017, memorandum prepared for the Commission, the Chairperson of the Appeals Committee provided a rational and consistent argument in support of the recommendation to dismiss the appeal:

> . . .
>
> The text in the Employer's plan concerning the payment of benefits and the interaction with other possible payments received

by the employee is too broad. The clause does not meet the requirements of the legislation since it may allow the reduction of plan benefits by amounts that are not permitted. Furthermore, without written confirmation from the Union, the strength of the evidence provided by the Employer as an assurance that the plan is in fact administered in accordance with the legislation is questionable.

The broad wording of the clause, which states that the benefits under the plans will be coordinated with disability benefits from other sources, is not sufficiently clear to determine that the requirements of subparagraph 63(c)(ii) of the EI Regulations are met. Some amounts paid to an employee as disability benefits from other sources may not be considered earnings under section as of the EI Regulations and therefore should not be taken into account by the Employer in the payment of benefits under the plan.

This is illustrated by the examples of "other sources" listed in the plan clause above (personal insurance, group insurance and governmental plans). Generally speaking, personal insurance payments could be considered not to be earnings under paragraph 35(7)(b) of the EI Regulations while group insurance payments could be considered earnings under subparagraph 35(2)(c)(i) of the EI Regulations.

As for governmental plans, it is unclear what this is intended to include. For instance, if this includes disability pensions or lump sums or pensions paid in final settlement of a claim made for worker's compensation' payments, these are not considered earnings pursuant to paragraph 35(7)(a) of the EI Regulations. Therefore, depending on the amounts that are intended to be included as governmental plans, there may be instances where such amounts are not considered earnings and therefore should not be considered by the Employer in the payment of benefits under the plan. Also, if governmental plans are intended to include EI payments, the Employer's plan would not meet the requirements of paragraph 63(c)(i) of the EI Regulations, which specifically states that payments under an Employer plan must be paid in full, irrespective of benefits payable under the EI Act.

The provision (paragraph 63(c) of the EI Regulations) states that benefits from the plan must be paid in full regardless of (i) the amount of the benefits that are payable to an Insured person under the EI Act, and (ii) the amount of benefits, payable from any source, that do not constitute earnings under section 35 of the EI Regulations. In this case, the plan may allow the Employer to take into account EI benefits and disability benefits from other

sources that are not considered earnings under section 35 of the EI Regulations.

Based on the above analysis, the Employer's plan does not meet the requirements of paragraph 63(c) of the EI Regulations.

Does the Employer's statement regarding the payment of benefits render the plan compliant?

The Employer provided a letter, dated May 12, 2015, indicating that benefits under the plan are paid regardless of benefits paid as a result of personal insurance or EI benefits. In the letter, the Employer also committed to amend the plan once the collective agreement is renewed (expected November 2017).

The Employer's letter is misleading for two reasons:

- The letter is signed only by the Employer, there is no evidence to suggest it was discussed with, or agreed to by, the Union. Without the Union's involvement, the strength of the evidence provided by the Employer as an assurance that the plan is, in fact, administered in accordance with paragraph 63(c) of the EI Regulations is questionable.

- The Employer's letter states that the benefits will be paid regardless of the payments from personal insurance and EI payments. It is silent on other types of disability payments that do not constitute earnings that may be paid to employees (for example disability pension or lump sum or pension paid in full and final settlement of a claim made for worker's compensation payments).

Based on the above, the Employer's statement regarding the payment of benefits does not, on its own, render the plan compliant.

CONSIDERATIONS

In considering the current situation, the following facts are noteworthy:

- While the Program was lenient for a number of years in allowing the reduced premium in the absence of a fully-compliant short-term disability plan, the Employer was given ample notice and opportunity to make the plan compliant.

- The Employer repeatedly indicated that the plan would be formally amended, but never followed through on this commitment despite several opportunities (new collective agreements). Nor did the Employer provide clear evidence of any discussions with the Union regarding the plan amendments requested by the Program.

- [Redacted in the original document filed with the Court.]

PREMIUM REDUCTION PROGRAM REVIEW PANEL RECOMMENDATION

The recommendation of the Review Panel is to deny the Employer's appeal (appeal #17-01). The Program acted reasonably in denying the reduction of premiums for 2015 based on the lack of evidence from the Employer that the plan met the requirements of paragraph 63(c) of the EI Regulations and would be administered in accordance with the Program requirements.

Since 2005, significant efforts were made by the Program to ensure that the Employer complied with the Program requirements. The Employer repeatedly indicated that the plan would be formally amended, but it was not. This is not acceptable and, despite the latitude in providing the Employer with time to amend the plan, the Employer did not action the Program request and ignored the feedback received.

[37] In the memorandum dated December 3, 2018, the Appeals Committee explains why the original recommendation to dismiss the appeal should be upheld:

> [TRANSLATION]
>
> Does this new information change the recommendation?
>
> No, this new information does not change the recommendation to deny the Employer's appeal. Copies of tables detailing the benefits paid in the years 2016, 2017 and 2018 and the pay stubs submitted are not part of the official commitment as stipulated in section 67 *of the . . .* (*sic*)
>
> The fact remains that the plan evidenced by a formal written commitment as stipulated in section 67 of the *Employment Insurance Regulations* (in this case according to each collective

> agreement) does not meet the criteria of subparagraph 63(c)(ii) of the *Employment Insurance Regulations*.
>
> [Emphasis added.]

[38] It must be noted that the Commission considered the applicant's evidence and arguments but found them to be unsatisfactory with respect to the requirements of sections 63 and 67 of the Regulations. In sum, the applicant has not discharged its burden of proof. However, as the Supreme Court noted in *Vavilov* "written reasons given by an administrative body must not be assessed against a standard of perfection" and the fact "[t]hat the reasons given for a decision do 'not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred' is not on its own a basis to set the decision aside" (*Vavilov* at para 91, citing *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16).

[39] In this case, the Commission's reasoning forms a rational and coherent whole leading it to uphold the non-entitlement decision and dismiss the applicant's appeal. The fundamental problem—since the disability plan derives its very existence from the collective agreements, and not from any other legal document—is that the employer's unilateral assurance of compliance with section 63 of the Regulations is not formal proof of sufficient commitment under subsection 67(1) of the Regulations. The deficient language in Annex A to the collective agreements must be amended. Incidentally, the probative value of the letter of May 12, 2015, appears doubtful, given that, according to verifications made by officials in the connection with the appeal, the applicant's employees have apparently filed 13 claims for special sickness

benefits with the Commission since 2006 (email dated August 14, 2017, Certified Tribunal Record, Tab 4, page 5).

Judicial deference

[40] The Court must show considerable deference to the reasoning of the decision maker and the reasons for dismissing the appeal. The Court may not, under the guise of an examination of the rationality of the decision maker's reasons, propose its own interpretation of the Regulations, nor can it make its own findings of fact based on the evidence. As the Supreme Court points out, a court of law applying the standard of review of reasonableness does not ask what decision it would have made in the place of the administrative decision maker, does not attempt to consider the "range" of conclusions that the decision maker might have drawn, does not engage in a *de novo* analysis, and does not attempt to determine the "correct" solution to the problem (*Vavilov* at para 83). Thus, the issue is not whether the practice relied upon by the applicant constitutes "estoppel", nor is it a question of re-evaluating whether or not the material submitted to the Commission has probative value.

[41] In this case, no reviewable material error was made in processing the application to maintain the reduction in the employer's premium rate. Moreover, the applicant never invoked the doctrine of estoppel before the Commission. Also, the fact that Commission officials may have previously shown some administrative leniency prior to the non-entitlement decision, by agreeing to continue to provisionally maintain the applicant's registration in the reduction program from year to year pending amendments to the collective agreements, does not constitute a vested right to a reduction in subsequent years, nor does it constitute administrative estoppel.

This is not a case where the Commission retroactively cancelled before 2015 any premium rate reductions that would have been granted since the program was registered in 1985 (*MacDonald Tobacco Inc. v Canada Employment and Immigration Commission*, [1979] 2 FC 100, aff'd [1981] 1 SCR 401). Needless to say, this Court is not an arbitration tribunal. Moreover, the union is not a party to this application for judicial review, and the Court can only speculate on any refusal or reasons of the union for not signing a letter of agreement or accepting any new language proposed by the employer regarding the compensation plan (Annex A to the collective agreements).

[42] In the present case, it is sufficient to consider whether the refusal of the officer and the Commission on appeal to accept the employer's letter dated May 12, 2015, as evidence of the plan meeting the relevant requirements was reasonably justified in the circumstances. It was indeed reasonably justified, as noted above. Here, the applicant had been aware, since at least 2005, that the collective agreements needed to be amended to bring the plan into compliance with the requirements of subparagraph 63(c)(ii) of the Regulations. The language of the collective agreements is clear, and in the absence of ambiguity, any past practice to the contrary cannot amend Annex A without the express consent of the union, which is the exclusive bargaining agent for the employees in the two affected groups. Therefore, the officer and the Commission could reasonably find that the unilateral assurance given in the May 12, 2015, letter was insufficient. Under labour legislation and the case law, for unionized groups, it is the collective agreement between the employer and the union that is the law between the parties and exhaustively regulates all working conditions of the affected employees, including the disability plan (*McGavin Toastmaster Ltd v Aincough*, [1976] 1 SCR 718; *Syndicat catholique des*

employés de magasins de Québec Inc v Compagnie Paquet Ltée, [1959] SCR 206; *St Anne Nackawic Pulp & Paper Co v Canadian Paper Workers Union, Local 219*, [1986] 1 SCR 704, at p 718). It was not unreasonable to require that an agreement in principle signed by both parties by provided pending amendment of the collective agreements.

[43] In particular, the Court is satisfied that the impugned decision is based on the evidence on the record and is reasonable as a whole. The statutory or regulatory requirements applicable to the case were not met by the employer. At the risk of repeating myself, in this case, the disability plan was created and governed exclusively by the collective agreements. It is not the role of the employer or of the Court to change the rules for evidencing the compliance of a plan which on its very face does not meet the requirements of subparagraph 63(c)(ii) of the Regulations. Some degree of legal certainty was required in the administration of the disability plan. In practice, the applicant's employees could not know that the disability plan provided for in the collective agreements—of which the language in Annex A speaks for itself—was not the plan as applied in practice by the employer. In order for the letter dated May 12, 2015, to qualify as a formal commitment in one of the forms referred to in subsection 67(1) of the Regulations, it would have had to have been sent to the employees in some way, as noted on February 22, 2017, by the Commission's business expertise advisor (Certified Tribunal Record, Tab 1, page 5).

[44] One final observation of the Court: the other types of formal written commitment listed in subsection 67(1) of the Regulations as evidence of whether a plan meets section 63 of the Regulations refer to documents which are, on their face, even issued for the benefit of the employees concerned, be it an industry-wide plan or a private carrier insurance policy; an

undertaking contained in an employees' handbook; a board of directors' resolution that has been implemented; an undertaking contained in a personnel policy bulletin; or a memorandum or other document addressed to employees by their employer (paragraphs 67(1)(b) to 67(1)(g) of the Regulations). In this case, although the list of types of formal commitment found in section 67 of the Regulations is not exhaustive, the officer was certainly in a better position than the Court to assess whether or not a document not mentioned in paragraphs (a) to (g) of subsection 67(1) of the Regulations had probative value. In this case, the applicant has not satisfied this Court that the interpretation or application by the officer or the Commission of section 63 or section 67 of the Regulations was arbitrary, capricious, without rational foundation or otherwise unreasonable.

Conclusion

[45] In conclusion, having examined the decision maker's reasons with "respectful attention", and having sought to understand the line of reasoning followed in reaching the conclusion that the applicant's appeal should be dismissed, the Court is satisfied that the impugned decision is, as a whole, reasonable (*Vavilov* at paras 83, 84 and 85). To put it another way, the impugned decision upholding the non-entitlement decision was based on "an internally coherent and rational chain of analysis", and was also justified "in relation to the facts and law that constrain the decision maker" (*Vavilov* at paras 85–102).

[46] For these reasons, the Court dismisses this application for judicial review, with costs to the respondent.

JUDGMENT in T-176-19

THIS COURT'S JUDGMENT is that the applicant's application for judicial review is dismissed with costs to the respondent.

"Luc Martineau"
Judge

Certified true translation
Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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