Federal Court Cour fédérale

Date: 20210922

Docket: T-52-20

Citation: 2021 FC 982

Ottawa, Ontario, September 22, 2021

PRESENT: Mr. Justice Pentney

BETWEEN:

ANTONINA SENNIKOVA

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Antonina Sennikova (the Applicant) was involved in a car accident that prevented her from returning to work. As a result, she obtained Employment Insurance (EI) sickness benefits. In addition, her car insurance provider, the Aviva General Insurance Company (Aviva), provided her with Income Replacement Benefits (the Aviva IRBs).

[2] The Canada Employment Insurance Commission (CEIC) determined that the Aviva IRBs were earnings, and it found the Applicant had therefore received too much in EI sickness benefits. The Applicant asked CEIC to reconsider its decision, but the CEIC refused. The Applicant then challenged the CEIC's refusal to reconsider before the Social Security Tribunal, General Division (General Division). When that challenge did not succeed, she appealed to the Social Security Tribunal Appeal Division (Appeal Division). It dismissed her appeal. The Applicant now seeks judicial review of that decision (the Appeal Division Decision).

[3] Judicial review in modern Canadian administrative law is a complicated and highly specialized area, and it can be confusing. The Applicant represented herself in these proceedings, although for reasons explained below, her husband made submissions on her behalf at the hearing. I have therefore written this decision in a manner that explains the law and my findings as clearly and simply as I can, avoiding the jargon or shorthand that is sometimes used by lawyers and judges familiar with this area.

II. Background

[4] In February 2019, the Applicant was involved in a car accident that prevented her from returning to work. She applied for, and received, EI sickness benefits provided under the *Employment Insurance Act*, SC 1996, c 23 [the *Act*] and the *Employment Insurance Regulations*, SOR/96-332 [the *Regulations*]. The Applicant received a letter from CEIC, dated March 18, 2019, informing her that she could receive weekly EI sickness benefits in the amount of $553 per week once her waiting period was over.

[5] Concurrently, the Applicant also received the Aviva IRBs from her car insurance provider.

[6] In June 2019, CEIC re-assessed the amount of EI sickness benefits the Applicant was entitled to because its earlier assessment did not take into account the amount of the income replacement benefits. CEIC determined that the Aviva IRBs (which it identified as “motor vehicle accident payments”) were classified as “earnings” and that the Applicant had been receiving an overpayment in her EI sickness benefits. As a result of this, CEIC reduced the amount of EI sickness benefits the Applicant was entitled to receive.

[7] The Applicant applied for a reconsideration of this decision, but CEIC did not change its determination that the Aviva IRBs constituted earnings under paragraph 35(2)(d) of the *Regulations*. The Applicant challenged the CEIC decision to the General Division, arguing mainly that the CEIC based its ruling on the wrong provision of the law.

[8] The General Division upheld the CEIC conclusion and dismissed the Applicant’s appeal because it found that the Aviva IRBs were earnings under paragraph 35(2)(d) of the *Regulations*. The General Division made the following key findings to support its conclusion: (i) the Applicant’s motor vehicle accident insurance plan was provided under or pursuant to provincial law; (ii) the Aviva IRB payments were compensation for actual or presumed loss of employment; and (iii) Aviva did not reduce the IRBs it paid to the Applicant to reflect the amount of the EI sickness benefits she was receiving. Based on this, the General Division concluded that the CEIC conclusion that the EI sickness benefits should be reduced was correct, and it therefore dismissed the Applicant’s appeal.

[9] The Applicant then appealed to the Appeal Division. Under the terms of the *Act*, the Appeal Division had to determine whether to grant her permission to appeal (called "granting leave to appeal") before it could consider her full appeal on the merits.

[10] The Appeal Division refused her permission to appeal, finding that the case she presented had no reasonable chance of success on any of the grounds of appeal it could consider (which is the legal test set out in the *Act*).

[11] In the case before the Court, the Applicant seeks judicial review of the Appeal Division Decision refusing her leave to appeal.

III. Preliminary Issues

[12] Three preliminary issues came up at the hearing, and it is easiest to deal with them at the outset.

[13] First, the Applicant had named the Social Security Tribunal as the Respondent in this application, but the proper Respondent is the Attorney General of Canada, pursuant to Rule 303(2) of the *Federal Courts Rules*, SOR/98-106 [the *Rules*]. As I explained at the hearing, this does not affect the Applicant's rights to any of the relief she seeks. It is a technical point. The style of cause will be amended to reflect this change, with immediate effect.

[14] Second, when the case came on for hearing, the Applicant asked that her husband be allowed to make submissions for her. She indicated that she was unable to make these submissions, and she requested that her husband speak for her because he is familiar with the proceedings and he had prepared all of the paperwork throughout this process. In addition, it

became clear in my initial discussion with the Applicant that her limited capacity to speak English might pose a problem for her in presenting her case. I should mention that the Applicant's husband had previously applied to be an intervener in the proceeding so that he could present her case, but this had been refused by Justice Andrew Little. In finding that the husband did not meet the test to be an intervener, Justice Little specifically left open the possibility that he would be permitted to represent his wife at the hearing.

[15] The Respondent did not object to allowing the husband to present the case for his wife. I decided that it was in the interests of justice to allow this, despite the general requirement in the *Rules* that individuals either represent themselves or be represented by counsel. I noted that in prior exceptional cases, the Court had permitted a spouse to make submissions on behalf of an applicant (for example, *Kennedy v Canada*, 2012 FC 1050 and *Mattu v Canada (Minister of National Revenue)* (1991), 45 FTR 190, [1991] FCJ No 539 (TD)). Given that the case was ready for hearing, the Applicant had requested that her husband make submissions on her behalf and explained why she was unable to do so, and the Respondent did not object, I exercised my discretion to permit it.

[16] Third, the Applicant filed an affidavit seeking to provide additional information relating to her claim. The Respondent objected to this, because judicial reviews generally proceed on the basis of the record that was before the decision-maker whose decision is being challenged, and none of the exceptions to that rule apply here.

[17] I ruled on this at the hearing, noting that the Respondent was correct in saying that applications for judicial review are generally based on the information that was presented to the decision-maker (*Association of Universities and Colleges of Canada v Canadian Copyright*

Licensing Agency (Access Copyright), 2012 FCA 22 at paras 19-20), and none of the exceptions apply here. Based on this rule, I refused to accept most of the Applicant's new material for two reasons: (i) some of it related to the Applicant's capacity to represent herself, and that issue had already been dealt with so this evidence was not needed; (ii) some of the material dealt with issues that were not in dispute, or the material was already in the record.

IV. Issues and Tests to Apply on Judicial Review

[18] The core of the Applicant's complaint about the Appeal Division decision is the same problem she has raised about all of the earlier decisions – namely, that the decision maker "erred in law by applying the wrong paragraph of proof". In summary, she says that the Aviva IRBs were not employment income and, therefore, they should not have been deducted from her EI sickness benefits. She has made many other points to support this argument, including how the specific part of the *Regulations* that applied to her case should be interpreted. The central theme of her argument, however, is that CEIC erred both in treating the Aviva IRBs as income and in finding that her private insurance was provided by or under provincial law; she argues that these errors were not corrected by the General Division nor the Appeal Division.

[19] As was explained at the hearing, an application for judicial review is different from an appeal. On judicial review, there are specific tests that a Court must apply and limits on the kinds of evidence and legal arguments a court can consider. The Supreme Court of Canada described the test and the approach to be followed in a recent decision called *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. That case says that most judicial reviews are to

be conducted under what is called the “reasonableness standard of review” and that standard of review applies to this case.

[20] The reasonableness standard means what it says – the basic question is whether the Applicant can persuade me that the Appeal Division Decision is “unreasonable” as that term is defined in law. It is perfectly clear that the Applicant strongly disagrees with the decision, but that does not make it unreasonable as a matter of law. I will explain some of this in more detail later on. For now, I will provide a short summary of how the Supreme Court of Canada says I am to conduct reasonableness review. My intention is to help to orient the reader and set the stage for the rest of the decision.

[21] It is helpful to group the types of questions the Supreme Court directs me to ask about the Appeal Division Decision into two categories. The first category relates to the “the facts and the law that constrain the decision-maker” (*Vavilov* at para 85). The second relates to the quality of the explanation that the decision-maker provided for the decision. I will now describe each category in a bit more detail.

[22] To determine whether the decision is reasonable, I must first ask whether the decision is based on a consideration of the right law as it applies to the key facts of the case. If a decision-maker has missed an absolutely crucial fact – a fact that is key to determining whether a legal test is met or not – then the decision is unreasonable. Similarly, I must ask whether the decision is based on a misapplication of the law. If so, it is unreasonable. In *Vavilov*, the Supreme Court refers to the “the facts and the law that constrain the decision-maker” (at para 85). It is helpful to think of the law and the facts as setting the boundaries of the “box” within which the decision must fall. If the decision is inside of the box, because the decision-maker respected the way that

the facts and the law limited the conclusions that the decision maker could reasonably reach, it can be found to be reasonable. If it is outside of the box, either because it is wrong on a key legal or factual point, it is unreasonable.

[23] The second category of questions relates to how well the decision is explained. It is not enough for a decision-maker to apply the right law to the key facts. They must also explain how they reached their conclusion. Written reasons do not always need to be long or complicated. However, they must tell the individual affected by the decision why and how the result was reached, with sufficient detail and in a way that explains the key steps in the analysis. A reader must be able to “connect the dots” in the reasoning process that justifies the result that was reached (*Vavilov* at para 97, citing *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 at para 11). Put another way, a reviewing Court needs to be satisfied that the decision “adds up” (*Vavilov* at para 104).

[24] The Applicant says the decision is unreasonable, and I will set out her arguments in more detail below.

[25] In addition, the Applicant raised an argument that the Appeal Division was biased. I will not deal with this argument in any detail because there is no support for it in the record. Some of the Applicant’s arguments were about the fairness of the hearing she had before the General Division, but the fairness of that hearing is not the a question that can be argued before this Court. The Applicant raised those concerns before the Appeal Division; it considered and rejected them. Further, many of her claims of bias are really about her disagreement with the result reached. I deal with these concerns below in my discussion of the decision’s

reasonableness. The fact that the Appeal Division did not accept the Applicant's arguments does not indicate it was biased against her. Based on this, I will say no more about the bias claim.

V. Analysis

[26] In this part of the decision, I will review the Applicant's main submissions. One of the Applicant's complaints is that the Appeal Division Decision did not use the same exact and precise words she had used in her appeal. This repeated a similar concern she raised about the General Division decision: that it did not use the same words that she used to describe certain things. I mention this here because I will also not be repeating every single argument or submission the Applicant advanced, nor will I always be quoting her words in exact terms.

[27] Because the Applicant's submissions constituted a paragraph-by-paragraph review of the Appeal Division decision with alleged errors identified in respect of each, it was necessary to group them in order to analyze the case and to prepare this decision. In addition, some of the expressions used by the Applicant do not express her real point in a way that is easily understood. This became clear in our discussion of certain questions during the hearing. All of this is to say that even where I am not using exactly the same words as the Applicant, I have carefully reviewed the written submissions and the transcript of the hearing, and what follows reflects the main points she advanced.

[28] At every stage of this process, and in her previous claims before the General Division and Appeal Division, the Applicant has made one overall key argument: that the decision-makers "applied the wrong paragraph of proof". All of her other arguments flow from this main theme. She says that the Appeal Division did not address this argument, or misunderstood her point. She

says it used incorrect terminology to describe the Aviva IRBs, and to interpret the applicable legal provisions. She says that it erred by relying on one provision in the *Regulations* but failing to consider other, equally important sections. In addition, she argues that the decision-maker erred by not relying on the Digest of Benefit Entitlement Principles (the Digest) that is supposed to guide the application of the law. All of this adds up, according to the Applicant, to make the decision unreasonable.

[29] In order to understand the Applicant's main argument, it is necessary to discuss the legal framework for EI sickness benefits and to describe the key provision in the *Regulations* that was applied to her case, because the interpretation and application of this provision lies at the heart of the Applicant's complaint.

[30] As noted earlier, the Appeal Division denied the Applicant leave to appeal because it found she had not shown that she had a reasonable chance of success. This decision, like the General Division decision and the CEIC decision before that, all rested mainly on the conclusion that the Aviva IRBs the Applicant was receiving were "income" or "earnings" that should be deducted from her EI sickness benefits. That finding is what this case is all about.

[31] It is not necessary to set out all of the specific provisions that guided the CEIC decision-making, and that in turn led to the General Division and Appeal Division decisions. A more general description of how the EI system works will be enough to set the stage for the main point – which involves a more detailed consideration of the Appeal Division's interpretation of paragraph 35(2)(d) of the *Regulations*.

[32] There is no dispute that the Applicant was entitled to EI sickness benefits after her car accident. She worked in insurable employment and she paid into the scheme because EI contributions had been deducted from her paycheque. Therefore, she met the minimum requirements for those benefits. In calculating her entitlement, the EI system is structured to require that both income and insurable hours worked (often referred to as "qualifying hours") are taken into account, and that was done in the calculation of her benefits. None of this is controversial and it is not in dispute here.

[33] Another feature of the EI system is that it is designed to avoid over-compensating individuals for their losses. One of the ways it does this is by setting out certain things that must be deducted from EI benefits. This is getting closer to the heart of the dispute in this case. The actual wording of subsection 35(2) of the *Regulations* is set out in an Annex to this decision – it is a long and complicated provision that is not easy to read. In summary, it is about what other kinds of payments to an individual count as "earnings" in calculating EI benefits.

[34] Paragraph 35(2)(d) specifically discusses IRBs provided under provincial law from a motor vehicle accident insurance plan. The purpose of this provision is clear – EI benefits are meant to compensate for loss of earnings, and so if an individual is simultaneously receiving other earnings, those should be deducted from their EI benefits. In its decision, the Appeal Division set out the following useful summary of the key parts of this provision:

> [25] The essential question is whether the payments meet the section 35(2)(d) criteria. Section 35(2)(d) states that motor vehicle accident insurance payments will be earnings in the following circumstances:
>
> - the payments are provided under a provincial law,
> - they are loss of employment earnings due to injury,

- Employment Insurance benefits have not already been deducted from the auto insurance payments.

[35] The Applicant's main argument is that this provision should not have been applied to her case because the Aviva IRBs she received were not provided "under a provincial law". The Applicant argues that the reference in paragraph 35(2)(d) to payments "under a provincial law" refer only to payments made directly by a province, such as is done in Quebec, British Columbia, and Manitoba, which have provincially-run automobile insurance plans. The Applicant was insured in Ontario, which does not administer its own automobile insurance plan. She says that she had a private contract of insurance with Aviva, which she paid for herself, and that her contract with Aviva was about automobile insurance, not employment. Therefore, she says, paragraph 35(2)(d) should not have been applied to her case.

[36] The Applicant had made similar arguments before the Appeal Division, but it rejected them. She says it was wrong to do so and that its decision should therefore be overturned.

[37] The Appeal Division Decision found that the General Division was right to find that the Aviva IRBs were provided under a provincial law. It found that a payment will be treated as earnings if it is made to a claimant under a motor vehicle insurance scheme regulated by the provincial government that provides for the payment of benefits for loss of wages. The Appeal Division found that the payments did not need to be made directly by the government and that the insurance scheme did not need to be provincially run. All that was required was that the payments be made under or pursuant to a provincially <u>regulated</u> scheme (Appeal Division Decision at para 27).

[38] The Appeal Division found that the General Division was correct to rely on a decision of the Federal Court of Appeal in *Canada (Attorney General) v Lalonde* (1996), 142 DLR (4th) 572, 1996 CanLII 3991 (FCA) [*Lalonde*] (Appeal Division Decision at para 29). That case dealt with whether certain amounts received by Mr. Lalonde were payments "from motor vehicle accident insurance provided under or pursuant to a provincial law in respect of the actual or presumed loss of income from employment due to injury…" under the law as it stood at the time of the decision. The Court of Appeal found that the payments did fall under that provision. Mr. Lalonde lived in Ontario and, under the insurance legislation that was then in force, all car insurance contracts had to include a number of mandatory benefits including a minimum amount as a weekly "income" benefit.

[39] In *Lalonde,* the Court of Appeal found that the key question was whether the weekly insurance "income" benefit for loss of wages due to a car accident is "motor vehicle insurance provided under or pursuant to a provincial law". It noted that there were some differences between the English and French versions of the provision, but it found that these did not matter because the underlying intention was the same. The Court of Appeal's main point on this is worth quoting here:

> What is clear from both versions is that the intention was to take compensation for lost wages to which a claimant is entitled under provincial legislation into account in calculating benefits payable under the *Unemployment Insurance Act*. Paragraph 57(2)(*d*) is not concerned with the form of the government intervention: as long as a payment is made to a claimant under a scheme of motor vehicle insurance regulated by the provincial government that provides for the payment of benefits for loss of wages, the benefits paid constitute earnings for the purposes of paragraph 57(2)(*d*) of the *Unemployment Insurance Regulations*, provided of course that the other requirements of that paragraph have been met.
>
> [Emphasis added.]

[40] The Appeal Division noted that the Federal Court of Appeal's ruling had not been overturned by a higher court and there was no more recent decision that affected it. It held that "*Lalonde* is still good law and the General Division is required to follow its lead" (Appeal Division Decision at para 29).

[41] The Applicant argues that this was wrong because *Lalonde* was about weekly income benefits under the *No-Fault Benefits Schedule*, RRO 1990, Reg 672, but her case involves statutory accident benefits under the *Statutory Accident Benefits Schedule*, O Reg 34/10, which is significantly different. Instead, she argues that the definitions used in the EI system established by the *Act* and *Regulations* should be applied to her case.

[42] In support of this argument, the Applicant points out that the Appeal Division did not consider another relevant provision of the *Regulations*. She notes that the decision pays attention to the opening words of paragraph 35(2)(d), namely that it operates "notwithstanding paragraph 7(b)", but it failed to consider subsection 35(3), which provides that where, subsequent to the week in which an injury occurs, a claimant has accumulated sufficient insurable earnings, the motor vehicle insurance payments referred to in paragraph 35(2)(d) shall not be taken into account in calculating benefits.

[43] Because she had accumulated 2,000 insurable hours, the Applicant argues that under subsection 35(3) the Aviva IRBs should not have been taken into account as earnings.

[44] In addition, the Applicant submits that the Appeal Division erred when it failed to apply the statutory definitions of "provincial plan" described in sections 76.01, 76.03, 76.31, and 76.32 of the *Regulations*. Under either approach, she says that the proper interpretation would have

lead to the finding that the Aviva IRBs should not have been deducted from her EI sickness benefits.

[45] The Applicant raises a number of other concerns about the Appeal Division Decision. Some of this relates to the wording used in the decision (specifically, the use of synonyms). She says the Appeal Division used the wrong terms, noting references in the decision to "insurance payments" instead of "insurance plan", which is the term used in the *Regulations*. She also objects to references to the Aviva IRBs as being about "wage loss" and to the mention by the Appeal Division of an "insurance scheme". The Applicant argues that this all goes to show that the decision was not based on a careful application of the specific terms in the law.

[46] Second, the Applicant contends that the Appeal Division made a mistake when it failed to rely on the Digest, which is intended as a reference tool for all users.

[47] These are the main points advanced by the Applicant to support her argument that the Appeal Division relied on the "wrong paragraph of proof".

[48] I am not persuaded by the Applicant's arguments.

[49] To begin with, it is important to remember that this is an application for judicial review. The question before me is whether the Appeal Division Decision to refuse the Applicant leave to appeal is reasonable. Part of that involves considering whether its interpretation and application of the *Regulations* is reasonable. In assessing that, I am not supposed to provide my own interpretation of the provision and then compare that with the Appeal Division's approach – that is not my job on judicial review. Parliament passed the law that created the General Division and Appeal Division of the Social Security Tribunal, and Parliament said that these decision-makers

had the power to interpret the law. Therefore, in reviewing the Appeal Division Decision, I must not to take the place of the decision-maker. Instead, I must consider whether the Appeal Division's interpretation was reasonable, and also whether it explained its decision with sufficient detail and in a logical way (this is explained in *Vavilov* at paras 115-124; see also *Hillier v Canada (Attorney General)*, 2019 FCA 44 [*Hillier*] at paras 13-17 and *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156).

[50] The Applicant asks me to find that the Appeal Division's interpretation of paragraph 35(2)(d) is unreasonable. This requires me to follow a particular path of analysis (*Vavilov* at paras 116; *Hillier* at paras 13-17). The starting point is to consider what range of interpretive options were actually available to the Appeal Division, based on the wording of the law. Once I have done that, I need to ask whether the decision-maker took into account the text, context, and purpose of the provision, in light of that range of interpretive options, in reaching its conclusion (*Vavilov* at paras 117-118; *Hillier* at paras 13-17). I must also look at how the decision-maker dealt with the parties' arguments, and how the decision-maker explained its reasoning. In *Vavilov* this is described as examining the reasons "with respectful attention" and by "seeking to understand the reasoning process" (at para 84).

[51] This is the approach that I have applied in this case. To start with, the focus is on the wording of the key portion of paragraph 35(2)(d), namely "a motor vehicle insurance plan provided under a provincial law". On a quick reading of these words, I agree with the Applicant that they can be read in several different ways. These include an interpretation that only insurance provided directly by a province is included, and another that is more open-ended, that says that car insurance provided under a provincial law is included, no matter who actually

provides the insurance. In general terms, those were the possibilities that the Appeal Division could have chosen.

[52] It is clear that the Appeal Division chose the “wider” approach – it did not limit this provision to car insurance provided by a provincial insurance agency or program, but instead found that it applied to the benefits under the Applicant’s insurance policy, even though these were not provided directly by the province.

[53] A review of the Appeal Division Decision makes it clear that the Appeal Division interpreted the applicable provision in light of their text, context, and purpose. The decision zeroes in on the arguments advanced by the Applicant, applies the relevant provision, and interprets it in light of the binding authority of the Federal Court of Appeal decision in *Lalonde*. The Appeal Division was not persuaded that the *Lalonde* decision did not apply to the Applicant’s case. This was a reasonable conclusion for the Appeal Division to reach. One of the hallmarks of a reasonable decision is that it applies the right legal framework to the key facts, and here, part of that legal framework is paragraph 35(2)(d) of the *Regulations* as interpreted by *Lalonde*.

[54] The Applicant says that *Lalonde* dealt with a different insurance benefit scheme and therefore it does not apply to her case. The Appeal Division did not agree with her, and it came to a reasonable conclusion in finding that the case did apply. This is reasonable. I do not agree with the Applicant that the *Lalonde* decision is somehow limited to the type of specific benefit that Mr. Lalonde was receiving in that case. Instead, I find that the key point of that decision is that paragraph 35(2)(d) applies to car insurance provided under a provincial law regardless of whether it was paid directly by a province or not. That is exactly the issue raised by the

Applicant here, and I find that the Appeal Division acted reasonably in finding that *Lalonde* still applies.

[55] In this way, the "range of interpretive options" open to the Appeal Division was narrowed to only one choice. This is consistent with the *Vavilov* approach to reasonableness review. This point is specifically discussed in that decision:

> [112] Any precedents on the issue before the administrative decision maker or on a similar issue will act as a constraint on what the decision maker can reasonably decide. An administrative body's decision may be unreasonable on the basis that the body failed to explain or justify a departure from a binding precedent in which the same provision had been interpreted. Where, for example, there is a relevant case in which a court considered a statutory provision, it would be unreasonable for an administrative decision maker to interpret or apply the provision without regard to that precedent… There may be circumstances in which it is quite simply unreasonable for an administrative decision maker to fail to apply or interpret a statutory provision in accordance with a binding precedent.

[56] I find that the Appeal Division was reasonable in basing its interpretation of paragraph 35(2)(d) on the approach set out in the binding precedent of *Lalonde*.

[57] The Applicant also argues that the Appeal Division should have applied other provisions in the *Regulations*, but again, I am not persuaded that its failure to do so, or to explain at length why it was not doing that, was unreasonable. Both the *Act* and *Regulations* each include many Parts that each deal with different subject matters. The definitions of "provincial plan" the Applicant rely on specifically say that they only apply to other Parts of the *Regulations*, and so the Appeal Division reasonably did not apply them to this case. It also acted reasonably in focusing on the specific provision that governs the Applicant's case (namely paragraph 35(2)(d)) rather than examining other provisions in any detail.

[58] Another problem with the Applicant's argument about these other legislative provisions is that she did not raise some of them before the Appeal Division. I cannot fault the Appeal Division for failing to consider an argument the Applicant never made before it. The onus was on the Applicant to put forward her best case, and if she failed to advance a particular argument, then the decision cannot be found to be unreasonable for failing to deal with it.

[59] In regard to the Applicant's argument about the Appeal Division's failure to consider her insurable hours in light of subsection 35(3), I accept the Respondent's submission that it does not apply to her case because it refers to insurable hours worked after the accident, and that is not the situation here. The provision says this explicitly, and there was no need for the Appeal Division to address it in the absence of any evidence that the Applicant had worked after she had the accident.

[60] I agree with the Applicant that the Appeal Division could have referred to the Digest in its decision, but I am not persuaded that it acted unreasonably in not doing that. The Digest is a non-binding guidance document (*Canada (Attorney General) v Greey*, 2009 FCA 296 at para 28), and it cannot have the effect of overriding the wording of the *Act* or the *Regulations* as interpreted by binding case law.

[61] I will now address the Applicant's complaints about the specific wording used by the Appeal Division. I am not persuaded that any of these complaints, individually or taken together, amounts to an error that is sufficiently central to the decision to make the decision unreasonable (*Vavilov* at para 100). On judicial review, I am required to read the decision as a whole, with an understanding of the administrative context in which it was made. It is often said that a court reviewing the reasonableness of a decision is not to conduct a "line-by line treasure hunt for

error" (*Vavilov* at para 102, citing *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 14).

[62] One way of evaluating the reasonableness of the Appeal Division Decision is to ask whether the decision shows that the Appeal Division truly "grappled with" the right questions – defined as the questions it needed to examine given the legal framework and the facts of this case. I find that the Appeal Division Decision shows that it did exactly that. It considered the heart of the Applicant's argument about why her Aviva IRBs should not be deducted from her EI sickness benefits. It examined the key provision in the *Regulations* and considered the purpose of this provision as interpreted by legally binding authority (*Lalonde*). It found that the Aviva IRBs were provided to the Applicant by or under a provincial statute, and therefore fell within the scope of paragraph 35(2)(d). It also noted that her Aviva IRBs had not already been reduced to take account of her EI sickness benefits – so she was not being "doubly penalized" or under-compensated.

[63] Another element of reasonableness review is to ask whether the Appeal Division Decision "adds up" – in the sense that the decision explains its reasoning, shows that the Appeal Division paid attention to the arguments made by the parties, and followed a logical chain of reasoning. Again, on all of these points, I find that the Appeal Division Decision meets the test. It outlines the Applicant's arguments and then reviews the applicable law, explaining its key conclusions along the way. The reasoning is clear, and there are no logical errors or internal inconsistencies.

[64] Therefore, for all of these reasons, I conclude that the Appeal Division Decision in this case is reasonable. Applying the framework for reasonableness review set out in *Vavilov*, I do not find that the Applicant's arguments are sufficient to make the decision unreasonable.

VI. Conclusion

[65] The Applicant strongly believes that she has been treated unfairly because her Aviva IRBs should not have been deducted from her EI sickness benefits. Having considered all of her arguments about the Appeal Division Decision, I am not persuaded that any of her arguments point to the kinds of errors or flaws that would make the decision unreasonable. The Appeal Division applied the right law, took into account the key facts, and explained its reasoning in a careful, logical, and coherent way. That is what reasonableness review requires, and I can find no basis to interfere with the decision.

[66] Therefore, the application for judicial review is dismissed.

[67] At the hearing, the Respondent indicated it was not seeking costs, and I think that is the right approach. In light of all the circumstances, and in exercise of my discretion under Rule 400 of the *Rules*, I will not order costs. Each party will bear their own costs.

JUDGMENT in T-52-20

THIS COURT'S JUDGMENT is that:

1. The Application for judicial review is dismissed.

2. Each party shall bear its own costs.

3. The style of cause is amended, with immediate effect, to name the Attorney General of Canada as the Respondent.

"William F. Pentney"

Judge

ANNEX

Employment Insurance Regulations, SOR/96-332

35 (2) Subject to the other provisions of this section, the earnings to be taken into account for the purpose of determining whether an interruption of earnings under section 14 has occurred and the amount to be deducted from benefits payable under section 19, subsection 21(3), 22(5), 152.03(3) or 152.04(4) or section 152.18 of the Act, and to be taken into account for the purposes of sections 45 and 46 of the Act, are the entire income of a claimant arising out of any employment, including

(a) amounts payable to a claimant in respect of wages, benefits or other remuneration from the proceeds realized from the property of a bankrupt employer;

(b) workers' compensation payments received or to be received by a claimant, other than a lump sum or pension paid in full and final settlement of a claim made for workers' compensation payments;

(c) payments a claimant has received or, on application, is entitled to receive under

(i) a group wage-loss indemnity plan,

35 (2) Sous réserve des autres dispositions du présent article, la rémunération qu'il faut prendre en compte pour vérifier s'il y a eu l'arrêt de rémunération visé à l'article 14 et fixer le montant à déduire des prestations à payer en vertu de l'article 19, des paragraphes 21(3), 22(5), 152.03(3) ou 152.04(4), ou de l'article 152.18 de la Loi, ainsi que pour l'application des articles 45 et 46 de la Loi, est le revenu intégral du prestataire provenant de tout emploi, notamment :

a) les montants payables au prestataire, à titre de salaire, d'avantages ou autre rétribution, sur les montants réalisés provenant des biens de son employeur failli;

b) les indemnités que le prestataire a reçues ou recevra pour un accident du travail ou une maladie professionnelle, autres qu'une somme forfaitaire ou une pension versées par suite du règlement définitif d'une réclamation;

c) les indemnités que le prestataire a reçues ou a le droit de recevoir, sur demande, aux termes :

(i) soit d'un régime collectif d'assurance-salaire,

(ii) a paid sick, maternity or adoption leave plan,

(ii) soit d'un régime de congés payés de maladie, de maternité ou d'adoption,

(iii) a leave plan providing payment in respect of the care of a child or children referred to in subsection 23(1) or 152.05(1) of the Act,

(iii) soit d'un régime de congés payés pour soins à donner à un ou plusieurs enfants visés aux paragraphes 23(1) ou 152.05(1) de la Loi,

(iv) a leave plan providing payment in respect of the care or support of a family member referred to in subsection 23.1(2) or 152.06(1) of the Act,

(iv) soit d'un régime de congés payés pour soins ou soutien à donner à un membre de la famille visé aux paragraphes 23.1(2) ou 152.06(1) de la Loi,

(v) a leave plan providing payment in respect of the care or support of a critically ill child, or

(v) soit d'un régime de congés payés pour soins ou soutien à donner à un enfant gravement malade,

(vi) a leave plan providing payment in respect of the care or support of a critically ill adult;

(vi) soit d'un régime de congés payés pour soins ou soutien à donner à un adulte gravement malade;

(d) notwithstanding paragraph (7)(b) but subject to subsections (3) and (3.1), the payments a claimant has received or, on application, is entitled to receive from a motor vehicle accident insurance plan provided under a provincial law in respect of the actual or presumed loss of income from employment due to injury, if the benefits paid or payable under the Act are not taken into account in determining the amount that the claimant receives or is entitled to receive from the plan;

d) malgré l'alinéa (7)b) et sous réserve des paragraphes (3) et (3.1), les indemnités que le prestataire a reçues ou a le droit de recevoir, sur demande, dans le cadre d'un régime d'assurance-automobile prévu par une loi provinciale pour la perte réelle ou présumée du revenu d'un emploi par suite de blessures corporelles, si les prestations payées ou payables en vertu de la Loi ne sont pas prises en compte dans l'établissement du montant que le prestataire a reçu ou a le droit de recevoir dans le cadre de ce régime;

(e) the moneys paid or payable to a claimant on a periodic basis or in a lump sum on account of or in lieu of a pension; and

e) les sommes payées ou payables au prestataire, par versements périodiques ou sous

forme de montant forfaitaire, au titre ou au lieu d'une pension;

(f) where the benefits paid or payable under the Act are not taken into account in determining the amount that a claimant receives or is entitled to receive pursuant to a provincial law in respect of an actual or presumed loss of income from employment, the indemnity payments the claimant has received or, on application, is entitled to receive pursuant to that provincial law by reason of the fact that the claimant has ceased to work for the reason that continuation of work entailed physical dangers for

(i) the claimant,

(ii) the claimant's unborn child, or

(iii) the child the claimant is breast-feeding.

f) dans les cas où les prestations payées ou payables en vertu de la Loi ne sont pas prises en compte dans l'établissement du montant que le prestataire a reçu ou a le droit de recevoir en vertu d'une loi provinciale pour la perte réelle ou présumée du revenu d'un emploi, les indemnités que le prestataire a reçues ou a le droit de recevoir, sur demande, en vertu de cette loi provinciale du fait qu'il a cessé de travailler parce que la continuation de son travail mettait en danger l'une des personnes suivantes :

(i) le prestataire,

(ii) l'enfant à naître de la prestataire,

(iii) l'enfant qu'allaite la prestataire.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-52-20
STYLE OF CAUSE:	ANTONINA SENNIKOVA v ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	HEARD BY VIDEOCONFERENCE
DATE OF HEARING:	DECEMBER 14, 2020
JUDGMENT AND REASONS:	PENTNEY J.
DATED:	SEPTEMBER 22, 2021

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