

e-document	T-482-23-ID 1	
F I L E D	FEDERAL COURT COUR FÉDÉRALE March 08, 2023 08 mars 2023 Wayne Sawtell	D É P O S É
OTT	1	

(Court File No.)

FEDERAL COURT

BETWEEN:

David Brown

Applicant

and

Treasury Board of Canada Secretariat

Respondent

APPLICATION FOR JUDICIAL REVIEW
UNDER SECTION 18.1 OF THE *FEDERAL COURTS ACT*

NOTICE OF APPLICATION

TO THE RESPONDENT:

A PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the applicant. The relief claimed by the applicant appears below.

THIS APPLICATION will be heard by the Court at a time and place to be fixed by the Judicial Administrator. Unless the Court orders otherwise, the place of hearing will be as requested by the applicant. The applicant requests that this application be heard in Ottawa, Ontario.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or a solicitor acting for you must file a notice of appearance in Form 305 prescribed by the [*Federal*](#)

Courts Rules and serve it on the applicant's solicitor or, if the applicant is self-represented, on the applicant, WITHIN 10 DAYS after being served with this notice of application.

Copies of the Federal Courts Rules, information concerning the local offices of the Court and other necessary information may be obtained on request to the Administrator of this Court at Ottawa (telephone 613-992-4238) or at any local office.

IF YOU FAIL TO OPPOSE THIS APPLICATION, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU.

March 7, 2023

Issued by: _____

(Registry Officer)

Address of local office: 90 Sparks Street, 5th floor
Ottawa, ON K1A 0H9

TO: The Attorney General of Canada
Department of Justice
50 O'Connor Street, Suite 500
Ottawa, ON K1A 0H8

TO: Doreen Gagnon - Assistant Deputy Minister - Human Resources Division
90 Elgin Street
Ottawa, Ontario K1A 0R5
Canada
Building Flaherty Building
Floor 3

Application

This is an application for judicial review in respect of the Treasury Board of Canada Secretariat's decision pertaining to David Brown's Individual Grievance #322152.

On Feb. 10, 2023, Doreen Gagnon, Assistant Deputy Minister Human Resources Division of the Treasury Board of Canada denied the applicant's grievance to be supported with other leave with pay as someone who is physically ill with Covid-19 would be supported. If the applicant needed to use some or all of his sick leave as someone who is ill or has complications related to the physical illness caused by Covid then it would be acceptable. The applicant simply asked for fairness to be treated the same way.

In early 2020, when COVID first broke out, the situation hit the applicant very hard. The applicant became aware of deficiencies in Canada's response to COVID so the applicant wrote to the Public Health agencies to raise his concerns (see affidavits). Days and weeks passed by and there was no action to rectify the situation and the death rate continued to climb. The applicant felt powerless to address the situation and felt like he was responsible because he was ineffective in inciting action on the part of Public Health agencies.

On May 1, 2020, the applicant woke up in mental distress. The applicant visited his doctor and the doctor provided the applicant with a note indicating the applicant was not well enough to work due to a medical condition that was exacerbated by the COVID 19 pandemic (see affidavits).

Because the applicant's mental health crisis was triggered by the COVID situation, the applicant thought his leave would be covered in some form or fashion by code 699. Before his mental health crisis, he had been receiving code 699 support to take care of his children for a few hours each day because they were home from school and had no online school option at the time. At the time there was no requirement to first use up your relevant leave first before being afforded Code 699 leave support. He and none of his team members had been required to use up their relevant leave prior to being afforded code 699 leave and since this was an approved utilization of code 699 leave, he thought the code 699 support that he was receiving would be extended or at least maintained. When he returned to work on his gradual return to work in December 2020, he learned the code 699 support he had been receiving was discontinued because he was told it should be covered by sick leave. As advised, he requested sick leave and this was approved but felt the situation was unfair as nothing changed about his situation except it got worse. If he got physically ill with Covid, his code 699 leave would have been maintained and extended. Since he had been previously approved code 699 leave to take care of his children, he felt it was not unreasonable to be granted code 699 leave for the two hours each day that he continued to need to take care of his children until the end of June and the rest of the hours to be counted as sick leave. Managers do not ask employees to change their vacation leave to sick leave when they get sick on their vacation so the same principle should apply.

Also, on November 9, 2020 the policy guidance related to utilization of code 699 changed to say generally, you first had to use up your relevant leave and then Other Leave With Pay (699) “should be granted on a case-by-case basis, and only after remote or alternate work, or flexible hours have been considered.” The applicant’s understanding of the intent of this policy was that manager’s should grant Code 699 leave in cases where relevant paid leave was used up and where an employee could not do remote work, alternate work or flexible hours. Employees should not be forced to get an advance on their relevant paid leave or be forced to use different leave like vacation leave or leave without pay. In all other cases that do not meet these criteria, management should not approve code 699 leave. In the applicant’s situation, in the fall of 2020, after using up all of his relevant leave due to his mental health illness triggered by the Covid situation, he was unable to do remote work, alternate work or flexible hours yet he was not afforded the same consideration as someone with physical or family impacts of Covid 19. He was forced to go on leave without pay. With all of our talk about treating mental health in the same was as physical health, the applicant doesn’t think it is unreasonable to expect that at least some small portion of his leave without pay after he had used up all of his sick leave be covered by code 699 leave. At least he and others with verifiable mental health impacts of Covid should be provided with the same consideration to access code 699 leave as those with physical and family impacts of Covid.

The applicant could not believe that we in the public service would discriminate between those that had physical and family related impacts of COVID and those who had mental health related impacts of COVID. The *Canadian Charter of Rights and Freedoms* states, “Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.” The applicant has a diagnosed mental health disability of depression and anxiety and the Covid situation triggered his disability to the extent that he was unable to work. Yet he was not afforded, nor could he access the same benefits as someone who gets physically ill with Covid or who is unable to work due to family obligations due to Covid. Due to this discrepancy, he engaged management up to the level of the Deputy Minister and only after a year and three months was he provided with the rationale that Code 699 was implemented to help reduce the spread of Covid.

In the final grievance response Doreen Gagnon stated that she found no evidence that the applicant had been disadvantaged or discriminated against. Even if it is determined by the court that this rationale is justifiable in how the code 699 policy discriminated in how it treated those with mental health impacts of Covid in comparison to the physical and family impacts of Covid, at a minimum the applicant would like the court to acknowledge that this was a situation of justifiable discrimination. To say there is no evidence that the applicant had been disadvantaged or discriminated against is inaccurate and insulting. Even if it is justifiable, the applicant was discriminated against because he did not receive the same consideration as others and was disadvantaged because he did not receive the same benefits as others. In policy decisions, we need to

fully acknowledge the implications of what we are doing and if we are not even willing to acknowledge that something is discriminatory, even if it is justified, then we are not being honest with ourselves and our decisions will not be adequately informed.

The applicant makes application for:

1. To be reimbursed up to two hours of sick leave for each workday from May 1, 2020 to June 19, 2020.

And/or

2. To be reimbursed for any leave without pay or portion thereof after the applicant finished all of his sick leave in the fall of 2020 to May 25, 2021.

And/or

3. To at least acknowledge that while it was justifiable, the Code 699 policy that was implemented discriminated in how it treated persons who were unable to work due to mental health reactions to the COVID 19 situation in comparison to those who were unable to work due to physical and family impacts of the COVID 19 situation.
4. The costs of this application; and
5. Such other relief as the Applicant may request and/or this Honourable Court finds just.

The grounds for the application are:

1. The Respondent erred in law and/or inappropriately exercised its jurisdiction when it applied its Code 699 policy in the circumstances of this case and precluded the Applicant from receiving the same or similar consideration and/or benefits which are due to the Applicant based on the *Canadian Charter of Rights and Freedoms*;
2. The Respondent erred in law, inappropriately exercised its jurisdiction and/or based its decision on erroneous findings of fact that it made in a perverse and capricious manner when it did not take into account or acknowledge the particular nuances of the Applicant's situation that were communicated in the grievance hearings and/or related correspondence;
3. The Respondent erred in law, inappropriately exercised its jurisdiction and/or failed to observe a principle of natural justice, procedural fairness and/or other procedure that it was required by law to observe when it provided inadequate, potentially misleading and/or insufficient reasons for its decision;
4. The Respondent's decision was unreasonable;
5. Section 18.1 of the Federal Court Act, rules 300-317 of the Federal Court Rules; and
6. Such further and other grounds as the Applicant may advise and this Honourable Court may permit.

This application will be supported by the following material:

1. D.B. First Level Grievance Response
2. D.B. Second Level Grievance Response
3. David Brown's Grievance Form
4. Email Exchange regarding First Grievance
5. Email Request for Covid-19 Projection modeling
6. Email Request to update Covid Self-Assessment tool
7. First Doctors note
8. FPSLREB form24 David Brown
9. Situation background and reaction to third level grievance result
10. Third level response (Griev. #322152) – D.B
11. Such further and other material as the Applicant may advise and this Honourable Court permit.

Pursuant to rule 317, the Applicant requests the Respondent to send a certified copy of the following material that is not in the possession of the Applicant but is in the possession of the Respondent to the Applicant and to the Registry:

1. The entire file before Doreen Gagnon, Assistant Deputy Minister of the Human Resources Division at the Treasury Board of Canada Secretariat, at the time she made her final level decision denying the Applicant's grievance.

Date: March 7, 2023



Signature of Applicant

David Brown
169 rue du Tournoi
Gatineau, Quebec
J9J 2T4
Email: David.brown@tbs-sct.gc.ca
Phone: 819-230-9631