

PART C – Decision under Appeal

The decision under appeal is the ministry's reconsideration decision of December 30th, 2011, which denied further income assistance to the appellant. The ministry maintains that the appellant did not make a reasonable effort to comply with the conditions in the Employment Plan; therefore, the appellant was not eligible for further income assistance, per Section 9 of the Employment and Assistance Act.

PART D – Relevant Legislation

Employment and Assistance Act (EAA) – Section 9

PART E – Summary of Facts

The evidence before the panel was provided in part in the appeal record and in part through oral evidence submitted at the hearing. In the appeal record, as part of the evidence, were copies of the following documents:

- 1) A letter from the appellant's advocate dated December 08th, 2011 stating that the ministry had previously deferred the appellant's EP's conditions on the basis that she was acting as an educational assistant for her 5-year-old nephew, who has special medical needs – Type I diabetes; that the appellant is still attending her nephew at his school every day to check his blood sugar and administer insulin as appropriate; that she travels to and from the school multiple times in order to attend her nephew. The appellant stated that the ministry, unreasonably, refused to accept her request for an extension of the deferral and then found the appellant to be in non-compliance with her EP and, consequently, determined her ineligible for assistance.

The appellant stated that the Ministry Social Development policy gives the ministry the discretion to defer an EP for up to 30 days where legitimate mitigating circumstances exist; that the 30-day deferral may be extended twice, for a maximum deferral period of 90 days. The appellant informed that she is giving the assistance to her nephew on a temporary basis until the school board can train one of its employees to work with her nephew; that the ministry accepted this situation as a mitigating circumstance and deferred the appellant's EP; that the ministry has refused to extend the deferral without providing adequate reasons. The appellant stated that she has a supportive role in caring for her extended family; that the ministry has considered this situation a legitimate mitigating circumstance before and the ministry cannot change its mind and take the position that the same circumstance is not a legitimate mitigating circumstance anymore.

Finally, that this circumstance is a temporary one; that she has provided verification of the circumstances (letters from her family doctor) and therefore, she should continue to remain eligible for income assistance and that her EP should be deferred until an alternate educational assistant can be put in place. Copies of the Employment Plan Policy, Procedures and Standards were provided with the appellant's advocate's letter.

- 2) Copy of a medical note dated Dec. 07th, 2011 stating that the appellant was functioning as an educational assistant for her nephew who has insulin dependent diabetes; that she needed to go to his school at 12 pm and 2 pm to check his blood sugar and give him insulin as appropriate; that a school board employee was being trained to carry out this activity, but that the appellant likely would need to continue doing this work until January 2012.
- 3) The appellant's Notice of Appeal, dated January 09th, 2012 with a statement she provided in which she stated that the ministry's decision is unreasonable and is not reasonably supported by the evidence; that the ministry has improperly fettered its discretion to extend the deferral of her EP and has considered improper factors in making decisions about her EP compliance.

At the hearing, the Appellant presented a submission that covered the following points:

- The appellant lives with her two children, her sister and her sister's son in the same house.
- The appellant has been acting as an educational assistant for her nephew since the beginning of the school year in September.

- The appellant signed her EP on September 28, 2011 and at that moment she told the ministry worker that she was assisting her nephew and that she would need to continue that assistance until a school board employee could be trained to take over; at that same moment she also told the worker she had daycare problems for her two children, but that the worker told her "it's not my problem" and no accommodations for her family status was offered by the ministry.
- At the moment she had to begin the EP program, she told the service provider about her impediment to attend because of the assistance she was giving to her nephew and was asked to provide a medical note; the appellant got a letter from her family doctor on Sep. 30, 2011 and gave a copy of this letter to the service provider and another one to the ministry, putting the document in the "document drop box" outside the ministry office.
- After three weeks, the newly trained educational assistant started attending her nephew, but it did not work well and there were serious problems with his health; the appellant then had to return to give assistance to him while another person could be trained.
- In November the service provider asked for another medical note in order to get an extension on the deferral of her EP. Again, the appellant got a note from her doctor and provided a copy to the service provider and another one to the ministry.
- The ministry, however, refused to extend the deferral stating that the nephew was not the appellant's dependent and did not accept the appellant's reason as a legitimate mitigating circumstance preventing her from attending her EP.
- The EP Standards states that when a client is not compliant, the ministry staff has to interview the client to discuss possible non-compliance and has to request verification if a legitimate mitigating circumstance is indicated by the client in support of the non-compliance on the EP; that in the appellant's situation, the Reconsideration Adjudicator did not undertake an assessment of whether legitimate mitigating circumstances were present or advised the appellant that additional documentation would be required; and that there is nothing in the Reconsideration Decision that suggests the appellant was asked to provide detail and failed to do so.
- The appellant is a single mother of two young children and eligibility for income assistance will have a major impact on her ability to provide her family's basic needs, and the ministry owed the appellant a duty to make decisions affecting her eligibility for EP in a fair and consistent manner. free from bias or consideration of irrelevant factors. The appellant, in supporting her claim, cited the decisions provided in *C.U.P.E. v Ontario (Minister of Labour)*, 2003 SCC 29, (2003) 1SCR 539, at para 172; and *Baker v. Canada (Minister of Citizenship and Immigration)*, (1999) 2SCR 817, at para 53.
- The focus in the Reconsideration Decision on whether the appellant obtained before-school-care for her children is an irrelevant consideration since the inquiry is whether the continuance of the temporary educational assistance role is a legitimate mitigating circumstance warranting a further deferral on the EP.
- The Reconsideration Decision was based entirely/predominantly on irrelevant factors and there is an absence of any relevant evidence or analysis supporting the decision not to extend the deferral.
- The school now has a trained employee who is taking care of her nephew's needs.

The panel sought additional information from the appellant on her progress toward finding pre-school child care; however, the appellant's advocate maintained that this information was irrelevant and did not allow the appellant to answer the questions posed by the panel, just the comment that "it is difficult to find a care provider".

The Ministry restated the position as it is set out in the reconsideration decision, reaffirming the appellant has not made a reasonable effort to comply with the conditions of her EP; that at the moment she signed the EP, the appellant affirmed that she had read, understood and agreed to follow the terms and conditions of the Plan

and that she had clearly understood the consequences of not doing so; that in spite of this, she did not attend the appointments scheduled for her by the service provider. The ministry stated that the appellant signed her EP on September 28th, 2011, but on October 17th, 2011 the service provider informed the ministry she was not attending the program and that she had provided a copy of a medical note excusing her from attending the program for 3 weeks; the ministry stated that it had not received the cited letter; that on October 25th, 2011 the appellant provided a copy of the mentioned letter indicating she was acting as an educational assistant for her nephew for three weeks. The ministry informed that because the appellant indicated at that moment that she was able to attend the program and, also, to give the appellant the benefit of the doubt that she did submit the letter before, the appellant was referred to the service provider; at that moment the appellant was advised further that Income Assistance would not be issued until she provided confirmation of the attendance.

The ministry also stated that on November 3rd, 2011 the appellant informed that she was not able to attend the program on time as her children's school did not open until 8:30 am; she was then advised to obtain daycare for her two children since the service provider would not accommodate late attendance. On November 17th, 2011 the service provider informed the appellant was not attending the program or several scheduled workshops. On November 21st, 2011 the appellant provide to the minister another letter from the same medical practitioner stating the appellant was acting as an educational assistant for her nephew while a school boarding employee was being trained; the appellant informed that it was an arrangement set up between the school and the child's parent who is not able to attend because of work obligations. The ministry then informed the appellant that because she was not the child's guardian, the child was not a dependent of hers on her file and that she had no legal responsibilities for the child, the requested extension to the suspension of her requirement to fulfill her EP obligations was denied; that the appellant did not provide any evidence indicating the child requires an educational assistant or that she was the only person able to provide this service; that she was advised to obtain before-school care for her children as attending on time was mandatory for the program, but that the appellant had stated to the ministry that she had not attempted to find the necessary childcare for her children; that the appellant's main concern appeared to be the issue of her inability to attend the program on time without before-school care for her children. Finally, the ministry pointed out that because the appellant had not demonstrated reasonable efforts to comply with her EP, the ministry found her ineligible for assistance, per Section 9 of the Employment and Assistance Act (EAA).

Answering the panel's questions, the ministry informed that when an applicant has a problem with child care, the minister defers the EP's conditions for up to a couple of months for the client to find a child care provider; that the minister normally does not accept the request for deferral if the reasons for it are not related to the applicant's immediate family.

At the hearing the appellant submitted copies of the following documents:

- 1) The Employment Plan signed by the appellant and dated 2011/28/09. The terms of the contract required the appellant to (1) make appointment with the contractor for an intake assessment visit; (2) attend intake assessment with contractor; (3) complete all tasks assigned by the BC Employment Program in accordance with the appellant's responsibilities as established with the contractor and/or in her participant plan; (4) work with the contractor to address issues that may be impacting her ability to secure and sustain employment; (5) declare all income and report any changes to her ministry caseworker; (6) attend all review appointments as required.
- 2) The appellant Request for Reconsideration with a copy of the original decision that denied the appellant further Income Assistance due to non-compliance with the conditions of her EP; and the appellant's reasons for requesting reconsideration with a statement she provided in which she stated that she thinks the ministry's decision was unreasonable; that a further documented submission from her advocate would be forthcoming and that the ministry should wait for that information before making a decision.

- 3) A letter dated 2011/09/30 and provided by a medical practitioner informing that the appellant was unable to work or attend a vocational program for three weeks because she was functioning as the educational assistant for her nephew while the actual EA was being trained.
- 4) A letter dated 2011/11/17 provided by a medical practitioner informing that the appellant was continuing to function as the educational assistant for her nephew while a school board employee was being trained; that the situation would be reassessed in a month.

The ministry did not object to admission of the documents .The panel reviewed the submitted documents and they were held to be in support of the information and records that were before the ministry when the reconsideration decision was made. As a result, and in accordance with the Employment and Assistance Act, section 22(4), the panel admitted the appellant's evidence.

PART F – Reasons for Panel Decision

The issue in this case is the reasonableness of the ministry's decision to deny the appellant income assistance because the appellant did not make reasonable efforts to comply with the conditions as set out in her EP, pursuant to Section 9 of the Employment and Assistance Act (EAA).

The Employment and Assistance Act, section 9, provides:

- (1) *For a family unit to be eligible for income assistance or hardship assistance, each applicant or recipient in the family unit, when required to do so by the minister, must*
 - (a) *enter into an employment plan, and*
 - (b) *comply with the conditions in the employment plan.*

.....
- (3) *The ministry may specify the conditions in an employment plan including, without limitation, a condition requiring the applicant, recipient or dependent youth to participate in a specific employment-related program that, in the minister's opinion, will assist the applicant, recipient or dependent youth to*
 - (a) *Find a job*
 - (b) *Become more employable*
- (4) *If an employment plan includes a condition requiring an applicant, a recipient or a dependent youth to participate in a specific employment-related program, that condition is not met if the person*
 - (a) *fails to demonstrate reasonable efforts to participate in the program, or*
 - (b) *ceases, except for medical reasons, to participate in the program*

.....

The ministry's position is that the appellant failed to comply with the EP she signed on September 28th 2011; that the consequences of non-compliance were explained to her, but in spite of that, she did not make reasonable efforts to comply with her EP. The ministry informed that the appellant had her EP's conditions waived after the fact for the period she attended to her nephew's medical issues at school, while the school board was training another person for this work; that after this period the appellant was referred to the service provider again on October 27, 2011; that the appellant again did not attend the appointments and/or workshops scheduled with the service provider; that the appellant stated to the ministry that she was unable to attend the program on time after taking her children to school; that the appellant was advised by the ministry worker to obtain before-school daycare for her children; however, the appellant later confirmed to the ministry that she had not attempted to find before-school daycare for her children.

The ministry added that the appellant then submitted another medical note on Nov. 17, 2011 requesting another deferral to her EP for the same reason – to take care of her nephew's medical condition while the school board was training another employee to deal with the child's health problem. The ministry stated that the situation did not warrant an extension to the suspension of her requirement to fulfill her employment obligations because the appellant was not the child's legal guardian, the child was not a dependent on her file and the appellant had no legal responsibilities for the child; that the appellant did not provide any evidence indicating the child required an educational assistant or that she was the only person able to provide this service; that she did not make any attempt to find before-school care for her children; that her main concern appeared to be the issue of her inability to attend the program on time without before-school care for her children. Finally, the ministry pointed out that because the appellant had not demonstrated reasonable efforts to comply with her EP, the ministry found her ineligible for further Income Assistance.

The appellant stated that the ministry had previously deferred her EP on the basis that she was acting as a temporary educational assistant for her 5-year-old nephew, who has special medical needs – Type I diabetes, until the school board could train one of its employees to work with her nephew; that the ministry accepted this situation as a mitigating circumstance and deferred the appellant's EP; that the ministry has refused to extend the deferral without providing adequate reasons. The appellant stated that she has a supportive role in caring for her extended family; that the ministry has considered this situation a legitimate mitigating circumstance before and the ministry cannot change its mind and take the position that the same circumstance is not a legitimate mitigating circumstance anymore; that the Ministry Social Development policy gives the ministry the discretion to defer an EP for up to 30 days where legitimate mitigating circumstances exist; that the 30-day deferral may be extended twice, for a maximum deferral period of 90 days. The appellant affirmed that this circumstance is a temporary one; that she has provided verification of the circumstances (letters from her family doctor) and therefore, she should continue to remain eligible for income assistance and that her EP should be deferred until an alternate educational assistant can be put in place.

The panel finds that the appellant relies extensively on ministry policy, saying that the policy gives the ministry the discretion to defer an EP requirement for up to 30 days where legitimate mitigating circumstances exist; that the 30 day deferral may be extended twice; that the ministry previously accepted the appellant's role in helping her nephew as a legitimate mitigating circumstance; and that since circumstances had not changed the ministry was thereby bound to continue to accept that as a legitimate mitigating circumstance when considering whether to extend the deferral.

With respect to the ministry policy, the general rule is that policy is not binding on a statutory decision maker unless there is legislative direction for it to be binding. (*Ainsley Financial Corp. v. Ontario Securities Commission* (1993), 14 O.R. (3d) 280 (Gen. Div.), affirmed (1994) 21 O.R. (3d) 104 (C.A.)).

The appellant effectively claims a legitimate expectation that the policy will be followed by the ministry.

A legitimate expectation can only arise with respect to a procedural matter, not to establishing a substantive right. (*Reference re Canada Assistance Plan (Canada)*, [1991] 2 S.C.R.525, 1 Admin. L.R. (2d) 1, [1991] 6 W.W.R. 1., and *Baker v. Canada (Minister of Citizenship & Immigration)* (1999), 174 D.L.R. (4th) 193, 243 N.R. 22, 14 Admin. L.R. (3d) 173 (S.C.C.))

The panel suggests that it would be a good practice for a Reconsideration Decision to reference any relevant policy and to explain how the appellant's circumstances were considered in light of the policy. However, the decision not to grant an extension to the deferral is a substantive matter that couldn't give rise to a legitimate expectation that an extension would be granted. Further, on the evidence, the first deferral appears to have been an after-the-fact decision by the ministry to overlook the appellant's previous absence rather than a proactive decision to grant a deferral. At the time the ministry advised the appellant of the first deferral decision it also advised that further Income Assistance would not be issued until the appellant had provided confirmation of attendance in the program. The appellant therefore couldn't have a legitimate expectation that a subsequent deferral or extension would necessarily be granted with her not having attended the program as required.

The appellant also argued that the Reconsideration Decision was based on an irrelevant consideration, namely that in the ministry's opinion the appellant had not been making reasonable efforts to obtain pre-school child care so that she could attend scheduled meetings as required by her EP, and that the Reconsideration Decision demonstrated an absence of any relevant evidence or analysis supporting the decision not to extend the deferral.

It is clear to the panel that the Reconsideration Decision referred to the appellant's admitted failure to attempt to find pre-school care for her children not as a reason for refusing to grant a deferral, but as evidence that the appellant's true motivation for volunteering to assist with her nephew's care was to avoid having to look for pre-school care for her children so that she could avoid attending her scheduled appointments under the EP. The panel finds that this is a relevant consideration, given the difficulty in obtaining information from the appellant on this issue. The panel sought additional information from the appellant on her progress toward finding pre-school childcare; however, the appellant's advocate maintained that this information was irrelevant and no information was provided concerning the appellant's efforts to find a pre-school childcare, only the comment that "it was difficult to find a care provider".

The Reconsideration Decision also provides adequate analysis as to why a subsequent deferral (or extension) was not granted: that the appellant was not her nephew's legal guardian; that the nephew is not a dependant on the appellant's file; and that the appellant has no legal responsibilities for the nephew. The appellant was advised of these considerations on November 21st. The Reconsideration Decision also relied on the fact that there was no evidence that the appellant was the only person available to assist her nephew.

Finally, the appellant argued that the ministry had taken the position that it "cannot" extend the deferral because the medical care/need is not a need of the appellant or a dependant on her file, and that this amounts to a fettering of the ministry's discretion to extend the deferral.

The Reconsideration Decision explains the reasons for concluding that the appellant was not eligible for income assistance, and does not contain any language indicating that the ministry improperly fettered the exercise of its discretion. Accordingly, the panel does not accept that the ministry fettered its discretion.

For these reasons, the panel finds that the ministry's decision to deny income assistance to the appellant was a reasonable application of the applicable enactment in the circumstances of the Appellant, and therefore confirms the ministry's decision in accordance with sections 24(1)(b) and 24(2)(a) of the Employment and Assistance Act.