

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the “ministry”) Reconsideration Decision dated April 18, 2012 in which, pursuant to s. 9 of the *Employment and Assistance Act*, the ministry determined that the appellant had ceased to be eligible for income assistance due to his failure to make a reasonable effort to satisfy a condition of his February 22, 2012 Employment Plan, namely the requirement that he attend to keep appointments with an employment counseling contractor, and such failure to attend was not for medical reasons.

PART D – Relevant Legislation

Employment and Assistance Act (“EAA”), s.9

PART E – Summary of Facts

The ministry did not send a representative to attend the hearing of the appeal. The panel was satisfied that the ministry had received notice of the hearing. Accordingly, the panel proceeded with the hearing in accordance with s. 86 of the *Employment and Assistance Regulation*.

Several days prior to the hearing of the appeal the appellant's representative (the "Representative") provided the Tribunal with two documents, copies of which were forwarded to the panel members prior to the hearing, that had not been before the ministry on reconsideration:

- ❑ an undated letter (confirmed by the Representative at the hearing to have been written on April 25, 2012) from an employment counseling contractor confirming that the appellant had contacted it and inquired about participating in one of its employment programs; and
- ❑ a letter dated April 25, 2012 from a counselor employed by a provider of substance abuse programs regarding the appellant's intention to participate in one of its programs.

The panel admitted these documents into evidence but noted that, though they did not conflict with the evidence before the ministry on reconsideration, they contained no information or evidence that was directly relevant to the evidence relied upon by the panel in making its decision on this appeal.

The written evidence before the ministry on reconsideration was comprised of the following documents:

- ❑ Sections 2 and 3 of the Employment and Assistance Request for Reconsideration (the "Request");
- ❑ 2-page Employment Plan between the appellant and the ministry signed February 22, 2012 (the "Employment Plan");
- ❑ fax transmitted March 3, 2012 from the employment counseling contractor to the ministry comprised of two pages titled Client Notes (the "Client Notes"); and
- ❑ 1-page document titled MSD History notes summarizing discussions between the appellant and the ministry at the time the employment plan was initiated (February 20, 2012) and signed (February 22, 2012) (the "History Notes").

The written evidence of the appellant and the ministry on matters material to this appeal was not in conflict. The relevant facts on which the parties were in agreement are summarized below:

- ❑ in the period immediately prior to the events relevant to this appeal, the appellant had been participating in an employment plan the primary condition of which was that the appellant was required to attend an addiction counseling program;
- ❑ on at least one occasion the appellant was in breach of that condition and, in consequence, he received a letter denying him income assistance;
- ❑ on February 20, 2012 the appellant attended at an office of the ministry to deal with the denial of income assistance and in the course of his discussions with the ministry that day he agreed that he would discontinue the employment plan he had been on and would enter into a new employment plan;
- ❑ the new employment plan included conditions - though not the condition contained in the prior plan regarding attendance in an addiction counseling program - requiring him to participate in an employment program with an employment counseling contractor (the "Contractor") retained by the ministry;
- ❑ on February 22, 2012 the appellant again attended at the office of the ministry and

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- signed the Employment Plan;
 - on both February 20 and 22, 2012 the ministry emphasized in its discussions with the appellant that the Employment Plan obliged the appellant to participate in sessions arranged by the Contractor and the appellant stated that he understood that his attendance was mandatory;
 - in the context of the appellant's discussions with the ministry on February 20 and 22, 2012, the appellant advised the ministry that he had no barriers to employment other than a criminal record and, in that regard, he was at that time on probation and reported to a parole officer;
 - the appellant also discussed with the ministry his drug (crack cocaine) and alcohol addictions but stated that he had been "clean" for a period of time;
 - the appellant attended the intake interview with the Contractor on February 22;
 - the appellant had a subsequent appointment with the Contractor on February 23, 2012 but did not attend because he had a conflicting meeting with his parole officer and was unable to reschedule that meeting; he failed to advise the Contractor that he had been unable to reschedule the meeting;
 - the appellant also failed to attend a rescheduled appointment with the Contractor on March 1, 2012;
 - the appellant arrived 1 hour and 45 minutes late for a class on March 8, 2012 and was not permitted to participate in the class of that day;
 - the appellant arrived 45 minutes late for a class on March 12, 2012 and again was not permitted to participate in the class;
 - the appellant explained that he was late on March 12, 2012 because he was not aware that the clocks had changed the day before [the panel notes that daylight savings time began at 2:00 a.m. on Sunday, March 11, 2012];
 - on March 12, 2012 the Contractor reported the appellant's non-participation in its programs and shortly thereafter the ministry informed the appellant that since he had breached a mandatory condition of his Employment Plan – the requirement that he participate in the program offered by the Contractor - he ceased to be eligible for income assistance.

Omitted from this summary of the facts, or so the Representative and the appellant submitted, was evidence regarding the appellant's drug and alcohol addictions and the effect that this illness had on his ability to meet the requirements of the Employment Plan. This submission will be more fully examined in the next part of this decision. In terms of evidence advanced by the appellant at the hearing in regard to his addictions, the panel accepted the following statements made by the appellant:

- when he went to the ministry office on February 20, 2012 the appellant was seeking a restoration of income assistance, not a new employment plan;
- the new employment plan was entirely the idea of the ministry and he entered into it because he presumed he had no choice;
- though he advised the ministry that he thought he had his addictions under control, he was motivated to say this in part because he could not risk saying anything else for fear that the ministry would share whatever he said with his parole officer, his parole would be revoked and he would be jailed again;
- in addition to his addictions, he suffers from fetal alcohol syndrome; and

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- shortly after he had signed the Employment Plan, that is during the time that he missed appointments with the Contractor or was late for them, he met up with an old friend from his days when he was heavily into his addictions and the result of this encounter was that for a period of time he resumed smoking crack cocaine and drinking alcohol.

The panel proceeded in this appeal on the basis that the parties agreed on the foregoing facts or, at least as regards the four which are listed in the previous paragraph, that they were not in dispute. Those facts not in dispute were admitted by the panel into evidence pursuant to EAA, s. 22(4)(b), that is they were in support of the information and records before the ministry on reconsideration.

PART F – Reasons for Panel Decision

The issue on this appeal is whether the ministry's decision on reconsideration is reasonably supported by the evidence, that is did the evidence before the ministry reasonably support its determination that, pursuant to s. 9, EAA, the appellant's was not eligible for continued income assistance due to his failure to make a reasonable effort to satisfy a condition of his Employment-Plan - namely the requirement that he participate in the programs offered by the Contractor - and that such failure was not for medical reasons.

The legislation relevant to this appeal is set out below, in particular subsection 9(4):

EAA

- 9 (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.
- (2) A dependent youth, 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 minister 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 employment, or
 - (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.
- (5) If a dependent youth fails to comply with subsection (2), the minister may reduce the amount of income assistance or hardship assistance provided to or for the family unit by the prescribed amount for the prescribed period.
- (6) The minister may amend, suspend or cancel an employment plan.
- (7) A decision under this section
 - (a) requiring a person to enter into an employment plan,
 - (b) amending, suspending or cancelling an employment plan, or
 - (c) specifying the conditions of an employment plan

is final and conclusive and is not open to review by a court on any ground or to appeal under section 17 (3) [*reconsideration and appeal rights*].

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To succeed in this appeal the appellant must persuade the panel that he has satisfied at least one of criteria set out in s. 9(4) of the EAA, that is (a) that he made reasonable efforts to participate in the program offered by the Contractor or (b) that if he did not make reasonable efforts, such failure was for a medical reason.

As to the first criteria, the Representative conceded that the appellant could not succeed in arguing that the efforts he made were reasonable. While the panel was not convinced that in the circumstances of the appellant this concession was necessary, the panel proceeded with the appeal solely in relation to the second criterion, that is it determined whether or not the appellant had a sufficient medical reason for not making a reasonable effort to participate in the program offered by the Contractor.

The submission of the Representative was that the ministry knew of the appellant's addiction problems and, accordingly, once the appellant began exhibiting behaviour that it knew, or ought reasonably to have known, were characteristic of persons with addictions – in this instance by failing to keep appointments or in coming late to them - that it had a duty to seek further medical evidence to determine whether or not that behaviour was a result of those addictions. The panel is unable to find any legislative basis for the Representative's submission that the ministry had any such duty. Neither was the Representative able to point to any such legislative authority though the Representative noted that the ministry had a form titled Medical Report – Employability that was designed to elicit the sort of information that could have been useful in the appellant's circumstances. The panel concluded that the existence of this form fell short of establishing that the ministry had a duty to seek medical information that might have been helpful to the appellant in this appeal.

However, the panel agreed with the Representative that the ministry was aware of the appellant's addictions, not only at the time of the reconsideration decision but throughout the time relevant to this appeal. Indeed, the Employment Plan was entered into in substitution for an employment plan that was terminated because the appellant had failed to satisfy the condition in that prior plan which required he participate in an addiction recovery program. It is clear that the ministry knew that the appellant had a serious addiction problem. The panel thought it somewhat puzzling that rather than craft an employment plan that addressed the addiction problem head on, the ministry instead removed the requirement that the appellant attend a recovery program and replaced it with conditions that appeared to the panel to be more onerous.

The appellant's addiction problems were again brought to the attention of the ministry following the decision to terminate his income assistance. He met with the ministry to discuss the financial difficulties that this decision had created for him and, later, in the context of his application for reconsideration, in Section 3 of the Request for Reconsideration he wrote:

My last Employment Plan was for me to find a stable recovery program to attend for my addiction issues which I thought were all dealt with but addition is a sneaky and cunning sickness that can sneak up on you each and every way and I am sorry to say that is the reason I've failed to make it to [the Contractor's] classes. If granted back I would go back to the original Employment Plan and seek another recovery centre to go back to because clearly I still need help in that part of my life and I do want to the help get through my addiction problems.

In the reconsideration decision this passage was paraphrased but the reconsideration officer made

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no comment whatsoever on it. Clearly the ministry did not consider the relationship between the appellant's addictions and his failure to participate in the Contractor's program. The ministry's failure to comment on the appellant's statement was not, in the opinion of the panel, reasonable.

The panel reviewed the specifics of the appellant's failure to keep appointments with the Contractor. The first appointment he missed was on February 23, 2012. He missed that because it conflicted with a meeting with his parole officer. He had so advised the Contractor and said he would try to reschedule the appointment with the parole officer. He was unable to do so, but he didn't so inform the Contractor. He should have. However, in the opinion of the panel this was an extenuating circumstance which the ministry should have considered. There is no evidence that it did.

The second missed appointment was on March 1, 2012. It was rescheduled to March 8, 2012. The appellant missed the rescheduled appointment. There is no explanation for this other than the appellant's evidence, which was not before the ministry on reconsideration, that this was during the time that he and his friend had resumed smoking crack cocaine and drinking. This, the panel decided, would not have been an extenuating circumstance but for the fact that the ministry knew of the appellant's serious addiction problems.

The third missed appointment was on March 12, 2012. The appellant arrived 45 minutes late (rather than 15 minutes early) because he was not aware that daylight saving time had begun the previous day. Again, this was an extenuating circumstance that, in the panel's view and in the circumstances of the appellant, should have been treated by the ministry as an extenuating circumstance. There is no evidence that it was.

It is the panel's view that the failure of the appellant to attend appointments with the Contractor as required was a serious breach of his Employment Plan but that in his circumstances he should reasonably have been afforded some greater latitude. Moreover, his reasons for not keeping appointments should have been given greater credence and consideration.

The ministry is presumed to know that persons with addictions do not perform daily activities in the manner of persons without this illness. In the opinion of the panel the appellant was held to a standard of performance that was unreasonable in his circumstances. As he said in response to a question from the panel, when his addictions take hold of him he "doesn't care about anything but the next hit". In creating an employment plan for a person in the circumstances of the appellant, the fundamental concern should be to address the medical reasons that influence, sometimes control, his behaviour, namely his addictions. This the ministry did not do. Indeed, it worsened his prospects for success by replacing an employment plan that focused on his addictions with one which ignored them.

The panel finds while the appellant failed to meet a condition of the Employment Plan, namely the requirement that he attend appointments with the Contractor, this was because he had a sufficient medical reason for not doing so.

In conclusion the panel finds that the Reconsideration Decision was not a reasonable application of the legislation in the circumstances of the appellant. The decision is rescinded.