

PART C – Decision under Appeal

The decision under appeal is the Reconsideration Decision dated October 30, 2012 in which the Ministry of Social Development (the “ministry”) denied the appellant’s request that his designation as a Person with Persistent Multiple Barriers to Employment (a “PPMB”) be extended. The ministry held that his recent work record was such that he was no longer eligible for the PPMB designation, that is, pursuant to section 2(4) of the *Employment and Assistance Regulation*, his medical condition no longer precluded him from searching for, accepting or continuing in employment.

PART D – Relevant Legislation

Employment and Assistance Regulation (EAR), section 2.

PART E – Summary of Facts

The evidence before the ministry on reconsideration included the following documents:

1. one-page letter from the ministry to the appellant dated September 28, 2012 stating that the appellant no longer met the criteria for PPMB designation;
2. Employability Screen prepared on or about September 26, 2012 giving the appellant a score of 9;
3. Medical Report – Persons with Persistent Multiple Barriers prepared by the appellant's doctor and dated July 18, 2012;
4. Medical Report – Persons with Persistent Multiple Barriers prepared by the appellant's doctor and dated September 2, 2010; and
5. Section 3, Employment and Assistance Request for Reconsideration completed by the appellant and dated October 23, 2012.

At the hearing the appellant produced a folder of documents relating to his initial designation as a PPMB in or around 2008. However, he provided the panel with information relating to that folder orally and so he did not seek to introduce the folder of documents into evidence. The appellant also produced pay slips for the days he worked in the period June through November, 2012. The panel and the ministry were satisfied with his oral evidence in regard to those slips and so he did not seek to introduce the pay slips into evidence.

At the hearing the appellant's oral evidence included the following:

1. He was initially designated a PPMB in or about 2008 and maintained that designation until it was revoked. By letter from the ministry (see documentary item 1, above) his PPMB designation was revoked on or about September 26, 2012 although his PPMB financial assistance will not be terminated until December 31, 2012.
2. In 2008 he was diagnosed as suffering from depression, anxiety attacks, fatigue, lack of concentration and paranoia. He is also being treated for alcoholism. These conditions predate 2008 by many years. He described himself as one of those persons occasionally encountered on the street, waving his arms and muttering and shouting at passersby.
3. In 2008 he sought medical and other help for his medical conditions. Since he started treatment some of his symptoms have lessened somewhat. The treatment has been a combination of medications and counseling. As a result of the treatment and support he has received, he has had some success in reintegrating into the community and achieving a measure of independence.
4. When he first started dealing with the ministry in 2008 his conduct was such that the ministry was unwilling to deal with him directly and required that he use the Elizabeth Fry Society as an intermediary. Recently he has dealt directly with the ministry, though primarily by telephone.
5. For the past several years on Wednesday mornings he has attended a gathering of persons like himself at a local church. He describes this activity as volunteering though he said that there were rarely any activities to perform. Occasionally, such as the last time he attended when he carried four boxes from a truck into the building, the volunteers were asked to help with a few chores. He said that essentially the only requirement to be a "volunteer" is that one show up and be sober. It is more of a support group.
6. During the years 2008 through 2011 the appellant did not work. However, over the past year he has made an effort to enter the job market. He occasionally attends a labour exchange where he waits to be called out for a day job. Most days he has attended the exchange he has been called out. The work is physical and unskilled. It includes jobs such as demolition of

- buildings or raking leaves.
7. Notwithstanding his desire to reintegrate into the work force, his actual work experience is rather modest. From January to June of this year he worked 1 or 2 days. In July, 1/2 day, in August, 6-1/2 days, in September, 1 day, in October, 0 days and in November, 1/2 day. In August he injured his back and ankle and these injuries have persisted. Until the injuries have resolved he is unlikely to work much, if at all. He has no idea when that will be.
 8. Each day that he works he receives a pay slip setting out his earnings and in due course he provides the ministry with copies of those slips.
 9. To encourage PPMBs to obtain employment the ministry allows them to earn up to \$500.00 each month before the financial assistance they receive is reduced. The delivery of the pay slips to the ministry forms part of the procedure employed by the ministry to monitor the earnings of PPMBs.
 10. The appellant confirmed that on or about September 26, 2012 he had been telephoned by the ministry for the purpose of completing the Employability Screen (see documentary item 2, above) though he does not think he was asked about his work record. In any event the ministry knew his work record because it had copies of his pay slips. He had not seen the Screen until after the reconsideration decision had been made and he received the appeal record.

The ministry did not question any of the foregoing evidence of the appellant. The panel admitted this oral evidence under subs. 22(4) of the Employment and Assistance Act as being in support of the evidence that was before the ministry on reconsideration. Indeed, the panel noted that much of it was part of the appeal record or was implicit in that record and simply added detail. However, there is one crucial caveat to this question of admissibility: it relates to the centrally important statement in the Reconsideration Decision that the appellant is working 1 to 2 days per week. This will be discussed later.

In his handwritten statement dated October 23, 2012 (see documentary item 5, above) the appellant wrote:

I have been under the care of a doctor and have been making progress attending counseling, volunteering, and recently working 1-2 days a week at labour ready with the goal of re-entering the work force. I believe it is premature to say "well – he's ready to go!"

As discussed, below, the panel made special note of this statement, particularly because it was inconsistent with the oral evidence.

The ministry introduced no evidence and asked no questions of the appellant.

The panel finds as fact the ten statements set out above. Additionally the panel finds as fact that, in the process of seeking reconsideration, the appellant stated in writing on October 23, 2012 that recently he had been "working 1-2 days a week" and that his goal was "re-entering the work force". This statement will be discussed further in the next section of this decision. At this point in its decision the panel wishes to make clear that it does not think this statement is in fact correct. What is a fact is that the appellant so advised the ministry on reconsideration.

PART F – Reasons for Panel Decision

The ministry's October 30, 2012 reconsideration decision was based on the ministry's conclusion that the appellant no longer satisfied all the eligibility criteria for PPMB designation, specifically the criterion set out in section 2(4)(b) of the EAR. Thus, the issue on this appeal is to determine whether or not the reconsideration decision holding that the appellant's medical conditions did not constitute "a barrier that precludes [him] from searching for, accepting or continuing in employment" was a reasonable application of this statutory provision in the circumstances of the appellant.

The relevant legislation is as follows:

EAR

Persons who have persistent multiple barriers to employment

2 (1) To qualify as a person who has persistent multiple barriers to employment, a person must meet the requirements set out in

- (a) subsection (2), and
- (b) subsection (3) or (4).

(2) The person has been a recipient for at least 12 of the immediately preceding 15 calendar months of one or more of the following:

- (a) income assistance or hardship assistance under the Act;
- (b) income assistance, hardship assistance or a youth allowance under a former Act;
- (c) a disability allowance under the *Disability Benefits Program Act*;
- (d) disability assistance or hardship assistance under the *Employment and Assistance for Persons with Disabilities Act*.

(3) The following requirements apply

- (a) the minister
 - (i) has determined that the person scores at least 15 on the employability screen set out in Schedule E, and
 - (ii) based on the result of that employability screen, considers that the person has barriers that seriously impede the person's ability to search for, accept or continue in employment,
- (b) the person has a medical condition, other than an addiction, that is confirmed by a medical practitioner and that,
 - (i) in the opinion of the medical practitioner,
 - (A) has continued for at least one year and is likely to continue for at least 2 more years, or
 - (B) has occurred frequently in the past year and is likely to continue for at least 2 more years, and
 - (ii) in the opinion of the minister, is a barrier that seriously impedes the person's ability to search for, accept or continue in employment, and
- (c) the person has taken all steps that the minister considers reasonable for the person to overcome the barriers referred to in paragraph (a).

(4) The person has a medical condition, other than an addiction, that is confirmed by a medical practitioner and that,

- (a) in the opinion of the medical practitioner,

- (i) has continued for at least one year and is likely to continue for at least 2 more years, or
- (ii) has occurred frequently in the past year and is likely to continue for at least 2 more years, and

(b) in the opinion of the minister, is a barrier that precludes the person from searching for, accepting or continuing in employment.

The appellant's submission, set out in part in the Request for Reconsideration and repeated and expanded upon in his oral presentation, had four elements as follows:

1. The decision of whether or not he should continue to be designated a PPMB should be based on the nature and severity of his medical conditions. Those conditions – primarily depression and the concomitant lack of energy and concentration, anxiety and other mood disorders, and paranoia – he argued were such as to render his ability to seek and retain regular employment unrealizable. It was not open to the ministry to introduce non-medical considerations into the decision.
2. Following on the first submission, the appellant argued that the fact that he had undertaken some gainful employment over the previous 6 months should not be a ground for disqualification. Indeed, quite the contrary. The ministry encouraged PPMBs to seek employment and specifically exempted the first \$500.00 of income earned by PPMBs who had the good fortune and fortitude to find employment. To then turn around and penalize them for doing this was inconsistent, perhaps perverse.
3. Equally unjust was the fact that some PPMBs were held to a lower standard in regard to the medical condition that constituted a barrier to their becoming employed. They had merely to show that their medical condition constituted a barrier which "seriously impedes" employment (the wording of EAR, section 2(3)(b)(ii)). By way of contrast, other applicants for PPMB designation, which group includes the appellant, had to establish that their medical condition reached the more demanding threshold of being a barrier which "precludes" employment (the word used in EAR, section 2(4)(b))
4. Finally, the appellant argued that the test the ministry had set out in the reconsideration decision was that he had to be precluded from "all types of employment" and this was a misreading of the regulatory provision and, in any event, absurd.

While the panel was not unsympathetic to the appellant's position, its jurisdiction is to review the reasonableness of the relevant statutory provisions applied in the reconsideration decision to the circumstances of the appellant. It has no jurisdiction to make the decision it thinks the ministry should have made (assuming it was so inclined) nor does it have any jurisdiction to amend the regulations (should it find them inapt). In dealing with the appellant's four submissions, the panel makes the following observations:

1. The test is not whether or not the appellant has serious and disabling medical conditions – unquestionably he did – rather it is whether, objectively speaking, those conditions form an essentially insurmountable barrier to some form of employment, that is employment for which the appellant might reasonably be expected to be qualified and which was reasonably accessible to him. The legislation clearly authorizes, indeed requires, the ministry to consider matters in addition to the appellant's medical condition in reaching its determination of whether or not he is eligible for PPMB designation.
2. The fact that the ministry encourages PPMBs to earn a modest income without penalty is consistent with a policy of encouraging persons to move in an incremental way from financial dependency to a measure of independence. As set out in the September 8, 2012 letter from

the ministry to the appellant (see documentary item 1, above), the ministry expected the appellant to move from the status of a PPMB to a person on an Employment Plan. Whether any such plan could be devised which would be reasonable in the circumstances of the appellant is a matter not germane to this appeal.

3. The panel agrees with the appellant that the different language used in sections 2(3)(b)(ii) and 2(4)(b) certainly establish different standards, the second more difficult to attain than the first. But that is the scheme of the regulations and as such it is within the exclusive competence of the legislature, not this panel. However, the panel notes that the less rigorous standard is applied to persons whose score on the Employability Screen is such that they are clearly at a disadvantage in obtaining employment. Perhaps that is sufficient to reduce the sting of any perceived unfairness between the two regulatory categories of applicants for PPMB designation.
4. The panel agrees that the reconsideration officer is not at liberty to change the language of the regulations. However, whether there is a material difference between "employment" and "all types of employment" is a semantic question that does not arise in the context of this appeal. The appellant was engaged in a form of employment that fits equally well under the rubric of "employment" or "all types of employment". Clearly the regulation could have been more aptly drafted. But, as a practical matter, such statutory language is inevitably read in a reasonable way or, if not, decisions based on an unreasonable interpretation would not withstand the scrutiny to which they are subjected on appeal. That issue does not arise in this appeal.

The submission of the ministry was simply that the reasoning set out in the reconsideration decision was correct. A person, though suffering from significant medical conditions that created a barrier to employment, who was nonetheless capable of volunteering and of working 1 to 2 days a week, is clearly, the ministry submitted, not a person who suffered from a barrier that would preclude him from searching for, accepting or continuing in employment. Indeed, by his actions he had clearly demonstrated that he had already done these things.

When first reviewing the evidence the panel was puzzled at what appeared to be the significant discrepancy between the evidence of the appellant and the conclusions drawn by the ministry on reconsideration. In the panel's view, the ministry view of the evidence was significantly flawed in respect to the appellant's so-called volunteering and, more importantly, his employment.

The ministry's reference to the appellant volunteering was, the panel thought, clearly strained. While that term was indeed used by the appellant, the fact is that it was a one morning a week social gathering at a local church with no program or outward purpose, whose only rule for membership was "come sober". It seemed to the panel that to call that activity volunteering was at best misleading, and most certainly a gross exaggeration.

More significantly, the ministry referred to the appellant working one to two days a week whereas the panel had accepted the appellant's oral evidence that the total time he had worked over the past four years was approximately ten days, with 6-1/2 of those days coming in August, 2012. Even the information contained in the Employability Screen - which described the time he had worked over the past as "less than 3 months" whereas the more accurate "none or very limited" would have been fairer - did not square with the ministry conclusion that he worked one to two days a week. The panel was of the view that the ministry had grossly overstated, inadvertently no doubt, the appellant's ability to become employed and had thereby arrived at an unsupportable conclusion regarding the

applicability of the test contained in EAR, section 2(4)(b)

However, the panel then considered the oral evidence of the appellant in relation to the appellant's October 23, 2012 statement forming part of the Request for Reconsideration. In that statement the appellant clearly referred to "volunteering" (without any qualification or description of what that meant) and, even more startling, "working 1 - 2 days a week at labour ... with the goal of re-entering the work force". The evidence of the appellant at the hearing, which the panel found credible and consistent, was strikingly at odds with this statement. Importantly, however, it is precisely this wording that was quoted in the reconsideration decision.

Faced with this contradictory evidence, the panel concluded that it had to acknowledge that what the panel thinks was an erroneous statement made by the appellant - perhaps more reflective of his aspirations than his performance or perhaps in the appellant's mind referring to July, 2012 when he did indeed work one to two days a week - that was the statement that was before the ministry on reconsideration and on which it relied. It was unambiguous. There was no evidence before the ministry to put it on notice that there might be a reasonable doubt as to the accuracy of this statement. Moreover, it was against the appellant's interest and, as such, the more credible. The appellant, the panel concluded, had to live with the consequence of having provided to the ministry what appears in retrospect to have been an inaccurate statement.

The mandate of the panel is to determine whether the reconsideration decision is reasonable when viewed in the context of the evidence that was before the ministry on reconsideration. Given the panel's conclusion that the appellant's unqualified statement in October, 2012 that he worked one to two days a week was paramount and that it must be given its obvious weight and meaning, the panel concluded that the ministry's reconsideration decision - that the appellant had not satisfied the statutory requirements for having his designation as a PPMB continued - was a reasonable application of the relevant statutory provisions in the circumstances of the appellant. The ministry's decision is confirmed.