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PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development's (the ministry) reconsideration decision dated January 21, 2013 which found that the appellant was dismissed from his employment for just cause as provided by section 13(1)(a)(iii) of the Employment and Assistance Act with the result being that he was ineligible for income assistance for a period of two months pursuant to section 13(2)(b) of the Employment and Assistance Act.

PART D – Relevant Legislation

Employment and Assistance Act (EAA), section 13
Employment and Assistance Regulation (EAR), section 29

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PART E – Summary of Facts

The evidence before the ministry at the time of the reconsideration decision consisted of the following:

1. The appellant's Request for Reconsideration dated January 10, 2013 attaching 3 pages of written submissions ("RFR");
2. A Human Resources Development Canada form dated January 3, 2013 ("the HRDC form");
3. The appellant's Application for Income Assistance dated December 27, 2012;
4. The appellant's Record of Employment from his former employer dated December 26, 2012 ("the ROE"); and
5. A notice addressed to the appellant indicating his landlord's intention to end his tenancy for unpaid rent or utilities dated January 8, 2013 ("the Eviction Notice").

In his Notice of Appeal dated February 6, 2013, the appellant states that the ministry has not demonstrated that his employer had just cause to dismiss him. The appellant states that he denies that he told a ministry staff member that he had been late 20 times but that he simply recounted what the employer's HR manager had heard from the store manager. The appellant states that the meaning of the phrase "just cause" has been misinterpreted and that the ministry has the onus of proof.

At the hearing, the appellant provided the panel with a medical note prepared by his family physician and dated February 27, 2013. The note provided confirmation that the appellant had been seen in the physician's medical clinic on November 14, 2012 and December 10, 2012. The ministry did not object to the admissibility of this document. The appellant argued it should be admitted as it was in support of the appellant's position that he had missed work due to illness. After considering the submissions of the parties, the panel decided to admit the medical note as in support of information and records that were before the minister when the decision being appealed was made pursuant to section 22(4)(a) of the *Employment and Assistance Act.*

At the hearing, the appellant's advocate provided written submissions which he referred to in detail. The advocate stated that the appellant was employed by his former employer as a sales associate from September 25, 2012 through December 8, 2012 when his employment was terminated during his probation period by the assistant store manager ("ASM") who refused to provide a reason for this decision to the appellant.

On December 11, 2012, the appellant filed a complaint with his former employer regarding unfair treatment by the ASM and on December 12, 2012, the appellant contacted the Employment Standards Branch ("ESB") who confirmed that it was permissible for his former employer to lay him off during his probation period without any reason.

On December 17, 2012, the appellant applied for income assistance at which time the ministry advised him that it required his Record of Employment ("ROE") from his former employer. On January 2, 2013 the appellant received his ROE and on closer review, he noted that the reason for issuing the ROE was listed as "Dismissal" which surprised the appellant. The appellant delivered a copy of his ROE to the ministry that same day.

On January 3, 2013, the appellant filled out a complaint form (the HRDC form described above) at an Employment Insurance office contesting his former employer's contention that he had been dismissed. On the HRDC form, the appellant notes that he was given only one verbal warning about his delays at which time he was told he could not make up any late time at the end of his shift as that time would be considered overtime.

On January 3, 2013, the ministry advised the appellant that he was not eligible for income assistance for a period of two months due to his being dismissed from his employment for just cause. On January 8, 2013, the appellant advised the ministry that he disagreed that he had been dismissed from his employment and he recounted what the former employer's human resources ("HR") manager had heard from the store manager. The appellant's advocate stated that the appellant denied telling the ministry that he had been late 20 times.

The appellant's advocate stated that the appellant's lateness was always minor except due to illness on December 4, 2012 when he arrived 40 minutes late and asked permission to finish work 2 hours earlier. The appellant called in sick on December 5 and 6, 2012 and on his next scheduled day of work, December 8, 2012, he was let go on his arrival.

The panel finds that the written submissions provided by the appellant's advocate include both evidence and argument and the panel further finds that the evidence is admissible as written testimony in support of the information and records that were before the minister when the decision being appealed was made pursuant to section 22(4)(b) of the EAA.

At the hearing, the appellant confirmed that he never admitted being late over 20 times and he noted that in the course of his employment, he had only worked 27 days in total. The appellant stated that he only missed 2 ½ days of work due to illness and that he had asked his supervisor for more hours to recover for that time which was agreed to. The appellant maintained he had no problems at work prior to being terminated, that he liked his job and had received compliments from at least 15 customers.

The appellant provided detail on how he would "clock in" prior to each shift. He stated that each day he would arrive at work he would clock in but that if he did so even one minute late he would be considered late for that day. The appellant provided an example of a day when he arrived at work and attended a staff meeting first without clocking in and when he did clock in, 20 minutes after his shift began, he would still have been considered late even though he was at the store engaged in store activities when his shift actually began.

After recounting the chronology of his employment in December 2012, the appellant stated that he attended his former employer's Christmas party on December 9, 2012 (the day after his termination) and in the course of a conversation with the store HR manager he came to realize that she was unaware that he had been terminated.

In response to a question from the ministry, the appellant advised that in the course of his shifts, he would clock in four times each day and that while he became aware of why they used the clock on his first day of employment, he denied knowing how it would affect the time he had been working (ie, he did not know making up missed time after his shift would result in that time being recorded as overtime and paid differently).

In response to a question from the ministry, the appellant stated that he had been hired as a part-time employee and worked for the most part 24 – 26 hours per week. He stated that the maximum shift each day would be 8 hours and that any time worked beyond 8 hours was counted as overtime.

In response to a question from the ministry, the appellant confirmed that the store HR manager had no idea that he had been terminated when he told her on December 9, 2012 at the store Christmas party.

In response to a question from the panel, the appellant confirmed that he had only been given one warning about being late which occurred at the end of October 2012. The appellant approximated that out of the 27 days that he had worked, he may have been late on no more than five occasions. The appellant further stated that he had requested only two shift changes in the course of his employment, once two weeks in advance and once 48 hours prior but that he had stated he would work his normal shift if that were not convenient for his employer.

The panel finds that the oral testimony of the appellant is in support of the information and records that were before the minister when the decision being appealed was made and is therefore admissible pursuant to section 22(4)(b) of the EAA.

The ministry relied on the reconsideration decision and submitted no new information. The ministry stated at

the hearing that the decision to deny the appellant income assistance for a two month period was based on a finding that he had been dismissed from his employment for just cause and that it was not simply an arbitrary decision by the former employer. The ministry commented that a phone call was made to the former employer who confirmed that the appellant was dismissed for just cause.

In response to a question by the advocate, the ministry confirmed that in the January 11, 2013 conversation with the appellant's former employer, the phrase "just cause" was not used in the discussion but rather the ministry made the determination that the appellant had been dismissed for just cause based on the discussion.

In response to a question from the panel, the ministry could not say who at the ministry spoke with the former employer, that the ministry had no notes of that conversation and it confirmed that it did not know the specific dates that the appellant was alleged to have been late during his employment.

In response to a question from the panel, the ministry was not able to identify any specific instances where the appellant was late for work after receiving his warning nor was it able to say whether the warning from the employer included a specific warning that failure to follow attendance guidelines would result in termination.

The panel finds that the oral testimony of the ministry is in support of the information and records that were before the minister when the decision being appealed was made and is therefore admissible pursuant to section 22(4)(b) of the EAA.

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PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's decision to deny the appellant income assistance for a two month period on the basis that he had been dismissed from his employment for just cause as provided by section 13(1)(a)(iii) of the Employment Assistance Act was reasonable.

The applicable section of the EAA in this appeal is as follows:

Consequences of not meeting employment-related obligations

13 (1) Subject to the conditions of an employment plan, the family unit of an applicant or a recipient is subject to the consequence described in subsection (2) for a family unit matching the applicant's or recipient's family unit if

(a) at any time while a recipient in the family unit is receiving income assistance or hardship assistance or within 60 days before an applicant in the family unit applies for income assistance, the applicant or recipient has

(i) failed to accept suitable employment,

(ii) voluntarily left employment without just cause, or

(iii) been dismissed from employment for just cause, or

(b) at any time while a recipient in the family unit is receiving income assistance or hardship assistance, the recipient fails to demonstrate reasonable efforts to search for employment.

(2) For the purposes of subsection (1),

(a) if a family unit includes dependent children, the income assistance or hardship assistance provided to or for the family unit must be reduced by the prescribed amount for the prescribed period, and

(b) if a family unit does not include dependent children, the family unit is not eligible for income assistance for the prescribed period.

(3) The Lieutenant Governor in Council may specify by regulation categories of applicants or recipients to whose family units this section does not apply.

The applicable section of the EAR in this appeal is as follows:

Consequences of failing to meet employment-related obligations

29 (1) For the purposes of section 13 (2) (a) *[consequences of not meeting employment-related obligations]* of the Act,

(a) for a default referred to in section 13 (1) (a) of the Act, the income assistance or hardship assistance provided to or for the family unit must be reduced by $100 for each of 2 calendar months starting from the later of the following dates:

(i) the date of the applicant's submission of the application for income assistance (part 2) form under this regulation;

(ii) the date the default occurred, and

(b) for a default referred to in section 13 (1) (b) of the Act, the income assistance or hardship assistance provided to or for the family unit must be reduced by $100 for each calendar month until the later of the following occurs:

(i) the income assistance or hardship assistance provided to the family unit has been reduced for one calendar month;

(ii) the minister is satisfied that the applicant or recipient who committed the default is demonstrating reasonable efforts to search for employment.

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(2) The reduction under subsection (1) applies in respect of each applicant or recipient in a family unit who does anything prohibited under section 13 (1) *[consequences of not meeting employment-related obligations]* of the Act.

(3) For the purposes of section 13 (2) (b) *[consequences of not meeting employment-related obligations]* of the Act, the period of ineligibility for income assistance lasts

(a) for a default referred in to section 13 (1) (a) of the Act, until 2 calendar months have elapsed from the later of the following dates:

(i) the date of the applicant's submission of the application for income assistance (part 2) form under this regulation;

(ii) the date the default occurred, and

(b) for a default referred to in section 13 (1) (b) of the Act, until the later of the following has occurred:

(i) the family unit has been ineligible for income assistance for one calendar month;

(ii) the minister is satisfied that the applicant or recipient who committed the default is demonstrating reasonable efforts to search for employment.

(4) Section 13 *[consequences of not meeting employment-related obligations]* of the Act does not apply to a family unit of an applicant or recipient who is in any of the following categories:

(a) Repealed. [B.C. Reg. 116/2003, Sch. 1, s. 2 (a).]

(b) sole applicants or sole recipients who have at least one dependent child who

(i) has not reached 3 years of age, or

(ii) has a physical or mental condition that, in the minister's opinion, precludes the sole applicant or recipient from leaving home for the purposes of employment;

(c) Repealed. [B.C. Reg. 48/2010, Sch. 1, s. 1 (b).]

(d) sole applicants or sole recipients who have a foster child who

(i) has not reached 3 years of age, or

(ii) has a physical or mental condition that, in the minister's opinion, precludes the sole applicant or recipient from leaving home for the purposes of employment;

(e) persons who receive accommodation and care in a special care facility or private hospital;

(f) applicants or recipients admitted to hospital because they require extended care;

(g) persons who reside with and care for a spouse who has a physical or mental condition that, in the minister's opinion, precludes the person from leaving home for the purposes of employment;

(h) applicants or recipients in a family unit that includes only applicants or recipients who are

(i) Repealed. [B.C. Reg. 160/2004, s. 2.]

(ii) persons who are participating in a treatment or rehabilitation program approved by the minister, if their participation in that program, in the minister's opinion, interferes with their ability to search for, accept or continue in employment,

(iii) persons who have separated from an abusive spouse or relative within the previous 6 months, if, in the minister's opinion, the abuse or the separation interferes with their ability to search for, accept or continue in employment,

(iv) persons not described in section 7 (2) *[citizenship requirements]*;

(v) persons who have persistent multiple barriers to employment; or

(vi) persons who have reached 65 years of age;

(i) Repealed. [B.C. Reg. 48/2010, Sch. 1, s. 1 (b).]

(j) sole applicants or sole recipients who are providing care under an agreement referred to in section 8 *[agreements with child's kin and others]* of the *Child, Family and Community Service Act* for a child who

(i) has not reached 3 years of age, or

(ii) has a physical or mental condition that, in the minister's opinion, precludes the sole applicant or recipient from leaving home for the purposes of employment;

(k) sole applicants or sole recipients who are providing care under an agreement referred to in section 93 (1) (g) (ii) *[other powers and duties of directors]* of the *Child, Family and Community Service Act* for a child who

(i) has not reached 3 years of age, or

(ii) has a physical or mental condition that, in the minister's opinion, precludes the sole applicant or recipient from leaving home for the purposes of employment.

[am. B.C. Regs. 367/2002, Sch. 1; 116/2003, Sch. 1, s. 2; 331/2003, s. 2; 160/2004, s. 2; 304/2005, s. 4; 48/2010, Sch. 1, s. 1 (b).]

Analysis

In this appeal, the appellant's advocate argues that the term "just cause" is not defined in the EAA or EAR and is largely case law based. Further, the advocate argues that common law has defined "just cause" as conduct that is inconsistent with the fulfillment of the express or implied condition of service citing *McKinley v. BC Tel*, [2001] 2 SCR 161.

The advocate submits that a different approach to "just cause" should be taken in cases of serious versus minor misconduct and he argues that the ministry should for policy reasons accept the standards as set out in the *Employment Standards Act* ("ESA") and its associated policy. Specifically, the advocate points to the Employment Standards Branch policy interpretation of section 63 of the ESA which provides that to establish just cause for misconduct considered minor in nature including poor performance, low productivity, absenteeism and tardiness, the employer must be able to satisfy all elements of the following test:

- The employer established a reasonable standard of performance and communicated that standard to the employee;
- The employer provided the employee with sufficient time and a reasonable opportunity to meet the standard (may include providing training or tools);
- The employer warned the employee that failure to meet the standard was serious and would result in termination; and
- The employer can show that the employee still did not meet the standard.

The advocate argues that neither the employer nor the ministry can satisfy this test in the appellant's case insofar as the appellant was not aware that he was required to provide a doctor's note, he received only one warning approximately two months into his employment about being late and no evidence has been provided to support the contention that the appellant was frequently late for work.

Lastly, the advocate argues that it is not sufficient for the ministry to simply take the ROE at face value and as justification for the decision that the appellant was dismissed for just cause. The advocate argues that the

ministry appears to have based its decision on a brief conversation with the former employer's HR manager and on a misunderstanding of what the appellant had said. The advocate submits that the ministry obtained no written documentation from the employer regarding the reason for the appellant's dismissal.

Conversely, the ministry argues that the reconsideration decision is based on the fact that the appellant was dismissed within his 90 day probation period due to excessive lateness which constitutes just cause and therefore the denial of income assistance is properly maintained.

The panel finds that in the present case, the appellant was employed for a period of time and on December 8, 2012 on his arrival at work he was dismissed from that employment. While the appellant and his advocate take issue with the language that was used to describe the cessation of his employment, the panel notes that the employer in completing the ROE used the word "Dismissal" as the reason for issuing the ROE and as such, the panel finds that the ministry was reasonable in its determination that the appellant was in fact dismissed from his employment.

That does not end the matter however. To deny the appellant income assistance for a two month period as provided by section 29 of the EAR, the ministry must be satisfied that that the appellant was not only dismissed, but that he was dismissed for just cause. In this case, the ministry discussed the matter with the appellant and in the reconsideration decision states that the appellant admitted being late on over 20 occasions. The appellant denies telling the ministry that and maintains that in the 27 days that he did work, he was late no more than 5 days and that on one of those occasions, he was actually at work attending a staff meeting but had forgotten to clock in prior to it commencing.

Further, the ministry says that in a conversation with the appellant's former employer on January 11, 2013, the manager there indicated that the appellant had been dismissed based on the fact that he had been late on over 20 occasions, had called in sick and requested shift changes on a regular basis at the last minute. The panel notes that the appellant's evidence was that he had been sick on only 2 ½ days during the month of December 2012 and that he had requested only two shift changes in the course of his employment, once two weeks in advance and once 48 hours prior but that he had stated he would work his normal shift if that were not convenient for his employer. The panel notes again the appellant's denial that he had been late over 20 times and his contention that he had been late no more than five times in the course of his employment.

Based on the totality of the evidence, the panel finds that the ministry's decision to deny the appellant income assistance on the basis that he had been dismissed for just cause was not reasonable. The panel prefers the evidence of the appellant that he had only called in sick on 2 ½ occasions and that he had only requested shift changes twice. Further, the panel prefers the evidence of the appellant that he recalled only being late approximately five times and the panel notes that despite its position that the appellant had been late over 20 times, the ministry was unable to provide any verification of this in the form of time sheets or other records from the appellant's former employer.

Conclusion

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's reconsideration decision which determined that the appellant was not eligible for income assistance for a period of two months as a result of his being dismissed from his employment for just cause was not reasonable and the panel therefore rescinds the reconsideration decision.