

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Social Innovation (the ministry) dated 08 January 2014 that denied the appellant's request for a crisis supplement for an ergonomic chair. The ministry determined that her request did not meet the criteria set out in section 57 of the Employment and Assistance for Persons with Disabilities Regulation that the supplement was needed to meet an unexpected expense or obtain an item unexpectedly needed. The ministry also found that an ergonomic chair is a health care good and thus an item for which a crisis supplement may not be provided.

The ministry was satisfied that the appellant met the other criteria set out in the Regulation:

- She does not have alternate resources available, and
- Failure to obtain the chair may result in imminent danger to health.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), Section 57



PART E – Summary of Facts

Preliminary matters

1. On 22 January 2014, the appellant sent a note to the tribunal (Appendix a of the Appeal Record) regarding scheduling the hearing. She indicated that she is not available Wednesdays or Fridays, her advocate is not available Mondays or Tuesdays, and is not available before 14 February 2014. The hearings cannot start before noon and must start by 1pm. She will require a total of three hours allocated for the appeal and the tribunal has a doctor's note regarding scheduling.
2. On 31 January 2014, the appellant submitted an Appeal Adjournment Request (Appendix B of the Appeal Record, though not marked as such.) She provided the following reasons for the request:
 - Her advocate will not be available before 14 February 2014.
 - She needs her advocate present because of her disabilities – she writes that when she is busy she “doesn't register up to 70% of what has been said” and because she “can misunderstand things and not realize something has been said” that she needs to respond to. She states that she has several doctors' letters informing the ministry of this problem.
 - She writes that because she had a head injury, her “ability to organize thoughts and speak is impaired” and she has short term memory problems.
 - Without her advocate to do most of participating, it could double or more the length of the hearing if she had to do it alone.As the ministry did not consent to this request, the Tribunal Chair did not approve the request.
3. At the outset of the hearing, the appellant requested an adjournment for the following reasons:
 - She has not had enough time to prepare:

The ministry has documents about how she has severe chronic fatigue – when she is stressed out she can't function or sleep properly. It has taken all the time since her request was denied to prepare for the appeal. In the process the ministry included multiple copies of documents in the record of the ministry decision and going through them causes her brain to stop functioning and she can't understand. The documents are all out of order and it has taken her a month to sort them out. She is always falling asleep going through all the material.
 - The ministry has not provided her with the information she has requested:

Ministry decisions have failed to substantiate the reasons for the denial of her request. She has requested the ministry provide copies of e-mails between her and the ministry requesting such information and the lack of ministry response. As a result of the ministry failing to provide these e-mails, she has submitted an FOI request but the ministry is delaying responding to this request. She has information that the ministry could obtain these documents within an hour.

She has important evidence from Ombudsperson reports for the panel to consider, but as the hearing was being held by teleconference, she was not able to courier the material to the panel.

For the same reason, she is unable to provide a brief doctor's note dated 08 February 2014 stating that she is unable to work on the appeal any quicker than she has been able to.
 - She has not had enough time to discuss the appeal with her advocate:

Her advocate will not know if there is something stated by the ministry at the hearing that

needs a response.

- She is exhausted, her brain is not working and she did not get any sleep the night before.
- As a result of her disability, she cannot hear 30% of what is said.

Her advocate also stated that she found it difficult to hear the appellant on the teleconference – she is not normally available at this time, but that she made herself available by phone so that the appellant is not alone.

In response to the appellant's adjournment request, the ministry asked her if this request was different from the request made before the hearing. The appellant replied "Yes," that there were two differences: a) the doctor's note, and b) that she did not realize she was so far behind in her preparations. The ministry's response was that the appellant seemed to be quite able to present her case; of more concern was the advocate's difficulty in hearing the appellant on the phone.

After a recess to consider the matter, the panel did not grant the appellant's request for the following reasons:

- If the appellant's advocate cannot hear another participant, she can ask for what was said to be repeated.
- In the panel's view, there is sufficient evidence on the record for the appellant to argue her case that the ministry did not substantiate its decisions. The panel agreed that the appellant could read into the record material from the Ombudsman's reports and her doctor's note of 05 February 2014 was contained in Appendix C.
- The hearing is to consider the reasonableness of the ministry's reconsideration decision, not to make a judgment concerning the delivery of ministry services.
- As the appellant had ably presented her request for adjournment, much of which addressed substantive issues respecting her arguments on the issues under appeal, and given that the request was for a crisis supplement, with the urgency implied in the need to address the request, the panel found it both fair and expedient to proceed as scheduled.

Substantive matters

The evidence before the ministry at reconsideration relevant to the issues under appeal included the following:

- A ministry reconsideration decision dated 24 July 2013 denying a request made on 18 April 2013 by the appellant for an ergonomic chair. The ministry denied the request as it was not satisfied that the "health care good," "no resources available" and "imminent threat to physical health" criteria had been met. The ministry made no determination on the "unexpected expense or item unexpectedly needed" criterion.
- A price quote dated 04 April 2013 from an office supply store for an ergonomic task chair with arms specified by make and model #, ("the requested chair") for \$406.54.
- A prescription note from a physician at a medical clinic, date unreadable but faxed on 07 June and 12 July 2013, stating that the appellant requires an ergonomic chair with cushions and arm support that fit her frame. She has a new health problem which started last month of losing consciousness when seated. Not having an ergonomic chair puts her at imminent risk of falls and fractures. Arm supports will prevent her from falling.

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- An exchange of e-mail correspondence between the appellant and the office supply store dated 12 July 2013. The store representative confirmed that the appellant came into the store furniture showroom and tested all suitable chairs at that location. It was determined that the requested chair was the only chair available that ergonomically fit her body frame and supported her as needed. All the other models were either too big or could not be adjusted to support her as required.
 - Two letters dated 26 May 2011 from the appellant's general practitioner. The letters relate to the appellant's need for other requested items and describe her medical conditions and the associated expenses she incurs to address her health needs.
 - A letter from the appellant's physician dated 28 August 2013 confirming that the information in the 26 May 2011 still applies. The physician goes on to write that there are no other less expensive suitable options to the prescribed ergonomic chair. All alternative options have been explored and these were too expensive or failed to be effective. Medically suitable shock absorbing mats are more expensive and would still result in soft tissue injuries. Using a belt to tie her to the chair wouldn't work due to cognitive impairment and memory problems. Having to change her routine and incorporate a new step is a difficult task for the brain. She was not able to consistently remember to restrain herself and injuries ensued.
 - A letter from the appellant's physician dated 16 October 2013. The letter states that the appellant requires an ergonomic chair with arms to prevent her from falling sideways off her chair when she experiences episodes of losing consciousness. The arm supports are needed to prevent the appellant's health from rapidly deteriorating as a result of soft tissue injuries and fractures as a result of falling sideways off her chair. The chair must be ergonomically designed to fit her small frame so the correct posture is maintained by the chair and not by sustained effort of her muscles.
 - A letter from a physician at another medical clinic dated 05 December 2013. The letter states that a chair with arms needs to be provided to the appellant immediately to prevent repeated, serious soft tissue injuries, pain, functional impairment and risk of fractures. Lack of provision is causing rapid deterioration of her physical health. The need for the chair with arm supports is not something the appellant could have anticipated. Reallocating support funds from the medical expenses listed in the physician's 26 May 2011 letters is not a viable option as it would adversely affect the appellant's health.
 - The appellant's Request for Reconsideration dated 04 December 2013. In giving her reasons for reconsideration, the appellant refers to the prescription note faxed on 07 July 2013 and the physician's letter of October 16.

The Appeal Record also contained the following:

- Documents provided by the appellant regarding the "no resources available" criterion – a note from her trustee, a bank balance statement and numerous emails and letters to community organizations requesting financial assistance or an ergonomic chair. The ministry has determined, on the basis of this evidence, that the appellant met this criterion.
- Numerous email exchanges between the appellant and the ministry and between the appellant and the Freedom of Information (FOI) office requesting copies of correspondence

between the appellant and the ministry.

The appellant's Notice of Appeal is dated 17 January 2014. She states that she meets the criteria in the legislation.

Before the hearing, the appellant 4 provided submissions, Appendices C to E. These are summarized below:

- Appendix C submitted on 07 February 2014. 56 pages, This appears to the panel to be a reordering of the Appeal Record, culling any duplications. Also included is a doctor's note dated 05 February 2014 which states: "Due to this person's multiple disabilities including a brain injury, she needs an advocate present to get a fair hearing."
- Appendix D submitted on 07 February 2014. It consists of an email to the Tribunal requesting an attached document be provided to the panel. The attachment is a copy of an email from the appellant to a community organization dated 25 December 2013 requesting funding for an ergonomic chair and another item.
- Appendix E submitted on 09 February 2014. It contains 2 copies of the email submitted in Appendix F (see below) and a copy of an email dated 06 September 2013 to the ministry requesting a phone appointment to discuss her service protocol, which she argues is not working for her.
- Appendix F submitted on 09 February 2014. It forwards to the Tribunal an email from the appellant to her worker dated 24 July 2014 regarding a request for another item, and stating that for this and all future request for funding, the ministry be notified that it was given documentation when funding was applied for that she had conditions which are known to be chronic and the expenses she had for things for these conditions that the Dr. had said was needed exceeded the funds issued; since then the doctors have repeatedly issued notes confirming that she still has the same needs and that would be harmful to forgo meeting any of those needs; she also refers to the Ombudsman Report #28.

At the hearing, the appellant read from, and made frequent reference to, a 2006 Ombudsman report. The panel has reproduced the relevant section below:

Ombudsman investigation of the Public Interest Advocacy Centre's complaints about the Ministry of Employment and Income Assistance

(Special report no. 28, March 2006, beginning on page 5)

c) The Right to Reasons

Giving reasons for a decision is one of the fundamental features of fairness. Reasons help parties to understand the factors considered by the decision-maker, the grounds on which conclusions were based and help to explain how a decision was made. Knowing the reasons for a decision also helps a person decide whether there may be grounds on which to dispute a decision. Reasons reduce the appearance of arbitrariness and promote public confidence in the fairness of administrative processes.

In some circumstances, particularly where a decision is complex or has significant consequences, written reasons offer advantages. In particular, written reasons allow individuals to review why a decision was made without having to fully absorb, understand and remember the critical elements of a decision the first time it is explained. The process of writing the reasons for a decision may also assist the decision maker by helping to ensure and demonstrate that all relevant information and issues were considered and that the rationale

behind the decision was carefully considered.

Concerns were raised that the Ministry did not always provide detailed reasons for decisions nor did they consistently provide complete disclosure of related records to individuals who were seeking reconsideration of a Ministry decision. It was also alleged that the Ministry put an unfair burden on clients to correctly identify and request the specific records or information required in order to prepare for reconsideration or appeal.

The Ministry's policy appeared to be clear and reasonably detailed. The policy requires Ministry staff to provide all reasons for a decision and, on receipt of a request, to provide copies of all documents and information on which the Ministry decision was based.

Our Office consulted with the Ministry regarding measures it had taken or would consider taking to help clients obtain all relevant information and to ensure that reasons were provided. The Ministry assured us that it expected staff to provide reasons for any decision to deny or reduce assistance of any kind. The Ministry said it is also committed to ensuring that clients have access to all information on which a Ministry decision is based.

The Ministry reviewed its practices and identified inconsistencies in practice with respect to the provision of reasons and information. The Ministry also noted that its policy did not clarify that reasons need to be "full and substantive" or that Ministry staff are required to inform clients that further information and records regarding the decision are available.

The Ministry advised that it would revise policy to require staff to provide full and substantive reasons for all decisions to deny or reduce a benefit. The revised policy will also require that staff advise clients of the availability of any information used in making a decision at the time the client is informed of the decision. In addition to the requirement already set out in policy to provide information upon request prior to any request for reconsideration, staff will be required to include copies of all information used in reaching an initial decision when a formal request for reconsideration is made.

The Ministry advised that it will conduct audits to make sure that staff practice complies with policy requirements.

The appellant also made reference to a recent report by the Ombudsperson (*Time Matters: An Investigation into the BC Employment and Assistance Reconsideration Process* Special Report no. 35.) The panel has reviewed this report and does not consider it relevant to the present appeal, as the report deals with delays in making reconsideration decisions, an issue not raised by the appellant.

The appellant stated that she viewed the whole process – from original application and reconsideration, then another application and reconsideration – as a frustrating exercise in trying to obtain from the ministry substantiation of reasons for denial, then having to go to her doctors to obtain notes to satisfy what she hoped the ministry required. For instance, she had obtained a note from a doctor that addressed her osteoporosis, but this did not satisfy the ministry so she obtained a second note – the one faxed to the ministry on 07 June 2013 – that referred to her losing consciousness. The balance of the appellant's presentation went to argument. (See Part F, Reasons for Panel Decision, below for a summary of her argument.)

The ministry stood by its position at reconsideration.

The panel finds that the new information provided by the appellant at the hearing is in support of the information before the ministry at the time of the reconsideration decision. The information provided by the appellant provides background relating to the appellant's position with respect to the need for

the ministry to substantiate reasons for its decisions and further information respecting the timing of the documents provided in support of her request for the ergonomic chair. The panel therefore admits the appellant's testimony pursuant to Section 22(4)(b) of the *Employment and Assistance Act*.

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PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry decision to deny the appellant's request for a crisis supplement for an ergonomic chair under section 57 of the EAPWDR was reasonably supported by the evidence or was a reasonable application of the legislation in the circumstances of the appellant. In particular, the issue is whether the ministry reasonably determined that the information provided did not establish that the appellant requires a crisis supplement to meet an unexpected expense or obtain an item unexpectedly needed and that an ergonomic chair is a health care good and thus an item for which a crisis supplement may not be provided.

The ministry was satisfied that the appellant met the other criteria set out in the Regulation:

- She does not have alternate resources available, and
- Failure to obtain the chair may result in imminent danger to health.

The relevant legislation is from section 57 of the EAPWDR:

Crisis supplement

57 (1) The minister may provide a crisis supplement to or for a family unit that is eligible for disability assistance or hardship assistance if

(a) the family unit or a person in the family unit requires the supplement to meet an unexpected expense or obtain an item unexpectedly needed and is unable to meet the expense or obtain the item because there are no resources available to the family unit, and

(b) the minister considers that failure to meet the expense or obtain the item will result in

- (i) imminent danger to the physical health of any person in the family unit, or
- (ii) removal of a child under the *Child, Family and Community Service Act*.

(2) A crisis supplement may be provided only for the calendar month in which the application or request for the supplement is made.

(3) A crisis supplement may not be provided for the purpose of obtaining

- (a) a supplement described in Schedule C, or
- (b) any other health care goods or services.

Unexpected expense or item unexpectedly needed

The position of the ministry, as set out in the reconsideration decision, is that it is not satisfied that the appellant has an unexpected expense or requires an item unexpectedly. The appellant made her original request for an ergonomic chair in April 2013. Her request was denied in a separate reconsideration decision dated 24 July 2013. Her current request addresses a note from a physician, date illegible, sent to the ministry 7 June 2013, stating that the appellant has a new health problem where she loses consciousness when seated and requires an ergonomic chair. The physician indicates the condition began a month before the note was written. One of the e-mails attached to the decision notes that the appellant received a quote for the ergonomic chair in April 2013, indicating that she was aware of the expense since at least that time. Several months have passed since she became aware of the need for the chair and since her request was previously denied. The ministry finds that her need for the chair cannot reasonably be considered unexpected and that she does not have an unexpected expense.

The appellant's position is that it was certainly unexpected that while sitting she started losing consciousness and falling off her chair, leading to her need for an ergonomic chair with arms. As soon as this happened she went to her physician and subsequently obtained a price quote from an office supply store for an ergonomic chair that would fit her small frame. She cannot remember when the physician wrote the note, but is sure that it was sometime close to when she got the price quote dated 04 April 2013.

She argues that the passage of time between when it became apparent that she needed an ergonomic chair and the reconsideration decision under appeal is due to delays resulting from the ministry not providing substantive reasons for denial of her request, as required by case law and ministry policy, or changing the reasons for denial, at each stage of the decision making process. While the decision may have cited the legislation and evidence and quoted the criterion which the ministry said had not been met, she had to spend a lot of time on the phone and sending e-mails to get some idea of what the ministry was looking for to prove she met the criterion and then had to go to her physician to write a letter to satisfy the ministry's requirements. Then the ministry would come up with a new reason for denial and she would have to start the process all over again. As a result, she was denied the benefit of the two-stage process she has a right to under the legislation: on application, being given substantive reasons for denial so that on reconsideration she has the opportunity to provide the information that might have been missing at the application stage, thereby ensuring that her request was approved. She argues that her request should not be prejudiced by the delays caused by the ministry's failure to provide substantive reasons and then by changing or adding reasons for denial. Further, the appellant states that, as confirmed by her doctor, she proceeded with matters respecting her request for the ergonomic chair as fast as she was capable of doing.

The appellant also argues that there is a difference between "unexpected expense" and "item unexpectedly needed" with the former meaning "something that cannot be reasonably anticipated and saved for." Citing case law (*Abrahams*, 1983 1 SCR 2, *Rizzo & Rizzo Shoes* 1 SCR 27) she argues that faced with two definitions, even if the panel considers the ministry's to be a better definition, as long as her definition is plausible, her definition must prevail. Given her limited financial resources as a recipient of disability assistance, and that her need for an ergonomic chair could not reasonably have been anticipated, her request meets this criterion. She also cited the *Interpretation Act* and *Hudson* (2009 BCSC 1461), arguing that the panel must give a large and liberal interpretation of the legislation and interpret it as remedial.

Panel findings

The panel views this criterion regarding eligibility for a crisis supplement in the context of section 57 of the EAPWDR in its entirety. While part of this section, subsection (1)(a)(i) uses language reflecting averting a crisis (failure to provide would result in imminent danger to physical health), the panel considers the overall legislative intent is to provide an effective means of dealing with a crisis – addressing in a timely way a sudden, unanticipated and adverse change in circumstances. The meaning of "unexpected" should be interpreted in this broader context to reflect the nature of the supplement being provided by section 57.

The panel's mandate is strictly limited to the outcome of the reconsideration decision under appeal. The panel would however comment that the application and reconsideration processes are not so



much "two-stage" parts of a single decision-making process but that reconsideration is an opportunity provided to an applicant to have an adjudicator, a new decision-maker, take a second look at the evidence, including any new information that might be provided, and apply that to the legislation. The reconsideration decision is thus considered a "new" decision, and the adjudicator is not bound by the rationale or conclusions respecting any parts of the decision made at the application stage. Reconsideration is not the same as an appeal, and in accordance with the principles of administrative fairness, the ministry may not introduce new reasons for denial at appeal as an appellant is entitled to know the basis of the ministry's position in preparation for the hearing. This appeal relates to a second reconsideration decision denying a second request for the same item.

This reconsideration decision concerns an application made by the appellant on 03 October 2013, with further information submitted on 24 October 2013. As the ministry noted in the reconsideration decision the request is for an ergonomic chair with arms for which a price quote was given on 04 April 2013 and a physician's note explaining the need for the request going back at least until 07 June 2013. Considering the nature of the supplement sought, given the passage of time and the absence of any sense of crisis from the standpoint of when the request was made in October 2013, or 7 months since the price quote was given, and in the context of the overall intent of section 57 of the EAPWDR, the panel finds it difficult to view the request as addressing a crisis situation.

In the reconsideration decision, the ministry noted that the request for an ergonomic chair was first made in April 2013, but it was not until June that the appellant provided a note from her physician specifically referring to "a new health problem which started last month of losing consciousness when seated." The appellant argues that losing consciousness while sitting and falling off her chair is a new medical condition and therefore the need for the ergonomic chair could not have been anticipated. The panel understands this sequence of events to mean that the appellant became aware of a need for an ergonomic chair in late March or early April, then provided justification based on a new condition from a physician some weeks later. The panel notes, however, that the appellant falling and suffering injury is not a new development: her physician's letter of 16 October 2013 stated that the appellant has already fractured four ribs and her hand from simple falls.

Given that the reconsideration decision addresses a second request, taking into account the time lag between when the appellant first became aware of a need for an ergonomic chair and when a physician agreed to provide justification, and considering that her osteoporosis has been ongoing, the panel finds that the ministry was reasonable in determining that the appellant's request for an ergonomic chair does not meet the criterion of unexpected expense or item unexpectedly needed set out in section 57(1)(a) of the EAPWDR.

Health care good or service

The position of the ministry, as set out in the reconsideration decision, is that the appellant is specifically requesting an ergonomic chair, which has been prescribed by medical doctors and is to be used to assist her with her multiple medical conditions. The ministry therefore concludes that she is requesting a health care good, an ineligible item for a crisis supplement under section 57(3) of the EAPWDR. At the hearing, the ministry representative compared a bed, to sleep on, which might be eligible for a crisis supplement, to a hospital bed, which would not be eligible.

The appellant's position is that just because something is prescribed by a physician does not mean that it is a "health care good." Her definition of a health care good is "something that is manufactured to meet a specific medical condition." As she argued in connection with the interpretation of "unexpected expense," if there is more than one interpretation of a term, her definition must prevail. The appellant submits that the dictionary definition (Random House) of ergonomic is "designed to minimize physical effort and discomfort, and hence maximize efficiency." In other words, an ergonomic chair is one designed for comfort and as such is simply a piece of furniture, not made to address a specific medical condition, and is therefore not a "health care good."

Panel findings

Returning to the overall intent of section 57 of the EAPWDR, the panel notes that in a crisis situation the minister may provide the supplement to meet an unexpected expense or provide an item unexpectedly needed, as long as the item or expense is not for any of the health supplements listed in Schedule C or any other health care good or service, and a failure to provide the supplement would result in imminent danger to physical health. The panel notes that the "imminent danger to physical health" criterion does not require confirmation by a medical professional, leaving it to the common sense of ministry workers to make that determination in the circumstances of the immediate crisis facing the applicant.

Given that section 57 specifically exempts the provision of a health care good or service, whether listed in Schedule C or not, as a crisis supplement, the panel considers it reasonable that the ministry would look to the specific circumstances of why the item or service requested was required to avert imminent danger to physical health. In the present appeal, the ergonomic chair with arms is prescribed by the appellant's physician initially because of her osteoarthritis and subsequently to prevent her from falling out when she loses consciousness. Her physician wrote: "The chair must be ergonomically designed to fit her small frame so the correct posture is maintained by the chair and not by sustained effort of her muscles." Given these specifications, the requested chair is not just a piece of furniture to sit upon but rather is an ergonomic chair specially selected to meet needs arising from her specific medical conditions – her health care needs. The panel therefore finds that the ministry reasonably determined that the requested ergonomic chair met the meaning of a health care good and was therefore not an item for which a crisis supplement can be provided.

Conclusion

Based on the foregoing, the panel finds that the ministry's decision to deny the appellant's request for a crisis supplement for an ergonomic chair with arms was reasonably supported by the evidence. The panel therefore confirms the ministry's decision.