

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision by the Ministry of Social Development and Social Innovation (the ministry) dated 17 August 2015 that determined that the appellant was provided disability assistance that she was not eligible to receive and, in accordance with section 18 of the *Employment and Assistance for Persons with Disabilities Act*, she is required to repay that amount. Specifically, the ministry determined that disbursements from the appellant's family trust were unearned income; that once the \$8000 annual limit for such disbursements had been reached, these disbursements were to be taken into account in determining her monthly disability assistance; and that as a result she received assistance in April, May, June and July 2014 for which she was not eligible.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (EAPWDA), section 18
Employment and Assistance for Persons with Disabilities Regulation, sections 9, 12 18 and 24, 70.1, 70.2 and Schedule B, sections 1 and 7.

PART E – Summary of Facts

The ministry did not attend the hearing. After confirming that the ministry was notified of the hearing, the hearing proceeded in accordance with section 86(b) of the Employment and Assistance Regulation.

The evidence before the ministry at reconsideration included the following:

- From the ministry's files: the appellant is a recipient of disability assistance; her spouse also has person with disability designation and they have two dependent children; the family unit's monthly assistance rate is \$1743.06.
- The appellant and her spouse are trustees of a family trust; the appellant has power of attorney for her spouse.
- Bank statements for the family trust from October 2013 to November 2014.
- Other documents: several invoices showing business-related expenses; vehicle registration certificates for two vehicles, one insured for business purposes; transaction details for the appellant's personal bank account for March, April, May and June 2015.
- An overpayment chart prepared by a ministry investigative officer dated 22 June 2015 (see below).
- The appellant's Request for Reconsideration dated 28 July 2015 (see below).

From the bank statements for the trust, the ministry determined that the appellant received the following disbursements from the trust for business purposes to promote independence:

19 Feb 2014: \$15,000	
27 Feb 2014: \$5,000	Feb sub-total: \$20,000
24 Mar 2014: \$2,500	
14 Apr 2014: \$500	
28 Apr 2014: \$317.50	Apr sub-total: \$817.50
28 May 2014: \$800	
TOTAL: \$24,117.50	

The overpayment chart is organized by assistance month, reflecting how income received in one month is to be reported by the 5th of the following month and taken into account in determining assistance for the subsequent month. Thus for April 2014, the chart shows the \$20,000 disbursement in February 2014. The chart shows, for the assistance months of April, May, June and July 2014, the overpayment reason, income type/source, actual income, declared income, cheque number, assistance amount, eligible amount and overpayment amount.

In her Request for Reconsideration, under Reasons, the appellant writes:

"...I had discussed with 2 workers about taking a loan from the [family] Trust to start/buy a business. We were told that this was alright. We needed to pay back the loan once we started making money, which we had to write and sign a [promissory] note. I feel since this was okayed that we shouldn't have to pay this amount back. As we have to pay back the loan from the trust, if we are to it back to ministry as well, then we are paying it back twice. Please reconsider this decision as it was okayed before hand."

She also attaches a Promisary[sic] Note, signed by her and she spouse and dated 11 June 2015, that states:

"We, [name of appellant and spouse], promise to make payments to [the family trust] to pay back our loan for our business. At fiscal year end, [business name] will repay [the family trust] at a rate of 50% of all profit. If the business goes under for any reason, all the inventory and equipment shall become property of [the family trust]."

In her Notice of Appeal, dated 26 August 2015, the appellant writes that workers from ministry offices in several centres told them that they could borrow money from their trust to start a business and their assistance would not be affected. She states that, while the ministry claims that they did not declare any of the loans, they did so when they filled out their self-employment monthly statements. The balance of her submission goes to argument (see Part F, Reasons for Panel Decision, below).

At the hearing, the appellant stated the ministry was fully aware, from the outset onwards, of her operations. From the start of this "business adventure," when she and her family lived in another community, she started discussing her ideas for a business with her employment and assistance worker (EAW). Over the time until they moved to their new community and purchased the business, the appellant stated that they dealt with four different EAW's and consistently received the same response: "it was okay to use the trust funds for the business."

Before actually committing to the business, she met with a ministry "business advisor" (she is unsure of actual title) at a regional ministry office. This worker reviewed her business plan and advised her of the reporting requirements. She completes and submits a "self-employment program monthly reporting worksheet" every month, including sales, expenses, loans, bank balance and inventory, etc. She discusses with the business advisor any major expenditure, such as the first purchase, buying the start-up inventory, and subsequent expenses such as for a vehicle for the business and for a security system and the business advisor approved these expenses. The business advisor was fully aware that she would be borrowing from the trust for these purposes.

In answer to a question, she acknowledged that the business plan may not have shown the contemplated amount of loans she would be taking from the trust, but she had informed the business advisor that the source of her capital requirements would be the trust and that she was told that she had to operate under a \$50,000 limit of inventory and other assets, including a limit of \$5,000 in the business bank account.

The balance of the appellant's presentation went to argument (see Part F, Reasons for Panel Decision, below).

The panel finds that the information provided by the appellant in her Notice of Appeal and in her testimony at the hearing is in support of the information before the ministry at reconsideration, as it tends to corroborate her statement in the Request for Reconsideration that she discussed the business start-up with ministry workers. The panel therefore admits this information as evidence under section 22(4) of the Employment and Assistance Act.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry was reasonable in determining that the appellant was provided disability assistance for which she was not eligible to receive and, in accordance with section 18 of the *EAPWDA*, she is required to repay that amount. More specifically, the issue is whether any of the following ministry findings were reasonably supported by the evidence or were a reasonable application legislation and the circumstances of the appellant:

- That disbursements from the appellant's family trust were unearned income;
- That once the \$8000 annual limit for such disbursements had been reached, these disbursements were to be taken into account in determining her monthly disability assistance; and
- That as a result she received for assistance in April, May, June and July 2014 for which she was not eligible.

The relevant legislation is as follows:

From the *EAPWDA*:

Overpayments

18 (1) If disability assistance, hardship assistance or a supplement is provided to or for a family unit that is not eligible for it, recipients who are members of the family unit during the period for which the overpayment is provided are liable to repay to the government the amount or value of the overpayment provided for that period.

(2) The minister's decision about the amount a person is liable to repay under subsection (1) is not appealable under section 16(3) [*reconsideration and appeal rights*].

And from the *EAPWDR*:

Definitions

1 (1) In this regulation:

"**unearned income**" means any income that is not earned income, and includes, without limitation, money or value received from any of the following:

- (l) a trust or inheritance;

Assets held in trust for person with disabilities

12 (1) In this section, "**disability-related cost**" means the cost of providing to a person with disabilities or a person receiving accommodation or care in a private hospital or a special care facility, other than a drug or alcohol treatment centre,

- (a) devices, or medical aids, related to improving the person's health or well-being,
- (b) caregiver services or other services related to the person's disability,
- (c) education or training,
- (d) any other item or service that promotes the person's independence, and
- (e) if a person with disabilities does not reside in a special care facility, a private hospital or an extended care unit in a hospital,
 - (i) renovations to the person's place of residence necessary to accommodate the needs resulting from the person's disability, and
 - (ii) necessary maintenance for that place of residence.

(2) If a person referred to in subsection (1) complies with subsection (4), up to \$200 000, or a higher limit if authorized by the minister under subsection (3), of the aggregate value of the person's beneficial interest in real or personal property held in one or more trusts, calculated as follows:

- (a) the sum of the value of the capital of each trust on the later of April 26, 1996 or the date the trust was created, plus
- (b) any capital subsequently contributed to a trust referred to in paragraph (a),
 - is exempt for the purposes of section 10 (2) [*asset limits*].

Limits on income

9 (1) For the purposes of the Act and this regulation, "**income**", in relation to a family unit, includes an amount garnished, attached, seized, deducted or set off from the income of an applicant, a recipient or a dependant.

(2) A family unit is not eligible for disability assistance if the net income of the family unit determined under Schedule B equals or exceeds the amount of disability assistance determined under Schedule A for a family unit matching that family unit.

Amount of disability assistance

24 Disability assistance may be provided to or for a family unit, for a calendar month, in an amount that is not more than

- (a) the amount determined under Schedule A, minus
- (b) the family unit's net income determined under Schedule B.

Business plan

70.1 (1) The minister may require a recipient who is

- (a) applying to participate in a self-employment program, or
- (b) participating in a self-employment program

to provide, for the acceptance of the minister and within the time specified by the minister, a business plan for the small business the recipient is operating or proposes to operate under the self-employment program.

(2) If a recipient provides a business plan under subsection (1) that is not acceptable to the minister, the minister may return the business plan to the recipient with directions and the recipient may resubmit the business plan within the time specified by the minister for that purpose.

- (3) If
 - (a) a recipient fails to provide a business plan in the time specified under subsection (1) or (2), as applicable, or
 - (b) a recipient provides a business plan that is not acceptable to the minister, the recipient is not or ceases to be eligible to participate in the self-employment program.

[en. B.C. Reg. 462/2003, Sch. B, s. 2.]

Monthly report

70.2 If a recipient who is participating in a self-employment program is operating a small business under the program, the recipient must, in addition to any report required under section 29, provide a monthly report to the minister in the form and at the time specified by the minister, setting out, for the period covered by the report, as required by the form, the business activities, earnings, expenses, assets and liabilities of the small business the recipient is operating.

And from Schedule B of the EAPWDR:

Deduction and exemption rules

1 When calculating the net income of a family unit for the purposes of section 24 (b) [*amount of disability assistance*] of this regulation,

- (a) the following are exempt from income:
 - (xxvi) a loan that is
 - A) not greater than the amount contemplated by the recipient's business plan, accepted by the minister under section 70.1 of this regulation, and
 - B) received and used for the purposes set out in the business plan;

Exemptions — unearned income

7 (0.1) In this section:

"**disability-related cost**" means a disability-related cost referred to in paragraph (a), (b), (c) or (e) of the definition of disability-related cost in section 12 (1) [*assets held in trust for person with disabilities*] of this regulation;

"**disability-related cost to promote independence**" means a disability-related cost referred to in paragraph (d) of the definition of disability-related cost in section 12 (1) of this regulation;

- (1) The following unearned income is exempt:
 - (d.3) subject to subsection (2.1),
 - (i) a payment made from a trust to or on behalf of a person referred to in section 12 (1) of this regulation,

(2.1) The maximum amount of the exemption under subsection (1) (d.3) is \$8 000 in a calendar year, calculated as the sum of all payments, structured settlement annuity payments and money that, during the calendar year, are applied exclusively to or used exclusively for disability-related costs to promote independence.

The position of the ministry, as set out in the reconsideration decision, is that once the appellant's disbursements from the trust exceeded \$8000 for the calendar year, under section 7(2.1) of Schedule B of the EAPWDR any further disbursements were no longer exempt and must be considered as unearned income in the calculation of monthly eligible amounts. That income is applied to the calculation of the amount of assistance the family unit is eligible to receive at the first opportunity, that being the month following the month of reporting. In this instance, the income received in February 2014, to be reported in March, affects April, and so on. As the amount of the nonexempt portion of trust disbursements received in February and March exceeded the appellant's monthly support/shelter rate, under section 9 of the EAPWDA she was not eligible for assistance for those months (including any supplements). The income from the disbursements in April and May affected her eligible amount for June and July, with the appellant being provided assistance for which she was not eligible equal to those amounts. The ministry determined that the appellant was provided assistance for which she was not eligible and consequently under section 18 she is required to repay that amount.

The appellant's position, as explained at the hearing, is that the ministry was fully aware, from the outset, of her business activities, including how she planned to start the business with a loan from the trust. She also consulted with the ministry regarding her intentions for subsequent major expenses, using loans from the trust. The appellant insisted that at no time did the ministry advise her that her eligibility for assistance would be affected or that she would have to repay any assistance provided. She argues that it is unfair and unreasonable, a year after the fact, to be told that she must repay the ministry: if she had known that she was going to be ineligible for assistance because of the loans from the trust and would have to go through with repaying such a large amount, she would not have started the business in the first place.

The appellant submits that the loans from the trust are income exempt under section 1(a)(xxvi) of Schedule B of the EAPWDR, as the money was used for the business consistent with the business plan discussed with the ministry "business advisor." She understood that the \$8,000 limit applied to personal use, such as fixing up their house. She testified that ministry workers who knew the background had expressed surprise when told of the repayment decision, stating that it might be that the legislation was open to interpretation.

Panel decision

The ministry determined that the disbursements at issue in this appeal qualify as "disability-related costs to promote independence." The panel notes that this reflects a broad interpretation of the definition of the costs referred to in section 12(1)(d) of the EAPWDR: "any other item or service that promotes the person's independence" (i.e. other than medical aids or devices, caregiver services, education or training, or home renovations and maintenance to accommodate disability needs). The ministry has accepted that promoting independence includes promoting *financial* independence, and that an "item" can encompass the purchase of a stock of inventory.

The appellant argues that she participates in a ministry-approved self-employment program, discussed her business plan with a ministry "business advisor" and submits the required monthly reports. The Record of the Ministry decision contains no specific reference by either the ministry or the appellant to her participation in such a program, and no documentary evidence, such as a

business plan that contemplated the loans from her trust, which would support the appellant's argument. Further, while the appellant has provided a promissory note committing the appellant and her spouse to repay the trust, there is no documentary evidence that would show that the disbursements were considered loans at the time of withdrawal, either with separate notes between the appellant as trustee and as beneficiary/creditor and/or shown as loans/liabilities on the monthly statements submitted to the ministry.

Even if a business plan were available and the loans documented, there is the issue of whether the loans to the appellant from the trust are income exempt, without limit, under section 1(a)(xxvi) of Schedule B of the EAPWDR, or are subject to the \$8000 annual limit under section 7(2.1) of the Schedule B. Both provisions relate to sources of "unearned income." The source in section 1(a)(xxvi) speaks to loans in general (whether from a bank, a friend or, as here, a trust) for business purposes. By comparison, section 7(2.1) addresses payments (including loans) from a specific source – from a trust established under section 12 of the EAPWDR, to be used for the purpose of promoting independence. Under the statutory interpretation principle of "implied exception," where the specific prevails over the general, the panel finds that the specific provision applies and that the ministry was reasonable in determining that \$8,000 limit set out in section 7(2.1) applied to the disbursements from the appellant's trust.

The panel therefore finds that the ministry was reasonable in determining that as a result of the disbursements from the trust in February, March, April and May 2014 the appellant had unearned income that must be taken into account in calculating the eligible amounts of assistance for April, May, June and July 2014. As she was provided assistance greater than these eligible amounts, the panel finds that the ministry was reasonable in determining that she received assistance for which she was not eligible and, in accordance with section 18(1) of the EAPWDR she must repay that amount.

The appellant argues that she was misinformed by ministry staff as to the consequences of taking out the loans from her trust on her eligibility for assistance and the possibility that she would have to repay the amount for which she was ineligible. The panel accepts that ministry staff may have misinformed the appellant. While that is unfortunate, the panel does not consider the ministry's decision as a sanction or "punishment." Rather, the decision is a result of an investigation that found, upon review, that the ministry provided the appellant with public funds she was not entitled to. Section 18 of the EAPWDR, requires repayment of the ineligible amount, no matter how the situation arose.

Section 18(2) of the *EAPWDA* states that the minister's decision about the amount a person is liable to repay under subsection (1) is not appealable to the Tribunal. Accordingly, the panel will not make a determination as to the actual amount to be repaid.

Conclusion

The panel finds that the ministry's decision, that for the period April to July 2014 the appellant received disability assistance and supplements for which she was not eligible and is liable to repay that amount, is reasonably supported by the evidence and is a reasonable application of the legislation in the circumstances of the appellant. The panel therefore confirms the ministry's decision.