

PART C – Decision under Appeal

The Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated 15 January 2016 determined that:

- The appellant was not and had not been eligible for an exemption from self-employment income under the Self Employment Program (SEP), sections 70.1 and 70.2 of the Employment and Assistance for Persons with Disabilities Regulation (EAPWDR);
- The appellant had received an overpayment of \$235 for the month of January 2015 assistance for which she was not eligible and for which she is liable to repay to the government under s. 18 of the Employment and Assistance for Persons with Disabilities Act (EAPWDA);
- There was no overpayment affecting the assistance period October – December 2015 due to the appellant's self-employment income.

PART D – Relevant Legislation

EAPWDA, s. 11 and 18

EAPWDR, s. 1, 24, 29, 70.1 and 70.2

EAPWDR, Schedule A, s. 1.

EAPWDR, Schedule B, s. 1, 2, 3 and 4.

PART E – Summary of Facts

At the hearing the ministry requested an adjournment because the ministry worker who was in charge of this matter had called in sick and was not available to participate on behalf of the ministry and that there was a shortage of available staff. The appellant objected to the adjournment because she indicated her health was declining because of cancer and her treatments, including chemotherapy, were hard on her and she had made considerable efforts to come to the hearing venue, at her expense which caused her additional hardship given she is on disability assistance. As well, her advocate who was representing her might not be available later if the hearing is adjourned. Finally the appellant wanted to have peace of mind since her condition will change in approximately 4 months when she will be eligible for Old Age Security. After deliberation, the panel denied the ministry's application for an adjournment for the following reasons:

- The deteriorating health condition of the appellant and the hardship caused her to attend to the hearing as well as the additional stress caused her by this matter;
- The uncertainty about the appellant's advocate to represent her if the hearing is adjourned;
- The fact that the ministry representative at the hearing had access to the appeal record and the appellant's ministry file and was very familiar with the legislation and the ministry's policies.

The following evidence was before the ministry at the time of reconsideration:

- The appellant is a sole recipient of disability assistance and her file was re-opened on 28 July 2014.
- In July 2014, the ministry received the appellant's online application for assistance declaring earned income of \$150 from a self-employed service (the business). According to the ministry, the appellant then indicated that her business income would likely stop once she begins receiving income assistance because it endangers her health to do it. The ministry advised the appellant to declare her business income on her monthly declaration due 5 August 2014.
- In August 2014, the ministry received the appellant's application for a Person with Disabilities (PWD) designation stating that the appellant continued to work in her business and her PWD application was approved on 29 August 2014.
- On 9 September 2014, the ministry processed the appellant's monthly declaration and noted the appellant declared only her Canada Pension Plan (CPP) income.
- On 26 October 2015 the appellant contacted the ministry and indicated that her business was still providing the service and that she rented space and paid for her supplies.
- On 23 November 2015, the ministry reviewed the appellant's file and noted she had not reported any employment or self-employment income since her file opened. During a discussion with the appellant, she informed the ministry that she was told she could earn up to \$800 per month without having to report it if it was less than or equal to that amount. The ministry worker then informed the appellant about the Annualized Earnings Exemption (AEE) and requested the appellant provide her income verification.
- On 1 December 2015, the ministry received the appellant's self-employment income verification for the period August 2014 – December 2015 in the form of monthly invoices. Those invoices showed, according to the ministry, that the appellant had received \$1,075 in November 2014 and \$10,145 for the period January – November 2015. The ministry also noted that the monthly invoices showed that 15% of the total income received was paid to the store where she worked as a referral fee.
- On 9 December 2015, a ministry worker discussed with the appellant an overpayment due to

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undeclared income in excess of the applicable exemption levels affecting January and the period October – December 2015 assistance months.

- An overpayment letter dated 10 December 2015 indicated to the appellant that a possible overpayment amount had been calculated as \$2,206.56 and that it may change if new information was received. A 2-page chart was attached to the letter indicating the months when the overpayment occurred as: January 2015: \$275, October 2015: \$245 and November 2015: \$825.78.

A Request for Reconsideration dated 6 January 2016 signed by the appellant indicated the following:

- The appellant has no rental agreement with the store where she has her business, she has no keys to the premises and they made an agreement at the start of her business that they would share the income 15% to the store for their services and 85% for the appellant.
- The fees were divided at the end of each business day and she never kept the portion that was dedicated to the store.
- For the year 2015, the exemption switched from \$800/month to \$9,600/year with no monthly limit but the appellant was never notified of that change. Had she been notified, she would have restructured her business plan and worked fewer hours.
- In September 2014, when the appellant was designated as PWD, an employee of the ministry's local office in her community advised her that since she was designated as a PWD, she was no longer required to fill the monthly report card and was allowed to earn up to \$800/month without having to report it.
- The appellant's November assistance was withheld and she went to the ministry's local office where a ministry employee attacked her, accusing her of lying and cheating. As a result, she was unable to work and she had no money to pay her rent and her bills. She spent most of December attending doctors' appointments and her tumour that was shrinking has grown and her cancer metastasis has become aggressive.
- She attached to the Request for Reconsideration a copy of the PWD application documents showing that she was self-employed at the time of applying, having her own business.
- She was never informed that she could apply for the SEP.

With her Request for Reconsideration, the appellant provided the following documents:

- A series of invoices for the period September 2014 – November 2015 indicating for each month the days worked, the fees paid by the customer and the 15% referral fee going to the store.
- Letter dated 27 November 2015 to the ministry from the appellant expressing her concerns that she had been trying unsuccessfully to provide the ministry with the information required.
- Letter dated 7 January 2016 signed by the store owner indicating that the appellant does not rent a space in his store and that she pays the store a 15% referral fee when they refer their customers to her.
- A letter signed by the appellant and dated 11 January 2016 stated that she was allowed to come into the store and offer limited services on a non-daily basis; in turn, the customers using her services are also likely to make purchases at the store.
- A 6-page document being excerpts of the appellant's application for PWD designation and indicating that the appellant was self-employed in her business.
- Summary of the appellant's earnings for the period August 2014 – November 2015.
- Ministry's Notices of Deposit for the months of August – November 2014 (4 months).

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- Various documentation on the SEP and metastatic bone/breast cancer.

In her Notice of Appeal dated 27 January 2016 and signed by the appellant, she indicated that she has no rental agreement with the store nor does she have a business plan or pay for equipment. She also indicated that her history of communication as reported by the ministry is inaccurate, incomplete and some statements are false.

In a document faxed to the tribunal on 12 February 2016, the appellant provided the following additional evidence:

- She did not receive any explanation as to why her December 2015 assistance was reduced to \$260.53 and what the \$565 deduction was for.
- She picked up the Application for PWD designation at her local ministry office and once completed by herself and the medical professional, she returned it in person at her local office.
- In November 2015 she was for the first time advised by a ministry worker of the other benefits she might be entitled to but it was on 26 October 2015 that she heard first about SEP.
- She does not rent space at the store for her business and never indicated she did – she shares a small utility space, approximately 10x4 feet storage/sink area, with staff and management and has no private access.
- She did not know at the time that the AEE was in force as of January 2015.
- In January 2016, ministry personnel advised her that becoming part of SEP at that time would be of no benefit to her because of her age and upcoming benefits.
- The appellant received another letter from the ministry, dated 26 January 2016 indicating an overpayment of \$535.53 and that an appointment was set with her to discuss this issue. She intended to ask for a reconsideration of that decision but a ministry worker told her that it should be resolved along with this appeal by the panel.

In a document submitted at the hearing the appellant indicated that when she went to the ministry office in her community on 12 February 2016 the ministry worker recognized her and he was the same ministry worker that told her in 2014 that she did not need to report her income if it did not exceed \$800/month but she did not tell him that this matter was now before the tribunal.

At the hearing the appellant testified that her clients paid her either in cash directly to her and that at the end of the day she would give the store its 15% referral fee of the daily fees she collected. If the client wanted to pay with a debit card, then it was the store that processed the card on its machine and would remit the appellant her 85% share of the fees collected and the store would keep its 15%. She and the store did not accept credit cards.

The panel determined the additional oral and documentary evidence was admissible under s. 22 (4) of the Employment and Assistance Act as it was in support of the records before the minister at reconsideration and provided more details about the interactions between the appellant and the ministry and corroborated the evidence at reconsideration. The panel accepts the appellant's evidence that the 15% paid to the store is a referral fee and not for rent as it is confirmed by the store owner.

PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry's decision was a reasonable application of the legislation or reasonably supported by the evidence. The ministry determined that:

- The appellant was not and had not been eligible for an exemption from self-employment income under the SEP;
- The appellant had received an overpayment of \$235 for the month of January 2015 assistance for which she was not eligible and for which she is liable to repay to the government;
- There was no overpayment affecting the assistance period October – December 2015 due to the appellant's self-employment income.

The relevant legislation for the SEP are s. 70.1 and 70.2 of the EAPWDR:

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.

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.

The legislation deals with overpayments as follows:

Earned income is defined at s. 1 of the EAPWDR:

"earned income" means

(a) any money or value received in exchange for work or the provision of a service,...

Liability to repay overpayments, s. 18 of the EAPWDA:

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*].

The ministry indicated that the appellant did not report as required by the legislation. That requirement is found at s. 11 of the EAPWDA:

11 (1) For a family unit to be eligible for disability assistance, a recipient, in the manner and within the

time specified by regulation, must

(a) submit to the minister a report that

(i) is in the form prescribed by the minister, and

(ii) contains the prescribed information, and

(b) notify the minister of any change in circumstances or information that

(i) may affect the eligibility of the family unit, and

(ii) was previously provided to the minister.

(2) A report under subsection (1) (a) is deemed not to have been submitted unless the accuracy of the information provided in it is affirmed by the signature of each recipient.

As well, s. 29 of the EAPWDR provides for the manner and time specified for these reports:

29 For the purposes of section 11 (1) (a) [*reporting obligations*] of the Act,

(a) the report must be submitted by the 5th day of the calendar month following the calendar month in which one or more of the following occur:

(i) a change that is listed in paragraph (b) (i) to (v);

(ii) a family unit receives earned income as set out in paragraph (b) (vi);

...

and

(b) the information required is all of the following, as requested in the monthly report form prescribed under the Forms Regulation:

(i) change in the family unit's assets;

(ii) change in income received by the family unit and the source of that income;

(iii) change in the employment and educational circumstances of recipients in the family unit;

(iv) change in family unit membership or the marital status of a recipient.

(v) any warrants as described in section 14.2 (1) of the Act.

(vi) the amount of earned income received by the family unit in the calendar month and the source of that income;...

Prior to 1 January 2015, the exemption, earned income, for the appellant's family unit was determined at s. 3 (3) of the EAPWDR:

3 (3) The exempt amount for a family unit that qualifies under this section is to be calculated as follows:

(a) in the case of a family unit that includes only one recipient who is designated as a person with disabilities, the exempt amount is calculated as the lesser of

(i) \$800, and

(ii) the family unit's total earned income in the calendar month of calculation;...

As of 1 January 2015, the formula changed under s. 3, Schedule B of the EAPWDR and the ministry determined that under that formula, the appellant was eligible for \$9,600 AEE.

The SEP issue:

The appellant argued that the ministry should have contacted her and let her know about that program that may have helped her in determining the best business plan for her self-employed business. She argued that she would have received the benefits that she was eligible for and would have avoided the situation she is now in with respect to the overpayments. She stated that she had

indicated in her PWD application that she had a business and that the ministry should have known that and should have contacted her to explain and offer the SEP.

The ministry argued that given the workload they face, it was not their practice to contact the clients to let them know of the possible benefits and that it is the client's responsibility to apply for those benefits. According to the ministry's information, the appellant would not pursue her business after she was eligible for disability assistance and she did not report any income from self-employment and, as a result, the ministry was not aware that she was pursuing her business. Further, it would not have made a difference for the appellant since the exemptions are the same than in her actual situation and she would not have been eligible for a deduction for the referral fee (15%) she was paying to the store since she indicated it was not a rent but a fee and while under SEP rents are deductible, there is no deduction for referral fees.

Panel decision:

The panel accepts the appellant's evidence to the effect that she did not mention to the ministry that she intended to stop her business if she received assistance and that she needed this income to help her meet her obligations. Nonetheless, to be eligible for the SEP, a person must apply to participate according to s. 70.1 of the EAPWDR and must meet its conditions and the appellant agrees she did not. She argued that it was the ministry's responsibility to contact her to offer the program but there is no legislative support that would make it the ministry's responsibility to offer its own programs to clients. Regardless of the ministry's actions, it remains that the appellant did not apply for the SEP and she did not provide a business plan according to s. 70.1 (1)(b) of the EAPWDR. It would be mere speculation to determine whether the appellant was or was not eligible for the SEP. The panel notes as well that in any event this would not change the fact that the exemptions were the same as she had under her actual disability assistance and that, since she argued that the fees that she was paying the store were not for her rent but for a referral fee, it would not have been deductible in any event.

Consequently, the panel finds the ministry reasonably determined that the appellant was not and had not been eligible for the SEP and its exemptions.

The overpayments:

The appellant argued that she was told that she did not need to report her monthly income if it remained under or equal to the exemption of \$800 and that her net income was only 85% of the prices of the services her business provided since she was paying a 15% referral fee to the store, which should have been exempted from her income. She also argued that she had been misled by the ministry as to her monthly reporting and that if she had been told the truth about her obligation to report her income monthly and not only when it was above \$800 she would have done so. Proof of that, she said, she did provide the ministry with all the information it required when they found that she was still pursuing her business. She argued that it was the ministry's fault if this overpayment situation occurred and that she should not be liable to repay those overpayments since she was not responsible for the error. She as well argued that for the year 2015, she was not advised that the exemption had switched to the AEE and that she did not know that the exemption was now \$9,600 for the whole year, regardless of each month's income. Had she known, she would have planned her

business accordingly and would have avoided the overpayment in 2015.

The ministry argued that it was the appellant's responsibility to report her income each month and had she done that, they would have been able to identify immediately the excess income and avoid any overpayment. The ministry took the position that no ministry worker would have told the appellant that she did not need to report her income if it was within the monthly \$800 exemption in 2014 or within the \$9,600 in 2015 and, in the latter case, the ministry would have been able to warn the appellant when she was close to reach the exemption. Because the appellant failed to report, the ministry was unable to advise her in time of the excess income and the overpayments occurred.

Panel decision:

There are a number of issues arising from this appeal.

The first issue is whether the appellant's business income is **earned income**. The definition of earned income is at s. 1 of the EAPWDR: any money or value received in exchange for work or the provision of a service. On occasion the appellant collects directly the money from the client and remits 15% referral fee to the store while on other occasions when the client pays with a debit card, it is the store that collects the funds from the client and gives the appellant her 85% share. The issue is whether the "earned income" is the full amount collected from the client or 85% of that amount. The panel finds that the appellant did in fact receive money in exchange of the provision of a service and that the arrangement with the store was a lose arrangement that was convenient for both parties. Clients were not aware of this arrangement and the fees they paid were in fact paid for the service received and it was reasonable for the ministry to determine that the full amount paid for the appellant's service met the definition of earned income of s. 1 of the EAPWDR.

The second issue is the **reporting requirements** the ministry argued the appellant failed to comply with. The appellant said that she was told not to report her income if it remained within the \$800 monthly exemption and the panel finds that the appellant genuinely believed that it was the information the ministry had given her and that she acted in good faith. This is understandable if we consider the 4 "Notice of Deposit" (a document that confirms the amounts deposited in the appellant's bank account and on the reverse of which the clients must report their monthly income on the 5th of the next month – s. 29 (a) of the EAPWDR) that the appellant received in September, October, November and December 2014 when 3 of those Notices include the mention "Return only if you have changes to report".

However, the panel notes that for the January 2015 assistance month where the ministry indicated an overpayment of \$235 earned in November 2014 (which is the normal cycle for the ministry), even if the 15% referral fee was removed from the total earnings, the balance of \$913.75 was still over the \$800 monthly exemption that the appellant testified she did not need to report. Further, the panel notes that in 2015 when the AEE came into force, the appellant still believed that she was not obligated to report earnings within the \$800 exemption but she failed to report the income in excess of that amount for the months of May (\$1260 less 15% = \$1071) and July (\$1163.28 minus 15% = \$988.50).

The appellant argued that she had not received the report card that she had to return to the ministry

and that was why she did not report. The panel notes that the ministry did not make any determination with respect to the appellant's failure to report her income. The ministry accepted the late reporting and determined whether there were any overpayments and the amount of such, advising the appellant by letter dated 10 December 2015 of what they had found and giving her the opportunity to provide any information that could assist the ministry to make a final determination. At the time of the letter, the ministry assessed the overpayments at \$2,206.56 but eventually and with the benefit of the appellant's input, the amount was significantly reduced. The panel makes no determination with respect to this issue since the ministry did not include it in its reconsideration decision.

The third issue is the **overpayment for the January 2015 assistance month**. While the AEE applied as of 1 January 2015, the January assistance month referred to income earned in November 2014. At that time the former exemption of \$800/month applied and the ministry assessed earned income at \$1,075, as reported by the appellant, and since \$800 were exempt, determined the excess income as \$235. The panel finds that since it was determined above that the full amount paid to the appellant was earned income, the ministry reasonably determined that this amount in excess of the \$800 exemption must be deducted from the appellant's January 2015 assistance. The appellant contended that because it was the ministry's error, she should not have to repay any overpayments. Yet, the panel notes that under the legislation the appellant had an obligation to report her income each month and that while she argued that a ministry worker told her it was not necessary if it was equal or under the exemption, the month when there is an overpayment is a month when she had an income in excess of \$800 with or without the 15% and that this is not a ministry error if she did not report. Consequently, the panel finds that under s. 18 of the EAPWDA, the ministry reasonably determined the appellant is liable to repay to the government the amount or value of the overpayment provided for that period.

The fourth and last issue is the **2015 income**. As mentioned earlier, the AEE came into force at the beginning of that year and the appellant's exemption was assessed at \$9,600 for the whole year. An assessment of the appellant's income from self-employment showed that the appellant had received \$10,145 by November 2015 resulting in an excess of \$545. However, the reconsideration decision continued: "Therefore, the minister determines \$0 of your self employment income must be deducted from your October – December 2015 assistance under section 24 of the EAPWDR." Further in the decision, the ministry determined that the appellant "did not receive October – December 2015 disability assistance for which [she was] not eligible, and as such the minister determines [she is] not liable to repay an amount of October – December 2015 assistance to the government due to [her] self employment income."

Unfortunately, the ministry's records do not explain why despite an excess income it determined there was no overpayment and that the appellant was not liable to repay any amount to the government. The appellant indicated in her evidence that her December 2015 payment had been deducted by \$565 but there was no evidence before the panel to explain this reduction in her monthly assistance. As well, the panel notes that the appellant contacted the ministry when she received the 26 January 2016 letter indicating an overpayment of \$535.53 and was told that this issue would be resolved during this appeal. Yet, no evidence was provided to the panel as to the nature of that overpayment but if it stems from the period under review in this appeal (earned income in 2015), then this appeal should resolve this matter. On the other hand if it pertains to another issue, independent from this

appeal, then the panel's jurisdiction is limited to the reconsideration decision of 15 January 2016 and would not have the jurisdiction to make a decision in that respect.

Given those circumstances and based on the fact that the ministry ruled in favour of the appellant for her 2015 income, the panel finds that the ministry reasonably determined that the appellant had no overpayment affecting October – December 2015 assistance months due to her self-employment income.

Conclusion:

Given the complexity of this appeal, the panel decision is summarized as follows:

1. The panel finds that the ministry reasonably determined that the appellant has not been and is not eligible for an exemption from her self-employment income through the SEP.
2. The panel finds that the ministry reasonably determined that the appellant received \$235 of January 2015 assistance month based on the November 2014 income, for which the appellant was not eligible and is liable to repay to the government.
3. The panel finds that the ministry reasonably determined that the appellant does not have an overpayment affecting October – December 2015 assistance months due to her self-employment income, taking into account that for 2015 the AEE was in force and that the cumulative exemption was reached only in November, and that the appellant is not liable to repay an amount of October – December 2015 assistance to the government.

For all those reasons, the panel finds the ministry's decision was a reasonable application of the applicable enactment in the circumstances of the appellant and confirms the decision.