

APPEAL NUMBER

PART C – DECISION UNDER APPEAL

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Poverty Reduction (the ministry) dated November 5, 2019, in which the ministry determined that the appellant received disability assistance for which the appellant was not eligible and is liable to repay in accordance with section 18 of the *Employment and Assistance for Persons with Disabilities Act* (EAPWDA). Specifically, the appellant received disability assistance for a family unit that included a dependent child from July 2016 to December 2016 when the appellant's son was no longer a dependent child.

PART D – RELEVANT LEGISLATION

Sections 1, 11, 18 and 19 of the EAPWDA

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), section 2 of Schedule A

Financial Administration Act, section 87

PART E – SUMMARY OF FACTS

Information before the ministry at reconsideration

On March 24, 2016, the appellant, who had been receiving disability assistance for a family unit comprised of the appellant and a dependent child, contacted the ministry to ask why the amount of monthly disability assistance had been reduced. The ministry explained that because the appellant's son turned 19 years of age in March 2016 he was no longer a dependent child and was removed from the appellant's family unit resulting in the reduction of disability assistance. Following contact from the appellant on March 24, 2016, the appellant's son was added back onto the appellant's file and would remain part of the family unit until the end of the school year. Ministry records indicate that the appellant was advised that the appellant's son would "drop off" the appellant's file at the end of June 2016.

On December 15, 2016, when the appellant attended the local ministry office seeking confirmation of income for housing and proof that the son was not in receipt of funds, the ministry realized that the appellant's son had not been removed as a member of the family unit at the end of June 2016.

On March 28, 2019, the ministry sent the appellant a letter advising that the appellant's file had been reviewed and that an overpayment of disability assistance in the amount of \$3,144.52 had occurred because the ministry had erred in not removing the appellant's son from the appellant's file until December 2016. A chart showing how the overpayment was calculated was included with the letter.

On September 17, 2019, the ministry phoned the appellant, advising the appellant of the overpayment, the reasons for the overpayment and of the right to request a reconsideration of the ministry's decision. On September 18, 2019, the ministry sent a letter and an overpayment chart to the appellant confirming this information.

The appellant requested reconsideration of the ministry decision.

The ministry upheld its decision at reconsideration and the appellant is now appealing that decision to the Tribunal.

Information provided on appeal and admissibility

The appellant's Notice of Appeal (NOA) received by the Tribunal on November 28, 2019, which did not include new evidence.

Prior to the hearing, the appellant's advocate submitted a 2-page excerpt from the ministry's Policy and Procedure Manual – "Overpayments that may meet an estoppel defence."

At the hearing, the advocate stated that the ministry was aware of what payments were to be issued but had not followed its own rules. In the interim, the appellant relied on the payments and was not advised of the overpayment until 3 years later.

At the hearing, the appellant confirmed being told by the ministry in March 2016 that the son could stay on the appellant's file until the end of June 2016. The appellant stated that the ministry should have been "more on the ball" and questions why the appellant should remind them – since they made the rules, it was up to them. The appellant described the difficulty of living on the amount of assistance provided, made even more difficult by a \$20 monthly reduction for the overpayment. The appellant stated that it would have been better if the overpayment assessment had happened three years ago and that the delay was the ministry's fault.

At the hearing, the ministry stated that, while it should have also known of the change in the son's circumstances at the end of June 2016, the appellant did not submit a monthly stub showing the change in circumstances despite the obligation to report any change of circumstances or other information that may affect eligibility (section 11 of the EAPWDA).

The ministry explained that when ministry error is involved in an overpayment, a Supervisor (Quality Compliance Specialist) reviews the overpayment to consider an estoppel defence and an estoppel service request may be created and sent to Debt Management, Financial Services Branch. This was the process followed in the appellant's case and the opinion of Debt Management was that the facts of the appellant's situation did not meet criteria for estoppel defence because the appellant reasonably should have been suspicious as to why the amount of disability assistance stayed the same knowing that the son was not eligible and the appellant only came forward when trying to get proof that the son was not receiving assistance. The ministry also stated that the reconsideration decision may or may not rely on that opinion with the final determination resting with the reconsideration officer. The ministry also noted that new policy allows for repayment of an overpayment debt to be reduced from \$20 monthly to \$10 monthly in some circumstances, including that there is no other outstanding debt.

In response to questioning from the advocate, the ministry confirmed that from June 2016 until March 2019, the ministry did not contact the appellant about the overpayment. The ministry explained that, while the appellant's overpayment sat open ready to be processed, unfortunately there was a delay in time, and there are no legislated "timed-out" provisions respecting overpayments. When asked, the ministry did not agree that the delay would make it more difficult to respond because, in this case, there was no documentation that the appellant needed to provide.

In accordance with section 22(4) of the *Employment and Assistance Act* (EAA), the panel may consider evidence that is not part of the record if the panel considers it "reasonably required for a full and fair disclosure of all matters related to the decision under appeal." On this basis, the panel admitted the oral testimony of the appellant and advocate, which either reiterated or clarified details in the appeal record.

Applying the same test for admissibility, the panel also admitted the information provided by the ministry at the hearing, including the ministry's process to determine the likelihood of a successful estoppel defence, and its application to the appellant's case. The panel notes the advocate's objection to the admission of Debt Management's estoppel opinion because it was not provided 3 days in advance of the hearing in accordance with Tribunal Practices and Procedures. The panel considered the objection and whether fairness required either an adjournment to allow for a review of the evidence or that the evidence not be admitted. The Panel admitted the evidence because: (a) the evidence was responsive to an argument raised by the advocate (namely, estoppel); and (b) the evidence expanded on the policy introduced by the advocate and/or reiterated information in the reconsideration decision. Generally, parties are expected to be prepared to respond to legal arguments raised by the other party; even more so when the issue is first raised by that party. The Panel determined that fairness required the admission of the evidence.

The positions of both parties and the ministry policy excerpt are set out in Part F of this decision.

PART F – REASONS FOR PANEL DECISION**Issue on Appeal**

The issue on appeal is whether the ministry's decision was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. That is, was the ministry reasonable when determining that the appellant is liable to repay disability assistance for which the appellant was not eligible because the appellant's son was not removed from the appellant's family unit at the end of June 2016?

Relevant Legislation**EAPWDA****Interpretation****1 (1) In this Act:**

"child" means an unmarried person under 19 years of age;

"dependant", in relation to a person, means anyone who resides with the person and who

(a) is the spouse of the person,

(b) is a dependent child of the person, or

(c) indicates a parental role for the person's dependent child;

"dependent child", with respect to a parent, means a child, other than a child who is 18 years of age and is a person with disabilities, who resides in the parent's place of residence for more than 50% of each month and relies on that parent for the necessities of life, and includes a child in circumstances prescribed under subsection (2);

"disability assistance" means an amount for shelter and support provided under section 5 [*disability assistance and supplements*];

"family unit" means an applicant or a recipient and his or her dependants;

(2) The Lieutenant Governor in Council may prescribe other circumstances in which a child is a dependent child of a parent for the purposes of this Act.

Eligibility of family unit

3 For the purposes of this Act, a family unit is eligible, in relation to disability assistance, hardship assistance or a supplement, if

(a) each person in the family unit on whose account the disability assistance, hardship assistance or supplement is provided satisfies the initial and continuing conditions of eligibility established under this Act, and

(b) the family unit has not been declared ineligible for the disability assistance, hardship assistance or supplement under this Act.

Reporting Obligations

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.

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*].

Liability for and recovery of debts under Act

19 (1) An amount that a person is liable to repay under this Act is a debt due to the government that may be

- (a) recovered in a court that has jurisdiction, or
- (b) deducted, in accordance with the regulations, from any subsequent disability assistance, hardship assistance or supplement for which the person's family unit is eligible or from an amount payable to the person by the government under a prescribed enactment.

(2) Subject to the regulations, the minister may enter into an agreement, or accept any right assigned, for the repayment of an amount referred to in subsection (1).

(3) An agreement under subsection (2) may be entered into before or after the disability assistance, hardship assistance or supplement to which it relates is provided.

(4) A person is jointly and separately liable for a debt referred to under subsection (1) that accrued in respect of a family unit while the person was a recipient in the family unit.

EAPWDR – Schedule A

Monthly support allowance

2(5) If a family unit includes a person who

- (a) immediately before reaching 19 years of age was a dependent child in the family unit, and
- (b) reached that age while attending secondary school,

the person is deemed to be a dependent child, for the purposes of this section, until the earlier of

- (c) the end of the school year in which the person reached the age of 19 years, and
- (d) the date the person stops attending secondary school.

(6) For the purposes of this section, if the family unit includes a deemed dependent child, the BC child adjustment amount applies in respect of the deemed dependent child as if the deemed dependent child was a dependent child.

Financial Administration Act

Defences to action for recovery of public money

87 (1) If public money is paid to a person by the government

- (a) in excess of the authority conferred by an enactment,
- (b) without the authority of an enactment, or
- (c) contrary to an enactment,

and a right is asserted by the government to recover the payment or part of it, or to retain other money in full or partial satisfaction of a claim arising out of the payment, the person against whom the right is asserted may, subject to subsection (2), rely on any matter of fact or law, including estoppel, that would constitute a defence in a proceeding brought to recover the payment as if it had been made under a mistake.

(2) Subsection (1) does not enable a person to rely on a defence that a payment made by the government was made under a mistake of law, and the right of the government to recover the money paid by it is not impaired merely because the payment was made under a mistake of law.

Ministry Policy and Procedure

Reasons Not to Recover an Overpayment Effective: February 1, 2019

Overpayments that may meet an estoppel defence

Section 87 of the Financial Administration Act provides for the availability of an estoppel defence when the ministry seeks to recover the assistance from a *recipient* that they were not eligible to receive. An estoppel defence protects a recipient, who through no fault of their own receives a payment they were not eligible to receive.

When establishing a ministry error overpayment, staff must review the following criteria to see if the overpayment meets all of the criteria of an estoppel defence, as described below. Overpayments that meet the following criteria **must** be referred to a supervisor.

There may be an estoppel defence when all of the criteria listed below are met:

1. A *recipient* received assistance that he or she was not eligible to receive, and,
2. The ministry represented to the recipient that he or she was eligible for the assistance.
 - This could be an explicit statement by the ministry that the person was eligible, or,
 - An implicit statement by the continued payment of assistance by the ministry despite having all the information needed to determine the recipient was actually ineligible (e.g. the client had provided sufficient evidence to determine their eligibility); and,
3. The recipient had relied on the funds to his or her detriment (detrimental reliance).
 - This detrimental reliance is when a client with non-discretionary income adjusts their living expenses to the increased amount of assistance.
 - It is generally accepted that a person in receipt of assistance will adjust their living expenses to an increased amount of assistance and therefore in almost all cases there will be detrimental reliance on the increased assistance.
 - An estoppel defence recognizes that, where there has been detrimental reliance, requiring an innocent recipient to return a mistaken payment (e.g. overpayment) of assistance would be inequitable.

Estoppel defence cases are highly dependent on the facts of the situation. The availability and strength of an estoppel defence will vary depending on the circumstances of the ministry's representation concerning eligibility and the reasonableness of the recipient's reliance on the information provided.

Examples of circumstances where the file should be referred for further review include the following:

- A recipient has been told by ministry that while receiving MSO, the recipient will continue to be eligible for the monthly nutritional supplement, which is not an eligible supplement for recipients of MSO.
- A recipient fails to report disability insurance payments as income, based on mistaken instructions from the ministry that such amounts are exempt income.

In each of these examples, the ultimate opinion as to whether the recipient is likely to have a successful estoppel defence will be determined by Debt Management in the Financial Services Branch.

Panel Decision

Appellant's Argument

The appellant's advocate argues that while there is no dispute that the appellant received assistance for which the appellant was not eligible, the ministry represented that the appellant was eligible by implicit statement and should therefore apply its own policy respecting an estoppel defence. The ministry erred, not the appellant, with the result being detrimental reliance on the funds by the appellant. The appellant adds that the decision is greatly unfair, will cause undue hardship and suffering, and because the ministry had the information it needed to assess eligibility, it should take some of the responsibility and the appellant should not have to pay back the whole amount of the overpayment.

Ministry Argument

The ministry's position is that upon turning 19 years of age the appellant's son was no longer a dependent child as defined in section 1 of the EAPWDA. However, ministry policy allows the son to remain part of the family unit for the purposes of determining monthly disability assistance until the end of the secondary school year, June 2016. Because the appellant's son was not taken off the appellant's file until December 2016, from July through December 2016 the appellant received disability assistance totalling \$3,144.52 for which the appellant was not eligible and which the appellant must repay.

In reaching this decision, the ministry finds it important to note that the appellant was aware of the reduction in assistance in April 2016 and why it occurred and that the appellant was also aware of the reason why the ministry determined that the son could be added back to the family unit through June 2016. The ministry acknowledges that it erred by not removing the son from the family unit at the end of June 2016, noting that it is unfortunate that the appellant did not make the ministry aware of the fact that assistance for the son continued after June 2016, as the appellant would have been well aware of the reduction amount having already seen the difference in the amount in April 2016.

Panel Analysis

The panel first considered the application of the legislation, noting that the fact that there was an overpayment of disability assistance from July 2016 through December 2016 is not in dispute. The definitions of "child",

“dependent child” and “family unit” in section 1 of the EAPWDA make it clear that for the appellant’s son to be part of the appellant’s family unit he must be under the age of 19, not married and residing with the appellant. However, ministry policy and section 2(5) of Schedule A of the EAPWDR provide an exception for the purpose of determining the amount of support if a dependent child who, immediately before turning 19 years of age, was attending secondary school. This exception was applied to the appellant’s son and the appellant was to continue to receive disability assistance as if the son was a dependent child until the end of the school year, June 2016. The legislation does not allow for assistance to be provided on behalf of the son past this date. Because the appellant did continue to receive disability assistance at the rate for a person with a dependent child from July 2016 through December 2016, the ministry was reasonable to determine that an overpayment of assistance was received.

Section 87 of the BC *Financial Administration Act* states that a person may rely on an estoppel defence when recovery of public money is sought. Ministry policy and procedure have been developed to address an estoppel defence for recipients “who through no fault of their own” receive a payment for which they were not eligible when two circumstances exist. While policy is not always instructive and does not carry the weight of legislation, in this case the policy nicely sets out the test for whether an estoppel argument ought to be successful: first, there was a representation by the ministry to a recipient that they were eligible and second, that the recipient has relied on the funds to their detriment. Ministry policy states that in almost all cases the ministry accepts that detrimental reliance occurred and that is not at issue in this appeal.

The question in the appellant’s circumstances is whether the ministry represented to the appellant that the appellant was eligible for the assistance, either by explicit statement or, as the advocate argues, by implicit statement by virtue of the continued payment of assistance by the ministry despite having all the information needed to determine ineligibility. Given that there is no dispute that the appellant was explicitly told by the ministry that the son’s eligibility would stop at the end of June 2016, the panel cannot accept the advocate’s assertion that the continued payment on the part of the ministry amounted to an implicit statement of eligibility. That is, the fact that payments continued after the son was not eligible cannot be viewed in isolation from that fact that the appellant knew that eligibility ended after June 2016. While the ministry clearly made an error, which it acknowledges, section 11 of the EAPWDA imposes a duty on the appellant to “notify the minister of any change in circumstances or information that may affect the eligibility of the family unit” by letting the ministry know that the son remained on the file when he was not eligible. Therefore, the panel concludes that the ministry is not estopped from relying on its legal right to repayment and was reasonable to determine that section 18 of the EAPWDA requires the appellant to repay the disability assistance for which the appellant was not eligible.

Conclusion

The panel concludes that the ministry’s reconsideration decision is reasonably supported by the evidence and a reasonable application of the legislation in the circumstances of the appellant. The reconsideration decision is confirmed and the appellant is not successful on appeal.

APPEAL NUMBER

PART G – ORDER

THE PANEL DECISION IS: (Check one) ☒ **UNANIMOUS** ☐ **BY MAJORITY**

THE PANEL ☒ **CONFIRMS THE MINISTRY DECISION** ☐ **RESCINDS THE MINISTRY DECISION**

If the ministry decision is rescinded, is the panel decision referred back to the Minister
for a decision as to amount? ☐ Yes ☐ No

LEGISLATIVE AUTHORITY FOR THE DECISION:

Employment and Assistance Act

Section 24(1)(a) ☒ or Section 24(1)(b) ☒

and

Section 24(2)(a) ☒ or Section 24(2)(b) ☐

PART H – SIGNATURES

PRINT NAME

Jane Nielsen

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2020/01/21

PRINT NAME

Susan Mackey

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020/01/21

PRINT NAME

Kenneth Smith

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020/01/21