IN THE COURT OF APPEAL OF NEW ZEALAND CA 457/2012

UNDER PART 1A HUMAN RIGHTS ACT 1993

BETWEEN CHILD POVERTY ACTION GROUP INCORPORATED (CPAG)

Appellant

AND THE ATTORNEY GENERAL

Respondent

SUBMISSIONS OF APPELLANT IN REPLY TO CROSS APPEAL
6 May 2013

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MAY IT PLEASE THE COURT:

1. SUMMARY OF APPELLANT'S RESPONSE

1.1 Differential treatment on a prohibited ground

1. The Appellant agrees with the Crown that the issue of discrimination involving multiple eligibility criteria should have been considered by the Court at the first step of the s 19 analysis (differential treatment on a prohibited ground), rather than at the second step (material disadvantage). It is a causation issue.

2. However, it disagrees with the Crown that the fact most beneficiaries cannot meet all eligibility criteria of the In-Work Tax Credit (IWTC) other than the off-benefit rule negates their claim of differential treatment on a prohibited ground. To hold so would be oppressive and contrary to the purpose of human rights legislation.

3. The Appellant says the High Court and Tribunal were right to find that all beneficiary families were subject to differential treatment on the ground of employment status at the first step of the section 19 analysis. It disagrees with the Crown that the purpose of the IWTC features in this question and says the High Court and Tribunal correctly identified the relevant comparator group and context in determining this question.

1.2 Material disadvantage

4. The Appellant says the High Court was correct to find that beneficiaries who met all IWTC eligibility requirements except the off-benefit rule suffered a material disadvantage. However, it submits the Court should have found that all 165,000 beneficiary families suffered a material disadvantage as a result of the off benefit rule, not just the small group of 1267 who met the work hours requirement.

5. While the Appellant accepts the objective of encouraging work permits some discrimination, it submits the objective is not something which should feature in the question of whether there is disadvantage. Rather, it forms part of the

section 5 analysis, where the Government has the opportunity to justify the means chosen to exclude beneficiary families from the IWTC in light of this objective.

2. DIFFERENTIAL TREATMENT ON A PROHIBITED GROUND

6. The Crown submits that beneficiary parents who do not meet the work hours requirement cannot be compared with those eligible for the IWTC because:
   (i) the purpose of the IWTC is to encourage people into work; and
   (ii) they do not meet all statutory criteria other than the off benefit rule.

7. The Appellant reiterates its submissions dated 22 April 2013 and endorses the approach taken by the High Court and Tribunal, namely that the appropriate comparator to the complainant group (those who are ineligible because they are reliant on a benefit) is those who are in paid work and in receipt of the IWTC.[1] This is consistent with the approach taken in *Atkinson*.[2]

2.1 Purpose of IWTC

8. The Crown suggests that the 'purpose' of the measure (which it says is to encourage people into work) should guide the determination of whether there is differential treatment on a prohibited ground and specifically whether the groups are in analogous situations. The Appellant submits there are two problems with such an approach. First, to do so would be to build the Crown's purported reason or justification for the differential treatment into the question of whether there is different treatment on a prohibited ground.[3] This is not consistent with the New Zealand statutory scheme. Part 1A HRA has a statutorily defined two step approach, namely (i) whether there is a limit on the right; and (ii) if so, whether there is justification for it.[4] To build the justification (reason for the discrimination) into the first step is to leave no work for the s 5 step.[5] Such an

[1] See HC decision at [103], COA vol 1, tab 6, p 114; HRRT decision at [62], COA vol 1, tab 7, p 213.
[2] *Ministry of Health v Atkinson* [2012] 3 NZLR 456 (CA) at [109]
[3] See discussion of this point in *Ministry of Health v Atkinson* at [67], [132], [136]
[4] See s 20L(2) Human Rights Act 1993 (HRA). In this way the HRA differs from article 14 of the European Convention on Human Rights and the UK's Human Rights Act 1998.
[5] *Air New Zealand v McAlister* [2010] 1 NZLR 153 (SC) at [151] and [152] per Tipping J

approach would also deprive claimants of the ability to put government to the test of whether it could have met its purpose by a less discriminatory means and whether the harm to the right was proportionate to the objective sought.

9. The second problem is that the Crown's asserted purpose of the IWTC is challenged by the Appellant as incomplete. In the Appellant's submission, the IWTC does not just have a work incentive objective but also has the objective of assisting with income adequacy so as to alleviate child poverty.[6] The Court cannot adopt only the part of a purpose that suits the Crown or a purpose that is under challenge to rule out a case at the first hurdle.

10. In essence the Crown is arguing for a test which allows it to simply assert that a measure was targeted at a particular group (defined on the basis of a prohibited ground) and thereby say the claimant group is not in a comparable or analogous situation (as they do not have the characteristics of the target group). That is a circular argument with an inevitable conclusion favourable to the Crown in every case and which defeats the purpose of the HRA. The exception where the Crown can argue the purpose of a measure allows it to be targeted at a particular group is s 19(2) NZBORA (affirmative action programmes).[7] The IWTC however, does not meet that definition.

11. The Crown says its argument aligns with the Court of Appeal's comments on Contract Board in *Atkinson*. The Appellant says they are not analogous. The Crown's asserted purpose of the IWTC is challenged by reference to a large amount of factual evidence and findings of the Tribunal and High Court.[8] In contrast, in *Atkinson* there was a dearth of factual evidence relating to Contract Board before the Tribunal and courts as none of the plaintiffs had applied for Contract Board or gave evidence about it. Hence in that case, the courts were left with a policy document without evidence as to whether it reflected the real

[6] See Appellant's submissions dated 22 April 2013 at paras 18-19. Note the Appellant agrees with the Crown that the purpose of the off benefit rule was to incentivise work – but not that this is the sole purpose of the IWTC.
[7] Section 19(2) New Zealand Bill of Rights Act 1990: Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part 2 of the Human Rights Act 1993 do not constitute discrimination.
[8] See Appellant's submissions dated 22 April 2013 at para 19

purpose of the scheme as operating in the field. For that reason, neither the High Court nor Court of Appeal was 'conclusive' in its decision on Contract Board.

2.2 All eligibility criteria must be met

12. The Appellant reiterates its submissions that the existence of another statutory eligibility criterion which the claimant group cannot meet is not fatal to the claim.[9] This is all the more so here where the other criterion the Crown points to (work hours requirement) is inextricably or inherently linked to the employment status ground. The reason the claimant group is on benefit in the first place is because they *cannot* meet the full time hours requirement – apart from a small group in a unique and atypical situation.[10] If they were meeting the work hours requirement, the vast majority would not be on benefit.[11]

13. Further, by submitting that the correct context for the comparator exercise is one where *all* statutory eligibility criteria have to be met before there can be differential treatment on a prohibited ground, the Crown is asking this Court to follow the now rejected "mirror image" comparator approach.

14. In the paragraphs below, the Appellant outlines briefly the approach to the comparison exercise taken by superior courts in the United Kingdom and Canada. The Appellant says this supports its submission that the Tribunal and High Court correctly undertook the comparator exercise and the Crown's proposed approach should not be followed.

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[9] See Appellant's submissions dated 22 April 2013 paras 30-34.

[10] In 2007 there were 1267 DPB recipients who were working 20 or more hours per week: Donald Gray, 1st SOE, COA, vol 4, tab 18, p 1150, para 45. These families mainly remain on benefit due to income security reasons i.e. they work in temporary or casualised work and have perilous job security-thereby needing a steady source of income to pay basics such as rent and food. Other reasons are poor health or undertaking training. See Donald Gray 1st SOE, COA vol 4, tab 18, p 1168-9 para 105; Donald Gray x-exam, COA vol 4, tab 18, p 1372 line 16 to p 1378 line 10

[11] Indeed, those who could work 20 hours per week would no longer be eligible for the Sickness Benefit, Invalid's Benefit or Unemployment Benefit: see Appellant's submissions dated 22 April 2013 at footnote 132. See also Michael Nutsford 1st SOE, which states the 20 and 30 hours work requirements were aligned to eligibility for the unemployment benefit: COA vol 4, tab 17, p 1046.

United Kingdom

15. Courts in the United Kingdom have frequently stated that the focus should not be on searching for an exact comparator. Rather, they follow the European Court of Human Rights approach where very few complaints are rejected because they are not in 'analagous situations.' In *AL (Serbia) v Secretary of State for the Home Department*, Baroness Hale stated that "unless there are very obvious relevant differences between the two situations, it is better to concentrate on the reasons for the difference in treatment and whether they amount to an objective and reasonable justification."[12] In *A & Ors*, Lord Bingham outlined the test as "whether the circumstances of X and Y are so similar as to call (in the mind of a rational and fair-minded person) for a positive justification for the less favourable treatment of Y in comparison with X."[13]

16. The House of Lords adopted a narrow approach to the appropriate comparator in *Lewisham London Borough Council v Malcolm*, holding that a tenant with schizophrenia who was evicted after he had sublet his flat should be compared with a person without his disability who had also sublet without permission.[14] The disability discrimination provision in the UK Equality Act 2010 (which replaced the Disability Discrimination Act 1995) has no requirement for a comparator.[15] This resulted from widespread criticism of the effect of the comparator analysis undertaken by the Court in *Malcolm*.

Canada

17. In *Withler v Canada (Attorney General)*, the Canadian Supreme Court indicated a revised approach to comparator group analysis, which retreated from its previous jurisprudence requiring a mirror image comparator. The Court explained the concerns with that approach, including that: it may mean that the

[12] *AL (Serbia) v Home Secretary* [2008] 1 WLR 1434 (HL) at 1445 per Baroness Hale. Earlier in the judgment, Baroness Hale cited research demonstrating that in less than 5% of cases had the Strasbourg court found that the persons with whom the complainant wished to compare him or herself with were not in a relevantly similar of analogous position (at 1444).
[13] *A & Ors v Secretary of State for the Home Department* [2005] 2 AC 68 (HL) at 116 per Lord Bingham, citing *R(Carson) v Secretary of State for Work and Pensions* [2003] 3 All ER 577 per Laws LJ.
[14] *London Borough of Lewisham v Malcolm* [2008] AC 1399 (HL). This decision is cited in *Air New Zealand v McAlister* at [35] to [36] (per Elias CJ and Blanchard J) and at [52] (per Tipping J).
[15] Section 15 Equality Act 2010

definition of the comparator group determines the analysis and the outcome; a focus on a precisely corresponding comparator group becomes a search for sameness rather than a search for disadvantage; it overlooks the fact that a claimant may be impacted by many interwoven grounds of discrimination and it places an unfair burden on claimants, both because finding a mirror group may be impossible and it may be difficult to decide which characteristics must be mirrored.[16]

18. The Court dealt with the question of differential treatment on a prohibited ground (where the claim was of age discrimination in pension scheme entitlements) briefly in two paragraphs:[17]

> [68]…In this case the question is whether the pension schemes at issue deny a benefit to the claimants that others receive. The answer to this question is clear in this case.
>
> [69] The Reduction Provisions reduce the supplementary death benefit payable to the surviving spouses of plan members over either 60 or 65 years of age. Surviving spouses of plan members who die before they reach the prescribed ages are not subject to the Reduction Provisions. This age-related reduction in pension legislation constitutes a distinction for the purposes of s 15(1): Law. It is obvious that a distinction based on an enumerated or analogous ground is established.

2.3 Comparison in this case

19. The Appellant says that the comparator exercise must start with a consideration of the characteristics of the group it claims is the subject of discrimination. This group comprises parents with dependent children who are reliant on an income tested benefit. The characteristics of the group they compare themselves with are those parents with dependent children who derive their income from paid work and receive the IWTC. This was the approach taken by the High Court and Tribunal.[18] The difference between the two groups is the prohibited ground of employment status. The former group are excluded from the IWTC because they are on income tested benefits. The latter group are not subject to this exclusion.

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[16] *Withler v Canada* [2011] 1 SCR 296 at 419-422.
[17] *Withler v Canada* at 424-425.
[18] See HC decision at [103], COA vol 1, tab 6, p 114; HRRT decision at [62], COA vol 1, tab 7, p 213.

20. The Appellant submits that the comparator test is only a tool to assist with the question as to whether there is differential treatment on a prohibited ground.[19] The comments of Tipping J in *McAlister* (used by the Crown to suggest a mirror group requirement) were made prior to the UK Parliament overturning the comparator approach to disability discrimination outlined in *Malcolm* (cited in *McAlister*) and prior to the Canadian Supreme Court decision in *Withler*.

2.4 Indirect discrimination

21. The Crown's response to the Appellant's submission that the criteria of being on benefit and not working 20/30 hours are inextricably/inherently linked is to say that the Appellant claims that the work hours requirement is indirectly discriminatory on a prohibited ground. It says the Appellant cannot claim this because it never challenged the work hours requirement as constituting indirect discrimination. This is a different point entirely to the jurisprudence on multiple factor eligibility criteria.

22. In relation to indirect discrimination, the Appellant says it has always acknowledged it did not plead the full time work hours requirement as indirectly discriminatory on the grounds of employment status (as it clearly is). It has never relied on the fact that the work hours requirement constitutes indirect discrimination to succeed in its arguments and does not do so here. Nevertheless, the Appellant says that the Court can take account of the indirectly discriminatory nature of the work hours requirement when considering the Crown's claim that the off-benefit rule is not differential treatment on a prohibited ground because beneficiary families cannot meet the work hours requirement.

23. Essentially the Crown proposes that a statutory eligibility criterion which the claimants do not meet, which clearly indirectly discriminates against them on

[19] In *Atkinson,* this Court commented that there had been considerable discussion overseas about the usefulness of the comparator exercise and the impact of the choice of comparator on the success of claims. It noted that the High Court in that case had treated the comparator as a helpful tool: *Ministry of Health v Atkinson* [2012] 3 NZLR 456 (CA) at [60].

employment status grounds (and as such should be justified under the HRA and NZBORA), should operate to bar their claim of direct discrimination on the same ground. That is to take a highly technical and non purposive approach to construction of the Human Rights Act. It would result in considerable unfairness in this case.

2.5 Material ingredient test

24. The Crown submits that the material factor/ingredient test outlined by the Supreme Court in *McAlister* should not apply here because it does not make sense in the case of multiple statutory criteria as no criterion can be said to be more material than any other (para 71).

25. While *McAlister* was a case involving the Employment Relations Act 2000 and a near-identical provision in Part 2 HRA, the Appellant submits the material factor/ingredient test is nonetheless appropriate to Part 1A. The Tribunal applied a "substantive reason" test in this case, which is very similar to the "substantial and operative factor" that was applied in Part 2 HRA cases prior to *McAlister*.[20] The Tribunal applied the "material factor" test in the Part 1A case of *Winther* and the High Court appears to have used this test in its decision in *Idea Services*.[21] This shows that the Tribunal and courts are easily able to apply the material factor test to the Part 1A context.

26. It may be that in cases of a challenge to one of a list of statutory criteria, each criterion will be considered a material ingredient. However in other Part 1A cases, particularly where the challenge is to policy decisions and not legislation, this test has the ability to differentiate the influence of various factors and make unlawful only what is material in the decision challenged (as it has done under Part 2 HRA).

[20] The substantial and operative factor test came from *Human Rights Commission v Eric Sides Motors* (1981) 2 NZAR 447 (EOT). It drew on overseas jurisprudence.
[21] *Winther v Housing New Zealand Corporation* [2011] NZHRRT 18; *Attorney-General v Idea Services* [2012] NZHC 3229.

3. MATERIAL DISADVANTAGE

3.1 Crown argument on material disadvantage

27. The High Court held that beneficiaries who met the work hours requirement were disadvantaged by the off-benefit rule.[22] The Crown says the Court erred in assuming that a financial difference was necessarily disadvantageous, without considering the wider context and implications for the affected group. The Crown says there are two relevant aspects to context, which negate disadvantage. First, those excluded had two forms of state assistance available to them, each with advantages and disadvantages. They could continue to receive the benefit or they could receive the IWTC. Second, the Court did not consider whether the existence of an incentive payment is disadvantageous. Persons could change their status and it was the role of government to make it easier for beneficiaries to change their employment status.

3.2 Appellant says all income tested beneficiaries disadvantaged

28. The Appellant says the High Court was wrong to reject the claim of disadvantageous treatment of all but 1267 of the 165,000 beneficiary parents because they were excluded by other factors.[23] It says all beneficiary families were disadvantaged by being excluded from a 'comparable gain'.

29. In the Appellant's submission, the context to their exclusion from a comparable gain is that beneficiary families were (and are) disproportionately represented in child poverty statistics; they received no other measure to materially address their situation; and the purposes of WFF and the IWTC included income assistance to address child poverty. The other relevant context is the status of the IWTC within the system of social security provision in New Zealand. The IWTC is a 'tier two benefit.'[24] These benefits are typically available to all low income persons whether on benefit or not. Main benefits provide a basic income

[22] HC decision at [128], COA vol 1, tab 6, p 121
[23] Appellant's submissions dated 22 April 2013 paras 29-34.
[24] See Donald Gray COA vol 4, tab 18 p 1149-1159 on the tier system and p 1368 lines 3-17 confirming IWTC and FTC are tier two benefits.

to replace income that would generally be obtained through paid employment and are subject to income tax.[25] CPAG's challenge cannot be deflected by a comparison of how much state assistance each group is receiving (as the Crown argued in its pleadings).[26]

3.3 Choice of two forms of state assistance

30. The Respondent submits the 1,267 sole parents who meet the work hours requirement are not disadvantaged by missing out on the weekly IWTC of $60 (or more) because they have chosen to stay on benefit and must have concluded the advantages outweigh the disadvantages of doing so.

31. The evidence on this point was that caregivers working 20 hours who stay on benefit do so primarily to maintain security and certainty of income for the family in a situation where employment is precarious.[27] Parent beneficiaries in this category tend to be in casualised temporary part time employment with fluctuating work hours each week. Others may have fragile family situations such as poor and unstable health and/or caring responsibilities for a dependent child who has a medical condition and may need to be hospitalised at short notice or cared for at home.[28]

32. The Appellant submits this context only serves to highlight the disadvantage these caregivers experience by being denied $60 IWTC each week. Even the Crown evidence accepted it was a 'constrained choice' and no choice at all for those with a child in hospital.[29] With respect, it is difficult to see how these options could ever be characterised as real choices and why the family should be disadvantaged by choosing income security.

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[25] Donald Gray 1st SOE paras 24 and 35, COA, vol 4, tab 18, p 1144 and 1146
[26] COA vol 1, tab 5, p 33, para 6
[27] See Donald Gray 1st SOE, COA vol 4, tab 18, p 1168-9 para 105; Donald Gray x-exam, COA vol 4, tab 18, p 1372 line 16 to p 1378 line 10. Dr St John 1st SOE, COA vol 3, tab 15, p 571 para 94-95, citing Future Directions paper relating to barriers to work in general.

[28] See Prof Innes Asher COA vol 2, tab 9, p 305 para 86-91. See also Donald Gray x-exam COA vol 4, tab 18, p 1337 line 11. Another reason was said to be wanting to avoid the risk of accumulating debt to the IRD from IWTC overpayments if end of year calculations show that the hours worked were not enough to qualify for the IWTC. In that situation the IRD establishes an overpayment which the parent beneficiary then has to repay: see Donald Gray COA vol 4, tab 18, p 1375 lines 1-13.
[29] See Donald Gray x-exam, COA vol 4, tab 18, p 1378 lines 3-10.

33. The fact that making either choice is unlikely to be a benefit to the taxpayer is also relevant. Parents working 20 hours per week who do move 'off benefit' are in all likelihood moving onto other forms of state subsidy, which may even be more expensive overall for the State. As well as being entitled to the IWTC, the family is also likely to be eligible for the Minimum Family Tax Credit (MFTC).[30] There is often no financial gain to the State of a parent being off benefit and being in receipt of the IWTC and MFTC.[31] The suggestion they have more of an attachment to the workforce from being 'off benefit' is unreal.[32] The parent will be aware how much of their income is being supplemented by the State. Unfortunately it appears the only real benefit in this situation is to the public portrayal of benefit numbers, a matter that should not concern this court.

34. In conclusion the Appellant says that the parent who considers they cannot risk moving off benefit (for reasons likely to be beyond their control) and who is eligible in all other respects, is being materially disadvantaged by the denial of the $60 IWTC.

3.4 Crown's argument that incentive payment not a material disadvantage

35. The Crown submits the Court did not consider whether the existence of an incentive payment is disadvantageous. In the Crown's submission, individuals can change their status and it is the role of government to make it easier for beneficiaries to change their employment status.

36. In response, the Appellant submits that the disadvantage is not the existence of an incentive payment per se but the characteristics of the incentive payment (i.e. that it also serves as a poverty alleviation measure) and that a group living in poverty is excluded from its receipt on the basis of a prohibited ground. It is the incentive itself that is under scrutiny and again the Crown's submission seeks to avoid that scrutiny under section 5 by this argument.

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[30] See Michael Nutsford 1st SOE, COA vol 4, tab 17, p 1049 paras 39-43 (note the MFTC was called the FTC at that time).
[31] See Susan St John 2nd SOE, COA vol 3, tab 15, p 603, para 29.
[32] See Susan St John 2nd SOE, COA vol 3, tab 15, p 603, paras 33-36.

37. The Appellant accepts government has a role to assist persons change their work status where they can, just as it has a role to provide an adequate minimum standard of living. That latter role is underscored by human rights treaty obligations. Hence measures taken to assist persons to change their employment status should not impair the right of persons on benefit more than is reasonably necessary to achieve that goal. This is a section 5 issue, not a section 19 issue.

38. The Appellant endorses the words of the Tribunal in relation to choice to remain on benefit.[33] These words were made in relation to the whole group of beneficiaries, but are just as apt in relation to the small group. The evidence shows that the substantial majority of beneficiary parents could not choose to take up the incentive payment and this was understood to be the case prior to implementation of the IWTC.[34] There is also evidence as to the many barriers faced by beneficiaries, including lack of suitable jobs (particularly in recessionary times), lack of transport and unavailability of childcare to name a few.[35] The fact that so many beneficiary families are living in such constrained living situations surely attest to this lack of choice.

39. The fact a beneficiary may not be a beneficiary for life does not reduce the material disadvantage to them while they are on benefit. The evidence was that the majority of DPB beneficiaries are on benefit for at least a year – and many for longer.[36] That is a long time in a child's life to live in significantly or severely constrained economic circumstances. Childhood poverty negatively impacts on the child for the rest of their life and also on society.[37] Case law also recognises that it is not easy to change beneficiary status, See *Falkiner et al v Director, Income Maintenance Branch, Ministry of Community and Social Services*, a case about discrimination against solo mothers on benefit, where Laskin J said:

[33] HRRT decision at [187], COA vol 1, tab 7, p 221.
[34] See Appellant's submissions dated 22 April 2013 at footnote 62
[35] Suzanne Mackwell, x-exam, COA vol 5, tab 19, p 927 lines 7-20
[36] Donald Gray 1st SOE, COA vol 4, tab 18, p 1173.
[37] See Appellant's submissions dated 22 April 2013 at para 9

> Receipt of social assistance is a characteristic that is difficult to change, at least for a significant period of time. It fits the expansive and flexible concept of immutability developed in the cases.[38]

4. CONCLUSION

40. In conclusion the Appellant says the IWTC constitutes differential treatment on a prohibited between persons in analogous circumstances and all those who are subject to the exclusion suffer material disadvantage as a result. The real issue in this case is whether the Government has demonstrated it is justified in excluding beneficiary parents from the IWTC. In the Appellant's submission, it has not.

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Counsel for the Appellant
6 May 2013

[38] *Falkiner et al v Director, Income Maintenance Branch, Ministry of Community and Social Services* (2002) 212 DLR (4th) 633 at 664.