CHILD POVERTY ACTION GROUP

CPAG v Attorney-General:

Comment on the judgment, 16th December 2008

Introduction

In its decision released on the 16th December 2008, the Human Rights Review Tribunal found Child Poverty Action Group (CPAG) had established that section MD 8(a) of the Income Tax Act 2007 gives rise to *prima facie* discrimination by reason of employment status. Section MD 8(a) specifies that in order to be eligible for the In-Work Tax Credit (IWTC) – the centre piece of the Working for Families (WFF) package – the person receiving it, and their spouse, civil union partner, or de facto partner must not be receiving an income-tested benefit. In a long and detailed decision the Tribunal did find, however, that the discrimination is "of a kind that is justified in a free and democratic society."

The finding of discrimination was a clear victory; the finding that it could be justified was disappointing and, in CPAG's view, incorrect. The finding of justification rested on the premise that families in which income is derived from work generally do better than those in which the main source of income is a benefit. This was a key plank of the Crown's argument, and was accepted as fact by the Tribunal. Therefore, they argued, getting families into work was an acceptable policy goal. Furthermore, the IWTC was assumed to perform this role despite the lack of substantial empirical evidence that it is effective, or that other measures that do not discriminate against children in families where income is derived from a benefit, might be more effective. CPAG considers that the Tribunal overlooked the core issue of the case, which is that the discrimination operates to substantially disadvantage *the children* in the families who miss out on the IWTC.

The legal test

Much of New Zealand's human rights law comes from Canada, which has a Charter of Rights and Freedoms. Thus, the legal test for CPAG's case comes from the Canadian *Oakes*[1] case, via *R v Hansen*[2]. Below, the test is outlined step-by-step, along with the conclusion the Tribunal came to in each part. This briefing concludes with some brief comments on the case.

Step 1: Does the impugned act or omission treat two comparable groups differently by reason of one of the prohibited grounds of discrimination?

The Tribunal considered this at length. Looking at the "comparator" group (ie what group should those claiming discrimination be compared against?), the Tribunal rejected the Crown's argument that the only relevant group was the approximately 1,200 families who were working and collecting a part-benefit. It chose instead to look at beneficiaries to whom the "off-benefit" rule applied, that is to families who do not get the IWTC because they receive an income-tested benefit.[3]

In order to show *prima facie* discrimination an element of disadvantage needs to be established. The Crown argued that discrimination could not be established unless the disadvantage suffered is shown to perpetuate prejudice or stereotyping, but this was rejected.[4] CPAG argued that the "substantive reason" for the differentiation in treatment is employment status. The Tribunal traversed all the arguments thoroughly, and found CPAG had proved discrimination.

The Tribunal briefly considered the "odd question" about whether or not the tax credits are child-related. In fact, this "odd question" goes to the very heart of the case, with CPAG arguing that using the child-related IWTC as a work incentive is inefficient, ineffective, and gives rise to the discrimination alleged. For its part, the Crown argued that the IWTC was not child-related in any way, and that it be considered only in connection to the "make work pay" element of the WFF package. The Tribunal disagreed, finding the Crown's argument "had no basis whatsoever" on the evidence heard.

Step 2: What is the disadvantage?

This leg of the test proved to be less straight-forward, in part because the Tribunal chose to accept that the "effect of the WFF package should be considered in the

---

[1] *R v Oakes* [1986] 1 SCR 103.
[2] *R v Hansen* [2007] 3 NZLR 1.
[3] In so doing it accepted the CPAG's argument that "a search for precise exactness [of comparator]…carries a risk of injustice", and took the "broader approach" of *R v Secretary of State for Work and Pensions, ex parte Carson* [2005] UKIIL 37.
[4] Para 154-158.

round, taking account of its context and components." Because WFF included increases in other supports including the Accommodation Supplement and Family Support, then the argument that families who did not receive the IWTC are disadvantaged *at least* by the amount of the IWTC was not accepted.

Arguing still that disadvantage necessarily entails the perpetuation of prejudice, the Crown submitted this Orwellian doublespeak: "Because unemployment is readily changeable…it is not a status that is inherent to, or highly personal to the individual…it does not perpetuate prejudice or stereotyping to enable families to move off benefit and into work. Quite the reverse…" They also argued, somewhat implausibly, that beneficiaries already get more in government assistance than everyone else so there can be no disadvantage.

The Tribunal was not impressed by the lack of cohesion in the Crown's argument. It was, moreover, "very troubled by the argument that anyone who is ineligible for the IWTC could simply chose [sic] to go into a job and so become eligible…We accept there must be a number amongst the cohort of those who receive income-tested benefits who could work if they wanted to, but effectively choose not to. Nonetheless, we think it is regrettable that the Crown sought to argue that all recipients of income-tested benefits fall into that same category…Overall, we are left with a real concern that this type of generalisation as it was put up on behalf of the Crown…represents exactly the kind of stereotyping, prejudice and disadvantage that the anti-discrimination standard NZBORA is intended to protect against."

The Tribunal noted: "an integral part of the package [was] that those on an income-tested benefit should not keep pace with those in work," with 60% of the spending in the WFF package not being available for beneficiary families. The Tribunal shared CPAG's concern about the quality of the analysis of the WFF package done leading up to its release: "Who are these children [that will not keep pace] and why were the generous work incentives…not expected to move or incentivise their caregivers/parents into work?" No clear answer to this was given during the hearing.

The Tribunal concluded that the WFF package treats families in receipt of an income-tested benefit less favourably than it does families in work, and these families are disadvantaged in a **"real and substantive way."**

With regard to ACC, the Tribunal agreed that the tax credit involved discrimination on the grounds of employment status. They also observed "even the government did not consider that it [the off benefit rule] was an appropriate rule to continue because it was removed after 2006." However, due to lack of evidence, they declined to rule on it.

Step 3: Can the impugned act or omission nonetheless be justified as a reasonable limit on the right to be free from discrimination in terms of s5 NZBORA?

The Tribunal discussed whether they even could make a ruling. Courts and Tribunals cannot substitute their views for that of the legislature, so the purposes of the WFF legislation stand as given. The tension is between policy goals determined by elected members of Parliament and common law made by unelected judges. The Tribunal cited *Carson*: "In the field of what may be called macro-economic policy…absent a florid violation by government of established legal principles" the constraining role of the courts is "modest". They did not give up all ground, though: "We think it would be an inadequate discharge of our responsibilities to conclude…the legislature has unconstrained discretion to infringe the freedom from discrimination" enshrined in NZBORA.

The Crown invited the Tribunal to consider employment status as "changeable", and proposed that therefore a "less weighty" justification was required. The Tribunal did "not accept that there is anything like an hierarchy amongst the grounds [for discrimination] within s.21 HRA."

Ultimately, what decided the question of justification was that the Tribunal found the WFF package had several purposes, namely:

- Make work pay;
- Ensure income adequacy;
- Achieve a social assistance system that supports people into work.

Given these aims, a measure such as the IWTC that was designed to create a gap between those in work and those on benefits could be justified.

Was this purpose sufficiently important to justify the curtailment of freedom from discrimination on the grounds of employment status?

The judgment notes CPAG's arguments regarding other objectives besides making work pay, such as the alleviation of poverty "and so on." In coming to its decision, the Tribunal instead chose a "somewhat more abstract" approach. "'Discrimination' means *nothing more* [emphasis added] than disadvantageous differentiation…", and the Tribunal had "no doubt that the purposes of WFF justify some intrusion into the right to be free from discrimination on grounds of employment status. If it were otherwise it is hard to see how the government could make effective policies for social spending in this area. The evidence makes it clear that being in work has long-term benefits for families, not only in financial terms but also in terms of health outcomes, social connectedness and role modelling…"[5] Thus, the Crown's evidence

[5] Para 233.

about the benefits of work was accepted, and the deleterious outcomes for children whose parents were not in work were put to one side.

Step 4: Was the off benefit rule of eligibility for the IWTC rationally connected with its purposes?

In an odd twist, the Tribunal made a distinction between the WFF as it was first endorsed by Cabinet in 2004, and the 2005 pre-election changes, which raised the threshold and reduced the rate of abatement. It is these reduced abatement rates that mean families on high incomes may in some cases still be eligible for the IWTC.

The Tribunal canvassed CPAG's arguments, including the absence of a rational connection between the goal of moving single parents off a benefit and into employment, and the fact that the IWTC does not address issues such as barriers to employment. Unfortunately, the Tribunal did not "see these arguments about the anticipated effectiveness of the challenged tax credits; the availability of other avenues to achieve a gap between earned and benefit income; and/or as to the post-implementation experiences as really addressing the issue of rational connection. Perhaps in another case, it might be demonstrated that the likely effect of a policy…ought to be regarded as dubious, and the rationality of the connection between policy and result doubtful. But, at least in respect of the WFF package *as it was adopted in 2004* [emphasis added], this is not a case of this kind. A tax credit which depends on being off benefit is clearly connected by logic and reason to the idea of creating or enhancing a gap between earned income an benefit income so as to encourage people to work…"[6]

The Tribunal notes "there is a qualification to the conclusion", and that is the 2005 changes (ie WFF in its current form). "When Cabinet first approved the tax credits in April 2004 it envisaged that the purposes of the scheme would be achieved by limiting eligibility to families with income levels at which the extra money would make a difference – both in terms of encouraging work, and also to alleviate poverty. The 2005 changes are much less easy to explain in terms of those objectives…" Indeed, the Tribunal tartly observed the 2005 changes "had more to do with politics than policy…We cannot accept that there is any logical connection between the objectives of the WFF package, and a scheme which pays cash credits as extra social assistance to (for example) a three-child family in which the earner(s) have income of over $100,000 per annum. We have not been persuaded by the Crown that the payment of the IWTC to families in the mid to high income brackets…is rationally connected to the objectives of the WFF package."

However, "the 2005 changes…were not specifically identified for a remedy in the statement of claim…[this creates] an obstacle to our dealing with the effect of the

[6] Para 241

2005 changes as a separate issue." For its part CPAG considers that it is the scheme enacted in the 2007 Act which is in issue. It is that scheme and nothing less which has to be justified, being the package that operates at present, and the package the Tribunal found could not be justified. If the scheme is considered in its entirety, the current package is plainly difficult to justify; the Government's original objectives count for nought if the legislation in force does not reflect those objectives.

Step 5: Does the off benefit eligibility impair the right of freedom from discrimination on the grounds of employment status no more than is reasonably necessary for sufficient achievement of its purposes?

The Tribunal considered all CPAG's arguments outlining why the IWTC was not "reasonably necessary." In the end the "purposes to be achieved" by the WFF package won the argument: "The 'make work pay' objective is a shorthand way of saying that incentives – specifically financial incentives – should be put in place to encourage people into paid employment. At a most basic level we find it difficult to see how that objective could ever be attained without putting some distance…between the income available from benefits on the one hand, and financial rewards for being in work on the other. The business of creating or enhancing that gap was reasonably necessary for sufficient attainment of the legislative purposes…The off benefit rule…does no more than to put the intended gap into place."[7]

On the question of whether the off benefit rule was "in due proportion" to the importance of the objectives, the Tribunal noted that where the balance should be struck between "no government spending is directed towards those who are out of work, and social spending is directed only to those who are in work…is inescapably a political decision." This somewhat artificial continuum served to assist the Tribunal to justify its conclusion. It acknowledged CPAG's argument that the focus should be the deleterious effects for children in families that do not qualify for the IWTC, and carefully noted that in 2006/07 187,870 families received the IWTC at a cost of $480.3 million: "It is not clear how many of these families really needed the payment as an incentive to stay in work, but it is clear that a significant proportion of the spending went to families outside the stated objectives of the WFF package." For example in the 2006/07 year some $229 million, or about 47% of all that was paid out as IWTC, went to families with incomes over $45,000, or "families that did not really need it." They noted with concern that "the decision to establish what is now the IWTC was not informed as well as it might have been by data describing the potential adverse effects of the package, particularly for the children of families who would not be eligible…"[8]

---

[7] Para 256-7.
[8] Para 269.

It went on: “If it were not for the fact that the IWTC is related not only to employment, but also to children, we would have no hesitation in concluding the social advantages of the package outweigh any damage done to the right to the freedom from discrimination on grounds of employment.” However, in a judicial sleight of hand, the disadvantage to children was glossed over in favour of the supposed benefits to wider society: “Our overall conclusion, in respect of the WFF package as it was adopted in 2004, is that the practical benefits to society outweigh the damage that was done to the right to freedom from discrimination on grounds of employment.” There was also a clear reluctance to take on the role of Parliament as having the ultimate power to tax and spend: “This is not a topic on which there are sufficient grounds for us to second guess the complex social policy assessment that was undertaken by the Government leading up to the decisions made by Cabinet in April 2004…At the same time we have not been persuaded that the changes to the abatement threshold and rates in 2005 were rationally connected to the purposes of WFF…we also have significant reservations as to whether the allocation of so much funding to families in mid to high income brackets *under the guise of funding for social assistance* [emphasis in original] can be said to have been ‘in due proportion’ to the objectives of the WFF package.”

Comments and conclusion

The Tribunal clearly found this case troubling. The decision is thoughtful and careful, and reflects due consideration of all the evidence presented. The finding that the IWTC is discriminatory is significant and heartening. Getting a finding that the discrimination was unjustified was always going to be difficult, especially given the New Zealand courts’ traditional deference to Parliament. This makes the conclusions in respect of the 2005 changes all the more startling. Unfortunately, the finding that the IWTC can be justified presents a danger that the state will argue in the future that discrimination against beneficiaries is justified, possibly on grounds even more spurious than those in this case.

One issue that did trouble the Tribunal was the lack of analysis of the legislation. Not only was it troubled by the lack of information on the impact of WFF on children who missed out, they were also unhappy about the lack of consideration about whether WFF complied with New Zealand’s obligations under the UN Convention of the Rights of the Child (UNCROC). It noted:[9] “We do not think it unfair to say that this dimension [consideration of UNCROC] of the WFF package does not appear to have received any significant consideration at all.” Regarding the s.7 report,[10] the Tribunal found: “the only topic that is addressed in the Attorney-General’s report related to a potential for discrimination on the grounds of sexual orientation…We find this a little

[9] Para 74-79.
[10] Section 7 of the Bill of Rights Act 1990 specifies that the Attorney-General must report to Parliament where a Bill appears to be inconsistent with the Act.

surprising: as noted, the underlying human-rights related complaint had been made by the plaintiff as early as October 2002…We can only say that we think it unfortunate that the issues we have had to deal with are not mentioned in the s.7 report at all."

Arguably, the essence of the discrimination alleged was not sufficiently emphasised. This may have occurred because of the Tribunal's concern to adhere to the legal test set out in *Hansen* rather than a lack of care by the Tribunal. The discrimination is discrimination against children by reason *of their parent's* employment status. The comparison therefore must be between children of parents who are on a benefit and the children of parents who are in work, in particular the children of parents who are, for any reason, unable to work. However, it is unclear whether the Human Rights Act 1993 is sufficiently liberal to cover discrimination against children by reason of *their parents'* employment status. The Tribunal's focus on working families and families on a benefit not only obscures the real discrimination, it allowed the discussion to become sidetracked on points which are not relevant rather than honing in on whether discrimination against children could be justified.

Whatever the stated purposes of the IWTC, the effect has been to substantially disadvantage children living in beneficiary households that did not receive it. In practice this means children live in households where food runs out; where children rely on luck or folk remedies to remain healthy, or live four or five to a bedroom to keep accommodation costs down. The fallacy that a monetary incentive alone would suffice to enable families to move off a benefit, and into work, is demonstrated by the government's own figures suggesting that only about 2% of sole parent families would do so. Of those that did, figures show many had a pre-existing attachment to the workforce. Now that the so-called new economy has been unmasked as the old boom and bust economy, the fundamental injustice of the IWTC will become even more apparent. The justification for the discrimination found, namely that the outcomes for families in work are generally better than those for families on benefit income, depends for its success on an economy that creates jobs. In an economy losing jobs, it seems like a cruel joke.