Decision No. 31/08

Reference No. HRRT 41/05

BETWEEN **CHILD POVERTY ACTION GROUP INCORPORATED**

Plaintiff

AND **THE ATTORNEY-GENERAL**

Defendant

BEFORE THE HUMAN RIGHTS REVIEW TRIBUNAL

Mr R D C Hindle Chairperson
Dr A D Trlin Member
Ms P J Davies Member

HEARING: 3-6, 9-12, 16-19, 23 & 24 June 2008; 14-18 July 2008 (Wellington)

APPEARANCES:

Ms C A Rodgers & Ms J M Ryan for plaintiff
Ms C Gwyn, Ms J Foster & Mr H McLachlan for defendant

DATE OF DECISION: 16 December 2008

DECISION

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A PRELIMINARY

[1] The plaintiff claims that sections MD 8(a) and MD 9(4) of the Income Tax Act 2007[1] are inconsistent with the right to freedom from discrimination as affirmed by s.19 of the New Zealand Bill of Rights Act 1990.[2] The defendant[3] rejects the allegation, saying that the legislation does not discriminate in any sense that engages NZBORA, and that in any event any discrimination that might be discerned is of a kind that is justified under s.5 NZBORA (that is, it falls within a reasonable limit on the right to freedom from discrimination as prescribed by law and which is demonstrably justified in a free and democratic society).

[2] Sections MD 8(a) and MD 9 of the ITA 07 govern eligibility for certain tax credits which form part of what is known as the 'Working For Families'[4] tax package. By s.MD 8(a) families which would otherwise be eligible for the tax credits are rendered ineligible where the family member who might claim the credit (or his or her spouse, civil union partner or de facto partner) receives an income-tested benefit from the Government. By s. MD 9 (4) of ITA 07 families which would otherwise be eligible for the tax credits are by implication rendered ineligible where the family member who might claim the credit (or his or her spouse, civil union partner or de facto partner) receives weekly compensation under the Injury Prevention, Rehabilitation, and Compensation Act 2001[5] in respect of an injury suffered before 2006.

[3] These two sections are the legislative tip of a very large iceberg of policy work and other initiatives from which they have emerged. The nature of this case is such that it is necessary to describe and discuss the background in at least enough detail to provide a basis for the reasoning that follows. The only relief that the plaintiff seeks, however, is a declaration under s.92J(2) of the Human Rights Act 1993[6] that these two provisions (and/or their predecessor provisions in

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[1] Referred to in this decision as 'the ITA 07'. The claim was expressed in terms of the predecessor provisions of the Income Tax Act 2004 ('the ITA 04') namely s.KD 2AAA(1)(e) and s.KD 2AAA(8) but wherever possible we use the language of the statute in force at the time of writing this decision, i.e., the ITA 07.

[2] 'NZBORA'.

[3] Whom we will refer to as 'the Crown'.

[4] 'WFF'. The WFF package was the subject of a Cabinet Paper titled *"Future Directions: Working For Families"* that was considered by Cabinet on 7 April 2004. We refer to it in greater detail below.

[5] We will refer to this Act and its predecessors as 'the ACC legislation'.

[6] 'The HRA'. Note that, since the plaintiff is challenging an enactment, a declaration of that kind is the only form of relief available from this Tribunal: s.92J(1) HRA.

the Income Tax Act 2004[7]) are inconsistent with the right to freedom from discrimination affirmed by s.19 NZBORA.

[4] There has been a preliminary issue about the plaintiff's standing to bring the case. That was resolved in the plaintiff's favour by the High Court in *Attorney-General v Human Rights Review Tribunal and Child Poverty Action Group* (2006) 18 PRNZ 295.[8] By the time the substantive hearing began the Crown had accepted that the Tribunal has the power to make the declaration sought if persuaded to do so.

[5] We have reached the following broad conclusions:

[a] The plaintiff has established that s. MD 8(a) of the ITA 07 gives rise to *prima facie* discrimination by reason of employment status;

[b] It is, however, 'discrimination' of a kind that is justified in a free and democratic society;[9]

[c] On the evidence that we heard, there is no sufficient basis for a finding that s. MD 9(4) of ITA 07 amounts to *prima facie* discrimination by reason of employment status, but in any event we consider that the provision is of a kind that is justified in a free and democratic society;

[d] It follows that in our assessment the legislation we have been asked to consider is not inconsistent with the right to freedom from discrimination affirmed by s.19 NZBORA;

[e] No breach of Part 1A of the HRA has been established;

[f] The plaintiff's claim for a declaration under s.92J of the HRA must be declined;

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[7] 'The ITA 04'.

[8] The Tribunal's decision on the issue is *Child Poverty Action Group Inc v Attorney-General* (2005) 7 PRNZ 939.

[9] However we have significant concerns about the decision in 2005 to make the WFF tax credits available to families with incomes in the mid to high income range. We deal with the topic in detail below.

[g] These outcomes are the same whether one is considering the challenged provisions of the ITA 07 or the corresponding provisions in the earlier ITA 04.

[6] Our reasons for these conclusions follow.

B CONTEXT

Introduction

[7] Discrimination is an elusive concept.[10] If one thing is clear, however, it is that the assessment of discrimination in any given case needs take account of the relevant context.[11] That must be particularly true of a case in which issues of justification under s.5 of NZBORA have to be decided. Furthermore, as was noted by the Tribunal in *Howard v Attorney-General*[12], ultimately a case of the present kind under Part 1A HRA is not about statutory interpretation. Our task is to consider and make decisions about the policies that lie behind the specific legislative provisions that are in issue.[13]

[8] We will identify and discuss the specific legislative provisions that are challenged by the plaintiff in the next section of this decision. We begin, however, by setting the context.

Income adequacy and making work pay

[9] Broadly speaking, this case concerns the provision of tax credits for taxpayers who have a dependent child, or dependent children. We are asked to consider the difference of treatment between that group of people, as against a group of people who also have a dependent child or dependent children but who are not eligible for the tax credits because they receive their main income by way of a benefit paid by the Government. As we discuss below, there are significant differences between the parties as to exactly which groups ought to be compared, and as to whether or to what extent any differences of treatment can properly be characterised as being 'child-related'. There are other issues

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[10] One need not go beyond the differing expressions of opinion and emphasis in the various judgments in *Quilter v Attorney-General* [1998] 1 NZLR 523 to illustrate the point. Also compare (for example) Rishworth et al, *The New Zealand Bill of Rights* (OUP, 2003) at pp. 375 to 376 with Andrew Butler & Petra Butler, *The New Zealand Bill of Rights – A Commentary* (LexisNexis, 2005) at para 17.9.40.

[11] Many references might be given, but the point is well made by Thomas J in *Quilter* at p.532: " ... *[b]y its very nature discrimination must have a context and it is that context that will determine whether or not a distinction or apparent disadvantage is prohibited discrimination.*" Also see Keith J at p. 557: "*... the prohibition on discrimination will often have to take careful account of the context and competing principles and interests.*"

[12] [2008] NZHRRT 10, at para's [33] to [35]. Note that Tribunal decisions since 2002 can be accessed at www.nzlii.org/nz/cases/NZHRRT/.

[13] See *Attorney-General v Human Rights Review Tribunal & Child Poverty Action Group* (2006) 18 PRNZ 495 at para's [64] and [65].

besides. Nonetheless, the case takes us into the general area of the initiatives taken by government to support those who have the care of children and to address poverty.

[10] It is not disputed that the Government has an interest in, and a responsibility for, the welfare of children in New Zealand. It is a matter of general concern that, even in the year 2008, there are still pockets of hardship[14] within the community, and that significant numbers of children continue to suffer from the consequences of poverty.[15]

[11] One obvious method of providing support to alleviate these hardships is in financial form – for example by direct cash payments, tax credits, subsidies for child-related costs, and so on. It is well established, however, that families in which income is derived by an adult or adults who are in work generally do better than those where the main source of income is a government benefit. Having people in work is also good for society generally. It is common ground in this case that the Government has powerful and legitimate reasons to want to encourage citizens to obtain, and retain, paid employment.

[12] These two approaches in the effort to ameliorate poverty and ensure adequate living standards for all (especially for children) do not always fit together easily.[16] The more government assistance that is available to families in the form of paid benefits or other cash support, the less incentive there is for those who would

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[14] The WFF Cabinet Paper, see note 51 below; *New Zealand Living Standards 2004*; *New Zealand Families Today* – Briefing for the Families Commission, Ministry of Social Development (July 2004); *Child Poverty in Rich Countries 2005,* UNICEF Innocenti Research Centre (2005); Craig, Jackson et al, NZCYES Steering Committee, *Monitoring the Health of New Zealand Children and Young People - Indicator Handbook,* Paediatric Society of New Zealand (2007); *The Social Report – Indicators of Social Wellbeing in New Zealand,* Ministry of Social Development and Employment (2006 & 2007 Reports); *Pockets of Significant Hardship and Poverty,* Centre for Social Research and Evaluation, Ministry of Social Development (2007); *What Does It Profit Us? A State of the Nation Report from the Salvation Army,* Social Policy and Parliamentary Unit (2008).

[15] A component of the evidence called by the plaintiff went to demonstrate these points, to give weight to the concerns about child poverty, and to illustrate the consequences of poverty for children in terms of heath and otherwise. We mean no disrespect to the relevant witnesses, nor do we wish to suggest that the problems that were described are not of grave concern. However, as the Crown submitted, evidence given by (for example) Professors Poulton, Asher and Blakely on these topics was not in dispute, and we do not need to deal with it in any detail.

[16] One report referred to by the OECD experts referred to at para [15] below put the dilemma in these terms: *"...the two main ways for a government to help people with low incomes – providing them with support directly and encouraging them to earn more themselves – are in head-on conflict with each other. How best to deal with this conflict has long been one of the central questions facing academic economists and economic policy makers."* Adam, Brewer and Sheppard, *The poverty trade-off: Work*

likely achieve work at the lower end of the income scale to go to work. For them, the difference between what they might earn from working, and what would be paid by the Government by way of benefits if they do not work, can come to operate as a reason not to look for employment, or even to leave employment.

[13] As a result there is a balance to be achieved between direct financial assistance (income adequacy) on the one hand and, on the other, the need to maintain an appropriate gap between benefit income and paid work, so that there are effective incentives to work (i.e., 'to make work pay').

[14] The task of setting and adjusting this balance from time to time is amongst the core responsibilities of any government.

The international setting

[15] New Zealand is not alone in dealing with these issues. During the hearing we had the benefit of evidence given by Mr Mark Pearson, who leads the Social Policy Division at the Organisation for Economic Co-operation and Development, and Dr Herwig Immervoll, who is the head of the Employment-Oriented Social Policies unit of the OECD Social Policy Division.[17] Their evidence surveyed the history and experience of in-work benefit ('IWB') schemes in other OECD countries, and gave some information as to the effectiveness of policies which seek to enhance employment opportunities for groups at the margins of the labour market – typically those with little work experience and/or low skills – while at the same time maintaining socially acceptable wage rates and income distributions.

[16] As the OECD experts observed, the challenge for policy is not one of choosing between the alternative strategies of providing direct financial support or encouraging people to earn more for themselves. It is about finding an optimum combination of approaches.

[17] Amongst the conclusions offered by the OECD experts were these:

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incentives and income redistribution in Britain, Policy Press and Joseph Rowntree Foundation, London.

[a] The appeal of IWB policies is that they can reduce poverty ***and*** increase employment (i.e., they offer improvements in both the equity and the efficiency of economies);

[b] Interest in IWB policies amongst social and employment ministers around the developed world *"... has gone from polite but slightly suspicious curiosity to urgent consideration."* 15 OECD countries now have some kind of IWB scheme;

[c] None of the countries considered by the OECD experts have very low child poverty rates without having both a strong benefit system, and a strong jobs focus;

[d] International evidence is that IWB policies are effective in raising the employment rate of the target group;

[e] International evidence is that IWB policies are effective in reducing poverty.

[18] The OECD experts stated:

> *" ... we would like to stress that we do not believe IWB policies to be some sort of panacea for all social and labour market problems. The international evidence does not suggest that policies to make work pay 'solve' the problems of low employment and low wages of those with low skills. IWB policies have to be seen as one element of a comprehensive strategy to tackle poverty and exclusion. But we do think that any policy that has empirical evidence supporting claims that, in certain circumstances, it could promote both efficiency and equity by fostering employment and decent levels of family income deserves to be considered in countries facing such problems. New Zealand is such a country. If it did not already have an IWB policy, it is certain that the OECD would recommend that it consider introducing one."*

[19] The plaintiff has no objection to any policy that seeks to support children by payments or provision of other forms of financial support to those who are

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Mr Pearson and Dr Immervoll's evidence was given as a joint statement, and so we refer to them as

responsible for their care, as long as the payments and/or support are available to all irrespective of the work status of the adults. Nor does the plaintiff have any objection in principle to policies that seek to maintain a gap between what is available from benefit income, and what can be achieved from paid work either, as long as the policies are applied to all.[18] The kernel of the plaintiff's concerns relates to the way in which the challenged legislative provisions connect the objective of creating or maintaining a gap between benefit income and paid work, with children. The discrimination arises (so the plaintiff contends) because eligibility for significant tax credits has been made to depend on the work status of the income earners in *families*; which, by definition, means where there are children to be cared for. Families whose main income is from a benefit[19] are ineligible for the substantial tax credits that are available to families who are in work.

[20] Of the 15 OECD countries in which an IWB scheme has been introduced, only 6 (Austria, Belgium, Ireland, South Korea, the Netherlands and the Slovak Republic) have schemes that share this feature with the scheme that has been adopted in New Zealand. We deal with the reasons for 'targeting' IWB schemes at working families below, but we note here that the OECD experts were not aware of any challenge in any other country similar to that now made by the plaintiff in this case. Nonetheless, the history of IWB schemes elsewhere suggests at least a possibility of some sensitivity to the kind of concerns now raised by the plaintiff in this case. In the United Kingdom, for example, a Family Income Supplement was introduced in 1970. It was designed to mitigate the effects of a means-tested minimum income guarantee that was in place. In 1986 it was replaced by a new in-work credit called the Family Credit. After the Labour Government took power in 1997 the payment was changed to become a tax credit. The work-related element of the credit (called the Working Tax Credit) does not depend – at least, not directly – on the number of children the taxpayer has care of. Instead the child support element of the credit was split out to become the Child Tax Credit. Eligibility for that tax credit does not depend on the taxpayer being in work.

'the OECD experts'

[18] We are not suggesting that the plaintiff would agree that the importance of 'making work pay' justifies leaving any children in poverty.

[19] As well as some whose income is by way of weekly compensation under the ACC legislation.

[21] Another dimension of the general background relates to the international obligations that New Zealand has undertaken, and which informs policy making in this context.[20]

[22] Throughout the period leading up to April 2004 New Zealand was, of course, party to the United Nations Convention on the Rights of the Child.[21] A Report was issued by the UN Committee on the Rights of the Child in October 2003 in relation to New Zealand's second periodic report under that Convention. Amongst other things the UN Committee expressed concern that, despite the persistence of poverty, New Zealand had not undertaken a comprehensive study of the impact of economic reform policies on children. The UN Committee recommended that New Zealand should:

> *" ... pay particular attention to the full implementation of article 4 of the Convention by prioritizing budgetary allocations to ensure implementation of the economic, social and cultural rights of children, in particular those belonging to economically disadvantaged groups, ' to the maximum extent of available resources' ..."*[22]

[23] The UN Committee also noted with concern that a significant proportion of children within New Zealand were living in poverty, and that single-parent families headed by women, as well as Mäori and Pacific Island families, were disproportionately affected. The Committee urged New Zealand to:

> *" ... take appropriate measures to assist parents, in particular single parents, and others responsible for the child to implement the child's right to an adequate standard of living. In this regard the Committee recommends that* [New Zealand] *ensure that assistance provided to Mäori and Pacific Island families respects and supports their traditional extended family structures."*[23]

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[20] Although we note and agree with the submission for the Crown that this case is not a review of the decision-making process by which Ministers arrived at the legislative provisions now challenged by the plaintiff. It is not in the nature of an application for judicial review nor, under Part 1A HRA, could

[21] 'UNCROC'.

[22] Report of the Committee on the Rights of the Child, 27 October 2003 para 15.

[23] Report of the Committee on the Rights of the Child, 27 October 2003 para's 41 and 42.

Early history to June 2001[24]

[24] A full history of the initiatives taken by government in New Zealand to address issues of poverty, including the plight of children living in poverty, would no doubt go back to the earliest days of the welfare state in New Zealand.[25] More recently reference can be made to the 1972 Royal Commission on Social Security[26] and the 1988 Royal Commission on Social Policy.[27] The reduction in benefit payments that was a part of the 1991 Budget warrants mention as well[28], if only because it was common ground at the hearing in the Tribunal that the result was to increase the incidence and severity of poverty, but (as one of the Crown witnesses observed) there is no evidence of any lasting improvement in work incentives having arisen out of those cuts.

[25] For present purposes, however, we take as our substantive starting point the position as it stood immediately before the introduction of what was called the Independent Family Tax Credit in 1996.

[26] By then the universal 'Family Benefit'[29] had been overtaken by 'Family Support'[30]. Family Support was paid in the form of a per child/ per week tax credit based on joint parental income, but it was available to all low-income families regardless of the work status of the adult(s). As well, there was what was known as a 'child component' within the main or 'first tier' benefits such as

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[24] The overview that follows is drawn from the comprehensive accounts that were given for the parties, in particular by Dr St John (for the plaintiff) and Ms S Mackwell (for the Crown). It is also derived from the extraordinarily detailed and thoughtful submissions there were prepared on both sides. Although we have given only the shortest possible summary, we record our appreciation for all of the work that has been done and the detail of the information that was prepared for us.

[25] We were referred to, e.g., A Beaglehole, *Benefiting Women: Income Support for Women 1893 to 1993* A Report for the Social Policy Agency, Ministry of Social Development (2003); M McClure, *A Civilised Community: A History of Social Security in New Zealand 1898 – 1998;* S Kegdley, *Mum's the Word: The Untold Story of Motherhood in New Zealand* (in specific relation to support for single mothers).

[26] *Social Security in New Zealand,* Report of the Royal Commission of Inquiry (March 1972).

[27] 1988 Report of the Royal Commission on Social Policy.

[28] By way of example, Dr St John told us that families on the DPB or unemployment benefit suffered a decrease of up to $27 per week. We were also referred to J Kelsey, *The New Zealand Experiment* (Auckland University Press, 1997 at pp. 276 *et seq)* for further details of the 1991 benefit cuts.

[29] Family Benefit was a universal payment paid at a standard rate per child under 16 years of age irrespective of the work status or income level of the adult(s). It was abolished in the 1991 budget. At that time it was being paid at a rate of $6 per week per child.

[30] 'Family Support' (note the capitals) in this context means a particular payment. It is not to be confused with 'family support' (note the lower case) which term is sometimes used as a general description of payments, rebates, credits, subsidies, etc by which Government support for children is delivered to families; or with 'Family Income Assistance', which is a name for a specific group of initiatives in the WFF package – see para [48] and note 53 below.

the domestic purposes benefit and the unemployment benefit (i.e, the rates at which those benefits were paid was somewhat higher for adults raising children that otherwise).[31] A third element was what was called the Family Tax Credit, which was paid to a relatively small number[32] of working families to guarantee a certain minimum after-tax income level (although the names have changed over time[33] it is convenient to think of this form of assistance as providing support for a guaranteed minimum income for those who are in work but on low incomes). The final element we note here was the Special Benefit. This was payable to families (irrespective of the work status of the adult(s)) as a form of hardship assistance.

[27] In 1996 the then National Government recognised that the rate at which Family Support was being paid was due for adjustment having regard to inflation. Instead of simply increasing the rates at which it was paid, however, a distinction between working families and families on benefit income was introduced for the first time. An additional $5 per child per week was paid to all families, but a further $15 per child per week was also available to families where the adult(s) were not in receipt of a main benefit. This new payment was called the Independent Family Tax Credit. That name applied from its inception in 1996 to 1999.

[28] It is this payment, in its subsequent manifestations as the 'Child Tax Credit' (1999 to 2004), the 'In-Work Payment' (2004 to 2008) and the 'In-Work Tax Credit' (since April 2008), which is the focus of this litigation[34].

[29] The introduction of this new child and work status-related payment was the subject of human rights-related criticism by the Labour Opposition of the day.[35]

[30] The general election of 1999 saw a Labour-lead Government take office. Assessment and reform of social assistance programmes were priorities. As

[31] The child component of main benefits had been reduced (although not altogether removed) in the 1991 Budget.
[32] In 2004 it was estimated that there were about 3,000 recipients of this form of support each year.
[33] Originally it was called the Guaranteed Minimum Family Income. Under the ITA 07 the same form of assistance in now called the Minimum Family Tax Credit – see subpart ME of ITA 07.
[34] Name changes were sometimes accompanied by substantive changes as well. For example, there was no minimum work hours requirement for either the Independent Family Tax Credit or the Child Tax Credit, but the in-work payment and (as we discuss below) the IWTC both have such a requirement. Nonetheless the underlying idea – i.e., of relating eligibility to work status and children – is the significant common factor for these payments.

early as 15 September 2000 the Minister of Social Services and Employment recommended a programme of work designed to achieve goals of enabling people and their families to meet their basic needs, to improve the movement of beneficiaries into sustained paid employment, and to encourage recipients of social assistance to participate in the community recognising that " ... *the primary focus for most will be activity through paid employment.*"[36]

June 2001 to March 2004: policy development

[31] One of the more significant outputs of the work programme discussed at the September 2000 Cabinet meeting was a report of June 2001 titled "*Pathways to Opportunity: From Social Welfare to Social Development*". Six important approaches were identified, including the objectives of making work pay (to ensure that a move into work is worthwhile) and of supporting families and children through difficult times, especially when no family member is employed (i.e, ensuring income adequacy). The 'Pathways' report discussed various initiatives towards these and the other objectives identified, including things like enhanced case management and training schemes.

[32] On 18 June 2001 Cabinet directed officials to begin work on reform of the social assistance system.[37] Crown counsel described this paper as being that which effectively set the reform process in motion.

[33] It is neither necessary nor practicable to trace the development of the subsequent policies and initiatives through each step. It suffices to say that there is ample evidence that very considerable work was undertaken by the Government, government officials and others in order to pursue the 'Pathways' initiatives. Throughout the process the two ideals that are of present concern to us (i.e. to make work pay, and to ensure income adequacy) are constant features.

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[35] Second Reading, Tax Reduction and Social Policy Bill, 29 February 1996 New Zealand Parliamentary Debates, pp. 11278 et seq.

[36] *Social Assistance Strategy: Goals and Work Programme*, paper for Cabinet Social Policy and Health Committee SPH (00) 128, 15 September 2000.

[37] *Pathways to Opportunity: Social Assistance Reform,* Cabinet Social Equity Committee, SEQ (01) 42, 18 June 2001.

[34] As an aside, we note that as early as October 2002 the plaintiff in this case had made a complaint to the Human Rights Commission about the Child Tax Credit, asserting that it gave rise to employment status and family status discrimination.

[35] Amongst the significant research which informed policy development work was an analysis of the correlation between parental income and outcomes for children,[38]a comprehensive review of living standards in New Zealand,[39] and research as to the experience of barriers to employment for long term beneficiaries.[40]

[36] Cabinet was regularly informed as to progress. In a report to Cabinet in October 2002[41], for example, the Minister of Social Development noted that in the year 2000 29% of children in New Zealand were living in poverty, and that approximately 6% suffered extreme poverty.[42] He referred to research which showed that children growing up poor were more at risk of: poor cognitive development; low educational achievement; early mortality; disease and injury; poor physical health and development; early parenthood; unemployment or inactivity as adults; and relatively low labour market earnings as adults.[43] The report discusses the difficulties in achieving lasting reductions in child poverty, and recommends a strategy which incorporated a number of 'income adequacy' measures.

[37] In October 2002 the Ministry of Social Development reported to the Minister on policy options for achieving lasting reductions in child poverty.[44] It offered the

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[38] E.g., S E Mayer, *The Influence of Parental Income on Children's Outcomes,* Ministry of Social Development , 2002).
[39] *New Zealand Living Standards 2000* Ministry of Social Development, 2002.
[40] S Singley, *Barriers to Employment Among Long-term Beneficiaries: A Review of Recent Evidence,* Ministry of Social Development, 2002.
[41] *Short and Medium Term Policy Options for Achieving Lasting Reductions in Child Poverty – Overview and Proposed Programme of Action,* Minister of Social Development Report to Prime Minister, Minister of Finance and Associate Minister of Finance, 11 October 2002.
[42] Taken from the *Living Standards* Report, supra note 39.
[43] None of these assertions are controversial. For further information in relation to the incidence and consequences of child poverty see e.g., S E Mayer, *What Money Can't Buy: Family Income and Children's Life Chances* (Harvard University Press, 1997); S E Mayer, supra at note 38; *The Social, Cultural and Economic Determinants of Health in New Zealand: Action to Improve Health,* National Advisory Committee on Health and Disability, June 1998; *Association between children's experience of socio-economic disadvantage and adult health: a life course study,* Poulton et al, The Lancet Vol 360 (9 November 2002); *Child mortality, socio-economic position, and one parent families: independent associations and variation by age and cause of death,* Blakely et al, International Journal of Epidemiology 2003:32:410 –418.
[44] *Policy Options for Achieving Lasting Reductions in Child Poverty,* Ministry of Social Development, 17 October 2002.

view that child poverty was unlikely to decline in the short to medium term without intervention, but that significant reductions in child poverty would not be achieved without substantial investment by government. It was also asserted that, in the long term, the most effective way to achieve a lasting reduction in child poverty rates is to reduce the number of children living in jobless families.

[38] We were shown a very wide range of papers and other materials that deal with issues of poverty, and child poverty in particular. We do not, however, think that there is any real disagreement that moving jobless families into work is an effective way of alleviating child poverty.[45] It is not, however, a simple thing to achieve.

[39] A Cabinet paper in December 2002[46] refers to the problem of a 'poverty trap' - in which taking up paid employment (or increasing hours of work) resulted in little or no increase in net income due to the interaction of income thresholds, abatement rates, and tax and entitlement rules. Other significant barriers preventing beneficiaries from working (such as access to, and the cost of, childcare; transport; personal circumstances; disability and health problems) were also noted.

[40] Early design of what later became the WFF package gave consideration (amongst other things) to the advantages and disadvantages of what was called a 'two payment' system as against a 'single payment' system[47]. In the latter, there would have been only an income adequacy payment, without any separate work incentive payment. The two payment system, of course, involved both kinds of support, with one set of payments designed to ensure income adequacy and another designed to make work pay. Many different versions of these basic ideas were explored. The single payment alternative clearly had some

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[45] The Government's 2002 *Agenda for Children* (Ministry of Social Development, June 2002) included this: "*A comprehensive programme to end child poverty requires a social system that ensures families with children have adequate income to meet their needs. Ensuring that people have the opportunity to earn an adequate income from work is central to the elimination of child poverty. Sole parents, especially, face difficulties balancing work and family responsibilities. For many sole parents there is little financial gain from moving off benefit and into work, once additional costs such as travel and childcare have been paid.*"

[46] *Future Directions for Social Assistance Paper One – The Case for Change,* Cabinet Social Development Committee SDC (02) 75, 5 December 2002.
See, e.g., *Future Directions for Social Assistance: Paper Two,* Cabinet Social Development Committee SDC (02) 76, 5 December 2002.

supporters, such as the Ministry of Women's Affairs. The Minister of Finance was also interested to see the 'single payment' model costed.

[41] Official papers during 2003 suggest that the various proposals that were being developed were coming under increasingly close financial scrutiny, including by Treasury.[48] At this stage of the policy development the 'ballpark' level of expenditure that the officials thought might ultimately be approved was comparatively modest. There is, for example, a Ministry of Social Development report in June 2003[49] which talks in terms of a model that might be delivered for about $450 million, but which adds that the Minister of Finance was likely to look for other packages costed at around $100 million and $300 million. It also seems that at that time not all senior Ministers had been convinced of the benefits of work incentives, and some still did not see them as a priority.

[42] By October 2003 officials had developed a fairly clear recommendation in favour of a two payment system, essentially because they did not see the single payment solution as being likely to deliver a sufficient work incentive.[50]

[43] There was then something of an unexpected development. At a point in or about November 2003 the Government reached the view that it had far greater resources available to it for the forthcoming 2004 Budget than had previously been forecast. Instead of having to keep the cost of reform within figures of $100 million, $300 million or, at the upper end, $450/500 million, officials found themselves working within a $1.1 billion expectation. But by then there was very little time left in which to get the WFF package ready for the 2004 Budget announcement. Our sense of the evidence on this topic was that by the time officials learned of the extent of the available funding, it was simply too late for them to go back to reconsider the 'one payment'/ 'two payment' alternatives - even though that might have been appropriate, and notwithstanding that if officials had known the level of funding at the outset they might have made different recommendations for WFF.

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[48] See, e.g., *Key Issues in Welfare Reform* , New Zealand Treasury Background Paper, April 2003; *Future Directions: Initial Analysis of Financial Incentives to Work,* Treasury Report June 2003.

[49] Ministry of Social Development: *Future Directions for Social Assistance* (Report to Minister, 13 June 2003).

[50] *Social Assistance Reform – Future Direction Package,* Report to Minister 10 October 2003.

[44] As noted above, it is clear that officials had been aware for some time that the proposed package of reform would potentially raise issues under NZBORA: the plaintiff had complained about the Child Tax Credit as early as October 2002. It seems that on 29 October 2003 Dr St John wrote to the Minister of Finance on behalf of the plaintiff to raise the same issues in the context of what was then being proposed to replace the Child Tax Credit. We have not seen her letter, but it prompted the Ministry of Social Development to report to the Minister of Social Development on 15 December 2003 that a Treasury report had been prepared *" ... covering the action of the Child Poverty Action Group in bringing a complaint under the Human Rights Act that Child Tax Credit carries employment status and family status discrimination."* It was recommended that officials should meet with representatives of the plaintiff to hear their concerns, but that they should not disclose details of the then current 'Future Directions' proposal to the plaintiff.

The Working For Families package

[45] The final version of the Future Directions Cabinet Paper was signed off by officials on 31 March 2004, and discussed at a meeting of the Cabinet Policy Committee on 7 April 2004.[51] The paper was made up of seven parts which, together with its appendices, takes up nearly 100 pages. We give only the shortest of summaries.

[46] The paper is entitled 'Reform of Social Assistance: Working for Families Package'. The WFF package was to be the centrepiece of the 2004 Budget providing *" ... more than $1.1 billion a year in extra financial assistance and in-work support to New Zealanders and their families by 2007."*[52]

[47] Although it will seem obvious, in view of what follows it is to be noted that even in this most high level description of the WFF package, and in its very name, there is the idea that the elements within it were not being put up as a series of stand-alone policy initiatives, but as a collection (a 'package') of measures that were to be deployed together in pursuit of the WFF policy objectives. We make the point because it was a significant element of the Crown's argument that, in considering the objectives of the WFF package, we should see the 'make work

[51] *Future Directions: Working For Families,* CAB101/02/1

[52] Outline of the proposal, preliminary to the executive summary at the front of the WFF Cabinet paper.

pay' element of the package as having been distinct from the 'income adequacy' element of the package. We return to the issue below.

[48] The WFF package had six components:

[a] Measures relating to Family Income Assistance[53] and the in-work payment initiatives;[54]

[b] Improvements to support for Childcare Assistance;[55]

[c] Initiatives relating to Accommodation Supplement;[56]

[d] Changes to the payment of Invalids' Benefit;

[e] Changes to the payment of Special Benefits;[57]and

[f]Various consequential changes to other social assistance programmes.[58]

[49] The measures noted at [a] above are of most significance for present purposes. However (and in contrast with the approach suggested for evaluating the objectives of WFF) it was important to the Crown's case that all elements of the package should be considered together in any assessment of who gained and who was either not advantaged, or even disadvantaged, as a result of these measures.

[50] The key objectives of WFF were to:

> *"**make work pay** by supporting families with dependent children, so that they are rewarded for their work effort. This involves better alignment of benefits*

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[53] Then comprising Family Support, child component of main benefits and Family Tax Credit (for descriptions of which see para [26] and note 30 above); also the Child Tax Credit (which later became the IWP then the IWTC) and the Parental Tax Credit (see para [83][c] & [d] below); and the Student Allowance.

[54] Again, we note that even within the package these two initiatives (income adequacy and make work pay) are stated together.

[55] Subsidies for pre-schoolers, and the Out of School Care and Recreation subsidy for children up to 13.

[56] Financial support to beneficiaries and non-beneficiaries on low incomes to assist with the cost of accommodation.

[57] Noted above at para [26].

and in work support (including Family Assistance, Childcare Assistance and Accommodation Supplement) so that people are better off as a result of the work they do;

***ensure income adequacy**, with a focus on low and middle income families with dependent children, to significantly address issues of poverty, especially child poverty. The package also addresses affordability problems by responding to the increased cost of private housing for low income people;*

***achieve a social assistance system that supports people into work,** by making sure that people get the assistance they are entitled to, when they should, and with delivery that supports people into employment. This involves steps to streamline the social assistance system so that it is easier for people to understand and access, and initiatives to improve take-up and enhance effectiveness of delivery."*[59]

[51] Families with dependent children were described as a priority both because families in low paid work were often little better off (after work-related costs, benefit abatement and tax were considered), and because of the *" ... incidence and the negative effects low living standards have on the well-being and development of children, particularly over time."*[60]

[52] About 60% of the new expenditure in the WFF package was to be directed to families in work.[61]

[53] The fact that the WFF objectives were not considered to be discrete from each other at the time the package was presented to Cabinet is again reflected in the following description taken from the WFF Cabinet paper:

"The package also goes a long way towards addressing child poverty, which hampers long-term economic performance, as well as resulting in poor social outcomes. Working For Families will be a major step toward our goal of a social assistance system that:

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[58] For example, increasing Community Services Card income thresholds, increasing the per child add-on in the stand-down for main benefits; re-setting repayment thresholds for student loans, etc.
[59] The emphasis is as given in the WFF Cabinet paper: see para 8 of the paper.
[60] Para 9 of the WFF Cabinet paper.
[61] Para 17 of the WFF Cabinet paper.

- *actively supports working aged people to take up and stay in employment, by ensuring that they are better off in work*

- *provides adequate social assistance for those who are not able to work*

- *helps beneficiaries to successfully make the transition from benefit to sustainable employment, and*

- *is simpler ....".*[62]

[54] The package was to be 'rolled out' over three years. In broad terms the proposed steps were to be these (the list is not exhaustive):

[a] By 1 December 2004: increase the Child Assistance rates and thresholds; remove abatement of Accommodation Supplement for beneficiaries; change threshold for payment of Accommodation Supplement to working people; extend the hours that recipients of the Invalids Benefit were able to work before impacting their benefits;

[b] By 1 April 2005: increase Family Support rates by $25/week (with an additional $15/week for the second and each subsequent child); introduce a new main benefit rate structure for families with children to remove the child component from all main benefits; increase rates relating to orphans, unsupported children and children in foster care; increase the Accommodation Supplement maximum payments in high cost areas; and adjust the Special Benefit to take account of these various changes;[63]

[c] By 1 October 2005: further increases to the Childcare Assistance rates were to be effected;

[62] Para 28 of the WFF Cabinet paper.

[63] During the hearing there was considerable debate as to what the effect of all this was for different people. For example, the Crown offered us illustrations in which recipients in particular circumstances would lose a bit here, but gain a bit there and end up in a neutral or even advantaged outcome. For its part, the plaintiff urged us to consider other suggested illustrations in which the subjects ended up in a disadvantaged position. It does, however, seem clear that the changes to Special Benefit were designed to reduce the availability of that kind of payment and its cost to the Government.

[d] By 1 April 2006: The Child Tax Credit was to be replaced by an In-work payment of $60.00 per week with an additional $15/week for the fourth and each subsequent child; the new payment was to be paid to the principal carer in a family; and eligibility criteria for the in-work payment were to be set to include a requirement that the recipient work a minimum number of hours each week. In addition the rate of the Family Tax Credit[64] was to be increased. At the same time a new 'Temporary Additional Support' payment was to be introduced to provide a less discretionary and more rules-based approach to hardship assistance;

[e] In April 2007, rates for Family Support were to be increased;

[f] By 1 April 2008 there was to be legislation to protect these various payments against the effects of inflation by periodic adjustment.

[55] Aspirations for the alleviation of child poverty were high:

"Income support is a key instrument for poverty alleviation and for improving living standards. Given the large investment through the Working for Families package, we would expect a significant reduction in measured income poverty. Using two internationally recognised income poverty measures, with thresholds (poverty lines) set at 50% and 60% of median household income, we estimate that after full implementation there will be:

- *a 70% reduction in child poverty at the lower threshold, and*
- *a 30% reduction in child poverty at the higher threshold."*[65]

Although there was the caveat:

"The estimated reduction in measured income poverty is mainly driven by measures in the package itself but it is also dependent on factors in addition to the package, especially the state of the economy."[66]

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[64] See para [26] above.

[65] para 51 of the WFF Cabinet paper. During the hearing we were referred to a number of different ways of assessing poverty, and child poverty in particular. However since there is no dispute about the fact that there are significant pockets of poverty (including child poverty) in New Zealand, we do not find it necessary to discuss the definitions in any detail.

[56] We note that the provision of work incentives in the form of the proposed In-Work Payment (later the IWTC) was clearly seen as a method for the alleviation of poverty – in other words, 'make work pay' was to be an integral part of achieving income adequacy.

[57] One of the parameters in designing these new policies was that there were to be 'no losers', in the sense that whatever the impact of the various changes for a given family might be, no-one was to be left worse off under WFF than they were before it. An example of the application of this approach is to be found in the rules for eligibility to the Child Tax Credit. As we note in greater detail below, one of the features of the then proposed In-work Payment was that is would have an hours of work requirement: eligibility would in future depend on the recipient working for a minimum number of hours each week. No such rule had applied to the Child Tax Credit, which was to be replaced by the In-work Payment. As a result (and as an example) some families who had been eligible for the Child Tax Credit before WFF faced a prospect that they would not be eligible for the In-work Payment when that replaced the Child Tax Credit. The WFF package therefore specified that, for those families, the Child Tax Credit would still be available. The Child Tax Credit was described as having been 'grandparented' in this way.

[58] Another relevant feature of the package relates to the thresholds (at the lower end of the spectrum of annual incomes) at which certain credits were to begin to become payable, the cut out points (i.e, at the upper end of the spectrum of annual incomes) beyond which the credits were no longer available, and the rates of abatement within those lower and upper parameters. For this purpose, a group of credits and other initiatives were collected under the title 'Family Income Assistance'. It was this group of initiatives to which the bulk of the funding was to be directed, rising to just under $1.1 billion per annum after 2007. For presently relevant purposes, the Family Income Assistance group included Family Support[67] (rates of which were to be increased), the new In-Work Payment and the old Child Tax Credit (to the extent that it was 'grandparented'), and the Parental Tax Credit. For these payments, the threshold for eligibility was to be an income of $27,500 per annum, and the rates of payment were to be abated at

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[67] Page 52 of the WFF Cabinet paper.
[68] See para [26] and note 30 above.

30%. This was said to represent a simplified and more generous result than before WFF.[68]

[59] Not all families would be eligible for each component of Family Income Assistance: so, for example, a family without a newborn in the year would not be eligible for the Parental Tax Credit; while a family with main benefit income would be eligible for Family Support but not the In-work Payment. In addition, in the case of the In-work Payment (for example) the credit was fixed at $60 per week for the first three children with an additional $15 per week for each subsequent child – so that a given family's entitlement would depend on the number of children as well as the levels of relevant income in the family. However in all cases the abatement rules were to be applied consecutively, first to the Family Support element, then to the In-work Payment/ Child Tax Credit element, and finally to the Parental Tax Credit. The precise application of these and other parameters applying to the abatement of entitlements is difficult to summarise, but for present purposes it is enough to note that in the case of the In-work Payment:

[a] Eligibility in a one child family was to cut out at an annual income of over $39,500;

[b] Eligibility in a two child family was to cut out at an annual income over $47,000.00;

[c] Eligibility in a three child family was to cut out at an annual income of over $56,000.

[60] Thus the credits were targeted at low to middle income families, and reduced effective marginal tax rates[69] in particular for those in the income range between around $20,000 a year to $27,500 a year. It was estimated that the changes would increase average weekly financial assistance for families with incomes over $20,356 a year and that around 4,000 families not previously eligible would

[68] Para 21, Appendix 1 to the WFF Cabinet Paper.

[69] Being the combined amount of tax and social assistance that the person would 'lose' if they were to earn an extra dollar.

become eligible for Family Income Assistance.[70] The greatest gains were expected to be for families with net incomes of $25,000 to $45,000 a year.[71]

[61] These changes to Family Income Assistance lay at the heart of the WFF package. By way of illustration, the total cost estimated for these changes (and after allowing for savings due to interactions with other aspects of the WFF package) was estimated to be around $94 million in 2004/05; $502 million in 2005/06; $764 million in 2006/07 and in 2007/08 and 'outyears' $1.1 billion.[72] There were many other changes besides, including in respect of housing costs for those on low incomes, and childcare. By comparison, however, the estimated combined cost of the changes to 'second tier' benefits such as the Accommodation Supplement and Childcare Assistance in the same years were around $82 million, $160 million, $176 million and $181 million, respectively.

[62] It is not practicable to list all of the detailed changes to other payments and benefits that were affected. Of these, the only one that warrants mention at this point were the changes to funding available for those in hardship. It had come to be accepted that the falling value of income support over time had led to a situation in which many people were dependent upon payment of the Special Benefit, although when introduced it had been intended as an emergency payment for unusual hardship, rather than a staple. The WFF package noted that as a result of other changes, Special Benefit could be redesigned. It was to be 'grandparented' (just as the Child Tax Credit) so that there would be no losers as a result of the changes, but from 1 April 2006 it would be re-named Temporary Additional Support. Eligibility would be made more rules-based than discretionary.

[63] There was considerable argument at the hearing about what the true effect of the changes to Special Benefit were.[73] It is clear, however, that just looking at Special Benefit on its own (i.e, without taking account of other elements of the package) considerable savings were expected over time: estimated at $7.4

[70] Para 21 of Appendix 1 to the Cabinet paper
[71] Para 41 of Appendix 1 to the Cabinet paper.
[72] Para 61 of the Cabinet paper.
[73] And other second and third tier benefits such as childcare support, accommodation supplements, and a number of other payments such as disability allowance, child disability allowance, advance payments of benefit, special needs and funeral grants, employment and training assistance, subsidies for skills investment, business training and enterprise allowances, and so on.

million in 2004/05, $46 million in 2005/06, $77 million in 2006/07, and $92 million in 2007/08 and beyond.

[64] On any view the WFF Package represented a significant and far-reaching set of reforms for social spending. It is hardly surprising, therefore, that issues under NZBORA and the HRA were potentially raised. There are references in the WFF Cabinet paper to different issues that were perceived at the time. There can be no doubt that the officials and the Minister for Social Development and Employment were aware of the issue that had already been raised by the plaintiff by then. The WFF Cabinet paper asked Cabinet to note that the package *"raises a number of issues of consistency with the New Zealand Bill of Rights Act and the Human Rights Act"* and stated that *" the Ministry of Social Development and the Inland Revenue Department will work closely with the Ministry of Justice to* ***provide justifications*** *for any continuing or new discriminatory practices that may be contained in the Working for families package".*[74]

The 2005 changes

[65] Working For Families was announced in the 2004 Budget, and work towards preparing the necessary legislative instruments followed. In fact, with one significant exception, as far as we are aware the package was 'rolled out' substantially as was envisaged in the Cabinet paper. The exception we note relates to the abatement thresholds, cut-offs and other related rules.

[66] In the lead up to the 2005 general election there was debate about tax relief generally. In response to tax cuts promised by the National Party, the Labour Party announced that it would provide tax relief targeted specifically at families. The result was that, after the Labour lead Government was returned to power, and before the new In-work Payment was ever implemented, there were significant changes to the rate of abatement (which was reduced from 30% to 20%) and, consequently, to the abatement cut-outs for the proposed in-work tax credit. In addition the threshold for abatement was increased from an income level of $27,500 to $35,000 a year.

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[74] para's 127 and 128 of the Cabinet paper; see also para's 77 to 79 of that paper. The emphasis is ours for reasons set out at para's [76] to [79] below. Also note that although the plaintiff was

[67] The effect is best demonstrated by reference to the schedule of payments published by the Inland Revenue Department for the 2007/08 tax year.[75] In that year a family with one child would not cease to be eligible for the challenged tax credit until an income level of over $71,000 a year was achieved.[76] For a family with three children the tax credit did not cut out until an annual income of over $101,000 was reached[77] (although it ought to be noted that, at those income levels, the amount of the credits had abated to $7/fortnight in the case of the one child family on $71,000 or under; and $4/fortnight for the three child family on $101,000 or under). For a larger family with (say) five children and an income as high as $120,000 the value of the challenged tax credit was still $142/fortnight. With 6 children the tax credit was available even if the annual income was as much as $157,720.

[68] These changes in 2005 were the subject of some debate in this case. Whether one regards the fundamental rationale for the challenged tax credits as being to make work pay, or as an income adequacy measure, or as a combination of the two, it is difficult to see that any of those reasons really justified paying the credits to such high income earners. The 2005 changes to the abatement rate, threshold and (as a consequence of the altered abatement rate) the cut-outs were, in reality, a tax cut for families in work.

[69] The OECD experts were asked about this aspect of matters. They said they could not support an in-work payment that went as far up the income scale as the post 2005 IWP does, because (amongst other things) it means that a lot of money goes to people for reasons that cannot really be defended as an anti-poverty strategy. Nor do people at the higher income levels need a payment of the kind to encourage them to stay in their jobs.

The ACC issue

[70] The plaintiff's claim relates not only to the situation of families that are in receipt of a main benefit, but also to those families in which the income earner(s) has or have been the victim of personal injury by accident leaving them unable to return

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described as a 'key national stakeholder' to be briefed about the package, there was no explicit reference to the point that had been raised by the plaintiff.

[75] By which point the in-work payment had been renamed the in-work tax credit.

[76] The initially proposed cut-out having been $39,500.

[77] The initially proposed cut-out having been $56,000.

to work, and to whom weekly compensation is paid under the ACC legislation as a result.

[71] Prior to the implementation of the WFF package, families in this situation were entitled to the Child Tax Credit, but they lost their entitlement to that credit if they did not return to work within three months of the date of their incapacity.

[72] The WFF package took the position that it was more equitable and consistent with the objectives of the ACC legislation to treat earners in this category as if still in work, even though they were in fact in receipt of weekly compensation.[78] But it was considered that it would be near impossible to establish whether people would have been entitled to the In-work Payment had it been available before the incapacitating accident.[79] It was decided that the new approach relating to recipients of weekly compensation would not be applied retrospectively for practical and administrative reasons. As a result:

[a] Earners who suffered an incapacitating injury before 1 January 2006 and were in receipt of weekly compensation at 31 March 2006[80] were (and are) not eligible for the In-work Payment; but

[b] Earners who suffered an incapacitating injury and have received weekly compensation on or after 1 January 2006 are eligible for the in-work payment (now the in-work tax credit).

[73] It follows that the group of people that are presently affected by this set of legislative decisions is limited to those who became unable to work because of personal injury suffered before 1 January 2006, and who have not returned to work since then.

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[78] Essentially because weekly compensation is funded through a contributory scheme, and replaces an individual's right to sue for compensation. People in this class were seen as recipients of wages rather than as recipients of social assistance.

[79] We imagine that one of the issues would have related to the retrospective application, on a case by case basis, of the new work hours requirement within the in-work payment.

[80] That is, the day before the IWP came into effect. The reference to 31 March 2006 corresponds with the rule by which eligibility for the CTC was not lost if an earner returned to work within three months of injury.

Some comments

[74] New Zealand's obligations under UNCROC are not mentioned in the WFF Cabinet paper. Witnesses for the Crown who gave evidence about the development of the WFF package were therefore asked about whether and to what extent the work that they had done preparing the WFF package had been informed by New Zealand's international obligations, including (but not limited to) UNCROC, and/or the kind of concerns expressed in the UN Committee's Report. We do not think it unfair to say that this dimension of the WFF package does not appear to have been given any significant consideration at all.[81]

[75] We accept the submission made by counsel for the plaintiff in this regard. Certainly there is no evidence that the UN Committee's recommendations were taken into account in 2005, when it was decided to alter the abatement threshold and rates in such a way as to pay the proposed credits to families with incomes well beyond the low to middle income range.

[76] Our second comment relates to the Report of the Attorney-General in relation to the Future Directions (Working For Families) Bill under s. 7 of NZBORA.

[77] Section 7 NZBORA obliges the Attorney-General to bring to the attention of the House of Representatives any provision in a Bill that appears to be inconsistent with the rights and freedoms protected by NZBORA. In the case of the WFF Report, however, the only topic that is addressed in the Attorney-General's report related to a potential for discrimination on grounds of sexual orientation.[82] There is no mention of the issue raised by the plaintiff in this case. We found this a little surprising: as noted, the underlying human-rights related complaint had been made by the plaintiff as early as October 2002, and there is no doubt that both officials and the relevant Ministers were aware of the plaintiff's concerns as the WFF package was being developed.[83] The WFF Cabinet paper itself refers to '*a number*' of issues of consistency with NZBORA and the HRA, and stated that the

[81] For further background, see Blaiklock et al, *When the Invisible Hand Rocks the Cradle: New Zealand Children in a Time of Change* Innocenti Working Paper No. 93 (July 2002).

[82] The concern was that the Bill did not recognise the status of same sex relationships, although it was noted that issues in relation to same sex couples were to be addressed (as they have been). It is not a matter that we need to deal with.

Ministry of Social Development and the Inland Revenue Department would work closely with the Ministry of Justice to *provide justifications* for any continuing or new discriminatory practices contained in the WFF package".[84]

[78] During the hearing there was at least a suggestion that the fact of the plaintiff's complaint, and the possibility that the issues thus raised might in due course be the subject of litigation, meant that whatever work was done by or for the Crown in these respects was covered by litigation privilege. Perhaps so. Nonetheless we were left wondering about the tension between a claim to litigation privilege in the circumstances, as against the underlying objective of s.7 NZBORA. The issues were, after all, being raised in the context of proposed legislation that was before the House of Representatives for consideration. The issues of *prima facie* discrimination and justification are topics the House might have expected to be dealt with.

[79] The evidence we heard does not allow us to say why the issues raised in this case were not mentioned in the s.7 Report, or what work (i.e., of the kind foreshadowed by the WFF Cabinet Paper) was done to provide any justifications, or what the Crown might have considered the justification(s) to be, before the relevant legislation was considered by the House and passed into law. We can only say that we think it was unfortunate that the issues we have had to deal with are not mentioned in the s.7 Report at all.[85]

84 See, e.g., *Engaging with the Child Poverty Action Group on Future Directions,* Report to Minister of Social Development and Employment, 15 December 2003.

85 Hence the emphasis we gave at para [64] above. In this context we were also referred to para 5.35 at p. 68 of the Cabinet Manual (2001).

C LEGISLATION

The tax credits

[80] The operative statement of claim at the commencement of the substantive hearing was dated 12 December 2006. At the time it was filed the challenged legislative provisions were contained in the ITA 04. Those provisions were subsequently replaced by the ITA 07, which came into effect in April 2008.

[81] The plaintiff seeks a remedy in respect of either or both of the relevant provisions in the 2004 and 2007 tax legislation. We are inclined to agree with Crown counsel, however, that given what has happened it now makes sense to deal with this case in terms of the ITA 07. The relevant provisions of the ITA 07 reflect the earlier provisions of the 2004 legislation, and are intended to have the same effect: see s. ZA 3(3) of the ITA 07. Furthermore, since the only relief that is ultimately sought is a declaration that the relevant legislative provisions are inconsistent with the right to freedom from discrimination affirmed by s.19 NZBORA, we cannot see that there is anything lost by referring to the legislation that is presently in force rather than its predecessors.

[82] In something of an understatement, Mr Nutsford[86] described the statutory provisions which establish the tax credits that we are concerned with as complex. This is not just a question of the detailed nature of the legislation, but also reflects the fact that each legislative iteration of the subject benefits and payments has[87] been accompanied by a new suite of names. So, in most of the materials the challenged tax credits are called the in-work payment, or IWP. They were referred to in that way throughout the hearing and in submissions as well. The same payment under the ITA 07, however, is now called the in-work tax credit, or IWTC. That is not, however, to be confused with: (a) the Family Tax Credit (which historically had been called the Guaranteed Minimum Family Income, and later the Family Tax Credit, and is now called the Minimum Family Tax Credit); or (b) the credit which before the ITA 07 had been called Family Support (and is now called the Family Tax Credit. The result is that what is now called the Family Tax Credit under the ITA 07 is altogether different from what used to be called the Family Tax Credit in the years before WFF was introduced in 2004.

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[86] Acting Group Manager, Policy Advice Division of the Inland Revenue Department.

[83] Unless the context indicates otherwise, in this decision we use the names for the subject tax credits as they are stated in the ITA 07, namely:

[a] The Family Tax Credit: this is payable regardless of the source of a family's income but depending on the level of income, on a per child basis;

[b] The In-Work Tax Credit[88]: this is the payment that is the principal subject of this claim. We discuss it in greater detail below;

[c] The Child Tax Credit: this is a remnant of the reforms of 1996. It is only paid to those who are not eligible for the IWTC but who were eligible for the Child Tax Credit when WFF was introduced in 2004. The amounts paid under this heading have been decreasing, with expenditure for the year to June 2008 having been forecast at only $13 million. Hence this element of the WFF package is not of any great significance for our purposes;

[d] The Parental Tax Credit: this is paid to families for eight weeks after the birth of a child, depending on the family's source and level of income, up to a maximum of $1,200. Like the Child Tax Credit, this item is not of great significance in this case;

[e] The Minimum Family Tax Credit: this serves to guarantee a minimum after-tax income to working families with dependent children. Families must meet the full-time earner requirement of the ITA 07[89] and, like the IWTC, must not be in receipt of an income-tested benefit. This credit is paid to about 2,800 families per annum at a total forecast cost in the year to 30 June 2008 of around $8 million. As with the Child Tax Credit and the Parental Tax Credit, this payment needs be understood for context, but of itself it is not of great significance to what we have to decide.

[84] The main focus of this case is the IWTC. The IWTC is provided for as part of sub-part MD of the ITA 07. The sub-part deals amongst other things with the 'abating' WFF tax credits: i.e., the tax credits that reduce as income rises. They

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[88] More or less.
[89] From this point of the decision on, 'the IWTC'.
[90] Discussed below, at para [92].

are also different depending on the number of children in the family under consideration. So, for example, in the tax year from 1 April 2007 to 31 March 2008 a working family with two children and an annual income of just over $41,000 would be eligible for a Family Tax Credit of $220 per fortnight and a further $120 per fortnight in IWTC. The same family with an annual income of just over $74,000 would no longer be eligible for any Family Tax Credit (the abatement schedule having ended after $69,500 for that family), but would still qualify for a payment of $86 per fortnight in IWTC.[90]

IWTC eligibility requirements

[85] Sub-part MD of the ITA 07 has five sub-headings. The first deals with the calculations of credits that are available, and the second deals with the Family Tax Credit (since the Family Tax Credit is paid irrespective of the work status of the taxpayer, it does not raise issues of concern to the plaintiff).

[86] The third sub-heading relates to the IWTC. It is comprised of 7 sections from MD 4 to MD10. These provisions establish entitlement to the IWTC, and then list the requirements for eligibility.

[87] Section MD 4(1) of ITA 07 provides:

> "*REQUIREMENTS A person is entitled to an in-work tax credit* ***for a child*** *if, for an entitlement period, the person meets the 5 requirements of sections MD 5 to MD 9"* (the emphasis is ours[91]).

[88] The eligibility requirements of sections MD 5, MD 6 and MD 7 are straightforward. They specify the age after which the tax credits can be claimed[92], and that the recipient must be the principal caregiver for a child who is financially dependent upon them. Various residence requirements are also set out. None of these elements raise any issues that we need to deal with.

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90 *Working for Families Tax Credits Registration Pack*, IRD/Work and Income (January 2007 – IR 200).

91 We have emphasised the words 'for a child' in this section because of an argument by the Crown to the effect that the IWTC is not a 'child-related' payment.

92 A person claiming the IWTC must be over 16.

[89] The fourth requirement for eligibility for the IWTC in s. MD 8 is, however, very much in issue. It provides:

> *"The fourth requirement for an entitlement to an in-work tax credit is that the person referred to in section MD 4 and their spouse, civil union partner, or de facto partner, do not receive –*
>
> (a) *an income-tested benefit; or*
>
> (b) [elements (b) and (c) relate to various grants under the Education Act 1964 and allowances under the War Pensions Act 1954, and are not directly relevant for present purposes]"

[90] In other words, a person who has financially dependent child/ren is not eligible for the IWTC if that person or his or her partner receives an income-tested benefit. This was referred to in argument as 'the off benefit rule', and we will use that term as well.

[91] The words 'income-tested benefit' are defined by the ITA 07 as including benefits paid under the Social Security Act 1964: namely, the domestic purposes benefit, the emergency benefit, the independent youth benefit, the invalid's benefit, the sickness benefit, the unemployment benefit and the widow's benefit (these benefits are sometimes referred to as 'main' benefits as well).

[92] The fifth requirement for IWTC eligibility is set out in s. MD 9. It is a more complex provision, but essentially there are two separate points to be taken from it:

[a] The first is a requirement that either or both of the persons who might be entitled to the IWTC and/or their partner is normally a 'full-time earner receiving income from a work activity' ('the full time earner' requirement). To qualify under s. MA 7(1) of the ITA 07 an income earner must either be:

[i] a person who, for a week, is employed for 20 hours or more and does not have a spouse, civil union partner, or de facto partner during the week (i.e., who is single) ***or***

[ii] a person who has a spouse, civil union partner or de facto partner in the week and either the person or the partner or both of them together are employed for 30 hours or more (i.e, is in a relationship of the kind specified and either individually or in combination with the partner the person meets a 30 hours/week threshold).

The provisions of s. MA 7(1) thereby effectively define what it means to say that someone is either 'employed' or 'unemployed' in the context of the s. MD sub-part. A single person working less than 20 hours a week, or a couple who between them do not work at least 30 hours a week, are not eligible for the IWTC because they are not 'full time earners'. It is to be noted that this element of the eligibility requirements for the IWTC stands independently of the 'off benefit' rule in s. MD 8(a).

[b] The second point to be noted in relation to s. MD 9 concerns those who were full-time earners but who, as a result of incapacity suffered before 2006 as a result of injury, receive earnings-related weekly compensation under s.26 of the ACC legislation. People in this category are not included as 'full-time earners', and so are left ineligible for the IWTC.[93] This exclusion makes up the second limb of the plaintiff's claim.

[93] During argument Crown counsel submitted that the only two requirements of the IWTC which the plaintiff had claimed to be discriminatory were the 'off benefit rule' in s. MD 8(a), and the provisions in s. MD 9(4) relating to recipients of weekly ACC compensation who were incapacitated before 2006. They complained that during closing submissions counsel for the plaintiff had referred not only to these provisions, but had in effect argued that the full-time earner requirements of ss. MD 9(1) and MA 7(1) of the ITA 07 discriminate on the ground of employment status as well – in other words, that the issue was not limited to the off-benefit rule, but had been extended to engage with the requirement to be in work (i.e., to qualify as a full-time earner) as well. Crown counsel submitted that this latter point had never been pleaded, nor was it ever referred to in the plaintiff's statement of issues. They urged us to find what they described as the introduction of an altogether new challenge to MD sub-part to be wholly inappropriate.

[94] The argument had its sharpest focus in the context of a debate as to which 'comparator group' it might be proper for the Tribunal to rely on in order to assess differential treatment. We will deal with it below.

Some practicalities

[95] As noted, the IWTC is a payment that depends on the number of children in a family. It is abated as the earner's(s') income rises. The calculation of the credit is set out in s. MD 1 (and indeed elsewhere in the sub-part as well). Abatement begins once a family's income exceeds $35,000 per annum, and falls away at a rate of 20 cents for every dollar earned above that figure. However it is applied in stages, so that (in a case where a family is eligible for all three credits) it is taken first from the Family Tax Credit, and only when that has been completely abated, then from the IWTC. By way of illustration we set out a table provided by Mr Nutsford:

Number of children	Income at which family can still receive Family Tax Credit	Income at which family can still receive IWTC
1	$56,320	$71,920
2	$71,140	$86,740
3	$85,960	$101,560
4	$100,780	$120,280
5	$115,600	$139,000
6	$130,420	$157,720

[96] The IRD/ Work and Income Registration pack[94] is also a useful guide to the way these calculations are intended to work. So, taking the IWTC example, in the 2007/08 tax year all families with 1, 2 or 3 dependent children and an annual income of anywhere from $35,000 to $56,000[95] were eligible for an IWTC of $120

[93] Although people whose incapacity was suffered in 2006 and afterwards are eligible for IWTC: see s.MD 9(4) ITA 07.

[94] See note 90 above.

[95] And all other things being equal. We say that because the family credit abatement regime applies to the combined sum of Family Tax Credit, IWTC (or CTC if that is what the family is still receiving) and Parental Tax Credit - but it is applied to the different credits at different stages. The result is that the level of income at which entitlement is fully abated is higher for families who are entitled to the IWTC than it is for families who qualify only for FTC. Secondly, Mr Nutsford's table applies to families where all children are under 13. Because entitlement to the FTC depends on the age of the children in

per fortnight. Families in the same income bracket with 4 children were eligible for $150 per fortnight, with an additional $30 per extra child per fortnight after that. At the same time, a family with (say) 3 children and an annual income between $99,501 and $101,000 would be eligible for an IWTC of $4 per fortnight. Another family in the same income bracket but with 6 children would be eligible for $210 per fortnight.

[97] The IWTC is delivered through the tax system. There are a number of reasons for this form of delivery, including administrative efficiency and the fact that it ensures optimal uptake. Furthermore, despite use of the word 'Credit' in the name, an IWTC does not require an offsetting tax liability before it can be received. These are in reality cash payments, worked out for each eligible family having regard to income levels and in light of any other tax credits that may be available such as the Family Tax Credit, the Parental Tax Credit and/or the Minimum Family Tax Credit. The credits can be, and often are, paid out on a weekly or fortnightly basis, based on estimated annual income. Mr Nutsford told us that about 17% of eligible families receive their credits as a lump sum at the end of the tax year, but the majority receive their credits in the form of regular weekly or fortnightly payments from the IRD. The credits are refundable – in other words, if at year's end the taxpayer has been overpaid then he or she will be liable to refund the appropriate sum to the IRD. If she or he has been underpaid, then the balance that is due will be paid out.

[98] In the case if the IWTC, payment is made to a principal caregiver of a dependent child or children. In a case where two separate families share the care of a child or children, the IWTC is available to both families as long as the adult(s) in each meet the work hours test and the off-benefit rule[96], and each family has care of the child/ren for at least a third of the time.

[99] In short summary, the IWTC is available to full time earners who meet the 'off benefit' rule, and it is paid at a rate that varies depending on the level of income

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the family, the income level at which a family with children older than 13 can still receive FTC and IWTC would be higher than stated in the table. By the same token, depending on circumstances, some families are eligible for only one of the component credits, while others are eligible for more than one. Most importantly, note that the income levels at which a family can still receive IWTC assume that before getting to that point, the family will have had FTC which will have been completely abated away. As an example: a family with one child and an entitlement to FTC up to an income level of $66,320 could still receive the IWTC at an income level of $71,920, but not beyond that.

being earned, and the number of children in the family under consideration. Families in which one or other (or both) of the adults are in receipt of a main benefit are not eligible.

Relevant provisions of NZBORA and the HRA

[100] We turn to consider the relevant provisions of NZBORA. Section 19(1) provides:

> *"Everyone has the right to freedom from discrimination on the grounds of discrimination set out in the Human Rights Act 1993."*

[101] The grounds on which discrimination is prohibited under the HRA are set out at s.21(1) of that Act. Of relevance to this case are the following:

[a] Section 21(1)(k):

> *"Employment status, which means –*
>
> *(i) Being unemployed; or*
>
> *(ii) Being a recipient of a benefit under the Social Security Act 1964 or an entitlement under the Injury Prevention, Rehabilitation and Compensation Act 2001: …"*

[b] Section 21(1)(l):

> *"Family status, which means –*
>
> *(i) Having the responsibility for part-time care or full-time care of children or other dependants; or*
>
> *(ii)* [this section relates to those who are single]*; or*

Unlike the Family Tax Credit, which is apportioned according to the amount of time each family has with the subject child/ren.

(iii) Being married to, or being in a civil union or de facto relationship with, a particular person; or

(iv) *Being a relative of a particular person."*

[102] The reference to the 'employment status' ground is obvious enough, at least insofar as the plaintiff's claim depends on a difference of treatment between those who are in work and those who are on a main benefit. The real concern behind the case is not, however, for the adult taxpayers. It relates to the consequences of the IWTC eligibility rules for the child/ren in families that are not eligible for the IWTC. That is the reason for reference to the 'family status' ground in s.21(1)(l). In addition the plaintiff also relied on s.21(2) (a) of the HRA:

"Each of the grounds specified in subsection (1) of this section is a prohibited ground of discrimination, for the purposes of this Act, if –

(a) It pertains to a person or a relative or associate of a person, and ...[the balance of the subsection refers to present or past discrimination, and is not material for the purposes of this decision]*"*

[103] In the alternative, the plaintiff referred to s.65 of the HRA, the decision of the High Court in *Northern Regional Health Authority v Human Rights Commission* [1998] 2 NZLR 218, and the view expressed by the authors of *The New Zealand Bill of Rights Act: A Commentary,*[97] to argue that children of ineligible families are victims of indirect discrimination.

[104] As we will discuss, the Crown's position is that there is no 'discrimination' of any kind that is contemplated by s.19 NZBORA at all. Beyond that its defence of the plaintiff's claims did not focus on any of these provisions of the HRA in any detail. That is unsurprising. After all, it can hardly be denied that the eligibility rules for the IWTC differentiate between individuals by reason of their employment status, and that s.21(1)(k) of the HRA is engaged. It is equally obvious that if there are adverse consequences arising out of ineligibility for the IWTC, then they stand to be suffered not just by the taxpayer but also by his or her family. We therefore proceed on the basis that, if there is any discrimination,

[97] Supra note 10 at para 17.11.4.

then – looking at the problem from the point of view of the children who are affected – it will not matter much whether the analysis proceeds on a footing of direct 'family status' discrimination under s.21(1)(l) of the HRA, or as engaging the 'relatives and associates' provisions of s.21(2) of the HRA, or as a case of indirect discrimination.

[105] It is also for these reasons that, although the differentiation at issue relates to adult taxpayers, it is appropriate to talk about 'families' rather than just the affected income-earners. That is, after all, the approach taken in the March 2004 WFF Cabinet Paper, and the earlier policy papers, and subsequent analyses.

[106] The real question is whether there is any discrimination at all. That depends, of course, on what the word 'discrimination' means in the context of NZBORA and the HRA. We discuss that difficult topic in the next section of this decision. Before doing so, however, there are a few more provisions to be noted.

[107] This claim is brought under Part 1A of the HRA in connection with what is alleged to be an act of discrimination by government. The challenged conduct is an act of the legislative branch of the Government of New Zealand within s.20J(1)(a) of the HRA. As noted in *Howard v Attorney-General*[98], the Tribunal's jurisdiction in this respect is often referred to as a 'declaration of inconsistency' power, embodying the idea of inconsistency with the right to freedom from discrimination as affirmed by s. 19 NZBORA. That reflects the terms of s.92J(2) of the HRA. Strictly speaking, however, the threshold for the making of such a declaration is a finding that an enactment is in breach of Part 1A: see s.92J(1) of the HRA.

[108] The requirements for a breach of Part 1A are set out at s.20L of the HRA. Section 20L(1) also refers to inconsistency with s.19 NZBORA, but then s.20L(2) goes on to make it clear that:

> *"... an act or omission is inconsistent with section 19 of the New Zealand Bill of Rights Act 1990 if the act or omission—*

[98] [2004] NZHRRT 10. The decision is under appeal.

(a) limits the right to freedom from discrimination affirmed by that section; ***and***

(b) *is not, under section 5 of the New Zealand Bill of Rights Act 1990, a justified limitation on that right."* (the emphasis is ours)

[109] For the purposes of proceedings in this Tribunal, s.20L(2) establishes that there can be no breach of Part 1A - and, therefore, no declaration of inconsistency under s.92J(2) of the HRA - until the assessment of inconsistency has evaluated both the right *and* any justified limitations under s.5 NZBORA:

"Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[110] Finally under this heading, s.92F(1) of the HRA makes it clear that if there is a finding of discrimination which calls for justification, then the Crown carries the onus of establishing that the eligibility rules for the IWTC fall within a justified limit on the right to be free from discrimination as affirmed by s.19 NZBORA.

D ASPECTS OF DISCRIMINATION

Introduction

[111] The word 'discrimination' is not defined in either NZBORA or the HRA. At the same time, the idea of what 'discrimination' might mean as a concept in this and comparable legislative contexts has been the subject of a very great deal of judicial analysis and academic writing in New Zealand and elsewhere.

[112] Counsel on both sides of this case presented very full and comprehensively researched arguments, drawing attention to various aspects of the problem, and describing the approaches in other jurisdictions (particularly, but certainly not limited to, Canada and the United Kingdom). We cannot hope to do justice to all that was argued, or to refer to (much less analyse) all of the various authorities and materials that we were directed to. In any event we come to the problem as first instance adjudicators recognising that, ultimately, any definitive description of what it means to say that there has been 'discrimination' under NZBORA or the HRA is a task more appropriate to the courts of higher jurisdiction. All we can realistically hope to do is to give a clear statement of the approach that we have taken, and explain our reasons for taking that approach.

[113] In addition, while we mean no disrespect to the submissions that we heard, we think it preferable to approach our task paying particular attention to the New Zealand authorities and other writings on the subject. That is not to say that decisions from other jurisdictions will not be referred to at all, or to suggest that cases from other jurisdictions are not persuasive. Far from it. We do, however, think it needs be recognised that the NZBORA solution to the problem of discrimination is not exactly the same as that embodied in (for example) the Canadian Charter of Rights and Freedoms[99], or in the European Convention on Human Rights, as incorporated into the law of the United Kingdom in the Human Rights Act 1998 (UK).[100] In the end, the approach taken in New Zealand must reflect the New Zealand legislation and respond to New Zealand experience.

[99] For example, NZBORA is not 'supreme law' as is the Charter; nor does it contain a general guarantee of equality as does the Charter.

Common ground

[114] Some propositions relating to the application of NZBORA and the HRA are not in issue:

[a] There are at least two steps to the analysis required by Part 1A of the HRA;

[b] The first inquiry is whether any *prima facie* discrimination has been established;

[c] At this first stage the plaintiff carries the burden of proving its case to the civil balance of probabilities standard;

[d] The second inquiry is whether any discrimination that has been identified is justified under s.5 NZBORA;

[e] At this second stage the defendant carries the burden of establishing justification, again to the civil balance of probabilities standard.

[115] Almost every other aspect of the analysis has been contested. We begin by dealing with what seemed to us to be a significant underlying tension between the competing positions of the plaintiff and the Crown.

Different approaches to the idea of 'discrimination'

[116] It is possible to identify two broad approaches to the meaning of the word 'discrimination' as it is used in the NZBORA from the relevant literature. One view is that discrimination is intended to encompass more than mere differentiation, even if on a ground that is listed in s.21(1) of the HRA. So, for example, in *Quilter*[101] Gault J said:

> *"[T]o differentiate is not necessarily to discriminate. It is necessary to distinguish between permissible differentiation and impermissible differentiation amounting to discrimination. This is a definitional question to be considered*

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[100] For example, there is nothing in the text of NZBORA that corresponds exactly with Article 15 of the European Convention on Human Rights.
[101] Supra, note 10.

before any issue of the application of the s.5 of the Bill of Rights Act arises. Discrimination generally is understood to mean differentiation by reference to a particular characteristic (classification) which characteristic does not justify the difference." (at p. 527, although he then added: "*Justification for differences will frequently be found in social policy resting on social values.*").

[117] This approach imports an element of normative assessment into the identification of 'discrimination' at the first stage of the analysis. As a result, and irrespective of any issue of justification under s.5 NZBORA, 'discrimination' in this sense involves some element to give content to the negative connotations commonly associated with the word 'discrimination'. Proponents of this approach argue that Parliament's choice of the word 'discrimination' in s.19 NZBORA reflects a deliberate legislative decision not to use the word 'differentiate', which would have been sufficient if the identification of 'discrimination' was intended to involve nothing more than differentiation on a prohibited ground. It is also noted that the right to be 'free' from discrimination only makes sense if 'discrimination' is a bad thing. For these and other reasons:

" ... discrimination is best understood as involving invidious treatment, just as it is understood in common parlance. To discriminate is to draw distinctions that are considered wrongful."[102]

[118] A different view of discrimination is that, at least at the first stage of the analysis, the word has a more neutral meaning. In his judgment in *Quilter*, for example, Tipping J described his approach in terms:

"I would prefer to define the right (that is to be free from discrimination) with the purpose of anti-discrimination laws in mind, and then consider whether any suggested limitation is justified or otherwise lawful rather than circumscribe the content of the right at the outset. ... [I]t is better to start with a more widely defined right and legitimise or justify a restriction if appropriate, than to start with a more restricted right. Of course any such restriction or limitation will, as is its purpose, pro tanto abrogate the right; but if restrictions which may be legitimate or justified in some circumstances are built into the right itself the risk

[102] Rishworth et al., supra note 10 at p376. Note that the authors go on to recognise: *"The problem on its approach, of course, lies in determining the criteria that render a distinction wrongful."* In

is that they will apply in other circumstances when they are not legitimised or justified." (at p.576)

[119] Proponents of this kind of approach argue that – at least at the first stage - the identification of 'discrimination' asks nothing about the 'wrongfulness' of the differentiation (that is, nothing beyond establishing that the differentiation has been by reason of a prohibited ground). By the same token, if 'discrimination' is established, then (as indicated by Tipping, J) on this view the question of whether or not it is justified under s.5 NZBORA ought not to be approached in a rigid way, but in a way which recognises the reality that some kinds of 'discrimination' can and should be regarded as being acceptable in a free and democratic society. Furthermore:

" ... any distinction that is based on a prohibited ground should be capable of objective justification or otherwise should not be used."[103]

[120] This broad debate about discrimination is hardly new, nor is it unique to New Zealand. The relevance of the discussion for present purposes, however, is this. Although not put in quite this way, the Crown's argument in this case was broadly in line with the first of the two approaches. We will deal with a particular point about the relevant 'comparators' below, but certainly it was the Crown's position that this case can and should be dismissed on the basis that there is no discrimination, and no need to even begin to embark on any analysis of justification. In contrast, the plaintiff's case is very much based on the second of the two approaches.

[121] As a result we think that it is important to identify the basis on which we have decided to proceed, and why.

[122] The view that 'discrimination' must involve an element of wrongfulness is clearly open on the wording used in NZBORA. At a practical level, we also recognise that the Crown has a legitimate concern about the costs and time that may need to be expended in litigation of the present kind if any prohibited differentiation, no matter how innocuous it may be thought to be, has to be

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Canadian jurisprudence an answer was found – at least, for a time - in an idea of conduct that offends human dignity: although now see *R v Kapp* 2008 SCC 41.

[103] The Butlers, supra note 10 at para 17.9.42

justified. We are not suggesting that this claim was improper in any way, but the reality is that it has put the Crown to very considerable cost and effort in defence of the WFF package.

[123] Nonetheless, we propose to adopt the approach advanced by the plaintiff. We regard it as being consistent with the broad purposes of NZBORA, and the enactment of Part 1A of the HRA against the background of the Government's international commitments. These include obligations under the International Covenant on Civil and Political Rights to ensure to the individuals within its territory enjoyment of the rights protected by ICCPR *"without **distinction** of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."*[104](the emphasis ours, to draw attention to the fact that the ICCPR does not use the word 'discrimination'), and to provide an effective remedy notwithstanding a violation of rights by a person acting in an official capacity.[105]

[124] In addition, the approach advanced by the plaintiff offers a more transparent methodology for the analysis of these kinds of claim. In the absence of any commonly accepted and adequately articulated standard by which to judge what should be held to be invidious, and what should not be held to be invidious, there must be an increased risk that the outcome in any given case will reflect the decision maker's individual (and perhaps inarticulate) perceptions and approach.[106] With respect, we consider that a methodology which encourages clear identification of the conduct at issue, leaving questions about what ought or ought not be regarded as justified until later, is to be preferred.[107]

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[104] ICCPR Article 2(1)

[105] ICCPR Article 3(a) and (b). This is not very far from the point made by Tipping J in *Quilter* (see pages 576/ 577), with which we respectfully agree. Reference can also be made – as in Tipping, J's judgment, to the definition of 'discrimination' given by the United Nations Human Rights Committee in respect of the ICCPR, General Comment 18 para 6 (1989).

[106] To illustrate the point we refer to Baker, *Comparison Tainted by Justification: against a 'Compendious Question' in Article 14 Discrimination* [2006] PL 476. Reference might also be made to Huscroft, *Discrimination, Dignity and the Limits of Equality* (2000) Otago L Rev 697. As the Butlers put it, the staged analysis for which the plaintiff argued in this case is helpful as *"... a check on unthinking assumptions as to the acceptability of distinctions based on the prohibited grounds. In short ... transparency is encouraged and a culture of justification ... is enhanced.": s*upra note 10 at para 17.9.43. Although related to the topic of justification, one might also compare the assertion in *Trevethick v Ministry of Health* [2008] NZCA 397 at para [18] with the observation of Blanchard J in *R v Hansen* that: *"... any limitation on a guaranteed right should be accepted as demonstrably justified only after the Court has worked through a careful process."* (at para [65] of the *Hansen* decision).

[107] Although of less significance, we also accept there is some force in the plaintiff's argument that this second approach is the approach that has been adopted by the Ministry of Justice since 2002: see *The*

[125] In addition, we find the argument that every distinction made on one or more of the prohibited grounds in s.21(1) of the HRA should ultimately be capable of justification under s.5 NZBORA to be compelling. Once it is established in any given case that there has been distinction made on a prohibited ground giving rise to relevant disadvantage, then if it is not a 'bad' thing one would expect it to be capable of justification. If not justifiable then that must cast significant doubt over any initial assessment that the distinction was not invidious. Of course it is true that justification can be a time consuming and expensive exercise. But that is a burden which, in our view, Parliament must be taken to have understood and accepted as appropriate for the assessment of human rights problems in cases of this kind when Part 1A of the HRA was enacted, and the anti-discrimination standard of NZBORA was extended to the activities of government.

[126] The result is that we accept the plaintiff's submissions about the approach that we should adopt in this case. Specifically, the following questions need to be considered:

[a] Does the impugned act or omission[108] treat two comparable groups differently by reason of one of the prohibited grounds of discrimination?[109]

[b] If so, does the different treatment[110] involve disadvantage to the disfavoured group?

[c] If so, can the impugned act or omission nonetheless be justified as a reasonable limit on the right to be free from discrimination in terms of s.5 NZBORA?

[127] If the answers to questions [a] and [b] above are 'yes', then *prima facie* discrimination is established. At that point the analysis moves to the issue of justification. We deal with the *prima facie* discrimination question in this section

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Non-discrimination Standards for Government and the Public Sector – Guidelines on how to apply the standards and who is covered (Ministry of Justice, March 2002).

[108] Here, ss. MD8(a) and MD9(4) of ITA 07.

[109] Or, does the impugned act (or omission) fail to treat two groups, who are different by reason of a prohibited ground of discrimination, differently?

[110] Or absence of different treatment, as the case may be.

and in sections E and F of this decision. We deal with the issue of justification in sections G to I below.

The 'comparator group' question

[128] The first of the questions raises an issue of comparison. As Tipping J put it in *Quilter*[111]

> *"The essence of discrimination lies in difference of treatment in comparable circumstances. For discrimination to occur one person or group must be treated differently from another person or group. Of course difference in treatment will not necessarily amount to discrimination; and not all discrimination will be unlawful."*

[129] The issue of what the relevant comparison in this case should be, was one of the most keenly contested questions in this litigation. Amongst other things it gave rise to a sharp disagreement about the adequacy of the plaintiff's pleadings. We will deal with that below. In this section of our decision we address the more general arguments about how one should approach the issue of comparison as a matter of law.

[130] As it happened, after the hearing in the Tribunal was completed the Court of Appeal issued its decision in *Air New Zealand v McAlister*[112] Both counsel have since filed detailed memoranda dealing with the case and its implications for this proceeding. It is in our view the appropriate starting point for discussion about the issue of comparison - although, as counsel for the plaintiff observed, it needs to be recognised that it is a decision in relation to s.104(1) of the Employment Relations Act 2000, not NZBORA or the HRA.[113]

[131] *Air New Zealand v McAlister* concerned a senior airline pilot who, having reached the age of 60, was demoted because relevant international regulations

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[111] Supra, note 10, at p.573.
[112] [2008] NZCA 264 (30 July 2008).
[113] As the Court of Appeal in *McAlister* noted, issues relating to the competing approaches to the conception of discrimination do not arise in quite the same way under s.104 of the Employment Relations Act, because to an extent that Act directs how the comparison is to be made: " ... *the point for present purposes is that the structure of the ERA anti-discrimination provisions seems to provide less scope for debate about the proper approach to 'discrimination'.* "(at para [45]). For completeness,

no longer allowed him to fly to a significant number of destinations, including the United States of America. His claim was that the reduction of his status amounted to discrimination by reason of his age, contrary to s.104(1) of the Employment Relations Act. In reaching its decision, the Court of Appeal noted that where the legislation at issue says something about the identity of the relevant comparator group, then obviously close attention must be paid to the statutory language.[114] It also recognised that the choice of comparator group in any given case can be, and often is, critical to the outcome.[115]

[132] The Court of Appeal held that the comparison required under the Employment Relations Act was as between a pilot over the age of 60 who is unable to fly to the United States because of age, and a pilot under the age of 60 but who is also unable to fly into the United States (perhaps because of an inability to meet entry requirements):

> *" ... to reach a true comparison of whether the appellant has discriminated against the respondent in terms of s.104(1)(b) it is necessary to place the comparator* ***in the same circumstances*** *as the aggrieved person, except for the allegedly discriminatory factor. This permits a focus on the role of that factor"* (our emphasis).[116]

[133] Crown counsel urged us to take the same approach to this case, namely to ensure that our comparison in this case puts the comparator in the same circumstances as the aggrieved group (here, families in which an adult is on benefit[117]), save only for the allegedly discriminatory factor (namely, the receipt of the benefit[118]). Amongst other authorities, we were referred to the decision of the Supreme Court of Canada in *Andrews v Law Society of British Columbia* [1989] 1 SCR 142, as recently re-stated in *R v Kapp* [2008] SCC 41. We were invited to apply the approach set out in those decisions as effectively stating the approach that should be taken in New Zealand under NZBORA.

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we understand that the decision is now the subject of an application for leave to appeal to the Supreme Court.

[114] Supra note 112 at para [77](a).

[115] Supra note 112 at para [77](b).

[116] Supra note 112 at para [90].

[117] Or in receipt of weekly ACC compensation in respect of an injury suffered before 2006.

[118] ~~Or weekly ACC compensation in respect of an injury suffered before 2006.~~

[134] The argument for the plaintiff on the comparator issue asks us to adopt a somewhat less restricted approach. We were given a comprehensive tour of cases in New Zealand and elsewhere in which different formulae for the comparison exercise have been articulated. In overview, counsel offered a table which compared different formulations, and which we have found to be helpful[119]:

Lower threshold	Higher threshold
➢ 'Sufficiently analagous qualities' – *Miron v Trudel*[120] ➢ 'Analagous situation' – *Wandsworth London Borough Council v Michalak*[121] ➢ 'Same or not materially different' – *Ashan v Watt*[122] ➢ 'Analgous or relevantly similar situations' – European Court of Human Rights[123] *and A & Ors v Secretary of State for the Home Department*[124] ➢ 'Similarly situated' – *Gosselin v Quebec (Attorney-General)*[125]	'Mirrors all (relevant) characteristics except ground' – *Hodge v Canada (Minister of Resources and Development)*[126]

[135] The table over-simplifies some of the decisions, and it certainly does not purport to be anything more than a sample of cases. It does, however, serve to illustrate that the Court of Appeal's approach in *McAlister* would lie at the high end of the spectrum, if it is read as requiring comparison not just with a group having relevantly similar circumstances, but one having the *same* circumstances save only for the allegedly discriminatory factor.

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[119] We have made a few alterations to that presented by the plaintiff, but the point of the analysis is the same.
[120] Supreme Court of Canada [1995] 2 SCR 818, 467.
[121] UK Court of Appeal, [2003] 1 WLR 617, 625.
[122] House of Lords, [2008] 1All ER 869, 882.
[123] See, e.g., *Zarb Adami v Malta* 20 September 2006 17209/02, para's 71 to 73 and *Kafkaris v Cyprus* 12 February 2008 21906/04, paras 159 to 161.
[124] House of Lords [2005] AC 68, 115.
[125] Supreme Court of Canada, [2002] 4 SCR 429, 482 and 522; see also *Canada (Attorney-General v Hislop* [2007] 1 SCR 429, 451.
[126] Supreme Court of Canada, [2004] 3 SCR 357, 368.

[136] In their argument counsel for the plaintiff drew attention to the pitfalls inherent in placing too great an emphasis on comparator groups. Of the many references we were given we think it sufficient to illustrate the point by reference to the observations by Lord Carswell in *R v Secretary of State for Work and Pensions ex parte Carson*[127]:

> *"Many discrimination cases resolve themselves into a dispute, which can often seem more than a little arid, about comparisons and identifying comparators, where a broader approach might more readily yield a serviceable answer which corresponds with one's instinct for justice. ... Much of the problem stems from focussing too closely on finding comparisons ..."*[128]

[137] We are inclined to agree with the plaintiff that in the analysis of discrimination a search for precise exactness of circumstances before one group can be regarded as a proper comparator for another, carries a risk of injustice. The Court of Appeal decision in *McAlister* makes it clear that the comparisons drawn there were informed by the wording of the particular legislation in question. We do not read *McAlister* as requiring us to search for a comparator group that is quite literally *the same in all respects* (save only for the allegedly discriminatory factor) as the group which is said to be victim of discrimination. There is no good reason in logic or policy to find that an irrelevant dissimilarity is fatal to the comparison, and we do not regard the Court of Appeal in *McAlister* as suggesting otherwise.

The disadvantage element

[138] The plaintiff accepts that in order to establish *prima facie* discrimination some disadvantage must be shown to arise from distinctions made between groups by reason of one or more of the prohibited grounds of discrimination.

[139] The argument for the Crown tended to emphasise that the idea of disadvantage in this context involves something that is real, in the sense that the

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[127] *Secretary of State for Work and Pensions ex parte Carson; Secretary of State for Work and Pensions ex parte Reynolds* [2005] UKHL 37. Reference might also have been made to the observations of Baroness Hale in *AL (Serbia) v Secretary of State for the Home Department* [2008] UKHL 42. It needs to be noted that Lord Carswell was in the minority in the *Carson* case; and that the European Court of Human Rights has since agreed with the House of Lords' decision: *Carson and Others v United Kingdom* Application No. 421841/05 (4 November 2008).

discrimination perpetuates prejudice or stereotyping.[129] Crown counsel observed (and we accept) that the very essence of government is to make distinctions between different groups of people, and that not all - indeed, not many - of the distinctions that are made infringe non-discrimination rights, even if made on one or more of the prohibited grounds. As McIntyre J said in *Andrews*[130]:

> *"It is not every distinction or differentiation in treatment at law which will transgress the equality guarantees of s.15 of the* [Canadian] *Charter* [of Rights and Freedoms]. *It is, of course, obvious that legislatures may – and to govern effectively – must treat different individuals and groups in different ways. Indeed such distinctions are one of the main preoccupations of legislatures. The classifying of individuals and groups, the making of different provisions respecting such groups, and the application of different rules, regulations, requirements and qualifications to different persons is necessary for the governance of modern society."*[131]

[140] Crown Counsel submitted that under the Canadian Charter a difference of treatment (or effect) – even if on a prohibited ground – is not enough to establish a discrimination claim. The claimant must also establish that the impact of the challenged provision is inconsistent with the purpose of s.15 of the Canadian Charter, namely the promotion of substantive (not merely formal) equality. The argument was also supported by reference to authorities from the United Kingdom, such as *AL v Secretary of State for the Home Department* [2008] UKHL 42.

[141] We do not go so far as to accept that there can be no *prima facie* discrimination under NZBORA unless the disadvantage suffered by an aggrieved person or group is shown to perpetuate prejudice or stereotyping. We do, however, accept that some real disadvantage arising by reason of differentiation on one or more of the grounds listed in s.21(1) of the HRA needs to be established.

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[128] Supra note 127 at para [96] on p.576.
[129] Again referring *inter alia* to *Andrews v Law Society of British Columbia* [1989] 1 SCR 142, and *R v Kapp* [2008] SCC 41.
[130] Supra, cited at para [133].
[131] At p. 168. While we respectfully agree with the idea that is articulated, it needs be remembered that the Canadian Charter provides a general guarantee of equality but NZBORA does not.

Summary

[142] For these reasons, we approach our assessment of the evidence insofar as it relates to this first stage of our enquiry on the following basis:

[a] It is for the plaintiff to establish, to the balance of probabilities standard, that the challenged provisions of the ITA 07 demonstrate *prima facie* discrimination;

[b] For that purpose, we must be satisfied on the evidence in this case that the challenged provisions of the ITA 07 treat two groups who are in otherwise relevantly similar circumstances differently by reason of one or more of the grounds of discrimination set out in s.21(1) of the HRA;

[c] We must also be satisfied that the difference of treatment gives rise to some real disadvantage to the disfavoured group.

E COMPARISON AND DISADVANTAGE IN THIS CASE

Introduction

[143] As explained above[132], the requirement to show that any discrimination is 'by reason of' one or other of the prohibited grounds relied upon by the plaintiff was not particularly controversial. Instead the analysis of the evidence boils down to three topics, namely who ought be compared with whom, whether the challenged tax credits should be regarded as 'child-related', and what disadvantage is to be observed (if any).

[144] Each topic has its own complexities. We take the comparison issue first.

Who is to be compared with whom?

[145] We begin this topic by referring to the pleadings and statements of issues that were filed in advance of the hearing. In its claim dated 12 December 2006 the plaintiff described the essential problem as being that:

> *"Families who are not entitled to receive payment of an IWP* [now, the IWTC] *by reason of the employment status of the principal caregiver, or where relevant the principal caregiver's spouse, civil union partner or de facto partner, are disadvantaged in terms of their household income by the amounts which would otherwise be payable to them in each case for the support of their children on the basis of the family's income level as well as number of dependent children."*

[146] In its statement of issues, the questions identified by the plaintiff referred to 'beneficiary families', i.e., parents with dependent children who are in receipt of an income-tested benefit under the Social Security Act 1964.[133] The specific provisions that were identified as being under challenge were the predecessors to ss. MD 8(a) and MD 9(4) of the ITA 07, that is the 'off benefit' rule of eligibility for the IWTC and the provision relating to recipients of weekly compensation under the ACC legislation for incapacity to work suffered before 2006.

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[132] See para's [102] to [105].

[133] And those in receipt of weekly compensation under the ACC legislation in respect of a pre 2006 injury.

[147] At least as a matter of first impression (and at some risk of over-simplification), it had seemed to us at the outset that this case was likely to involve a comparison between the position of families who are in work and receive the IWTC as against those families who are not in work and do not receive the IWTC because they do not meet the 'off benefit' rule. As an indication of the scope of that issue:

[a] A report prepared by the Ministry of Social Development for the Families Commission in 2004 showed that, at 30 June 2003[134], there were 167,000 *families* receiving core benefits (that is, including the DPB, sickness benefits, unemployment benefit, etc). There is data to suggest that the number of recipients of the DPB – which forms the largest single group within that number - has fallen since then. Equally data shows that there have been increases in the total numbers on other benefits. It is difficult to say how many recipients of those other benefits are in families, but as a general approach we think it is reasonable to take 165,000 as an estimate of the number of families who are in receipt of core benefits;

[b] As noted, amongst those who receive such a benefit, the largest group receive the Domestic Purposes Benefit. In his evidence Mr Gray[135] told us that at the end of December 2007 there were 88,701 recipients of that kind of benefit. An internal Ministry of Social Development memo dated 12 January 2007 puts the number of people receiving the DPB (all classes) at 106,962 at year end 2005, and 101,000 at year end 2006. The IRD/MSD Report *Receipt of the Working For Families Package: 2007 Update* gives the total number of DPB recipients as at August 2007 at 97,200. An MSD summary *'Key Facts at the end of December 2007'* put the number at 98,000[136];

[c] Mr Nutsford's evidence was that in the year to 31 March 2007 there were approximately 180,000 families receiving the IWTC.

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[134] *New Zealand Families Today*, Ministry of Social Development, July 2004. Note that the figures which we give had changed by the time WFF came into effect, but even so the data provides a relevant indication of the scope of the issues being debated.

[135] Deputy Chief Executive – Social Development Policy and Knowledge, Ministry of Social Development.

[136] We mean no criticism of Mr Gray's evidence; exact figures are elusive here, as in many other areas of the case.

[148] At the same time, however, it needs be noted that neither of the plaintiff's claim or its issues statement explicitly referred to or challenged the predecessors of what are now ss. MD 9(1) and/ or MA 7(1) of the ITA 07 - that is, the 'full time earner' requirement of eligibility for the IWTC.

[149] In the course of closing arguments the submissions for the plaintiff were nonetheless couched in terms that referred to the 'full time earner' requirement as well as the other aspects of rules for eligibility for the IWTC. Crown counsel objected strenuously. They submitted that last minute inclusion of the 'full time earner' rule as part of the plaintiff's challenge would involve a very considerable change to the claim, and one that they were not prepared or willing to deal with.

[150] The reason for the objection had to do with the way in which the Crown's argument on the 'comparator groups' issue was presented. We think it best to set it out as it was put to us:

> *"In this case, a simple comparison between income-tested beneficiary families and non-beneficiary families establishes nothing. While none in the former category qualify for an* [IWTC] *many in the latter category do not either. Without requiring both claimant and comparator to be similarly eligible or ineligible except for their employment status, it is not possible to establish either different treatment or the reason for it. In such a situation, the Government should not be put to the hugely resource-intensive task of having to justify its policy choices. Nor should public resources be wasted on hearing and adjudicating on a claim of this nature if the actual result makes no difference because of other (non-discriminatory) eligibility criteria.*
>
> ...
>
> *"No family is eligible for the* [IWTC] *unless they meet all the eligibility requirements. There is no difference in treatment between beneficiary families who do not meet the criteria and non-beneficiary families who do not meet the criteria. For example, a person with no children on an unemployment benefit working ten hours a week does not qualify for the* [IWTC], *but neither does a person with a child, not in receipt of a benefit working ten hours a week. Employment status makes no difference to the outcome unless the other criteria are satisfied."*

[151] In short summary, the Crown took the requirement for sameness between comparator groups to an extreme conclusion. The correct comparison must (so it was contended) hold everything constant save only for the difference that is being challenged. The only difference that the plaintiff has identified in its challenge is the 'off benefit' rule. It follows, in the Crown's submission, that the full time earner requirement must be held constant for both groups in the comparison. So, while it may be true that families in receipt of a benefit do not get the IWTC, at the same time no family – whether in receipt of an income-tested benefit or not – gets the IWTC if they do not meet the full time earner requirement.

[152] Mr Gray's evidence indicated that at the end of December 2007 there were 1,267 families who met all the eligibility requirements for the IWTC (including the full time earner requirement) but who received an income-tested benefit and so were ineligible for the IWTC *only* because they do not meet the off benefit rule. The Crown conceded that in respect of this group, there is a comparison to be made and at least a debate to be had about whether there is any disadvantage such as might indicate *prima facie* discrimination.[137] But the Crown was adamant that it is not even open to the Tribunal to carry out the kind of comparison exercise that we were asked by the plaintiff in its closing argument to do.

[153] Thus:

[a] The plaintiff says this is a case about the difference of treatment between around 165,000 or so families[138] who are not in paid work and on a benefit (and who do not get the IWTC), as against around 180,000 or so families[139] who are in paid work and not on a benefit (and who do get the IWTC);

[b] The Crown says that this is a case about the difference of treatment between around 1,270 or so families[140] who are in paid work and also on a benefit (and so do not get the IWTC) as against the 180,000 or so families who are also in paid work but not on a benefit (and who therefore do get the IWTC).

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[137] The Crown's position was that no such disadvantage is present.
[138] See para [147] [a] above.
[139] See para [147] [c] above.
[140] See para [152] above. We add that, even if we had accepted this part of the argument for the Crown, the plaintiff would still have advanced its case in respect of the limited group of some 1,267 or so families affected.

[154] The fact that the Crown was arguing that the only legitimate comparison to be made is one between two groups of families both of which are in work, and that the case has nothing to do with families who are not in work, was not immediately apparent. But, once the potential significance of the point was understood, we were curious to know how and in what ways the Crown's preparation for and response to the claim might have been different had it been clear at the outset that the full-time earner requirement would be in issue as well (or, more simply, that this might be a case about the difference between a group of families who are in work and a group of families who are not). Given all that we had heard by the last day of the hearing, we wanted to get a sense of the extent of the prejudice asserted by the Crown, in terms of what other evidence might have been called, what evidence might not have been called, and generally how the case might have been different.

[155] Crown counsel declined to assist us, ultimately submitting that our request was quite simply inappropriate. For their part, counsel for the plaintiff took the view that the plaintiff's case has been clear throughout, and that the plaintiff's pleadings needed no amendment. They too declined an opportunity offered at the end of the hearing to address further submissions to the Crown's point (which is undoubtedly correct) that the claim does not explicitly refer to the full time earner requirement as part of the plaintiff's challenge.

[156] We can see that this issue would not have been available if the plaintiff's claim had incorporated an express reference to what are now s. MD 9(1) and the definition of 'full-time earner' in s. MA 7(1) of ITA 07. Even so, we think it is unreal to suggest that this could ever sensibly have been understood to be a case about the difference of treatment between two kinds of families, but where both kinds of family are in work. The claim is, after all, directed at alleged discrimination on the basis of employment status. The claim as a whole makes it clear that it is the exclusion of unemployed families from eligibility for the IWTC which gives rise to or exacerbates the adverse consequences that are of concern to the plaintiff.

[157] Reference to the statement of reply filed by the Crown should also be made. A number of instances might be given, but we think it suffices to refer to paragraphs

4 and 5 as they appear in the general introduction to the reply, to draw attention to the Crown's essential objections to the claim:

> *"4. The purpose of the IWP[141] is to encourage people to enter the paid workforce or if already there, remain in the workforce. That purpose is not discriminatory. Section 19 BORA does not limit the right of government to assist labour market development and provide work incentive schemes such as the IWP. Given the purpose of the IWP it necessarily must exclude families whose income is from specified income-tested benefits under the* [Social Security Act] *and not from work.*
>
> *"5. At the core of any discrimination claim it must be shown that comparable individuals or groups are being treated differently by reason of a prohibited ground of discrimination. Here the two groups chosen by the plaintiff are not comparable. It is not valid to found a discrimination claim by comparing the situation of families whose income is from a benefit under the* [Social Security Act] *with those who receive their income from work because their circumstances are not analogous. Therefore, although the IWP excludes families whose income is from a benefit under the* [Social Security Act] *on the basis of 'employment status' as defined in s.21(1)(k) of the HRA, that difference in treatment does not constitute a prima facie breach of s.19 BORA. There needs to be a difference of treatment between those in comparable or analogous circumstances in order to constitute such a breach."*[142]

[158] We read these passages from the statement of reply, and the statement of reply as a whole, as reflecting a clear appreciation that the plaintiff's case was and is about the difference of treatment between families that are in paid work, and those that are not in paid work. We can see that the Crown did not agree

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[141] Now the IWTC.

[142] The reply goes on to assert that even if there is differential treatment there is no disadvantage; and if there is differential treatment and disadvantage then the current legislation is justified under s.5 NZBORA. In fairness to the Crown, its statement of issues dated 16 May 2008 (which was filed a few days before the hearing started) does identify its proposed comparator group clearly. Nonetheless it remains our assessment that the Crown was aware that the plaintiff had a different comparison in mind, and that the evidence called by the Crown addressed the substance of the plaintiff's case on the point.

with the case that was being put forward, but we do not think it can now be heard to say that it did not understand it.

[159] Our assessment of the statement of reply is confirmed by a review of the evidence. We are unable to reconcile the content and scope of all of the evidence that was prepared and presented on behalf of the Crown – dealing as it did in detail with the different circumstances of families in work as against families who are not in work – with the Crown's argument on the 'comparator group' question (namely that the case is only about differences between two different kinds of families both of which are in work). To give just two examples to illustrate the point:

[a] The Crown called the OECD experts to give evidence about the attractiveness of in-work benefit schemes generally, and the importance that is attached by other OECD countries to dealing with poverty issues by incentivising people to move into, and/or to remain in, paid work. The OECD experts had nothing to say about any differences that there might be between families who are in work and thus eligible for an in-work benefit on the one hand, as against families who are in work but who happen not to qualify because they are in receipt of a benefit as well. The evidence given by the OECD experts addresses the substantive issue raised by the plaintiff's claim, indicating that they must have been briefed for the hearing on the basis of the plaintiff's claim rather than what was (subsequently) advanced by Crown counsel in their argument[143];

[b] Similarly, the Crown's evidence on justification, and most (although not all[144]) of its arguments on the issue of justification, were not addressed to a comparison of one group of families that is in work and receiving the IWTC as against another group of families that is in work but not receiving IWTC. The evidence and argument addressed the question of whether or not there is a justification for different treatment between families that are in work, and those that are not.

[143] The same can be said to a greater or lesser extent of all of the witnesses called by the Crown, with the possible exception of Dr Yeabsley whose evidence did not touch the issue of comparison.

[144] See para's [184] to [186] below.

[160] For these reasons we reject the Crown's complaint about the adequacy of the plaintiff's pleadings in respect of the issue of comparison. We are satisfied that this case is, and has always been understood by both parties to be, a case in which the plaintiff is inviting a comparison between families who are in work and who receive the IWTC, as against families who are not in work and do not receive the IWTC because they are in receipt of an income-tested benefit. The plaintiff's failure to specifically refer to the 'full time earner' requirements of the MD sub-part of the ITA 07 in its claim is not determinative of anything. To the contrary, we find the Crown's argument on the comparator group issue to be out of kilter with most of the rest of the Crown's own case. Indeed in our view this aspect of the argument serves to highlight a danger that the search for exactness of similarity of circumstances in the comparators can become an artificial and, ultimately, counter-productive exercise.

[161] A question still remains as to whether it is appropriate to accept the comparison that the plaintiff has proposed. One consequence of the way in which the Crown ran this part of its argument, however, is that it did not address the plaintiff's proposed comparison in any detail, beyond arguing that it is not a comparison that we ought to be concerned with at all. In our view, however, any uncertainty on the matter is removed by reference to the WFF package itself. The concern of the legislators was clearly to differentiate between families that are in work, as against those that are not in work and receive an income-tested benefit instead.

[162] We therefore accept the plaintiff's submission that the substantive reason for the differentiation which is at issue in this case is employment status - in the sense of either being in receipt of an income-tested benefit, or being in paid work. When it comes to assessing comparative disadvantage, we think that it is appropriate to look at the situation of those families who receive an income-tested benefit and who are not eligible for the IWTC as a result, as against those families who are in paid work and who are therefore eligible for the IWTC (within the parameters of the relevant thresholds and cut-offs that apply to the IWTC).

Are the challenged tax credits 'child-related'?

[163] Before turning to the evidence of disadvantage in the context of that comparison, we deal with a question as to whether the challenged tax credits can or should be described as being 'child-related'.

[164] We have found this an odd question to have to deal with, not least because it does not fall neatly into any particular stage of the analysis and, in a way, the answer does not of itself determine anything.[145] Certainly it is a curious point in a case that is about the allocation of tax credits to families which, by definition, means having the care of a dependant child or children.

[165] It was however a significant part of the argument for the Crown that we ought not describe the IWTC as being child-related in any way, and that - despite outward appearances - we should find it to be connected only to the 'make work pay' element of the WFF package.

[166] It would, of course, have been possible for the plaintiff to argue that, as long as allocation of tax credits depends on being off an income-tested benefit (i.e., in work) or on an income-tested benefit (i.e., off work) then there is differentiation on the basis of employment status, and corresponding disadvantage, and so the spectre of unlawful discrimination is raised.[146] But as the case is not put in that way and focuses instead on the position of the adult taxpayers, then justifying the result by reference to the 'make work pay' objective might not be as onerous. As we have said, the plaintiff has no objection in principle to policies that seek to create or maintain a gap between income from benefits, and what can be achieved from paid work.

[167] However, the plaintiff's central concern is that children ***are*** involved, not only in the obvious sense that they constitute the cornerstone eligibility criterion[147] for the tax credits at issue, but also because a stated objective of the WFF package as a whole was to alleviate the burden of child poverty. The 'sting' of the discrimination alleged by the plaintiff is that, while WFF may have desirable benefits for children in families who qualify for the tax credits, the inescapable result of the allocation of the IWTC is that children of families that are not in work are left further and further behind.

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[145] In other words, even if it were to be accepted that the challenged tax credits are not properly described as being 'child-related', it would not follow that there is no *prima facie* discrimination.

[146] That being the issue noted at para [25] of the Tribunal's decision on the strike out application in this case: *supra*, note 8.

[147] The package is, after all, called the Working For **Families** tax package (our emphasis).

[168] The point will undoubtedly inform the assessment of justification. After all, while it is one thing to assert that an adult has a choice to make about being in work or not being in work, children are certainly not in that position. They have to live with the consequences of the choices that their caregivers make in the context of their (the caregivers') individual circumstances, various constraining factors and the level of government support that is available to them (the caregivers). Children are by far the most vulnerable of all the people under consideration.

[169] The Crown's argument that the challenged tax credits cannot be described as 'child-related' has no basis whatsoever in the evidence we heard. A number of witnesses were asked to identify what facts or circumstances might justify a conclusion that the tax credits are not child-related, despite the fact that eligibility depends on having the care of dependent children, and the rates of payment depend on the number of children being cared for. No satisfactory explanation was given.

[170] In the closing submissions, Crown counsel nonetheless argued that the label 'child-related' establishes nothing: all it can sensibly mean is that the IWTC is a form of social assistance targeted at families, and *" ... the fact that a measure is targeted at families does not determine its objective."* The Crown does accept that the IWTC is a work incentive targeted at families but beyond that it submits that the description 'child-related' is unhelpful and even meaningless:

> *"What the plaintiff seeks to do is to point to the uncontroversial fact that the IWP[148] is targeted at families and therefore is available only to those with children. It therefore calls the IWP a 'child-related' payment. From this innocuous description it attempts to infer that the objective of the IWP is necessarily to assist with the costs of raising children. Therefore, it argues, the IWP must be compared solely with Family Support, whose objective is explicitly to assist with the cost of raising children. Yet all that is revealed by the combined amount of Family Support and the IWP that beneficiary and working families receive is that beneficiary families do not receive the IWP. This is scarcely an enlightening insight.*

[148] Now the IWTC.

"In the end, all that the plaintiff's argument that the IWP is 'child-related family assistance' amounts to, and therefore all that the plaintiff objects to[149]*, is that the IWP is targeted at families with children, and* [it] *is delivered within the same administrative mechanism as another social assistance measure whose objective is to assist with the costs of raising children.*

"... Neither of [these design features] *imply that the IWP is directed at assisting with the costs of raising children ...".*[150]

[171] We do not agree. The fact that the challenged measure is targeted at families seems to us to say a very great deal about its objectives. Indeed, the fact that the IWTC has a purpose of assisting with the costs of raising children is the only sensible explanation we can see for the fact that it was targeted at families. It has a work incentive purpose as well, but even viewed in that light it is about incentivising people in families (i.e., where there are children to be cared for) to get into and/or to stay in work. As already noted[151], one of the significant reasons that the legislature sought to do that through the WFF package was the alleviation of poverty, including child poverty.

[172] In any event, the short answer to this debate lies in the legislation at issue. Section MD 4(1) of the ITA 07 provides:

"MD 4 ENTITLEMENT TO IN-WORK TAX CREDIT

MD 4(1) REQUIREMENTS A person is entitled to an in-work tax credit ***for a child*** *if, for an entitlement period, the person meets the 5 requirements of sections MD 5 to MD 9."* (our emphasis).

[173] The payment is only available if there is a child or there are children to be cared for. If the number of children in the care of the taxpayer receiving the credit is four or more, then the payment goes up by $15 per extra child per week.

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149 We make it clear that, all other issues aside, we do not think that this is an accurate summary of what the plaintiff objects to.

150 We have altered the formatting, but (save as indicated by square brackets) not the wording of this extract from the Crown's argument

151 See para [s [50] and [53] above.

[174] To conclude, we have no doubt that the IWTC is properly described by the plaintiff as being 'child-related'.

What is the disadvantage?

[175] Although we have rejected the Crown's argument that the IWTC is not properly described as 'child-related' we do agree with the Crown that, of itself, the description does not establish that there is disadvantage sufficient to give rise to *prima facie* discrimination.

[176] We also accept the Crown's argument[152] that it is simplistic to suggest that there must be disadvantage only because one group is eligible for the IWTC while the other is not. Just as we have rejected the invitation to isolate different objectives of the WFF package in order to assess its intended impact, by the same reasoning we accept that the effect of the WFF package should be considered in the round, taking account of its context and all of its components, and not just the particular elements relating to the IWTC. In principle we also agree with the Crown that, if it were to be established that families that do not get the IWTC because they are not in work and on a benefit nonetheless obtained additional support from other elements of the WFF package, and as a result were left in no lesser position than those who are eligible for the IWTC, then there would be no disadvantage to establish *prima facie* discrimination. It is difficult to imagine circumstances in which the way in which these kinds of social support are labelled might, of itself, be material.[153]

[177] It follows that we do not accept the plaintiff's argument that children in families who are not entitled to receive the IWTC by reason of their parents' employment status are disadvantaged *at least*[154] in terms of their household income by the amounts which would otherwise be payable to their families. The argument might have been tenable in that very simple form if it were the case that the WFF package did not include any other elements aside from the IWTC. However, as already noted, the WFF package included a number of other elements including

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[152] Which referred to Canadian cases including *Andrews v Law Society of British Columbia* [1989] SCR 41; *Thibeaudeau v Canada* [1995] 2 SCR 627; *Symes v Canada* [1993] SCR 695; *Gosselin v Quebec* [2002] 4 SCR 429 and *R v Kapp* [2008] SCC 41 to emphasise that disadvantage ought to be judged in a setting that takes account of the social, economic and political context in which the challenged distinction has been made.

[153] Ultimately any disadvantage must be of substance, not form: *Andrews*, supra at p.174.

changes to the accommodation supplement, changes to abatement rates for Family Income Assistance, increased childcare assistance and so on. Some affected or were available to all families, others only to families in certain situations.

[178] The plaintiff does not accept that these other elements of WFF - individually or collectively - gave rise to a level of household income/resources sufficient to offset the disadvantage to beneficiary families such as to match the advantage of the IWTC for non-beneficiary families. As we will explain, both the plaintiff and the Crown offered different examples of the overall impact that the WFF package would or might have had for families in this situation or that situation. There are difficulties and dangers in that kind of exercise, but even so it needs be recognised that this is not a case in which the disadvantage that is asserted involves anyone having actually lost ground in absolute dollar terms. The 'no losers' principle applied: no family was to be left receiving a smaller number of dollars per week than they had before the WFF changes. If there is disadvantage in this case then it is of the 'lack of comparable gain' kind.[155]

[179] We add that we do not see the evaluation as involving any assessment as to whether, as a matter of law, we should approach the evidence on the basis that the threshold for a finding of disadvantage should be considered to be 'high' or 'low', or anything of that sort. Indeed we do not see that there is anything much to be achieved by trying to add adjectives[156] to the idea of 'disadvantage' in this context. We think that the issue of the existence or otherwise of disadvantage[157] is ultimately and unavoidably one of fact, that has to be decided on the evidence and in the circumstances of the particular case.

[180] The Crown drew attention to a number of contextual factors. Significant among these was the proposition that employment status is a unique kind of ground amongst the prohibited grounds of discrimination. The argument is that our society is increasingly characterised by 'casual and precarious' employment.

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[154] The emphasis is the plaintiff's.

[155] For completeness we note that, despite the evidence as to a 'no losers' approach, the plaintiff says that there were some families for whom the end result of all the elements of the WFF was a reduction in income.

[156] Such as 'real' or 'serious', etc. This observation responds to a submission for the plaintiff to the effect that, since this is a human rights case, it would be appropriate to adopt a 'low' threshold and so accept that there is sufficient disadvantage simply because beneficiaries 'missed out' on eligibility for the IWTC.

Many people become reliant on a benefit at some point in their lives, and there is evidence (which we accept) that for some there is a high rate of 'churn' – i.e., people who move on and off benefit repeatedly over a period of time. Crown counsel noted the evidence of the OECD experts who, while accepting that chronic unemployment is a reality for some, provided data to suggest that the rate at which unemployed people transition back into the workforce is substantial. The overall point was that, unlike (say) race or age, employment status is *'readily changeable';* and, unlike (say) religion, employment status is something that the government has a legitimate interest in changing (we take that to mean, from being unemployed to being employed). In a dynamic employment environment, a person who is on benefit today might at a future time move into employment and so become eligible for the IWTC.

[181] From this basis it was argued:

> *"Because employment status is readily changeable, and does indeed change often for people, 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. It assists beneficiary families by improving their wellbeing including the wellbeing of children, and it enables beneficiary families to avoid the stigma attaching to beneficiary status."*

[182] A different aspect of the Crown's argument had to do with the level of payments made by the Crown to beneficiaries as against those in work. We were invited to consider examples, but the suggested conclusion was that once the context of government social spending is looked at as a whole it becomes clear that there is no disadvantage, because those on benefits generally receive more rather than less overall social assistance than those who are in work.

Or 'less favourable treatment' - see e.g. Butler & Butler, supra note 10 at para 17.13.1.

[183] There was also a submission that there has been no real evidence of disadvantage in any event. Overall the Crown summarised its position on the issue of disadvantage as follows[158]:

> *"... the off benefit rule for the* [IWTC] *does not cause disadvantage, in fact the opposite. The* [IWTC] *provides an option for income-tested familes to be better off by being able to choose to go off benefit and receive the* [IWTC]. *It is not a requirement, it is a choice. That some families opt not to make this choice does not make the measure disadvantageous. Requiring someone to choose between two valuable options cannot be discriminatory. ... Further, it needs to be noted that while a person may chose one option today, in three months or six months time their choice may well be different."*

[184] Our first observation about the Crown's argument on disadvantage is that it was not always clear which comparison was being referred to. We have explained the Crown's position, namely that the only proper comparison ought to be as between families who are in work and who are entitled to get the IWTC, as against families who are in work but who receive an income-tested benefit and so are not entitled to get the IWTC. At some points in the submissions on disadvantage it was clear that the Crown's argument was being advanced within that framework. But at other points it rather seemed that the Crown had moved into the competing comparison (namely as between families in work and entitled to the IWTC, as against families not in work and so not entitled to the IWTC).

[185] The result is that it is not altogether clear which group the Crown was referring to in its argument that not being entitled to receive the IWTC is effectively a matter of free choice made by those who are ineligible – i.e., whether the point was being put forward as engaging the overall number of families in receipt of an income-tested benefit or just the 1,267 families or so who are both in work[159] and also in receipt of an income-tested benefit.

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[158] For completeness, there also an argument for the Crown that, to the extent that the plaintiff claims direct discrimination against the children of families on a benefit, there is no relevant differentiation in all event because no-one under the age of 16 is entitled to the IWTC. However for reasons set out at para's [104] and [105] above we do not think it necessary to address the point beyond saying that as we apprehend it this case is it about differentiation between differently circumstanced families. The fact that children do not directly qualify for the tax credits at issue is not material.

[159] I.e. who meet the full time earner definition in s.MA (7) of ITA 07.

[186] We proceed on the basis that the Crown had in mind the much wider group of beneficiary families in this part of its argument. There are two reasons. First, that does seem to us to be the overall tenor and purport of the argument that was presented by the Crown, even if at some points there were references to the narrower group. Secondly, for reasons already given, we have rejected the Crown's analysis of the relevant comparators. In our assessment any assessment of disadvantage ought to involve the wider group.

[187] We are very troubled by the argument that anyone who is ineligible for the IWTC could simply chose to go into a job and so become eligible. That cannot be realistic for all beneficiaries, and quite likely it is not even realistic over the short- to even medium-term for the majority of them. After all, the OECD experts described the movement in other OECD countries of single digit percentages of people who receive benefit income into work in terms of being a significant achievement. The WFF Cabinet paper itself was based on an assumption for costing purposes that just 2% of single parent families would respond by moving into work, and that there would be no net change for couple families.[160]

[188] We accept that 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. The ability of any given person to work depends on many factors that can be quite beyond their control, including their health, the need to care for others, the availability of suitable work, and the willingness of prospective employers to give them a chance, to name just a few obvious things. Overall, we were left with a real concern that this type of generalisation as it was put up on behalf of the Crown – i.e., that all those on a benefit income are simply there by choice – represents exactly the kind of stereotyping, prejudice and disadvantage that the anti-discrimination standard of NZBORA is intended to protect against.

[189] Both of counsel for the plaintiff and Crown counsel invited us to assess the effect of the WFF package by looking at various 'worked examples' as to how such and such a family in this situation or that fared as a result of WFF. The

[160] WFF Cabinet paper, para 66.

WFF Cabinet paper itself includes these kinds of illustrative examples.[161] At a general level, however, we have some concern about placing too much reliance on examples of particular cases. It was not always clear whether or to what extent a specific illustration can reliably be regarded as being representative of the wider group to which the example was said to belong (whether that was the group of working families who are eligible for the IWTC, or the group of families that are not in work and on income-tested benefits of one kind or another). Furthermore, the various illustrations that were put forward on each side were often highly controversial in themselves.

[190] We do not dismiss the examples that were debated as being of no relevance at all, but we have preferred to take an approach which considers the evidence at a more general level:

[a] The plaintiff placed a good deal of emphasis on the uncontested facts that there are a great many children in New Zealand who live in poverty, that family income levels are key determinants of health and educational outcomes for children, and that the Government was aware of these matters when WFF was adopted. We accept the Crown's points that these things do not of themselves establish discrimination of any kind, and that it is not the function of anti-discrimination laws to (for example) compel the Government to act to alleviate the burden of poverty.[162] Even so, we think the plaintiff is right to say that they are relevant to the context within which our assessment of comparative disadvantage should be made; and that insofar as the claim concerns the children of those who are not in work and who cannot access the IWTC, it relates to a particularly vulnerable group in society;

[b] When making the decision as to how it would allocate an estimated $1.1 billion of new expenditure on social assistance, the Government decided that about 60% would be directed to low- and middle-income families who were in work[163] in the expectation that as a result there would be about a 2% movement of single parent families into work, and hopefully some movement of couple families into work (although it was recognised there might be no net

[161] WFF Cabinet Paper at para 53 and pp. 17 & 18.

[162] Even though the anti-discrimination right is aimed at the protection of subordinated and marginalised groups, it does not of itself impose an obligation on Government to act to remedy the disadvantages faced by those groups.

[163] WFF Cabinet paper para 4.1.

gain there). Although exact figures are elusive, it will be recalled[164] that (in very broad terms) at the end of 2007 the number of families who were not in paid work stood at something like 165,000, and the number of families who were accessing the IWTC stood at about 180,000 – in other words, 60% of the spending was allocated exclusively to a little over 52% of relevant families;

[c] Even within the 40% of the spending that was not specifically targeted at working families, there were items that benefited working families as well as those not in work, such as the other tax credits, the accommodation supplement changes, subsidies for out of school care of children and other child care assistance. In other words, while non-working families could not access any of the 60% of spending targeted at working families[165], working families were able to access some of the remaining 40% of spending. It is not possible for us to say just how much of the residual 40% of spending went to non-working families, but what is clear is that it must have been less than 40%;

[d] The intention and the result of the WFF changes were to enhance incentives for families receiving income-tested benefits to move into work for financial reasons. It was an integral part of the package that those who were on an income-tested benefit should not keep pace with those in work. A conclusion that, despite the stated objectives of the WFF Cabinet Paper and the deliberate targeting of social spending that it proposed, in reality there was no disadvantage to non-working families would be surprising in the circumstances;

[e] We share Dr St John's concerns about the WFF Cabinet paper:

> *"Two internationally recognised income poverty measures are used. These are thresholds or poverty lines set at 50% and 60% of the median household income. The two different expected reductions in poverty are explained by reference to these lines. The 70% decrease is expected in terms of the 50% line. The 30% decrease is expected for the 60% line ... clearly, however, there is an expectation that a corresponding 30% (on*

[164] See para [147] above.

the 50% line) or 70% (on the 60% line) of ***children*** *will remain in poverty. The questions which arise from this include: Who are these children and why were the generous work incentives which formed part of the WFF package (including the IWP) not expected to move or incentivise their caregivers/parents into work? These questions are not explored in the cabinet paper. Nor does there appear to have been any work done separately from the cabinet paper which analysed the different impacts expected for the group of children who would gain under the package compared to those who would miss out.";*

[f] Although there was considerable argument about the extent of the real differences of outcome for beneficiary families and working families under WFF, the Crown accepted that beneficiary families gained less than working families under the WFF package.

[191] We therefore agree with the plaintiff's submission that children in beneficiary families – who were particularly vulnerable to the adversities of poverty before the WFF package was adopted – were disadvantaged by the WFF package at least in the sense that they were left behind the children of families that were in work or for whom a move to work was a realistic possibility. G E Dwyer put the point at its most obvious *"Redistribution can make some people better off but only at the cost of making others worse off."*[166]

[192] We are satisfied that the WFF package as a whole, and the eligibility rules for the IWTC in particular, treats families in receipt of an income-tested benefit less favourably than it does families in work, and that as a result families that were and are dependent on the receipt of an income-tested benefit were and are disadvantaged in a real and substantive way.

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least, not without moving into work.

[166] G E Dwyer, *Dissecting the Working For Families Package*, New Zealand Business Roundtable, 2005 at p.48. We add, however, that the thrust of the article is that while WFF is primarily concerned with income redistribution it does little to make work pay, or to address the problems of child poverty and income insufficiency.

The ACC aspect

[193] We return briefly to s. MD 9(4) of ITA 07, which implicitly excludes from eligibility for the IWTC recipients of ACC weekly compensation whose incapacitating injury was suffered before 2006.[167]

[194] It was not argued that there might be an outcome in this litigation in which the challenged provisions relating to recipients of weekly compensation might support the making of a declaration of inconsistency, if the challenged provisions relating to recipients of a main benefit did not: in a sense, the former issue has come into this case on the coat-tails of the latter. In reality there was very little evidence that was directed at this particular group at all.

[195] Certainly there is no reliable data from which to estimate how many people with dependent children presently fall into this class, or have fallen into this class at any time in the period after 1 January 2006 (and, if so, for how long). Our sense of the evidence, however, is that the number is unlikely to be very large; certainly nowhere near the number who did not qualify for the In-Work Payment after 2006 because of receipt of a benefit such as the Domestic Purposes Benefit, the Unemployment Benefit or any of the other main benefits.

[196] No doubt part of the reason for the lack of evidence has to do with the nature of the underlying payments. Unlike benefits, weekly compensation under the ACC legislation is (broadly speaking) set at 80% of the recipient's pre-injury earnings. Of course we accept in principle that there must be some families that receive weekly ACC compensation in respect of an incapacitating injury suffered before 2006, and which fall within the income brackets at which the IWTC was initially targeted. Equally, we expect that some families which depend on receipt of weekly ACC compensation are outside the abatement cut out for the IWTC, or fall at the upper end, so that the rate of payment of IWTC if it were available would not be great.

[197] Even for those families that fall within the income targets, it is still not altogether clear whether, after taking into account (i) the elements of WFF aside from the

IWTC; and (ii) any other accruals to income, subsidies or other forms of assistance to which the families might be entitled because they are ACC recipients, there is such relative disadvantage as to support a positive finding that the group suffers from *prima facie* discrimination because of the WFF package in general, and s.MD 9(4) of ITA 07 in particular.

[198] In addition, we think there is force in the Crown's submission that, while the effect may be to exclude some, in fact s.MD9(4) was less a restrictive rule than had applied to the CTC.[168]

[199] We agree with the plaintiff that the 'off ACC in respect of pre 2006 injury' rule of eligibility for the challenged tax credit involves differentiation on a prohibited ground of discrimination i.e., employment status.[169] We also note that clearly even Government did not consider that it was an appropriate rule to continue because it was removed after 2006. But on the evidence that was presented at this hearing, answers to questions such as 'exactly who is disadvantaged?'; 'how many are affected?'; 'what is the extent of the disadvantage?' and so on would be speculative.

[200] For these reasons we have significant reservations about making any firm findings about the disadvantage element for this group.

Summary

[201] To collect the conclusions of this section:

[a] When it comes to assessing comparative disadvantage, we think that it is appropriate to look at the situation of those families who are in paid work and who are therefore eligible for the IWTC (within the parameters of the relevant thresholds and cut-offs that apply to the IWTC) as against those families who receive an income-tested benefit and who are therefore not eligible for the IWTC;

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[167] If s.MD 8(a) of ITA 07 is the 'off benefit' rule of eligibility for the IWTC, then s. MD 9(4) is the 'off ACC in respect of pre 2006 incapacity' rule.

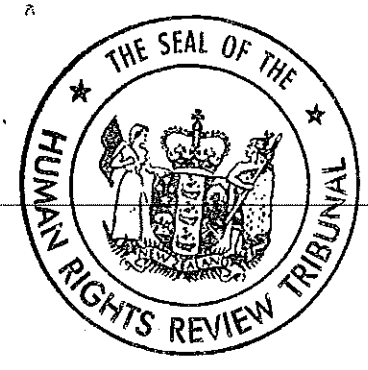
[168] Although we do recognise that there was no work hours requirement under the CTC.

[169] In essence, a family in receipt of ACC weekly compensation for a pre 2006 injury does not get the IWTC because the income is not income from paid work.

[b] We have no doubt that the IWTC is properly described by the plaintiff as being 'child-related';

[c] In our assessment the WFF package (including but not limited to the allocation of the IWTC to working families but not to families on an income-tested benefit) involves less favourable treatment of families on an income-tested benefit, and that there is substantive disadvantage as a result; but

[d] Even so, we are left with significant reservations about making any firm findings about the disadvantage element for the group of families which receive weekly compensation under the ACC legislation in respect of an injury suffered before January 2006, and which are not eligible for the IWTC for that reason.



F *PRIMA FACIE* DISCRIMINATION: CONCLUSION

[202] The plaintiff has satisfied us that the WFF package of reforms including the allocation of the IWTC to families in which there is income from working adults, but not to families in which an adult has income from a means-tested benefit, establishes a case of *prima facie* discrimination against the families in which an adult has income from an income-tested benefit.

[203] We find that s. MD 8(a) of the ITA 07 amounts to *prima facie* discrimination by reason of employment status.

[204] We have not, however, been persuaded *on the evidence that we heard* that s.MD 9(4) – relating to recipients of ACC compensation for injury suffered prior to 2006 - amounts to *prima facie* discrimination by reason of employment status.

[205] We therefore turn to the issue of justification under s.5 NZBORA in respect of the off benefit rule of eligibility for the challenged tax credits.

G ASPECTS OF JUSTIFICATION

[206] We have set s.5 NZBORA out at paragraph [109] above.

Methodology

[207] The cornerstone authority on s.5 NZBORA is *R v Hansen* [2007] 3 NZLR 1. Furthermore, both counsel for the plaintiff and Crown counsel adopted the approach for the evaluation of justification that is given by Tipping, J at para [104] of the Supreme Court judgments:

> *"This approach* [i.e., as discussed by the Supreme Court of Canada in *R v Oakes* [1986] 1 SCR 103] *can be said to give rise to the following issues:*
>
> *(a) does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?*
>
> *(b) (i) is the limiting measure rationally connected with its purpose?*
>
> *(ii) does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?*
>
> (iii) *is the limit in due proportion to the importance of the objective?"*[170]

[208] Our analysis of the evidence relating to justification is organised in the form of responses to each of these questions, as they relate to this case.

Other considerations

[209] Aside from providing the methodology for our inquiry under s.5 NZBORA, the *Hansen* decision also assimilates a number of ideas from significant decisions in

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[170] For the sake of accuracy we note that in their submissions counsel for the plaintiff preferred to substitute the word 'objective' for the word 'purpose' where the word 'purpose' is used. We do not think anything important attaches to the difference in wording; to the contrary, the way in which the word 'objective' is used in question (b)(iii) suggests to us that His Honour was not really intending to distinguish between 'purposes' and 'objectives' in formulating these questions. We have used the words interchangeably in this decision.

other jurisdictions, and earlier decisions in New Zealand. We were referred to many of these by counsel in their arguments. Each side has understandably put different emphasis on different aspects of the authorities. We have found all of the various passages that were drawn to our attention to be helpful. However, because the broad approach to the justification exercise was not in dispute in this case, we do not regard it as being necessary to set out the arguments in full. Instead, we think it sufficient to summarise some of the more pertinent observations taken from *R v Hansen* and other cases, and which have informed our assessment of the evidence in this case.

[210] The assessment of justification must allow appropriate deference to Parliament. This engages a principle of proportionality:

> *"Whether a limit on a right or freedom is justified under s.5 is essentially an enquiry into whether a justified end is achieved by proportional means. The end must be justified and the means adopted to achieve that end must be proportionate to it. Several sub issues inform that ultimate head issue. They include whether the practical benefits to society of the limit under consideration outweigh the harm done to the individual right or freedom. The Court's function is not immutably to substitute its own view for that of the legislature. If the Court agrees with the legislature that the limit is justified, no further issue arises. If the Court does not agree, it must nevertheless ask itself whether the legislature was entitled to come to the conclusion under challenge. It is only if Parliament was not so entitled that the Court should find the limit to be unjustified.*
>
> *"In this way and to this extent the Court's function is one of review. It is not one of directly substituting the Court's own judgment. But the more intensely it is appropriate to review Parliament's appreciation of the matter, the closer the Court's role will approach a simple substitution of its own view. This is the regime under which the Courts manage the ever-present potential for tension between democratically elected representatives and unelected Judges concerning when and to what extent a parliamentary majority may limit rights and freedoms."*[171]

[171] *R v Hansen,* supra (per Tipping J at para's [123] and [124]).

[211] There is a spectrum of review that extends from those matters that engage major political, social and/or economic decisions at one end, to those matters that have a substantial legal content at the other. As one moves from one end of the spectrum to the other, so the latitude which ought be given to Parliament's appreciation of the legislative problem varies. [172] The point is encapsulated by Laws LJ in a passage that was adopted by Lord Walker in *R (Carson) v Work and Pensions Secretary* as follows:

> *" ... in any particular area the decision-making power of this or that branch of government may be greater or smaller, and where the power is possessed by the legislature or executive, the role of the courts to constrain its exercise may correspondingly be smaller or greater. In the field of what may be called macro-economic policy, certainly including the distribution of public funds upon retirement pensions, the decision-making power of government is all but at its greatest, and the constraining role of the courts, absent a florid violation by government of established legal principles, is correspondingly modest. ... I think* [this approach] *reflects ... the search for a fair balance between the demands of the general interest of the community and the protection of individual rights ...".*[173]

[212] It must be obvious that the policies at issue in this case are at least as far towards the macro-economic policy end of the spectrum as were the policies at issue in *Carson.*

[213] At the same time, if after due inquiry a legislative measure is found to discriminate in a manner that is not consistent with the rights affirmed by s.19 NZBORA, and no sufficient justification is established, then the Tribunal's responsibility must be to articulate the issues, and declare the inconsistency, no matter what the legislation. Although made in the context of the issue of statutory interpretation that was engaged in *Hansen*, we respectfully agree with the observation by Gault J that:

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[172] *R v Hansen*, supra (per Tipping J at para [116]). In *Hansen* the measure under consideration was one that involved a substantial legal content and was, on any view, a long way from the measures that we are concerned with in this case.

[173] *R (Carson) v Work and Pensions Secretary* [2006] 1 AC 173, per Lord Walker at pp. 198 and 199. We also note the analysis by Lord Steyn in *'Deference: A Tangled Story'* Public Law Journal [2005] PL Summer 346.

> *"Articulating* [that] *reasoning* [i.e., for a finding of unjustified inconsistency] *serves the important function of bringing to the attention of the Executive branch of government that the Court is of the view that there is a measure on the statute book which infringes protected rights and freedoms, which the Court has decided is not a justified limitation. It is then for the other branches of government to consider how to respond to the Court's finding. While they are under no obligation to change the law and remedy the inconsistency, it is a reasonable constitutional expectation that there will be a reappraisal of the objectives of the particular measure, and of the means by which they were implemented in the legislation, in light of the finding of inconsistency with these fundamental rights and freedoms concerning which there is general consensus in New Zealand society and there are international obligations to affirm."*[174]

[214] We think it would be an inadequate discharge of our responsibilities under HRA to conclude that, since the legislation at issue reflects government decision-making at the macro-economic and social policy end of the spectrum, the Legislature effectively had an unconstrained discretion to infringe the freedom from discrimination on the grounds of employment status as affirmed by s.19 NZBORA.[175] The same kind of concern was expressed by the House of Lords recently in *In re P and others (AP) (Appellants) (Northern Ireland):*

> *"Cases about discrimination in an area of social policy ... will always be appropriate for judicial scrutiny. The constitutional responsibility in this area of our law resides with the courts. The more contentious the issue is, the greater the risk is that some people will be discriminated against in ways that engage their Convention rights. It is for the courts to see that this does not*

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[174] *R v Hansen*, supra at para [254]. The underlying idea is sometimes expressed in terms of a 'dialogue' between the Legislature and the Courts: see, for example, Hogg & Bushell, *The Charter Dialogue between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All* (1997) Osgoode Hall LJ 75 (Canada) and Hickman, *Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998* [2005] PL 306 (United Kingdom). Some of the relevant materials were referred to in *Howard v Attorney-General No.2* [2007] NZHRRT 24 at para's [31] – [33].

[175] We also note that the practical considerations suggested by Anderson J at para [268] of the *Hansen* decision to support allowing a margin of appreciation for what the Legislature has enacted, do not apply with equal force to proceedings in this Tribunal: certainly the topics of concern in this case were addressed at a high level of generality.

happen. It is with them that the ultimate safeguard against discrimination rests."[176]

[215] There was some discussion in argument as to what question (b)(ii) of Tipping J's methodology in *Hansen* really involves. For the Crown it was submitted that government is not required to establish that the limiting measure has impaired a right or freedom as little as possible; the majority of the judges in *R v Hansen* held that the government has only to demonstrate that the limit it has chosen is within a reasonable range of alternatives.[177] The concern expressed by counsel for the plaintiff was that this does not quite mirror the wording of Tipping J's question (b)(ii), and may introduce a lower threshold for justification than is envisaged by s. 5 NZBORA and Tipping J's proposed methodology in *Hansen*.

[216] Counsel for the plaintiff did not go so far as to say that[178], if there are a range of policy choices that are open to government, then government must be shown to have chosen that which has the *least* discriminatory effect. At the same time they did argue that where a government 'needs' to discriminate to achieve a sufficiently important objective then it must do so *' ... no more than is reasonably necessary'*. In their submission it goes too far to say that, if a desired outcome serves a sufficiently important objective to justify discrimination, then government is left with a free choice between alternative policies. The argument placed emphasis on the phrase 'demonstrably justified in a free and democratic society' in s.5 NZBORA, and was supported amongst other things by reference to the approach applied in the *Northern Regional Health Authority* case.[179]

[217] In our assessment the distinction that was debated on this point is rather more apparent than real. After all, the argument on both sides referred to what Tipping J said in formulating his methodology. At para [126] of his judgment His Honour added:

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[176] [2008] UKHL 38, at para 48; or, as Blanchard J has put it: *"It will be remembered that s 5 of the Bill of Rights has the effect of requiring the Courts to undertake, within the bounds of their jurisdiction and processes, an analysis of the legitimacy of challenged statutory provisions in their particular societal context."* (para [82] of *R v Hansen,* supra). See also Lord Steyn, *Deference: A Tangled Story* [2005] P.L. Summer 346.

[177] *R v Hansen* supra; see para's [79], [104], [126] and [279] – note that Gault J retained the 'as little as possible' formulation but, as Crown counsel observed, that was in the context of a criminal case.

[178] Assuming that the analysis gets beyond the first question, namely: 'does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?'.

[179] Supra, cited at para [103].

> *"The Court must be satisfied that the limit imposed on the presumption of innocence* [which was the right at issue in that case] *is no greater than is reasonably necessary to achieve Parliament's objective. … In practical terms this inquiry involves the Court in considering whether Parliament might have sufficiently achieved its objective by another method involving less cost to the presumption of innocence. ..."*

[218] We do not understand His Honour's reference to considering other possible legislative solutions as having been intended to dilute or detract from the issue as to whether the challenged legislative solution impairs the right or freedom any more than reasonably necessary. Instead it seems to us to have been offered as a way of checking whether the provision under challenge has infringed the right at issue more than reasonably necessary for the achievement of its purpose: all other things being equal, it must be obvious that if there is some other legislative solution that could have been adopted to achieve the same outcome, but which does not infringe the protected right at all (or to the same extent), then the challenged provision will be more difficult to justify than it would be if there were no such alternative.

[219] Finally, there was a discussion as to whether or not we ought to approach the justification exercise differently because the right that is engaged relates to the employment status ground and not (by way of contrast) to grounds such as race, sex, religious belief and so on.

[220] The Crown submitted that employment status is unlike (for example) race, which is an immutable personal characteristic; and it is unlike (for example) religious belief, which the government has no legitimate business to try to change. Employment status is changeable, and when it involves people who are unemployed the government has a very direct and real interest in changing it. It was said as a result that employment status is the 'least suspect' ground on which discrimination is prohibited by the HRA; and that as a result 'less weighty' reasons should be sufficient to justify it. Authorities in support of the argument included a number of decisions from the United Kingdom under the European

Convention: see, for example *R (Carson) v Work and Pensions Secretary*[180] and *AL v Secretary of State for Home Department.*[181]

[221] To the extent that the Crown's argument suggests that there may be an hierarchy of importance or seriousness that applies to the different grounds of discrimination listed in s.21 HRA, we agree with the plaintiff that there is no basis in any of the HRA, NZBORA and/or the international instruments to which they give effect, that would justify such a conclusion. We also agree with the plaintiff that it over-simplifies things to suggest that those who are unemployed can easily change their status. We have already noted the evidence of the OECD experts to the effect that even with the benefit of the work incentives within the IWTC a movement of small percentages of people from benefit income to work income would be a significant achievement. The point was also made by Laskin JA in *Falkiner et al v Director, Income Maintenance Brach, Ministry of Community and Social Services et al*[182]:

> *"Receipt of social assistance is a characteristic that is difficult to change, at least for a significant period. It fits the expansive and flexible concept of immutability developed in the cases."*[183]

[222] While we do not accept that there is anything like an hierarchy amongst the grounds within s.21 HRA[184], we do think that the elements which make up the overall assessment of justification in any given case will, to a greater or lesser extent, be informed by the particular ground of discrimination that is under consideration. In this we respectfully agree with the approach suggested by the Butlers:

> *"... rather than adopting a simplistic hierarchical approach, when considering whether a particular distinction is justified in terms of s. 5 of BORA, a range of matters such as the impact of the differential treatment on a persons' dignity and self worth; the extent to which the distinction is based on negative and*

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[180] Supra, note 127.
[181] [2008] UKHL 42
[182] (2002) 212 DLR (4th) 633. The point has particular resonance since the greatest number of recipients of income-tested benefits in New Zealand receive the Domestic Purposes Benefit, and the great majority of recipients of that benefit are single mothers. *Falkiner* was a case about single mothers.
[183] At para [39].
[184] See also Rishworth et al, *The New Zealand Bill of Rights*, supra note 10, at p. 374

demeaning stereotyping, etc is more helpful. Some grounds are more likely to implicate these concerns more often (for example, race, nationality, sex) than others. Nonetheless, it is highly likely that in respect of each of the grounds there will be particularly egregious instances of outright discriminatory stereotyping that ought to be subject to searching scrutiny."[185]

[185] Butler & Butler, *The New Zealand Bill of Rights: A Commentary*, supra note 10, at para 17.15.4.

H: SECTION 5 NZBORA JUSTIFICATION: CONSIDERATIONS IN THIS CASE

[223] We have formulated the questions raised by Tipping J's methodology for application in this case on the basis that:

[a] The 'limiting measure' that we are concerned with is the off benefit rule of eligibility for the IWTC;[186]

[b] The 'right or freedom' that we are concerned with is the right to freedom from discrimination on the grounds of employment status;

[c] For reasons set out at paragraphs [47] above, and [229] and [230] below, we have some difficulty accepting that the IWTC should be seen as having served a single purpose. We prefer to approach the issue having regard to the purposes (plural) of the WFF package.

[224] We make it clear that in formulating the questions in this way we have not overlooked the discussion under the heading *'Who is to be compared with whom?'* at paragraphs [145] to [162] above relating to the work hours requirement of the IWTC. We maintain the view that this is not a case about a comparatively small group of families which meet the work hours requirement but which are also in receipt of a main benefit. When we refer to the 'off benefit' rule we mean the rule by which families that are not in work and are in receipt of a main benefit are not eligible for the IWTC.

Does the off benefit rule of eligibility for the IWTC serve a purpose sufficiently important to justify curtailment of the right to freedom from discrimination on the grounds of employment status?

[225] We begin this topic with two preliminary points.

[226] The first is that this is a threshold question. If the answer is *'no'* then the justification analysis is over (such a decision was reached in *Howard v Attorney-*

[186] There is of course also the issue relating to recipients of weekly compensation under the ACC legislation for pre 2006 incapacity; but for reasons set out at para's [70] to [73] and [193] to 200] above

General (No.3)[187]). It is only if the answer is 'yes' that it becomes necessary to go on to consider the issues of rationality, extent of the impairment and proportionality which are combined to form the second stage of the analysis proposed by Tipping J in *Hansen*.

[227] We make the point because the argument for the plaintiff on this issue invited us to consider the competing importance of the objectives of making work pay as against the alleviation of poverty, evidence as to the effectiveness of the 'make work' pay objective of WFF, and so on, at a reasonably detailed factual level with reference (for example) to data about how many were really expected to move off benefit, whether or to what extent single parents and other kinds of beneficiaries might in fact be motivated (and/ or able) to move into the workforce, evidence that people were moving off benefit without the incentives of the IWTC, and so on.

[228] In our view, however, at this first step the issue is better approached at a somewhat more abstract level.[188] The threshold question is whether, in principle, the objectives of the WFF package justify some curtailment of the right to freedom from discrimination on grounds of employment status. Questions as to whether the IWTC intrudes too far into that right to be justified, come later.[189]

[229] Our second preliminary point relates to the suggestion that the objectives of WFF can or should be divided up and taken separately. In this our approach differs from that taken by both counsel for the plaintiff and counsel for the Crown. Although for different reasons and to differing degrees, both approached the argument on the basis that we should see discrete purposes giving rise to separate provisions within WFF - importantly, that the limiting measure we are concerned with (namely the IWTC) should be seen as relating to the 'make work pay' element of WFF only, while the 'income adequacy' element of WFF should be seen as relating to other aspects of the package.[190]

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and para [276] below we do not consider that it requires the same detailed discussion as does the off benefit rule.

[187] Supra, note 98. As noted the decision is under appeal.

[188] This conclusion agrees with the submission for the Crown on this point.

[189] Again, on this we accept the Crown's submission that it is not necessary at this stage to weigh the objectives against the suggested deleterious effects said to be associated with the intrusion into the right.

[190] In fairness, the plaintiff's submissions were less committed to the idea of a separation of the objectives of WFF, and to an extent were framed as they were in response to the argument put up by the Crown.

[230] We have already touched on this point at paragraph [47]. We do not think it is either appropriate or practicable to divide WFF up in that way. Of course some of the specific measures arise more directly out of particular objectives than others, but WFF was a package. There is no reason we can see for applying Part 1A of the HRA after the package has been deconstructed. Nor do we think there is much to be gained at this stage of the analysis by debating the relative significance or likely effectiveness of different objectives of the package. Perhaps in another case that kind of exercise might be indicated, but in this case we think that the objectives that gave rise to the IWTC as expressed in the WFF Cabinet Paper should be taken together and as they were stated.

[231] The principal purposes of the WFF package were to make work pay, to ensure income adequacy, and to achieve a social assistance system that supports people into work: see paragraph [50] above.

[232] The question, then, is whether steps taken in service of those purposes justify some curtailment of the right to be free from discrimination on the grounds of employment status (remembering that, in this context, 'discrimination' means nothing more than disadvantageous differentiation on a prohibited ground between otherwise similarly circumstanced people or groups of people).

[233] We have 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 difficult to see how 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. It is a basic building block of the economy. As we said at the outset, the government has powerful and legitimate reasons to want to encourage citizens to obtain, and retain, paid employment. Sooner or later that will inevitably bring government to the point of having to make distinctions – including distinctions giving rise to disadvantages - between people who are in paid employment and people who receive income by way of a main benefit.

[234] In our assessment, the off benefit rule of eligibility for the IWTC serves purposes which are sufficiently important to justify some curtailment of the right to freedom from discrimination on the grounds of employment status.

[235] It follows that the second limb of Tipping J's methodology is engaged, and it is necessary to consider whether the off benefit rule of eligibility for the IWTC is rationally connected to its purposes, the extent to which the right is impaired, and the problem of proportionality.

Is the off benefit rule of eligibility for the IWTC rationally connected with its purposes?

[236] Under this heading we begin by recalling the distinction between the WFF package as it was first endorsed by Cabinet, and what was ultimately 'rolled out' in 2006.

[237] As first adopted by Cabinet in April 2004, the challenged tax credit was targeted to working families in the low to middle income brackets. As already explained[191], the threshold for abatement was $27,500 per annum. After abatement, eligibility for a one child family cut out at an annual income of over $39,500, and for a three person family it cut out at over $56,000 per annum. But by the time the tax credits actually became payable in 2005 the threshold for abatement had been raised to $35,000 per annum. The rates of abatement had also been changed, in such a way as to make the credits available to many more families much higher up the income scales. So, again, eligibility for a one child family after the 2005 changes did not cut out until an annual income of $71,000 was reached, and eligibility for a three child family did not cut out until an annual income of $101,000 was reached.

[238] We start by considering the 'rational connection' question in relation to the package as it was endorsed by Cabinet in April 2004.

[239] Counsel for the plaintiff submitted, again with detailed reference to the evidence, that there is no rational connection between the goal of moving single

[191] Supra, para [66]. Also see the details in note 95.

parents[192] off benefit and into employment, and influencing them to remain in employment. It was their argument that the expected movement into work was only ever modest because of the barriers to work that exist and which the tax credit did not address; that the movement into work after the introduction of the IWTC[193] as been less than expected (in fact, that it has been no larger than the long run trend before the introduction of the IWTC would have predicted anyhow); that other incentives for movement off benefit exist in any event; and that there are other measures such as the Minimum Family Tax Credit, childcare subsidies and Child Support which contribute to the creation of an effective gap between earned income and benefit income.

[240] With respect to the 'income adequacy' objective of the WFF package, the plaintiff accepted that there is a rational connection between income adequacy and receiving the challenged tax credits (in the obvious sense that the income of families who get the credits is enhanced by them). However, counsel for the plaintiff submitted again that there were and are other vehicles to achieve the same objectives (such as Family Support), and that in any event there are some families who receive the tax credits but nonetheless remain in poverty.

[241] We do 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, or the post-implementation experience of it, is so very different from its stated objective(s) that the objective(s) themselves ought to be regarded as being dubious, and the rationality of connection between policy and result doubtful. But, at least in respect of the WFF package as it was adopted in April 2004, this is not a case of that 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 and benefit income so as to encourage people to work, and (at least for those who are eligible) to address issues of income adequacy.

[192] Single parents – and single mothers in particular - constitute the majority of people on an income-tested benefit.
[193] Then the IWP.

[242] There is, however, a qualification to the conclusion. It arises out of the changes to the tax credits that were implemented the year after the WFF package was adopted by Cabinet (we will refer to those changes as 'the 2005 changes').

[243] It must be obvious that any scheme targeted at low to middle income-earning families needs be limited by reference to certain identified income levels, and that at the margins (especially the upper margin) there is a possibility of debate as to whether families at that end of the scale really fall within the target group.

[244] 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, for at least two reasons:

[a] First, there is no evidence to suggest that (for example) one child families with an earned income as high as $70,000 per annum need government support for the alleviation of any real poverty, or that the receipt of a tax credit for being in work is going to make any significant difference to whether the earner(s) in that family might or might not choose to go off work and on to a benefit;[194] Several Crown witnesses were questioned about this, and all of them agreed that there comes a point as a family's income rises at which the tax credits are no longer serving any 'make work pay' or income adequacy purposes, but are in reality a tax cut. Circumstances of individual families vary of course, but in broad terms we share the sense of this that was conveyed by Mr Gray[195], who put the point at which the tax credits start to become tax relief (as opposed to work incentive) at about $45,000 per annum and above;

[b] Secondly, it seems reasonable to assume that Cabinet thought that the income brackets that were targeted in 2004 were appropriate for fulfilment of the objectives of WFF. There was a great deal of policy work that lay behind the decisions taken in April 2004, and the WFF package was the result of

[194] Of course at that income level the value of the IWTC is not great, but the point remains.
[195] His evidence in this regard is consistent with the parameters contemplated in the WFF Cabinet paper.

detailed consideration of the issues over an extended period of time. However, the evidence does not explain in any satisfactory way what then happened in the year that followed, and which indicated that such significant threshold/abatement rate changes were going to be needed to give effect to any, or any combination of, the goals of making work pay, ensuring income adequacy and /or achieving a social assistance system to support people into work.

[245] The OECD experts were asked about this aspect of the IWTC. They did not try to explain the changes of 2005 in terms of the policy objectives as stated in 2004.[196] The reality, as other Crown witnesses explained, was that the changes of 2005 represented a tax cut that was targeted at working families (to the exclusion of all others, including beneficiary families). The changes emerged in the lead up to the 2005 general election as a Labour Party response to tax cuts then being promised by the National Opposition. The decision to extend the WFF tax credits had more to do with politics than policy.

[246] 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.[197] We have not been persuaded by the Crown that the payment of the IWTC to families in the mid to high income brackets (starting somewhere about $45,000 per annum) is rationally connected to the objectives of the WFF package.

[247] This second question under the general heading of justification is, like the first one, a threshold question[198]: if there is no rational connection between the 2005 changes to the threshold and abatement rates at which the credits are assessed on the one hand, and the purposes of the WFF package on the other, then that might of itself be sufficient to support a conclusion that the 2005 changes are not justified in NZBORA terms. That conclusion is not altered even if the analysis of the extent of impairment and proportionality in respect of what was adopted by Cabinet in April 2004 supports a finding of justification.

196 See para [69] above.
197 Again, at that level the credit is modest - $4/fortnight – but the point remains.
198 See, e.g. *Hansen* cited supra at para [207], see para's [121] and [122] of the *Hansen* decision.

[248] This is a difficult nuance in this case. An aspect of the difficulty is that, while this element was dealt with to some extent in the evidence, the 2005 changes to the thresholds and abatement rules for the IWTC were not specifically identified for a remedy in the statement of claim. That is not intended as a criticism; the plaintiff drew the issues wider than that, and for good reason. It does, however, create an obstacle to our dealing with the effect of the 2005 changes as a separate issue. The Crown might well be heard to say that that is not how the case has been framed: the challenge has always been directed to ss.MD 8(a) and MD 9(4) of ITA 07[199], not specifically the abatement thresholds and rates, and certainly not the 2005 changes to them. For its part, we anticipate the plaintiff might say that the legislative provisions under challenge embody the IWTC as it was rolled out, not as it was initially designed and approved; and that in any event our responsibility is to deal with this case on its substantial merits: see s.105 of the HRA.

[249] We will return to the problem below. In the meantime we conclude under this heading that:

[a] The off benefit rule of eligibility for the IWTC was and is rationally connected with the purposes of the WFF package as that package was adopted by Cabinet in 2004;

[b] We are not satisfied that the 2005 changes to the threshold and abatement rates for the IWTC were rationally connected to the purposes of the WFF package as that package was adopted by Cabinet in 2004.

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

[250] Again, we start this section with some preliminary points:

[a] We draw a distinction between kinds of impairment and degrees of impairment. We have found that the off benefit rule of eligibility is *prima facie* discriminatory on grounds of employment status. The discrimination is of a

[199] And their predecessors in the ITA 04.

kind which excludes one group from financial benefits that are available to another group. It is a significant part of the plaintiff's case that there are other things that might have been done, in particular to achieve the make work pay objective of WFF, and which are either not discriminatory or which are more benign in effect. The focus of attention under this question, therefore, had for the most part to do with the different kinds of things that government might have done to create work incentives instead of establishing the off benefit rule. But that leaves open an issue about the degree to which the off benefit rule is disadvantageous.[200] We make the point to explain that we see the issue of degree as being better dealt with in this case under the fourth and final question relating to proportionality.[201]

[b] Secondly, the question demands an assessment of what is *'reasonably necessary'* for *'sufficient achievement'* of the purposes of the WFF package. The words 'reasonably' and 'sufficient' in this context render this stage of the analysis far more vulnerable to the perceptions and assumptions of the individual decision-maker than are the first two questions. In our view, the reasons for this Tribunal to defer in an appropriate way to Parliament's assessment of what was needed have particular importance at this step. Crown counsel referred us to the observations of the Canadian Supreme Court in *Canada (Attorney-General) v JTI-Macdonald Corporation* [2007] 2 SCR 610:

> *"There may be many ways to approach a particular problem, and no certainty as to which will be the most effective. It may, in the calm of the courtroom be possible to imagine a solution that impairs the right at stake less than the solution Parliament has adopted. But one must also ask whether the alternative would be reasonably effective when weighed against the means chosen by Parliament. To complicate matters, a particular legislative regime may have a number of goals, and impairing one right minimally in the furtherance of one particular*

[200] To illustrate: at present, the IWTC is paid under the abatement threshold at a rate of $60 per week for up to three children, with an additional $15 per week for each additional child after that. If instead it were paid at a rate of (say) $240 per week for up to three children, with an extra $60 per week for each additional child after the third one, it would still be the same kind of discrimination, but of a rather different degree.

We do not suggest that this is an approach that should be taken in any other case, but we have found it a practical way to approach the analysis in this case.

goal may inhibit achieving another goal. Crafting legislative solutions to complex problems is necessarily a complex task."

[251] The case for the plaintiff under this heading was (in summary) that:

[a] The device of using the general tax system to deliver work incentives in the form of child-related cash payments is not a common choice in other OECD countries;

[b] Other strategies could have been used to achieve the same outcomes; for example:

[i] The IWTC could have been taken out of Family Assistance and, like the Working Tax Credit in the United Kingdom, made not to depend on having children;

[ii] The IWTC could have been smaller in value, and it could have been more tightly targeted at those in the margin between working and not working;

[iii] Improved case management of people who are not in work, and better opportunities for training, could have contributed towards delivering the desired outcome of moving people off benefit and into work;

[iv] Various possible tax reforms might have been considered, such as lowering the bottom tax rate, extending the bottom tax rate to higher income ranges, or (as in Australia[202]) having an initial 'band' of income that is effectively tax free;

[v] Changes could have been made to the abatement rates that apply to income earned by beneficiaries on part benefits, which would bring particular incentives for beneficiaries to work even if only on a part time basis;

[vi] The minimum wage might have been increased;

[202] We understand that the first A$14,000 of annual income is not taxed in Australia.

[c] The potential effect of these other kinds of strategies needs to be evaluated in light of the expectation in the WFF Cabinet paper that, if successful, the introduction of the IWTC was hoped to result in a 2% movement into work;

[d] While it is not the plaintiff's obligation (nor the Tribunal's role) to say which policy options should have been adopted, the evidence relating to these kinds of strategies shows that there were other options available to government to achieve the same outcome, and which would not have involved any discrimination (certainly not discrimination of the same kind as the IWTC).

[252] Counsel for the plaintiff urged us to find that, in the circumstances, the Crown had not established that the IWTC impairs the right to freedom from discrimination no more than reasonably necessary for sufficient achievement of its work incentive purpose.

[253] Insofar as the IWTC involves an income adequacy objective, the argument for the plaintiff accepted that the IWTC results in higher household incomes for families that qualify, and even that some families who were in poverty before the introduction of what is now the IWTC have been lifted out of poverty by it. Again, however, it was submitted that these results could have been achieved by different means without discrimination - such as, for example, by increasing Family Support.

[254] In reply the Crown placed some emphasis on the proposition that at this stage of the inquiry it is enough to show that Parliament chose a solution that was amongst one of several reasonable alternatives.[203] Crown counsel were critical of various of the other solutions suggested by the plaintiff, saying that none was likely to be as effective as the off benefit rule in achieving the objective of moving beneficiary families into work.

[255] We agree with the result proposed by the Crown under this heading, although we would put our reasons for doing so somewhat differently. In part this is because we prefer to stick to the question framed by Tipping J rather than

[203] Reference was made to *Canada (Attorney-General) v JTI-Macdonald Corporation* [2007] 2 SCR 610 at para's 38 to 46, with particular reference to para 43; also see the discussion at para's [215] to [218] above.

replace it with the *'does the limiting measure fall within a range of reasonable alternatives?'* formulation[204], and in part it is because it allows us to approach the problem more directly and without some of the distractions that inevitably come with comparative analysis.

[256] We take as our starting point the purposes that were to be achieved: to make work pay, to ensure income adequacy, and to achieve a social assistance system that would support people into work. 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 (i.e., creating or enhancing a 'gap') between the income available from benefits on the one hand, and the financial rewards for being in work on the other.

[257] The business of creating or enhancing that gap was reasonably necessary for sufficient attainment of the legislative purposes; more than that, we think it was an indispensable element for achievement of the WFF package. No matter what other elements there were, the legislative initiatives would not have made much sense, nor could they realistically have been expected to be effective, otherwise.[205] WFF was intended to leave families on benefit income with financial reasons to move into work.

[258] Our conclusion under this heading might have been different if, for example, there had been some other burden cast upon those on benefit income as well as the implementation of this financial gap. But the off benefit rule of eligibility for the IWTC does no more than to put the intended gap into place. In our assessment the limiting measure is not of a kind that impairs the right to freedom from discrimination any more than is reasonably necessary for sufficient achievement of the legislative purpose.

[259] We have already held that the legislative objectives of the WFF package (and the off benefit rule of eligibility for the IWTC) serve purposes that are sufficiently

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[204] As we have said, this may just be semantics but one of the few things that counsel agreed upon was that we ought to analyse the evidence under the questions proposed by Tipping J.

[205] This conclusion is really just the corollary of our finding that the WFF package (and the allocation of the IWTC in particular) disadvantaged families on a benefit income. Put at its simplest, it was intended to.

important to justify some curtailment of the right to freedom from discrimination on grounds of employment status. The real question in this case, and the one that we have found to be by far the most difficult, is the last one - which requires us to weigh up of the degree of damage to the protected right as against the importance of the legislative objective.

Is the off benefit rule of eligibility for the IWTC in due proportion to the importance of the objectives?

[260] We begin by returning to the *Hansen* decision. The issue here is whether the practical benefits to society of the limit under consideration outweighs the harm done to the right at issue.[206]. To paraphrase the question posed by Tipping J at para [134] of *Hansen*, in practical terms the decision we have to make comes down to this: Do the important social objectives of making work pay, ensuring income adequacy and achieving a social assistance system that supports people into work justify the damage done to the right to freedom from discrimination on the grounds of employment status (paying particular attention to the consequences for children in families which are denied the IWTC because of the off benefit rule of eligibility for it)?

[261] The legislation we are concerned with marks a point somewhere between two extremes. At one end there is a solution in which no government spending is directed towards those who are out of work, and social spending is directed only to those who are in work. At the other end there is a solution in which no government spending is directed toward those who are in work, and it is all directed to those who are out of work. The closer one gets to either of those limits, the easier it would likely be to find a 'florid' violation of rights of the kind contemplated by Laws LJ and Lord Walker.[207] But within reasonable limits along that continuum, the issue as to where the balance should be struck at any given point in time is an inescapably political question.

[262] In this part of the argument, the focus of the submissions for the Crown returned squarely to the proposition that the only comparison we ought to be concerned with is as between people who are in work and on a benefit, and

[206] *R v Hansen*, supra at para [123].
[207] *See R (Carson) v Work and Pensions Secretary*, supra at para [211].

people who are in work.[208] Since that analysis relates to only about 1,270 families, and all of those families are by definition already in work, it was a simple argument for the Crown to say that no sufficient damage is done to their rights by the off benefit rule of eligibility for the IWTC to begin to indicate a conclusion in favour of the plaintiff. Regrettably, however, the Crown's approach meant that its submissions on the issue we regard as important (involving a comparison between families that are in work, and families that are not in work) were not as well developed as they might have been.

[263] In contrast, the plaintiff presented a comprehensive argument to the effect that the balance represented by the WFF package in general (and the off benefit rule of eligibility for the IWTC in particular) results in damage to the interests of those who depend on benefit income which is not outweighed by any corresponding social advantage, and which ought not to be regarded as acceptable. Again, the focus of the plaintiff's concerns was in respect of the deleterious effects for children in families that do not qualify for the IWTC. Amongst other things, counsel for the plaintiff argued:

[a] The work incentive impact of the IWTC was not expected to do more than move about 2% of families off benefit, and in fact the results of the initiative since implementation suggest that movement off benefit has been modest, and may well have been caused by other factors (such as the strong economic climate that was enjoyed after 2005 and before 2008);

[b] *"To achieve modest movement into work and to keep an unidentified number of sole parents in work ... 185,000 children living in hardship or 150,000 children living in significant or severe hardship were excluded from receipt of family assistance in the form of the* [IWTC] *and left to suffer the consequences..."*

[c] It is anomalous that the IWTC is paid to couples at the same rate as it is paid to single parents – if the objective is to incentivise work one would have thought it would be paid at higher rates to single parents whose need is

[208] For the most part. Even in this section, however, some submissions referred to and relied on the overall effect of the IWTC in terms of observed decreases in DPB beneficiaries, falling numbers of children dependant on the benefit system, and so on – none of which data would be particularly relevant if the comparison were indeed as the Crown insisted.

greater. In fact, in cases where the IWTC is paid to a couple it can even operate as a disincentive to both parents working;

[d] The minimum work hours requirement – which in effect stipulates what it means to say that someone is either in work or not in work - was adopted without assessment as to its relevance or suitability for the IWTC; and there is no evidence to suggest that it was either necessary or appropriate in this context. Most other countries do not impose such a requirement;

[e] 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 of the stated objectives of the WFF package (by way of illustration, if one accepts $45,000 per annum as a point beyond which the payment is no longer needed as a work incentive, then in the 2006/07 year some $229 million – or about 47% of all that was paid out as IWTC – went to families that did not really need it).

[264] These kinds of consideration were placed in contrast with the evidence that many benefit-dependent children remain in poverty after the IWTC, and indeed that the situation for those children has deteriorated over time – in other words, that those children are simply being left further and further behind.

[265] The foregoing is no more than a short summary of some of the more important points made by for the plaintiff, but we hope that it will at least serve to illustrate the tenor of the plaintiff's case in respect of this last justification question. Overall, the plaintiff contended that the benefits to society of the IWTC in terms of its work incentive are significantly outweighed by the harm done to the children who are unable to derive advantage from the IWTC because their caregiver(s) receive income by way of a main benefit.

[266] In fairness to the Crown, most if not all of the propositions that were advanced by the plaintiff under this heading were addressed elsewhere in the Crown's submissions. Certainly, taking the issue of the effectiveness of the IWTC as an example, the Crown firmly rejected the plaintiff's argument, pointing instead to recent studies which suggest that the number of DPB-dependent families decreased from 109,700 in August 2004 (just before introduction of the IWTC) to

97,200 at August 2007, and that the number of children dependent on the benefit system had fallen from 261,527 in September 2002 to 199,006 in March 2008.[209]

[267] In the end, we deal with the issue at a general level.

[268] In 2004 the Government decided to allocate funds for substantially increased social spending rising to $1.1 billion per annum in and after 2007. It developed a package that addressed work incentives and income adequacy.

[269] There are grounds for 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. There are also grounds for concern that the package may have over-stated the ability that people have to move off benefit and into paid work. Even so, there is no doubt that the WFF package was intended to achieve significant gains for working families, and in so doing to incentivise people to move off benefit into paid work, with all of the attendant advantages for those families including the children in them. A number of the elements in the package went to address issues of income adequacy for all. WFF contained significant elements for social advantage.

[270] Were it not for the fact that the IWTC is related not only to employment, but also to children, we would have had no hesitation in concluding that the social advantages of the package outweigh any damage done to the right to freedom from discrimination on grounds of employment. But the fact that the tax credits are child-related makes the decision much more difficult. We accept that issues of child poverty are real and pressing in New Zealand; no other conclusion is possible on the evidence that we heard.

[271] The reality, however, is that any scheme that includes financial incentives to encourage those who are on benefit incomes to move into work necessarily involves conferring financial advantage on those who can make the move. To the extent that people in that class have families, it follows that their children have the chance to access the advantages as well. At the same time the children of

[209] There is inevitably an issue as to whether or to what extent the IWTC was the cause of these effects. It may be that the numbers reflect a period of strong economic performance nationally. Certainly the

those who cannot or will not make the move will miss out. That is so whether or not there is a formal connection between the incentives and children (as there is in the case of the IWTC). Unless one takes the extreme view that the Government cannot create financial incentives to work at all - because they infringe the right to freedom from discrimination on grounds of employment status, and are inherently unjustifiable - then a level of harm to that right (here, experienced in the sense that those who do not qualify will be 'left behind') is inevitable.

[272] Our overall conclusion, in respect of the WFF package as it was adopted in 2004, is that the practical benefits to society were sufficient to outweigh the damage that was done to the right to freedom from discrimination on grounds of employment. In both its nature and to the extent of what was approved by Cabinet in 2004, we think that the off benefit rule of eligibility for the IWTC was in due proportion to the importance of the objectives of the WFF package.

[273] Any hesitation we have about that conclusion is removed by reference to the authorities that emphasise the role of judicial deference in this context. 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.

[274] That still leaves the problem of the 2005 changes. As explained, even if the off benefit rule which underlies the IWTC is a kind of discrimination that is capable of being justified, there is still an issue of degree. We have concluded that paying the challenged tax credit to families in the low to middle income brackets was justified. 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.

[275] We now add that in any event we also have significant reservations as to whether the allocation of so much funding to families in mid to high income

financial crisis and recession much talked about at the time of writing this decision will be a far sterner test of the effectiveness of the work incentives in WFF than anything that has gone before.

brackets *under the guise of funding for social assistance* can be said to have been be 'in due proportion' to the objectives of the WFF package.[210]

The ACC issue revisited

[276] We have found that the evidence that we heard in this case does not permit us to reach the conclusion that s. MD 9(4) of ITA 07 amounts to *prima facie* discrimination by reason of employment status. We think it appropriate to make it clear, however, that even if this limb of the claim had passed the *prima facie* discrimination threshold, we would in any event have found it to fall within s.5 NZBORA. In our assessment it is within the class of cases contemplated by Moses J in *R (on the application of Hooper) v Secretary of State for Work and Pensions* [2002] EWHC 919 at [115]:

> *"In determining how to target resources to those in need, the legislature is entitled to impose 'bright line' rules which are easy to apply and which may not focus with precision on the merits of individual cases. No logic can indicate where the balance should be struck; evaluative judgments are required, based on experience. . . . but such bright line rules in the context of social and economic policy do not lead to incompatibility* [in that case, with the European Convention on Human Rights] *even if individual hardship is occasioned. ... The Government was entitled to avoid complex and expensive assessments of need."*

[210] This is, after all, a discussion about the allocation of funds as a means of providing necessary social assistance, not a discussion about the allocation of tax cuts.

I JUSTIFICATION: CONCLUSIONS IN THIS CASE

[277] We have concluded that:

[a] The off benefit rule of eligibility for the IWTC serves purposes which are sufficiently important to justify some curtailment of the right to freedom from discrimination on the grounds of employment status;

[b] The off benefit rule of eligibility for the IWTC is rationally connected to the purposes of the WFF package, as that package was approved by Cabinet in 2004;

[c] The off benefit rule of eligibility for the IWTC is not of a kind that impairs the right to freedom from discrimination more than is reasonably necessary for sufficient achievement of the legislative purposes;

[d] The off benefit rule of eligibility for the IWTC was in due proportion to the importance of the objectives of the WFF package, as that package was approved by Cabinet in 2004; and

[e] On the evidence that we heard, even if the 'off ACC in respect of pre-2006 incapacity' rule of eligibility for the IWTC[211] were found to amount to *prima facie* discrimination on the grounds of employment status, it would be a justified limitation on the right to freedom from discrimination under s. 5 NZBORA.

[278] At the same time:

[a] We have not been persuaded that the 2005 changes to the threshold and abatement rates for the IWTC were rationally connected to the purposes of the WFF package, as that package was approved by Cabinet in 2004; and

[b] We have not been satisfied that the 2005 changes to the threshold and abatement rates for the IWTC were in due proportion to the importance of the

[211] That is, s. MD 9(4) of ITA 07.

objectives of the WFF package, as that package was approved by Cabinet in 2004.

J RESULT

[279] The outcome in respect of the plaintiff's challenge to s. MD 9(4) of ITA 07 (concerning recipients of ACC compensation for injury suffered prior to 2006) is uncomplicated.

[280] In our assessment, and on the evidence that we heard, a finding of *prima facie* discrimination is not open to us. Even if it were, we think that the provision is justified under s. 5 NZBORA. The plaintiff's claim in that respect is dismissed.

[281] The outcome in respect of the plaintiff's challenge to s. MD 8 (a) of ITA 07 (i.e., the off-benefit rule of eligibility for the IWTC) is not so straightforward.

[282] We have given particular consideration to the question of how our reservations in respect of the 2005 changes ought to be reflected in the final result in this case, including the possibility of asking counsel for further submissions on the issues raised.[212] In the end, however, we think that the parties are entitled to have our decision on the issues that have been traversed. If (as is likely) a further opinion is to be sought, then that process should not be delayed.

[283] We therefore make it clear that, putting aside the effect of the 2005 changes, our conclusion is that although the off-benefit rule in s.MD 8(a) of the ITA 07 does limit the right to freedom from discrimination on the grounds of employment status somewhat, the limit is justified under s.5 NZBORA.

[284] No breach of Part 1A of the HRA has been established.

[285] We find no basis for a declaration under s.92J(2) of the HRA relating to the off benefit rule of eligibility for the IWTC as it was approved by Cabinet in April 2004.

[286] Beyond that, we think it important to confine ourselves to what we have been asked to decide, which was expressed in terms of the plaintiff's statement of

claim as being the off benefit rule that is now contained in s. MD 8(a) of the ITA 07, not the 2005 changes to the abatement threshold and rates which have been applied to the IWTC since its introduction. The off-benefit rule itself was, after all, enacted as s.KD 2AAA(1)(e) of ITA 04, which was before the 2005 changes to abatement rates and thresholds were implemented. It must suffice that our reservations about the 2005 changes have been identified. A formal remedy based specifically on that aspect of the IWTC is not appropriate.

[287] The plaintiff's claim in respect of s. MD 8(a) of ITA 07 is therefore also dismissed.

[288] These conclusions are the same whether expressed in terms of the relevant provisions of the ITA 04 or the ITA 07.

[289] The parties agreed before the hearing that, regardless of the final outcome, costs would be left to lie where they have fallen.[213] No orders are required.

Mr R D C Hindle
Chairperson

Dr A D Trlin
Member

Ms P J Davies
Member

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[212] Which we expect would likely include the competing considerations noted at para [248] above, and no doubt other points besides.

[213] Joint memorandum dated 26 April 2006. The agreement in respect of costs avoids the need to consider whether costs should be treated as a 'remedy' that is excluded by s.92J(1) of the HRA in proceedings which challenge an enactment as being in breach of Part 1A HRA.