

IN THE MATTER of a Claim under the Human Rights Act 1993

BETWEEN CHILD POVERTY ACTION GROUP INC.

Plaintiff

AND ATTORNEY-GENERAL

Defendant

STATEMENT OF REPLY TO
SECOND AMENDED STATEMENT OF CLAIM

14 February 2007

BORA	New Zealand Bill of Rights Act 1990
CTC	Child tax credit
FSC	Family support credit (known as family support)
FCA	Family credit abatement
HRA	Human Rights Act 1993
IPRC	Injury Prevention, Rehabilitation and Compensation Act 2001
IWP	In-work payment
PTC	Parental tax credit
SSA	Social Security Act 1964
ITA	Income Tax Act 2004

INTRODUCTION

1. The defendant denies the claim by the plaintiff in the second amended statement of claim dated 12 December 2006.
2. In particular, the defendant denies that any part of s KD 2AAA of the ITA, which provides for the IWP, limits the right to be free from discrimination affirmed by s 19 BORA on the grounds of “employment status” as defined in s 21(1)(k) of the HRA or unjustifiably limits that right.
3. The plaintiff’s claim is brought as a general challenge to the IWP and is not founded on a specific set of factual circumstances concerning an individual or group of individuals. The second amended statement of claim consists almost entirely of the reproduction or summary of statutory provisions and legal submissions. The defendant is not required to plead to such statements or submissions. In light of the somewhat more informal nature of the Tribunal’s procedure the defendant has however replied to each specific paragraph of the second amended statement of claim (see paragraph 18 below). The defendant first summarises why he denies that the IWP is discriminatory and provides a brief description of the IWP and its statutory context.

IWP is not discriminatory

4. The purpose of the IWP 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 SSA 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 SSA 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 SSA 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.

6. Even if the exclusion from the IWP of those who receive a benefit under the SSA is sufficient to constitute differential treatment for the purposes of s 19 BORA, nonetheless that differential treatment does not result in disadvantage. Families ineligible for IWP because their income is from a benefit under the SSA usually receive more state assistance than families who are eligible for the IWP. For this reason also the plaintiff’s claim must fail.
7. Even if the IWP was found to be a *prima facie* infringement of s 19 BORA, it is a reasonable limit on that right under s 5 BORA and therefore not discriminatory. Research shows that incentives such as IWP are effective in encouraging people into work and if already there, staying in work. Research also shows the outcomes are better for families with children when the family income is obtained from work, rather than from a benefit.
8. The IWP is designed to achieve the legitimate social development purpose of encouraging New Zealanders to enter into and remain in the labour market. If already in the labour market it encourages someone to stay there. It does this by incentivising paid work as the principle source of family income. The Court, in determining whether the IWP as a method of achieving that objective excessively and unreasonably impairs the right to freedom from discrimination, the Government is entitled to considerable deference by the courts. The question involves consideration of inherently complex social policy judgments and as well concerns the allocation of significant financial resources. As such, it is a question which legislatures rather than courts are better placed to determine.

In-Work Payment

9. The IWP was introduced in 2004 as part of the government's "Working For Families" package and came into force in 2006. The IWP is aimed at incentivising paid work as the principal source of family income by encouraging families with children to move off state assistance and into work and if already there, to remain in work.

IWP is a component of subpart KD credit

10. The IWP is a component of the subpart KD credit that may be allowed under s KD 2(1) of the ITA. Subpart KD is a credit of tax and is one of the tax credits provided for in subpart KD of the ITA, that is ss KD A1 – KD 9. [Subpart KD and any relevant definitions in the ITA are set out in full in the appendix to this reply.]

11. The subpart KD tax credit is a means of providing government assistance and income support to families with dependent children, depending on the number of children and the level and source of family income.

12. The formula for the subpart KD credit is:

$$\text{FSC} + \text{IWP or CTC} + \text{PTC} - \text{FCA}$$

13. The components of the formula can be described as follows:

13.1 FSC, family support credit (generally known as "family support"), is aimed at ensuring income adequacy for families with dependent children. Family support is available to families with dependent children regardless of the family's income source. If eligible, the credit may be paid by Work and Income if the family receives an income-tested benefit or otherwise is available from Inland Revenue. The FSC is provided for in s KD 2(3).

13.2 IWP, in-work payment, is aimed at encouraging families with dependent children to move off state assistance into work and to

remain in work. IWP is available to working families. The IWP is provided for in s KD 2AAA and is available from Inland Revenue.

- 13.3 CTC, child tax credit, is aimed at encouraging families with dependent children to become independent of state assistance. The CTC is available only to those persons who are not eligible for the IWP (generally because they do not meet the IWP work hours requirement) but who were eligible for the CTC immediately prior to the IWP coming into force. CTC is generally available to families who receive their income from a source other than state assistance. The CTC is provided for in s KD 2(4) and s KD 2AAAB.
- 13.4 PTC, the parental tax credit, is for the eight weeks after the birth of a child depending on the family's income source and provided the family is not receiving paid parental leave under the Parental Leave and Employment Protection Act 1987. The PTC is provided for in s KD 2(5) and s KD 2AB.
- 13.5 FCA, the family credit abatement, is the calculation for reduction in the amount of the credit as income rises above a threshold (currently \$35,000 per annum). The FCA is provided for in s KD 2(6). The order in which the FCA is applied to the components is provided for in s KD 2A.

Eligibility for IWP

14. The eligibility requirements for the IWP and the amount are set out in s KD 2AAA. In summary, the three key eligibility requirements are that either the principal caregiver or their partner must:
- 14.1 Receive income from work, either as a wage or salary earner or from a business; and
- 14.2 Be a "full-time earner". That is for a single person work of 20 hours or more per week and for a person who has a partner combined work of 30 hours or more per week; and

- 14.3 Not receive an “income-tested benefit” (domestic purposes, emergency, independent youth, invalids’, sickness, unemployment or widows’), or a grant under one of the Education Acts (i.e. student allowance) or a parent’s allowance under s 32(2) of the War Pensions act 1954.
15. There are some exceptions to these requirements for persons who are on parental leave from employment (see s KD 2AAA(6) and (7)).
16. Persons who are receiving weekly compensation under the IPRC Act are eligible for the IWP provided the compensation is not being paid as a result of an incapacity, suffered before 1 January 2006, due to a personal injury by accident (see ss KD 2AAA(1)(d) and (5)). See also ss KD 2AAA(8) which ensures that persons who suffered an incapacity due to a personal injury by accident on or after 1 January 2006, but before the IWP came into effect on 31 March 2006 are not precluded from obtaining the IWP, provided they would have meet the full-time earner test prior to the incapacity.

REPLY TO SPECIFIC ALLEGATIONS IN THE SECOND AMENDED STATEMENT OF CLAIM

17. The plaintiff alleges in pages 1 and 2 of the second amended statement of claim that subsections KD 2AAA(1)(e) and (8)(a) of the ITA are in breach of the HRA. The defendant denies those allegations.
18. In reply to the allegations at pages 3-11 of the second amended statement of claim the defendant says he:
- 18.1 Admits paragraph 1.
- 18.2 Admits paragraph 2.
- 18.3 Admits paragraph 3 and further says s KD 2(3) of the Income Tax Act 1994 was amended by the Income Tax Act 1994 Amendment Act 1996 and that the IFTC was renamed the CTC by the Taxation (Parental Tax Credit) Act 1999.

- 18.4 Admits paragraph 4 and further says the IWP is a component of the subpart KD credit and as such is provided for in ss KD 2 and KD 2AA of the ITA.
- 18.5 In reply to paragraph 5:
- 18.5.1 Admits this proceeding is about the IWP;
- 18.5.2 Admits s KD 2AAAB continues the CTC for some persons who are ineligible for the IWP;
- 18.5.3 Otherwise denies paragraph 5.
- 18.6 In reply to paragraph 6:
- 18.6.1 Admits the IFTC was and the CTC and IWP are:
- (a) Components of the tax credit available to the principal caregivers of dependent children;
 - (b) Available in varying amounts depending on the level of family income and the number of dependent children;
 - (c) Not available in respect of the same period to families who receive income by way of income-tested benefits or to some families who receive compensation under the IPRC Act or its predecessors.
- 18.6.2 Otherwise denies paragraph 6.
- 18.7 In reply to paragraph 7:
- 18.7.1 Admits that a full time earner is defined in s OB 1 of the ITA;
- 18.7.2 Otherwise denies paragraph 7.
- 18.8 In reply to paragraph 8:

- 18.8.1 Admits the CTC and IWP have different rates and that the higher rate of IWP means that it is fully abated at a higher income level;
- 18.8.2 Otherwise denies paragraph 8.
- 18.9 Denies paragraph 9 and further says that:
 - 18.9.1 For the 2005/06 year families with one child could earn income before tax of up to \$35,686 and still receive the maximum CTC of \$30 per fortnight;
 - 18.9.2 For the 2006/07 year families with one child can earn income before tax of up to \$53,720 and still receive the maximum IWP of \$120 per fortnight;
 - 18.9.3 The amounts on the website are expressed in income bands for the purpose of estimating income when families choose to receive their family assistance in interim weekly or fortnightly instalments.
- 18.10 Denies paragraph 10, in particular denies that the estimate figures are valid for comparison and further says:
 - 18.10.1 The subpart KD credit component entitlements changed between the 2005/06 and 2006/07 tax years;
 - 18.10.2 The maximum income amount at which a 3-child family could get CTC of \$90 per fortnight is \$51,979; and at which a 3-child family can get IWP of \$100 per fortnight is \$78,160.
- 18.11 Admits paragraph 11.
- 18.12 In reply to paragraph 12:
 - 18.12.1 Admits that part of s KD 2 of the ITA is set out in paragraph 12 but says that the section reproduced has

since been amended by s 104 of the Taxation (Savings Investment and Miscellaneous Provisions) Act 2006;

18.12.2 Otherwise denies paragraph 12;

18.12.3 Further says that s KD 2 as amended by the Taxation (Savings Investment and Miscellaneous Provisions) Act 2006 is set out in full in the appendix to this reply.

18.13 In reply to paragraph 13:

18.13.1 Admits that part of s KD 2, as it was prior to 1 April 2006, is set out in paragraph 13;

18.13.2 Otherwise denies paragraph 13.

18.14 In reply to paragraph 14:

18.14.1 Admits that the IWP largely replaced the CTC;

18.14.2 Otherwise denies paragraph 14;

18.14.3 Further says the CTC is now available only for those persons who are not eligible for the IWP but who were eligible for the CTC at 31 March 2006 and who continue to be otherwise eligible to receive the CTC.

18.15 In reply to paragraph 15:

18.15.1 Admits that s KD 2AAAB provides for the continuation of CTC for some persons who are not entitled to receive the IWP;

18.15.2 Otherwise has no knowledge of and therefore denies paragraph 15.

18.16 In reply to paragraph 16:

- 18.16.1 Admits that the FSC and PTC are also components of the subpart KD credit and that the FSC is available to some families who are ineligible to receive the IWP;
- 18.16.2 Otherwise denies paragraph 16.
- 18.17 In reply to paragraph 17:
 - 18.17.1 Admits that the FCA is a means of gradually reducing the amount of subpart KD credit payable to those whose income exceeds the specified income threshold;
 - 18.17.2 Otherwise denies paragraph 17.
- 18.18 In reply to paragraph 18:
 - 18.18.1 Admits that the eligibility for the CTC is provided for in s KD 2(4) of the ITA;
 - 18.18.2 Otherwise denies paragraph 18.
- 18.19 In reply to paragraph 19:
 - 18.19.1 Admits that s KD 2(4) of the ITA is set out in paragraph 19;
 - 18.19.2 Otherwise denies paragraph 19.
- 18.20 Admits paragraph 20.
- 18.21 In reply to paragraph 21:
 - 18.21.1 Admits that the definition of “specified payment” in s OB 1 of the ITA includes an “income-tested benefit” but says that the relevant definition of “income-tested benefit” is that in s OB 1 of the ITA and not that in s 3 of the SSA;
 - 18.21.2 Otherwise denies paragraph 21;

18.21.3 Further says s OB 1 provides that an “income-tested benefit” means any of the following benefits paid or payable under the SSA:

- (i) domestic purposes benefit;
- (ii) emergency benefit;
- (iii) independent youth benefit;
- (iv) invalids’ benefit;
- (v) sickness benefit;
- (vi) unemployment benefit;
- (vii) widows’ benefit.

18.22 In reply to paragraph 22:

18.22.1 Admits that families are not eligible for the CTC if they receive a “specified payment” as defined in s OB 1 of the ITA;

18.22.2 Otherwise denies paragraph 22.

18.23 Admits paragraph 23.

18.24 In reply to paragraph 24:

18.24.1 Admits that s KD 2AAA of the ITA provides for who is entitled to IWP and how it is calculated and that this section was inserted by the Taxation (Working for Families) Act 2004, which came into force on 1 April 2006;

18.24.2 Further says s KD 2AAA has subsequently been amended by the Income Tax Amendment Act 2005, s 3 and Part 1 of the Schedule, the Taxation (Depreciation, Payment Dates Alignment, FBT, and Miscellaneous Provisions) Act 2006 (2006 No 3), s122 and the Taxation

(Savings, Investment and Miscellaneous Provisions) Act
2006, s 105;

18.24.3 Otherwise denies paragraph 24.

18.25 In reply to paragraph 25:

18.25.1 Admits that part of s KD 2AAA(1)(e) is set out in
paragraph 25;

18.25.2 Further says s KD 2AAA(1)(e) is set out in full in the
appendix to this reply;

18.25.3 Otherwise denies paragraph 25.

18.26 Admits paragraph 26.

18.27 In reply to paragraph 27:

18.27.1 Admits that s KD 2AAA provides that some families
receiving payment of compensation under the IPRC Act
are eligible for the IWP;

18.27.2 Further repeats paragraph 16 above;

18.27.3 Otherwise denies paragraph 27.

18.28 Denies paragraph 28.

18.29 Admits paragraph 29 and further says the definition of “dependent
child” in s OB 1 of the ITA requires financial dependence.

18.30 Admits paragraph 30.

18.31 In reply to paragraph 31:

18.31.1 Admits that a full time earner is defined in s OB 1 of the
ITA;

18.31.2 Otherwise denies paragraph 31.

- 18.32 Denies paragraph 32.
- 18.33 In reply to paragraph 33:
- 18.33.1 Denies that the HRA and BORA were enacted to recognise and affirm New Zealand's international obligations under the International Covenant on Civil and Political Rights ("ICCPR") and further says that BORA was enacted to affirm New Zealand's commitment to the ICCPR and the HRA was enacted to provide better protection of human rights in New Zealand in general accordance with the United Nations Covenants and Conventions on Human Rights;
- 18.33.2 Otherwise admits paragraph 33 but says General Comment 18 is a general description of discrimination and does not provide the precise legal test for discrimination under BORA.
- 18.34 Admits paragraph 34 but further says that the distinction must be with those in analogous circumstances.
- 18.35 In reply to paragraph 35:
- 18.35.1 Admits that some persons who receive an income-tested benefit or receive weekly compensation under the IPRC Act or its predecessors in respect of an incapacity suffered before 1 January 2006, due to a personal injury by accident are not eligible for the IWP;
- 18.35.2 Otherwise denies paragraph 35.
- 18.36 Denies paragraph 36.
- 18.37 In reply to paragraph 37:

- 18.37.1 Admits that in this proceeding the relevant prohibited ground of discrimination is employment status pursuant to s 21(1)(k) of the HRA;
- 18.37.2 Further says that the IWP does not breach s 19 BORA;
- 18.37.3 Otherwise denies paragraph 37.
- 18.38 Denies paragraph 38.
- 18.39 Admits paragraph 39.
- 18.40 Denies paragraph 40.
- 18.41 Denies paragraph 41.
- 18.42 In reply to paragraph 42:
- 18.42.1 Denies that the exclusion of families from access to the IWP contributes to and/or exacerbates the adverse consequence suffered by these generally vulnerable children in such families across a range of social indicators;
- 18.42.2 Otherwise has no knowledge of and therefore denies paragraph 42.
- 18.43 In reply to paragraph 43:
- 18.43.1 Admits that the Ministry of Social Development's report *The Social Report 2006* at pages 64 and 65 records that in 2004 families whose main source of income was from income-tested benefits represented 51% of the total economic families who have low living standards (defined as a standard of living characterised by “severe hardship”, “significant hardship” and “some hardship”: Levels 1-3 of the Economic Living Standard Index (ELSI), as measured in the New Zealand Living Standards Surveys);

18.43.2 Otherwise denies paragraph 43.

18.44 In reply to paragraph 44:

18.44.1 Admits that the paper by Vasantha Krishnan, John Jensen and Mike Rochford of the Knowledge Group, Ministry of Social Development *Children in Poor Families: Does the Source of Family Income Change the Picture*, Social Policy Journal of New Zealand, Issue 18, June 2002 (“the *Children in Poor Families* paper”), p118, focuses on children who have been statistically classified as “poor” or “in poverty” because their families’ resources fall below a specified “poverty threshold” and examines the extent to which such children are found to differ in their living standards, characteristics and circumstances according to whether the main source of family income is from government transfers or market income;

18.44.2 Otherwise denies paragraph 44;

18.45 In reply to paragraph 45:

18.45.1 Admits that the *Children in Poor Families* paper concludes that the study's results suggest that poor children in families primarily reliant on government transfers are a particularly vulnerable group (p 146);

18.45.2 Otherwise denies paragraph 45.

18.46 In reply to paragraph 46:

18.46.1 Admits that the *Children in Poor Families* paper concludes that the findings show that poor children reliant on government transfers, when compared with poor children reliant on market incomes, have lower living standards and a number of compounding shortfalls that can be

expected to place them at greater risk of negative outcomes (p 146);

18.46.2 Otherwise denies paragraph 46.

18.47 Denies paragraph 47.

18.48 Denies paragraph 48.

18.49 In reply to paragraph 49:

18.49.1 Admits that any limits on the right to be free from discrimination affirmed by s 19 BORA can be justified in terms of s 5 BORA;

18.49.2 Further says that even if the IWP does limit the right to be free from discrimination as alleged in the second amended statement of claim (which is denied) that limit is justified under s 5 BORA on that basis that:

(a) Government is entitled to target social programmes, provided the purpose of those programmes is not discriminatory or does not exclude people on a discriminatory basis. Governments are not required to treat everyone equally;

(b) Families ineligible for IWP (because their income is from a benefit) are not disadvantaged in comparison with those who are eligible for IWP. Those on benefits receive greater overall government support;

(c) Assisting labour market development and providing a work-incentive scheme is a legitimate government objective. There is a significant public interest in encouraging people

to enter into and stay in work in order to achieve better outcomes for their families;

- (d) Work-incentives schemes have been shown to be effective in encouraging people into work and staying in work. Outcomes have been shown to be better for families with children when the family income is obtained from work;
- (e) Since the appropriateness of IWP as a means to achieve the government's objectives involves significant issues of social policy as well as the allocation of significant financial resources, the government is entitled to considerable deference by the courts when determining whether IWP excessively impairs the right to be free from discrimination.
- (f) The right is not excessively impaired as IWP falls within a range of reasonable alternatives open to government.

18.50 Denies paragraph 50.

18.51 Admits paragraph 51.

This statement of reply is filed by Cheryl Gwyn, Deputy Solicitor-General, Crown Law, on behalf of the abovenamed defendant whose address for service is Crown Law, PO Box 2858, DX SP20208, Wellington Central and whose day time telephone number is (04) 472-1719 and whose fax number is (04) 494-5677.