IN THE COURT OF APPEAL OF NEW ZEALAND

CA457/2012
[2013] NZCA 402

BETWEEN	CHILD POVERTY ACTION GROUP INCORPORATED (CPAG) Appellant
AND	THE ATTORNEY-GENERAL Respondent

Hearing:	28 and 29 May 2013
Court:	Ellen France, Randerson and Stevens JJ
Counsel:	F M Joychild QC and J M Ryan for Appellant C R Gwyn, J Foster and C I J Fleming for Respondent R M Hesketh and S A Bell for the Human Rights Commission as Intervener
Judgment:	30 August 2013 at 11.30 am

JUDGMENT OF THE COURT

A The Court answers the questions of law on which leave to appeal was granted as follows:

(i) ***First question*: Did the High Court correctly state and apply the test for a breach of s 19 of the New Zealand Bill of Rights Act 1990? *Answer*: No. All beneficiaries were the subject of prima facie discrimination because of the off-benefit rule.**

(ii) ***Second question*: Did the High Court correctly state and apply the test for s 5 of the New Zealand Bill of Rights Act 1990? *Answer*: Yes. The off-benefit rule is a justified limit on the right to freedom from discrimination on the ground of employment status.**

B The appeal is accordingly dismissed.

C No order as to costs.

REASONS OF THE COURT

(Given by Ellen France J)

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Introduction

[1] In 2004, the then Labour Government introduced a package of reforms for social assistance known as the Working for Families package. One component of that package is the in-work tax credit. The in-work tax credit supplements the income of those in work by up to $60 a week for families with three or fewer

children.[1] The tax credit is available to any family that meets its statutory criteria for eligibility. These criteria exclude persons who are receiving an income-tested benefit.[2] This exclusion is called the "off-benefit" rule. Persons who do not meet the "full-time earner requirement" (working at least 20 hours a week for a single person and at least 30 hours for a couple) are also excluded.[3]

[2] The appellant, the Child Poverty Action Group Inc (CPAG), maintains that the in-work tax credit constitutes discrimination on the basis of employment status. In terms of s 21(1)(k) of the Human Rights Act 1993, it is unlawful to discriminate against persons on the basis of their employment status which includes the fact that the person is in receipt of a social security benefit. CPAG made a complaint about the in-work tax credit and was granted legal representation by the Office of Human Rights Proceedings to pursue its case in the Human Rights Review Tribunal.

[3] The Tribunal concluded that the eligibility rules for the in-work tax credit were prima facie discriminatory on the grounds of employment status. However, the Tribunal also found that this was a justified limit under s 5 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights).[4] Section 5 of the Bill of Rights provides that rights may be limited only to the extent reasonably necessary in a free and democratic society.

[4] CPAG appealed unsuccessfully against the Tribunal decision to the High Court.[5] The High Court found that the off-benefit rule was prima facie discriminatory but only in respect of the small (1,267) group of persons who, while on a benefit, would meet the full-time earner criterion for eligibility for the in-work tax credit. The High Court concluded that the off-benefit rule was however a justified limit on the right in terms of s 5 of the Bill of Rights.

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1 For families with four or more children, an additional $15 per week is paid for each subsequent child. The evidence was that 92 per cent of families in New Zealand have three or fewer children.

2 Income Tax Act 2007, s MD 8(a).

3 Income Tax Act, s MD 9.

4 *Child Poverty Action Group Inc v Attorney-General* NZHRRT decision 31/08, 16 December 2008 [Tribunal decision].

5 *Child Poverty Action Group Inc v Attorney-General* HC Wellington CIV-2009-404-273, 25 October 2011 [HC judgment], Dobson J sitting with Ms J Grant and Ms S Ineson.

[5] After the High Court declined to grant leave to appeal,[6] this Court gave leave to appeal on two questions of law, namely, whether the High Court correctly stated and applied the test for a breach of s 19 and for s 5 of the Bill of Rights.[7] The Court said that the question about s 19 was to include the issues raised by the respondent, the Attorney-General, by way of cross-appeal, that is, whether the High Court erred in applying s 19 in holding that:

> (i) those who are ineligible for the in-work tax credit on the basis of only s MD 8(a) of the Income Tax Act [2007] are the subject of *prima facie* discrimination; and
>
> (ii) those who are ineligible for the in-work tax credit on the basis of both s MD 8(a) and s MD 9 of the Income Tax Act [2007] are not the subject of *prima facie* discrimination.

[6] We note that the Human Rights Commission gave notice of its intention to appear and be heard on this appeal as it is entitled to do under s 92H of the Human Rights Act.

[7] Before answering the questions of law, we first discuss the context of the appellant's claim, the features of the Working for Families package, and the relevant statutory provisions.

The context of the claim

[8] CPAG is an incorporated society formed in 1994 to advocate for a "better informed social policy to support New Zealand children" particularly those living in poverty.[8] CPAG undertakes research, publishes information and is a lobbyist for policy change. Its management committee includes Dr Susan St John, an Associate Professor in the Economics Department at Auckland University and Professor Innes Asher, Head of Paediatrics at Auckland University School of Medicine both of whom gave evidence before the Tribunal as did CPAG's director, Janfrie Wakim.

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6 *Child Poverty Action Group Inc v Attorney-General* [2012] NZHC 675.
7 *Child Poverty Action Group Inc v Attorney-General* [2012] NZCA 319.
8 HC judgment, above n 5, at [4].

[9] The present complaint is one of a number of claims pursued by CPAG since 2002 challenging forms of State assistance to families with children that are unavailable to families whose parents are in receipt of benefits on the basis of discrimination.

[10] As the submissions for the respondent record, State social assistance in New Zealand is provided in a number of ways. The evidence was that tax credits, like the in-work tax credit in issue, have become an increasingly common means both here and overseas of providing social assistance.[9] The in-work tax credit and other tax credits are delivered under the Income Tax Act 2007. The other principal forms of income support are provided via the Ministry of Social Development under the Social Security Act 1964 and under the New Zealand Superannuation and Retirement Income Act 2001.

[11] Income support is seen as comprising three tiers. The first, or main, tier includes the domestic purposes and unemployment benefits. These benefits are intended to provide for basic living costs and are subject to income tax.[10] The domestic purposes benefit is the most significant in this case because the majority of children in single parent families reliant on a benefit are in households receiving the domestic purposes benefit. By contrast, relatively small numbers of couples in receipt of the unemployment benefit have children.[11] Second tier assistance is directed towards persons in particular situations and/or for specific ongoing costs such as accommodation, disability, and child care. Third tier benefits are income- and asset-tested and provided generally to assist in times of hardship. The temporary additional support benefit introduced in place of the special benefit as part of the Working for Families package is in this category.

[12] We turn then to the development and features of the Working for Families package.

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9 In *Humphreys v Revenue and Customs Commissioners* [2012] UKSC 18, [2012] 1 WLR 1545 at [30] Baroness Hale noted that the concept of "integrating the tax and social security systems, ... to smooth the transition from benefit to work and reduce the employment trap, has been attractive to policy makers for some time".

10 New Zealand Superannuation and Veteran's pensions have rates that are before the deduction of tax. "Income-tested" benefits like the Domestic Purposes and Unemployment benefits are defined in s YA 1 of the Income Tax Act.

11 The evidence of Donald Gray of the Ministry of Social Development was that as at the end of December 2007, there were 2,156 unemployment benefit couples with children.

The genesis of the Working for Families package

[13] The Tribunal's decision contains a helpful summary of the history of the events leading up to the package which we draw upon in the material that follows.[12]

[14] The starting point for these purposes is 1996. By that time the universal family benefit had been replaced by family support. There are four aspects to note of the position as at that time. First, family support was paid in the form of a per child/per week tax credit based on joint parental income. Importantly, it was available to all low income families regardless of the work status of the adult(s). Secondly, for the benefits in issue here, the domestic purposes benefit and the unemployment benefit, there was a child component, that is, these benefits were paid at a higher rate for adults raising children. The third point that we highlight in terms of the position as at 1996 is that there was a family tax credit paid to a relatively small number of working families to guarantee a certain minimum after-tax income level. Finally, the special benefit was payable to families irrespective of the adults' work status as a form of hardship assistance.

[15] In 1996 the then National Government recognised that the family support rate needed adjustment because of inflation. In addition to increasing the rates by an additional $5 per child a distinction between working families and families on benefit income was introduced for the first time. An additional $15 per child per week was paid to families where the adults were not in receipt of a main benefit. This new payment was called the "independent family tax credit" but in this judgment we call this "family support".

[16] In 1999 there was a change of government and the new Labour-led Government took office. As the Tribunal said, "[a]ssessment and reform of social assistance programmes were priorities".[13] In 2000, the relevant Minister commenced a programme of work to achieve a number of goals recognising that "the primary factor for most will be activity through paid employment".[14] This work programme led to a report to the Cabinet Social Policy and Health Committee in

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12 Tribunal decision, above n 4, at [24]–[44].

13 At [30]. The speech from the throne referred to an intention to review aspects of the benefit system to remove disincentives for people to re-enter the workforce.

14 Cited in the Tribunal decision, above n 4, at [30].

September 2000 recommending draft goals for the social assistance system, a detailed work programme as well as the indicators against which the current system was to be assessed.

[17] Various papers followed as a result. As the Tribunal noted, an important output of the work programme was a report from the Minister of Social Services and Employment of June 2001 entitled *Pathways to opportunity: Social assistance reform*.[15] The report stated that under the proposed new approach, the focus would be on "providing opportunities and the financial encouragement to move off benefit into work and to stay in work (making work pay)".[16] Six main areas of policy development were identified, including simplifying the system, "making work pay and investing in people", "supporting families and children" and "tackling poverty and social exclusion". Officials were directed to advance work accordingly.

[18] As the Tribunal records, there is "ample evidence" of the "considerable work" undertaken to realise the "Pathways" initiatives.[17] This work culminated in a Cabinet paper of 31 March 2004 which contained the various elements of the Working for Families package.[18] We will come back to some of the features of the policy development process later in this judgment.

The Working for Families package

[19] We preface our discussion of the main features of the package by noting, first, that while some of the changes resulted in an increase in assistance other changes reflected a decrease in support. For example, the new criteria for the temporary assistance allowance were less flexible than the largely discretionary special benefit that it replaced. However, in general terms, as noted in the Cabinet paper, the package represented the application of more money in total to this area. Further, the clear direction to officials was that overall there should be "no losers" as a result of the package. The evidence confirmed that in absolute dollar terms no one was worse off. Secondly, the package, while introduced as part of the 2004 Budget,

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15 Minister of Social Services and Employment *Pathways to opportunity: Social assistance reform* (18 June 2001).

16 At [12].

17 Tribunal decision, above n 4, at [33].

18 Cabinet Paper "Future Directions: Working for Families" (31 March 2004).

was implemented on a staged basis over a period between 1 October 2004 and 1 April 2008. The total cost of the package was estimated at $1.14 billion for the first year following full implementation. However, and this is the final general point we make, in 2005 before the legislation enacting the changes was in force, it became apparent more money was available to the Government. The decision was made to alter the family credit abatement rate and threshold which meant families earning higher incomes were able to receive family assistance tax credits including both family support and the in-work tax credit.

[20] The objectives of the package are expressed in this way in the Cabinet paper:

> - **make work pay** by supporting families with dependent children, so that they are rewarded for their work effort. This involves better alignment of benefits and in-work support (including Family Income 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 housing affordability problems by responding to the increased cost of private housing for low income people, and
>
> - **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 the effectiveness of delivery.[19]

[21] The intention was that the package as a whole would achieve these goals. In other words, the various aspects of the package were seen as working together to achieve the objectives. That said, the Cabinet paper identified particular initiatives as achieving one or other of the objectives. For example, one of the key initiatives linked to the objective of improving income adequacy as at 1 April 2005 was the increase in family support rates.

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[19] Those objectives are in turn reflected in the Future Directions (Working for Families) Bill. Section 1A of the Social Security Act 1964 sets out a number of purposes including enabling provision of financial and other support to help people to support themselves and their dependents while not working and to help people find or retain paid work, and to "enable in certain circumstances the provision of financial support … to help alleviate hardship": s 1A(b).

[22] The Cabinet paper identified the six components of the package as follows:

- Family Income Assistance and the In-Work Payment initiatives
- Childcare Assistance improvements
- Accommodation Supplement initiatives
- Invalid's Benefit changes
- Special Benefit changes, and
- consequential changes to other social assistance programmes.

[23] For these purposes, "family income assistance" relevantly covers family support (now, the family tax credit), the in-work tax credit and its predecessor, the child tax credit, the minimum family tax credit and the parental tax credit. We outline the relevant features of each in turn.

Family support

[24] Family support, as the respondent submits, is the primary method of government contribution to income adequacy for families. It is available regardless of income source.[20] In terms of Working for Families, the key changes to family support were an increase in the rates (in April 2005 and 2007) and an increase in the income level that could be reached before the family income assistance abated. The chart below shows the increase:

	Rate for first child		**Rate for subsequent children**		
	0–15 yrs	16–18 yrs	0–12 yrs	13–15 yrs	16–18 yrs
Prior to WFF reforms	$47	$60	$32	$40	$60
From 1 April 2005	$72	$85	$47	$55	$75
From 1 April 2007	$82	$95	$57	$65	$85

[25] The legislation also provided for family support to be adjusted regularly on the basis of the Consumer Price Index.[21] The quid pro quo for these changes was the removal, for the second and subsequent children, of the amount previously paid as

[20] Income Tax Act, ss MC 2–11 and MD 3.
[21] Both the rate and abatement threshold adjust.

the "child component" of the main benefits. The evidence was that the increases to family support more than offset this change.

The in-work tax credit and its predecessor, the child tax credit

[26] The in-work tax credit is available to any family that meets its criteria for eligibility. Those criteria are provided for in ss MD 4–10 of the Income Tax Act. Those sections state that a person must:

(a) be aged 16 years or older;[22]

(b) be the principal caregiver for a child who is financially dependent on them;[23]

(c) be a New Zealand resident;[24]

(d) not be receiving an income-tested benefit (the "off-benefit rule");[25] and

(e) be a full-time earner[26] (a full-time earner is defined in s MA 7 as a single person employed for at least 20 hours per week or a couple employed for at least 30 hours per week in total).

[27] We interpolate here that some benefits, relevantly the domestic purposes benefit, are available when the recipient is earning a low income. Unlike the unemployment benefit, a person on the domestic purposes benefit has no work hours limitation.[27] Their benefit will, however, abate.[28] Accordingly, a person on the domestic purposes benefit may meet all of the criteria for eligibility for the in-work tax credit except for the requirement to be off-benefit. The number of persons in this

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22 Section MD 5.
23 Section MD 6.
24 Section MD 7.
25 Section MD 8(a).
26 Section MD 9.
27 A person does not qualify for the unemployment benefit if they work an average of 30 hours or more per week. Those in receipt of an invalids benefit may work up to 15 hours a week.
28 See s 27H and sch 16 of the Social Security Act. The current rate is 30 cents for each $1 of income between $100–$200, and 70 cents for every $1 of income after that.

category at the time of the High Court judgment was 1,267. To put that figure in context, the evidence was that at the end of December 2007, there were some 88,700 persons in receipt of the domestic purposes benefit. Over 17,800 of these declared they were working and 1,538 declared earnings of more than $300 per week.

[28] The in-work tax credit was estimated to cost $593 million in the year to June 2008. At that point, it was received by 180,000 families.

[29] The child tax credit, introduced in 1996, can be seen as the predecessor to the in-work tax credit. It is now available only to those persons ineligible for the in-work tax credit who were eligible for this credit immediately before the in-work tax credit came into force. The evidence was that, as at the year ended 31 March 2007, the child tax credit was paid to 22,000 families at a cost of $25 million.

The other tax credits

[30] The minimum family tax credit provides a minimum after-tax income to working families with dependent children.[29] Its aim is to help to see that families are better off in work than on a benefit. This goal is achieved by topping up net non-benefit income to an amount set annually. At the time of the hearing before the Tribunal, the threshold was $18,044 annually. This tax credit has a full-time earner requirement like that of the in-work tax credit and an off-benefit rule. There was evidence that, because this is a top-up, for every extra dollar earned (net) under the threshold, a family receives $1 less of the credit.

[31] The evidence of Michael Nutsford from the Inland Revenue Department was that for the year ended 31 March 2007, this tax credit was paid to 2,800 families at a cost of $8 million.

[32] Sections MD 11–12 deal with the parental tax credit which is available to families not in receipt of paid parental leave for 56 days after the birth of a child. The evidence showed that for the year ended 31 March 2007, the parental tax credit was paid to 14,000 families at a cost of $16 million.

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[29] Income Tax Act, s ME 1.

The abatement regime

[33] Section MD 1 deals with abatement for the in-work tax credit, family support (the family tax credit), parental tax credit and child tax credit. They abate according to this formula:

> Family tax credit + (in-work tax credit or child tax credit) + parental tax credit – credit abatement.

[34] The family tax credit abates first and then the in-work tax credit. As the parties submit, this means the in-work tax credit is available to some families on a relatively high income. We annex, as Annexure A, the schedule showing the abatement at the time of the Tribunal hearing.[30]

Other aspects of the package

[35] In terms of the other aspects of the Working for Families package, there were increases in the amount of childcare assistance available and increases to accommodation supplements. The special benefit was replaced by the new temporary assistance allowance. Again, payment for existing recipients of the special benefit was grandfathered for a period. There were also changes to invalids' benefits and consequential changes to other social assistance programmes.

The relevant statutory provisions

[36] The provisions relating to discrimination are found in the Bill of Rights and in the Human Rights Act.

[37] Section 19(1) of the Bill of Rights protects the right to freedom from discrimination on prohibited grounds.[31] The prohibited grounds are those set out in the Human Rights Act. The prohibited grounds include:[32]

> employment status, which means–
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> (i) being unemployed; or

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30 This schedule was annexed to the HC judgment, above n 5.

31 Affirmative action measures do not constitute discrimination: Human Rights Act 1993, s 19(2). It is not suggested that s 19(2) applies in this case.

32 Section 21(1)(k).

> (ii) being a recipient of a benefit under the Social Security Act 1964 or an entitlement under the Accident Compensation Act 2001:

[38] We interpolate here that employment status became a prohibited ground of discrimination on the enactment of the Human Rights Act.[33] The report of the Department of Justice to the select committee considering the Human Rights Bill said the Department was unaware of any overseas legislation including this ground but noted that the Human Rights Commission's "experience is that discrimination on this ground occurs here".[34] The Department's report also noted that initially "beneficiary status" was to be a separate ground but because of a concern about the number of grounds, this ground was subsumed into the employment status ground.

[39] The rights in the Bill of Rights may be limited only in the manner provided for in s 5. Section 5 states that these rights:

> … may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[40] The Human Rights Act applied immediately to the private sector but its application to the Government was initially limited.[35] Part 1A dealing with discrimination by government was introduced via the Human Rights Amendment Act 2001. The effect of the Human Rights Act is that a declaration may be made that a statutory provision is in breach of pt 1A of the Act if the provision is inconsistent with s 19 of the Bill of Rights. For these purposes, a statutory provision is inconsistent with s 19 if it:[36]

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33 The Human Rights Act brought together and revised the Race Relations Act 1971 and the Human Rights Commission Act 1977. It appears that at the time of the 1977 Act, the approach was to start with a less ambitious measure in terms of the number and scope of the grounds of prohibited discrimination: (7 July 1977) 411 NZPD 1245 and (23 August 1977) 413 NZPD 2392.

34 Department of Justice *Human Rights Bill – Report of the Department of Justice* (28 May 1993) at 16. There are some broadly equivalent provisions in some of the provincial human rights legislation in Canada: for example, Human Rights Code SS 1979 c S-24, s 2(1); Human Rights Act RSNS 1989 c 214, s 5(1) (refers to discrimination on the basis of source of income); Human Rights Act RSA 2000 c A-25.5, preamble (source of income); Human Rights Code CCSM 1987 c H-175, s 9; Human Rights Act RSPEI 1988 c H-12, s 1(1); Human Rights Code RSBC 1996 c 210, s 10(1); and Human Rights Act RSY 2002 c 116, s 7.

35 It was envisaged that there would be an examination of the compliance of acts and regulations with the Act prior to 31 December 1998. This became known as the "Consistency 2000" project, see ss 151 and 152 of the 1993 Act.

36 Human Rights Act, s 20L (2).

(a) limits the right to freedom from discrimination affirmed by [s 19]; and

(b) is not, under section 5 of the [Bill of Rights], a justified limitation on that right.

[41] We add that New Zealand also has obligations relating to the family under the International Covenant on Economic, Social and Cultural Rights and under the United Nations Convention on the Rights of the Child.[37]

[42] We turn now to the questions of law raised by the appeal.

Is the in-work tax credit discriminatory?

[43] There is no issue that the correct test to be applied in the s 19 analysis is the two-stage test adopted by this Court in *Ministry of Health v Atkinson*.[38] The first step is to ask "whether there is differential treatment or effects as between persons or groups in analogous or comparable situations on the basis of a prohibited ground of discrimination".[39] The second question is whether the treatment "viewed in context, … imposes a material disadvantage on the … group differentiated against".[40] We deal with each question in turn.

Differential treatment as between groups in comparable situations?

[44] The issue under this heading is that raised by the Crown's cross-appeal. It affects the choice of comparator. The High Court said that in determining whether there was differential treatment the appropriate comparison was between those whose income from wages is for sufficient hours to entitle them to the in-work tax credit and those excluded because of the off-benefit rule, irrespective of their full-time earner status.[41] The Tribunal took the same approach.

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37 See, for example, International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (signed 16 December 1966, entered into force 3 January 1976), art 10(2); see also arts 9, 12 and 15; United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), arts 2, 3(2), 6(2), 26 and 27.

38 *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456.

39 At [55].

40 At [109].

41 At [88] and [103].

[45] The Crown says that in analysing the appropriate comparator, the High Court should have taken into account all of the eligibility criteria for the in-work tax credit. If the Court had taken that approach, it would be apparent that the difference in treatment was not as a result of employment status but because those represented by the appellant group do not meet the full-time earner requirement. The latter requirement is not challenged by CPAG. The further submission is that the Court should have considered the purpose of the in-work tax credit, that is, to encourage people into work. That would be another reason for concluding that the different treatment was not as a result of status as a beneficiary.

[46] CPAG supports the choice of comparator adopted by the High Court and the Tribunal. CPAG further says that the existence of other statutory criteria which beneficiaries cannot meet is not fatal to its claim. That is especially so where the work hours criterion is inextricably linked to or is a proxy for employment status. CPAG argues that the Crown approach would require the adoption of the "mirror image" comparator approach, that is, the selection of a comparator in exactly the same circumstances as the claimant group except for the prohibited factor. That approach is now rejected by the authorities. Alternatively, CPAG contends that employment status is at least a material ingredient of the difference in treatment between the two groups via the off-benefit rule. The Human Rights Commission, similarly, submits that employment status is "a, if not the, determinative factor" in the situation of those in the group represented by CPAG.

Our assessment

[47] We consider that the High Court and the Tribunal were correct to conclude that there was differential treatment as between groups in comparable situations on the basis of their employment status. Our reasons follow.

[48] The first point we make is that the Crown's approach to the comparator would impose too high a threshold and effectively cut out the inquiry into potential discriminatory action too soon. The intention of the Human Rights Act is to take what has been described as a "purposive and untechnical" approach to whether there

is prima facie discrimination and so to avoid artificially ruling out discrimination at the first stage of the inquiry.[42]

[49] The Crown approach also leads to the types of problems that resulted in a move away from the "mirror" comparison analysis.[43] The high point of the move away from a mirror comparator group is seen in the Supreme Court of Canada decision in *Withler v Canada (Attorney-General)*.[44] The Court outlined concerns arising from the search for a mirror comparator, first, that this search may mean that "the definition of the comparator group determines the analysis and the outcome".[45] Secondly, the Court stated that the search for a "precisely corresponding" comparator becomes "a search for sameness, rather than a search for disadvantage, ... occluding the real issue."[46] Finally, McLachlin CJ and Abella J, in delivering the judgment for the Court, also suggested that another concern was that:

> [58] ... allowing a mirror comparator group to determine the outcome overlooks the fact that a claimant may be impacted by many interwoven grounds of discrimination. Confining the analysis to a rigid comparison between the claimant and the group that mirrors it except for one characteristic may fail to account for more nuanced experiences of discrimination. …

[50] The danger apparent in the Crown approach is that a range of criteria could be established for eligibility but with the knowledge that one of those criteria will effectively cut out and so discriminate against, for example, all those of a particular ethnic group.

[51] It is also necessary to come back to why it is that a comparison is being undertaken. The need to consider this exercise arises, at least in part, because legislation and policy decisions all involve to a greater or lesser extent differential treatment or the making of distinctions of some sort. What the Court is trying to do by reference to the comparator is to sort out those distinctions which are made on the basis of a prohibited ground. The Court is looking at the reality of the situation not,

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42 *Air New Zealand Ltd v McAlister* [2009] NZSC 78, [2010] 1 NZLR 153 at [51] per Tipping J.

43 See discussion in *Atkinson*, above n 38, at [60]. The observation by Tipping J in *McAlister* suggesting the need for a close coincidence between the characteristics of the two groups preceded this line of authority.

44 *Withler v Canada (Attorney-General)* 2011 SCC 12, [2011] 1 SCR 396.

45 At [56].

46 At [57].

as Iacobucci J said in *Law v Canada (Minister for Employment and Immigration)*, "in the abstract".[47] It is necessary also to be comparing apples with apples and hence the inquiry focuses on analogous or comparable situations. The comparator exercise, as has been said on earlier occasions, is simply a tool in that analysis. In some cases, particularly those where there is a single criterion, the comparator analysis will effectively answer the first stage of the inquiry.

[52] Where there are multiple statutory criteria as here, or indeed where effects-based discrimination is being considered, further analysis may be required. There may be questions about how the multiple criteria impact on the choice of comparator and whether the discrimination is on the basis of the prohibited ground. The latter question may raise further questions about the causative link between the treatment and the prohibited ground. We agree with the parties and the Commission that consideration of this aspect is a part of this limb of the test. Accordingly, we do not consider the High Court was correct to consider questions of causation at the second stage. As this Court said in *Atkinson*, the second step is focused on whether the differential treatment has a discriminatory impact although we acknowledge that the two issues may overlap to some degree. Our approach is consistent with that taken in Canada.[48]

[53] The concept of "material ingredient" has been utilised in cases where the legislation refers to discrimination "by reason of" the prohibited ground. In the *Human Rights Commission v The Eric Sides Motor Co Ltd*, the Equal Opportunities Tribunal stated that for treatment to be "by reason of" a prohibited ground, the prohibited ground had to be "a substantial and operative factor" for the treatment.[49] CPAG points out that in *McAlister*, Tipping J said that this description of the test required "too strong a link between the outcome and the prohibited ground".[50] Instead, Tipping J stated:[51]

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47 *Law v Canada (Minister for Employment and Immigration)* [1999] 1 SCR 497 at [57].

48 Ibid, at [39].

49 *Human Rights Commission v The Eric Sides Motor Co Ltd* [1981] 2 NZAR 447 (Equal Opportunities Tribunal) at 465.

50 At [48].

51 See also at [48]–[50] per Tipping J and at [40] per Elias CJ, Blanchard and Wilson JJ.

> [49] The correct question raised by the phrase "by reason of" is whether the prohibited ground was a material ingredient in the making of the decision to treat the complainant in the way he or she was treated.

[54] The Human Rights Review Tribunal in *Winther v Housing New Zealand Corp* did not see the different wording, that is, "by reason of" rather than "on the grounds of" as warranting a different approach to these issues under pt 1A of the Human Rights Act.[52] Rather, the Tribunal said:

> [59] … [T]he problem is essentially the same. To adapt the approach articulated by Tipping J for use in this case – and bearing in mind the need to keep an eye on the difference between motives and reasons – the question we have to decide is whether the prohibited ground relied on (here, family status) was a material ingredient in HNZ's decision to issue the plaintiffs with 90 day notices.
>
> (Footnote omitted.)

[55] In that case the Tribunal concluded that Housing New Zealand had not acted because of its belief as to the nature of the plaintiffs' relationship with the men involved (that is, the prohibited ground of family status) but rather because of its belief that those men had been involved in serious acts of antisocial behaviour. Accordingly, the action was taken to terminate the connection between the men and the properties rather than on the family status of the plaintiffs.

[56] Turning to the overseas authorities, the point is well made by Iacobucci J in *Law*. The Supreme Court of Canada in that case was looking at whether an age requirement in the Canada pension plan was discriminatory. The Court described the plan as follows:

> [90] The [Canadian pension plan] grants benefits to surviving spouses over the age of 35 immediately following the death of the contributor. However, those benefits are not available to able-bodied spouses without dependent children who are less than 35 years of age at the time of the death of the contributor, until they reach age 65 or unless they should become disabled in the interim. In addition, while those over age 45 are entitled to receive benefits at the full rate, those between the ages of 35 and 45 receive a reduced sum.

[57] The appellant argued that the issue was whether age was properly included among the factors determining eligibility for survivor's benefits and the amount that

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52 *Winther v Housing New Zealand Corp* [2011] NZHRRT 18.

was provided. The Crown responded that entitlement depended on the "interplay" of age, disability and responsibility for dependent children.[53] Iacobucci J stated:

> [91] … In my opinion, it does not follow from the fact that any one of several criteria, including age, might determine entitlement to a survivor's pension, that the legislation does not draw a distinction on the basis of age.
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> [92] As an able-bodied woman without children, the appellant does not suggest that the [Canadian pension plan] discriminates by denying her equal benefits as compared to surviving spouses who have disabilities or dependent children. The appellant submits that the issue in dispute is whether age is properly included among the factors which determine eligibility … and the amount that is provided. Had the appellant been able-bodied, without dependent children, and over age 45 at the time of her spouse's death, she would have been immediately entitled to receive full benefits. However, as an able-bodied, childless woman who was 30 years of age at the time of her spouse's death, she is denied any benefits until she reaches age 65, provided she does not subsequently become disabled. Similarly, for surviving spouses aged 35 to 45, it is their age alone that serves to reduce the amount of benefits they receive as compared to those over age 45. In my view, the survivor's pension provisions of the [plan] clearly draw distinctions on the basis of the enumerated ground of age.

[58] Similar issues were considered by the United Kingdom Supreme Court in *Patmalniece v Secretary of State for Work and Pensions*.[54] In that case the Supreme Court was considering whether State pension credit criteria were compatible with European Union law.[55] In order to obtain a State pension credit, a person had to be "in Great Britain" as defined. The definition of being "in Great Britain" relevantly included being "habitually resident" and no person could be habitually resident if they did not have the right to reside in Great Britain.

[59] The link to the right to reside was challenged. The challenge was on the basis that nationals of other member states do not qualify for the same treatment unless they have a right to reside in the United Kingdom which they do not have solely on the grounds of their nationality. A citizen of the United Kingdom, by contrast, has such a right.

[60] The Supreme Court followed a European Court of Justice decision in finding that this requirement comprised indirect discrimination although the majority

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53 At [91].

54 *Patmalniece v Secretary of State for Work and Pensions* [2011] UKSC 11, [2011] 1 WLR 783.

55 The criteria in question were listed in the State Pension Credit Regulations 2002 (UK), reg 2.

considered that this limitation was justified. The purpose of the limit was to ensure an applicant was sufficiently socially or economically integrated in the United Kingdom before receiving social assistance. This reflected the principle of European Union law that persons dependent on social assistance would be looked after by their own member State.

[61] Since *Patmalniece* considered whether the alleged discrimination was direct or indirect it is not entirely analogous. Further, the concern in that case related to the cumulative effect of the criteria rather than whether or not, as in this case, two of the criteria would exclude. It is useful nonetheless to consider, first, the observations of Lord Walker, in dissent. Lord Walker expressed the view that the fact there was more than one criterion made it necessary to focus on the criteria as a whole. That was so if it was only one criterion that produces unequal treatment. Lord Walker continued:

> [65] … The right to reside condition is not a sufficient condition for entitlement, but it is a necessary condition, and it is one that is automatically satisfied by every British national. The fact that there is another cumulative condition (actual or deemed habitual residence) is irrelevant … . It might be different if there were alternative conditions, because neither condition would then be necessary (although one would be sufficient).

[62] Secondly, Baroness Hale, in the context of confirming that the discrimination was indirect, stated:

> [93] … [I]n essence it is the application of a criterion which is applied equally both to nationals and to non-nationals but which in fact places non-nationals at a particular disadvantage when compared with nationals. The right to reside criterion obviously places non-nationals at a particular disadvantage when compared with nationals and has in fact placed Ms Patmalniece at that disadvantage.

[63] Further, Baroness Hale discussed authority suggesting that conduct may be discriminatory where there is an "exact coincidence" between a criterion and the prohibited ground.[56]

[64] The point that emerges from this discussion is that the existence of another criterion which may render the person ineligible for assistance does not of itself

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[56] At [91].

mean there may not be discrimination on a prohibited ground. That is particularly pertinent where there is a close link between the two criteria. That point is illustrated by the facts of this case because the two grounds, that is, being off-benefit and meeting the full-time earner requirement, are factually interlinked. Indeed, 99.2 per cent of persons who are ineligible for the in-work tax credit are ineligible on both grounds. Whether described as a "material ingredient" or as an operative factor, in this case, the reality is that no matter what a beneficiary's eligibility is under any of the other criteria, that person will never be able to qualify under the "off-benefit" rule so long as he or she exhibits the characteristic on which basis discrimination is prohibited. The criterion operates to exclude people on the basis of a prohibited ground.

[65] Returning to the Crown's proposed approach, there are difficulties if the purpose of the measure is considered at this stage rather than at the s 5 stage because that conflates matters of justification with the question of whether or not there is prima facie discrimination. The approach reflected in *Atkinson* was that "matters of justification" should be dealt with at the s 5 stage not at the s 19(1) stage.[57]

[66] For these reasons, we agree with the High Court and the Tribunal that the comparison is between those whose income from work is for sufficient hours to entitle them to the in-work tax credit and those excluded because of the off-benefit rule, irrespective of their full-time earner status. Once that comparator is utilised, it is clear that the differential treatment is on the basis of the prohibited ground.

A material disadvantage?

[67] There are two issues under this head. The first issue is whether the High Court was right to find that only those (1,267) beneficiaries who met the full-time earner requirement are materially disadvantaged or whether, as the Crown contends, there was no material disadvantage. The second issue is whether, as CPAG submits, all beneficiaries with children are at a material disadvantage.

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[57] At [117].

[68] As we have foreshadowed, with one qualification, the High Court found that there was no material disadvantage for those on a benefit because the lack of comparable gain was not caused by the off-benefit rule. That was because, even without that requirement, those on a benefit not working the requisite minimum 20 or 30 hours per week would still not qualify for the in-work tax credit unless they began to meet the full-time earner requirement. The High Court said that the only persons who are directly disadvantaged are the 1,267 who are in full-time work but elect to remain on a benefit. This group are at a real disadvantage financially, namely, to the extent of the difference between the total net income as earned from a benefit and that if obtaining the in-work tax credit.

[69] On this point, the Tribunal had accepted CPAG's submission that children in beneficiary families were disadvantaged by the Working for Families 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".[58]

[70] CPAG says that all beneficiaries are materially disadvantaged by the off-benefit rule because they are in this way excluded from a comparable gain. In support of the submission that there is a material disadvantage, the Commission emphasises that the effect of the Income Tax Act is that beneficiaries are excluded from claiming the benefit of the in-work tax credit. Further, the Commission says that the inability to claim the benefit amounts to a disadvantage for a significant number of beneficiaries.[59]

[71] The respondent cross-appeals arguing, first, that no-one in the group represented by the appellant is materially disadvantaged by the measure. A person on a benefit either remains on the benefit or receives the in-work tax credit. Accordingly, he or she simply has two forms of state assistance available, each with advantages and disadvantages and can elect one or the other. Secondly, the argument is that in considering the group who do meet the full-time earner requirement, the High Court should have looked at a number of contextual factors. In that respect, the

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58 Tribunal decision, above n 4, at [191].

59 The Commission supports the approach taken by Hart Schwartz "Making Sense of Section 15 of the Charter" (2011) 29 NJCL 201 at 217 which focuses on exclusion as a way of identifying discrimination; see the discussion of Hart Schwartz's approach in *Atkinson*, above n 38, at [132].

Crown emphasises that over a person's lifetime that person may move on and off the benefit and so may at various points in time be eligible for and receive the in-work tax credit. The point is also made that it is accepted that a gap between earnings on a benefit and those in work is permissible and that movement into work is beneficial to society.

Discussion

[72] In our view, beneficiaries with children are materially disadvantaged by the lack of a comparable gain, namely, the ability to receive the in-work tax credit. The Crown submission is that a more subtle inquiry is necessary but we do not see a need to complicate this part of the analysis. The point of the exercise is to consider the impact on the claimant group in context and that impact must be material. The lack of comparable gain meets that test. Further, a number of the matters referred to by the Crown relating to the benefits of the measure are more relevant to the s 5 inquiry.

[73] In any event, the evidence suggests that the choice, particularly of those on the domestic purposes benefit who otherwise meet the criteria for the in-work tax credit, is a constrained one. Ms Joychild QC pointed to the evidence that those working 20 hours and receiving a benefit primarily continue in receipt of the benefit to maintain some security and certainty of income in a situation where employment is less stable. Further, there may be other reasons, such as childcare responsibilities, that restrict any election to go off-benefit.

[74] Ms Gwyn for the respondent is correct that employment status is not an immutable characteristic like ethnicity. The evidence showed that there is considerable movement on and off the benefit. Over 26 per cent of working-aged recipients of the domestic purposes benefit were in receipt of the benefit for less than a year. However, over 36 per cent of those in receipt of the domestic purposes benefit have been continuously receiving that benefit for between one and four years. Nearly 26 per cent have been continuously receiving the domestic purposes benefit for between four and 10 years. For those in either category, the period of disadvantage is material.

[75] For these reasons, we conclude the in-work tax credit is prima facie discriminatory. It takes as an operative characteristic a prohibited ground of discrimination and results in a lack of comparable gain to beneficiaries with children. Accordingly, we consider that the High Court was wrong to limit the finding of prima facie discrimination to the smaller group of beneficiaries who met the full-time earner criterion. We turn then to the question relating to s 5 of the Bill of Rights. As we have noted, that section provides that the rights in the Bill of Rights "may be subject only to such reasonable limits" as can be "demonstrably justified in a free and democratic society".

Is the in-work tax credit a justified limit?

[76] In *Atkinson*, this Court approached s 5 considering the headings set out by Tipping J in *R v Hansen*, namely:[60]

> (a) does the limiting measure serve a purpose sufficiently important to justify [curtailing the right]?
>
> (b) (i) is the limiting measure rationally connected with its purpose?
>
> (ii) does the limiting measure impair the right … no more than is reasonably necessary for sufficient achievement of its purpose [minimal impairment]?
>
> (iii) is the limit in due proportion to the importance of the objective [proportionality]?

[77] In this case the limiting measure identified by the High Court and accepted by the parties is the off-benefit rule. The purpose is incentivising relatively low income earners to pursue and remain in work. The High Court found, and the parties accept, that this purpose is sufficiently important to justify curtailing the right and that the off-benefit rule is rationally connected to the purpose. The focus of the appeal is therefore on the last of the two questions identified by Tipping J, namely, minimal impairment and proportionality.

[78] Before we address each of these limbs in turn, we discuss briefly some of authorities here, in the United Kingdom and in Canada on the question of the

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[60] *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [104].

respective roles of the court and decision maker. We focus particularly on the extent of latitude or leeway to be given to the decision maker, for example, as to the choice of measure adopted as that was the subject of discussion at the hearing and in submissions.

The approach to s 5

[79] The authorities suggest that how much choice will be afforded to the legislature or decision maker depends on the circumstances. It is generally accepted, and it is accepted in this case, that in matters involving social security and the allocation of spending, a greater degree of leeway will be afforded to the decision maker's choice.[61]

New Zealand

[80] Tipping J in *Hansen* referred to a spectrum extending "from matters which involve major political, social or economic decisions at one end to matters which have a substantial legal content at the other".[62] Tipping J envisaged that the nearer to the legal end of the spectrum the more intense the review by the courts was likely to be. As his Honour said, though, particular matters may have a number of different elements involving different aspects of the spectrum. To illustrate, Tipping J said, "the allocation of scarce public resources can often intersect with questions which, from a different standpoint, may seem more legal than political".[63]

[81] We find helpful this observation:

> [117] Ultimately, judicial assessment of whether a limit on a right or freedom is justified under s 5 of the Bill of Rights involves a difficult balance. Judges are expected to uphold individual rights but, at the same time, can be expected to show some restraint when policy choices arise, as they may do even with matters primarily involving legal issues. ... [Depending on the circumstances] the Court should allow the decision maker ... some degree of discretion or judgment. If the decision maker is Parliament, and it has manifested its decision in primary legislation, the case for allowing a degree of latitude may well be the stronger.

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61 This Court in *Atkinson*, above n 38, at [172] said that the concept of affording a degree of latitude to the decision maker had a "particular resonance in areas such as social and economic policy".

62 At [116].

63 At [116].

[82] Tipping J went on to develop the concept of a bull's-eye, a concept relied on by CPAG in this case. The margin of judgement or leeway left to Parliament represents the area of the target outside the bull's-eye. The idea is that the size of the target beyond the bull's-eye will turn on the subject matter. But, and this is the aspect CPAG relies on, Tipping J made the point that Parliament's view must not miss the target altogether. We come back to this aspect in considering the proportionality of the off-benefit rule.

United Kingdom

[83] In the United Kingdom these concepts are well established. There is a helpful summary of the position in Lord Nicholls' judgment in *Ghaidan v Godin-Mendoza* as follows:[64]

> [19] … Parliament is charged with the primary responsibility for deciding the best way of dealing with social problems. The court's role is one of review. The court will reach a different conclusion from the legislature only when it is apparent that the legislature has attached insufficient importance to a person's [European] Convention rights. The readiness of the court to depart from the view of the legislature depends upon the subject matter of the legislation and of the complaint. National housing policy is a field where the court will be less ready to intervene. Parliament has to hold a fair balance between the competing interests of tenants and landlords, taking into account broad issues of social and economic policy. But, even in such a field, where the alleged violation comprises differential treatment based on grounds such as race or sex or sexual orientation the court will scrutinise with intensity any reasons said to constitute justification. The reasons must be cogent if such differential treatment is to be justified.

[84] CPAG relies on *Burnip v Birmingham City Council*, a recent decision of the Court of Appeal of England and Wales.[65] That case dealt with the provision of assistance for disabled persons who needed carers throughout the night. The Council provided a housing benefit but quantified it by reference to the one-bedroom rate applicable to the able-bodied. The Court concluded the maintenance of the one-bedroom rule was discriminatory and not justified. Henderson J in a separate judgment noted that the case concerned a benefit designed to meet a "basic human

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64 *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557.

65 *Burnip v Birmingham City Council* [2012] EWCA Civ 629.

need" for acceptable accommodation for a limited number of persons the "cost and human resource implications" of which were modest.[66]

Canada

[85] A similar approach to the question of the nature of the review role has been adopted in Canada. In *Alberta v Hutterian Brethren of Wilson Colony*, the Supreme Court of Canada was considering a requirement for a photograph on drivers' licences.[67] The Wilson Colony believes that the Second Commandment prohibits them from having their photograph willingly taken and objected to having their licence photographs taken on religious grounds. Some attempts were made to try to lessen the impact of the requirement but a photograph was still to be taken for placement in the province's facial recognition databank. These attempts did not meet the concerns of the Wilson Colony so the requirement's constitutionality was challenged. McLachlin CJ delivering the judgment for herself, Binnie, Deschamps and Rothstein JJ made the point that under the minimal impairment test, another way of putting the question was to ask:

> [53] … whether there are less harmful means of achieving the legislative goal. In making this assessment, the courts accord the legislature a measure of deference, particularly on complex social issues where the legislature may be better positioned than the courts to choose among a range of alternatives.

[86] The Court made the point, though, that the leeway to be accorded the government in formulating its objective was not "blind or absolute".[68] McLachlin CJ continued that the test at the minimum impairment stage was whether there was "an alternative, less drastic means of achieving the objective in a real and substantial manner".[69]

[87] To illustrate the point that the leeway is not without its limits, reference can be made to the earlier decision of *Eldridge v British Columbia (Attorney-General).*[70] The Supreme Court of Canada concluded in that case that the failure of hospitals and the Medical Services Commission to provide sign language interpreters as an insured

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66 At [64].
67 *Alberta v Hutterian Brethren of Wilson Colony* 2009 SCC 37, [2009] 2 SCR 567.
68 At [55].
69 Ibid.
70 *Eldridge v British Columbia (Attorney-General)* [1997] 3 SCR 624.

benefit under the Medical Services Plan to deaf persons using their medical services was an unjustified breach of the anti-discrimination provision. The Court was critical of the failure to attempt to set up a scheme constituting a lesser limit.[71] In that case, the Court had evidence that the estimated cost of providing sign language interpretation for the whole of the province, British Columbia, was $150,000 or "approximately 0.0025 per cent of the provincial health care budget at the time".[72]

[88] Reference should also be made to *Gosselin v The Attorney-General of Quebec* as CPAG says that case is closest on its facts to the present.[73] In 1984 the Quebec Government set up a new social assistance scheme. One regulation of that scheme provided people who were single, unemployed and under the age of 30 with a base amount of welfare approximately one third of that for people over 30. Under the scheme, if a person under 30 participated in an approved employability programme then their welfare payment was increased to be close to, or the same amount as, that payable to those over 30. In 1989, new legislation removed this age-based distinction. The appellant brought a class action challenging the 1984–1989 scheme alleging breach of, amongst other rights, the right equivalent to s 19 in the Canadian Charter of Rights and Freedoms (s 15). The majority concluded that the welfare scheme did not breach this provision so did not reach the justified limits analysis. However, it is worth noting two comments made by McLachlin CJ for the majority, albeit in the context of considering whether the measure was discriminatory. The Chief Justice said:

> [55] … Perfect correspondence between a benefit programme and the actual needs and circumstances of the claimant group is not required to find that a challenge provision does not violate the *Canadian Charter*. The situation of those who, for whatever reason, may have been incapable of participating in the programs attracts sympathy. Yet the inability of a given social program to meet the needs of each and every individual does not permit us to conclude that the program failed to correspond to the actual needs and circumstances of the affected group. … Crafting a social assistance plan to meet the needs of young adults is a complex problem, for which there is no perfect solution. …
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> [56] Second, we cannot infer disparity between the purpose and effect of the scheme and the situation of those affected, from the mere failure of the government to prove that the assumptions upon which it proceeded were

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71 At [93] per La Forest J.
72 At [87].
73 *Gosselin v The Attorney-General of Quebec* 2002 SCC 84, [2002] 2 SCR 429.

> correct. … [T]he legislator [does not have a duty] to verify all its assumptions empirically, even where those assumptions are reasonably grounded in every day experience and common sense. …

[89] CPAG relies on the approach taken by the dissenting judges, L'Heureux-Dubé and Bastarache JJ. L'Heureux-Dubé J in the context of considering whether the scheme was prima facie discriminatory stated:

> [112] … By necessary implication, the fact that a legislature intends to assist the group or individual adversely affected by the impugned distinction also does not preclude a court from finding discrimination. Nor is it determinative, where a distinction produces prejudicial effects, that a legislature intends to provide an incentive for the affected individuals to alter their conduct or to change themselves in ways that the legislature believes would ultimately be beneficial for them …

[90] In terms of the minimal impairment test, Bastarache J agreed that the Court should avoid "second-guessing" government policy and that the government need not have chosen the less drastic means available. However, the Judge continued that the government must have chosen to infringe the right "as little as was reasonably possible".[74] In that case, Bastarache J examined the evidence and concluded that there were other available alternatives, for example, the creation of a universally conditional programme that would achieve the objective but in a way that was less impairing to the right.

Conclusions

[91] The effect of these authorities is therefore, that in approaching the s 5 analysis, some latitude or leeway is given to the legislature or the decision maker particularly in a case like the present which involves the complex interaction of a range of social, economic, and fiscal policies as well as taxation measures. In addition, those policy factors relate to the overall social assistance measures with various tiers of benefits for the relief of poverty, as well as incentives to encourage beneficiaries to move into employment. That latitude or leeway to the legislature does not however alter the fact that the onus is on the Crown to justify the limit on the right. The justification has to be "demonstrable".[75]

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74 At [271].

75 *Hansen*, above n 60, at [110] per Tipping J.

[92] It must also be kept in mind that the effect of the Human Rights Act and the Bill of Rights is that when a measure is prima facie discriminatory the courts have to decide whether or not the measure meets the s 5 threshold. As Lord Scott said in *A v Secretary of State for the Home Department*, the function of measuring compliance with human rights norms is not one "that the courts have sought for themselves" but it is nonetheless a function that has been "thrust" on the courts by the Human Rights Act and the Bill of Rights.[76] In that context, the term "deference" as used in the authorities is not helpful if it is read as suggesting the court does not need to undertake the scrutiny required by the human rights legislation. The courts cannot shy away from or shirk that task. Rather, it is a question of recognising the respective roles of the courts and the decision maker, here, the legislature.[77]

[93] With these principles in mind, we turn then to the minimal impairment limb.

Minimal impairment

[94] The issue under this heading is whether the High Court was correct to conclude that the Crown had shown the right to be protected from discrimination on the ground of employment status was minimally impaired given there were other means of achieving a gap between earnings on- and off-benefit. A related issue is whether the High Court gave undue deference to the legislature's choice of method to incentivise work.

The decisions below

[95] The High Court in reaching this conclusion noted that the objective of the off-benefit rule was to create a sufficient margin between earnings whilst on a benefit and earnings whilst in work. Given the influence of other non-financial incentives to pursue employment and the various different individual circumstances affecting the decision, it was not reasonable to decide how much of a gap was justified. The High Court did nonetheless look at the approximate extent of the difference in the financial position of the two groups. That is set out in the chart

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[76] *A v Secretary of State for the Home Department* [2004] UKHL 56, [2005] 2 AC 68 at [145].

[77] At [29] Lord Bingham referred to the "demarcation of functions" and questions of "relative institutional competence"; see also at [42].

annexed to this judgment as Annexure B.[78] The Court said that the figures in the chart suggested a gain for moving off the benefit of some $23 for a couple and $35 for a sole parent. The Court continued:

> [204] … By far the largest State payment made in recognition of child care responsibilities is [family support], which is paid indiscriminately to all principal caregivers (included in the chart at $139 per week for two children under 12). For those earning at the lowest levels, the biggest contributor to the difference between earned income and beneficiaries is the [minimum family tax credit], which abates first.

[96] Accordingly, the Court was not persuaded that in a quantitative sense there was a greater disparity and therefore a greater impairment on the right than was reasonably necessary to achieve the objective of a work incentive.

[97] The Court said that when the matter is looked at in a more qualitative way another qualifying requirement for the in-work tax credit is that the recipient is the principal caregiver of dependent children. The High Court stated:

> [211] … Predictably, no issue was raised that that is discriminatory against those without children. Once the relevant category is confined to those caring for dependent children, then a distinction can appropriately be drawn between those in receipt of benefits, and those in work. From that perspective, the limiting measure does not impair the right to be free from discrimination on the grounds of employment status more than is reasonably necessary to achieve the objectives of the [in-work tax credit].

[98] The Tribunal said that "at a most basic level" it is difficult to see how the objective of making work pay could ever be achieved without 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.[79] The Tribunal continued:

> [257] The business of creating or enhancing that gap is reasonably necessary for sufficient attainment of the legislative purposes; more than that, we think it was an indispensable element for achievement of the [Working for Families] 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. [Working for Families] was intended to leave families on benefit income with financial reasons to move into work.

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78 Set out in the HC judgment, above n 5, at [41].

79 Tribunal decision, above n 4, at [256].

The competing contentions

[99] CPAG says the High Court, in concluding that the measure met the minimal impairment threshold, has given too much deference to the legislature. Ms Joychild in developing the submissions on this point notes, first, that there is already a gap between earnings on benefit and those in work because of the minimum family tax credit. The submission is that the problem the Government was trying to address is largely confined to the small group of beneficiaries who are working 20 hours a week and staying on the benefit for security of income. Secondly, CPAG relies on the evidence of Dr St John as illustrating there were many reasonable alternative ways of achieving the objective. Finally, Ms Joychild emphasises the relevant international obligations and the failure to consider these in developing the Working for Families package.

[100] The Commission is similarly critical of what it sees as the High Court's failure to engage with this issue in a substantive way.

[101] The Crown supports the approach taken by the High Court and the Tribunal and says those decisions have not relied unduly on the concept of deference. Ms Gwyn adds that the Court should not be in the business of considering the other possible alternatives advanced by CPAG because that would be to engage in political debate absent any "legal anchor". If this exercise is undertaken, the Crown says it is apparent that each of the options has other disadvantages. In any event, it is not the Crown case that those alternatives are too expensive but rather that they are alternatives to the in-work tax credit and not to the off-benefit rule.

The relevant principles

[102] As was the case in *Atkinson*, this part of the test can be dealt with by considering whether the approach taken fell within a range of reasonable alternatives. This limb was discussed by the Supreme Court in *R v Hansen*.[80] In that case, Blanchard J said that "a choice could be made from a range of means which

[80] *Hansen*, above n 60.

impaired the right as little as was reasonably necessary".[81] Tipping J preferred to phrase the question as whether or not the limit was "no greater than is reasonably necessary to achieve Parliament's objective".[82] His Honour considered that approach built in "appropriate latitude to Parliament" and would not "unreasonably circumscribe Parliament's discretion".[83] Finally, McGrath J stated that the inquiry was into "whether there was an alternative but less intrusive means of addressing the legislature's objective which would have a similar level of effectiveness".[84]

[103] This Court in *Atkinson* also referred to the following excerpt from *RJR-MacDonald Inc v Canada*:[85]

> [160] … [T]he law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it over-broad merely because they can conceive of an alternative which might better tailor objective to infringement … . On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail.

Application of the principles to this case

[104] The starting point in considering whether it has been shown that the in-work tax credit meets the minimal impairment requirement is that it is accepted that there has to be a gap between earnings on- and off-benefit. There is no dispute then that there has to be a measure creating such a gap. Once that is accepted, the focus turns to the way in which the gap is achieved. In that respect, the evidence before the High Court and the Tribunal of the experience of other member countries in the Organisation for Economic Co-operation and Development (OECD) was that a measure like the in-work tax credit is a recognised alternative in other democratic societies.

[105] The Tribunal heard evidence from two experts who worked with the OECD. Their expertise was in the effects of tax and benefit systems on employment and

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81 At [79].
82 At [126].
83 At [126].
84 At [217].
85 *RJR-MacDonald Inc v Canada* [1995] 3 SCR 199.

poverty. Mr Mark Pearson and Dr Herwig Immervoll said that over half of the 30 member countries of the OECD have some form of grants that are dependent on being in work. Their evidence was that although in-work benefit policies were not "some sort of panacea for all social and labour market problems" the international evidence was that these policies were effective in raising the employment rate of the target group and in reducing poverty. They said that if New Zealand had not already introduced such a policy, the OECD would recommend that it do so.

[106] CPAG says that the models elsewhere are different and that this one is less tailored. That may be so, but it must be relevant to an assessment of the off-benefit rule that the OECD experience supports this type of alternative.

[107] CPAG also relies on the fact a gap already exists by virtue of the minimum family tax credit. However, in considering whether the off-benefit rule minimally impairs the right, it is no answer to say there is already an incentive to stay off-benefit. The purpose of the in-work tax credit is to ensure it is not more economic to stay on the benefit. The evidence of Donald Gray from the Ministry of Social Development was that the gap created by the minimum family tax credit was not sufficient, so both forms of tax credit were necessary. Suzanne Mackwell from the same Ministry explained that the minimum family tax credit is withdrawn by $1 for every $1 increase in income so has little incentive to increase earnings. She said that "[f]or this reason [this tax credit] was designed to operate across a quite narrow band of income for a small group of families". Further, there are a number of factors in play that influence the decision as to how big a gap is necessary.

[108] It is also important that this is not a case where the Government has latched on to one option without careful consideration of the alternatives. Reference was made in argument to the observation of Abella J dissenting in *Quebec (Attorney-General) v A*.[86] Her Honour said that the key factor is the ultimate legislative choice and "the degree of legislative time, consultation and effort cannot act as a justificatory shield to guard against constitutional scrutiny".[87] That goes without saying, but the presence or absence of a good process prior to

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86 *Quebec (Attorney-General) v A* 2013 SCC 5.

87 At [363].

implementation is always relevant. Its absence will be significant, for example, in considering the leeway to be afforded a particular choice.[88] Its presence will often be helpful for government. It is one of the relevant factors.

[109] The policy process leading to the enactment of the Working for Families legislation was an extensive one. Two points can be made about that process.

[110] First, a range of options were explored and tested against various indicators. That process was assisted by advice and research, for example, as to the programmes in other OECD countries. In addition, a comprehensive review of living standards in New Zealand was prepared as well as an analysis of the interrelationship between parental income and outcomes for children. One of the papers prepared early on in the process identified and evaluated what were described as three possible approaches. These were: [89]

- The modified status quo: … ad hoc improvements to the current system;
- A universal benefit: …
- A universal basic income: … .

[111] Each of these options was assessed against a range of factors including "poverty alleviation" and "employment outcomes". The "Pathways" paper also discussed various options such as a universal benefit and rationalisation of the current tax and benefit based assistance.

[112] Further, as the Tribunal notes, "early design" of the Working for Families package also considered the pros and cons of a "two payment" as against a "single payment" system.[90] In a single payment system, there would be an income adequacy payment and no separate work incentive payment. The two payment systems involved "one set of payments designed to ensure income adequacy and another

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88 The Supreme Court of Canada in *Health Services and Support v British Columbia* 2007 SCC 27, [2007] 2 SCR 391 at [156]–[157] was critical of the absence of any consideration on the record of less intrusive means and, in a case involving collective bargaining, was also critical of the very limited consultation with the unions.

89 Ministry of Social Development *Future directions for social assistance* (19 December 2001) at [35].

90 Tribunal decision, above n 4, at [40].

designed to make work pay".[91] By October 2003, officials were favouring a two payment system primarily on the basis a single payment system was not seen as being likely to achieve a sufficient work incentive.

[113] The second point that emerges from a consideration of the policy process is that there was discussion about a balancing off between the amounts of money invested into poverty alleviation against that invested in work and how striking a different balance could impact on the approach taken to social assistance.

[114] There was one "unexpected development" in the process leading up to the Working for Families package which occurred in or around about November 2003 that we need to discuss.[92] Prior to that point, it was understood that the level of expenditure that might be approved was relatively modest. However, in late 2003, the Government decided it had more resources available for the upcoming 2004 Budget that had been forecast. As the Tribunal explained:

> [43] … 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 [Working for Families] 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 [Working for Families].

[115] CPAG is critical of the failure to reconsider options at this point. However, in addition to the time constraints referred to by the Tribunal, Ms Mackwell expressed some uncertainty about whether officials would have "got to" a single payment approach. That was in part because of difficulties perceived in making the one-payment approach address both of the objectives of the Working for Families package, namely, making work pay and income adequacy. In any event, we do not see this as detracting from the overall proposition that a range of possible alternatives including more fundamental change such as a move to a universal benefit were considered in the course of the development of the package.

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91 Ibid.

92 Ibid, at [43].

[116] CPAG also points to the lack of consultation, the absence of specific reference to human rights obligations and international obligations and the absence of any report of inconsistency with the Bill of Rights as required under s 7 of that Act. The submission is that these omissions should lead to a reduction in any deference or latitude given to the government's choice of measure. CPAG's focus in this respect is on the child's right to a standard of living. That is obviously important but the key focus here is whether the right to protection from discrimination on the basis of employment status has been minimally impaired.

[117] The absence of consultation no doubt reflected the fact the Working for Families package was introduced as a budget initiative. CPAG did give a presentation to two officials at one stage. Further, a number of government departments with different perspectives were involved in the policy development process. Finally, as we have noted, the proposals were measured against a range of different indicators.

[118] Consideration of human rights issues over the course of the policy development process was limited. Mr Nutsford explains issues that may have had human rights implications were identified "quite early" in the process although he did not know a great deal about what work was done on this. Ms Mackwell said the Ministry's lawyers and the Department of Justice were involved. It is fair to say not a great deal was said in the papers about this and that closer attention to these issues and the associated international obligations would have been beneficial.

[119] As to the s 7 report, the respondent's position remains that there is no prima facie discrimination. Presumably, the advice to the Attorney-General would have reflected that. Certainly, it does not necessarily follow from the failure to report per se that this matter was not given any consideration. The Attorney-General did table a s 7 report stating that the effect of the Working for Families bill breached the right to be free from discrimination on the basis of sexual orientation in treating same sex couples differently from opposite sex couples.[93]

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[93] Margaret Wilson *Report of the Attorney-General under the New Zealand Bill of Rights Act 1990 on the Future Directions (Working for Families) Bill* (27 May 2004).

[120] When analysed in the round, it can be said that the adoption of this particular method of work incentive reflected a careful analysis of a range of possible options each with differing social and economic impacts. The method chosen was at least broadly in line with the approach taken in other democratic societies. This Court in *Atkinson* made the point that the fact there is an alternative with less impact does not mean the option adopted is not reasonable.[94] However, in this case we can test the availability of another, less intrusive option, by briefly reviewing the other alternatives advanced by Dr St John for CPAG. When that analysis is undertaken, it is plain that each of the other possibilities raises other issues, for example, as to the impact on effective marginal tax rates.

[121] The options advanced by Dr St John were as follows:

(a) a low income rebate or initial tax free band;

(b) increasing the minimum family tax credit;

(c) a lump sum in-work benefit;

(d) a tax credit that differentiates on employment status but not family status;

(e) an increase in the minimum wage; and

(f) a change in abatement rates.

[122] As to the first of these options, it was explored in the policy development process. Ms Mackwell's evidence was that the suggested changes to the low income rebate would have had a very small impact on work incentives in comparison to the in-work tax credit and no effect on income adequacy.

[123] Dr St John's response was that there were ways of changing the low-income tax structure that could have a greater effect on returns from work for low-income

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94 *Atkinson*, above n 38, at [154].

workers.[95] However, Ms Mackwell's more general point was that the "key issue" with using tax reform to make work pay was targeting the group most in need. That was because tax is assessed on an individual not a family basis. She also said that targeting those on low to modest incomes only via this method was difficult and so fiscally more costly.

[124] The minimum family tax credit, as we have noted, also includes an off-benefit rule. It is not clear why this would be less rights impairing. Further, there was evidence that larger increases to this tax credit would distort the labour market by creating larger poverty traps at the low end of the income scale. Dr St John captured the concern when she accepted Ministers were "worried about it because it is so ugly with its marginal effective tax rate".

[125] The point made by the Crown submissions in relation to a lump sum or time limited payment was that this provides a work incentive only for that period. If the recipient has not increased his or her income sufficiently within that period, there may be low incentives to stay in work. There was also evidence that such payments may also incentivise people to leave employment to gain access to the payment. Finally, such lump sum payments would necessarily not be available to beneficiaries so, again, it is unclear that they would be less rights impairing than the in-work tax credit.

[126] We also agree with the Crown submission that it is unclear why a tax credit differentiating on the basis of employment but which is not child related (the United Kingdom model) would be less impairing of the right to be free from discrimination on the basis of employment status.

[127] As to changes in the minimum wage, Ms Mackwell made the point that these are part of the employment relations framework. She accepted that increases in the minimum wage complement the goal of making work pay but "because they must balance competing objectives and do not recognise family type and number of children", they are insufficient to achieve the objective of making work pay for families with children.

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[95] Dr St John noted she was writing before the 2008 Budget.

[128] Finally, in terms of abatement changes, there were some changes to abatement rates as part of the Working for Families package. Ms Mackwell said that, on their own, these were insufficient to make work pay for most low income families. Further, the evidence was that relaxing the abatement for recipients of the domestic purposes benefit would not encourage families to move off benefit but in fact would have the opposite effect.[96] Mr Nutsford explained that adopting different abatement regimes for family support and the in-work tax credit would have an effect on effective marginal tax rates.

[129] Accordingly, this is not a case where there is an obvious reasonable alternative less impairing of the right that has been overlooked. Of course, it is possible to envisage a combination of the various options advanced by Dr St John but for us to weigh up the pros and cons of the possible combinations would be to stray beyond our role. In an area where there are a range of legitimate policy choices, an approach has been adopted following conscientious consideration of those options. That approach achieves a gap in earnings on- and off-benefit but it is accepted that the creation of a gap is a legitimate part of a work incentive measure. In these circumstances, the High Court was correct to conclude that the minimal impairment test has been met and has not unduly deferred to the decision maker's choice of method.

A proportional response?

[130] The issue under this heading is whether, given the cost of the scheme, its benefits outweigh its adverse effects on beneficiaries. CPAG says the salutary effects do not outweigh the deleterious effects. The Crown responds that they do.

[131] The High Court accepted that the high point of CPAG's argument was the "relatively modest levels of success" on the goals of encouraging beneficiaries into work and alleviating child poverty given the significant overall expense.[97] However, the High Court said that argument did not deal with the fact that the exercise at this stage involved looking at proportionality between the off-benefit rule and the

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[96] There was a relaxation of the abatement regime for the domestic purposes benefit in 1996 and an analysis of this change suggested it increased the chance of staying on-benefit.

[97] HC judgment, above n 5, at [221].

objective of encouraging beneficiaries into work. If looked at in this way, the extent of the harm to the right is not out of proportion with the objective.

[132] The Tribunal said that the reality was that any such scheme involves a level of harm to the right. Looking at the matter overall, the Tribunal was satisfied that the "practical benefits" were sufficient to outweigh the damage.[98]

Submissions

[133] The appellant says the High Court has not focused on the key question of whether the salutary effects outweigh the deleterious effects. CPAG emphasises that the benefit was for a small number of persons whilst involving a very expensive work incentive. The expected effect of the incentive in moving people off-benefit was about two per cent. The submission is that this does not represent sufficient social gain given the cost. In her evidence, Dr St John describes this as a very expensive way to achieve the objective and says that it is not well targeted.

[134] The Commission is similarly critical of what it describes as a failure of the High Court to "engage" in the exercise "as it did not take into consideration those affected by the exclusion".

[135] For the respondent, Ms Gwyn submits that the question on this point is whether the harm to the right that arises as a result of the off-benefit rule is proportional to the benefit achieved. When viewed in this way, the submission is that the High Court and the Tribunal were right, particularly as the purpose is to lessen the barriers to beneficiaries moving off-benefit. CPAG's claim is really a claim for an increase in family support.

Analysis

[136] To put the issues under this heading in context, the effect of pt 1A of the Human Rights Act is that it is not permissible to discriminate on the grounds of employment status. Measures chosen to achieve a work incentive accordingly have to be implemented in a way that meets the s 5 test. While incentivising work is an

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[98] Tribunal decision, above n 4, at [272].

important objective, the measure chosen to achieve it must be proportionate. As to how proportionality is assessed, the description of the questions for this part of the test in *Canada (Attorney-General) v JTI-MacDonald Corp* is helpful.[99] In that case, the Supreme Court of Canada said:

> [42] … This inquiry focuses on the practical impact of the law. What benefits will the measure yield in terms of the collective good sought to be achieved? How important is the limitation on the right? When one is weighed against the other, is the limitation justified?
>
> [43] … [This is the only part of the s 5 inquiry] where the attainment of the objective may be weighed against the impact on the right.

[137] The modelling used in the Working for Families papers forecast "modest" movement off-benefit as a result of the in-work tax credit in the order of two per cent. CPAG posits the comparison between the cost of a gain of that order ($593 million) and a benefit of about two per cent.

[138] We do not consider that is the correct comparison. First, no one disputes some expenditure on a work incentive is legitimate. Accordingly, on CPAG's approach less may have been spent on the in-work tax credit but we can assume a sum would still have been incurred. For example, if as an alternative a combination of an in-work tax credit and, say, an increase to the minimum wage was adopted, a proportion of the $593 million forecast to be expended on the in-work tax credit would still have been spent on that tax credit. Accordingly, the comparison is not as stark as CPAG suggests.

[139] Secondly, the evidence showed that the effects were better than the two per cent forecast. An Inland Revenue/Ministry of Social Development report dated January 2010 considered the labour market effects of the changes to financial incentives and support.[100] That report noted that the employment rate of sole parents aged 18 to 64 increased by 10 per cent from 48.3 per cent in the quarter ending June 2004 to 57.7 per cent in the quarter ending June 2007. The report noted that the

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99 *Canada (Attorney-General) v JTI-MacDonald Corp* 2007 SCC 30, [2007] 2 SCR 610.

100 Inland Revenue/Ministry of Social Development "Employment incentives for sole parents: Labour market effects of changes to financial incentives and support" (January 2010), and see also Jacinta Dalgety and others "Employment incentives for sole parents: labour market effects of changes to financial incentives and support" in Iris Claus and others (eds) *Tax Reform in Open Economies: International and Country Perspectives* (Edward Elgar Publishing, Cheltenham, 2010) 194.

employment rate for sole parents grew faster than that for all of the working age population over that period.

[140] The report also noted that the numbers of sole parents receiving the domestic purposes benefit were fairly stable from 1999 to March 2005 but since that time New Zealand experienced "the largest fall" in the number of persons receiving the domestic purposes benefit since the benefit was introduced in 1973.[101] Numbers of all domestic purposes recipients decreased from 107,900 at the end of March 2004 just prior to the introduction of the first changes to the accommodation supplement and child care assistance to 94,300 at the end of March 2008, a reduction of 12 per cent. There had been an increase in the numbers of those receiving the domestic purposes benefit in the latter part of 2008 but the numbers, according to the report, are still well below the level seen in the early 2000s.

[141] The paper accepts that these changes cannot be attributed solely to the policy changes. Other factors, such as changes in the economy, are also responsible. However, the report estimates that around two thirds of the increase in the employment rate for sole parents can be estimated to be due to changes in financial incentives and support for work. Accordingly, the report writers estimate that six per cent of the increase was due to the policy changes.

[142] The report also notes that the percentage of sole parents meeting the eligibility threshold for the in-work tax credit requirement increased from 35.9 per cent in June 2004 to 47.5 per cent in June 2007, an increase of 11.6 per cent. The analysis suggests that around 9.2 per cent of this increase was due to the policy changes. Finally, the policy changes have increased the rate of domestic purposes benefit sole parent recipients' exit from benefit and decreased the rate of re-entry to benefit for sole parents.

[143] Hence, there is force in the High Court's conclusion that the projections in the Cabinet paper were "relatively conservative".[102] The fact individuals may receive the in-work tax credit at some point, reflecting the movement on- and

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101 At 7.

102 HC judgment, above n 5, at [172].

off-benefit, is also relevant in assessing the effects. Therefore, the High Court referred to the impact on a "rolling basis" as higher than the two per cent forecast.[103] We interpolate here that the Supreme Court of Canada in the *Hutterian* case suggested that the legislature was not required to show that the law in issue will in fact produce the forecast benefits.[104]

[144] Two further points can be made about these effects. First, whatever the means chosen to incentivise work, the state of the economy will be a factor in its effectiveness. That is one of many variables that the government has to work with in determining the appropriate levels of expenditure. Secondly, our impression of the evidence is that relatively small gains are of significance in this area. The evidence was that an increase in employment rates of single mothers of 4–7 percentage points in the United States was seen as "substantial". Likewise, a 10 per cent increase in employment in the United Kingdom was also seen as substantial employment gains.[105] Mr Gray made the point that any movement in this area was likely to be small but in itself that was not insignificant. Accordingly, there is a basis for regarding the positive effects as proportionate to the off-benefit rule. The measure has not missed the target.

[145] In any event, the logical extension of CPAG's submission is that more money should have been spent on beneficiaries with children to alleviate child poverty. On that approach, the focus is on the comparative amounts spent on family support and the in-work tax credit. At the time of the introduction of the Working for Families package, 60 per cent of the funding was directed towards those in work and 40 per cent to those on a benefit. Ms Mackwell in cross-examination accepted that with the 2005 changes the percentages were probably more like 70 to 30 per cent.[106]

[146] The evidence was of forecast government expenditure for 2005/2008 as follows:

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103 At [172].

104 *Alberta v Hutterian*, above n 67, at [85].

105 This equated to a five percent increase in employment rates for single mothers from 50 per cent to 55 per cent.

106 The High Court noted documentation showing that 2005 changes to the abatement regime were viewed as a tax relief package: at [30]–[32].

	$ m
Family support	2,000
Child tax credit	13
Special benefit/temporary assistance allowance	69
In-work tax credit	593

When those figures are utilised the $2,000 million spent on family support is approximately 75 per cent of the total and the $593 million spent on in-work tax credit is approximately 22 per cent of that total.

[147] Another possible way of considering the matter is to break down the $593 million. Dr St John in her evidence was critical of the amount spent on those earning over $45,000 per year. On the 2006/2007 figures that was some 48 per cent or $229 million.[107] In that year, however, using the same figures, some 31 per cent was spent on families earning less than $35,000 a year. An alternative grouping is those earning $25,000 to $45,000 a year and some 37 per cent of the total figure was spent on this group. The latter is the group from which Ms Mackwell explains the government was looking for the most gain. Hence the 60/40 split. Mr Nutsford in his evidence said that the bulk of expenditure in the Working for Families package goes to people below the median income for households or for families.

[148] On either analysis, it cannot be said the government's approach is out of proportion to the goals. As the Tribunal said:

> [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 towards those who are in work, and it is all directed to those who are out of work. The closer one gets to either of these limits, the easier it would be likely to find a "florid" violation of rights of the kind contemplated by Laws LJ and Lord Walker. But within reasonable limits along that continuum, the issue as to where the balance should be struck at any given point in time is inescapably a political question.
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> (Footnote omitted.)

[149] Drawing these threads together, it is apparent that there are a number of considerations at play here. First, the balance struck in the decision making will

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[107] The total figure for 2006/2007 was $480.3 million.

reflect social and economic factors such as the state of the economy, assessment of levels of poverty and relative disadvantage. The ongoing political process will mean differing views over time as to where the balance should be struck as between those factors. The relative proportions of money spent for relief of poverty as distinct from the other objective of moving people off-benefit and into work is very much a matter of overall political judgment.

[150] Secondly, a decision about where the balance should lie in terms of the amount spent on family support vis-à-vis a measure like the in-work tax credit, will undoubtedly impact on other areas of spending. This is one of the points made by John Yeabsley, an economist working at the New Zealand Institute of Economic Research, who gave evidence before the Tribunal about the policy development process. His opinion was that "the business of government in the social policy area is a complex and practically difficult job". He explained that often even "relatively small adjustments in policy settings can radically alter the choices that most suit some families". Mr Yeabsley noted the difficulty in predicting such outcomes especially given the diversity of family situations and their economics. We observe that the evidence disclosed the complex interrelationship between the various forms of benefit, abatement provisions and taxation measures, to name a few of the considerations relevant to the overall package. A change in any one of these material considerations may have an effect on the others.

[151] Finally, in the present case, once it is accepted that the other limbs of the s 5 test are met, it inevitably becomes harder to say that the measure that results is not proportionate. In making this point, we should make it clear that we do not subscribe to Professor Hogg's view that when an objective is sufficiently important to meet the s 5 test, is rationally connected and minimally impairs the right, the proportionality analysis adds nothing.[108] However, in this area of socio-economic policy the reality is that the various limbs of the s 5 analysis overlap. That said, we have found this aspect of the s 5 analysis difficult.

[152] Our difficulty no doubt reflects the undisputed fact that the issue of child poverty highlighted by CPAG's present claim is a serious one. CPAG points to the

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[108] Peter Hogg *Constitutional Law of Canada* (looseleaf ed, Carswell) at [38.12].

impact of benefit cuts in 1991 and the problems of child poverty for beneficiary families since that time. The figures CPAG relied on in the evidence show that when the legislation implementing the Working for Families package was enacted in 2004, there were some 245,000 children living in beneficiary families. CPAG refers to evidence from Janfrie Wakim indicating that approximately 180,000 of those children were living in hardship and 150,000 of those are described as in "significant" hardship.[109] Nor is there any dispute about the consequences of poverty for children in particular and for society more generally. The Tribunal and the High Court both recognised these issues and their importance. Accordingly, CPAG properly seeks to focus attention on the need for consideration of this issue. We have, nonetheless, concluded that the High Court was correct that the off-benefit rule is proportional to the work incentive objective.

[153] Accordingly, while our reasoning on this aspect differs in some respects from that in the High Court we agree that the s 5 test is met.

Result

[154] For these reasons, we answer the questions of law on which the appellant was granted leave to appeal as follows:

(i) *First question*: Did the High Court correctly state and apply the test for a breach of s 19 of the New Zealand Bill of Rights Act 1990?
Answer: No. The High Court should have concluded that all beneficiaries were the subject of prima facie discrimination because of the off-benefit rule.

(ii) *Second question*: Did the High Court correctly state and apply the test for s 5 of the New Zealand Bill of Rights Act 1990?
Answer: Yes. The High Court correctly found that the off-benefit rule is a justified limit on the right to freedom from discrimination on the ground of employment status.

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[109] Bryan Perry *Household incomes in New Zealand: trends in indicators of inequality and hardship 1982 to 2008* (Ministry of Social Development, 2009); and see also John Jensen and others *New Zealand Living Standards 2044: Ngā Āhuatanga Noho o Aotearoa* (Ministry of Social Development, 2006).

[155] The appeal is accordingly dismissed.

[156] The parties are agreed that there is no issue as to costs. We accordingly make no order as to costs.

Solicitors:
Davenport City Law, Auckland for Appellant
Crown Law Office, Wellington for Respondent

Annexure A

Working for Families Tax Credits 2009

FORTNIGHTLY PAYMENTS (1 April 2008 to 31 March 2009)

FAMILY TAX CREDIT AND IN-WORK TAX CREDIT

Family tax credit is paid regardless of your source of income. In-work tax credit is for families who normally work a minimum number of hours each week.

FAMILY INCOME (BEFORE TAX)		NUMBER OF CHILDREN											
		ONE		TWO		THREE		FOUR		FIVE		SIX	
Weekly $	Annual $	FTC $	IWTC $	FTC $	IWTC $	FTC $	IWTC $	FTC $	IWTC $	FTC $	IWTC $	FTC $	IWTC $
to 673	35,000	164	120	278	120	392	120	506	150	620	180	734	210
674 to 702	35,001 to 36,500	152	120	266	120	380	120	494	150	608	180	722	210
703 to 731	36,501 to 38,000	140	120	254	120	368	120	482	150	596	180	710	210
732 to 760	38,001 to 39,500	129	120	243	120	357	120	471	150	585	180	699	210
761 to 788	39,501 to 41,000	117	120	231	120	345	120	459	150	573	180	687	210
789 to 817	41,001 to 42,500	106	120	220	120	334	120	448	150	562	180	676	210
818 to 846	42,501 to 44,000	94	120	208	120	322	120	436	150	550	180	664	210
847 to 875	44,001 to 45,500	83	120	197	120	311	120	425	150	539	180	653	210
876 to 904	45,501 to 47,000	71	120	185	120	299	120	413	150	527	180	641	210
905 to 933	47,001 to 48,500	60	120	174	120	288	120	402	150	516	180	630	210
934 to 962	48,501 to 50,000	48	120	162	120	276	120	390	150	504	180	618	210
963 to 990	50,001 to 51,500	37	120	151	120	265	120	379	150	493	180	607	210
991 to 1,019	51,501 to 53,000	25	120	139	120	253	120	367	150	481	180	595	210
1,020 to 1,048	53,001 to 54,500	14	120	128	120	242	120	356	150	470	180	584	210
1,049 to 1,077	54,501 to 56,000	2	120	116	120	230	120	344	150	458	180	572	210
1,078 to 1,106	56,001 to 57,500		110	104	120	218	120	332	150	446	180	560	210
1,107 to 1,135	57,501 to 59,000		99	93	120	207	120	321	150	435	180	549	210
1,136 to 1,163	59,001 to 60,500		87	81	120	195	120	309	150	423	180	537	210
1,164 to 1,192	60,501 to 62,000		76	70	120	184	120	298	150	412	180	526	210
1,193 to 1,221	62,001 to 63,500		64	58	120	172	120	286	150	400	180	514	210
1,222 to 1,250	63,501 to 65,000		53	47	120	161	120	275	150	389	180	503	210
1,251 to 1,279	65,001 to 66,500		41	35	120	149	120	263	150	377	180	491	210
1,280 to 1,308	66,501 to 68,000		30	24	120	138	120	252	150	366	180	480	210
1,309 to 1,337	68,001 to 69,500		18	12	120	126	120	240	150	354	180	468	210
1,338 to 1,365	69,501 to 71,000		7		120	115	120	229	150	343	180	457	210
1,366 to 1,394	71,001 to 72,500				109	103	120	217	150	331	180	445	210
1,395 to 1,423	72,501 to 74,000				98	92	120	206	150	320	180	434	210
1,424 to 1,452	74,001 to 75,500				86	80	120	194	150	308	180	422	210
1,453 to 1,481	75,501 to 77,000				74	68	120	182	150	296	180	410	210
1,482 to 1,510	77,001 to 78,500				63	57	120	171	150	285	180	399	210
1,511 to 1,538	78,501 to 80,000				51	45	120	159	150	273	180	387	210
1,539 to 1,567	80,001 to 81,500				40	34	120	148	150	262	180	376	210
1,568 to 1,596	81,501 to 83,000				28	22	120	136	150	250	180	364	210
1,597 to 1,625	83,001 to 84,500				17	11	120	125	150	239	180	353	210
1,626 to 1,654	84,501 to 86,000				5		119	113	150	227	180	341	210
1,655 to 1,683	86,001 to 87,500						108	102	150	216	180	330	210
1,684 to 1,712	87,501 to 89,000						96	90	150	204	180	318	210
1,713 to 1,740	89,001 to 90,500						85	79	150	193	180	307	210
1,741 to 1,769	90,501 to 92,000						73	67	150	181	180	295	210
1,770 to 1,798	92,001 to 93,500						62	56	150	170	180	284	210
1,799 to 1,827	93,501 to 95,000						50	44	150	158	180	272	210
1,828 to 1,856	95,001 to 96,500						38	32	150	146	180	260	210
1,857 to 1,885	96,501 to 98,000						27	21	150	135	180	249	210
1,886 to 1,913	98,001 to 99,500						15	9	150	123	180	237	210
1,914 to 1,942	99,501 to 101,000						4		148	112	180	226	210
1,943 to 1,971	101,001 to 102,500								136	100	180	214	210
1,972 to 2,000	102,501 to 104,000								125	89	180	203	210
2,001 to 2,029	104,001 to 105,500								113	77	180	191	210
2,030 to 2,058	105,501 to 107,000								102	66	180	180	210
2,059 to 2,087	107,001 to 108,500								90	54	180	168	210
2,088 to 2,115	108,501 to 110,000								79	43	180	157	210
2,116 to 2,144	110,001 to 111,500								67	31	180	145	210
2,145 to 2,173	111,501 to 113,000								56	20	180	134	210
2,174 to 2,202	113,001 to 114,500								44	8	180	122	210
2,203 to 2,231	114,501 to 116,000								32		176	110	210
2,232 to 2,260	116,001 to 117,500								21		165	99	210
2,261 to 2,288	117,501 to 119,000								9		153	87	210
2,289 to 2,317	119,001 to 120,500										142	76	210

The rates on the chart are based on your eldest child being under 16 and all other children being under 13. To work out how much you can expect if you have children older than this you will need to:

- add $16 to the "FTC" amount for each child (other than the eldest) aged 13, 14 or 15
- add $26 to the "FTC" amount if your eldest child is 16, 17 or 18
- add $56 to the "FTC" amount for any other child aged 16, 17 or 18

If you are receiving a foster care allowance or an orphan's benefit, the amounts listed in the chart above may not apply to you. Please call us on 0800 227 773 and we will calculate your correct entitlement.

Annexure B

	Sole Parent				Couple				
Tax credit and benefit examples	**Working 20 hours**			**Not working**	**Working 30 hours**			**Not working**	**6 hours work**
As at April 2007	**DPB claimed (net)**	**Wages (gross)**	**IWP claimed (net)**	**DPB claimed (net)**	**UB claimed (net)**	**Wages (gross)**	**IWP claimed (net)**	**UB claimed (net)**	**IB claimed (net)**
Benefit abated for income	194.15		0.00	255.65	117.21		0.00	297.46	371.84
Family Support Credit (2 children under 12) *Family Tax Credit*	139.00		139.00	139.00	139.00		139.00	139.00	139.00
Family Tax Credit *Minimum Family Tax Credit*	0.00		158.29		0.00		60.13	0.00	0
In Work Payment									
In Work Tax Credit	**0.00**		**60.00**		**0.00**		**60.00**	**0.00**	**0**
Support from the State	**333.15**		**357.29**	**394.65**	**256.21**		**259.13**	**436.46**	**510.84**
Income from employment (secondary tax when on benefit)	174.83	225.00	185.79		262.24	337.50	282.49		52.45
Net total income	**507.98**		**543.08**	**394.65**	**518.45**		**541.62**	**436.46**	**563.29**
Gain from moving off benefit			35.10				23.17		