

Reference No. HRRT 028/2017

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN MAREE HENNESSY

PLAINTIFF

AND ATTORNEY-GENERAL in respect of the
Minister of Social Development

DEFENDANT

AT WELLINGTON

BEFORE:

Mr RPG Haines ONZM QC, Chairperson

Mr MJM Keefe QSM JP, Member

Ms LJ Alaeinia JP, Member

REPRESENTATION:

Mr G Robins for plaintiff

Mr AM Powell for defendant

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 22 January 2019

**DECISION OF TRIBUNAL GRANTING DECLARATION OF INCONSISTENCY FOR
ENACTMENTS IN BREACH OF PART 1A HUMAN RIGHTS ACT 1993¹**

[1] The plaintiff is a beneficiary who at the relevant time was in receipt of an income-tested benefit under the Social Security Act 1964. She was also then entitled to weekly compensation payments under the Accident Compensation Act 2001. Her compensation payments were offset against the benefit as it was said this was required by s 71A of the Social Security Act 1964, now substantially re-enacted by s 198 of the Social Security Act 2018. Her case is she was thereby discriminated against on the ground of her employment status, namely being a recipient of a benefit as defined in the Social Security Act 1964.

¹ [This decision is to be cited as: *Hennessy v Attorney-General* [2019] NZHRRT 4]

[2] The remedy sought by the plaintiff in her amended statement of claim dated 7 December 2018 is a declaration under s 92J of the Human Rights Act 1993 that s 71A of the Social Security Act 1964 and s 198 of the Social Security Act 2018 are inconsistent with the right to freedom from discrimination affirmed by s 19 of the New Zealand Bill of Rights Act 1990.

[3] The parties by joint memorandum dated 14 January 2019 ask the Tribunal to make a declaration of inconsistency without opposition by the Attorney-General.

[4] No evidence having been filed by the parties the narrative which follows has been taken from the joint memorandum.

The enactment under consideration

[5] The effect of s 71A of the Social Security Act 1964 and of s 198 of the Social Security Act 2018 is that any person who, like the plaintiff, is in receipt of an income-tested benefit and also receives weekly compensation for loss of earnings under the Accident Compensation Act 2001, will have their benefit abated by 100% of that weekly compensation.

[6] Recipients of income tested benefits are allowed to earn wages in addition to their benefit, but there is a regime for their benefit to abate after the wages reach a certain level. If such recipients suffer an accident which prevents them from working, they will be eligible for weekly compensation for loss of earnings assessed at 80% of the wages they were receiving at the time of the accident.

[7] Section 71A was introduced into the Social Security Act 1964 by an amendment in 1976. Prior to amendment by section 415(1) of the Accident Insurance Act 1998 from July 1999, s 71A provided that the full abatement of the income tested benefit only applied if the earnings related compensation was payable in respect of the same circumstances as those which gave rise to the income tested benefit. Otherwise the compensation was treated as any other income. The section remained in its current form until it was repealed and replaced by s 198 of the Social Security Act 2018.

[8] Although the Social Security Rewrite Bill was the subject of a report to the House by the Attorney-General under s 7 of the New Zealand Bill of Rights Act 1990, the clause that became s 198 was not mentioned in that report.

Discriminatory impact

[9] The prohibited ground of discrimination engaged by this enactment is discrimination on the grounds of employment status (Human Rights Act 1993, s 21(1)(k)), which includes:

(ii) being the recipient of ... an entitlement under the Accident Compensation Act 2001.

[10] The plaintiff is a recipient of an entitlement under the Accident Compensation Act 2001 who also receives an income-tested benefit.

[11] For the purpose of assessing the discriminatory impact on her the parties agree that the appropriate comparator is a person who receives wages or other income and who also receives an income-tested benefit. This is the position the plaintiff was in prior to her accident.

[12] The material disadvantage to the plaintiff arises from the abatement of her income-tested benefit which abates at 100% of the payment received under her ACC entitlement. The comparator's income-tested benefit abates at no more than 70% of the income received.

Justification

[13] The remaining question is whether the admitted discrimination is demonstrably justified under s 5 of the Bill of Rights Act, which would remove the inconsistency with s 19.

[14] The historical justification for s 71A has been the application of the "one-benefit" policy. Those who receive benefits from the Government should receive the most appropriate one for their circumstances and should receive only one benefit. While the "one benefit" principle is not under challenge here, its application to s 71A of the Social Security Act 1964 and s 198 of the Social Security Act 2018 appears misplaced because the weekly earnings related compensation cannot be characterised as a benefit. Rather, it is compensation paid under a no-fault statutory scheme that stands in the place of wages or other income. See *Heads v Attorney-General* [2015] NZHRRT 12, (2015) 10 HRNZ 203 at [91] to [105].

[15] In the absence of justification, which the Crown would need to prove, the Tribunal is therefore invited by the plaintiff, without opposition from the Crown, to find s 71A of the Social Security Act 1964 and/or s 198 of the Social Security Act 2018 to be in breach of Part 1A of the Human Rights Act 1993.

Power to make a declaration in respect to s 198 of the Social Security Act 2018

[16] Counsel for the plaintiff has raised a jurisdictional issue for the Tribunal's consideration.

[17] The plaintiff's complaint arose, and proceedings were filed, when s 71A of the Social Security Act 1964 was in force. Understandably, she has not complained to the Human Rights Commission about the Social Security Act 2018.

[18] On a strict view of ss 76 and 92B of the Human Rights Act 1993, it could be said that proceedings have not been properly brought in respect of the Social Security Act 2018. For the plaintiff it is submitted that the proceedings are properly brought in that a valid complaint was made and proceedings were properly filed at the time, so the Tribunal may find "an" enactment is in breach of Part 1A: s 92B(1)(b). The enactment need not be "the" enactment that was the subject of the complaint to the Commission if it is the same enactment in substance.

[19] As to this we believe it is sufficient that the joint memorandum explicitly invites the Tribunal to find both s 71A of the Social Security Act 1964 and s 198 of the Social Security Act 2018 are in breach of Part 1A of the Human Rights Act 1993. In addition a declaration in respect of the Social Security Act 2018 would better reflect the position of the current law. The Tribunal must also act according to the substantial merits of the case, without regard to technicalities as required by s 105(1) of the Human Rights Act 1993. It is not without significance the declaration in respect of s 198 of the Social Security Act 2018 is requested without opposition from the Attorney-General and from the Minister of Social Development with whom the responsibility of bringing the declaration to the attention of the House under s 92K of the Human Rights Act 1993 will lie.

The form of the declaration under s 92J(2) of the Human Rights Act 1993 sought by the parties

[20] The terms of the declaration sought by the parties and in respect of which there is no opposition from the Attorney-General or the Minister of Social Development follow:

Section 198 of the Social Security Act 2018 is inconsistent with the right to freedom from discrimination affirmed by s 19 of the New Zealand Bill of Rights Act 1990 because it discriminates against persons on the ground of their employment status.

[21] While the suggested draft refers to the Social Security Act 2018 it must be read in the context that the parties invite the Tribunal to find also that s 71A of the Social Security Act 1964 was in breach of Part 1A of the Human Rights Act 1993.

[22] In the above circumstances we intend making a declaration of inconsistency in relation to both statutes.

REMEDY

[23] For the reasons given the following declarations are made under s 92J(2) of the Human Rights Act 1993:

[23.1] Section 71A of the Social Security Act 1964 is inconsistent with the right to freedom from discrimination affirmed by s 19 of the New Zealand Bill of Rights Act 1990 because it discriminates against persons on the ground of their employment status.

[23.2] Section 198 of the Social Security Act 2018 is inconsistent with the right to freedom from discrimination affirmed by s 19 of the New Zealand Bill of Rights Act 1990 because it discriminates against persons on the ground of their employment status.

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| Mr RPG Haines ONZM QC | Mr MJM Keefe QSM JP | Ms LJ Alaeinia JP |
| Chairperson | Member | Member |