Inland Revenue
Te Tari Taake

CASE SUMMARY

Court orders the backdating of child support liability is invalid

Decision date: 20 April 2021

CSUM 21/06

CASE

Lindsay v Commissioner of Inland Revenue [2021] NZHC 830

LEGISLATIVE REFERENCES

Child Support Act 1991 (as it applied in October 2003), ss 4, 14, 17, 18, 19

Judicial Review Procedure Act 2016, s 16.

High Court Rules 2016, r 14.6.

LEGAL TERMS

Judicial review; Child support; Proof of paternity; Backdated child support liability; Court's discretion in granting judicial review; Increased costs.

Summary

This is a judicial review proceeding in which Mr Lindsay challenged the Commissioner of Inland Revenue's (**the Commissioner**) decision requiring him to pay child support dating back to 2003.

Cooke J upheld Mr Lindsay's judicial review challenge, making a declaration that the child support assessment of the Commissioner dated 23 November 2017 is invalid to the extent that it imposed backdated liability to 2003.

Cooke J also awarded scale costs against the Commissioner with an uplift of 10%.

Impact

Whilst the outcome of this case turned on its facts, the judgment is significant as it is the first time that a New Zealand Court has had to consider the interpretation of s 19 of the Child Support Act 1991 (**the CSA**).

Facts

Mr Lindsay met Ms Jones in around 1994. (These are not the parties true names. Under the inherent jurisdiction there are orders prohibiting the publication of the identity of Mr Lindsay, Ms Jones and their child.) They began a sexual relationship in 1999 or 2000 when Mr Lindsay was a single parent. The sexual relationship ended in December 2002.

Ms Jones rang Mr Lindsay in March 2003 to tell him that she was pregnant and that he was the father. Ms Jones gave birth to their son in September 2003.

In 2016, Mr Lindsay was served with paternity proceedings by Ms Jones. He defended the proceedings on the basis that he could not be sure that he was the father but agreed to do DNA testing. This testing established that he was the father and a paternity order was made by the Family Court on 26 October 2017. Ms Jones also applied for child support at this time.

On 27 November 2017 the Commissioner determined that Mr Lindsay was obliged to provide child support. His child support liability was backdated to 2003, the time when Ms Jones first made an application for child support. The backdated amount owing by Mr Lindsay was around $89,000.

Issues

The issues that Cooke J were required to determine are:

- Which version of s 19 of the CSA is applicable; the section as it applied in 2003 (when the application was first made) or the one that applied when the Commissioner made the assessment in 2017;
- Whether other matters, such as the lack of a birth certificate and IRD number for the child, prevented s 19 from applying;
- Whether s 19 applied to the 2003 application;
- Whether the Court should nevertheless decline relief even if Mr Lindsay were able to persuade the Court that the Commissioner had misinterpreted the legislation; and
- Whether the Commissioner was liable for indemnity costs pursuant to r 14.6(4) of the High Court Rules.

Decision

Which version of s 19 of the CSA is applicable

Cooke J determined that Parliament provided that child support for the financial years before the amended legislation came into effect were to be assessed under the legislation prior to amendment as provided for in transitional provisions. Cooke J held that the words "financial support" clearly refer to "child support", which includes backdated child support since s 19 is part of the child support regime. (The provisions concerning child support applications are within cl 1A(1) of the Child Support Amendment Act 2013.)

Whether the other matters prevented s 19 from applying

Cooke J agreed with the Commissioner's submission that the two additional matters (lack of birth certificate and IRD number) did not prevent s 19 from operating. Cooke J held that both were routine matters that would be expected to be addressed had the application for child support been pursued. The key issue for s 19 purposes was the lack of evidence of parenthood.

Whether s 19 applied to the 2003 application

Cooke J held that the application in 2017 was correctly treated as a new application rather than a continuation of the one made in 2003. Cooke J specifically accepted Mr Lindsay's argument that the application filed in 2003 was refused and that Ms Jones subsequently confirmed it was not pursued.

Cooke J determined that s 19 had no application, for the following two reasons:

- This was not a situation where the Commissioner was "unable to accept" Ms Jones' 2003 application for lack of evidence of parenthood. Rather, Ms Jones' application was declined at that time. This was because Ms Jones had advised that she was not pursuing the procedures referred to in s 19 to establish parenthood, and she received reduced social welfare as a consequence; and
- In 2006, Ms Jones advised the Commissioner that she was no longer receiving any social welfare for the child or pursuing any child support application. From this point her application was no longer alive, including for the purpose of s 19.

Whether the Court should exercise its discretion to decline relief

The Commissioner submitted that the Court should not exercise its discretion for the following two reasons:

- Since Mr Lindsay had a right of appeal which he had not exercised, judicial review relief should not be made available to him; and
- In all the circumstances of the case relief should be declined.

Mr Lindsay should have pursued appeal rights

Cooke J saw no substance in the Commissioner's argument. His Honour held that the right to challenge decisions by way of judicial review is a fundamental right that is affirmed by s 27 of the New Zealand Bill of Rights Act 1990. Cooke J held that this right exists irrespective of whether there is a right of appeal, which is expressly confirmed by s 16(3)(a) of the Judicial Review Procedure Act 2016.

In addition, his Honour considered objection or appeal rights would not have been the most appropriate avenue because the present case was one best suited for judicial review since it turned on questions of statutory interpretation.

Finally, whilst there was some delay in the present case it was not such that would warrant a Court declining relief in its discretion for that reason.

Other discretionary factors

Cooke J had no hesitation in rejecting the other arguments advanced by the Commissioner. His Honour held that there was real difficulty with the proposition that the Court should, in its discretion, decline to set aside a determination that someone is liable to pay the Crown approximately $90,000 notwithstanding concluding that that amount was not lawfully due.

To the extent that it was appropriate to consider what is before Parliament by way of a Bill, Cooke J noted that it is noteworthy that the Child Support Bill 2020 recognises the unfairness in long periods of backdating. However, his Honour considered that the proposals did not remedy the more extreme circumstances such as the present case.

Whether the Commissioner was liable for indemnity costs

Cooke J held that the high threshold required for indemnity costs to be awarded was not met in this case. However, Cooke J considered that increased costs under r 14.6(3)(c) could be awarded if a proceeding is of importance to persons other than the parties and it is reasonably necessary for the party claiming costs to bring the proceeding in the interests of those affected.

Cooke J held that Mr Lindsay met both requirements and accordingly awarded an uplift of 10% in scale costs on a 2B basis.

About this document

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