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IN THE FAMILY COURT
AT TAURANGA

I TE KŌTI WHĀNAU
KI TAURANGA MOANA

FAM-2020-070-000723
[2023] NZFC 1794

IN THE MATTER OF	THE CHILD SUPPORT ACT 1991
BETWEEN	NICHOLAS ALAN TURNER Applicant
AND	BREANNA FRANCENE TURNER Respondent

Hearing:	7 February 2023
Appearances:	Applicant appears in Person J Hosking for the Respondent
Judgment:	13 March 2023

RESERVED JUDGMENT OF JUDGE S J COYLE
[IN RELATION TO APPLICATIONS UNDER THE CHILD SUPPORT ACT]

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[1] Mr Turner and Ms Turner are the parents of Wesley Turner who was born on 22 December 2000. At the date of hearing Wesley is an adult and is now 22 years old. Mr Turner seeks to now challenge a number of past Child Support assessments that were made by the Commissioner of Inland Revenue in relation to his child support obligations. He seeks a number of remedies:

(a) That the Court overturn assessments made over a number of years on the basis that the Commissioner made an error in fixing the actual amount of time Wesley was in his care.

(b) A revisiting of the assessments on the basis that his income should have been assessed at $50,000 per annum being what he would have earnt had he worked 40 hours a week. He in fact was working in excess of 40 hours a week and it is his contention that his additional income should not be classed as income.

(c) That Ms Turner should have been assessed as earning $50,000 (her potential earning capacity), not her assessed actual income of around $32,000.

(d) That he should be reimbursed for expenses that have benefited Wesley, including his car expenses and hobbies, including a need to purchase a boat for $15,000.

Can Mr Turner seek to challenge the child support assessments on the basis that the Commissioner wrongly determined the actual care arrangements?

[2] Mr Turner seeks to overturn the child support assessments for several years on the basis that the Commissioner "got it wrong" in that the actual care arrangements were 40 per cent in his favour from October 2016 to January 2017, 50 per cent in his favour from February 2017 to November 2017, 75 per cent from December 2017 to February 2017 and 90 per cent from June 2018 and zero per cent thereafter. Ms Turner does not agree with his assertions. The records of IRD show a change in care

arrangement to a 5/14 split in January 2018, initially agreed to by both parties and by Wesley.[1]

[3] On 26 April 2018 an objection was disallowed in respect of the change of care date. The determination was that a change of the care arrangements commenced on 15 January 2018. Then on 12 July 2018 an objection was disallowed by the Commissioner in respect of Mr Turner alleging he had in excess of 70 per cent care of Wesley. On 1 April 2019 an objection was disallowed by the Commissioner in respect of Mr Turner. Care was assessed to have changed to 23 per cent (under the statutory threshold) from 17 July 2018, and Ms Turner was assessed a child support payment for the 2018 year at the minimum amount.

[4] In relation to each of those assessments by the Commissioner no appeal was filed by Mr Turner pursuant to ss 90 or 91. Decisions under s 90 may be appealed under s 102. Section 102(2) makes it clear that such appeals must be brought within two months of the determination. Similarly, s 103(2) makes it clear that appeals against assessments under s 91 must be brought within two months. There is no provision allowing for an extension of time. Thus, Ms Hosking submits that the Court has no jurisdiction to address the issue of care arrangements. She notes in her submissions at [22] that Ms Chappell, for the Commissioner, noted in her memorandum that Mr Turner's application under s 102 had been dismissed as being out of time. Nor is the revisiting of care arrangements and the substitution by the Court of its determination of the care arrangements grounds pursuant to s 105.[2]

Determination

[5] I agree with the submissions of Ms Hosking. The Act is clear that a party has only two months from the date of the determination by the Commissioner to file an appeal. Mr Turner has not done so, and he now cannot retrospectively seek to challenge those assessments in this hearing as he is time-barred. His applications for a review of the Commissioner's determinations in relation to those matters are

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1 Bundle of exhibits to Ms Turner's affidavit of 26 July 2022 at p 12.
2 *C v L* [2008] NZFLR 960 (HC).

dismissed as there is no lawful basis upon which I am able to revisit those determinations.

Can Mr Turner claim from Ms Turner the overpayment that she has received?

[6] Initially, Mr Turner and Ms Turner entered into a voluntary agreement pursuant to which Mr Turner was to pay $350 per week by way of child support. However, Mr Turner subsequently reduced that amount, unilaterally, to $250 per week. Ms Turner's response was to then file an application with IRD for a child support assessment.

[7] That assessment took some time to be processed by IRD, and eventually, around four months later, IRD advised Mr Turner that he had been assessed to pay child support in accordance with the child support formula. His liability commences from the date upon which the application was submitted to IRD. Mr Turner, unaware that an application had been filed (at least initially), continued to pay the voluntary payments to Ms Turner. Thus, there is a four month period in which Ms Turner received $250 per week from Mr Turner pursuant to his unilateral variation to the voluntary agreement, while at the same time receiving a backdated liability for child support pursuant to the formula set out in the Act. Mr Turner is right that Ms Turner owes him for the overpayment. The issue is what the Court can do to require Ms Turner to pay to Mr Turner the overpayment that she received.

[8] The short answer is nothing. If the voluntary agreement had been registered and managed through IRD, the Commissioner is able to order repayment of the overpayment from Ms Turner pursuant to s 115AA(3)(1). However, in this case because the agreement was not registered with IRD the Commissioner is under no obligation, and nor does the Commissioner have any legal authority, to order repayment. The powers of the Court are only those set out in the statute, and they do not include the ability to order repayment of the overpayment. Mr Turner's only recourse, I suggest, is by way of a civil remedy in the District Court or the Disputes Tribunal. But I am clear that this Court has no jurisdiction to award a refund from Ms Turner.

[9] I do note that Ms Hosking has foreshadowed an intention to apply for costs against Mr Turner should Ms Turner's defence be successful. Morally, I suggest it is repugnant for Ms Turner to seek costs against Mr Turner when she has clearly received an overpayment of child support all those years ago. That is an issue for Ms Turner to discuss with Ms Hosking.

The sole remaining issue for determination is whether a departure order should be granted pursuant to s 104 of the Child Support Act

[10] As Ms Hosking accepts an application under s 104 is not time-barred. Justice Gendall in *IPD v KME* held that there was jurisdiction to make a retrospective order.[3]

[11] The first issue is whether Mr Turner is satisfied s 104(2)(b) in respect to each child support year in issue. In respect of the 2017 year there is a determination dated 22 March 2017. In respect of the 2018 and 2019 years the correspondence from IRD dated 13 June 2022 says the applications were made under ground 8 but no information was provided why the income or earning capacity was incorrect.[4] Thus, there appears to be a determination that comes within s 104(2)(b)(ii) in that the Commissioner has refused to make a determination under Part 6A. Accordingly, the Court does have jurisdiction to determine Mr Turner's application under s 104 taking into account (exclusively) the matters set out in s 105.

[12] There are three steps which need to occur as prerequisites to the making of a departure order under s 104. They are:

(a) That one or more of the five grounds for departure set out in s 105(2) exits; and

(b) It would be "just and equitable" in respect of the child, the receiving carer and the liable parent; and

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3 *IPD v KME* [2008] 2 NZLR 523.
4 Ms Hosking's submissions at [24](b).

(c) It would be "otherwise proper" to make a departure order.[5]

[13] As Ms Hosking sets out there is no jurisdiction for the Court to revisit the care arrangements and substitute its views about what the care arrangements were at the relevant time as these are not grounds under s 105.[6] Pursuant to s 105(2) the onus is on Mr Turner to show that there are special circumstances which would result, in relation to the application of the provisions of the Act relating to the formula assessment, in an unjust and inequitable determination of the level of financial support to be provided by Mr Turner for Ms Turner in relation to Wesley.

[14] Special circumstances must be found for a successful application. The onus lies on Mr Turner as the applicant to show that special circumstances are established on the balance of probabilities. The Court of Appeal in *Lyon v Wilcox* stated:

> … the formula assessment is the norm; and departure from it will be allowed only if stringent tests are satisfied. As has been said in a number of cases, those seeking departure must pass through a narrow gate.[7]

[15] Special circumstances have been held to mean "facts peculiar to the particular case which set it apart from other cases".[8]

[16] It appears from Mr Turner's submissions and pleadings that he relies upon s 105(2)(c)(i):

> The income, earning capacity, property, and financial resources of either parent or the child.

[17] Mr Turner appears to be suggesting that he should be assessed at an income of $50,000 instead of his actual income during the relevant years. He further argues that Ms Turner should also be assessed as having income of $50,000 being what he anticipates she would be likely to earn should she be in full-time employment. In terms of earning capacity, the leading authority is the High Court decision in *Johnson*

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5 In the marriage of *Gyselman* [1992] FLC 79,050; and followed by *CIR v Cutbush* [1994] NZFLR 598 at 600 and *Lyon v Wilcox* [1994] 3 NZLR 422 (CA).

6 See, for example, *C v L* [2008] NZFLR 960.

7 *Lyon v Wilcox* at 430.

8 *EJD v AJCB* [2013] NZCA 100 at [54] and [55]; *re M [Child Support]* (1992) 9 FRNZ 693 (HC) at 701.

v Commissioner of Inland Revenue.[9] That case concerned an appeal to the High Court against a Family Court judgment, primarily relating to the departure from a formula assessment order granted by the Family Court. The Court held that the focus in determining a liable parents' "earning capacity":

> …must be on the existing skills and reasonable opportunities available to the parent; The Act does not impose an obligation on a parent to better himself or herself in order to be able to earn more money beyond the requirement that he or she utilise existing skills and existing opportunities.

[18] I disagree with Mr Turner's argument that his income should be assessed on a nominal 40 hour week and not on the actual income that he earnt. If the Court were to grant a departure order on that basis, I agree with Ms Hosking's submissions that it would then open a floodgate of applications with applicants claiming they should be assessed on nominal not actual income (on the basis that they worked more than 40 hours a week).

[19] The cases where earning capacity has been considered are often situations in which a party has earnt a level of income pre-assessment, and then post-assessment has chosen to either significantly reduce their hours, or to resign from employment and take up tertiary study, in an effort to reduce their child support liability. In those cases the Courts have assessed earning capacity in terms of a requirement that they utilise their existing skills and opportunities. Mr Turner chose to work in excess of 40 hours a week and reaped the financial rewards as a consequence. His income increased accordingly, and that affected his child support liability. There is nothing special or unusual about someone working more than 40 hours a week and earning overtime. I do not accept and reject Mr Turner's argument that the Commissioner was mistaken in making a determination based on his actual as opposed to nominal income.

[20] Nor do I accept that the Commissioner was wrong to assess Ms Turner on her actual income rather than projected income. Again, this is not a situation which Ms Turner was deliberately reducing her hours. Indeed, her evidence is she struggled to obtain any more hours from her employer. She simply continued a care arrangement which existed whereby she worked effectively part-time and was available for Wesley

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9 *Johnson v Commissioner of Inland Revenue* [2002] 2 NZLR 648 at [16].

the balance of the time. But in any event, as I have set out, even if she wanted to obtain more hours her evidence was that she was unable to do so. Again, this is not a situation in which a party is seeking to deliberately diminish their income so as to avoid a liability. It is not the intention of the Child Support Act to effectively "force" custodial parents into working full-time, particularly where there is a form of shared care, so as to benefit the liable parent by reducing his or her child support liability. It is my determination that Mr Turner has failed to establish that ground, let alone whether such grounds amount to special circumstances.

Should the Commissioner have taken into account expenses paid by Mr Turner that have benefited Wesley?

[21] Mr Turner seeks that he should be reimbursed for expenses that have benefited Wesley, including his car expenses and hobbies, including a need to purchase a boat for $15,000. By this I take him to mean that the Commissioner should have taken into account that he has made these payments when assessing his child support liabilities for the relevant years.

[22] The only possible statutory basis for this appears to be pursuant to s 105(b)(i) of the Act. It cannot be pursuant to s 105(2)(a)(ii) as there is no evidence that Wesley has any special needs.

[23] Again, the evidence is insufficient to establish that this ground is made out. These are not costs associated with access to Wesley, or if they are, then there is no evidence to substantiate this claim. It is not uncommon for a liable parent to pay expenses towards a child's care in excess of their child support liability, such as school uniform costs, sports fees and the like. But there is no recourse under the Act for these payments to be offset against a liable parent's child support liability, and therefore no ability for the commissioner to have considered these payments. There is no jurisdiction under the Act for me to take into account these payments.

Result

[24] As I have set out above, some of the claims advanced by Mr Turner are statute-barred. The balance fail as Mr Turner has not satisfied the statutory grounds for the making of a departure order, or that those grounds (if he had established them) amount to special circumstances.

[25] Accordingly, there is no jurisdiction for me to make the departure orders as sought and Mr Turner's applications are dismissed.

[26] If Ms Hosking wishes to pursue her client's application for costs, then she is to file submissions within 28 days of the date of the release of this judgment. Mr Turner, if he wishes to file any submissions in response, is to do so 28 days thereafter.

[27] The registrar should then refer the matter to me in chambers for the making of a chambers determination in relation to the issue of costs.

S J Coyle
Family Court Judge

Signed this 13th day of March 2023 at am / pm