(1) NOTE ALL NON-PUBLICATION ORDERS MADE BY THE TRIBUNAL HAVE BEEN RESCINDED AND NO LONGER APPLY

(2) ORDER PREVENTING SEARCH OF THE TRIBUNAL FILE WITHOUT LEAVE OF THE TRIBUNAL OR OF THE CHAIRPERSON

IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2015] NZHRRT 40**

	Reference No. HRRT 040/2015
UNDER	**THE HUMAN RIGHTS ACT 1993**
BETWEEN	**RACHEL MACGREGOR**
	PLAINTIFF
AND	**COLIN CRAIG**
	DEFENDANT

AT AUCKLAND – ON THE PAPERS

TRIBUNAL: Rodger Haines QC, Chairperson

REPRESENTATION:
Mr HJP Wilson and Ms L Clark for plaintiff
Mr J McKay and Mr S Misselbrook for defendant

DATE OF HEARING: **Heard on the papers**
(last submissions for plaintiff filed on 2 September 2015)

DATE OF DECISION: **11 September 2015**

SECOND INTERIM NON-PUBLICATION ORDER[1]

Introduction

[1] By application dated 31 July 2015 Ms MacGregor seeks interim orders under s 95(1) of the Human Rights Act 1993:

[1] [This decision is to be cited as *MacGregor v Craig (Second Interim Non-Publication Order)* [2015] NZHRRT 40. When first published on 11 September 2015 this decision was subject to interim publication restrictions. See para [61]. Those interim restrictions were subsequently rescinded by the Tribunal in *MacGregor v Craig (Limited Extension of Confidentiality Orders)* [2016] NZHRRT 30. Non-publication orders made in the High Court by Katz J on 12 September 2016 in CIV-2015-404-1845 were on 30 September 2016 lifted with effect from 5:00pm on Monday 3 October 2016.]

[1.1] Prohibiting publication of the names of the parties; and

[1.2] Preventing search of the Tribunal file without leave of the Tribunal or of the Chairperson of the Tribunal.

[2] By notice of opposition filed on 13 August 2015 Mr Craig:

[2.1] Opposes the first interim order sought; and

[2.2] Consents to the second interim order on the basis that any request to search the Tribunal file should be notified to the parties who will then be given an opportunity to express a view on how the application should be determined.

[3] On 13 August 2015 the parties filed a joint memorandum setting out an agreed timetable for the filing of evidence and submissions on the application. The last variation to that timetable allowed further submissions to be filed by 1 September 2015. See the *Minute* issued on 31 August 2015. While Ms MacGregor filed additional submissions, Mr Craig elected not to do so.

The "interim" interim order

[4] On 18 August 2015 the solicitors for Mr Craig advised Mr Craig consented to "interim" interim orders being made in the terms sought by Ms MacGregor pending completion of the timetable steps and the filing by the parties of their evidence and submissions on the substantive interim order application. It was in these circumstances the "interim" interim orders were made on 18 August 2015.

[5] The parties having subsequently filed their evidence and submissions, the issue which now falls for determination is whether the interim orders sought by Ms MacGregor in her application dated 31 July 2015 should be made. In determining that issue it is necessary to put to one side entirely the fact that consent "interim" interim orders were made on 18 August 2015. The making of those orders and the reasons given in the decision of 18 August 2015 are not material to the present decision which must be made on a de novo consideration of the evidence now filed along with the submissions which have been made, including the submissions on the case law listed in the *Minute* issued on 31 August 2015 following the teleconference held on that date.

[6] Both Ms MacGregor and Mr Craig have filed affidavits. This being an interim order application and the parties having agreed the application is to be determined on the papers, it is not intended this decision resolve disputed issues of fact. The background circumstances as seen by each party are accordingly separately described. Any view expressed on the merits of the case or on the legal issues which will ultimately fall for determination in these proceedings is necessarily provisional.

The evidence in support of the application

[7] In her affidavit sworn on 18 August 2015 Ms MacGregor said that on or about 18 September 2014 she filed a complaint with the Human Rights Commission claiming she had been sexually harassed by Mr Craig while employed by him as his press secretary. Although the complaint arose out of her employment, she chose to make her claim to the Commission rather than to the Employment Relations Authority as she did not wish to settle her dispute with Mr Craig in a public way and wanted to avoid being the centre of media interest.

[8] On or about 4 May 2015, following a mediation facilitated by the Commission, she entered into a confidential settlement with Mr Craig. The document has the heading "Mutual Resolution", and contains a cross-reference to s 83 of the Act. Significantly for present purposes the agreement specifically provides:

> **[8.1]** Neither party will make comment to the media or third parties other than a statement that the parties had met and had resolved their differences.
>
> **[8.2]** The terms of the document were to be "strictly confidential between the parties".

[9] On or about 9 June 2015 Ms MacGregor became aware Mr Craig had spoken about her in an interview with a television programme. She immediately engaged a lawyer who requested Mr Craig not to speak about her (Ms MacGregor) in public again.

[10] Ms MacGregor has listed in her affidavit a number of subsequent occasions when Mr Craig has spoken in public about her and the sexual harassment claim. It is said Mr Craig has repeatedly told reporters he wants the confidentiality obligations in the agreement lifted so he can say more about his relationship with Ms MacGregor and the circumstances surrounding the terms of the settlement. Ms MacGregor states that on or about 29 June 2015 she became aware Mr Craig had held a media conference at Auckland at which he released a booklet called "Dirty Politics and Hidden Agendas". The booklet mentions Ms MacGregor, claims to quote her and refers to a relationship she had, which is information Mr Craig could only have known through the mediation process. Mr Craig has sent a copy of this booklet to households throughout New Zealand.

[11] Ms MacGregor says that each time Mr Craig makes a public comment about her or the settlement or the confidentiality obligations in the agreement she is contacted by reporters seeking comment. She has lost count of how many reporters have contacted her. She has been telephoned directly both at her place of work and on her private number. She has been contacted by email, both on her work email and on personal email. She has found the media coverage and the media contact unwelcome, stressful and hurtful.

[12] Reporters have also contacted her employer and have turned up at her place of work asking to speak to her. In or about late June 2015 her employer told her he was concerned about the impact publicity about her relationship with Mr Craig was having on her reputation and on the employer's reputation. She was told her employer did not want any more publicity about her in the media and that he was concerned about the effect of the publicity both on her career prospects and on the business she works for.

Grounds of the application

[13] It is not intended to recite at length the grounds set out in the notice of application dated 30 July 2015. The principal points are:

> **[13.1]** Ms MacGregor's purpose in filing the present claim with the Tribunal is to protect her privacy under the confidential terms previously agreed to in mediation with Mr Craig.
>
> **[13.2]** Ms MacGregor relies on the confidentiality obligations in s 85 of the Act and seeks to have those obligations enforced.

[13.3] Publication of the evidence filed in these proceedings (including the "Mutual Resolution" agreement) will cause further humiliation, loss of dignity and distress to Ms MacGregor, as well as pecuniary loss.

The grounds of opposition

[14] The grounds on which Mr Craig opposes the making of an order prohibiting publication of the names of the parties are:

[14.1] The normal rule should apply that the existence of the claim and the identities of the parties to it should be a matter of public record and not treated as confidential.

[14.2] It is undesirable and inconsistent with the principle of open justice for Mr Craig to have to take a "neither confirm nor deny" position about the existence of the proceeding if faced with media or other inquiries about whether a claim has been filed and whether it will be defended. Disclosing the names of the parties is preferable to media speculation.

[14.3] The general nature of the underlying dispute between the parties is already in the public arena and it is inappropriate to prejudge the merits of the claims and counterclaims in issue.

[14.4] Mr Craig has filed a counterclaim and has rights in this matter as both a defendant and a plaintiff.

[14.5] Ms MacGregor is and chose to be a public figure, having been the press secretary of the Conservative Party during a general election in which that party received widespread publicity and significant support, and then resigning by means of an announcement on Newstalk ZB two days before the election.

[14.6] Suppression of the names of the parties is not in the interests of justice and is not necessary to preserve the position of the plaintiff.

The evidence in support of the notice of opposition

[15] The affidavit by Mr Craig largely repeats the points made in the notice of opposition. To avoid unnecessary duplication it is intended to mention here only the following additional matters.

[15.1] Mr Craig does not see why even the existence of Ms MacGregor's claim should be kept secret. He seeks the "open justice" which he believes underpins the rule that the existence of a claim and the identities of the parties to it should be a matter of public record.

[15.2] He believes the concerns expressed by Ms MacGregor in her affidavit will be catered for by the second of the orders sought and to which he consents.

[15.3] As to his counterclaim, it includes a claim for damages and a declaration upholding his right to terminate the settlement agreement on the basis he was induced to enter into it by a material misrepresentation by Ms MacGregor. His position in the present proceedings is that her actions, not his, are the real trigger for the intense media interest generated since the settlement agreement was signed.

[16] The legal issues are now addressed.

MEDIATION, CONFIDENTIALITY AND THE HUMAN RIGHTS ACT

[17] The statutory setting in which dispute resolution meetings are held under the Human Rights Act and the statutory confidentiality which attaches to what is said during those meetings has a significant bearing on the outcome of this interim order application.

The dispute resolution process – overview

[18] The mechanism provided by the Human Rights Act for the resolution of complaints of unlawful discrimination is one of dispute resolution (including mediation). Attached to that process is a mandatory statutory duty to keep confidential anything said or agreed to at a dispute resolution meeting.

[19] The significance of the dispute resolution process as presently found in the Act cannot be overemphasised. The Human Rights Amendment Act 2001 required the Human Rights Commission to replace the formal investigation of complaints of unlawful discrimination and the issuing of opinions with facilitation of their resolution in the most efficient, informal and cost-effective manner possible.

[20] The account of these changes in Sylvia Bell (ed) *Brookers Human Rights Law* (looseleaf ed, Brookers) vol 1 at [HR75.01] follows:

> **HR75.01**
>
> **Change in complaints process**
>
> Part 3 outlines the new process for managing complaints. Prior to the Human Rights Amendment Act 2001 (the "2001 Amendment Act") the process was based on investigation. A group of Commissioners (known as the Complaints Division) investigated complaints and attempted conciliation. If the conciliation was unsuccessful the Commissioners could refer the complaint to the Proceedings Commissioner to decide whether to instigate proceedings. The need for Commissioners to personally determine whether complaints had substance in terms of the Act had lent the process a quasi-judicial character and the requirement of observing the principles of natural justice had resulted in an elaborate and protracted system of provisional and final opinions. The length of the process and the resources consumed led the Re-Evaluation team to recommend a conciliation process to be carried out principally by staff rather than by Commissioners. Where this was unsuccessful, the complaint was to be referred to the (then) Proceedings Commissioner to decide whether to initiate proceedings before the Tribunal (Re-Evaluation of Human Rights Protections in New Zealand (Human Rights Commission, Wellington, 2000)). The current process, which is based on alternative dispute resolution, is designed to be more flexible and allow the parties themselves to retain control: s 75(b).

[21] The new provisions for the resolution of disputes about compliance with Part 1A and Part 2 of the Act are set out in Part 3. The separate "objects" clause in s 75 of the Act specifically state that the object of Part 3 is (inter alia) to recognise disputes over compliance with the non-discrimination provisions of the Act are more likely to be successfully resolved by the parties themselves and to that end the Commission is to provide expert problem-solving support, information and assistance to the parties to those disputes:

> **PART 3**
> **RESOLUTION OF DISPUTES ABOUT COMPLIANCE WITH PART 1A AND PART 2**
>
> **75 Object of this Part**
>
> The object of this Part is to establish procedures that—
> (a) facilitate the provision of information to members of the public who have questions about discrimination; and
> (b) recognise that disputes about compliance with Part 1A or Part 2 are more likely to be successfully resolved if those disputes can be resolved promptly by the parties themselves; and

(c) recognise that, if disputes about compliance with Part 1A or Part 2 are to be resolved promptly, expert problem-solving support, information, and assistance needs to be available to the parties to those disputes; and
(d) recognise that the procedures for dispute resolution under this Part need to be flexible; and
(e) recognise that judicial intervention at the lowest level needs to be that of a specialist decision-making body that is not inhibited by strict procedural requirements; and
(f) recognise that difficult issues of law may need to be determined by higher courts.

[22] Consistent with s 75, a "primary function" of the Commission is to facilitate the resolution of disputes about compliance with Part 1A or Part 2, by the parties concerned, in the most efficient, informal, and cost-effective manner possible. See ss 76(1)(b) and 77. The flexibility of the methods used by the Commission in the resolution of disputes is noted in Bell (ed) *Brookers Human Rights Law* vol 1 at [HR75.03]:

> **HR75.03**
>
> **Flexibility of methods used in resolution**
>
> Unlike the Employment Relations Act 2000, which includes a specific procedure for conciliation, no particular method of dispute resolution is preferred. Rather the legislation refers to resolving disputes flexibly with expert support and assistance.

[23] As noted by Miller J in *Attorney-General v Human Rights Review Tribunal [Judicial Review]* (2006) 18 PRNZ 295 at [47], private enforcement proceedings have since 2001 assumed significant importance in the legislative scheme.

[24] It is not necessary for the present context to address the other statutory provisions which relate to the dispute resolution process but they are listed for ease of reference:

77 Dispute resolution services
78 Method of providing services
79 How complaints received to be treated
79A Choice of procedures
80 Taking action or further action in relation to complaint
81 Commission to inform parties of process
82 Information gathering and disclosure by Commission

[25] The Commission is required by s 83(2) to use its "best endeavours" to assist the parties to secure a "settlement" as defined in s 83(3):

> **83 Settlement**
>
> (1) This section applies if at any time it appears to the Commission from a complaint (including one referred back to the Commission by the Director, under section 90(1)(b), or the Tribunal, under section 92D), or from information gathered in relation to the complaint (including any response made under section 81(4)(b)), that it may be possible to reach a settlement.
> (2) The Commission must use its best endeavours to assist the parties to secure a settlement.
> (3) In this section, *settlement*—
> (a) means the agreement of the parties concerned on actions that settle the matter, which may include the payment of compensation or the tendering of an apology; and
> (b) includes a satisfactory assurance by the person to whom the complaint relates against the repetition of the conduct that was the subject matter of the complaint or against further conduct of a similar kind.

[26] A settlement between the parties to a complaint may be enforced by proceedings before the Tribunal:

> **89 Enforcement of terms of settlement agreed by parties**
>
> A settlement between parties to a complaint may be enforced by proceedings before the Tribunal brought under section 92B(4)—

(a) by the complainant (if any) or the aggrieved person (if not the complainant); or
(b) by the person against whom the complaint was made.

The dispute resolution process and the Tribunal

[27] The centrality of dispute resolution (including mediation) to the Part 3 process is underlined by the fact that when proceedings under s 92B are brought before the Tribunal, the Tribunal is under a mandatory duty to consider whether an attempt has been made to resolve the complaint (whether through mediation or otherwise) and must refer the complaint back to the Commission unless the Tribunal is satisfied that attempts at resolution, or further attempts at resolution, of the complaint by the parties and the Commission will not be productive. Indeed, the Tribunal may at any time before, during, or after the hearing of proceedings refer a complaint back to the Commission if it appears to the Tribunal from what is known to it about the complaint, that the complaint may yet be able to be resolved by the parties and the Commission. See s 92D:

> **92D Tribunal may refer complaint back to Commission, or adjourn proceedings to seek resolution by settlement**
>
> (1) When proceedings under section 92B are brought, the Tribunal—
> (a) must (whether through a member or officer) first consider whether an attempt has been made to resolve the complaint (whether through mediation or otherwise); and
> (b) must refer the complaint under section 76(2)(a) to which the proceedings relate back to the Commission unless the Tribunal is satisfied that attempts at resolution, or further attempts at resolution, of the complaint by the parties and the Commission—
> (i) will not contribute constructively to resolving the complaint; or
> (ii) will not, in the circumstances, be in the public interest; or
> (iii) will undermine the urgent or interim nature of the proceedings.
> (2) The Tribunal may, at any time before, during, or after the hearing of proceedings, refer a complaint under section 76(2)(a) back to the Commission if it appears to the Tribunal, from what is known to it about the complaint, that the complaint may yet be able to be resolved by the parties and the Commission (for example, by mediation).
> (3) The Tribunal may, instead of exercising the power conferred by subsection (2), adjourn any proceedings relating to a complaint under section 76(2)(a) for a specified period if it appears to the Tribunal, from what is known about the complaint, that the complaint may yet be able to be resolved by the parties.

Confidentiality

[28] As a necessary adjunct to the statutory dispute resolution process there is a mandatory statutory duty to keep confidential what is said and what is agreed to at mediation. The statutory duty to keep the information confidential is imposed on (inter alia) both parties and cannot be waived unless by consent. See s 85:

> **85 Confidentiality of information disclosed at dispute resolution meeting**
>
> (1) Except with the consent of the parties or the relevant party, persons referred to in subsection (2) must keep confidential—
> (a) a statement, admission, or document created or made for the purposes of a dispute resolution meeting; and
> (b) information that is disclosed orally for the purposes of, and in the course of, a dispute resolution meeting.
> (2) Subsection (1) applies to every person who—
> (a) is a mediator for a dispute resolution meeting; or
> (b) attends a dispute resolution meeting; or
> (c) is a person employed or engaged by the Commission; or
> (d) is a person who assists either a mediator at a dispute resolution meeting or a person who attends a dispute resolution meeting.

[29] These provisions are reinforced by s 86 which provides that no evidence can be given of information required by s 85(1) to be kept confidential:

86 Evidence as to dispute resolution meeting

(1) No mediator at a dispute resolution meeting may give evidence in any proceedings, whether under this Act or any other Act, about—
  (a) the meeting; or
  (b) anything related to the meeting that comes to his or her knowledge for the purposes of, or in the course of, the meeting.
(2) No evidence is admissible in any court, or before any person acting judicially, of any statement, admission, document, or information that, under section 85(1), is required to be kept confidential.

[30] The confidentiality imposed by s 85(1) is extended by s 87 to requests under the Official Information Act 1992 and the Local Government Official Information and Meetings Act 1987. There are strictly limited circumstances in which confidential information can be disclosed (see s 88) but the principle of confidentiality is unaffected.

[31] The rationale for the duty of confidentiality has frequently been explained in the analogous private mediation context. See for example *Vaucluse Holdings Ltd v Lindsay* (1997) 10 PRNZ 557 (CA) at 559 and *Just Hotel Ltd v Jesudhass* [2007] NZCA 582, [2008] 2 NZLR 210 at [34] and [35]. More recently in *Sheppard Industries Ltd v Specialized Bicycle Components Inc* [2011] NZCA 346, [2011] 3 NZLR 620 at [23] the following statement of principle from *Ocean Bulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44, [2011] 1 AC 662 at [19] to [29] was articulated. The quote which follows is from the New Zealand decision:

> The public policy consideration is that parties should be encouraged to settle disputes without resort to litigation and should not be discouraged from this endeavour by facing the risk that things said in the context of settlement negotiations might be used against them in court. To facilitate settlement, parties should be encouraged to discuss the matters in dispute freely and frankly and this can only be achieved if it is clear that things said in the discussions may not subsequently be used against them in proceedings.

[32] See also *Morgan v Whanganui College Board of Trustees* [2014] NZCA 340, [2014] 3 NZLR 713 at [11].

Summary

[33] The point of this possibly over-extended discussion of the dispute resolution process in Part 3 of the Human Rights Act and of the confidentiality provisions can possibly be summarised as follows:

> **[33.1]** Disputes about compliance with Part 1A or Part 2 of the Human Rights Act are primarily left to be resolved by the parties with the assistance and support of mediators provided by the Human Rights Commission.
>
> **[33.2]** Resolution of such disputes is facilitated by a statutory assurance of confidentiality.
>
> **[33.3]** A settlement agreement between parties to a complaint may be enforced by proceedings before the Tribunal.

Confidentiality and enforcement proceedings before the Tribunal

[34] It would be an odd result if, by taking enforcement proceedings before the Tribunal, a party to a settlement loses the confidentiality which otherwise attaches (via s 85) to the agreement and related negotiations.

[35] Interpreting s 85 in light of the objects of Part 3 of the Act as set out in s 75 it is plain confidentiality is not intended to be limited in this way. This is underlined by s 86

which prevents evidence being given of (inter alia) documents and information required by s 85(1) to be kept confidential. The provisions of s 57 of the Evidence Act 2006 might also be relevant to the extent allowed by s 5(1) of that Act and s 106 of the Human Rights Act.

[36] On the filing of proceedings under s 89 the Tribunal has ample power to protect the confidentiality intended by ss 85 and 86 by holding a closed hearing and by prohibiting publication of the parties' names and the evidence given in the proceedings. See s 107(3). In the period between the filing of proceedings and the substantive hearing the Chairperson has jurisdiction under s 95 to make any interim order necessary in the interests of justice to preserve the position of the parties.

[37] It is now intended to address first the general principles to be applied in an application under s 95 and second, recent Court of Appeal decisions in which the open justice principle is considered in the context of name suppression applications in civil proceedings.

INTERIM ORDERS UNDER SECTION 95 – PRINCIPLES

[38] The relevant principles applicable to interim order applications under s 95 were summarised in *IDEA Services Ltd v Attorney-General (No. 4) – Interim Order Application* [2013] NZHRRT 24 (10 June 2013) at [49] to [52].

> **Section 95 – principles**
>
> **[49]** At the risk of repetition s 95(1) provides:
>
> > **95 Power to make interim order**
> >
> > (1) In respect of any matter in which the Tribunal has jurisdiction under this Act to make any final determination, the Chairperson of the Tribunal shall have power to make an interim order if he or she is satisfied that it is necessary in the interests of justice to make the order to preserve the position of the parties pending a final determination of the proceedings.
>
> **[50]** As discussed in *Deliu v New Zealand Law Society* [2012] NZHRRT 1 (8 February 2012) there are similarities as well as differences between s 95 of the HRA and s 8 of the JAA 72. As the differences are significant, s 95 is to be interpreted in its own terms although the established case law under the JAA 72 is a useful point of reference:
>
> > **[50.1]** Being "satisfied" in this context simply means that the Chairperson has made up his or her mind that the interim order is necessary in the interests of justice to preserve the position of one of the parties pending a final determination of the proceedings. The term "satisfied" does not require that the Chairperson should reach his or her judgment having been satisfied that the underlying facts have been proved to any particular standard. See by analogy *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [26] (Elias CJ) and [96] (Blanchard, Tipping and McGrath JJ).
> >
> > **[50.2]** The term "necessary" means reasonably necessary. See by analogy *Carlton & United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 423 (CA) at 430 per Cooke J.
> >
> > **[50.3]** As to "the interests of justice" it was held in *X v Police* HC Auckland AP 253/91, 9 October 1991 by Barker J that the phrase "interests of justice" is a broad expression. There is no need in the present context for elaboration.
> >
> > **[50.4]** There is a clear distinction between preserving the position of a party on the one hand and improving it on the other. It is clear from s 95(1) of the HRA and from s 8(1) JAA 72 that the position of a plaintiff cannot be improved: *Movick v Attorney-General* [1978] 2 NZLR 545 (CA) at 551 line 35; *Nair v Minister of Immigration* [1982] 2 NZLR

571 at 575-576 (Davison CJ) and more recently *Squid Fishery Management Co Ltd v Minister of Fisheries* (2004) 17 PRNZ 97 at [29] (Ellen France J).]

[50.5] The phrase "the position of the parties" must in this context be read as including the singular "party". See Interpretation Act 1999, s 33 and Burrows and Carter *Statute Law in New Zealand* (4th ed, LexisNexis, Wellington, 2009) at 428. Were the position otherwise, an interim order could seldom, if ever be made, as it is difficult to envisage circumstances in which an interim order could be couched in terms which preserved, simultaneously, the position of both parties to the proceedings.

[50.6] The phrase "pending a final determination of the proceedings" in the context of a case where a reference has been made from the Tribunal to the High Court under s 92R HRA means pending the final determination of the Tribunal under s 92U ie after the decision of the High Court on remedies has been remitted to the Tribunal; or alternatively, upon the reference coming to an end for some other reason and the Tribunal then making its final determination.

[51] The power in s 95(1) HRA is to be applied flexibly. Here s 8 JAA 72 assists by analogy:

[51.1] In *Carlton & United Breweries Ltd v Minister of Customs* [1986] 1 NZLR 423 (CA) Cooke J at 430 said that the s 8 power should not be restricted by any formulation such as that found in the cases on interim injunctions, for example *American Cyanamid*. Specifically there is no general rule that a prima facie case must be established by the applicant for the order. The Court has a wide discretion to consider all the circumstances of the case:

> Of course I am not suggesting that there should be any general rule that a prima facie case is necessary before interim relief can be granted under s 8. In general the Court must be satisfied that the order sought is necessary to preserve the position of the applicant for interim relief – which must mean reasonably necessary. If that condition is satisfied, as the Chief Justice was entitled to find that it was here, the Court has a wide discretion to consider all the circumstances of the case, including the apparent strength or weakness of the claim of the applicant for review, and all the repercussions, public or private, of granting interim relief.

[51.2] The broad language of this section was also emphasised by Richardson J at 430-431 and by Somers J at 433. In the interests of brevity only the passage from the judgment of Richardson J is reproduced here:

> Section 8 of the Judicature Amendment Act 1972 does not mandate any particular approach to the statutory test of whether an interim order is necessary for the purpose of preserving the position of the applicant. The legal answer must depend on an assessment by the Judge of all the circumstances of the particular case. Clearly the nature of the review proceedings will be material. So will the character, scheme and purpose of the legislation under which the impugned decision was made. And appropriate weight must of course be given to all the factual circumstances including the nature and prima facie strength of the applicant's challenge and the expected duration of an interim order. Nor should the residual discretion under s 8 be circumscribed by reading qualifications into the broad language of the section.

The *Carlton & United Breweries* approach was recently described by the Supreme Court in *Easton v Wellington City Council* [2010] NZSC 10 at [5] as settled principle. See also *Minister of Fisheries v Antons Trawling Company Ltd* (2007) 18 PRNZ 754 (SC) at [3] and [8].

[52] Also relevant in the context of exercising the power to make an interim order under s 95 are the provisions of s 105 of the HRA which provide:

> **105 Substantial merits**
>
> (1) The Tribunal must act according to the substantial merits of the case, without regard to technicalities.
> (2) In exercising its powers and functions, the Tribunal must act—

(a) in accordance with the principles of natural justice; and
(b) in a manner that is fair and reasonable; and
(c) according to equity and good conscience.

[39] Since delivery of the *IDEA Services* case these principles have not been modified or changed. Because the "interests of justice" in s 95 require account be taken of the principle of open justice, that topic is addressed next.

NON-PUBLICATION ORDERS AND THE OPEN JUSTICE PRINCIPLE

[40] The non-publication orders sought by Ms MacGregor seek to achieve before the Tribunal the same degree of confidentiality which by virtue of s 85 attaches to the mediation process itself under Part 3 of the Act and to the settlement agreement. Not only is name suppression sought, but equally (and necessarily) the fact that these proceedings have been brought.

[41] In opposition Mr Craig submits that while it is routine for confidential matters to be the subject of court (or tribunal) proceedings, orders suppressing the names of the parties and the very existence of the proceedings is highly unusual.

The Tribunal's non-publication jurisdiction to date

[42] The Tribunal's present approach to name suppression is possibly best summarised in *Director of Proceedings v Emms* [2013] NZHRRT 5 (25 February 2013) at [117]:

> **[117]** The granting of name suppression is a discretionary matter for the court or tribunal: *R v Liddell* [1995] 1 NZLR 538 (CA). The starting point when considering suppression orders is the presumption of open judicial proceedings, freedom of speech (as allowed by s 14 of the New Zealand Bill of Rights Act 1990) and the right of the media to report. However, in *Liddell* it was recognised at 547 that the jurisdiction to suppress identity can properly be exercised where the damage caused by publicity would plainly outweigh any genuine public interest. The decision in *Lewis v Wilson & Horton* [2000] 3 NZLR 546 (CA) underlines that in determining whether non-publication orders should be granted, the court or tribunal must identify and weigh the interests of both the public and the individual seeking publication.

[43] To this analysis it must be added that more than embarrassment or detriment to reputation must be shown. See *Jones v Waitemata District Health Board* [2014] NZHRRT 52 at [51]:

> **[51]** As best we understand the submissions made by Mr Jones, he does not claim that he will be prejudiced by disclosure of the personal information recorded in this decision. It is more an issue of embarrassment. However, it is well-established that more than embarrassment or detriment to reputation must be shown before a court or tribunal will intervene. See *Peters v Birnie* at [30] and reference should also be made to *Haydock v Gilligan Sheppard* HC Auckland, CIV-2007-404-2929, 11 September 2008 at [31] where Harrison J stated:
>
> > [31] … The legislature and the Courts are well aware that the hearing of a case in public requires individuals to give evidence which may be embarrassing or humiliating. Nevertheless, the public interest, demanding the fair and efficient administration of justice, consistently trumps any personal features. A party who chooses to initiate a hearing which Parliament stipulates is to be held in public must take all the unpalatable consequences, not only of an adverse substantive decision but also on publicity and costs.
> >
> > [32] The last word on this subject belongs, as Ms Grace points out, to Lord Woolf CJ in *R v Legal Aid Board, ex parte Kaim Todner* [1999] QB 966 at 978 as follows:
> >
> > > ... It is not unreasonable to regard the person who initiates the proceedings as having accepted the normal incidence of the public nature of court proceedings. If you are a defendant you may have an interest equal to that of the plaintiff in the outcome of the proceedings but you have not chosen to initiate court proceedings which are normally conducted in public. A witness who has no interest in the

> proceedings has the strongest claim to be protected by the court if he or she will be prejudiced by publicity, since the courts and parties may depend on their co-operation. In general, however, parties and witnesses have to accept the embarrassment and damage to their reputation and the possible consequential loss which can be inherent in being involved in litigation. The protection to which they are entitled is normally provided by a judgment delivered in public which will refute unfounded allegations. Any other approach would result in wholly unacceptable inroads on the general rule.

[44] In *Clark v Attorney-General (No. 1)* [2005] NZAR 481 (CA) (Glazebrook, Panckhurst and Gendall JJ) at [11] it was noted that the corollary of the principle of open justice is that persons engaged in proceedings will necessarily be identified publicly. This might be painful or humiliating but is tolerated because a public trial is the best security for the pure, impartial and efficient administration of justice and the best means for winning public confidence and respect for the system.

Recent Court of Appeal jurisprudence

[45] The principle of open justice (on which Mr Craig relies) has in recent times received considerable emphasis in the Court of Appeal, that Court holding that an applicant for name suppression must show the interests of justice displace the presumption favouring publication. The threshold is high. See *McIntosh v Fisk* [2015] NZCA 247, [2015] NZAR 1189 (Harrison, Miller and Cooper JJ) at [1]:

> [1] The principle of open justice requires that all aspects of proceedings, both civil and criminal, are conducted in public. It extends to the identification of parties to litigation. Accordingly, a litigant seeking confidentiality in the nature of a name suppression order must show the interests of justice displace the presumption favouring publication. The threshold is high because any suppression order necessarily derogates from the principle of open justice and the right to freedom of expression. [Footnote citations omitted]

[46] Different formulae have been used to better described that threshold. In *Clark v Attorney-General (No. 1)* at [42] it was stated that the presumption in favour of disclosure of all aspects of court proceedings can be overcome only in "exceptional circumstances":

> [42] … we remark that the principles of open justice and the related freedom of expression create a presumption in favour of disclosure of all aspects of Court proceedings which can be overcome only in exceptional circumstances. We refer here to the case of *Re Victim X* [2003] 3 NZLR 220 (HC and CA) in which this Court upheld the setting aside of a suppression order in favour of the intended victim of a failed kidnapping plot. The Court was mindful of the "sense of anguish" the result would cause the intended victim and his family but held that the victim's private interest did not outweigh the fundamental principles of open justice and freedom of expression.

[47] By way of contrast in *Jay v Jay* [2014] NZCA 445, [2015] NZAR 861 (Randerson, Stevens and White JJ) at [118], without citation of *Clark v Attorney-General (No. 1)*, it was stated that in a civil case extraordinary or exceptional circumstances are not required to justify suppression:

> [118] It is true the starting point is generally based on the principle of open justice of proceedings. The desirability of open justice must be weighed against competing considerations arising in particular cases and each case must be addressed on its merits. Unlike in the criminal context, "extraordinary circumstances" are not required to justify suppression in a civil case. This Court's judgment in *Muir v Commissioner of Inland Revenue* made no reference to the need for "extraordinary" or "exceptional" circumstances. In refusing leave in that case the Supreme Court observed that situations warranting confidentiality are "likely to differ between the [civil and criminal] categories", and also "within them". Ultimately, bearing in mind the requirements for open justice in a civil context the court must exercise a discretion as to whether to make a suppression order in the particular circumstances of the case. [Footnote citations omitted]

[48] On the other hand in *Sax v Simpson* [2015] NZCA 222 (9 June 2015, Stevens, French and Miller JJ) at [10] the Court stated (in the context of civil proceedings for defamation) that the presumption in favour of disclosure will be overcome only in the most exceptional circumstances, citing the above passage from *Clark v Attorney-General (No. 1)* at [42]. The Court went on to state at [11] that there is no definition or list of circumstances a court will regard as exceptional.

[49] The *McIntosh v Fisk* decision was given only a few days later on 16 June 2015. The passage from this decision cited earlier makes no reference to "exceptional circumstances" but does emphasise that the threshold is high. The decision in *Clark v Attorney-General (No. 1)* is cited.

[50] Whether there is a difference in substance between *Clark v Attorney-General (No. 1)* and *Jay v Jay* does not have to be determined in the present context. The differences may not be significant. The more important point is that as observed by the Court of Appeal in *McIntosh v Fisk*, the threshold is high because any suppression order necessarily derogates from the principle of open justice and the right to freedom of expression. It is this threshold which Ms MacGregor must cross when establishing the interests of justice displace the presumption favouring publication.

The interests of justice

[51] The decisive point in the present case is that these proceedings are about a claim by Ms MacGregor that she is entitled to confidentiality. That is, a claim that the parties are prevented by s 85 of the Act from disclosing:

> **[51.1]** Any statement, admission, or document created or made for the purposes of the dispute resolution meeting; and
>
> **[51.2]** Information that was disclosed orally for the purposes of, and in the course of, the dispute resolution meeting.

[52] It is also claimed the parties are bound by the confidentiality clause in the settlement agreement itself.

[53] The statutory means of enforcing these obligations is the taking of proceedings under s 89 of the Act before the Tribunal. In my view the interests of justice require that until the confidentiality status of the dispute resolution meeting and of the settlement agreement has been determined by the Tribunal, the duty of confidentiality prima facie imposed both by statute and by the agreement must be upheld. Otherwise the proceedings by Ms MacGregor will be futile and she will be deprived of the remedy arguably of most importance to her, namely the continued confidentiality of the mediation process and of the consequent settlement. By seeking to enforce the agreement before the Tribunal she cannot sensibly be taken to have discarded her claimed rights under s 85 and under the agreement itself.

[54] In this respect her case is the reverse of *Musuku v Commissioner of Inland Revenue* [2015] NZHC 1584 (7 July 2015, Woodhouse J). In that case the plaintiff had unsuccessfully brought judicial review proceedings in the High Court before taking his case to the Taxation Review Authority where general anonymity applies. His case was that that anonymity in the "private" setting of the Authority justified the High Court making a non-publication order in the "public" setting of the judicial review proceedings. His application failed on the ground he had by filing proceedings in the High Court

chosen a forum in which the general rule is that there is no anonymity. The fact that proceedings before the Taxation Review Authority are anonymised was irrelevant.

[55] Ms MacGregor's case is the exact opposite. She took her complaint of sexual harassment to the Human Rights Commission (as opposed to the Employment Relations Authority) to receive the protection of the confidentiality provisions of the Human Rights Act which attach to the "private" mediation process. Following mediation a settlement agreement was entered into. That agreement has its own confidentiality clause. Seeking to enforce the settlement agreement Ms MacGregor is not changing fora from private to public or engaging in forum shopping. She is simply following the enforcement mechanism prescribed by the Act and there is nothing in the Act to suggest that by doing so Ms MacGregor has thrown away any of her confidentiality rights.

Conclusion as to whether interests of justice displace the presumption favouring publication

[56] For the reasons given the interests of justice in the present case decisively displace the presumption favouring publication. That is, for sound public policy considerations dispute resolution under Part 3 of the Human Rights Act mandates that all aspects of dispute resolution meetings and settlements are to be kept completely confidential. By taking enforcement proceedings before the Tribunal under s 89 of the Act a plaintiff does not waive or abandon the very confidentiality sought to be enforced. The same public policy considerations which mandate confidentiality at the dispute resolution stage require confidentiality at the enforcement stage. In this special statutory setting a litigant such as Ms MacGregor displaces the presumption favouring publication. Given the statutory context the "high threshold" set by the law is comfortably satisfied and Ms MacGregor has established that a suppression order is necessary even though it derogates from the principle of open justice and the right to freedom of expression. Put another way, on the facts the "exceptional circumstances" flow directly from the statutory setting.

Conclusion as to whether interim order necessary to preserve the position of the plaintiff

[57] As to whether the orders are necessary "to preserve" Ms MacGregor's position, there can be little doubt the answer must be in the affirmative. As submitted by her:

> **[57.1]** Given the intense media interest in Mr Craig and his relationship with Ms MacGregor, there exists a real risk that, without a non-publication order in place, the proceedings will become opportunity for Mr Craig to disclose otherwise confidential information. Were this to occur, the hurt, humiliation and distress that form a key part of Ms MacGregor's substantive claim before the Tribunal, will inevitably be amplified.
>
> **[57.2]** The alleged breaches of her confidentiality have already caused hurt, distress and humiliation. Publication of the process by which she now seeks to enforce the confidentiality obligations and obtain damages for breaches of those obligations would result in her re-victimisation.

[58] As for Mr Craig, he engaged in the dispute resolution process knowing he would be bound both by the terms of the settlement agreement and by s 85 of the Act. The order sought by Ms MacGregor will have the effect of holding him to those obligations until the substantive hearing, at which point his defence and counterclaim will be heard. No prejudice of any significant kind has been established by his evidence. If Ms MacGregor

fails in her action and Mr Craig prevails in showing he is not bound by s 85 or by the agreement, the case for publication restrictions may well fall away. The substantive fixture being scheduled for 7 December 2015 (five days have been set aside) means the interim publication restrictions will be of short duration.

[59] In these circumstances Ms MacGregor has established to a high threshold that the orders sought are necessary in the interests of justice to preserve her position pending a final determination of these proceedings.

[60] Given the identity of the parties and the unique circumstances of the case the order prohibiting publication of the names of the parties or of any details which could lead to their identification necessarily requires an ancillary order requiring that there be no disclosure of the bringing of or the existence of these proceedings.

FORMAL ORDERS

[61] The following orders are made pursuant to ss 95 and 107 of the Human Rights Act 1993:

> **[61.1]** Publication of the name or of any details which could lead to the identification of the plaintiff or of the defendant to these proceedings is prohibited pending further order of the Chairperson or of the Tribunal.
>
> **[61.2]** Publication of the fact these proceedings have been brought and publication of the fact of the existence of these proceedings is prohibited pending further order of the Chairperson or of the Tribunal.
>
> **[61.3]** There is to be no search of the Tribunal file without leave of the Chairperson or of the Tribunal. The plaintiff and defendant are to be notified of any request to search the file and given opportunity to be heard on that application.
>
> **[61.4]** The "interim" interim orders made on 18 August 2015 are discharged and replaced by the present orders.
>
> **[61.5]** Leave is reserved to both parties to make further application should the need arise.

.....
Mr RPG Haines QC
Chairperson