(1) NOTE ALL NON-PUBLICATION ORDERS MADE BY THE TRIBUNAL HAVE BEEN RESCINDED AND NO LONGER APPLY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 **[2016] NZHRRT 23**

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

AT WELLINGTON

BEFORE:
Mr RPG Haines QC, Chairperson
Ms K Anderson, Member
Ms GJ Goodwin, Member

REPRESENTATION:
Mr HJP Wilson and Ms L Clark for plaintiff
Mr C Craig in person

DATE OF HEARING: **16 May 2016**

DATE OF DECISION: **21 June 2016**

DECISION OF TRIBUNAL RESCINDING INTERIM CONFIDENTIALITY ORDERS[1]

Introduction

[1] In this decision the Tribunal gives its reasons for rescinding the interim confidentiality orders first made by the Chairperson on 11 September 2015 in *MacGregor v Craig*

[1] [This decision is to be cited as: *MacGregor v Craig (Rescission of Confidentiality Orders)* [2016] NZHRRT 23. In the circumstances set out in *MacGregor v Craig (Limited Extension of Confidentiality Orders)* [2016] NZHRRT 30 all restrictions on publication were rescinded as from 5pm on Monday 12 September 2016. 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.]

(Second Interim Non-Publication Order) [2015] NZHRRT 40 and subsequently continued (on an interim basis) by the Tribunal itself in its substantive decision given on 2 March 2016 in *MacGregor v Craig* [2016] NZHRRT 6. Those orders were in the following terms:

> **[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.

Variations followed on 11 December 2015 and 2 March 2016 but the terms of those variations are not relevant in the present context.

Background

[2] Section 95 of the Human Rights Act 1993 confers on the Chairperson jurisdiction 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":

> **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.

[3] By application dated 31 July 2015 Ms MacGregor sought an interim order prohibiting publication of the names of the parties. At the time the application was made the parties had not then filed their evidence and the substantive hearing was three months away. The essence of Ms MacGregor's case in support of the application was:

> **[3.1]** Although the matters in dispute arose out of her employment, she chose to make her sexual harassment claim to the Human Rights 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.
>
> **[3.2]** On or about 4 May 2015, following a mediation facilitated by the Commission, she entered into a confidential settlement with Mr Craig which provided that neither party would make comment to the media or third parties other than a statement that the parties had met and had resolved their differences. The terms of the document were stated to be "strictly confidential between the parties". The parties were also bound, via s 85 of the Human Rights Act, by a statutory duty of confidentiality.
>
> **[3.3]** On or about 9 June 2015 Ms MacGregor became aware that, contrary to the settlement agreement, Mr Craig had spoken in public about her and the sexual harassment claim.

[3.4] A prohibition on the publication of both her name and that of Mr Craig was necessary to preserve the confidentiality she had sought via the mediation process.

[4] Mr Craig opposed the application, submitting that he sought "open justice" and believed the concerns expressed by Ms MacGregor could be catered for by an order preventing search of the Tribunal file without leave of the Tribunal or of the Chairperson.

[5] In his decision given on 11 September 2015 the Chairperson held the decisive point was that the application was about a claim by Ms MacGregor that she was entitled to enforce the parties' confidentiality obligations without exposing herself to publicity.

[6] The Chairperson concluded at [53] the interests of justice required that until the confidentiality status of the dispute resolution meeting and of the settlement agreement had 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 would be futile and she would be deprived of the remedy then thought to be of most importance to her, namely the continued confidentiality of the mediation process and of the consequent settlement. For the reasons set out at greater length in the 11 September 2015 decision the Chairperson made confidentiality orders as to the identity of Ms MacGregor and of Mr Craig and, in the unusual circumstances of the case, further prohibited publication of the fact the proceedings had been brought.

[7] Following the substantive "merits" hearing at Wellington on 7, 8, 9, 10 and 11 December 2015 the Tribunal by decision dated 2 March 2016 made comprehensive findings in favour of Ms MacGregor and awarded her a declaration, a restraining order and substantial damages. The interim non-publication orders were continued in force until after the question of costs had been resolved. See [154] and [155] of the decision. The parties having agreed on costs the final issue for determination is whether the interim orders should be made permanent or rescinded.

Recent developments

[8] While these proceedings were in train or subsequent to the Tribunal's decision of 2 March 2016 Mr Craig has become involved in four sets of civil proceedings which arise out of the same factual circumstances as those heard by the Tribunal. Three of the civil proceedings (and all three are in the High Court) are based on allegations of defamation. While the Tribunal was not given full details, it is understood Mr Craig is the plaintiff in one set of proceedings and the defendant in another. His status in the third is not known. The fourth set of proceedings (filed in the District Court) are based on an allegation by Mr Craig that Social Media Consultants Ltd and others breached Mr Craig's copyright in a document by publishing it on the Whale Oil blog site. As best we understand from the limited information given to us, it is alleged that while the document was in the lawful possession of Ms MacGregor it was copied by a third person without her knowledge or consent and provided to the blog.

[9] Ms MacGregor is not a party to any of the four proceedings although she stands at the centre of the allegations and counter-allegations made by the various parties. Documents in her possession or control have already been the subject of an application by Mr Craig for non-party discovery. See the *Minute (No. 13)* issued by Toogood J on 12 May 2016 in Williams v Craig CIV-2015-404-1845. The Tribunal was told that in those proceedings all aspects of Ms MacGregor's claim of sexual harassment, including some claims and allegations never made by her but linked (by others) to her claim of sexual harassment, are highly particularised.

THE POSITION OF THE PARTIES

Overview

[10] Following delivery of the Tribunal's decision on 2 March 2016 Ms MacGregor initially took the position that publication of some parts, but not all, of the decision would provide an opportunity for her to be publicly vindicated.

[11] She also submitted non-publication orders should be made to uphold and protect the confidentiality undertakings that formed the core of the claim before the Tribunal. The broad terms of the redactions sought were listed in a memorandum of 16 March 2016. It is not necessary to review the proposals here but it should be observed the redactions were so extensive that it must be doubted anything comprehensible of the Tribunal's decision would have been left.

[12] Mr Craig argued for maintenance of very wide restrictions on publication of the decision and supported only publication of a mutually agreed skeletal summary of the decision.

[13] In response Ms MacGregor submitted that having regard to the open justice principle the short summary proposed by Mr Craig would not provide the "required amount of sunlight" and argued Mr Craig's preference for only very limited publication was based solely on a concern for his own reputation and potential embarrassment. Relevant case law was cited in support of the proposition that more than embarrassment or detriment to reputation must be shown before a court or a tribunal will suppress information.

[14] However, in her submissions presented at the oral hearing convened at Wellington on 13 May 2016 Ms MacGregor abandoned her request for limited publication of a redacted decision and sought full publication of the decision. For his part Mr Craig continued to argue for no publication but accepted that he had in fact breached his confidentiality obligations under the agreement and that Ms MacGregor was entitled to argue for some form of publication except insofar as such publication involved disclosure of confidential information.

[15] The competing submissions are enlarged on below.

The submissions of Ms MacGregor in opposition to continuation of the confidentiality orders

[16] Ms MacGregor explained that the circumstances which had led her to abandon her original "no publication" position in favour of the full publication for which she now argued were related to the four proceedings to which Mr Craig, not Ms MacGregor, is a party. In her view the protection afforded by the Tribunal's interim orders has been overtaken by those proceedings because in them Mr Craig is once more publishing confidential and private information about her for the purpose of attempting to repair his own reputation and political prospects. In those fora neither she nor the Tribunal has influence.

[17] Developing this argument, Ms MacGregor pointed out, for example, that in the pleadings filed in the High Court case of Williams v Craig all aspects of Ms MacGregor's sexual harassment claim, including (as mentioned) some claims and allegations never made by her but linked (by others) to her claim for sexual harassment, are highly particularised. It is not intended to repeat here the detailed analysis of those pleadings

provided to the Tribunal. Suffice it to say we accept the submission made by Ms MacGregor and note Mr Craig challenged neither the analysis nor the conclusion.

[18] Nor did Mr Craig challenge the following submission by Ms MacGregor:

> 39. There can be little doubt that as a result of the *Williams v Craig* and *Craig v Social Media Consultants Limited and Williams* proceedings the events that Ms MacGregor has sought to keep confidential, including details surrounding the settlement of her claim with Mr Craig, will become public. The *Williams v Craig* proceedings in particular are framed in such a way as to resolve issues involving:
>
> a. whether Ms MacGregor filed a complaint with the Human Rights Commission alleging that Mr Craig sexually harassed her;
>
> b. what conduct on the part of Mr Craig constituted the basis of the claim of sexual harassment;
>
> c. what role was played by Mr Williams in the preparation of the claim;
>
> d. what Mr Craig agreed to pay Ms MacGregor to resolve either her financial dispute with him, or her claim of sexual harassment or both;
>
> e. under what circumstances Ms MacGregor withdrew her claim; and
>
> f. how information about Ms MacGregor's claim came to be published.
>
> 40. These are all issues which were discussed and settled in mediation, and which Ms MacGregor has consistently sought to keep confidential. There can also be little doubt that, given the personalities involved and in particular the public profile of Mr Craig, the upcoming proceedings will be the focus of intense media interest and the claims and counter-claims made during the proceedings will be published to the widest possible audience.
>
> 41. This is a matter of great concern to Ms MacGregor and it is in that context that Ms MacGregor seeks full publication of the Tribunal's Decision.
>
> 42. The Tribunal having heard the evidence, and in particular having heard from both Mr Craig and Ms MacGregor, preferred Ms MacGregor's version of events. However, the upcoming proceedings offer Mr Craig a further platform from which to publish his views and, in effect, control the narrative. Ms MacGregor, as a non-party, will not have the same opportunity.
>
> 43. In that context, publication of the Decision offers Ms MacGregor some prospect of protection.

[19] The Tribunal was told litigation in Williams v Craig will generate substantial publicity and Ms MacGregor is bracing herself for another onslaught of attention as Mr Craig and Mr Williams both seek reputational repair through litigation.

[20] In this context it was submitted it would assist Ms MacGregor's recovery and reputation to have on the public record the complete catalogue of Mr Craig's confidentiality breaches as found by the Tribunal and the resulting harm caused by those breaches. As a careful consideration of all of the facts publication of the decision in full would provide a strong factual basis for all future reporting relating to Mr Craig's actions and his relationship with Ms MacGregor given that future reporting is an inevitable consequence of the upcoming litigation. This, in turn, could provide a degree of protection for Ms MacGregor against the likelihood of claims made earlier by Mr Craig, and which the Tribunal found to be false or unsupported, being repeated as fact.

The submissions of Mr Craig in support of continuation of confidentiality orders

[21] In his submissions presented at the hearing on 16 May 2016 Mr Craig continued to argue any publication of the decision would likely result in further disclosure of the

information the parties have agreed to be confidential and therefore no further publication was the best course. He nevertheless accepted he did breach the confidentiality obligations and that Ms MacGregor was entitled to argue for some form of publication of the decision. Mr Craig agreed to publication provided such publication did not contain confidential information. He also accepted that as a general rule, court and tribunal decisions are to be published. For that reason he continued to advance the case for the publication of a synopsis.

[22] Significantly Mr Craig accepted a central premise of Ms MacGregor's submissions, namely that the agreed confidential information is central to all of the proceedings in which he is currently involved:

> Because Mr Williams used the confidential information to make defamatory allegations against Mr Craig and because he then passed this information to Mr Slater and Mr Stringer who then also published defamatory allegations the confidential information is evidential and central to these cases.

[23] Mr Craig expressed concern at the "considerable risk" that any publication of the Tribunal decision would initiate a media cycle harmful to both parties. This was particularly true given what he described as "the unique circumstances" involved. Here he made reference to the fact that Mr Stringer (one of the parties to the litigation in which Mr Craig is currently involved) and Mr Slater of the Whale Oil blog site had publicly stated they intended destroying Mr Craig. Mr Craig submitted that it was exceptional to have such "motivated and media connected opponents". It is to be noted that the submission, as framed, concentrates on the potential harm to Mr Craig, not to Ms MacGregor.

[24] The Tribunal raised with Mr Craig the question of how the parties were to enforce a partially published account of the decision because once some content was released, there would be a risk of further content being divulged. Mr Craig submitted this was an accurate assessment and that any publication had an attached risk and would attract media speculation. For that reason he submitted non-publication was the safest position.

[25] In response to further questions from the Tribunal Mr Craig on 16 May 2016 stated that in none of the proceedings in which he is involved does he have name suppression and the only confidentiality order made as at that date was that recorded in the *Minute* issued by Toogood J on 12 May 2016.

[26] Asked what grounds he had to justify the Tribunal granting him name suppression and related confidentiality orders Mr Craig responded:

> **[26.1]** The circumstances of the case were exceptional and the interim order recognised that fact. He (Mr Craig) had an interest in the confidential information, an interest which he had not waived. While he had approached the Tribunal proceedings on the assumption confidentiality did not apply to the information, the Tribunal had found to the contrary.
>
> **[26.2]** He accepted embarrassment and harm to reputation was not enough to justify the making of confidentiality orders.
>
> **[26.3]** Nevertheless there were compelling reasons in that the contractual obligation of confidentiality was still in place. While he accepted he had breached that agreement, it had not been set aside. It would be inherently wrong for the

Tribunal to uphold the confidentiality obligations and then allow publication of its decision holding him in breach.

[26.4] By making permanent the interim confidentiality orders the Tribunal would reduce the harm to one or other of the parties, harm which went beyond damage to reputation and embarrassment.

THE RELEVANT LAW

Non-publication orders and the open justice principle

[27] The Human Rights Act 1993 explicitly provides every hearing of the Tribunal must be held in public unless it is desirable for the hearing to be closed or for a non-publication order to be made:

> **107 Sittings to be held in public except in special circumstances**
>
> (1) Except as provided by subsections (2) and (3), every hearing of the Tribunal shall be held in public.
> (2) The Tribunal may deliberate in private as to its decision in any matter or as to any question arising in the course of any proceedings before it.
> (3) Where the Tribunal is satisfied that it is desirable to do so, the Tribunal may, of its own motion or on the application of any party to the proceedings,—
> (a) order that any hearing held by it be heard in private, either as to the whole or any portion thereof:
> (b) make an order prohibiting the publication of any report or account of the evidence or other proceedings in any proceedings before it (whether heard in public or in private) either as to the whole or any portion thereof:
> (c) make an order prohibiting the publication of the whole or part of any books or documents produced at any hearing of the Tribunal.
> (4) Every person commits an offence and is liable on conviction to a fine not exceeding $3,000 who acts in contravention of any order made by the Tribunal under subsection (3)(b) or subsection (3)(c).

[28] Plainly the granting of name suppression or the making of confidentiality orders is discretionary. In exercising that discretion the Tribunal takes as its starting point the presumption of open judicial proceedings, freedom of speech and the right of the media to report. There are, however, countervailing interests and in determining whether non-publication orders should be made, the Tribunal must identify and weigh the interests of both the public and the individual seeking publication. See *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.

[29] The most recent decision of the Tribunal which addresses the principles which apply to non-publication and confidentiality orders is *Scarborough v Kelly Services (NZ) Ltd (Application for Non-Publication Orders)* [2015] NZHRRT 43 (11 September 2015) at [15] to [26]. It is not intended to repeat what is said there or to further analyse the recent Court of Appeal jurisprudence cited in that decision, including *McIntosh v Fisk* [2015] NZCA 247, [2015] NZAR 1189 (Harrison, Miller and Cooper JJ), *Clark v Attorney-General (No. 1)* [2005] NZAR 481 (CA) (Glazebrook, Panckhurst and Gendall JJ), *Jay v Jay* [2014] NZCA 445, [2015] NZAR 861 (Randerson, Stevens and White JJ) and *Sax v*

Simpson [2015] NZCA 222 (9 June 2015, Stevens, French and Miller JJ). Useful reference can also be made to the recent discussion of these cases by Asher J in *H v S (Interim Anonymisation)* [2016] NZHC 433, [2016] NZAR 405.

[30] For the purposes of the present decision we have been guided by the following:

[30.1] The paramount principle is that justice should be administered in the open and subject to the full scrutiny of the media. See (inter alia) *R v Liddell* [1995] 1 NZLR 538 (CA) at 546-547 and *Peters v Birnie* [2010] NZAR 494 at [21] (Asher J).

[30.2] In general parties must 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 to the general rule. See *R v Legal Aid Board, ex parte Kaim Todner* [1999] QB 966 at 978 cited with approval by Harrison J in *Haydock v Gilligan Sheppard* HC Auckland, CIV-2007-404-2929, 11 September 2008 at [32]. Harrison J emphasised the public interest which demands the fair and efficient administration of justice consistently trumps any personal features.

[30.3] Most defendants would rather not be in court and they would rather not have their hitherto private affairs aired. However, open justice requires that as a general rule this is a consequence of civil litigation. More than embarrassment or detriment to reputation should be shown before a court will intervene. See *Peters v Birnie* at [30].

[30.4] In *Clark v Attorney-General (No. 1)* at [11] it was noted that the corollary to 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.

[30.5] If there has been extensive publication about the issues in the proceeding already, it is unsatisfactory to have one important aspect of that dispute suppressed. This could lead to an essential aspect of the arguments, and the reasoning in the decision, not being understood and, therefore, not being transparent and open to scrutiny. See *Peters v Birnie* at [31].

[30.6] In civil proceedings there is an onus on a party to establish a proper foundation for a confidentiality order. Given the paramount principle of open justice, it is necessary for a person seeking such order to point to some public interest such as particular circumstances relating to the privacy of an individual, to justify a departure from the open justice process. A party seeking to justify a confidentiality order will generally have to show specific adverse consequences that are exceptional. See *Peters v Birnie* at [25].

[30.7] The threshold which must be crossed before the interests of justice displace the presumption favouring publication have been differently expressed. In *McIntosh v Fisk* at [1] it was said 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. In *Clark v Attorney-General (No. 1)* at [42] it was stated the presumption in favour of disclosure of all aspects of court proceedings can be overcome only in "exceptional circumstances". See also *Brown v Attorney-General (Name Suppression)* [2006] NZAR 450 at [13].

[30.8] The courts have not attempted to define or list what would amount to exceptional circumstances justifying departure from the starting point of "freedom of speech, open judicial proceedings, and the right of the media to report the latter fairly and accurately as 'surrogates of the public'": *R v Liddell* at 546-547 cited in *Brown v Attorney-General (Name Suppression)* at [14]. In *Sax v Simpson* the Court of Appeal at [11] similarly stated there is no definition or list of circumstances a court will regard as exceptional.

[30.9] It is correct that in *Jay v Jay* at [118] it was stated that in a civil case extraordinary or exceptional circumstances are not required to justify suppression. But no reference was made to *Clark v Attorney-General (No. 1)* or to *Brown v Attorney-General (Name Suppression)* which are to the contrary. However, as the Tribunal stated in *Scarborough v Kelly Services (NZ) Ltd (Application for Non-Publication Orders)* at [24], 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. Recent decisions of the High Court show a high standard is appropriate. See *H v S (Interim Anonymisation)* at [12].

[30.10] Pre-trial the courts can place more weight on privacy concerns and less weight on open justice than at the trial phase when matters are being argued in open court. Part of the reasoning behind refusing access to court documents at this first stage is that access does not further the cause of open justice, as the documents cannot shed light on a proceeding where none has occurred, and when allegations in statements of claim and defence and other documents are contested and not in final form they are less likely to be accurate. Judgments and minutes are in a different category to other court documents. See *H v S (Interim Anonymisation)* [2016] NZHC 433, [2016] NZAR 405 (Asher J).

APPLICATION OF THE LAW TO THE FACTS

[31] There are two preliminary points. The first is the weight to be given to the 11 September 2015 decision in which the Chairperson (sitting alone) granted the interim orders then sought by Ms MacGregor. The second is the claim that publication of the Tribunal decision of 2 March 2016 would breach the parties' confidentiality obligations under the Human Rights Act and under the settlement agreement.

The relevance of the interim order decision

[32] Where the Tribunal has given a final judgment on the merits of a case, the decision whether non-publication or confidentiality orders should also be made must be reached independent of and without regard to any earlier interim decision. This is for three reasons:

[32.1] First, the criteria governing the power to make an interim order under s 95 of the Act are specific to the situation which pertains prior to any final decision of the Tribunal. Section 95(1) requires the applicant to show the interim order is "necessary in the interests of justice … to preserve the position of the parties pending a final determination of the proceedings".

[32.2] Second, the decision on the application must necessarily be reached on the basis of only a superficial knowledge of the issues and before any view can be reached on the truth of the allegations. The decision can therefore only be interim.

[32.3] Third, a decision on final non-publication orders is governed by very different considerations and the open justice principle presumptively applies. In addition the decision follows full opportunity to hear all the evidence and to assess the credibility of the witnesses. In addition, the circumstances of the parties may (as here) change between the making of the interim order and the determination whether final non-publication orders should be made.

[33] For these reasons Mr Craig's reliance on the fact that interim orders were made by the Chairperson in September 2015 was misguided. The making of those orders does not of itself provide support for Mr Craig's case. The Chairperson's decision of 11 September 2015 simply records that applying different criteria to different evidence, interim orders were at that point in time justified for the purpose of preserving the position of the parties pending a final determination of the proceedings. The real issue is whether, in the light of the Tribunal's 2 March 2016 merits decision there are presently exceptional circumstances compelling displacement of the principle of open justice.

The confidentiality point

[34] Mr Craig submitted release of the Tribunal's decision for general publication would breach the very confidentiality obligations to which the Tribunal has bound Mr Craig.

[35] The first fundamental flaw to this argument is that both parties lifted the s 85 confidentiality for the purpose of enabling the Tribunal to determine their respective claims. See the Tribunal's decision of 2 March 2016 at [15]. The second flaw is that it is the parties, not the Tribunal, who are bound by the confidentiality clause in the settlement agreement. No authority was cited for the proposition implicit in Mr Craig's argument that if one party to a confidential agreement alleges the other has breached the confidentiality obligation, determination of that allegation by a court or tribunal must necessarily itself be the subject of confidentiality orders without regard to the open justice principle and without regard to the extensive and repeated breaches by the defendant. It is not uncommon for confidentiality to be available in one forum but not in another. See *Clark v Attorney-General (No. 1)* at [46] and [48].

[36] It is now necessary to identify and weigh the interests of the public, Ms MacGregor and Mr Craig.

The public interest

[37] Part 3 of the Human Rights Act provides a mechanism for the resolution of complaints of unlawful discrimination. That mechanism is based on a dispute resolution process which since the Human Rights Amendment 2001 has displaced the formal investigation of complaints. The change in the complaints process had as its aim the resolution of complaints in the most efficient, informal and cost-effective manner

possible. This is explained more fully in the Chairperson's decision in *MacGregor v Craig (Second Interim Non-Publication Order)* [2015] NZHRRT 40 at [17] to [33.3].

[38] A settlement between the parties to a complaint may be enforced by proceedings before the Tribunal (see ss 89 and 92B(4)) and the remedies which may be granted by the Tribunal under s 92I(3) are broad ranging and include a declaration, a restraining order, damages and specific performance.

[39] It is important that it be known that the enforcement provisions of the Human Rights Act are more than theoretical and that on an appropriate set of facts an effective remedy can be granted. Demonstrating the statutory system has credibility will promote faith in the dispute resolution services offered by the Human Rights Commission and provide incentive for persons to use the Commission's mediation process instead of needlessly lodging a claim directly with the Tribunal.

[40] But above all the public interest lies in giving meaningful effect to the open justice principle, a principle which has particular resonance in the context of legislation which provides a remedy for the violation of the right to be free from discrimination. Subject to narrow exceptions, publication of decisions of the Tribunal is necessary to win public confidence and respect for the system.

The interests of Ms MacGregor and Mr Craig

[41] We address first the interests of Ms MacGregor.

[42] At the time Ms MacGregor applied for interim orders she could not foresee the extent to which the confidentiality obligations owed to her and which she sought to enforce would later be trumped by High Court proceedings prompted by the actions of Mr Craig and initiated in one case by one of the witnesses who appeared before the Tribunal (Mr Williams). In these new circumstances, whatever form the Tribunal might use for final non-publication orders, Ms MacGregor's privacy under the confidential terms agreed to in mediation with Mr Craig can no longer be protected. Nor can the Tribunal protect her from future publicity in the form of Mr Craig appearing in the High Court proceedings or speaking to media in relation to those proceedings.

[43] For the reasons detailed earlier, Ms MacGregor no longer supports the withholding of any part of the Tribunal's decision. In the words of her submission, it is no longer practical to "shroud" parts of the Tribunal's findings in secrecy when both Mr Craig and one of the witnesses who appeared before the Tribunal are now engaged in further proceedings in which both men are relying on key facts and events central to the settlement agreement from which the confidentiality arose. Those exceptional or special circumstances which once existed and therefore justified suppression in order to protect and uphold the confidentiality at issue have been superseded by external events. Key aspects of both the mediation and the settlement agreement have been and will be published in other fora. Indeed the Tribunal has been asked by Mr Craig (through his lawyers representing him in the High Court proceedings) to make an order releasing (on conditions) the Tribunal's transcript of evidence for use in the High Court proceedings (see *MacGregor v Craig (Third Variation to Interim Orders)* [2016] NZHRRT 22) and Mr Craig has filed a similar application in relation to the District Court proceedings.

[44] Because Ms MacGregor no longer supports the withholding of any part of the decision and in fact actively argues for its publication so as to obtain some prospect of protection from intense media interest, the public interest in having the decision published is not under challenge by her.

[45] We turn now to the interests of Mr Craig.

[46] As noted in the Tribunal's decision of 2 March 2016, Mr Craig founded the Conservative Party in 2011 and was leader of that party when it contested the 2011 and 2014 general elections. The sexual harassment allegation made by Ms MacGregor contributed to his resigning as party leader on 19 June 2015.

[47] As Mr Craig rightly submitted, anything relating to him and Ms MacGregor has since been newsworthy, attracting the interest of not only bloggers but also mainstream media. His political career and reputation will come under renewed attack.

Assessment

[48] Mr Craig's interest lies in the suppression of information which could damage his reputation and undermine his political aspirations. No other adverse consequences were cited by him.

[49] The findings made by the Tribunal in the 2 March 2016 decision are unflattering of Mr Craig and potentially unhelpful to him in the context of the civil proceedings in which he is presently engaged. But the weight to be attached to Mr Craig's potential embarrassment and harm to reputation upon publication of the decision is problematical. This is due to a number of factors:

> **[49.1]** Mr Craig is involved as both plaintiff and defendant in High Court and District Court proceedings in which he and the other parties are re-litigating key facts and events central to the case heard by the Tribunal. Indeed it would appear all parties to the High Court proceedings have already been given access to the transcript of the Tribunal hearing. It seems inevitable that in one or more of the cases (if not all) Mr Craig's political future, credibility and reputation will be at risk independent of the Tribunal's findings. Suppression of the Tribunal's decision will largely be an exercise in futility and suppression will potentially distort public reporting of the issues by withholding the Tribunal's findings in favour of Ms MacGregor.
>
> **[49.2]** Suppression of the decision will allow the parties to the recent litigation, especially Mr Craig, to put forward in public their own version of events without fear of contradiction by the findings made by the Tribunal. Not being a party to any of the proceedings Ms MacGregor will have no means of challenging Mr Craig's version by way of referencing the Tribunal's decision or the versions put forward by the other parties.
>
> **[49.3]** We believe this has the potential of working great unfairness, stripping Ms MacGregor of the protection spoken of by Lord Wolf in *R v Legal Aid Board, ex parte Kaim Todner*, namely the protection provided by a judgment delivered in public and which refutes unfounded allegations.
>
> **[49.4]** We take into account also the extensive breaches of confidentiality frankly acknowledged by Mr Craig and which are detailed in Appendix One to the 2 March 2016 decision. It is unsatisfactory to have this extensive information before the public but not the Tribunal's findings as to whether Mr Craig's actions amounted to a breach of his obligations to Ms MacGregor. Without publication of the Tribunal's decision there is a real risk the public will hear only one side of the story (Mr Craig's) and not Ms MacGregor's notwithstanding we have found her to have been grievously wronged by Mr Craig. By arguing for suppression of the

Tribunal decision Mr Craig is arguing for suppression of Ms MacGregor's vindication. This is what Ms MacGregor refers to as Mr Craig controlling the narrative. In our view it would be contrary to the public interest for the Tribunal to facilitate such state of affairs.

[49.5] Mr Craig submitted Ms MacGregor was seeking unredacted publication of the Tribunal decision to publicly embarrass him. That is, Ms MacGregor was motivated by revenge or spite. The submission is without factual foundation. Ms MacGregor is seeking publication of the Tribunal decision as a means of vindicating her own integrity. Any embarrassment (public or private) which Mr Craig might experience is the inevitable consequence of his own ill-advised and repeated breaches of the settlement agreement he entered into with Ms MacGregor.

[50] We are of the clear view Mr Craig has failed by a substantial margin to establish any circumstances which justify a departure from the open justice principle. As the case law has repeatedly emphasised, more than embarrassment or detriment to reputation must be shown.

CONCLUSION

[51] For the reasons given all restrictions on the publication of the Tribunal decision delivered on 2 March 2016 are rescinded. This ruling necessarily applies also to all other decisions of the Tribunal which pre-date or post-date that decision and to which the interim orders were applied.

[52] For the avoidance of doubt the order made by the Tribunal on 2 March 2016 under s 92I(3)(b) continues to operate. That order provides:

> **[149.2]** An order is made under s 92I(3)(b) of the Human Rights Act 1993 restraining Mr Colin Craig from continuing or repeating the breaches of his confidentiality obligations under the settlement, or from engaging in, or causing or permitting others to engage in, conduct of the same kind as that constituting the breach or conduct of any similar kind.

[53] In the course of the proceedings the Tribunal received closed documents from Ms MacGregor. To protect the confidentiality attached to those documents and to respect the basis on which they were provided to the Tribunal (but not to Mr Craig) those documents are not to be available upon search of the Tribunal file. We accordingly order 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 an opportunity to be heard on that application.

Interim non-publication order pending possible appeal[2]

[54] While the Tribunal has rescinded all non-publication orders account must be taken of the fact that Ms MacGregor and Mr Craig have a right of appeal to the High Court. See s 123(1) of the Human Rights Act. The time for appealing is 30 days after the date of the giving of this decision. So that the appeal right is not rendered nugatory an interim non-publication order is made for the period between the delivery of this decision and the expiry of the appeal period. If an appeal is filed application will have to be made to the High Court for continuation of the interim order. If, on the other hand, no appeal is to be lodged, Ms MacGregor and Mr Craig are asked to so notify the Tribunal prior to

[2] As neither plaintiff nor defendant appealed against this decision the interim non-publication order pending possible appeal made at [54] of this decision has automatically expired.

expiry of the appeal period. If both parties give such notice this interim order will then lapse.

Costs

[55] Costs are reserved. Unless the parties come to an arrangement on costs the following timetable is to apply:

> **[55.1]** Ms MacGregor is to file and serve her submissions within 14 days after the date of this decision. The submissions for Mr Craig are to be filed and served within a further 14 days with a right of reply by Ms MacGregor within 7 days after that.
>
> **[55.2]** The Tribunal will then determine the issue of costs on the basis of the written submissions without further oral hearing.
>
> **[55.3]** In case it should prove necessary, we leave it to the Chairperson of the Tribunal to vary the foregoing timetable.

ORDERS

[56] The Tribunal orders:

> **[56.1]** The order made by the Tribunal at para [149.2] of the decision given on 2 March 2016 continues to operate.
>
> **[56.2]** All restrictions on the publication of the Tribunal decision delivered on 2 March 2016 are rescinded as are all restrictions on the publication of all other decisions of the Tribunal or Chairperson given prior to 2 March 2016 or after 2 March 2016.
>
> **[56.3]** 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 an opportunity to be heard on that application.
>
> **[56.4]** Costs are reserved.

.....	.....	.....
Mr RPG Haines QC	**Ms K Anderson**	**Ms GJ Goodwin**
Chairperson	**Member**	**Member**