(1) NOTE ALL NON-PUBLICATION ORDERS MADE BY THE TRIBUNAL HAVE BEEN RESCINDED AND NO LONGER APPLY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 6**

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 JA McKay and Mr S Misselbrook for defendant

DATE OF HEARING: **7, 8, 9, 10 and 11 December 2015**

DATE OF DECISION: **2 March 2016**

DECISION OF TRIBUNAL[1]

Introduction

[1] Mr Colin Craig founded the Conservative Party in 2011 and was leader of that party when it contested the 2011 and 2014 general elections. However, on 19 June 2015 he resigned in circumstances intertwined with the events narrated in this decision.

[1] [This decision is to be cited as: *MacGregor v Craig* [2016] NZHRRT 6. When first published on 2 March 2016 this decision was subject to interim publication restrictions. Those interim restrictions were subsequently rescinded by the Tribunal in *MacGregor v Craig (Limited Extension of Confidentiality Orders)* [2016] NZHRRT 30.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.]

[2] From August 2011 until 18 September 2014 Ms Rachel MacGregor worked for Mr Craig as his press secretary. Her resignation two days before the 2014 election day caused media speculation.

[3] On the day of her resignation Ms MacGregor filed a claim of sexual harassment with the Human Rights Commission. The claim was not at that time communicated to Mr Craig.

[4] By email dated 29 January 2015 Ms MacGregor sent to Mr Craig an invoice for the work she had done during the election campaign and also notified Mr Craig of the sexual harassment claim. Mr Craig disputed the amount owing to Ms MacGregor and denied the sexual harassment claim.

[5] Following discussion between their respective lawyers, Ms MacGregor and Mr Craig on 4 May 2015 attended a mediation in Auckland facilitated by the Human Rights Commission. The outcome of that mediation was that both the sexual harassment claim and the financial dispute were settled. A settlement agreement styled (at Mr Craig's request) as a Mutual Resolution Agreement was signed on 4 May 2015 and the documentation recording the financial settlement executed on 7 May 2015.

[6] Section 85 of the Human Rights Act 1993 imposed on the parties a duty to keep confidential the information disclosed at the mediation meeting and the settlement agreement itself contained confidentiality obligations to the effect that neither party would make comment to the media or third parties other than a statement that the parties had met and resolved their differences. With this one limited exception the terms of the settlement were to remain strictly confidential between the parties.

[7] A few weeks after the settlement Mr Craig became aware evidence relating to Ms MacGregor's sexual harassment claim had apparently come to the attention of some of the members of the Conservative Party Board. On 8 June 2015, in a media interview held in a sauna, Mr Craig was asked whether he had had an affair with Ms MacGregor. Other media enquiries in similar terms followed and a poem written by Mr Craig and sent by him to Ms MacGregor appeared on the Whale Oil blog.

[8] Believing Ms MacGregor was, contrary to her obligations under the settlement, leaking confidential documents sent to her by Mr Craig, Mr Craig decided to correct the information which had thus been made public. Rather than cancelling the settlement agreement Mr Craig embarked on a course of action which he knew would result in himself breaching the agreement. That course of action included calling a press conference on 22 June 2015, media interviews on the days which followed (23 and 24 June, 30 June and 10 July 2015) and distributing a letter to almost every member of the Conservative Party. In addition, on 29 July 2015 he held a further press conference to launch a booklet denouncing dirty politics and announcing legal action against Mr Cameron Slater (proprietor of the Whale Oil blog), Mr John Stringer (a member of the Conservative Party Board) and Mr Jordan Williams. The booklet was distributed widely throughout New Zealand.

[9] Mr Craig accepts that on each of these occasions he breached the confidentiality obligation in one way or another but claims justification for doing so on the grounds Ms MacGregor made misrepresentations during the mediation meeting and that Ms MacGregor herself, post 4 May 2015, disclosed confidential documents covered by the settlement. On 31 August 2015 (a month after the present proceedings were filed) Mr Craig purported to cancel the settlement agreement pursuant to s 7(3) of the Contractual Remedies Act 1979.

[10] Ms MacGregor denies breaching the settlement agreement and has brought these proceedings under ss 89 and 92B(4) of the Human Rights Act seeking (inter alia) a declaration Mr Craig has breached the terms of the settlement, an order restraining him from further breaches and damages for humiliation, loss of dignity and injury to her feelings. Mr Craig has counterclaimed, seeking a declaration he has validly cancelled the settlement contract.

[11] The primary issues for determination are:

> **[11.1]** The nature and extent of the confidentiality obligation imposed on Ms MacGregor and Mr Craig by the Human Rights Act, s 85, by the mediation confidentiality agreement and by the settlement document itself. In this regard the closing submissions for Mr Craig properly conceded that by the conclusion of the hearing it could be seen there was no evidence Ms MacGregor either released or consented to the release of the confidential documents relating to her sexual harassment complaint.
>
> **[11.2]** If Mr Craig breached any confidentiality obligation, the nature and extent of those breaches.
>
> **[11.3]** Whether Mr Craig was justified in breaching confidentiality.
>
> **[11.4]** Whether remedies are to be awarded and more particularly:
>
> > **[11.4.1]** In relation to the damages claim for humiliation, loss of dignity and injury to feelings, whether there is a causal connection between any established breaches of confidentiality by Mr Craig and the harm suffered by Ms MacGregor.
> >
> > **[11.4.2]** Mr Craig's conduct and particularly, whether such conduct mitigated or increased the humiliation, loss of dignity and injury to feelings experienced by Ms MacGregor.

[12] It is necessary to emphasise that the sexual harassment claim having been resolved and settled by the parties at the mediation held on 4 May 2015, the issue before the Tribunal is not whether sexual harassment occurred as alleged by Ms MacGregor but whether the terms of the settlement agreement are to be enforced.

Assistance of counsel acknowledged

[13] The confining of the issues has been made possible by the responsible and professional manner in which both parties have been represented by counsel. It is only appropriate the Tribunal expressly acknowledges their assistance.

The mediation provisions of the Human Rights Act

[14] These being proceedings to enforce the terms of a settlement agreed at a Human Rights Commission facilitated mediation a brief overview of the dispute resolution provisions of Part 3 of the Human Rights Act is necessary. In this regard we adopt the following account taken from the Chairperson's decision in *MacGregor v Craig (Second Interim Non-Publication Order)* [2015] NZHRRT 40 (11 September 2015) at [17] to [33.3]:

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.

Admissibility of evidence

[15] In Ms MacGregor's opening submissions the question of admissibility of evidence was dealt with in the following terms:

> 11. This is a proceeding seeking enforcement of the settlement agreement under section 92B(4) of the HRA.
>
> 12. Both the plaintiff and the defendant have entered as evidence documentation and other material created for, or in the course of, the mediation. The plaintiff brings that evidence to establish the extent of the settlement agreement. The defendant brings that evidence to argue that he was induced into settlement by a misrepresentation. Both parties bring evidence to respond to the other's claim.
>
> 13. Section 86(2) states that 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.
>
> 14. In the circumstances, the plaintiff submits that both parties should be taken as having consented to lift the section 85 confidentiality for the purposes of providing the Tribunal with sufficient information to determine their respective claims.

15. In *Sheppard Industries Ltd v Specialized Bicycle Components Inc* [2011] NZCA 346, [2011] 3 NZLR 620 a case in which the parties disputed what had occurred at a mediation, the Court of Appeal distinguished between evidence which goes towards "whether there was a genuine settlement or to its meaning" and evidence which establishes the parties' positions on the merits of the underlying dispute.

[16] There being no challenge by Mr Craig to this approach the Tribunal was content to proceed on the suggested basis without further argument.

THE EVIDENCE

[17] Because the issues are confined we do not intend setting out at length the evidence heard during the first four days of the hearing. We begin with a brief overview of the financial dispute as it has a bearing on the settlement reached at the mediation.

The financial dispute

[18] Mr Craig is the owner and a director (along with his wife, Helen Craig) of Centurion Management Services Ltd (Centurion). Ms MacGregor was contracted through Centurion to provide services primarily related to public relations for Mr Craig and the Conservative Party. Ms MacGregor worked for Centurion as a contractor, then as an employee and then as a contractor again for a period of just over three years. In the lead up to the 2014 general election Ms MacGregor and Mr Craig could not agree on a pay rate appropriate to Ms MacGregor's increased hours and workload with the result the invoicing of her time broke down. To bridge the gap Mr Craig (Centurion) made two advances of $10,000, one on 19 August 2014 and the other on 10 September 2014.

[19] Earlier, in January 2014, Centurion had lent Ms MacGregor $18,990. The interest rate was zero for the first six months and then 4% for the next six months. After Ms MacGregor lodged the sexual harassment claim the interest rate was increased by Mr Craig to 29%.

[20] Ms MacGregor's sudden resignation on 18 September 2014 followed a discussion between her and Mr Craig. One aspect of that discussion formed part of her sexual harassment claim while another related to what Ms MacGregor believed was Mr Craig's refusal to talk about her rate of pay. Mr Craig's view was that Ms MacGregor had no entitlement to an increase and in any case a sudden demand twenty minutes before Mr Craig was to have a major radio interview two days ahead of the election was the wrong way to approach a contract negotiation.

[21] Be that as it may, Ms MacGregor's next communication with Mr Craig after her resignation was her email of 29 January 2015 to which she attached an invoice for the work she had done during the election campaign from 2 June 2014 until 17 September 2014. The total amount was $47,085.60, including GST. In her email Ms MacGregor acknowledged the loan as well as the two advances would be deducted from the invoice amount.

[22] It was in this same email Ms MacGregor gave notice of her filing of the sexual harassment complaint with the Human Rights Commission.

The lead up to the mediation

[23] In her email of 29 January 2015 Ms MacGregor asked that all further correspondence take place between the parties' lawyers, a request agreed to by Mr Craig in his reply of 30 January 2015. At that time Ms MacGregor was represented by Mr G Bevan while Mr Craig was represented by Mr DS Alderslade. Mr Bevan and Mr

Alderslade thereafter communicated both orally and in writing. They also represented their respective clients at the mediation held on 4 May 2015. Happily the evidence of Mr Bevan and Mr Alderslade is largely in accord, simplifying the task of resolving the three key issues arising out of the mediation:

> **[23.1]** First, whether Mr Craig is correct in alleging that during the settlement negotiations misrepresentations were made by Ms MacGregor.
>
> **[23.2]** Second, whether the sexual harassment and financial claims were linked and settled within the context of the mediation (as alleged by Ms MacGregor) or settled separately (as claimed by Mr Craig).
>
> **[23.3]** Third, whether the confidentiality obligation in s 85 of the Act and in the settlement document itself applied to both the sexual harassment and financial claims.

[24] Such differences as do exist between Mr Bevan and Mr Alderslade are largely differences of emphasis and not matters of credibility.

[25] On 3 February 2015 Mr Bevan and Mr Alderslade spoke by telephone. For present purposes it is sufficient to note Mr Bevan advised he would be writing to Mr Alderslade outlining details of both the sexual harassment and the arrears of payments claims while Mr Alderslade asked if there had been any enquiries from the media regarding the allegations made by Ms MacGregor. Mr Bevan responded that as far as he was aware there had not been any such enquiries apart from when in the previous year the parties had parted ways just before the general election. He had advised Ms MacGregor she should make no comment if approached by the media.

[26] By subsequent letter dated 18 February 2015 (sent by email) Mr Bevan set out details of Ms MacGregor's sexual harassment claim.

[27] This letter was followed by a second telephone discussion between Mr Bevan and Mr Alderslade on 19 February 2015. On the linkage issue Mr Alderslade told Mr Bevan that initially Mr Craig had considered settling the timesheets dispute separately but Mr Alderslade had advised against this course on the basis he (Mr Alderslade) wanted to be able to use the issue to assist the reaching of an overall resolution. On the issue of media enquiries and disclosure by Ms MacGregor to other persons, Mr Alderslade's file note recorded Mr Bevan saying he had advised Ms MacGregor against speaking to the media and that the persons to whom disclosure of the sexual harassment allegations had been disclosed were in a close circle. Mention was made of her brother and possibly one other.

[28] Mr Bevan's recollection is that in answer to Mr Alderslade's question "Has she spoken to the media?" he said "No, she hasn't. She has spoken to a close group of friends which includes two former boyfriends and her brother but she hasn't spoken to the media". No assurance was given that she had not told anyone of her belief she had been sexually harassed.

[29] In a subsequent letter dated 24 February 2015 Mr Bevan set out the remedies sought by Ms MacGregor, making it clear she was seeking to resolve both the harassment and financial issues.

[30] By letter dated 13 March 2015 Mr Alderslade set out in detailed terms Mr Craig's rebuttal of the sexual harassment allegations and by separate letter of the same date responded to the financial claim.

[31] Once the exchange of correspondence had taken place it was eventually agreed the parties would attend a mediation meeting under the Human Rights Act facilitated by a mediator from the Human Rights Commission.

The mediation

[32] On 4 May 2015 the mediation meeting was attended by the mediator, Ms MacGregor, Mr Bevan, Mr Craig and Mr Alderslade.

[33] Prior to the meeting the mediator had on 1 May 2015 circulated to Mr Bevan and Mr Alderslade a confidentiality agreement (which was to be signed prior to a commencement of the mediation) along with a copy of s 85 of the Human Rights Act which imposes an obligation of confidentiality on parties to a dispute resolution meeting convened under the Act:

> **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.

[34] The confidentiality agreement (signed by Ms MacGregor, Mr Bevan, Mr Craig and Mr Alderslade on 4 May 2015) was in the following terms:

> **Mediation meeting confidentiality agreement**
>
> We, the undersigned, agree to participate in today's mediation meeting on the following basis:
>
> 1. Everything said in the mediation meeting is subject to a statutory obligation of confidentiality. This means that nothing said in mediation (that isn't available outside the process and isn't your information) may be used as evidence at the Human Rights Review Tribunal or in any other legal forum, unless required by law.
> 2. We will not discuss anything said in the mediation meeting with anyone except our advisors, close family or friends who already know of the matter, and those to whom we are required to report back such as relevant managers.
> 3. We understand and agree to the confidentiality terms and principle set out section 85 of the Human Rights Act 1993, *Confidentiality of information disclosed at dispute resolution meeting* (attached).

[35] After the initial discussion and exchange of views between the parties Ms MacGregor and Mr Craig went to separate rooms and a significant period of time was spent by the mediator talking to each group separately with a view to seeing whether there was a way to resolve the issues.

[36] In these discussions Mr Craig was adamant the sexual harassment and financial claims were separate but both prior to and at the meeting Ms MacGregor made it clear she would accept settlement of the sexual harassment claim only if all other matters were resolved. It was on this basis the negotiations at the mediation took place.

[37] The parties eventually reached agreement regarding the terms of a settlement which reconciled their respective fixed positions:

[37.1] Mr Craig would only agree to pay the money owing to Ms MacGregor if the sexual harassment claim was withdrawn.

[37.2] Ms MacGregor would only agree to withdraw the sexual harassment claim if Mr Craig agreed to pay her the money she was owed.

[38] While Ms MacGregor accepted Mr Craig wanted the issues to be seen to be separate (he did not want to be seen to be making a "pay off" in respect of the sexual harassment allegations) she did not accept the separation was anything but a way of recording the agreement.

[39] In the result at the conclusion of the mediation the parties signed a settlement agreement and also agreed Centurion would make a payment of $16,000 to Ms MacGregor. In addition the personal loan and interest would be forgiven.

[40] While it was agreed the correspondence relating to the financial claim would be exchanged by the parties immediately after the mediation it was Mr Bevan's view the oral agreement that payment of the $16,000 be made to Ms MacGregor and that the personal loan be forgiven was immediately enforceable and not dependent on the subsequent paperwork, a view not seriously challenged by Mr Alderslade.

[41] The settlement agreement was in the following terms:

MUTUAL RESOLUTION
(s 83 Human Rights 1993, Ref 102452)

BETWEEN Rachel MacGregor ("Rachel")

AND Colin Craig ("Colin")

The parties agree as follows

1. A significant part of the working/friendship relationship between Colin and Rachel was positive, constructive and mutually beneficial.
2. In hindsight however, both parties acknowledge that on occasions some of their conduct was inappropriate.
3. Colin apologises for any inappropriate conduct on his part to Rachel.
4. Rachel withdraws her complaint to the Human Rights Commission.
5. Neither party will make comment to the media/third parties other than a statement that the parties met and have resolved their differences.
6. Except as provided in the previous paragraph the terms of this document are strictly confidential between the parties.
7. This resolution is in full and final satisfaction of all or any claims that either party has or may have arising out of the allegations in the Human Rights Commission complaint.

SIGNED at Auckland on the 4th day of May 2015

[42] The subsequent correspondence relating to the financial claim comprised a letter dated 5 May 2015 from Mr Alderslade to Mr Bevan proposing Centurion make payment of $16,000 in full and final settlement and requesting Mr Bevan to confirm Ms MacGregor's acceptance of the offer. At the same time Mr Alderslade provided to Mr Bevan a draft letter to be sent by Mr Bevan to Mr and Mrs Craig seeking forgiveness of the personal loan and interest on compassionate grounds. On 6 May 2015 Mr Bevan provided the two requested letters with the result the agreed figure of $16,000 was paid by Centurion to Ms MacGregor and the personal loan was forgiven.

THE PRIMARY FACTUAL DISPUTES

[43] The parties are apart on two fundamental issues associated with the mediation:

> **[43.1]** Whether the financial settlement was included in the confidentiality obligation.
>
> **[43.2]** Whether in the course of the negotiations which led to the mediation or during the mediation itself Ms MacGregor made misrepresentations which entitle Mr Craig to cancel the settlement agreement under the Contractual Remedies Act.

[44] The issues are addressed in turn.

THE FINANCIAL SETTLEMENT – WHETHER SUBJECT TO DUTY OF CONFIDENTIALITY

[45] Ms MacGregor contends the financial settlement is included in the confidentiality duty imposed on the parties by s 85 of the Act, by the confidentiality agreement and by the settlement agreement. Mr Alderslade conceded that at the mediation meeting there was no discussion whether the financial settlement was to be confidential or not, but said it was deliberately recorded separately, outside the mediation process and with no confidentiality clause. He was also conscious it involved corporate entities associated with Mr Craig.

[46] In our view there can be little doubt the financial settlement was the subject of the same duty of confidentiality as applied to the settlement agreement relating to the sexual harassment claim:

> **[46.1]** Both parties accepted there could be no settlement unless both the financial issues and the sexual harassment claim were settled in tandem. That is, Mr Craig would only agree to pay the money owing to Ms MacGregor if the sexual harassment claim was withdrawn and Ms MacGregor would only agree to withdraw the sexual harassment claim if Mr Craig paid her the money he owed.
>
> **[46.2]** The account given by Mr Bevan and Mr Alderslade of the course of the mediation establishes that following the opening statements, almost all of the time was spent negotiating the financial settlement. Indeed Mr Craig's own notes made on the day record the mediator telling him "Rachel has to get something. Needs to settle all issues. Best for both".
>
> **[46.3]** The settlement eventually agreed to has been accurately described in Ms MacGregor's submissions as an oral agreement under which the dollar amounts and timeframe were agreed to, but the paperwork relating to the payment of money to Ms MacGregor could not be exchanged and signed until the next day and the writing off of the personal loan. These documents were part of the same process as the settlement of the sexual harassment claim. The fact that elements of the wider agreement were managed in separate documents does not mean they were separate agreements.
>
> **[46.4]** Both Mr Bevan and Mr Alderslade were in accord that an oral agreement on the financial issues was reached during the mediation and that both considered the agreement was then enforceable.

[46.5] Apart from the post-4 May 2015 exchange of documents relating to the financial settlement there was no further discussion of any aspect of the financial settlement once the mediation meeting had come to an end.

[46.6] The confidentiality agreement signed by the parties at the commencement of the mediation explicitly required the mediation discussions and the settlement to be kept confidential. Only one limited category of persons was excepted. Those persons were described as "our advisors, close family or friends who already know of the matter, and those to whom we are required to report back such as relevant managers". Mr Craig did not need anything further in order to disclose the settlement terms to his wife and those in Centurion who were required to process the agreed payment.

[46.7] As submitted by Ms MacGregor, nowhere was it suggested either to her or to Mr Bevan that specific "carve outs" be agreed to (such as the Conservative Party Board) or that any limits be placed on the reach of the confidentiality on which the parties both relied.

[46.8] In the context something more than silence was necessary to lift or displace the confidentiality expressly agreed to by the parties and indeed imposed by s 85 of the Human Rights Act itself.

[47] In these circumstances we conclude the confidentiality stipulated in the "Mediation meeting confidentiality agreement" signed by Ms MacGregor and Mr Craig on 4 May 2015 and reinforced by s 85 of the Act covered all of the matters discussed and agreed to at the mediation meeting, specifically the sexual harassment claim, the financial issues, the settlement and the two components of that settlement, being the mutual resolution agreement and the agreement over the financial claim.

[48] As conceded by Mr Craig in cross-examination, this finding has a direct impact on the scope and scale of Mr Craig's admitted breaches of the confidentiality obligation.

[49] We turn now to the second issue, namely the nature of the alleged representations made by Ms MacGregor.

THE MISREPRESENTATION ALLEGATION

The question of the alleged representations by Ms MacGregor – background

[50] On or about 22 May 2015, approximately three weeks after the 4 May 2015 mediation, Mr Craig was told by a member of the Conservative Party Board (Ms Christine Rankin) there were rumours Mr Craig had paid off Ms MacGregor to cover serious misbehaviour. Ms Rankin added she was in possession of information sent to her by an informant. This information turned out to be a poem taken from a letter Mr Craig had sent to Ms MacGregor on 24 December 2013. That letter was part of the material relied on by Ms MacGregor in support of her sexual harassment complaint. At about the same time as his discussion with Ms Rankin Mr Craig was told attempts were being made to remove him as leader of the Conservative Party.

[51] By 30 May 2015 it appeared to Mr Craig other Board members (including the Chairman, Mr Brian Dobbs) had been given details about the mediation as well as confidential information. On 16 June 2015 Mr Craig received an anonymous text quoting from the 24 December 2013 letter and on 19 June 2015 the Whale Oil blog published extracts from the confidential documents. On the same day Mr Craig felt compelled to stand down as leader of the Conservative Party.

[52] By this time Mr Craig was certain the source of the information was Mr Jordan Williams. His suspicions were confirmed when Mr Williams gave evidence to the Tribunal that it was he (Mr Williams) who had provided the information to members of the Board and to Mr Slater of the Whale Oil blog. He explicitly acknowledged he did not have Ms MacGregor's permission to disclose the information and indeed had been expressly instructed by her not to disclose the information to anyone. The disclosure was also contrary to an express assurance given by Mr Williams to Mr Bevan that the information relating to Ms MacGregor's sexual harassment claim and in relation to which Ms MacGregor had, prior to the mediation, confided in Mr Williams would be kept confidential.

[53] It was against this background that Mr Craig at least initially argued (prior to Mr Jordan Williams giving evidence) that both prior to and during the mediation Ms MacGregor had not been truthful about what she had already disclosed to others about her sexual harassment claim and the persons to whom such disclosure had been made. In addition Mr Craig believed she and Mr Williams had been working in unison in leaking the confidential documents to the Board, media and others. See for example the following passage taken from Mr Craig's statement of evidence:

> I realise this information is directly at odds with what Ms MacGregor claimed both before and during the mediation and also at odds with her brief of evidence paragraphs 25 and 68. However I believe Ms MacGregor has not been truthful about this.
>
> It was now clear to me that Ms MacGregor had not kept the confidence that she said she had. Instead she had passed out allegations and confidential documents that were now being circulated around Board Members, key supporters, and the media. I knew at the very least she was co-ordinating with Mr Williams.

[54] However, in closing submissions it was conceded by Mr Craig there was no basis on which the Tribunal could find on the evidence given by Ms MacGregor and Mr Jordan Williams that Ms MacGregor had consented to the release of the documents relating to her sexual harassment complaint against Mr Craig. In our view this concession was properly made. Ms MacGregor was an honest witness whose evidence was largely supported by the evidence given by Mr Bevan and none of the witnesses who gave evidence claimed they had received confidential information from her. Indeed she declined to speak to the Board or to the media about the sexual harassment allegations and the circumstances of her resignation. We accept her evidence in its entirety.

[55] It is still necessary, however, to briefly outline Ms MacGregor's relationship with Mr Jordan Williams and her dealings with him.

Ms MacGregor and Mr Jordan Williams

[56] Ms MacGregor met Mr Jordan Williams through her work with the Conservative Party. After her resignation she confided in Mr Williams because she knew he was a lawyer and someone who understood politics. She thought he would understand her situation and be able to provide good advice. She showed him the correspondence from Mr Craig but did not give him copies or permission to make copies of any of that correspondence. Mr Williams helped Ms MacGregor to put her claim in chronological order and to prepare a file note which was then sent to Mr Bevan.

[57] Some time later, prior to the mediation, Ms MacGregor and Mr Williams began a romantic relationship. At the time Mr Williams allowed Ms MacGregor to store certain documents, including correspondence between Ms MacGregor and Mr Craig, in the safe at his (Mr Williams') work place. Mr Williams assured Ms MacGregor only he had access to the safe and that the material would be secure.

[58] At the time Ms MacGregor confided in Mr Williams she was under no obligation of confidentiality to Mr Craig (the mediation had not yet been agreed to and had consequently not taken place) and Mr Craig accepted in evidence she was entitled to speak to whomsoever she wished prior to the mediation confidentiality agreement being signed.

[59] When in November 2014 Ms MacGregor told Mr Bevan she had sought advice and counsel from Mr Williams, Mr Bevan decided to speak to Mr Williams about the importance of confidentiality, believing such discussion justified in the light of Mr Williams' mention by Nicky Hager in his *Dirty Politics: How Attack Politics is Poisoning New Zealand's Political Environment* (Craig Potten Publishing, Nelson, 2014). Mr Bevan contacted Mr Williams by telephone on 26 November 2014. Mr Bevan (inter alia) stressed the importance of Mr Williams keeping confidential the information Ms MacGregor had shared with Mr Williams. Mr Williams told Mr Bevan that he (Mr Williams) was a lawyer holding a practising certificate, but working in-house. He made it clear he was not acting for Ms MacGregor but that he was treating (or would treat) information he obtained from her on the same confidential basis as he would if she were his client. This gave Mr Bevan (and Ms MacGregor) a level of assurance Ms MacGregor would not be compromising her chances of a settlement by confiding in and seeking help from Mr Williams. Mr Williams also told Mr Bevan that he (Mr Williams) had a romantic interest in Ms MacGregor.

[60] In his evidence Mr Williams confirmed Mr Bevan's account of the November 2014 discussion and that he (Mr Williams) had given Mr Bevan an assurance he would keep the information confidential as if Ms MacGregor were a client. Mr Williams also confirmed to the Tribunal he had subsequently received from Ms MacGregor an email dated 18 June 2015 asking him to return any copies of letters she had received from Mr Craig and asking that he not make any copies as she did not want the letters used against Mr Craig. Mr Williams further told the Tribunal he ignored the email and was the person who took the two photographs of the poems subsequently published on the Whale Oil blog. He took these steps knowing he did not have Ms MacGregor's permission to photograph or distribute the documents.

Other persons confided in by Ms MacGregor

[61] Ms MacGregor has never made any secret of the fact that a small group of confidantes had seen, prior to the filing of the sexual harassment claim and her January 2015 decision to progress that claim, some of the correspondence between her and Mr Craig.

[62] As it was Mr Bevan who discussed confidentiality issues with Mr Alderslade, his evidence on this point is summarised:

> **[62.1]** In the course of assisting Ms MacGregor to prepare her initial complaint Ms MacGregor told Mr Bevan she had spoken to a number of people over the years about the concerns she had about Mr Craig and his treatment of her. Mr Bevan and Ms MacGregor also spoke about persons to whom she had shown various letters from Mr Craig which formed part of the basis of her complaint.
>
> **[62.2]** Ms MacGregor told Mr Bevan that over the years Ms MacGregor's brother and two of her former boyfriends had been shown the letters. She said the two former boyfriends (both named Andrew) had extensive knowledge of her concerns about Mr Craig because they were each (at different times) in a relationship with her at the time the behaviour was occurring.

[62.3] Ms MacGregor told Mr Bevan that at various times over the years she had spoken to a small group of other close confidantes about Mr Craig and aspects of his behaviour and treatment of her. Ms MacGregor named some or all of those confidantes when she spoke to Mr Bevan but he could not now remember who they were. As far as he could recall, Ms MacGregor said she had not shown the letters from Mr Craig to these people.

[62.4] She also said that in mid to late 2011 her flatmates had raised issues with her about the amount of time Mr Craig had been spending with her and at her flat. Ms MacGregor did not believe those flatmates had seen Mr Craig's letters but she could not rule that out.

[62.5] Given the length of time involved (Ms MacGregor's concerns about Mr Craig dated back to 2011) Ms MacGregor also told Mr Bevan she may have confided in a handful of other people in addition to those she had remembered and identified to Mr Bevan. She believed she could not remember everybody to whom she had spoken.

[62.6] As mentioned, in November 2014, Ms MacGregor told Mr Bevan of her having sought advice and counsel from Mr Jordan Williams.

[63] It must be remembered that at the time Ms MacGregor spoke to her confidantes she was not under any duty of confidentiality.

The communications between Mr Bevan and Mr Alderslade

[64] As previously mentioned, Mr Bevan and Mr Alderslade first spoke by telephone on 3 February 2015. Asked by Mr Alderslade if there had been any recent enquiries from the media regarding the situation, Mr Bevan had replied that as far as he was aware there had been no such enquiries and added the only comment by Ms MacGregor had been in the previous year at the time of the bust up between the parties during the election campaign. He added that his advice to Ms MacGregor had been that she should not make any comment if approached.

[65] When Mr Bevan and Mr Alderslade spoke for a second time on 19 February 2015 Mr Alderslade again asked Mr Bevan if Ms MacGregor had spoken to the media recently. Mr Bevan replied he had spoken to Ms MacGregor and advised against that. In a file note made at the time Mr Alderslade recorded Mr Bevan adding some information as to who (outside media) Ms MacGregor had confided in. That file note records Mr Bevan mentioning disclosure by Ms MacGregor to a close circle:

> I also asked whether his client had been to the media recently. He said he had spoken to her and advised against that. He says that the issues that this raises are within a close circle, I think he mentioned her brother and possibly one other who know about what is going on.

[66] Mr Bevan's account when giving oral evidence was that he said Ms MacGregor had spoken to a close group of friends which included two former boyfriends and her brother but had not spoken to the media.

[67] Mr Craig complains that at no time did Mr Bevan indicate to Mr Alderslade that Ms MacGregor had spoken at various times over the years to a small group of other close confidantes. Nor did he identify any other people by name or of any other description. Specifically Mr Bevan did not mention Mr Jordan Williams or details of the way in which Ms MacGregor had confided in him.

[68] The criticism is unjustified and largely driven by hindsight, that is by knowledge that post-mediation Jordan Williams betrayed Ms MacGregor's trust and breached the undertaking he had given to Mr Bevan.

[69] Our findings on the evidence are:

> **[69.1]** As Mr Alderslade's file notes make clear, on both 3 February 2015 and 19 February 2015 his questions to Mr Bevan were whether there had been any recent enquiries from the **media** (3 February 2015) or whether Ms MacGregor had been to the **media** recently (19 February 2015) [emphasis added]. There is no contest that the answer given by Mr Bevan to Mr Alderslade ("No") was the truthful answer.
>
> **[69.2]** Both Mr Bevan and Mr Alderslade agree that both prior to and during the mediation Ms MacGregor was never asked to provide the names of her confidantes, nor confirmation of precisely how many people she had confided in, nor what information she had shared with them.
>
> **[69.3]** Similarly, neither Mr Alderslade nor Mr Craig asked questions about the identity of the boyfriends, or how much they (the boyfriends) knew.
>
> **[69.4]** Ms MacGregor was never asked what control, if any, she had over the people she had confided in. Nor was she asked, prior to or at the mediation, to give assurances of confidentiality regarding information she had disclosed to third parties prior to the mediation.
>
> **[69.5]** Accordingly no assurances on these points were provided.
>
> **[69.6]** In these circumstances there was no duty to disclose Mr Jordan Williams was one of Ms MacGregor's confidantes. In the absence of such duty mere silence does not constitute a misrepresentation. See *Ware v Johnson* [1984] 2 NZLR 518 at 538 and *Overton Holdings Ltd v APN New Zealand Ltd* [2015] NZCA 526 at [36]. In the context of his counterclaim Mr Craig has fallen well short of establishing to the civil standard that the name "Jordan Williams" triggered a duty of disclosure.

[70] Our findings are reinforced by the evidence given by Mr Craig. He accepted:

> **[70.1]** The focus of Mr Alderslade's questions to Mr Bevan was solely on enquiries from or contact with the media.
>
> **[70.2]** The obligation of confidentiality undertaken at the mediation was forward looking.
>
> **[70.3]** Mr Alderslade did not ask for the identity of the persons in whom Ms MacGregor had confided pre-mediation.
>
> **[70.4]** Ultimately Mr Craig's concern was always whether the confidential information would reach the media. He was not concerned if an individual had the information so long as it was not given to the media because "suddenly it's got a whole different impact and context".
>
> **[70.5]** At the mediation no request had been made for Ms MacGregor to disclose the names of those she had confided in.

[70.6] It was his view that in a mediation it would not have been reasonable to ask Ms MacGregor to provide the exact names and details of every individual she had confided in.

[71] It is now possible to address the allegation by Mr Craig that misrepresentations by Ms MacGregor induced him to enter into the 4 May 2015 settlement.

The alleged misrepresentations

[72] In his counterclaim of 31 August 2015 the key allegations made by Mr Craig are that Ms MacGregor represented the confidential information had not been disclosed to any person in respect of whom there was a material risk they might not maintain that confidentiality and that Ms MacGregor had the power to preserve the confidentiality of the information. See the following paragraphs taken from the statement of defence and counterclaim:

> 19. During the negotiation that resulted in the HRA Settlement, legal counsel for Mr Craig (Mr Alderslade) discussed confidentiality with Ms MacGregor's legal counsel (Mr Bevan) on several occasions, including in phone calls (including on 3 February and 19 February 2015) before the mediation and during the mediation itself. Both counsel agreed that confidentiality was a critical factor for the parties and Mr Alderslade received assurances regarding confidentiality over the subject matter of the dispute to the effect that:
> 19.1 Ms MacGregor had not discussed the Confidential Information with the media;
> 19.2 Ms MacGregor understood the need to keep the Confidential Information as confidential as possible;
> 19.3 to the limited extent that she had confided in anyone regarding the Confidential Information, it was only to a few people, comprising her brother and three boyfriends and only as informal sounding boards about what they thought;
> 20. The clear intent and actual effect of the above assurances was to represent, reassure and provide important comfort to Mr Craig (and Mr Alderslade) in the context of a sensitive and difficult negotiation that (**the misrepresentations**):
> 20.1 the Confidential Information had not been disclosed to any party whose identity was such that they created a material risk or serious cause for concern that confidentiality had been, or might in the future be, seriously compromised and not maintained;
> 20.2 to the extent that Ms MacGregor had discussed the Confidential Information with her brother and boyfriends, it was only as informal sounding boards about what they thought;
> 20.3 the ability to preserve the confidentiality of the Confidential Information (including the Correspondence), remained within her power (and would be exercised).
> …
> 21. …
> 22. As a result of the misrepresentations Mr Craig:
> 22.1 was left with a false and misleading understanding of the extent to which Ms MacGregor had maintained and was capable of continuing to maintain, the confidentiality of the Confidential Information;
> 22.2 was induced to enter the HRA Settlement.

[73] It is further pleaded at para 26 of the statement of defence and counterclaim the parties agreed impliedly that the truth of the misrepresentations was essential to Mr Craig.

[74] In the context of the counterclaim Mr Craig must meet the civil standard burden of proof.

Findings on the allegation there were misrepresentations by Ms MacGregor

[75] Addressing first para 19 of the statement of defence and counterclaim, Mr Bevan accepted assurances had been given to Mr Alderslade in the terms pleaded in sub-paras 19.1 and 19.2. However, he disputed para 19.3 saying he had never been asked to give a clear assurance in the terms alleged, nor could he have given such assurance as he knew Ms MacGregor had confided extensively in her brother and boyfriends,

including Mr Jordan Williams. The alleged representation would have been untrue and Mr Bevan would not have lied to Mr Alderslade in any circumstances. In addition Mr Bevan knew Ms MacGregor had spoken to a few other people at different times about very specific events. Those people did not have the full picture (unlike Ms MacGregor's brother and boyfriends) but Mr Bevan did not know exactly what they knew and Ms MacGregor could not recall either.

[76] Because we accept Mr Bevan's evidence in its entirety we find the allegation in the statement of defence and counterclaim at para 19.3 is not only without an evidential foundation, it is contradicted by the direct evidence of Mr Bevan.

[77] Turning now to para 20 of the statement of defence and counterclaim, the plain fact of the matter is that the alleged representations (whether explicit or implicit) were neither sought by Mr Craig and Mr Alderslade nor were they made by Ms MacGregor and Mr Bevan. The entire focus of the enquiries made by Mr Alderslade was on enquiries by and contact with the media. Ms MacGregor was never asked to provide the names of her confidantes and what they knew.

[78] Furthermore, and perhaps most importantly, Ms MacGregor was never asked what control (if any) she had over the people she had confided in nor was she ever asked to give assurances relating to her ability to preserve the confidentiality of the information she had already disclosed to her confidantes.

[79] It follows we reject the claim made in the statement of defence and counterclaim at para 22 that Mr Craig was left with a false and misleading understanding of the extent to which Ms MacGregor had maintained and was capable of continuing to maintain, the confidentiality of the information in question and that he was induced by misrepresentation to enter into the settlement.

[80] In short, Mr Craig's entire counterclaim fails for the simple reason it has no factual foundation. However, out of an abundance of caution we address next the Contractual Remedies Act claim.

The Contractual Remedies Act 1979

[81] In his statement of defence and counterclaim Mr Craig seeks a declaration he validly cancelled the 4 May 2015 settlement when on 31 August 2015 his solicitors gave notice of his election to cancel under s 7(3) of the Contractual Remedies Act.

[82] It was common ground between the parties that settlement agreements are contracts and are subject to the same principles which apply to other contracts (*Sheppard Industries Ltd v Specialized Bicycle Components Inc* at [41]) and that while a court or tribunal will not enter into a critique or analysis of what took place at a mediation, the exception to that principle is an inquiry as to whether a settlement was reached or, having been reached, could be set aside by invoking some other doctrine such as fraud. See *Hildred v Strong* [2007] NZCA 475, [2008] 2 NZLR 629 at [44] and *Sheppard Industries Ltd v Specialized Bicycle Components Inc* at [41] to [43].

[83] Mr Craig's right to cancel the 4 May 2015 settlement agreement is codified by the Contractual Remedies Act as follows:

> **7 Cancellation of contract**
> (1) ….
> (3) Subject to this Act, but without prejudice to subsection (2), a party to a contract may cancel it if—

(a) **he has been induced to enter into it by a misrepresentation**, whether innocent or fraudulent, made by or on behalf of another party to that contract; or
(b) a term in the contract is broken by another party to that contract; or
(c) it is clear that a term in the contract will be broken by another party to that contract. [Emphasis added]

(4) …

[84] Mr Craig was entitled by s 7(4) of the Act to cancel the settlement agreement if, and only if, he could establish that (1) there was a misrepresentation, (2) he had been induced to enter into the contract by Ms MacGregor's misrepresentation, and (3) the parties had agreed – expressly or impliedly – that the truth of the representation was essential to Mr Craig or that the effect would be (a) to substantially reduce the benefit of the contract to Mr Craig or increase his burden under the contract or (b) to make the benefit or burden substantially different from that which was represented.

[85] It was conceded by Mr Craig in his closing submissions that inducement requires more than he (Mr Craig) saying a representation caused him to enter into the settlement. He must also show that either the representor (Ms MacGregor, through Mr Bevan) intended him to do so, or constructive intention.

[86] As will be plain from our earlier findings, no false representations were made by Ms MacGregor or Mr Bevan. It follows Mr Craig cannot show Ms MacGregor was aware of the alleged representations pleaded in the amended statement of defence and counterclaim (*Overton Holdings Ltd v APN New Zealand Ltd* at [39]) or that she intended to induce Mr Craig as alleged.

[87] It follows we find Mr Craig did not validly cancel the 4 May 2015 settlement.

[88] It should be noted it was common ground that because cancellation of a contract under s 7(3) of the Contractual Remedies Act is prospective (s 8(1)(a)) a ruling in favour of Mr Craig would not in any event be relevant to breaches by him which had already occurred as at the date of the purported cancellation. That is, cancellation would relate to quantum, not liability. It should be further noted that had we found in favour of Mr Craig on the facts, it would have been necessary to give serious consideration to Ms MacGregor's compelling submission that the evidence establishes Mr Craig, with full knowledge of the misrepresentations, affirmed the contract and was therefore not entitled to cancel (s 7(5)).

Summary of findings – counterclaim dismissed

[89] In summary our key findings are the 4 May 2015 settlement as well as the associated financial settlement were included in the same mediation confidentiality obligation and second, no misrepresentations were made by Ms MacGregor in the exchanges leading to the mediation or in the mediation itself. Mr Craig was not entitled to cancel the contract under the Contractual Remedies Act and the counterclaim is dismissed.

[90] It is now necessary to address the breaches by Mr Craig of the confidentiality obligation and thereafter the question of the remedies to be awarded Ms MacGregor.

THE BREACHES BY MR CRAIG

[91] Mr Craig candidly accepted that on multiple occasions he breached his confidentiality obligations and further accepted that should the Tribunal find the financial settlement fell within those obligations, the number of breaches would be increased.

[92] However, neither party asked that the evidence be analysed in minute detail with a view to an exhaustive list of each and every breach being compiled. It was agreed some breaches were substantial and some relatively minor. Rather the Tribunal was invited to take a broad brush approach, focusing on the big picture and making an assessment in the round.

[93] Fortunately the parties have agreed on a schedule summarising the occasions on which Mr Craig's engagements with the media led to breaches of the settlement agreement. That schedule, prepared by Ms MacGregor and subsequently amended to reflect the changes requested by Mr Craig via Mr McKay's post-hearing email of 15 December 2015, is annexed as Appendix One to this decision.

[94] In the circumstances we do not intend an exhaustive re-telling of the occasions on which the admitted breaches occurred. It is sufficient to note most of the breaches occurred during an intense period commencing with Mr Craig's media conference on Monday 22 June 2015 and ending with his second media conference one month later on Wednesday 29 July 2015. The illustrations which follow focus on the two key stipulations of the 4 May 2015 agreement that:

> **[94.1]** The terms of the document were strictly confidential between the parties.
>
> **[94.2]** 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.

[95] When on 9 June 2015 Mr Craig was asked (in the course of the interview held in a sauna) whether he and Ms MacGregor had had an affair, Mr Craig did not answer with the agreed "we have met and resolved our differences" as stipulated by the settlement, he spoke about Ms MacGregor being unable to manage the stress of her job and linked this with her reason for resigning.

[96] Ms MacGregor was dismayed when she saw the interview. Her resignation had not been related to stress. She was particularly concerned because the description of the circumstances leading to her resignation was inconsistent with what she had told her new employers during the recruitment process.

[97] On Friday 19 June 2015 Mr Craig caused a media sensation when he stood down as leader of the Conservative Party. Interviewed by Fairfax the following day regarding allegations over his relationship with Ms MacGregor, Mr Craig again stepped out of the boundary set by the agreement by stating that the suggestion he had paid Ms MacGregor off over a complaint of sexual harassment was scurrilous and false. Asked to respond to the allegation of sexual harassment he said he would not be doing so until the following Monday, being the date of his media conference. By failing to respond in the terms agreed to with Ms MacGregor and by leaving his response until the Monday media conference, Mr Craig ensured a higher degree of anticipation and interest in what he had to say about his relationship with Ms MacGregor.

[98] At the Monday 22 June 2015 media conference Mr Craig and his wife read out prepared statements. The event was covered by all mainstream media and live-streamed. Mr Craig opened by announcing the purpose of the media conference was to address "wild speculations and allegations" made about his dealings with Ms MacGregor. He then detailed the financial settlement reached with her at the mediation, disclosing (inter alia) the settlement figure. He then addressed the personal advance to Ms MacGregor in the following terms:

> My wife (Helen) and I had been helping Ms Macgregor bring her finances into order. To assist we agreed to an interest free loan (just under $20,000) to enable her credit card debt to be cleared. Ms Macgregor however went into default on the repayment of this loan and was unable to make payment. Subsequently she requested that the loan be forgiven on compassionate grounds. The request was granted.

[99] Then, under the heading "Allegations of Harassment" he repeated clause 2 of the settlement agreement ("both parties acknowledge that on occasions some of their conduct was inappropriate"), an action specifically prohibited by the confidentiality undertaking and then asserted:

> **Allegations of Harassment**
>
> There has been a great deal of wild and inaccurate speculation about the allegation of sexual harassment that was made against me.
>
> The widespread circulation of inaccurate information on this topic is completely inconsistent with the basis on which I sought to resolve my differences with Miss MacGregor. Reluctantly, I am being forced to respond.
>
> I have already explained above how our financial differences were resolved, as a separate matter.
>
> I have said on numerous occasions that my working relationship with Miss MacGregor was positive and constructive. I am grateful for the good work she did for the party and her assistance in handling the media.
>
> In hindsight, on some occasions our conduct was inappropriate and we have acknowledged that so we can both move on.
>
> Let me make it very clear that I have never sexually harassed anyone and allegations to the contrary are wrong.

[100] On any view this statement was a serious breach of confidentiality. In addition it had the effect of linking the financial settlement with the sexual harassment claim. Ms MacGregor was portrayed as someone who could not manage her personal finances and who, in the context of her sexual harassment claim, had acknowledged her own conduct had on occasion been inappropriate and in fact her allegation of sexual harassment had been "wrong".

[101] Mr Craig did not give Ms MacGregor advance warning the press conference would be held and she was at work when told by others it was being live-streamed. She watched some of it as it happened but after a while could not watch any more. She felt distressed and sick. This was her worst nightmare. Her professionalism and ethics and personal life were all being talked about publicly. Her reputation was also being damaged and she could not respond. She was shocked and deeply upset. She was also very distressed Mr Craig was claiming to get the story straight but was telling one side of the story only and doing it in such a way as to damage her reputation. He also said he wanted the confidentiality of the settlement lifted so that he could answer more questions and speak more freely.

[102] Ms MacGregor's telephone began to ring before the media conference was even halfway through. She also received texts and emails from journalists and people she had not heard from in years. The messages kept coming until late at night and then started again very early the next morning.

[103] Ms MacGregor was upset at the way Mr Craig had described their relationship. By referring to both of them acting inappropriately he had in her opinion given the impression they had had a sexual relationship. She wanted to make it clear this had not happened. Accordingly late in the afternoon of the media conference Ms MacGregor

issued a short statement through Mr Bevan to the effect Mr Craig had breached the confidentiality agreement and that because Ms MacGregor considered herself still bound by that agreement she could not correct the factual inaccuracies made by Mr Craig. She said she was willing to correct those inaccuracies if Mr Craig confirmed he would not take legal action against her under the confidentiality agreement. Ms MacGregor felt it necessary to issue the statement to stop journalists contacting her. The statement made it clear she could not talk to anyone about any of the matters raised by Mr Craig.

[104] If that was the intent of the statement, it was unsuccessful as reporters continued to call Ms MacGregor. Later that night, shortly before 8pm she sent out a single tweet which said "Colin Craig is trying to frame me as a mistress. There was never a sexual relationship, nor was there consent for his inappropriate actions". Ms MacGregor took this step after speaking to Mr Bevan because she felt she had to do something to protect herself. It was the last thing she ever said publicly about any of the breaches by Mr Craig other than to repeat the statement that she was not able to comment.

[105] Other interviews of Mr Craig followed. On 23 June 2015, when interviewed by Mike Hosking on Newstalk ZB Mr Craig accepted he had given the impression his conduct, while embarrassing, would be seen as falling short of sexual harassment.

[106] There was a second interview on 23 June 2015, this time with *Morning Report*. In brief Mr Craig confirmed there was an allegation of sexual harassment which had been withdrawn and which he had also denied. He also said there was more information about the relationship which had not been disclosed. He acknowledged there had been inappropriate behaviour.

[107] It is not intended to summarise the media interviews of 24, 25 and 30 June 2015 and of 7 and 10 July 2015 beyond noting Mr Craig again discussed his relationship with Ms MacGregor and asserted the allegations of sexual harassment were false and had been withdrawn.

[108] In the meantime on 23 June 2015 the solicitors for Mr Craig asked Ms MacGregor to agree to lift all confidentiality. The upshot was that on 29 June 2015 the parties met for a second mediation facilitated by the Human Rights Commission. Ms MacGregor sought an agreement Mr Craig would stop talking about his relationship with her as it was causing her distress and harming her reputation. She also sought an acknowledgement he had breached the 4 May 2015 settlement and wanted payment of her new legal costs as well as damages. This second mediation was adjourned without agreement being reached.

[109] At about this time Mr Craig circulated to the approximately 8,000 persons on the Conservative Party mailing list (with the exception of Ms MacGregor's parents) a letter headed "A Personal Update – Your Chance to Respond" which contained passages asserting the sexual harassment allegations were false and had been withdrawn. While Ms MacGregor was not named there could have been little doubt she was the person referred to. Again Mr Craig asserted both he and Ms MacGregor acknowledged there had been occasions on which their conduct had been inappropriate. While reference was made to constraints of confidentiality, it is plain the settlement agreement of 4 May 2015 was acknowledged more in its breach than in its observance:

> **False Allegations of Sexual Harassment**
>
> You may have heard media rumours in recent days claiming that Colin sexually harassed a staff worker. We assure you that **this is not the case** and allegations of this nature are false and have been withdrawn. Full copies of the media statements from Monday 22nd are overleaf.

> The working relationship and friendship that Colin had with the staff member was for the most part positive and constructive. While there was **no harassment** and **no sexual relationship** there were some occasions where their conduct was inappropriate which has been acknowledged from both sides so that all parties can move on.
>
> Colin regrets hugely any point at which he has been at fault and Helen continues to support him 100%. The rumours and false allegations have not harmed our wonderful marriage of over 23 years. At this stage we cannot elaborate on any details as we are constrained by confidentiality. We have requested that this be waived so that we can say more. [Emphasis in original]

[110] There then followed a major media event on 29 July 2015 when Mr Craig convened a press conference to launch a booklet entitled "Dirty Politics and Hidden Agendas". Some 1.2 or 1.4 million copies were distributed widely throughout New Zealand at a cost to Mr Craig of approximately $200,000. In both the booklet and in the accompanying media statement Mr Craig asserted the sexual harassment claim was false. In his evidence to the Tribunal he accepted this denial was in breach of the mediation agreement.

[111] Ms MacGregor said it had been extremely distressing to be contacted by people to whom she had not spoken for many years asking her about the booklet. Her elderly parents (her father, a retired minister of religion, is 95 years of age) also received calls from people in various parts of New Zealand who had read the publication. Her brother, also a minister of religion, had been similarly contacted.

Conclusion on liability

[112] In the face of this overwhelming evidence (largely uncontested by Mr Craig) only one conclusion is possible, namely that the breaches of the 4 May 2015 settlement agreement have been deliberate, systematic, egregious and repeated. The fact that the obligation of confidence which attached to the financial settlement was similarly breached simply compounds the gravity of Mr Craig's actions.

[113] Liability having been established and the counterclaim having been dismissed it is now necessary to address the question of remedies.

REMEDY

[114] Section 89 of the Human Rights Act provides that a settlement between parties to a complaint can be enforced by proceedings before the Tribunal brought under s 92B(4) which states:

> (4) If parties to a complaint under section 76(2)(a) have reached a settlement of the complaint (whether through mediation or otherwise) but one of them is failing to observe a term of the settlement, another of them may bring proceedings before the Tribunal to enforce the settlement.

[115] Should the Tribunal be satisfied on the balance of probabilities the defendant has committed a breach of the terms of the settlement, the Tribunal has jurisdiction to grant the remedies described in s 92I(2) and (3):

> (2) In proceedings before the Human Rights Review Tribunal brought under section 92B(1) or (4) or section 92E, the plaintiff may seek any of the remedies described in subsection (3) that the plaintiff thinks fit.
>
> (3) If, in proceedings referred to in subsection (2), the Tribunal is satisfied on the balance of probabilities that the defendant has committed a breach of Part 1A or Part 2 or the terms of a settlement of a complaint, the Tribunal may grant 1 or more of the following remedies:

(a) a declaration that the defendant has committed a breach of Part 1A or Part 2 or the terms of a settlement of a complaint:
(b) an order restraining the defendant from continuing or repeating the breach, 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 specified in the order:
(c) damages in accordance with sections 92M to 92O:
(d) an order that the defendant perform any acts specified in the order with a view to redressing any loss or damage suffered by the complainant or, as the case may be, the aggrieved person as a result of the breach:
(e) a declaration that any contract entered into or performed in contravention of any provision of Part 1A or Part 2 is an illegal contract:
(f) an order that the defendant undertake any specified training or any other programme, or implement any specified policy or programme, in order to assist or enable the defendant to comply with the provisions of this Act:
(g) relief in accordance with the Illegal Contracts Act 1970 in respect of any such contract to which the defendant and the complainant or, as the case may be, the aggrieved person are parties:
(h) any other relief the Tribunal thinks fit.

[116] It is no defence that the breach was unintentional or without negligence on the part of the party against whom the complaint is made but the Tribunal must take the conduct of the parties into account in deciding what, if any, remedy to grant. See s 92I(4).

[117] The heads of damages allowed by s 92M(1) are:

92M Damages

(1) In any proceedings under section 92B(1) or (4) or section 92E, the Tribunal may award damages against the defendant for a breach of Part 1A or Part 2 or the terms of a settlement of a complaint in respect of any 1 or more of the following:
(a) pecuniary loss suffered as a result of, and expenses reasonably incurred by the complainant or, as the case may be, the aggrieved person for the purpose of, the transaction or activity out of which the breach arose:
(b) loss of any benefit, whether or not of a monetary kind, that the complainant or, as the case may be, the aggrieved person might reasonably have been expected to obtain but for the breach:
(c) humiliation, loss of dignity, and injury to the feelings of the complainant or, as the case may be, the aggrieved person.

[118] It is further provided in s 108B that before the Tribunal grants any remedy under Part 3, it must give the parties to the proceedings an opportunity to make submissions on the implications of granting that remedy and the appropriateness of that remedy. In the present case, full submissions were heard on the last day of the hearing.

The conduct of the parties – Ms MacGregor

[119] It is difficult to see any basis for criticising Ms MacGregor's conduct. With the exception of the single tweet of 22 June 2015 (of which Mr Craig made nothing) she has at all times adhered to the settlement and confidentiality obligation. It was conceded by Mr Craig in closing there was no evidence to support his initial allegation that she consented to or assisted in the release to third parties of highly confidential documents relating to Mr Craig and her sexual harassment complaint. Even when provoked by the 22 June 2015 media conference, the responsible step taken by her was to issue (through Mr Bevan) a media release to the effect that because she was bound by the confidentiality agreement she would be unable to correct factual inaccuracies in Mr Craig's statement until Mr Craig confirmed that should she do so he would not take legal action under the agreement.

[120] In fairness Mr Craig did not in the end contend there was any disqualifying conduct on Ms MacGregor's part (as mentioned he did not make anything of the tweet sent on 22

June 2015) although the need for a causative link between her emotional harm and the damages sought was stressed. That issue will be addressed when the assessment of damages for humiliation, loss of dignity and injury to feelings is considered.

The conduct of the parties – Mr Craig

[121] At the hearing Mr Craig acknowledged his confidentiality breaches caused Ms MacGregor humiliation, loss of dignity and injury to feelings.

[122] In mitigation his main points were:

> **[122.1]** He did not cause the leak of confidential information which turned unsubstantiated rumour into what was purported to be documented fact. Mr Craig was the target of the leak and tried to defend himself in an unprecedented situation.
>
> **[122.2]** The leak put him under enormous pressure as his political career and many friendships unravelled.
>
> **[122.3]** His belief that the confidential material could not have ended up where it did without Ms MacGregor's consent or at least tacit approval was understandable.
>
> **[122.4]** Despite that belief he did not go all out to harm Ms MacGregor as much as possible. His goal was not to exact revenge (as in *Hammond v Credit Union Baywide* [2015] NZHRRT 6 (2 March 2015)) but to defend himself.
>
> **[122.5]** He resisted breaching confidentiality under the initial onslaught. Even after it had become clear Board members had seen the confidential information Mr Craig endeavoured to uphold the confidentiality obligations and in some media interviews he responded (in part) by employing the agreed formula that the parties had met and resolved their differences.
>
> **[122.6]** He did not resort to the step which would have helped him most and caused Ms MacGregor the most harm, namely publishing the documentation and information Mr Alderslade had disclosed to Mr Bevan by letter dated 13 March 2015. He had ample material with which to assist not only in relation to his claim there had been no sexual harassment but to back that up with documents which would have assisted his credibility at the expense of Ms MacGregor.
>
> **[122.7]** In the "Dirty Politics and Hidden Agendas" booklet he tried to direct the focus to Mr Cameron Slater, Mr Jordan Williams and Mr John Stringer, not Ms MacGregor.
>
> **[122.8]** Conventional legal remedies were impractical when dealing with the multitude of publishers, their appetite for a fight and a defence based on freedom of speech.
>
> **[122.9]** The outcome was a personal disaster.
>
> **[122.10]** He took some steps to lessen the effect on Ms MacGregor.

[123] It is true Mr Craig did not cause the leak of confidential information but his post-leak view of Ms MacGregor was coloured by his belief her allegations of sexual harassment were "mostly a work of fiction", that she was the source of the information, was coordinating with Mr Williams, had betrayed him and had equipped and facilitated

those who were his opponents to run prolonged defamatory attacks against him. His interest was to protect himself, his political career and his leadership of the Conservative Party, not Ms MacGregor.

[124] Any steps he did not take were motivated by self-interest. He and Ms MacGregor both held documents which allegedly supported their respective views on the sexual harassment and financial claims and which could inflict substantial harm on the other. In a sense they were in a Mexican standoff. It was in Mr Craig's self-interest that only a limited selection of information be released by him. The claim Mr Craig could have inflicted more harm cannot realistically be accepted as mitigation of the serious harm which was in fact inflicted on Ms MacGregor.

[125] Mr Craig was an experienced politician well used to dealing with the media and the frenzy of the period 22 June 2015 to 29 July 2015 began and ended with the two press conferences he himself called on those dates. At each Mr Craig read out a prepared statement which had been drafted with care and after taking legal advice. He acknowledged he made a calculated decision to breach the terms of the mediation agreement in order to stop harm to his reputation. At the same time a conscious decision was made not to cancel the settlement agreement he had entered into with Ms MacGregor. In the result the breaches occurred in the most public and damaging of circumstances.

[126] We accept the submission for Ms MacGregor that far from turning his mind to how little he could damage Ms MacGregor, Mr Craig was controlling the narrative. He was exercising power and control over what was in the media by carefully releasing what he thought would save himself, what he thought would save his position and save his reputation. The released information was selected not after a careful navigation to avoid breaching the confidentiality as little as possible, but to paint himself as a person who had been falsely accused by a woman who was clearly incapable of managing her money and a fair inference was that what she was seeking through the sexual harassment complaint was money. Instead of holding the agreed line and waiting for the media frenzy to abate, instead of going back to mediation or coming to the Tribunal for orders enforcing the settlement agreement (if there was indeed a rational basis for claiming Ms MacGregor was breaching it) Mr Craig chose the most public of stages. While he might not have been seeking to exact revenge in the *Hammond* sense, his actions were calculated and the likely impact on Ms MacGregor was obvious.

[127] The breaches of the confidentiality obligations have been deliberate, sustained and calculated. In the circumstances the absence of a revenge motive is of little consequence. Mr Craig has had legal advice throughout. The most significant breaches were pre-scripted and, as submitted by Ms MacGregor, engineered to attract maximum publicity. He did not stumble into the breaches. He sought, fed and received media attention.

[128] Mr Craig's claimed consideration for Ms MacGregor must be seen against the fact that his brief of evidence, as filed and read into evidence, was correctly described by Ms MacGregor as nothing short of a vilification of her. He referred to her as unreliable, as dishonest, as of wanting a sexual relationship with him, being obsessed with him and referring to her supposed mental health issues. He also held her responsible for his political downfall, an allegation he retracted in cross-examination. In fairness it was also accepted by Mr Craig in cross-examination and in closing that Ms MacGregor had not consented to the release of the confidential documents.

[129] In the circumstances we are of the view only limited weight can be attached to the mitigating circumstances relied on by Mr Craig.

[130] We turn now to the remedies sought by Ms MacGregor being:

> **[130.1]** A declaration that Mr Craig breached the terms of the settlement.
>
> **[130.2]** An order restraining Mr Craig from any further breaches of the terms of the settlement or engaging in conduct that would breach s 85 of the Human Rights Act.
>
> **[130.3]** Damages for pecuniary loss (lost earnings and legal expenses).
>
> **[130.4]** Damages for humiliation, loss of dignity and injury to feelings.
>
> **[130.5]** Costs on an indemnity basis.

Declaration

[131] We address first the question of a declaration. In the analogous jurisdiction under s 85(1)(a) of the Privacy Act 1993 it was held in *Geary v New Zealand Psychologists Board* [2012] NZHC 384, [2012] 2 NZLR 414 (Kós J, SL Ineson and PJ Davies) at [107] and [108] that while the grant of a declaration is discretionary, the grant of such declaratory relief should not ordinarily be denied and there is a "very high threshold for exception". On the facts we see nothing to justify the withholding from Ms MacGregor of a formal declaration that Mr Craig has breached the terms of the settlement of Ms MacGregor's sexual harassment complaint. Indeed to withhold such declaration would be unfair. It is noted Mr Craig's closing submissions recognised the Tribunal was likely to make a declaration under s 92I(3)(a).

Restraining order

[132] Section 92I(3)(b) gives the Tribunal jurisdiction to make a restraining order:

> (b) an order restraining the defendant from continuing or repeating the breach, 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 specified in the order:

[133] While Mr Craig says there is no need for such order because he has no intention of breaching his confidentiality obligations in the future we are of the view a restraining order is fully justified. Mr Craig has admitted to repeated, deliberate breaches of his obligations and that emotional harm to Ms MacGregor has resulted. In view of the admission he acted out of self-interest and further given the level of distrust between the parties we make an order restraining Mr 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.

Damages for pecuniary loss

[134] Ms MacGregor makes a claim under s 92M(1)(a) for pecuniary loss. The parties are agreed that in the event of Ms MacGregor being successful in her claim those losses and the quantum are as follows:

> **[134.1]** Lost earnings of $7,000.

[134.2] Legal expenses of $1,780 (GST inclusive), being Mr Bevan's in relation to responding to the breaches of the settlement agreement.

[135] We are of the view it is only appropriate these losses be compensated and the damages are accordingly awarded in the agreed amount.

Damages for humiliation, loss of dignity and injury to feelings

[136] We turn finally to s 92M(1)(c) being the assessment of damages for humiliation, loss of dignity and injury to feelings. In doing so reference will be made to *Hammond v Credit Union Baywide* because while that was a case under the Privacy Act 1993, the relevant provision in the Privacy Act 1993 (s 88(1)(c)) is identical to s 92M(1)(c) of the Human Rights Act, a point accepted by both parties to the present case. We adopt, but do not intend repeating what is said in that case at [170] as to the general principles which are to be applied. It is sufficient to note only two of those principles:

[136.1] There must be a causal connection between the action which is complained about and the damages sought. In appropriate circumstances causation may be assumed or inferred. See *Winter v Jans* HC Hamilton CIV-2003-419-854, 6 April 2004 at [33] and [34].

[136.3] The award of damages is to compensate for humiliation, loss of dignity and injury to feelings, not to punish the defendant. The conduct of the defendant may, however, exacerbate (or, as the case may be, mitigate) the humiliation, loss of dignity or injury to feelings and therefore be a relevant factor in the assessment of the quantum of damages to be awarded for the humiliation, loss of dignity or injury to feelings.

[137] We adopt also the definitions of humiliation, loss of dignity and injury to feelings set out in *Hammond v Credit Union Baywide*.

The particular circumstances of Ms MacGregor's case – causation

[138] Mr Craig accepts humiliation, loss of dignity and injury to feelings have been experienced by Ms MacGregor but submits he should not be required to compensate Ms MacGregor for such harm as she would have suffered regardless of Mr Craig's post-settlement actions. Specifically he did not cause the highly sensitive and embarrassing correspondence to become public. Particular aspects of this issue are:

[138.1] As a result of the 2014 election campaign Mr Craig was highly newsworthy and controversial.

[138.2] The nature and timing of Ms MacGregor's resignation as press secretary meant that anything regarding her resignation and her relationship with Mr Craig would be seized on by the media and attract widespread publicity and speculation.

[138.3] The nature of the leaked material and the number of people using it to push political or other agendas (Cameron Slater, Jordan Williams and John Stringer) meant such publicity would not be short-lived.

[139] Ms MacGregor's response is that it is not uncommon for a high profile politician to face media questions, often uncomfortable, and questions in relation to their personal life. In general, those questions pass and had Mr Craig held the line drawn by the mediation confidentiality obligation the media flurry would have passed or substantially

subsided. Ms MacGregor's resignation, high profile as it was, was a media story for a couple of days and then the media moved on. If Mr Craig had sought other remedies, the media flurry might have passed. Mr Craig's causative acts were the press conferences of 22 June 2015 and 29 July 2015. The effect of these causative acts was to take the story national. He took it from gossip on a blog and debate around the Conservative Party Board table to a story that was on the evening news. As Mr Craig accepted in cross-examination, what he did was to pour petrol on the flames and he did so repeatedly. This was intentional and deliberate. The case went from the asking of hard questions arising from a leak to an enormous media storm that exposed highly personal, highly sensitive information about Ms MacGregor.

[140] We believe this analysis is correct.

The particular circumstances of Ms MacGregor's case – the emotional harm

[141] For Ms MacGregor it is submitted:

> **[141.1]** She agreed to settle her claim through the Human Rights Commission mediation process because she wanted to resolve the issues with her former employer as speedily and discreetly as possible.
>
> **[141.2]** Having agreed to the settlement she thought the whole saga was over. Mr Craig's breaches have had a profound effect on her, physically, emotionally and financially.
>
> **[141.3]** She was at work when Mr Craig held his 22 June 2015 media conference. She had no notice he intended to talk about her and his relationship with her and no indication he would publish personal information about her financial situation. As she watched the conference live on the internet she felt distressed and sick. She described it as her worst nightmare.
>
> **[141.4]** Before the media conference was finished her phone began ringing with journalists trying to get comment about what Mr Craig had said. The media storm caused by Mr Craig and the toxic mix of sexual harassment allegations, politics and gossip was long-lasting. Reporters contacted her by text, telephone and email. One reporter turned up unannounced at her place of work. Every time Mr Craig says anything publicly they begin calling her again.
>
> **[141.5]** People she had not heard from in years have contacted her to ask about it or to tell her about the brochure that arrived in their letterbox naming her. Her elderly father, a former Presbyterian Minister, was also contacted by former parishioners.
>
> **[141.6]** She has described waking up with a tight feeling in her chest every morning since then. She is unnaturally tired. Her attention span has reduced markedly and her confidence has disappeared. She still fears answering her phone. She is still anxious about what else Mr Craig might say or do.
>
> **[141.7]** She has isolated herself from many of her former friends because she does not want to be asked about Mr Craig and does not want to be a figure of fun or ridicule.
>
> **[141.8]** Her elderly father has been deeply saddened by these events and Ms MacGregor feels as if she has brought shame on herself and her family. Her deepest shame is that she has been identified as "that woman" and will be for

many years to come. The association with Mr Craig and the much talked about "inappropriate behaviour" is now indelible. For a young woman navigating a career in communications, the harm will be long lasting.

[141.9] Ms MacGregor moved to Wellington at the beginning of 2015 to start a new chapter but the strain of these events has derailed those plans. Her employer has been unhappy for her to be involved in any work with a political or high profile dimension and has removed her from such work.

[141.10] She has suffered from constant headaches, anxiety and tiredness such that she has been forced to cut back her working hours to part-time. She has no plans in the foreseeable future to return to full-time work. The combination of her poor health and the stigma attached to being associated with such a high profile and unflattering scandal presents very real challenges to Ms MacGregor's future prospects.

[141.11] Ms MacGregor's reputation has been severely tarnished.

[141.12] A process designed to provide protection to claimants in sexual harassment cases has ended with her experiencing victimisation, isolation and very serious emotional harm.

[142] In our view Ms MacGregor was correct in submitting the breaches flowing from the post-settlement media interviews, especially the interviews of 22 June and 29 July 2015, involved the following:

[142.1] First:

[142.1.1] Identification of Ms MacGregor as the complainant in a sexual harassment case.

[142.1.2] Publication of the fact Ms MacGregor's complaint was withdrawn.

[142.1.3] Assertion that the relationship between Mr Craig and Ms MacGregor was mutual.

[142.1.4] Assertion that both Mr Craig and Ms MacGregor behaved inappropriately.

[142.1.5] Publication of Ms MacGregor's financial details.

[142.1.6] Assertion that Ms MacGregor is unable to manage her finances.

[142.1.7] Assertion that Mr and Mrs Craig acted compassionately in forgiving the loan to Ms MacGregor (and that Ms MacGregor had asked them to be compassionate).

[142.1.8] Marginalisation of Mr Craig's role in the events in dispute.

[142.2] Second, publication of information Ms MacGregor sought to keep confidential and information she could expect to remain confidential.

[142.3] Third, the use of national media organisations and breaches by Mr Craig on a scale only possible because of his political connections and personal wealth,

with the effect the information involved in the breaches reached the widest possible audience.

[142.4] Fourth, Mr Craig is wealthy, well-connected and well advised. At all times he has been in a more powerful position than Ms MacGregor. He has used his power and his wealth to conduct a calculated campaign of breaches for the sole purpose of bolstering, or attempting to bolster, his own reputation. He has disregarded his obligations under the Human Rights Act and the settlement agreement.

[142.5] Each utterance has had the effect of diminishing the reputation of Ms MacGregor by portraying her as variously a mistress, a trouble-maker, a woman who cannot manage her own life, a woman with no financial management skills, who is mentally unwell and, in evidence before the Tribunal, a liar and a blackmailer.

[142.6] Mr Craig has breached his obligations repeatedly and intentionally, rendering Ms MacGregor the victim of a series of statements and media events choreographed to portray her in a negative light. She has been unable to exert any control over the timing, nature or extent of those breaches.

[142.7] Ms MacGregor has experienced, as a direct result of Mr Craig's breaches, such feelings as anxiety, anger, despair and alarm. She has been marginalised and her right to the protection of the Human Rights Act has been deliberately overridden by Mr Craig.

[143] In summary, Ms MacGregor has suffered significant humiliation, significant loss of dignity and significant injury to feelings. The causative link between Mr Craig's breaches and Ms MacGregor's humiliation, loss of dignity and injury to feelings has been amply established.

Assessment of damages

[144] We are satisfied to the civil standard there is a direct causal connection between Mr Craig's post-settlement media interviews (especially those of 22 June 2015 and 29 July 2015) and the humiliation, loss of dignity and injury to feelings experienced by Ms MacGregor. We exclude from consideration any humiliation, loss of dignity and injury to feelings experienced by her prior to the mediation settlement and take account only of that humiliation, loss of dignity and injury to feelings attributable to post-settlement events.

[145] In *Hammond v Credit Union Baywide* the Tribunal noted that while awards for humiliation, loss of dignity and injury to feelings are fact driven, awards will usually fall within three broad bands:

[145.1] At the less serious end of the scale the first band ranges upwards to $10,000.

[145.2] For more serious cases the second band ranges between $10,000 to about (say) $50,000.

[145.3] For the most serious category of cases it is contemplated awards will be in excess of $50,000.

These bands are descriptive, not prescriptive.

[146] In the present case we are of the view the facts of the case fall within the "most serious" band because:

> **[146.1]** By flouting the confidentiality of what was said during the dispute resolution meeting Mr Craig stripped Ms MacGregor of the protection intended by the Human Rights Act.
>
> **[146.2]** The breaches were deliberate, repeated and choreographed in such a way as to attract maximum publicity and attention at a national, not local level.

[147] Perhaps the three most egregious features of the case (and which distinguish it from *Hammond v Credit Union Baywide*) are:

> **[147.1]** The relentless exposure (over a prolonged period of time) of Ms MacGregor to adverse media attention on a nationwide basis including the distribution of 200,000 copies of the "Dirty Politics and Hidden Agendas" booklet to most households in New Zealand and the sending of Mr Craig's Personal Update to almost all 8,000 persons on the Conservative Party mailing list.
>
> **[147.2]** The exposure of Ms MacGregor's sexual harassment claim has led to her being stigmatised as having engaged in sexually inappropriate behaviour and as a person who cannot manage or control her own finances. Her humiliation and stigmatisation as "that woman" has been held up for all to see.
>
> **[147.3]** It was these very consequences which Ms MacGregor sought to avoid by availing herself of the statutory confidentiality which attaches to the mediation process under the Human Rights Act. It was a process explicitly agreed to by Mr Craig when signing the statutory confidentiality provision and reinforced by the explicit terms of the settlement agreement itself. She has been shocked by the deliberate and systematic stripping away of the promised protection. The subsequent systematic violation of her legal rights has left her traumatised, marginalised and disempowered.

[148] In these circumstances we believe an award higher than in *Hammond v Credit Union Baywide* ($98,000) is justified. Looking at the facts as a whole we are of the view an appropriate sum to adequately compensate Ms MacGregor for the severe humiliation, loss of dignity and injury to feelings inflicted on her by Mr Craig is $120,000. As in *Hammond v Credit Union Baywide* we have taken care to focus only on the emotional harm which the actions of Mr Craig caused to Ms MacGregor in the post-settlement period and have excluded any element of punishment or disapproval.

FORMAL ORDERS

[149] For the foregoing reasons the decision of the Tribunal is that it is satisfied on the balance of probabilities the causes of action alleged in the statement of claim have been established and:

> **[149.1]** A declaration is made under s 92I(3)(a) of the Human Rights Act 1993 that in the period commencing on 9 June 2015 and ending on 29 July 2015 Mr Colin Craig breached the terms of the 4 May 2015 settlement of Ms MacGregor's sexual harassment complaint.
>
> **[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.

[149.3] Damages of $7,000 are awarded against Mr Colin Craig under s 92I(3)(c) and 92M(1)(a) of the Human Rights Act 1993 for pecuniary loss in the form of lost earnings.

[149.4] Damages of $1,780 (GST inclusive) are awarded against Mr Colin Craig under ss 92I(3)(c) and 92M(1)(a) of the Human Rights Act 1993 for pecuniary loss in the form of legal expenses.

[149.5] Damages of $120,000 are awarded against Mr Colin Craig under ss 92I(3)(c) and 92M(1)(c) of the Human Rights Act 1993 for humiliation, loss of dignity and injury to the feelings of Ms Rachel MacGregor.

[150] The counterclaim by Mr Craig is dismissed.

COSTS

[151] In her statement of claim Ms MacGregor seeks costs on an indemnity basis. Costs are accordingly reserved. Unless the parties come to an arrangement on costs the following timetable is to apply:

[151.1] 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.

[151.2] The Tribunal will then determine the issue of costs on the basis of the written submissions without further oral hearing.

[151.3] In case it should prove necessary, we leave it to the Chairperson of the Tribunal to vary the foregoing timetable.

NON-PUBLICATION ORDERS[2]

[152] For the reasons explained by the Chairperson in his decision *MacGregor v Craig (Second Interim Non-Publication Order)* [2015] NZHRRT 40 the identity of the parties and the unique circumstances of this case require an order prohibiting the names of Ms MacGregor and Mr Craig or of any details which could lead to their identification. The orders he then made prohibited not only publication of the names of the parties or of any details which could lead to their identification, but also disclosure of the bringing of or the existence of these proceedings. The formal orders made pursuant to ss 95 and 107 of the Act were:

FORMAL ORDERS

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

[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.

[2] The interim non-publication orders made in this decision at para [154] were rescinded on 21 June 2016 by *MacGregor v Craig (Rescission of Confidentiality Orders)* [2016] NZHRRT 23.

[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.

[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.

[4] The "interim" interim orders made on 18 August 2015 are discharged and replaced by the present orders.

[5] Leave is reserved to both parties to make further application should the need arise.

[153] On 11 December 2015 these orders were varied by *MacGregor v Craig (Variation to Interim Orders)* [2015] NZHRRT 52 as follows:

[2.1] Publication to the New Zealand Police of the information that is the subject of the Orders is permitted should either Ms MacGregor or Mr Craig or her or his legal representatives find it necessary to lay a complaint with the New Zealand Police about the conduct or threatened conduct of any third party.

[2.2] Publication by the New Zealand Police of the information that is the subject of the Orders is permitted only to the degree necessary to receive, process, investigate and prosecute any such complaint or for the purpose of maintaining the law.

[2.3] The New Zealand Police are otherwise required to take such steps as are reasonable to preserve the integrity of the non-publication Orders.

[154] The interim orders made by the Chairperson presently continue in force as varied and are to continue to do so pending further order of the Chairperson or of the Tribunal.

[155] However, final orders will have to be made by the Tribunal once the question of costs has been resolved. As discussed at the hearing the submissions of the parties are now sought on the form of the final non-publication orders. Unless the parties are able to submit a joint memorandum, the following timetable is to apply:

[155.1] 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.

[155.2] The Tribunal will then consider the form of the final non-publication orders on the basis of the written submissions without further oral hearing.

[155.3] In case it should prove necessary, we leave it to the Chairperson of the Tribunal to vary the foregoing timetable.

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

Appendix One

Agreed Summary of Breaches of Settlement Agreement

Date	Particulars	Sexual Harassment	Financial Issues
9 June 2015	'*Sauna Interview*': Failure to abide by clause 5 of the Mutual Resolution • He talked about Ms MacGregor being unable to manage the stress of her job. • He linked this with Ms MacGregor's reason for resigning.		x
20 June 2015	Interview with Fairfax (appeared stuff.co.nz: *Colin Craig off to lawyers, would consider a Conservative Party comeback* [**ABD 248**] • Discussion of sexual harassment claim - the suggestion that he paid MacGregor off over a complaint of sexual harassment to the Human Rights Commission was 'scurrilous and false'. • Failure to abide by clause 5 of the Mutual Resolution	x x	
22 June 2015	Held a media conference – live streamed and covered by all mainstream media. References to sexual harassment claim made in written statement [**ABD 261**]: • Named Ms MacGregor • Confirmed there had been a sexual harassment claim • Reference to 'wild and inaccurate speculation' about sexual harassment claim • 'On some occasions our conduct was inappropriate' (using the language of the Mutual Resolution) • 'my working relationship with Miss MacGregor was positive and constructive'. (using the language of the Mutual Resolution) • Failure to abide by clause 5 of the Mutual Resolution References to settlement of financial issues made at media conference [**ABD 261**]: • Ms MacGregor submitted an invoice for just under $50,000 • Mr Craig had paid $20,000 in advances to Ms MacGregor • Mr Craig paid $16,000 to Ms MacGregor in settlement of this dispute • Ms MacGregor needed help getting her finances in order • Mr and Mrs Craig loaned her money to enable her credit card debt to be cleared • Ms MacGregor defaulted on the loan • Ms MacGregor requested the loan be forgiven on compassionate grounds (using the language of the settlement) • Mr and Mrs Craig forgave the loan • Ms MacGregor agreed to return Centurion property in her possession • Failure to abide by clause 5 of the Mutual Resolution	x x x x x x	x x x x x x x x x x

23 June 2015	Interview with Mike Hosking, *Newstalk ZB* [**ABD 273**] References to sexual harassment complaint: • 'Obviously, there was some inappropriate behaviour between us' (using the language of the Mutual Resolution) • 'I've acknowledged that, apologised for that' (using language of the Mutual Resolution) • Failure to abide by clause 5 of the Mutual Resolution References to financial issues: • Discussion of the $20,000 loan • Discussion of the payment of $16,000 • Discussion of the forgiveness of the loan	x x x	x x x
23 June 2015	Interview with *Morning Report* References to sexual harassment claim [**ABD 275**]: • Discussion of allegations of harassment • Denial of sexual harassment • Denial of sexual relationship • Confirmation there was an allegation of sexual harassment, which was withdrawn • Acknowledgement of inappropriate behaviour ('and we have both acknowledged')(using the language of the Mutual Resolution) References to financial issues: • Discussion of allegations of pay-out or hush money	x x x x x	x
24 June 2015	Interview with Paul Henry, *The Paul Henry Show* MediaWorks [**ABD 281**] References to sexual harassment claim: • Discussion of sexual harassment allegations • Discussion of the relationship with Ms MacGregor • Assertion that allegations of sexual harassment were wrong References to financial issues: • Discussion of hush money	x x x	x
25 June 2015	A Personal Update – letter to Conservative Party members. (Distributed to 4500 households, targeted 8000 members.) [**ABD 287**] References to sexual harassment claim: • Denial of sexual harassment of a staff worker • Assertion that allegations are false and have been withdrawn • Denial of sexual relationship with the staff member (the letter was attached to 22 June media statement that named Ms MacGregor) • Acknowledgement that on some occasions 'their' conduct has been inappropriate (using language of the Mutual Resolution) • Reference to both sides acknowledging that conduct had been inappropriate (using language of the Mutual Resolution)	x x x x x	

30 June 2015	Interview with Larry Williams, *Newstalk ZB* [**ABD 299**] References to sexual harassment claim: • Discussion of the dispute with Ms MacGregor • Discussion of the 'inappropriate behaviour' • Discussion of the nature of the relationship with Ms MacGregor • Acknowledgement that the conduct was 'inappropriate' (using the language of the Mutual Resolution)	 x x x x	
7 July 2015	Interview with Stacey Kirk, Fairfax [**ABD 303**] References to sexual harassment claim: • Discussion about the state of the relationship with Ms MacGregor • Failure to abide by clause 5 of the Mutual Resolution	 x x	
10 July 2015	Interview with *CTV News* [**ABD 312**] References to sexual harassment claim: • Failure to abide by clause 5 of the Mutual Resolution	 x	
29 July 2015	Colin Craig media statement [**ABD 320**] References to sexual harassment claim: • Discussion of sexual harassment claim • Assertion that sexual harassment claim was false • Failure to abide by clause 5 of the Mutual Resolution References to financial issues: • Discussion of pay-out to a 'victim' • Discussion about the payment of $16,000 to Ms MacGregor • Discussion about the financial dispute over invoices	 x x x	 x x x
29 July 2015	Publication of *Dirty Politics and Hidden Agenda* Booklet. [**ABD 323**] Distributed throughout New Zealand, at cost of $200,000. References to sexual harassment claim: • Failure to abide by clause 5 of the Mutual Resolution • Named Ms MacGregor as the source of some of the information (allegedly used against Mr Craig) • Discussion of the sexual harassment claim • Assertion that sexual harassment claim was false ('and some of the claims made were easily proved so') • Discussion of the withdrawal of the claim by Ms MacGregor References to financial issues: • Discussion about a settlement (between Ms MacGregor and Mr Craig) • Discussion of money paid to Ms MacGregor	 x x x x x	 x x