(1) ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS AND IDENTIFYING PARTICULARS OF THE PLAINTIFF, HER HUSBAND AND CHILDREN

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

IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2017] NZHRRT 25**

	Reference No. HRRT 067/2016
UNDER	**THE HUMAN RIGHTS ACT 1993**
BETWEEN	**[Redacted]**
	PLAINTIFF
AND	**MICHAEL VAN WIJK**
	FIRST DEFENDANT
AND	**THE BISHOP OF NELSON**
	SECOND DEFENDANT
AND	**THE VICAR OF BLENHEIM PARISH**
	THIRD DEFENDANT

AT WELLINGTON

BEFORE:
Mr RPG Haines QC, Chairperson

REPRESENTATION:
Mr RW Kee, Director of Human Rights Proceedings, for plaintiff
Mr BR Green for first defendant
Mr JLS Shaw for second and third defendants

DATE OF NAME SUPPRESSION HEARING: Heard on the papers

DATE OF DECISION ON APPLICATION FOR NAME SUPPRESSION: 18 July 2017

DECISION OF CHAIRPERSON ON APPLICATION BY PLAINTIFF FOR INTERIM NAME SUPPRESSION[1]

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[1] [This decision is to be cited as *A v Van Wijk (Application for Non-Publication Orders)* [2017] NZHRRT 25. Note non-publication restrictions.]

Introduction

[1] In these proceedings filed on 10 October 2016 the plaintiff is represented by the Director of Human Rights Proceedings. The plaintiff's two causes of action are based on the sexual harassment provisions of s 62(1) of the Human Rights Act 1993. She alleges that when providing her with pastoral care and counselling, the first defendant subjected her to language and physical behaviour of a sexual nature and that he made ongoing requests for sexual activity.

[2] The statement of reply by the first defendant was filed on 2 November 2016 while that by the second and third defendants was received on 16 November 2016. An amended statement of reply by the first defendant followed on 1 December 2016 while the amended statement of reply by the second and third defendants was filed on 16 December 2016. The plaintiff's allegations are denied.

[3] A case management teleconference has not yet been convened due to the unprecedented increase in the Tribunal's workload and the fact that the Human Rights Act 1993 does not allow the appointment of a deputy chair to assist the Chairperson to keep pace with the large inflow of new cases. See further *Wall v Fairfax New Zealand Ltd (Delay)* [2017] NZHRRT 8.

[4] By application dated 26 May 2017 the plaintiff has applied for interim orders:

> **[4.1]** Prohibiting publication of the name, address, occupation and any other details which might lead to the identification of the plaintiff or of the plaintiff's husband or children in these proceedings.
>
> **[4.2]** That there be no search of the Tribunal file without leave of the Tribunal or Chairperson.

[5] Filed in support of the application is an affidavit sworn by the plaintiff on 20 May 2017 as well as comprehensive submissions by Mr Kee. His assistance is acknowledged.

[6] On 2 June 2017 directions were given requiring the defendants to file any notice of opposition and submissions by 16 June 2017.

[7] No notice of opposition or submissions have been filed on behalf of the first defendant. For their part, the second and third defendants have by memorandum dated 16 June 2017 given notice that they consent to the orders sought by the plaintiff.

[8] In these circumstances the application is straightforward and is to be determined by the application of established principle to the exceptional set of circumstances described by the plaintiff in her affidavit.

The plaintiff's evidence

[9] – **[15]** [Redacted]

The relevant law

[16] Section 107 of the Human Rights Act confers on the Tribunal jurisdiction to make non-publication orders. Consequently the Chairperson of the Tribunal sitting alone has power under s 95(1) to make such orders on an interim basis if "satisfied that it is

necessary in the interests of justice to make the order to preserve the position of the parties pending a final determination of the proceedings".

[17] The principles to be applied by the Tribunal when making non-publication orders were recently examined at some length in *Waxman v Pal (Application for Non-Publication Orders)* [2017] NZHRRT 4. At [66] the Tribunal summarised the (non-exhaustive) points which will assist determination whether the Tribunal is satisfied it is "desirable" under s 107(3)(b) of the Act to make a non-publication order:

> **[66]** In summary (and at the risk of some repetition) the following principle points (they are not intended to be exhaustive) should be kept in mind when interpreting and applying s 107(1) and (3) of the Human Rights Act. It is these points which will assist the determination whether the Tribunal is satisfied that it is "desirable" to make a suppression order:
>
> **[66.1]** The stipulation in s 107(1) that every hearing of the Tribunal be held in public is an express acknowledgement of the principle of open justice, a principle fundamental to the common law system of civil and criminal justice. The principle means not only that judicial proceedings should be held in open court, accessible to the public, but also media representatives should be free to provide fair and accurate reports of what occurs in court.
>
> **[66.2]** There are circumstances in which the interests of justice require that the general rule of open justice be departed from, but only to the extent necessary to serve the ends of justice. This is recognised by s 107(1), (2) and (3) of the Act.
>
> **[66.3]** The party seeking the order must show specific adverse consequences that are sufficient to justify an exception to the fundamental rule. The standard is a high one.
>
> **[66.4]** In deciding whether it is satisfied that it is desirable to make a suppression order the Tribunal must consider:
>
> > **[66.4.1]** whether there is some material before the Tribunal to show specific adverse consequences that are sufficient to justify an exception to the fundamental rule.
> >
> > **[66.4.2]** whether the order is reasonably necessary to secure the proper administration of justice in proceedings before it. The phrase "the proper administration of justice" must be construed broadly, so that it is capable of accommodating the varied circumstances of individual cases as well as considerations going to the broader public interest.
> >
> > **[66.4.3]** whether the suppression order sought is clear in its terms and does no more than is necessary to achieve the due administration of justice.

[18] Mr Kee invites the Chairperson to apply these principles with such adjustments as are necessary to accommodate the fact that the orders made by a Chairperson under s 95 are interim only and that the determining criterion under that provision is whether the Chairperson is satisfied the interim order is "necessary in the interests of justice to … preserve the position of the parties pending a final determination of the proceedings".

[19] It has long been recognised by the Tribunal (and by the Chairperson) that non-publication orders are often required in sexual harassment proceedings because intimate personal details of the complainant will be divulged and this is bound to be a deterrent to the making of complaints and the bringing of proceedings by persons who might otherwise have a justifiable grievance. See for example *BNK v Trainor* [2004] NZHRRT 17 at [15] and [46] – [47] and *Director of Proceedings v Emms* [2013] NZHRRT 5 at [123].

[20] Such approach is within the principle recognised by the Supreme Court in *Erceg v Erceg [Publication restrictions]* [2016] NZSC 135, [2017] 1 NZLR 310 at [3] that the general rule of open justice can be departed from if the interests of justice require, albeit only to the extent necessary to serve the ends of justice. At [18] the Court cited with approval the statement made by Kirby P in *John Fairfax Group v Local Court of New South Wales* (1991) 26 NSWLR 131 at 141 that the open administration of justice is not an absolute end in itself. If the very openness of court proceedings would destroy the attainment of justice in the particular case or discourage its attainment in cases generally (as by frightening off blackmail victims or informers) the rule of openness must be modified to meet the exigencies of the particular case.

[21] These comments acknowledge the potentially chilling effect of publicity and the potential discouragement of the making of complaints of sexual harassment. Such circumstances would clearly be to the detriment of the interests of justice.

Assessment

[22] On the (presently) unchallenged evidence of the plaintiff I am satisfied:

> **[22.1]** The plaintiff has shown specific adverse consequences sufficient to justify an exception to the fundamental rule of open justice.
>
> **[22.2]** The interests of justice require that that rule be departed from.
>
> **[22.3]** The making of an interim order in the terms sought by the plaintiff is necessary in the interests of justice to preserve the position of the parties pending a final determination of the proceedings.

INTERIM ORDERS

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

> **[23.1]** Publication of the name, address, occupation and of any other details which could lead to the identification of the plaintiff in these proceedings is prohibited pending further order of the Chairperson or of the Tribunal.
>
> **[23.2]** Publication of the name, address, occupation and of any other details which could lead to the identification of the plaintiff's husband or children is prohibited pending further order of the Chairperson or of the Tribunal.
>
> **[23.3]** There is to be no search of the Tribunal file without leave of the Chairperson or of the Tribunal. The plaintiff and the defendants are to be notified of any request to search the file and given opportunity to be heard on that application.
>
> **[23.4]** Leave is reserved to all parties to make further application should the need arise.

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Mr RPG Haines QC
Chairperson