

- (1) ORDER PROHIBITING PUBLICATION OF CHRISTIAN NAMES OF PLAINTIFF'S CHILDREN
- (2) ORDER PREVENTING SEARCH OF THE TRIBUNAL FILE WITHOUT LEAVE OF THE TRIBUNAL OR OF THE CHAIRPERSON

IN THE HUMAN RIGHTS REVIEW TRIBUNAL

[2021] NZHRRT 39

I TE TARAIPUNARA MANA TANGATA

Reference No. HRRT 067/2016

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN JACINDA KAREN THOMPSON

PLAINTIFF

AND MICHAEL VAN WIJK

FIRST DEFENDANT

AND THE BISHOP OF NELSON

SECOND DEFENDANT (discontinued)

AND THE VICAR OF BLENHEIM PARISH

THIRD DEFENDANT (discontinued)

AT WELLINGTON

BEFORE:

Mr RPG Haines ONZM QC, Chairperson

Ms J Foster, Deputy Chairperson

Ms LJ Alaeinia JP, Member

Ms SB Isaacs, Member

REPRESENTATION:

Ms N Taefi for plaintiff

Mr M Van Wijk in person (absent and did not participate in the hearing)

DATE OF HEARING: 8, 9 and 10 June 2020

DATE OF DECISION: 11 August 2021

DECISION OF TRIBUNAL¹

¹ [This decision is to be cited as *Thompson v Van Wijk* [2021] NZHRRT 39. Note publication restrictions.]

INTRODUCTION

[1] In 2000 the plaintiff had a stillborn baby. The birth was traumatic for the plaintiff and she developed post-traumatic stress disorder. In 2001 the plaintiff's profound grief led her to become a parishioner at the Nativity Anglican Church in Blenheim (Nativity Church). In late 2004, to help the plaintiff with her grief and trauma at the death of her baby and her faith issues, Mr Van Wijk, then a Reverend at Nativity Church, began providing her with spiritual advice and counselling. The plaintiff claims Reverend Van Wijk sexually harassed her on several occasions in early 2005, including one occasion where he forcibly attempted to have sexual intercourse with her.

[2] The plaintiff seeks a declaration that Mr Van Wijk discriminated against her by sexually harassing her in breach of s 62 of the Human Rights Act 1993 (HRA) and an award of \$150,000 damages for humiliation, loss of dignity and injury to feelings.

[3] Mr Van Wijk denies the claim. He did not participate in the hearing of the claim.

[4] In this decision the Tribunal will use both Mr Van Wijk and Reverend Van Wijk when referring to the defendant. Reverend Van Wijk will be used when the Tribunal is discussing events that occurred when the defendant was a Reverend.

Proceedings history

[5] In October 2016 the plaintiff filed this claim. The claim was initially brought against Mr Van Wijk as the first defendant; the Bishop of Nelson as the second defendant; and the Vicar of Blenheim Parish as the third defendant. The claim against the second and third defendants was on the basis they were vicariously liable for the alleged sexual harassment under HRA, s 68, as Mr Van Wijk was at the relevant time their employee or agent. The remedies were sought against all the defendants and included a declaration, a training order and damages of \$100,000 for humiliation, loss of dignity and injury to feelings caused by the actions of Mr Van Wijk as particularised in the statement of claim.

[6] In November 2016 Mr Van Wijk filed an amended statement of reply defending the claim. In his reply he denies sexually harassing the plaintiff and says they had a consensual intimate relationship and any sexual intimacy was consensual. He raised a limitation defence in respect of the claim for damages as a remedy.

[7] The Bishop of Nelson and the Vicar of Blenheim Parish initially defended the claim. In December 2016 they filed an amended statement of reply denying the claim, including on the basis that HRA, s 62 does not apply as Reverend Van Wijk was not providing the plaintiff "goods or services" within the meaning of that section; and that they were not vicariously liable under HRA, s 68 for any sexual harassment that occurred as Reverend Van Wijk was neither their employee nor agent and/or that they took reasonable steps to prevent any sexual harassment. A limitation defence was raised in respect of the claim for damages as a remedy.

[8] In October 2018 Mr Van Wijk (who was by then self-represented) gave notice that he would not take any further part in these proceedings in an email that stated as follows:

My intentions were to contest the allegations of sexual harassment however, I do not have the funds to mount a defence and I am not eligible for legal aid.

I also do not have the ability nor skills to properly defend myself in person. My relationship with Jacinda Thompson was consensual and I admit no wrongdoing. I will not partake in these proceedings but will comply with any orders made by the HRRT.

[9] In June 2019 the Bishop of Nelson and the Vicar of Blenheim Parish filed a second amended statement of reply that essentially no longer denied the claims against them under HRA, ss 62 and 68, (they admitted Reverend Van Wijk's pastoral role included providing spiritual counsel and advice, and that he was their agent) and they abandoned their limitation defence.

[10] On 26 March 2020 the plaintiff discontinued her claim against the Bishop of Nelson and the Vicar of Blenheim Parish following them entering into a non-confidential deed of settlement. The terms of the settlement included the plaintiff would be paid \$100,000 compensation as sought in the statement of claim for humiliation, loss of dignity and injury to feelings; a public apology would be made to the plaintiff (this was given by way of a press release dated 23 March 2020); the Diocese of Nelson would take specific steps to address sexual harassment and improve safety for parishioners; and the plaintiff would discontinue her claim against these defendants but not Mr Van Wijk.

[11] On 25 May 2020 Mr Van Wijk confirmed by email that he maintained the position that he would not be taking any further part in the proceedings (as expressed in his email dated 15 October 2018) and would not be attending the hearing.

[12] On 27 May 2020 the plaintiff filed a memorandum amending the relief sought in her claim, including increasing the damages sought from Mr Van Wijk for humiliation, loss of dignity and injury to feelings to in the order of \$150,000.

The law

[13] The plaintiff's claim is that Mr Van Wijk sexually harassed her in breach of HRA, s 62. Section 62 is set out at [55].

[14] It is for the plaintiff to establish, on the balance of probabilities, that Mr Van Wijk has discriminated against her by sexually harassing her in breach of s 62 as alleged (see s 92(3)). It is not a defence to these proceedings that any breach of s 62 was unintentional or without negligence on Mr Van Wijk's part (see s 92(4)).

[15] If the plaintiff establishes a breach of s 62 then the Tribunal may grant any of the remedies in s 92(3). The Tribunal must take the conduct of the parties into account in deciding what, if any, remedy to grant (see s 92(4)).

The issues

[16] The key issues that the Tribunal must determine are:

[16.1] Whether the plaintiff was sexually harassed by Mr Van Wijk in breach of HRA, s 62.

[16.2] If the plaintiff was sexually harassed in breach of HRA, s 62, what remedies should be granted, including whether the Limitation Act 1950 applies to bar the damages relief sought.

THE EVIDENCE

The witnesses

[17] Only the plaintiff presented evidence as Mr Van Wijk chose not to participate in the hearing. The Tribunal heard evidence from the following witnesses:

[17.1] The plaintiff.

[17.2] The plaintiff's husband.

[17.3] Dr Ian Goodwin, consultant psychiatrist, who gave independent expert evidence as to whether the plaintiff was under a disability that led to the delay in bringing proceedings.

[17.4] Miss Joyce Parker, a former counsellor of the plaintiff.

[17.5] Miss Jillian Jane Larsen, a retired clinical psychologist, who provided support to the plaintiff from 2014 onwards.

[17.6] Miss Margaret Corbet Dewar, clinical psychologist, who treated the plaintiff between February and December 2007.

[17.7] Reverend Susan Maree Howath who worked at Nativity Church from 2008 until 2018.

[18] The plaintiff also provided the Tribunal with numerous documents, including some that were contemporaneous, that supported her account of events.

SUMMARY OF EVIDENCE

[19] The plaintiff and her witnesses were all found to be sincere and genuine. No issues of credibility or reliability arise in respect of their evidence.

[20] The case is to be determined on the facts established by the evidence of the plaintiff and her witnesses. It is unnecessary to set out all that evidence. The following sets out the relevant facts. Some findings of fact are further discussed in other sections of the decision.

[21] In 2000 the plaintiff had a stillborn baby. The baby had an abnormality that meant the pregnancy could not go full term. The birth was very traumatic for the plaintiff and she developed post-traumatic stress disorder (although this was not officially diagnosed until 2007).

[22] The plaintiff found comfort in the belief the baby was with God. In 2001 she became a regular parishioner at the Nativity Anglican Church (Nativity Church) in Blenheim, in the Diocese of Nelson. The Nativity Church quickly became a big part of the plaintiff's life; she became involved with a weekly mothers group, helped run the Sunday morning creche, and was often a communion assistant.

[23] Around early 2003 Reverend Van Wijk and his then wife, Reverend Moss, joined the staff at Nativity Church. Reverend Van Wijk held a licence as a priest and held the office of priest assistant at Nativity Church. The plaintiff met Reverend Van Wijk and Reverend Moss at Church and social events. The plaintiff both admired and trusted them.

[24] In 2004 the plaintiff sought assistance from Reverend Moss as she was having flashbacks of her dead baby and was struggling with her faith. Reverend Moss referred the plaintiff to the church counsellor, Ms Hammond. Reverend Moss also recommended the plaintiff speak with Reverend Van Wijk as he had specialised in pastoral care and counselling during his ministry studies.

[25] Trusting Reverend Moss's recommendation, the plaintiff began spiritual counselling sessions with Reverend Van Wijk in December 2004.

[26] During the first spiritual counselling session Reverend Van Wijk spoke about his image of the plaintiff's stillborn baby safe in Jesus' arms and performed a ritual placing oil on the plaintiff's head and a cross in front of her, so she could hand her pain over to Christ. This upset the plaintiff and he put his arm around her and began rubbing her back. The plaintiff felt grateful to Reverend Van Wijk for comforting her by listening and giving her hope her child was in heaven in the arms of Jesus.

[27] At the next session Reverend Van Wijk said he had a lot of psychotherapy experience. He got the plaintiff to try imagining the child in her arms and moving the image to the side. She tried but became upset. Following this meeting they began exchanging in-depth emails regarding her grief and feelings. The plaintiff found Reverend Van Wijk's emails made her feel safe and that she could trust him. He began to increasingly befriend the plaintiff and confide in her, stressing the importance of her keeping everything confidential.

[28] In February 2005 the plaintiff began counselling with Ms Hammond. During counselling a role playing exercise triggered flashback memories and physical reactions in the plaintiff. She became lightheaded, nauseous, and couldn't stop her hands shaking. Ms Hammond recommended she see a specialist post-traumatic stress disorder therapist and consider taking antidepressants, but the plaintiff was not keen to do so.

[29] Sometime in February Reverend Van Wijk set up a new small "care cell group" that he insisted the plaintiff join. The group rules were explained by him as including total confidentiality as to what happened in the group. On 22 February 2005 Reverend Van Wijk introduced foot washing to the group meetings – so he could serve the members by both washing and massaging their feet, as Jesus served. After the other members had left and the plaintiff was waiting for her counselling session with Ms Hammond, Reverend Van Wijk asked to practice another foot washing on her. As he washed and massaged her feet he touched further up her lower legs, saying he was "turned on" and commenting that "women are lucky that it doesn't show". The plaintiff didn't know what to say, felt embarrassed and that he had acted inappropriately. He apologised, saying he was a very honest person.

[30] In late February 2005 Reverend Van Wijk became the plaintiff's spiritual advisor/mentor after he explained that he and the church counsellor, Ms Hammond were looking at moving to a team approach for people with needs such as the plaintiff's. The intention was to meet weekly. Reverend Van Wijk also set up a separate private email for the mentoring and had the plaintiff do the same.

[31] On 24 February 2005 Reverend Van Wijk came to the plaintiff's home for the first mentoring meeting because his office was a mess. The session began with a foot massage and during this Reverend Van Wijk began touching the plaintiff further up her leg until his hand was on her upper thigh. She asked him to stop and became upset. She began crying after he spoke about how she had to be honest. Reverend Van Wijk got the

plaintiff to sit on his knee, saying "It's okay, you can come to the Father". Whilst she was still crying heavily he put his arm around her and asked her to kiss him. Although she repeatedly said "No" and was crying, he kissed her several times on her mouth and face and was rubbing her inner thigh, saying "It's okay". The plaintiff was still teary after he left, she felt embarrassed, intensely confused, bad and guilty.

[32] The plaintiff subsequently told Reverend Van Wijk that if they were going to keep meeting for mentoring, she wanted boundaries. He, however, made light of the holy kisses, hand holding, foot massage and hugs, making the plaintiff feel it was normal Christian practice. One Sunday morning while a church service was in progress Reverend Van Wijk, who was fully robed, got the plaintiff out of the creche on the pretext of seeing him upstairs for a minute. He kissed her, saying "I needed that". This prompted the plaintiff to again ask for boundaries, telling him physical touching and holy kisses made her uncomfortable and confused, and she was betraying her husband and his wife. He agreed to the boundaries.

[33] The spiritual counselling sessions with Reverend Van Wijk continued in March 2005. At a session at Reverend Van Wijk's home the plaintiff became upset as she shared some of her vivid memories of the child's birth, she was crying heavily, struggling with intrusive memories of her dead child, feeling light-headed and distant. Reverend Van Wijk took off her top and her bra, held her breasts, put his hand up her skirt, rubbing her genital area and put his finger in her vagina saying he would massage the pain away and she needed to open up and trust him. This made the plaintiff extremely confused and she couldn't understand what had happened.

[34] Following this the plaintiff told Reverend Van Wijk she didn't want to do the sessions anymore and she did not want him to touch her. He did not want to stop the sessions and encouraged her to continue as she was making progress with the memories. He eventually apologised, promising boundaries. The plaintiff believed he was sincere and would not touch her again. She also feared leaving the Church and was desperate for help with her mental health.

[35] During the next few counselling sessions Reverend Van Wijk did not touch the plaintiff. Around 17 March 2005 at a session at Reverend Van Wijk's house the plaintiff became light-headed, nauseous and was in a flashback. Whilst the plaintiff was crying Reverend Van Wijk undid her shorts and fingered her vagina. The plaintiff left feeling very confused and upset.

[36] Later that day the plaintiff told him she never wanted to see him again and she was going to quit the Church. He responded by sending her multiple emails about how they had to be together and included comments about how he found her extremely sexy and how the first time he saw her he knew he had to have her. A day or two later he told the plaintiff he had told his wife he was leaving and he was talking about his plan for them. The plaintiff told him again she did not want to see him anymore and to leave her alone. She felt angry having to repeat this and she also felt intense pressure, guilt, shame and confusion.

[37] Because Reverend Van Wijk told the plaintiff he would believe her if she told him face to face, she went to his home on 22 March 2005. At the door she told him she didn't want to see him again, but he didn't seem to hear her and was talking about how she could leave her husband. The plaintiff became upset and was crying. Reverend Van Wijk led her to the bedroom, telling her she owed it to him to talk things through. Whilst the plaintiff was crying he undressed her and then himself. Although the plaintiff was resisting

and saying repeatedly “No” he pulled her to the bed and attempted to have intercourse with her. He was saying things like she needed him to take the pain of her dead child away and that the child’s memory would consume her without his help. The plaintiff was very upset; she pulled away, got dressed, and left in tears.

[38] That night the plaintiff was so upset she told her husband there was stuff that had happened with Reverend Van Wijk.

Events after the plaintiff revealed Reverend Van Wijk’s abuse

[39] The plaintiff described the time after she revealed the abuse as one of total confusion, emotional pain and anxiety. The impact of the abuse on the plaintiff is discussed below at [93]-[97].

[40] Reverend Van Wijk continued to email and phone the plaintiff despite her not replying to the emails and she and her husband asking him to stop calling. In late March the plaintiff sought Vicar Elana’s help to get Reverend Van Wijk to stop contacting her, but he continued to call the plaintiff. His last phone call to the plaintiff was in May 2005.

[41] After her husband knew about what Reverend Van Wijk had been doing he complained about what was going on to Reverend Turrell, a senior member of Nativity Church.

[42] In June 2005 the plaintiff gave Vicar Elana a written statement of what had happened. She was advised a few weeks later, in July 2005, that Reverend Van Wijk had resigned (he had surrendered his licence).

[43] Later in 2005, some six months after revealing Reverend Van Wijk’s abuse the plaintiff starting counselling with Lorraine Moffat at Bread of Life Church. Ms Moffat advised the plaintiff she was sexually abused, and the counselling would be funded by the ACC Sensitive Claims Unit. She also diagnosed the plaintiff as suffering from PTSD. In 2006 the plaintiff quit this counselling as she thought she was getting worse.

[44] In February 2006 the plaintiff’s GP put her on antidepressants.

[45] In February 2007 the plaintiff began counselling with a clinical psychologist, Miss Dewar. Ms Dewar also considered the plaintiff was a victim of sexual abuse, obtained funding from the ACC Sensitive Claims Unit and gave a formal diagnosis of PTSD and depression. It was extremely difficult for the plaintiff to speak about either her child’s death or the details of the abuse itself. She found counselling hard and ended this in December 2007.

[46] In February 2007 the plaintiff complained to the Health and Disability Commissioner, but the complaint was outside of that jurisdiction. The Church’s Title D process was suggested as an appropriate course of action but the plaintiff did not trust Church leadership so did not pursue it.

[47] In September 2007 the plaintiff consulted lawyers on pursuing a claim. However, she found it too difficult to go over everything and did not feel strong enough to cope with taking legal steps. She decided to delay taking any action and instead focused on coping strategies. The lawyers closed their file in 2008.

[48] In 2014 the plaintiff, on the recommendation of the family pastor, Susan Howard, met with Jillian Larsen, a retired psychologist who had experience working with victims of sexual abuse. Whilst not providing formal counselling, Ms Larsen helped the plaintiff with coping strategies for PTSD.

[49] In November 2014 the plaintiff laid a Police complaint about Mr Van Wijk.

[50] In 2015 the plaintiff began seeing Joyce Parker who was working as a counsellor in the Anglican Church and who had experience working with sexual abuse victims. The plaintiff continued to see her until 2017.

[51] On 10 February 2016 the plaintiff made a complaint to the Human Rights Commission.

[52] On 8 May 2016 the plaintiff wrote to the Nelson Diocese and asked for her 2005 complaint to be reopened and the Anglican Church's Title D procedure to be used. The Anglican Church Disciplinary Tribunal found that Mr Van Wijk had engaged in misconduct by acting in a manner inappropriate or unbecoming to the office and work of a Minister. His ordination was revoked. On 5 December 2016 the Title D determination was published. It was that:

Reverend Van Wijk knowingly engaged in sexual conduct with the complainant to which she did not truly consent. In doing so he engaged in misconduct by acting in a manner inappropriate or unbecoming to the office and work of a minister including:

- (a) An act of corruption or immorality; and
- (b) An act of sexual harassment or disregard for responsible personal relations.

Given the seriousness of this misconduct I hereby depose (permanently take away) the Reverend Michael Van Wijk of his right to perform the duties of every office for which Holy Orders are required, and thereby render him ineligible for re-election or re-appointment to the office or to any other office in this Church.

[53] In 2016 the Police advised the plaintiff that they had investigated her complaint but that no charges would be laid because there was insufficient evidence to prove a criminal offence. Following the plaintiff complaining about that decision the investigation file was reviewed by a specialist team of Police in 2018 who agreed with the decision not to prosecute. The plaintiff then complained to the Independent Police Complaints Authority.

[54] In May 2019 the Independent Police Complaints Authority advised the plaintiff their view was that the decision not to prosecute was an appropriate one as the evidence was insufficient to meet the very high standard required to prove a criminal case. The Authority, nevertheless, agreed with the plaintiff there were several deficiencies in how Police had communicated with her and for which they had now apologised. They also advised that as a result of her complaint, the Police District Commander for Tasman District was reviewing sexual assault practice and procedures to ensure investigations are complying with adult sexual assault investigation policy and procedures. The Authority had oversight of that review.

Sexual harassment in breach of s 62

[55] Sexual harassment is defined in HRA, s 62 as set out below.

62. Sexual harassment

- (1) It shall be unlawful for any person (in the course of that person's involvement in any of the areas to which this subsection is applied by subsection (3)) to make a request of any other person for sexual intercourse, sexual contact, or other form of sexual activity which contains an implied or overt promise of preferential treatment or an implied or overt threat of detrimental treatment.
- (2) It shall be unlawful for any person (in the course of that person's involvement in any of the areas to which this subsection is applied by subsection (3)) by the use of language (whether written or spoken) of a sexual nature, or of visual material of a sexual nature, or by physical behaviour of a sexual nature, to subject any other person to behaviour that—
 - (a) is unwelcome or offensive to that person (whether or not that is conveyed to the first-mentioned person); and
 - (b) is either repeated, or of such a significant nature, that it has a detrimental effect on that person in respect of any of the areas to which this subsection is applied by subsection (3).
- (3) The areas to which subsections (1) and (2) apply are—
 - (a) the making of an application for employment:
 - (b) employment, which term includes unpaid work:
 - (c) participation in, or the making of an application for participation in, a partnership:
 - (d) membership, or the making of an application for membership, of an industrial union or professional or trade association:
 - (e) access to any approval, authorisation, or qualification:
 - (f) vocational training, or the making of an application for vocational training:
 - (g) access to places, vehicles, and facilities:
 - (h) access to goods and services:
 - (i) access to land, housing, or other accommodation:
 - (j) education:
 - (k) participation in fora for the exchange of ideas and information.
- (4) Where a person complains of sexual harassment, no account shall be taken of any evidence of the person's sexual experience or reputation.

[56] A breach of s 62 can be established under either s 62(1) or s 62(2). For s 62 to apply the alleged sexual harassment must occur in one of the areas defined in s 62(3).

[57] The plaintiff's claim is made under both ss 62(1) and (2), and on the basis the field in which sexual harassment occurred was access to services (s 62(3)(h)).

[58] As all the plaintiff's allegations of sexual harassment can be considered under s 62(2) it is unnecessary for the Tribunal to also consider whether some of the allegations of sexual harassment would also be a breach of s 62(1).

[59] To establish a breach of s 62(2) the plaintiff must establish each of the following:

[59.1] Reverend Van Wijk was providing the plaintiff services for s 62(3)(h) purposes;

[59.2] When in the course of providing the plaintiff services, he used language or physical behaviour of a sexual nature;

[59.3] That language or physical behaviour of a sexual nature was unwelcome or offensive to the plaintiff;

[59.4] That language or physical behaviour of a sexual nature was either repeated or of such a significant nature it had a detrimental effect on the plaintiff in respect of her access to the HRA, s 62(3)(h) services.

Was Reverend Van Wijk providing the plaintiff with services for the purposes of s 62(3)(h)?

[60] The plaintiff's claim is made on the basis Reverend Van Wijk was providing the plaintiff services in terms of s 62(3)(h). The term "goods and services" in s 62(3)(h) is not defined in the HRA.

[61] In Mr Van Wijk's statement of reply he denies he was providing the plaintiff with services. In that reply he says he was involved in a consensual intimate relationship with the plaintiff and denies he was providing her with counselling. He admits to providing the plaintiff with pastoral conversations concerning grief and depression and that in his care cell group he provided spiritual guidance and facilitated theological discussions.

[62] The evidence, however, establishes that the plaintiff was not in a consensual intimate relationship with Reverend Van Wijk. It also establishes her understanding was that she was receiving spiritual counselling, spiritual advice and mentorship from Reverend Van Wijk. He had also been recommended by Reverend Moss to provide suitable counselling to the plaintiff on the basis he had specialised in pastoral care and counselling during his studies for the Ministry. The Tribunal finds Reverend Van Wijk was providing the plaintiff with spiritual counselling.

[63] The Tribunal is satisfied the term "services" in s 62(3)(h) includes counselling, including spiritual counselling. Accordingly, the Tribunal is satisfied that Reverend Van Wijk was providing the plaintiff with services in terms of s 62(3)(h).

Did Reverend Van Wijk use language or physical behaviour of a sexual nature that was unwelcome or offensive to the plaintiff?

[64] It is convenient to consider together the next two elements required to establish a breach of s 62(2). That is, that Reverend Van Wijk in the course of providing services to the plaintiff used language or physical behaviour of a sexual nature that was unwelcome or offensive to the plaintiff. The test for each of these elements is set out and then applied to the facts of this case.

[65] The test for whether the language used and the physical contact by Reverend Van Wijk were of a sexual nature is an objective one. See *DML v Montgomery* (2014) 15 NZELR 673 at [103]. The intention of Reverend Van Wijk is irrelevant, see HRA, s 92(4).

[66] In addition, HRA, s 62(2) requires that the use of language or physical behaviour of a sexual nature occurred in the course of Reverend Van Wijk providing the plaintiff services. That is, it must be somehow related or associated with the provision of the services. See *Director of Human Rights Proceedings v Smith* [2004] NZHRRT 50 at [66]-[68].

[67] The test for whether the physical behaviour of a sexual nature was unwelcome or offensive to the plaintiff is a subjective one. It is immaterial whether Reverend Van Wijk considered the language or physical behaviour of a sexual nature to be unwelcome or offensive. The context in which the words and behaviours occurred and the nature of the relationship between the plaintiff and Reverend Van Wijk is a relevant consideration. See *DML v Montgomery* at [105]-[109].

[68] We are satisfied that Reverend Van Wijk in the course of providing services to the plaintiff used language or engaged in physical behaviour of a sexual nature on multiple occasions. These include occasions where Reverend Van Wijk made sexual comments to the plaintiff, kissed her, undressed her, touched her on the legs, upper thigh, breasts, genitals, digitally penetrated her vagina and attempted to have sexual intercourse with her. See paragraphs [29] to [37] above.

[69] We are also satisfied that on each occasion the language or physical behaviour of a sexual nature was unwelcome to the plaintiff, and in some instances was also offensive. On all of these occasions the plaintiff was either embarrassed, upset or confused. On some occasions the plaintiff protested or tried to resist at the time. In all but the first instance she subsequently sought to stop the sexual behaviour by asking Reverend Van Wijk for boundaries or seeking to limit or end contact with him.

[70] Accordingly, the Tribunal is satisfied that on multiple occasions Reverend Van Wijk in the course of providing services to the plaintiff used language or physical behaviour of a sexual nature that was unwelcome or offensive to the plaintiff.

Was the language or physical behaviour of a sexual nature repeated or of such a significant nature it had a detrimental effect on the plaintiff's access to services?

[71] It must be established that the detrimental effect on the plaintiff was in respect of her access to pastoral services. Detriment is a term that is not to be read down and if the physical behaviour of a sexual nature has a detrimental effect, the case is made out.

[72] The fact that the victim either voices robust objection on the one hand or elects to tolerate the harassment, however unwelcome and offensive on the other, does not make any difference. See *DML v Montgomery* at [117]. As noted there it includes the undermining of the complainant's health and having to work in a strained, tense work atmosphere. Detriment has also been found to include loss of self-esteem and loss of trust in those around the complainant. See *Proceedings Commissioner v Dally* [1996] NZCRT 33 (22 August 1996) at p 8.

[73] Here it is clear the behaviour at issue is both repeated and of such a significant nature that it had a detrimental effect on the plaintiff's access to services. The multiple instances of the behaviour included the plaintiff being subjected to repeated incidents of unwanted physical contact, some of it extremely intrusive and serious. Further, the most serious instances of the behaviour occurred in circumstances where Reverend Van Wijk had used the plaintiff's dead child as a tool to manipulate her into an extremely vulnerable state when he was supposed to be providing her with counselling and spiritual guidance to help her with the loss and trauma of the child's death.

[74] It is unsurprising the behaviour had a detrimental effect on the plaintiff's access to pastoral services. We find the plaintiff suffered substantial detriment in respect of her access to services as follows:

[74.1] During the several week period that the sexual harassment occurred the plaintiff suffered detriment in the form of confusion, distress, discomfort and upset, both at the time the harassment occurred and afterwards.

[74.2] The plaintiff ultimately had to stop accessing any of the pastoral services she had been receiving and sever all links with Nativity Church and any pastoral services they could provide.

[74.3] The plaintiff also suffered long-term effects in relation to access to counselling services. She found counselling difficult because she found it hard to trust, she found it difficult to attend faith-based counselling and she does not feel she will be able to get counselling again from a male.

Section 62 – summary of findings

[75] For the reasons given, we find all the sexual harassment elements prescribed by HRA, s 62 have been established. In particular we have concluded that Reverend Van Wijk, while involved in providing the plaintiff with pastoral services, used language and physical behaviour of a sexual nature and subjected the plaintiff to behaviour which to her was both unwelcome and also at times offensive. This behaviour was both repeated and of such a significant nature that it had a detrimental effect on her in respect of her access to pastoral services from Nativity Church.

[76] Having found that the plaintiff has established that Mr Van Wijk sexually harassed her in breach of HRA, s 62, we now turn to assess remedy.

REMEDY - ASSESSMENT

Declaration

[77] We have found that Mr Van Wijk has sexually harassed the plaintiff in breach of HRA, s 62. The plaintiff seeks a formal declaration to that effect. There is nothing in this case that would justify withholding from the plaintiff a declaration that Mr Van Wijk committed a breach of Part 2 of the Human Rights Act 1993 in that the plaintiff was subjected to language and physical behaviour of a sexual nature which was unwelcome and offensive to the plaintiff and which was repeated and of such a significant nature that it had a detrimental effect on the plaintiff in the course of her access to pastoral services.

Damages for humiliation, loss of dignity and injury to feelings

[78] The plaintiff also seeks an order for damages for humiliation, loss of dignity and injury to feelings under HRA, s 92M(1)(c).

[79] Before assessing the damages claim it is necessary to consider the limitation defence raised by Mr Van Wijk and the relevance of delay.

Limitation defence and relevance of delay

[80] Mr Van Wijk pleaded an affirmative defence that damages sought by the plaintiff are time barred by s 4 of the Limitation Act 1950, as the events at issue in these proceedings occurred in 2005 and the six-year limitation period applies to the damages claim.

[81] In *Ashworth v Kent* [2018] NZHRRT 55 the Tribunal discussed why a defendant does not have a limitation defence under the Limitation Act 2010 or the Limitation Act 1950 in Tribunal proceedings but that the principle that claims should be brought promptly applies by analogy. The Tribunal accordingly has a discretion to refuse relief for undue delay.

[82] The delay in this case is not undue, however, for the following reasons. The reason for delay was the plaintiff was under a recognised disability that prevented her from

progressing her claim and that disability was in part brought about by the sexual harassment she seeks relief for. It is accepted that the complainant's illness was episodic in nature, but that the underlying condition remained and significantly inhibited her capacity to bring these proceedings.

[83] The Tribunal heard independent expert evidence from psychiatrist, Dr Ian John Goodwin, that the plaintiff satisfied the test in *J v J* [2014] NZCA 445 for unsoundness of mind and establishes she was under a disability while of unsound mind that precluded her from bringing proceedings between 2005 and 2014 when she was able to make her Police complaint. This was due to a combination of PTSD and depression.

[84] Nor has there been any evidence or submissions presented of any prejudice to Mr Van Wijk arising from this claim being brought years after the events at issue. As Ms Taefi, counsel for the plaintiff submitted, the numerous steps taken by the plaintiff prior to bringing this claim would make it difficult for Mr Van Wijk to establish there had been prejudice to him arising from a lack of notice, or that he had a reasonable expectation the matter was resolved, or that he would be able to show that those involved did not have a clear recollection of events. There is contemporaneous documentation of what occurred from the perspective of the parties. Over the years the plaintiff made the following formal complaints about Mr Van Wijk: to the Church in June 2005; to the Health and Disability Commissioner in 2007 (that he would likely have been notified of); and to Police in 2014 (that was investigated). When in November 2016 the Anglican Church Diocese Tribunal reopened the plaintiff's 2005 complaint Mr Van Wijk participated in that process and did not allege delay caused him prejudice.

[85] The onus is on Mr Van Wijk to convince the Tribunal the delay warrants denial of monetary relief. He having taken no part in the proceedings the Tribunal is well-satisfied by the plaintiff's evidence that the delay in this case does not warrant denial of damages.

Assessment of damages

[86] The plaintiff seeks damages for humiliation, loss of dignity and injury to feelings under HRA, s 92M(1)(c) in the order of \$150,000.

[87] The monetary limits on remedies the Tribunal may grant is provided for in HRA, s 92Q and at the time this proceeding was filed, that limit was \$200,000.

[88] The plaintiff accepts that no award of damages can be made against Mr Van Wijk if the Tribunal determines the appropriate amount to compensate the plaintiff for her humiliation, loss of dignity and injury to feelings is \$100,000 or less. That is because the Tribunal must take account of the \$100,000 compensation for humiliation, loss of dignity and injury to feelings the plaintiff received under the deed of settlement with the Bishop of Nelson and the Vicar of Blenheim Parish (discussed above at [10]). Wherever multiple parties are responsible to a plaintiff, the overriding consideration is that the plaintiff cannot recover more than once.

[89] Before considering appropriate damages in this case, it is useful to consider the general principles relevant to this matter that apply to the three heads of damages as discussed in *Hammond v Credit Union Baywide* [2015] NZHRRT 6 at [170] and *Marshall v IDEA Services (HDC)* [2020] NZHRRT 9 at [88]-[92] and [101]-[107]. That is:

[89.1] There must be a causal connection between the sexual harassment and the damages sought.

[89.2] The plaintiff is not required to establish all three of the heads of damages referred to in HRA, s 92M(1)(c). These heads of damage are to be read disjunctively, and it is not to be assumed because one head of damage is established, that others are as well.

[89.3] 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.

[89.4] The circumstances of humiliation, loss of dignity and injury to feelings are fact specific.

[89.5] Humiliation and injury to feelings are assessed subjectively, on the basis of the impact of the actions of the actual defendant in any given case and accordingly turn on the personality of the aggrieved individual.

[89.6] Loss of dignity damage, on the other hand, is to be assessed objectively without reference to how the plaintiff has reacted or feels and without reference to whether the plaintiff is capable of reacting or feeling. If damages are to be awarded it will be for the vindication of the dignity interest, not to compensate for emotional harm or other feelings.

[90] We adopt the definitions of humiliation, loss of dignity and injury to feelings set out in *Hammond v Credit Union Baywide* at [170], and *Marshall v IDEA Services (HDC)* at [91]-[92].

[91] In respect of damages in sexual harassment cases in *DML v Montgomery* at [140] the Tribunal held the following:

[140] Provided a causal connection between the breach of s 62 and the damages sought is established, damages in sexual harassment cases must be genuinely compensatory and should not be minimal. See *Laursen v Proceedings Commissioner* (1998) 5 HRNZ 18 (HC) at 26 (Gallen ACJ). In that case it was also held that the real question is what is an appropriate response to adequately compensate the complainant for the behaviour which she suffered and the compensation should meet the broad policy objectives of the legislation. In the subsequent *Carlyon Holdings Limited v Proceedings Commissioner* (1998) 5 HRNZ 527 (HC) at 535 Potter J agreed with Gallen J that the appropriate starting point is to ask what is an appropriate response to adequately compensate the complainant for the behaviour which she suffered. In addressing this question the criteria appropriate for the Tribunal to take into account included such matters as:

- [140.1] The nature of the harassment.
- [140.2] The degree of aggressiveness and physical contact in the harassment.
- [140.3] The ongoing nature.
- [140.4] The frequency.
- [140.5] The age of the victim.
- [140.6] The vulnerability of the victim.
- [140.7] The psychological impact of the harassment upon the victim.

Potter J at 535 went on to comment:

However, each case must be considered on its merits, which it seems to me a specialist tribunal such as the Tribunal, is especially suited to do. Accordingly it was of little assistance to me to be referred by counsel for the appellants to the schedule of Tribunal awards and to be invited to make comparisons.

[92] The Tribunal is satisfied as set out below as to the impact of the sexual harassment on the plaintiff that there is causal connection between the breach of HRA, s 62 and the damages sought.

Humiliation and injury to feelings suffered by plaintiff from the sexual harassment

[93] In this case the plaintiff's evidence of humiliation and injury to feelings is profound. The plaintiff, her husband and those who have supported and counselled her throughout the years gave evidence about the pervasive impact of the sexual harassment on every aspect of the plaintiff's life (her physical and psychological health, her relationship with her husband, with the community, on her work life and her faith) and the deep humiliation and injury she has suffered as a result.

[94] As well as humiliation, the plaintiff experienced the injury to her feelings directly caused by the sexual harassment including suicidal feelings, feelings of betrayal, victimisation, a loss of trust in men, a loss of faith, isolation, loneliness, guilt, feeling "dirty", feelings of powerlessness, anger, anxiety, embarrassment, fear, confusion, distress and despair.

[95] There is still distress the plaintiff experiences when recalling her dead child because it is connected now to the sexual harassment she suffered.

[96] The plaintiff was away from Nativity Church for five years and has found the journey back to faith and church extremely hard. There are still effects on the plaintiff's feelings in relation to her faith.

[97] The plaintiff has established she suffered significant humiliation and injury to feelings. In these circumstances it is unnecessary to also consider whether the plaintiff suffered loss of dignity. We do not consider in this case it is necessary or appropriate to approach the damages assessment by awarding an amount for humiliation and injury to feelings and an additional amount for loss of dignity. A global assessment of damages must be made. We simply record that the plaintiff submitted she had also suffered loss of dignity as a result of the sexual harassment.

Appropriate response to adequately compensate the plaintiff

[98] Adopting the approach taken in *DML v Montgomery* as set out above, the starting point is to ask what is an appropriate response to adequately compensate the plaintiff for the behaviour which she suffered. The relevant factors to take into account (as set out in that decision and above at [91] are addressed below.

[99] The nature of the harassment in this case was serious. It occurred within the context of a trusted relationship where the plaintiff was supposed to be receiving services to aid her, not further harm her. It involved the plaintiff being manipulated by Mr Van Wijk into an even more vulnerable state, using her stillborn child and her faith as tools to exploit her so she could be sexually abused.

[100] There was a significant degree of physical contact in the harassment, including fondling the plaintiff's breasts, two instances of digital penetration and attempted sexual intercourse that involved force.

[101] There were repeated incidents of harassment, over a period of approximately four weeks, despite the plaintiff trying to put in place boundaries so it would not reoccur.

[102] The plaintiff was particularly vulnerable. She was suffering from PTSD (undiagnosed until later) from the stillbirth of her child some years before, and she was desperate for help dealing with her grief.

[103] The psychological impact of the harassment on the plaintiff has been profound, as set out above.

[104] The Tribunal must also take into account the conduct of the parties in deciding what, if any, remedies to grant under HRA, s 92(4).

[105] The plaintiff has done nothing that would disentitle her to damages or reduce their amount. To the contrary, the plaintiff tried to stop any further sexual harassment by repeatedly asking Mr Van Wijk for boundaries and trying to reduce and then end contact with him.

[106] On the other hand, Mr Van Wijk continued to contact the plaintiff for weeks after he had been clearly and repeatedly asked not to contact her. He was still wanting to be friends, offering to help with her dead child and trying to justify his actions. Further, Mr Van Wijk has not accepted responsibility for what occurred.

[107] The plaintiff submits that this case is in the most serious category of cases when applying the three broad bands for the awards of humiliation, loss of dignity and injury to feelings as set out by the Tribunal in *Hammond v Credit Union Baywide* at [176]. The plaintiff seeks damages in the order of \$150,000. She notes that in *Hammond* where the plaintiff suffered enormous stress over a prolonged period of time, the Tribunal had awarded damages of \$98,000 for humiliation, loss of dignity and injury to feelings. The plaintiff also notes that an award of \$120,000 for this type of damages was made in *MacGregor v Craig* [2016] NZHRRT 6. In that case Ms MacGregor had suffered severe humiliation, loss of dignity and injury to feelings following the breach of terms of a settlement agreement and prolonged exposure to a publicity campaign of unprecedented proportions by Mr Craig.

[108] In making the damages assessment for the humiliation and injury to feelings the plaintiff suffered from the sexual harassment by Mr Van Wijk, the Tribunal cannot compensate the plaintiff for:

[108.1] The PTSD and depression from which she already suffered prior to the sexual harassment occurring.

[108.2] Damages arising directly or indirectly out of a personal injury covered by the Accident Compensation Act 2001 (see s 317(1) of that Act). See also *Wilding v Attorney-General* [2003] 3 NZLR 787, *Mitchell v Blue Star Group* [2008] ERNZ 594 and *Harrild v Director of Proceedings* [2003] 3 NZLR 289.

[108.3] Her suffering arising from the way the Anglican Church dealt with her complaint about the sexual harassment.

[109] We agree with the plaintiff that this case falls inside the third and highest band identified in *Hammond* [at 176] that is appropriate for the most serious category of cases. That band begins at \$50,000. At the time this case was brought the Tribunal had jurisdiction to award amounts of up to \$200,000. Further, when the plaintiff filed the claim she sought \$100,000 in damages. That figure was nominated by the plaintiff as appropriate for the damages she had suffered.

[110] In our view also \$100,000 is the appropriate response to adequately compensate the plaintiff for the impact of the sexual harassment she sustained over a period of four weeks in circumstances where Mr Van Wijk used his position of trust and power to sexually exploit the plaintiff, using her vulnerability, dead child and her religion. The plaintiff's suffering has been significant.

[111] The overall assessment we have reached as to the appropriate sum to compensate the plaintiff would not be increased were the dignity ground to be included with the grounds of humiliation and injury to feelings. There is therefore no need to explore the degree to which the dignity ground, as recently explained in *Marshall v IDEA Services Ltd (HDC Act)*, has application to the present circumstances. We are, however, clear that whether included in the assessment of damages or not, the outcome in terms of the quantum of our award would be no different.

[112] As the Tribunal has determined that \$100,000 compensation is appropriate for the humiliation and injury to feelings suffered by the plaintiff it follows that no award of damages can be made against Mr Van Wijk (see [88] above). The plaintiff has already received \$100,000 compensation for **that same** humiliation, loss of dignity and injury to feelings following her settlement with the two defendants against whom she discontinued her proceedings (see [10] above). The plaintiff also accepts that no award of damages can be made against Mr Van Wijk if the Tribunal concludes the appropriate amount to compensate the plaintiff for her humiliation, loss of dignity and injury to feelings is \$100,000 or less.

[113] Given our finding that no award of damages is to be made against Mr Van Wijk, it is unnecessary to consider whether the deed of settlement between the plaintiff and the Bishop of Nelson and Vicar of Blenheim Parish operates as a release of liability or as full satisfaction of the plaintiff's damages claims. We simply record that the plaintiff submitted it did not have that effect.

[114] The plaintiff does not seek costs.

DECLARATION

[115] For the reasons given above the decision of the Tribunal is that:

[115.1] A declaration is made under s 92(3)(a) of the Human Rights Act 1993 that Mr Van Wijk sexually harassed Jacinda Karen Thompson in breach of s 62 of the Human Rights Act 1993.

NON-PUBLICATION ORDERS

Interim non-publication orders

[116] On 18 July 2017 in *Thompson v Van Wijk (Application for Non-Publication Orders)* [2017] NZHRRT 25 the Tribunal made interim orders suppressing the publication of the plaintiff's name, that of her husband and those of her children and prohibiting search of the Tribunal file without leave.

[117] On 1 December 2020 in *Thompson v Van Wijk (Variation of Non-Publication Orders)* [2020] NZHRRT 46 those orders were varied at the plaintiff's request by revoking the non-publication orders in relation to the plaintiff and her husband and limiting the non-publication order regarding her children to an order that they not be identified by their

Christian names. The plaintiff's reasons for seeking the amended orders are summarised in that decision at [4] as follows:

- a. The plaintiff intends to participate in the faith-based redress hearing in the Royal Commission into Abuse in Care on 7 December 2020.
- b. The plaintiff is advocating for survivors of abuse in faith-based settings and assisting churches to prevent sexual harassment and abuse. She is finding it difficult to do this, while maintaining her anonymity.
- c. The plaintiff's older children are aware of her claim and what occurred. She intends to tell her younger children when they are older.
- d. The plaintiff wishes to continue to protect her children from being directly identified.
- e. The plaintiff does not wish to speak about the details of the sexual harassment, which are still distressing to her and trigger her PTSD symptoms.
- f. The plaintiff now understands that the shame around what occurred does not belong with her.

Final non-publication orders

[118] The plaintiff seeks final non-publication orders in the same terms as the modified interim non-publication orders.

[119] It is appropriate that a final non-publication order be made in respect of the children's Christian names to avoid potential adverse consequences to them from being directly identified.

[120] It is also appropriate that a final order be made prohibiting search of the Tribunal file without leave and notification to the parties. This allows the plaintiff an opportunity to comment on whether certain intimate details of her private life she has disclosed in these proceedings should remain private. Such an order is appropriate in a sexual harassment case as it allows the Tribunal to balance the public interest in open justice against any harm likely to be caused to the plaintiff and against the general risk that other persons may be deterred from making complaints of sexual harassment. Memoranda filed by the plaintiff that identifies the details she would seek to redact will be highly relevant to that determination.

[121] Both orders only minimally impact on the fundamental rule of open justice and do no more than necessary to achieve the due administration of justice. For the same reasons the orders only minimally limit the right to freedom of expression guaranteed by s 14 of the New Zealand Bill of Rights Act 1990 and are a reasonable limit under s 5 of that Act.

[122] The terms of the final non-publication orders reflect the above.

ORDERS

[123] The following final orders are made under s 107 of the Human Rights Act 1993:

[123.1] The publication of the Christian names of the plaintiff's children (including the Christian name of her child who died during childbirth) is prohibited pending further order of the Chairperson or of the Tribunal.

[123.2] 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 be given an opportunity to be heard on that application.

[123.3] Leave is reserved for all parties to make further application should the need arise.

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Mr RPG Haines ONZM QC
Chairperson

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Ms J Foster
Deputy Chairperson

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Ms LJ Alaeinia JP
Member

.....
Ms SB Isaacs
Member