

- (1) ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION AND OTHER IDENTIFYING DETAILS OF THE PLAINTIFF
- (2) ORDER PREVENTING SEARCH OF THE TRIBUNAL FILE WITHOUT LEAVE OF THE TRIBUNAL OR OF THE CHAIRPERSON

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IN THE HUMAN RIGHTS REVIEW TRIBUNAL

[2024] NZHRRT 2

I TE TARAIPUNARA MANA TANGATA

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Reference No. HRRT 002/2019

UNDER

HUMAN RIGHTS ACT 1993

BETWEEN

BGH

PLAINTIFF

AND

TARUN KUMAR (also known as BALA)

DEFENDANT

AT AUCKLAND

BEFORE:

Ms SJ Eyre, Chairperson

Dr SJ Hickey MNZM, Member

Ms SP Stewart, Member

REPRESENTATION:

Mr M Timmins, Director of Human Rights Proceedings and Ms J Glover for plaintiff

Mr J Harder for defendant

DATE OF HEARING: 8-10 September, 17 November and 10 December 2020

DATE OF DECISION: 30 January 2024

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**(REDACTED) DECISION OF TRIBUNAL<sup>1</sup>**

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[1] BGH was the [occupation redacted] and only female employee at Viti Panel and Paint Limited (Viti). Tarun Kumar<sup>2</sup> was the second in charge at Viti and was a close family

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<sup>1</sup> This decision is to be cited as *BGH v Kumar* [2024] NZHRRT 2, note publication restrictions.

<sup>2</sup> Mr Kumar's legal surname is Kumar, but he is also known as Mr Bala and was referred to as such by BGH and others in evidence.

friend of the owner of Viti, Nilesh Maharaj. BGH claims she was sexually harassed by Mr Kumar over a period of two years, with the final incident of him peeping at her through a hole in the toilet wall the catalyst for her resignation. Mr Kumar denies any sexual harassment, including the peeping incident.

## **BACKGROUND**

[2] BGH started working for Viti part time in November 2014 and then commenced full time work in August 2016. Mr Maharaj was the sole director at Viti; he and Mr Kumar's families were close friends outside of work and there was also a financial relationship between the two families. In total there were five or six men who worked at Viti, including Hari Prasad. Mr Prasad was the former employee who ultimately alerted BGH to the hole in the toilet wall.

[3] The accounts of BGH and Mr Kumar of BGH's experience of working at Viti differ in many respects and are the subject of the Tribunal's credibility considerations later in this decision.<sup>3</sup> The undisputed background is summarised below.

[4] Throughout his workday, Mr Kumar sung Hindi songs either along with the radio or independently of the radio. Mr Kumar and BGH also communicated on occasion, via text and on at least one occasion Mr Kumar sent BGH a video on Vimeo, that video depicted a waitress's bare buttocks. Mr Kumar later laughed about this video outside BGH's office with his male colleagues at Viti.

[5] In November 2016, there were two incidents of concern between BGH and Mr Kumar. The first was in her office on 2 November 2016, where Mr Kumar touched her while she was on the phone. The second was on 15 November 2016 when BGH returned from the toilet and accused Mr Kumar of peeping at her in the toilet. Mr Kumar denied the peeping at the time and continues to deny it.

[6] The second incident was immediately raised with Mr Maharaj and he arranged for the hole to be fixed but provided no other meaningful or substantive response. Later that evening BGH confided in her [redacted], and they decided that BGH would report the matter to the Police as BGH was afraid to return to work. The matter was initially investigated by the Police, but the investigation was closed without any charges being laid.

[7] BGH never returned to work at Viti and was left with no employment for approximately nine months. She attended three counselling sessions recommended by the Police due to her distress and was then also referred to her GP. BGH also sought advice from the Citizens Advice Bureau (CAB) and was subsequently referred to the [redacted] Community Law Centre. BGH was in financial stress and faced uncertainty

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<sup>3</sup> See [27]–[52] below.

regarding her immigration status at that time. She also filed a personal grievance claim against Viti, but the grievance was not resolved at mediation and Viti was subsequently liquidated.

[8] BGH filed a complaint with the Human Rights Commission in May 2017, but the complaint was not resolved and no mediation took place.

### **THE CLAIM**

[9] In January 2019 BGH filed this claim against Mr Kumar and Viti alleging that Mr Kumar had sexually harassed BGH and that Viti was also vicariously liable for Mr Kumar's sexual harassment of BGH.

[10] BGH was granted leave of the High Court to file proceedings against Viti, despite it being in liquidation. However, on 2 August 2019, the liquidator removed Viti from the Companies Register, despite being on notice of these legal proceedings. For practical reasons BGH chose not to apply to the High Court to restore Viti to the register.

[11] Mr Kumar denies sexually harassing BGH and specifically denies much of the behaviour referred to by BGH. The behaviour that did take place, he says, was taken out of context.

[12] The claim proceeded against Mr Kumar only, alleging that he sexually harassed BGH in breach of s 62(2) of the Human Rights Act 1993 (HRA).

### **LEGAL FRAMEWORK**

[13] Sexual harassment is unlawful in employment settings and workplaces.<sup>4</sup> This necessarily includes Viti, where both BGH and Mr Kumar worked.

[14] Sexual harassment is described in s 62 of the HRA. Section 62(2) provides the relevant definition for this claim, as set out below:

#### **62 Sexual harassment**

(1) ...

(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

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<sup>4</sup> Human Rights Act 1993, s 62(3)(a).

- (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).

**[15]** The standard of proof which the Tribunal must apply to assessing the evidence of the alleged sexual harassment is the balance of probabilities.<sup>5</sup> That means the Tribunal must decide if it is more probable than not that a behaviour occurred in the manner described by a particular party or witness.

**[16]** Counsel for Mr Kumar submitted that *Z v Dental Complaints Assessment Committee (Z)*,<sup>6</sup> is authority for the proposition that the Tribunal should apply a third standard of proof, being a “flexible” standard of proof. He referenced the comments of the Chief Justice (who dissented in *Z*) in support of this. The majority view in *Z*, however, explicitly does not provide for a different third standard of proof, rather it reiterates that the balance of probabilities is the appropriate standard, but that “the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard”.<sup>7</sup> This is not a different standard of proof as suggested by counsel for Mr Kumar; it is a flexible approach that the Tribunal may be guided by when determining if an action is more probable than not to have occurred.

**[17]** In this claim, for BGH’s claim to be upheld, the Tribunal must therefore be satisfied that BGH’s evidence proves the issues below to the standard of the balance of probabilities, meaning more probable than not.

## ISSUES

**[18]** The issues which must now be determined by the Tribunal are set out below. The first issue is the necessary credibility assessment, given the marked divergence in accounts of BGH and Mr Kumar regarding the behaviour of Mr Kumar.

**[18.1]** What was the language, visual material or physical behaviour that BGH was subjected to?

**[18.2]** Was that language, visual material or physical behaviour of a sexual nature in her place of employment?

**[18.3]** If so, was that behaviour unwelcome or offensive to BGH?

**[18.4]** If so, was the behaviour either repeated or of such a significant nature that it had a detrimental effect on BGH in respect of her employment?

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<sup>5</sup> Human Rights Act 1993, s 92(3).

<sup>6</sup> *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1.

<sup>7</sup> At [102].

**[18.5]** If so, what is the appropriate remedy?

**WHAT WAS THE LANGUAGE, VISUAL MATERIAL OR PHYSICAL BEHAVIOUR  
THAT BGH WAS SUBJECTED TO?**

**[19]** The evidence of BGH and Mr Kumar regarding the behaviour that occurred while BGH was working at Viti is disputed. Before the sexual nature of the behaviour can be determined the Tribunal must make findings of fact as to what behaviour actually occurred.

**[20]** BGH claims that she was subjected to day-to-day harassment comprising language, visual material and physical behaviour of a sexual nature regularly from the commencement of her employment in November 2014 up to what will be referred to as the office incident on 2 November 2016. BGH then describes a lull in the behaviour until, what is described as, the peeping incident, occurred on 15 November 2016, following which BGH resigned without notice.

**BGH**

**[21]** BGH described the day-to-day harassment as including, Mr Kumar:

**[21.1]** Commenting on BGH's clothes and appearance, her marital status (namely being single) and making statements such as "you look very pretty today" and calling her "Princess [redacted]".

**[21.2]** Singing Hindi love songs in BGH's presence.

**[21.3]** Sending inappropriate text messages including "why u driving baby" and "wat u old lady".

**[21.4]** Sending BGH the waitress video which depicted a waitress displaying a menu on her bare buttocks.

**[21.5]** Touching BGH on her shoulder and coming too close or encroaching on her personal space.

**[22]** The two more serious incidents were described by BGH as:

**[22.1]** The office incident on 2 November 2016, when Mr Kumar entered BGH's office while she was on the phone. BGH claims that he pushed a ring on to her finger and then touched her shoulder and waist, her thigh and the side of her buttock. BGH's evidence is that when she told Mr Kumar off for this behaviour he responded with words to the effect of "what you think you are, a princess? My wife is more beautiful than you". BGH reported the incident to Mr Maharaj who said he would speak to Mr Kumar. That evening Mr Kumar texted BGH "I'm sorry" and Mr Maharaj introduced a rule that no employees were allowed in BGH's office while

she was in there. There were no incidents or day-to-day concerns by BGH for almost two weeks.

**[22.2]** The peeping incident on 15 November 2016 followed a phone call BGH received from Mr Prasad on 14 November 2016. Mr Prasad told BGH there was a hole in the wall between the storeroom and the toilet, and that Mr Kumar had watched BGH when she was in the toilet. BGH found the hole in the toilet and photographed it. The following day BGH went to the toilet to see if Mr Kumar would peep through the hole, she intended to take a photo if he did so. Once in the toilet BGH claims she saw Mr Kumar through the hole and attempted unsuccessfully to take a photo of him. BGH then confronted Mr Kumar and he denied looking through the hole.

### **Mr Kumar**

**[23]** Mr Kumar denies any behaviour of a sexual nature and maintains that while some of the alleged behaviour occurred, it was taken out of context and was not of a sexual nature.

**[24]** In relation to the alleged day- to-day harassment, Mr Kumar has accepted:

**[24.1]** He sang Hindi love songs at work, sometimes he would sing songs that were on the radio and sometimes he would just sing a love song he felt like singing and this could be while BGH walked by him, but he maintains that the songs were not sung to BGH.

**[24.2]** He sent BGH the waitress video and also shared it in the office and laughed with his colleagues about it while BGH was in her office. Mr Kumar also acknowledged the video was deleted from his phone records that were provided to the Tribunal.

**[24.3]** He sent BGH a text stating “why u driving baby” and that this was also deleted from the texts he provided in evidence to the Tribunal.

**[25]** In relation to the November incidents, Mr Kumar accepts:

**[25.1]** In the office incident he touched BGH on her shoulder and sent her a text that evening apologising.

**[25.2]** In relation to the peeping incident, he knew about the hole in the toilet wall and he took no action to repair the wall, did not tell Mr Maharaj about the hole, nor did he ask for it to be fixed or tell BGH about it. Mr Kumar’s evidence regarding when he found out about the hole varied. At one point in the hearing he said he knew about it for at least a few days prior to the peeping incident and then another response indicated he knew about it a few months prior to the peeping incident.

**[25.3]** He said to BGH a comment along the lines of “No it was not me, my wife is beautiful why would I bother looking at you”. However, Mr Kumar says he said that after the peeping incident, whereas BGH says he said something similar after the office incident.

### **The disputed behaviour**

**[26]** The following behaviour is disputed by Mr Kumar, so the Tribunal must determine whether it is more probable or not that this behaviour occurred:

**[26.1]** Mr Kumar commenting on BGH’s appearance, marital status and clothes.

**[26.2]** Mr Kumar touching BGH on her shoulder and encroaching on her space prior to 2 November 2016.

**[26.3]** Mr Kumar touching BGH’s finger, waist, upper thigh and buttock in the office incident.

**[26.4]** Mr Kumar looking at BGH through the hole in the toilet wall in the peeping incident.

### **Analysis**

**[27]** The Tribunal has considered the accounts of the disputed behaviours and for the reasons discussed below, finds that it is more probable than not that the behaviour that BGH alleges Mr Kumar subjected her to, did occur.

**[28]** Overall, we found BGH’s evidence to be considerably more probable and plausible than Mr Kumar’s evidence. BGH presented her evidence throughout in a calm, considered and consistent manner. By contrast, Mr Kumar’s evidence was at times implausible and exhibited multiple inconsistencies, both internally with his own earlier evidence and in contradiction with his own witness Mr Maharaj. Mr Kumar submitted that BGH took “a number of actual events or occurrences that were innocent and [has] woven them into a tissue of lies” and that she was motivated by financial or immigration concerns. The Tribunal heard no evidence that supported this submission or these motivations and has found BGH to be a credible witness for the reasons elaborated upon below.

#### *The day-to-day behaviour.*

**[29]** The Tribunal accepts BGH’s evidence of the day-to-day behaviour, including the comments, text messages and encroachment on her personal space, touching her shoulder and the singing of Hindi love songs, which BGH felt were directed at her. BGH presented her evidence of the day-to-day behaviour in a consistent and resolute manner, acknowledging she had often brushed it off, even though she did not like it. BGH and her [redacted] both noted that she was worried for her job. She did not complain and it was

only when a casual employee asked her why she accepted that behaviour that she started to really consider whether she needed to accept it. BGH's [redacted]'s account of what she heard from BGH was consistent with BGH's descriptions of the ongoing nature of the behaviour.

**[30]** The Tribunal observed that BGH did not embellish her claim. For instance, BGH was clear that it was only her shoulder that Mr Kumar had touched prior to the office incident and noted that there had only been one inappropriate video sent to her.

**[31]** BGH's matter of fact account of this day-to-day behaviour contrasted with Mr Kumar's evidence of this time. Mr Kumar's evidence was often confusing, difficult to follow and not consistent. By way of example, his changeable evidence regarding the singing of songs is discussed below.

**[32]** Mr Kumar's evidence in chief referred to him singing and whistling often in the workplace, singing "just the sort of songs that were playing on the radio and not love songs directed at BGH". However, in cross-examination Mr Kumar admitted that he would sing whatever song he felt like singing, even if it was not being played on the radio. He also acknowledged in cross-examination that BGH may have heard him singing but then later asserted again that she was not around when he sung. This contradiction was not resolved. The Tribunal prefers BGH's evidence. Given the inconsistent and contrary evidence provided by Mr Kumar and BGH's clear evidence, it is more probable than not that Mr Kumar regularly sang Hindi love songs while BGH was nearby.

**[33]** In concluding that the day-to-day behaviour described by BGH occurred, the Tribunal has had regard to Mr Kumar's submission that this evidence may have been made up, as it was not mentioned to her lawyer at the [redacted] Community Law Centre. BGH's response to this submission was that she and the lawyers had focused on the two most serious incidents. Under cross examination BGH consistently maintained her evidence in relation to the day-to-day behaviour. We do not consider that her initial concentration on the most serious behaviour undermines her credibility in relation to the day-to-day behaviour.

**[34]** The Tribunal, having heard BGH's evidence in person, including cross-examination and having had the opportunity to question her, finds that it is more probable than not that this behaviour occurred as described by BGH.

#### *The office incident*

**[35]** BGH claims Mr Kumar came into her office when she was on the phone to a customer and angrily shoved a ring on her finger, then touched her shoulder, moving his hand down to her waist, upper thigh and buttock. BGH says she told him off and he yelled at her, leaving her feeling humiliated and embarrassed.



**[36]** Mr Kumar says he only touched her shoulder, did not try to put a ring on her finger and did not touch her waist, upper thigh and buttock. However, having heard both parties, the Tribunal prefers the evidence of BGH on this point. The Tribunal again found BGH to be a consistently credible witness. Mr Kumar has acknowledged he was in the office and touched her shoulder. BGH says that he then moved his hand down touching her waist, upper thigh and side of her buttock. The Tribunal does not consider this implausible given the proximity of Mr Kumar to BGH (already within touching distance), the behaviour leading up to this (singing to her, inappropriate comments and shoulder touching) and Mr Kumar's confusing and unclear evidence about this incident in cross-examination. Mr Kumar's evidence was difficult to understand as despite being asked about the office incident, he repeatedly changed the topic to talk about the peeping incident, despite reminders about which incident was being discussed. The inability to directly answer the questions about this incident in cross-examination negatively impacted on the Tribunal's assessment of his credibility.

**[37]** Mr Maharaj's evidence of the office incident was that after this incident he introduced a rule that no employees were allowed to enter BGH's office if she was in there, despite the fact that was where the kettle and office tea making supplies were. This response by Mr Maharaj is consistent with a managerial response to the more serious incident that BGH has described rather than a singular finger poke on the shoulder as described by Mr Kumar. While not determinative on its own, it supports the Tribunal's finding that it is more probable than not that BGH's evidence is what actually occurred in the office incident.

**[38]** Notwithstanding submissions made by counsel for Mr Kumar that this incident cannot have occurred because BGH lied by saying she was on a work call when she was actually talking to her mother, the Tribunal is satisfied that it is more probable than not that BGH's account of this event is what occurred in the office incident on 2 December 2016. Whether the call BGH was on was a work call or a personal call is not relevant to the factual finding by this Tribunal about the behaviour that Mr Kumar exhibited while BGH was on the call. The nature of the call provides no justification for touching a colleague or sexual harassment.

**[39]** Finally, it is noted that Mr Kumar's counsel has suggested that the failure of BGH's counsel to cross-examine witnesses regarding the disputed evidence about which customer and which vehicle was being discussed in the phone call, is in breach of s 92 of the Evidence Act 2006. He suggests this undermines BGH's overall credibility. However, the type of vehicle, the customer and the type of phone call is not relevant, so it would not be considered a significant matter to cross-examine any witnesses about and the Tribunal has put no weight on which vehicle the phone call was about (or what type of phone call it was).

### *The peeping incident*

**[40]** In relation to the peeping incident on 15 November 2016, the evidence of BGH is again preferred, namely that Mr Kumar did look through the hole in the toilet while she was in the toilet.

**[41]** BGH's consistent evidence was that she was "absolutely sure" that she saw Mr Kumar through the hole and that when she confronted him he shouted at her in front of the other employees, humiliating her, denying looking through the hole, telling her she was not a "good girl" and that the hole had been there a long time.

**[42]** Mr Kumar has admitted he knew about the hole but denied looking through it. However, his specific evidence about this is less compelling and straightforward than BGH's account. Mr Kumar's responses are set out below and the lack of certainty is self-evident:

**[42.1]** His evidence in chief was that his first response to BGH's accusation was to say "what, I was here with these people"; however, when she again accused him, his evidence is that he said "I wasn't there, why didn't you shout if you saw someone".

**[42.2]** Mr Kumar further asserted in his evidence in chief that he told BGH, "I'm not wet. How could I have been outside." His evidence notes that it was raining that day and to look through the hole would have required him walking down an uncovered passage through the rain and around into a storage unit to access the hole. However, the floorplan of Viti provided in evidence indicates it was a relatively short walk and easy access to the storage unit.

**[42.3]** In his evidence in reply, Mr Kumar reiterated that it was raining at the time and that he was dry, so he could not have looked in the hole. Mr Kumar also provided evidence of the rainfall data from that day which described the weather at Auckland Airport overall as "Drizzle. Low clouds", the different readings from throughout the afternoon predominantly said "light rain", "overcast" and "drizzle".

**[42.4]** Mr Kumar also said in his reply evidence that he was in the workshop and that he saw BGH come in and out of the toilet, but then in cross-examination he said he was not watching the bathroom exit as he was busy working. When this discrepancy was put to him, he said that he was not actually busy and he looked up when she made a noise but did not know if she came out of her toilet or the office.

**[43]** In summary, Mr Kumar has admitted he knew about the hole and had known about it for at least a few days prior to the peeping and possibly knew about it for a few months, but notwithstanding him being second in charge at Viti he saw no reason to repair it or to

mention it to the owner of the business. The Tribunal finds the differing accounts Mr Kumar provided about when he found out about the hole and his apparent disinterest in repairing the hole contributes to concerns the Tribunal holds about the credibility of Mr Kumar's evidence in relation to this matter.

**[44]** Furthermore, the repeated reliance on the statement that he was not wet as evidence that he did not look in the hole is an unusual response, particularly when by his own evidence the rain was light, meaning that the short walk from the workshop to the storeroom is unlikely to have resulted in anyone looking particularly wet. It is also arguably consistent with BGH not having any recollection of the rain that day, if it was not particularly heavy rain. Furthermore, it is not clear how far the Auckland Airport weather sensor is from the Viti workplace, nor was there any evidence about how the weather across Auckland may vary. For these reasons the Tribunal finds that the apparent rain that day is not in itself enough to persuade the Tribunal that it is more probable than not that Mr Kumar did not look in the hole.

**[45]** Mr Kumar's subsequent engagement with Mr Prasad also does not assist with Mr Kumar's credibility.

**[46]** After BGH accused Mr Kumar of looking at her through the hole, BGH and Mr Maharaj phoned Mr Prasad on speakerphone and arranged for him to come into Viti at 3 pm that day to discuss the matter further. However, Mr Kumar then phoned Mr Prasad separately to tell him how angry he was at him, the implication being that he was angry at him telling BGH about the hole. Mr Prasad subsequently did not go to Viti at 3 pm.

**[47]** That evening, BGH phoned Mr Prasad to ask why he did not go to Viti and she recorded that phone call. In the professional translation of that call, in answer to a question regarding whether Mr Kumar made the hole bigger, the answer is recorded in English as "Yes they themselves did it". The implication being that Mr Kumar (and possibly others) enlarged the hole.

**[48]** Overall, the Tribunal finds Mr Kumar's responses and actions after being accused in the peeping incident, to be improbable and implausible. The focus on the rain, his prior knowledge of the hole and subsequent inaction about it as well as his contacting of Mr Prasad to express his anger provide the Tribunal with significant reason to doubt Mr Kumar's evidence and to reinforce the Tribunal's view that when these implausibilities are combined with the other credibility concerns discussed, there is considerable doubt regarding the overall truthfulness of his account.

**[49]** The actions of BGH immediately after the incident also contrast starkly with Mr Kumar's. BGH first attempted to get evidence of Mr Kumar peeping, then angrily confronted him, told her employer, spoke to the landlord about it (who was next door) and then left work early that day and did not return to work there again – giving no notice and initially ignoring phone calls from her employer. BGH then went to the Police, the CAB

and a community law centre in her attempts to obtain a remedy to the situation. BGH's undisputed actions are consistent with someone who was embarrassed and humiliated after finding out someone had been looking at them in the toilet.

[50] The Tribunal finds it is more probable than not that the peeping incident occurred in the manner described by BGH.

[51] The Tribunal has had regard to the submission by counsel for Mr Kumar that the fact the Police did not lay charges supports Mr Kumar's evidence, but this is not accepted. The criminal standard of proof is different from the civil standard and it also appears that some of the information we have before us was not available to the Police. Notwithstanding that, the Tribunal is required to undertake its own analysis of the evidence before it and any evidence presented to us of the Police investigation is assessed in accordance with our usual consideration of evidence. There were no Police witnesses before us and the documentary records from the Police, while not direct first-hand evidence, do not provide any persuasive basis upon which to challenge the credibility findings we have made regarding BGH's evidence.

### **Conclusion of Tribunal's credibility analysis**

[52] BGH's evidence of the actions which she was subjected to by Mr Kumar are all accepted as credible in their entirety for the reasons detailed above.

### **WAS THAT LANGUAGE, VISUAL MATERIAL OR PHYSICAL BEHAVIOUR OF A SEXUAL NATURE?**

[53] The assessment of whether the behaviour in question is of a sexual nature is an objective test and the intention of the defendant is irrelevant when considering if behaviour is of a sexual nature or not.<sup>8</sup> The Tribunal must consider how a reasonable person would objectively view the actual words or behaviour<sup>9</sup> and also have regard to the context. Context is particularly important in this assessment as conduct which might be unremarkable between, say, siblings, would take on a completely different complexion in the workplace,<sup>10</sup> particularly so if there is a power imbalance between the parties.

[54] In *Lenart v Massey University*,<sup>11</sup> the Employment Court reviewed behaviours that could constitute sexual harassment.<sup>12</sup> This non-exclusive list is a useful guide. The Court noted that physical behaviour could include touching, unwanted and deliberate contact, patting, pinching, stroking, or brushing up against the body, hugging, cornering, mauling,

<sup>8</sup> See Human Rights Act 1993, s 92(4) and *DML v Montgomery (DML)* [2014] NZHRRT 6 at [103].

<sup>9</sup> See for instance *Craig v Slater* [2018] NZHC 2712 at [411]. The High Court's description of sexual harassment was affirmed by the Court of Appeal in *Craig v Slater* [2020] NZCA 305 at [89].

<sup>10</sup> See for instance *Proceedings Commissioner v H* (1996) 3 HRNZ 239, [1996] NZAR 451 (CRT) at [247]-[248], cited in *DML*, above n 8, at [108].

<sup>11</sup> *Lenart v Massey University* [1997] ERNZ 253 (EC) at 267.

<sup>12</sup> Which has and had at the time of *Lenart* also an analogous provision regarding sexual harassment, see s 29(1) of the repealed Employment Contracts Act 1991 and s 108 of the Employment Relations Act 2000.

and invading another's personal space. Examples of verbal behaviour can include comments of a sexual nature about weight, body shape, size, or figure; comments about a person's looks, dress, appearance, or sexual habits; inquiries or comments about an individual's sex life and/or relationship with sex partner; remarks about a woman's overall figure. These behaviours could all arguably have a sexual nature, but whether they do will always be a matter of fact.<sup>13</sup> Context is therefore an important determinant in claims, such as BGH's and the circumstances in *Lenart* where not all the alleged behaviour was plainly or manifestly sexual on its face.<sup>14</sup>

**[56]** Turning now to the behaviour BGH experienced, the Tribunal considers that the "day-to-day" behaviour is at the lower end of the behaviour of a sexual nature, but comments about BGH's appearance and her clothing, the singing of Hindi love songs (even if they were not being played on the radio) around her, sending her a video of a waitress with the menu on her bare buttocks and repeated touching of BGH's shoulder and encroaching on her space are all sexual in nature when considered in context. When the fact they were repeated and sustained over almost two years, and the power imbalance is considered, the sexual nature is very apparent. The context here is that these behaviours were perpetuated by the second-in-charge at Viti, a man who was older than BGH, had more power in the workplace than her and had a very close connection to the owner and director of Viti (Mr Maharaj). In this context and between these two particular individuals each of these behaviours is of a sexual nature, albeit less overt than some other behaviours; but cumulatively and repetitively, they create an environment of behaviour which is objectively of a sexual nature in this context of a senior male employee and a younger female employee. The Tribunal also finds that while the text messages, "why u driving baby" and "wat u old lady", may in themselves appear not to be of a sexual nature, in *Lenart*<sup>15</sup> it was suggested that it may be helpful to consider assessing whether these same comments would be made to a male colleague and in borderline cases to look at the behaviour as a whole. Having regard to this guidance, the Tribunal finds that the first text was of a sexual nature, but while the second text is unkind it is not of a sexual nature.

**[57]** The office incident and the peeping incident are undoubtedly sexual in nature, and the multiple touches of BGH's body in the office, again within the context of a power imbalance, was significant. The peeping incident is sexual in nature and particularly humiliating, given the expectation of privacy in the toilet and again the power imbalance and the context. These two final incidents were the final straw for BGH after almost two years of less overt behaviour of a sexual nature and resulted in her resignation.

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<sup>13</sup> *Lenart*, above n 11, at 269.

<sup>14</sup> In *Lenart*, above n 11, the complainant alleged that the defendant had come into close physical contact, embraced her, spoke in a "soft husky voice", called her "darling" and "sweetheart", told her she was beautiful, that her boyfriend was lucky, and "fondled (her hair) lingeringly twice".

<sup>15</sup> *Lenart*, above n11 at 270-271

## WAS THE BEHAVIOUR UNWELCOME OR OFFENSIVE?

[58] The test for whether conduct is unwelcome or offensive is a subjective one. It is not considered from an objective standpoint, the 'objective reasonable person' test, and the defendant must take the consequences of the victims' sensibilities.<sup>16</sup> BGH is not required to prove that Mr Kumar knew or intended that the conduct would be unwelcome or offensive. If she found the behaviour unwelcome or offensive, that is determinative. It is immaterial what Mr Kumar's thoughts and intentions were regarding the behaviour.

[59] BGH has given compelling and clear evidence that she found all of the behaviour subject to this claim unwelcome and offensive. While she acknowledged that she did brush off some of the comments and did not challenge them initially, that was because although they were unwelcome, her need for employment and her lack of power in relation to Mr Kumar and Mr Maharaj were important considerations. As already noted, the power imbalance is considerable, and it is accepted in case law relating to sexual harassment claims that just because someone did not object to behaviour at the time, it does not mean they did not find that behaviour unwelcome or offensive.<sup>17</sup>

[60] The Tribunal has had regard to Mr Kumar's repeated submissions, via counsel, that because BGH did not mention the day-to-day harassment to her initial lawyers, it cannot be said to have been unwelcome, but the Tribunal does not accept that. BGH was at work, a job she needed to provide for herself, and it is understandable that she may have put up with the initial behaviour to maintain her job and not cause difficulties. As noted earlier and accepted in case law,<sup>18</sup> this Tribunal acknowledges that accepting and putting up with behaviour of this nature is not in itself unusual, particularly where a woman is isolated at her workplace and in a vulnerable position with power imbalances. Furthermore, after reaching a point where she could tolerate it no longer, with the peeping incident as the catalyst, BGH then took consistent and determined steps to express how unwelcome and offensive she found the conduct overall.

[61] BGH was upset, and she discussed this regularly with her [redacted] at the time. As the conduct continued and then escalated, BGH and her [redacted] discussed it further and decided to report it to the Police. Ultimately BGH left her employment the day of the peeping incident because of the impact it had on her, of how unwelcome and offensive it was and how distressing it was to her. This impact and BGH's view of the behaviour was also discussed in her [redacted]'s evidence. It is accepted that the behaviour prior to the two November incidents and the office and peeping incidents themselves were all unwelcome and offensive to BGH.

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<sup>16</sup> *DML*, above n 8, at [110].

<sup>17</sup> Most notably *Craig*, above n 9, at [405].

<sup>18</sup> *Craig*, above n 9, at [405].

**WAS THE BEHAVIOUR REPEATED OR OF SUCH A SIGNIFICANT NATURE THAT  
IT HAD A DETRIMENTAL EFFECT ON BGH?**

[62] Section 62(2) requires that the behaviour was “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).” Detriment is not required to be financial or material in nature, nor does it require robust objection. If the conduct has a robust impact it is made out.<sup>19</sup>

[63] The behaviour in question comprises language of a sexual nature, visual material of a sexual nature and physical behaviour of a sexual nature. It was submitted for BGH that the language and some of the physical behaviour was demonstrated over a period of approximately two years, was repetitive behaviour and the peeping through the toilet wall was of such a significant nature that even if it happened only once, it was submitted it would meet the threshold of significant.

[64] It is also submitted that both the repetitive and significant behaviour caused detriment to BGH. Counsel for BGH noted that the courts have accepted that detriment can include the detriment of having to work in a hostile work environment in a demeaning atmosphere created by unwelcome sexual conduct and can include losses of self-esteem and loss of trust. It has also been noted in *Craig v Slater* that detriment is inherent where someone is subjected to an unwelcome, unwanted or offensive sexual language or behaviour.<sup>20</sup> In cases of power imbalance, it is submitted the inevitability of detriment means the imbalance should be treated as an aggravating factor in assessing the seriousness of the harassment. The victim’s tolerance of that does not make any difference to the assessment of detriment.

[65] BGH was in an all-male workplace, with an unsupportive employer, reliant on the job for income and required to put up with behaviour of a sexual nature to keep earning an income. BGH was vulnerable, and her [redacted] has also spoken of BGH’s distress and how she initially just put up with it. A workplace where an individual feels she must simply accept behaviour of a sexual nature is a workplace where that employee is facing detriment. It is not a comfortable, appropriate work environment and BGH’s evidence that she noticed and relaxed during the pause in this behaviour between the two November incidents demonstrates how much additional pressure she was experiencing when the behaviour was ongoing. The Tribunal is satisfied that these behaviours were repeated and significant (in relation to the peeping incident) and had a detrimental effect on BGH in her employment.

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<sup>19</sup> See for instance *Read v Mitchell* [2000] 1 NZLR 470 (HC) at 480.

<sup>20</sup> *Craig*, above n 9, at [23], [401] and [411].

## **SEXUAL HARASSMENT CONCLUSION**

**[66]** All the elements necessary to prove the claim of sexual harassment under s 62(2) have been established. In particular, the Tribunal has found that Mr Kumar subjected BGH to language, visual material and physical behaviour of a sexual nature which was both unwelcome and offensive. This behaviour was repeated and of such a significant nature that it had a detrimental effect on her in respect of her employment (which she ultimately ended). Mr Kumar has breached s 62(2) of the HRA.

**[67]** The Tribunal must now determine the appropriate remedy.

### **REMEDY**

**[68]** The Tribunal has determined on the balance of probabilities that Mr Kumar has sexually harassed BGH in breach of s 62(2) of the HRA. The Tribunal may therefore grant one or more of the remedies set out in s 92I(3). BGH seeks:

**[68.1]** A declaration that Mr Kumar breached the HRA by subjecting the plaintiff to sexual harassment.

**[68.2]** Damages for pecuniary loss for lost wages in the sum of \$25,160.00.

**[68.3]** Damages for humiliation, loss of dignity and injury to feelings in a sum of no less than \$35,000.00.

**[68.4]** Such further relief as the Tribunal thinks fit including an order that the defendant pay interest on the damages, calculated in accordance with s 12 of the Interest on Money Claims Act 2016.

**[68.5]** The cost of these proceedings.

### **Declaration**

**[69]** The Tribunal has found that Mr Kumar has sexually harassed BGH, accordingly, a formal declaration is appropriate. There is nothing in this claim that would justify withholding a declaration and although the grant of a declaration is discretionary, declaratory relief is not normally denied where the Tribunal finds there has been a breach. A declaration is made accordingly.

### **Damages**

**[70]** The Tribunal may order damages under three specific heads as set out in s 92M of the HRA, which provides:



## **92M Damages**

- (1) In any proceedings under section 92B(1) or (4) or sections 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.

[71] BGH claims damages for pecuniary loss being the loss of her employment and damages for humiliation and loss of dignity and injury to feelings. Each of these heads of damages will now be considered in turn.

### **Damages for pecuniary loss**

[72] The Tribunal may award damages against a defendant for a breach of the HRA, in respect of pecuniary loss suffered as a result of the activity out of which the breach arose.

[73] BGH seeks payment of \$25,160.00 as damages for pecuniary loss, being equivalent to 37 weeks of her income of \$680 per week. This represents the time from when she left Viti on 15 November 2016 to when she commenced new employment on 27 July 2017. It was submitted that as Mr Kumar sexually harassed BGH, which was a breach of the HRA that resulted in her resigning from her role, he should be ordered to pay her loss of income over this time period.

[74] The awarding of damages for pecuniary loss is discretionary and the Tribunal is guided by the principles in *Telecom NZ v Nutter*<sup>21</sup> when considering what is appropriate. Full compensation for any pecuniary loss is the upper limit and the actual damages awarded must be assessed on the facts of each claim. In this instance, it is not appropriate to award the full damages sought for pecuniary loss. There is very little evidence regarding the attempts BGH made to obtain alternative employment, including the possibility of part-time or casual employment which would have impacted the full amount of claimed pecuniary loss. Nor is there any evidence of any other matters that may have impacted on her ability to obtain work more quickly. However, the Tribunal does acknowledge that the immediate catalyst for BGH's departure from work was the sexual harassment by Mr Kumar and that there is a causal connection between this and her loss of income. In particular, the sexual harassment meant she did not give or receive one month's notice as was provided for in her employment contract, leaving her suddenly without income.

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<sup>21</sup> *Telecom NZ Ltd v Nutter* [2004] 1 ERNZ 315 (CA) at [70]-[84].

[75] Accordingly, it is appropriate that BGH be awarded pecuniary loss equivalent to the loss of four weeks' income, which is four weeks' pay of \$680, totalling \$2,720.00.

[76] Mr Kumar is now the only defendant in this claim. The Tribunal was presented with no case authorities precluding the making of an award of damages for pecuniary loss as a result of loss of income against a fellow employee. Likewise, s 92M of the HRA does not preclude this. In the circumstances of this case we consider that Mr Kumar should be ordered to pay BGH damages for the pecuniary loss that the Tribunal has found she is entitled to.

### **Damages for humiliation, loss of dignity and injury to feelings**

[77] The Tribunal may award damages against the defendant for a breach of the HRA in respect of humiliation, loss of dignity and injury to the feelings of the complainant.

[78] To award damages of this type, the Tribunal must be satisfied that BGH has suffered humiliation, loss of dignity or injury to feelings and that there is a causal connection between the sexual harassment and that emotional harm.

[79] The award of damages is intended to compensate for the harm suffered, not to punish the defendant.<sup>22</sup> In sexual harassment claims the damages must be "genuinely compensatory and not minimal".<sup>23</sup> The conduct of the parties must also be taken into account in deciding what remedy to grant.<sup>24</sup>

[80] BGH has claimed \$35,000 in damages under this head of damages, but her counsel has submitted that this is at the lower end of what might be appropriate. Mr Kumar submits that if damages are to be awarded at all under this head, they should be in the lowest band of damages identified in *Hammond*,<sup>25</sup> which would mean less than \$10,000.

[81] In *Hammond* the Tribunal identified that while awards for damages are fact-driven, they often fall within three bands.<sup>26</sup> The lowest band where Mr Kumar says the damages should sit, is for damages at the less serious end of the scale, being less than \$10,000. BGH's counsel submits this claim is within the middle band which is for more serious cases and damages may range from say \$10,000 to \$50,000. The highest band is for damages of over \$50,000 for the most serious category of cases. There is agreement that BGH's claim does not fall within that most serious band.

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<sup>22</sup> See *Hammond v Credit Union Baywide (Hammond)* [2015] NZHRRT 6, (2015) HRNZ 66 at [170].

<sup>23</sup> *Main v Topless* [2004] NZHRRT 6 at [125].

<sup>24</sup> Human Rights Act 1993, s 92I(4).

<sup>25</sup> *Hammond*, above n 21.

<sup>26</sup> At [176].

### *The harm suffered by BGH*

[82] BGH's evidence is that she was embarrassed and humiliated after the office incident and after finding out about the peeping through the hole in the toilet, she was scared to go back to work, scared to be humiliated again and so she resigned and reported the incident to the Police. The Police referred BGH to counselling and BGH attended three sessions, as she felt her "whole life had fallen apart and [I] couldn't see a way through". BGH also described herself as feeling that she was "not coping day to day". The counsellor referred BGH to her GP, who saw BGH in late November 2016. These appointments are corroborated by documentary evidence from those professionals.

[83] BGH also found herself under severe financial pressure, with no income and bills to pay and loans to service. BGH's [redacted], who she lived with, provided evidence that BGH would be "distraught and upset" when she came home from work as a result of the day-to-day sexual harassment. BGH's [redacted] also testified that BGH was very upset and distressed after the office incident, which led to her crying and feeling violated and humiliated. [Redacted] also commented on the toll that the sexual harassment had on BGH's physical and mental state: she became very quiet, she kept to herself, and she was not eating much.

[84] The Tribunal finds BGH to be a credible witness in respect of this evidence also and accepts her evidence regarding the humiliation, loss of dignity and injury to feelings that BGH felt. This was also corroborated by BGH's [redacted] and by BGH's actions following the peeping incident. It is also accepted there is a causal connection between the sexual harassment and the harm BGH claims she has suffered.

### *Assessment of damages*

[85] The most recent sexual harassment claim heard by this Tribunal where damages were awarded was issued in 2014.<sup>27</sup> In that claim the plaintiff was awarded damages of \$25,000 for the humiliation, loss of dignity and injury to feelings she experienced as a result of sexual harassment consisting of being repeatedly subjected to language of a sexual nature, and of a significant nature resulting in detriment to her in her employment. There have been no awards of damages for sexual harassment by this Tribunal since *Hammond*.<sup>28</sup> Counsel for BGH has therefore encouraged the Tribunal to take this opportunity to review the awards of damages for sexual harassment in New Zealand. However, given the facts of this claim and the nature of the sexual harassment, it is not considered the appropriate claim to undertake a recalibration of these awards at this time.

[86] The Tribunal has however had regard to the damages awarded previously in this Tribunal in relation to sexual harassment and also in relation to humiliation, loss of dignity

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<sup>27</sup> *DML*, above n 8.

<sup>28</sup> *Hammond*, above n 21.

and injury to feelings for other relatively recent breaches of the HRA, in particular *Elhassan v Webby*<sup>29</sup> and *Beauchamp v B & T Co (2011) Ltd*.<sup>30</sup> The Tribunal is also mindful of the time that has passed since the previous sexual harassment awards were made, and the relative value of the amounts awarded in the past. It is noted that all the cases referred to by counsel for Mr Kumar were over 14 years ago and do not reflect the awards being made by the Tribunal in other HRA claims in recent years, nor as submitted by counsel for BGH, the increasing awareness of the effects of sexual harassment on those it impacts.

**[87]** In assessing quantum, account must be taken of the circumstances in which the discrimination occurred. Relevant factors to be considered include:<sup>31</sup> the nature and type of harassment, including physical contact, the ongoing nature and frequency of the conduct, the age and vulnerability of the plaintiff and the psychological impact on the plaintiff.

**[88]** Having regard to these factors the Tribunal acknowledges the repetitive nature of the day-to-day harassment experienced by BGH over two years, albeit being at the lower end of sexual harassment (as acknowledged by BGH's counsel), it was constant and unwelcome. The office incident and the peeping incident were each humiliating and had an immediate and intense psychological impact on BGH, particularly as she was in a position of relative vulnerability as the only female in the workplace and with Mr Kumar in a position of power.

**[89]** The loss of dignity that occurs when being watched in the toilet cannot be overstated and specifically contributes to the Tribunal's finding that the harm BGH experienced is in the upper half of the middle band in *Hammond*.<sup>32</sup>

**[90]** Mr Kumar's counsel has characterised the sexual harassment as "largely verbal", aside from the office incident and the peeping incident. This submission minimises the sexual harassment and its impact and to base the appropriate level of damages on this premise would be misguided, given the extent of the sexual harassment experienced by BGH, ranging from inappropriate comments to unwelcome and offensive touching by a colleague and being watched in the toilet.

**[91]** Furthermore, the Tribunal does not accept Mr Kumar's submissions that the humiliation, loss of dignity and injury to feelings BGH experienced is in the lower band of the *Hammond* bands. The indignity of being watched in the toilet, and the humiliation and injury to feelings of repeated moments at work over almost two years where BGH experienced unwelcome behaviour of a sexual nature, brings this claim well into the middle band of *Hammond*.

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<sup>29</sup> *Elhassan v Webby* [2022] NZHRRT 27.

<sup>30</sup> *Beauchamp v B & T Co (2011) Ltd* [2022] NZHRRT 10.

<sup>31</sup> *DML*, above n 8, at [140] citing *Carlyon Holdings Ltd v Proceedings Commissioner* HC Auckland AP 104/98, 12 October 1998.

<sup>32</sup> *Hammond*, above n 21.

[92] Mr Kumar also submitted that as the only evidence of any harm is the visits to the counsellor and the GP, this evidence may be insufficient to support a finding of loss of dignity or injury to feelings. Mr Kumar's counsel referred to *Attorney-General v Dotcom*<sup>33</sup> which he submits requires direct evidence to support a finding of loss of dignity or injury to feelings. The Tribunal notes that in this claim, there is the specific evidence of BGH and her [redacted] and confirmation of her sessions with a counsellor and GP. Furthermore, unlike in *Dotcom*, in this proceeding BGH must only prove humiliation, loss of dignity and injury to feelings, not significant humiliation, loss of dignity and injury to feelings as was required in the *Dotcom* claim which was decided under the Privacy Act 1993, not the HRA.

[93] BGH sought external support to cope with this situation and there is credible evidence from her [redacted] of the impact of these events on her. The fact BGH underwent three counselling sessions and one GP appointment supports the conclusion that the impact of this incident on BGH was significant and more than she could handle herself, requiring professional assistance to navigate. However, it would be wrong to use the number of sessions of external assistance to correlate in some numerical manner to the amount of damages to be awarded. The appointments themselves are evidence that this behaviour had an initially unmanageable impact on BGH.

[94] The Tribunal must also take into account the conduct of the parties in deciding what, if any, remedies to grant. BGH has not done anything that would disentitle her to damages or reduce their amount. Similarly, Mr Kumar did not do anything during these proceedings to either lessen or exacerbate the emotional harm caused by the sexual harassment. Counsel for BGH submitted that Mr Kumar's attempts to evade the Human Rights Commission process aggravated the situation, but the Tribunal does not consider that warrants an increased award of damages under this head.

[95] As noted in *Hammond* the very nature of these heads of damages means there are subjective elements to their assessment. BGH's feelings are incapable of objective proof or measurement in monetary terms. In these circumstances, having regard to the facts of BGH's claim and the findings above, the Tribunal considers damages of \$29,000 appropriate compensation for damages for the humiliation, loss of dignity and injury to feelings experienced by BGH.

### **Interest on damages**

[96] BGH seeks interest on damages under s 12 of the Interest on Money Claims Act 2016. However, the Tribunal is not bound by that Act, as the definition of "court" in s 6 expressly excludes Tribunals. Accordingly, no interest is awarded on top of the damages.

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<sup>33</sup> *Attorney-General v Dotcom* [2018] NZHC 2564.

## NON-PUBLICATION ORDERS

[97] The Tribunal may order non-publication of the name and identifying details of a participant in a proceeding, or any account of the evidence, in accordance with s 107(3)(b) of the HRA, if the Tribunal is satisfied that it is desirable to do so. BGH has applied for final non-publication orders in respect of her name, address, occupation and any other details which lead to her identification.

[98] Mr Kumar has appropriately not opposed the orders sought if the Tribunal finds in BGH's favour. As the Tribunal has found in BGH's favour, it is appropriate that the non-publication orders sought are made.

[99] To determine whether it is desirable to do so, the Tribunal must consider whether there is material before the Tribunal to show specific adverse consequences sufficient to justify an exception to the fundamental rule of open justice. The Tribunal must also consider whether an order is reasonably necessary to secure the "proper administration of justice" in proceedings before it and ensure it does no more than is necessary to achieve that.<sup>34</sup>

[100] Open justice is an essential legal principle. It was described in *Waxman*<sup>35</sup> as follows:

[2] The principle of open justice is fundamental to the common law system of civil and criminal justice. It is a principle of constitutional importance and has been described as "an almost priceless inheritance". The principle's underlying rationale is that transparency of court proceedings maintains public confidence in the administration of justice by guarding against arbitrariness or partiality, and suspicion of arbitrariness or partiality, on the part of courts. Open justice "imposes a certain self-discipline on all who are engaged in the adjudicatory process – parties, witnesses, counsel, Court officers and Judges". The principle means not only that judicial proceedings should be held in open court, accessible by the public, but also that media representatives should be free to provide fair and accurate reports of what occurs in court. Given the reality that few members of the public will be able to attend particular hearings, the media carry an important responsibility in this respect. The courts have confirmed these propositions on many occasions, often in stirring language. [Footnote citations omitted]

[101] BGH has been subjected to sexual harassment in the course of her employment and this has undisputedly had a significant impact on her. It is submitted that the publication of BGH's identity would unnecessarily compound her sense of humiliation and distress arising from the sexual harassment, particularly as she has not discussed the sexual harassment with her wider family or some friends. This would be a specific adverse consequence for BGH. The publication of BGH's name in relation to this claim could lead to further significant distress in feeling required to discuss these matters with those individuals, workmates and other acquaintances. It is not inconceivable that it may also result in further medical or therapeutic care.

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<sup>34</sup> See *Waxman v Pal (Application for Non-Publication Orders)* [2017] NZHRRT 4 at [66].

<sup>35</sup> At [56] where the Tribunal cited *Erceg v Erceg* [2016] NZSC 135.

**[102]** Counsel have also submitted, and the Tribunal acknowledges that, non-publication orders are mandatory in respect of criminal proceedings of a sexual nature and are also commonly necessary in claims involving sexual harassment in civil proceedings. If this was not the case, the disclosure of such distressing and often intimate details may be a deterrent to complainants, which would be highly undesirable.

**[103]** There is no public interest in BGH's name or other identifying details being known in connection with the circumstances of this claim. The principle of open justice can be maintained by the publication of the Tribunal's decision with her name and identifying details redacted. This enables transparency of the reasons for this decision and does not undermine the ability of the public to understand or the media to report on the decision in accordance with open justice.

**[104]** It is desirable to prohibit publication of the name, address, occupation and any other details which could lead to BGH's identification. It is also appropriate to give effect to this non-publication order by restricting search of the Tribunal file. Those orders are made accordingly.

## **ORDERS**

**[105]** The Tribunal is satisfied on the balance of probabilities that the following orders should be made:

**[105.1]** A declaration is made under s 92I(3)(a) of the Human Rights Act 1993 that Mr Kumar has breached Part 2 of the Human Rights Act 1993 by sexually harassing BGH.

**[105.2]** Mr Kumar is to pay BGH damages of \$2,720.00 under s 92M(1)(a) for pecuniary loss, no later than 20 working days after the date of this decision.

**[105.3]** Mr Kumar is to pay BGH damages of \$29,000.00 under s 92M(1)(c) of the Human Rights Act 1993 for humiliation, loss of dignity and injury to the feelings of BGH, no later than 20 working days after the date of this decision.

**[105.4]** A final order is made prohibiting publication of the name, address, occupation and any other identifying details of BGH.

**[105.5]** There is to be no search of the Tribunal file without leave of the Chairperson or Deputy Chairperson or of the Tribunal. The parties are to be notified of any request to search the file and given the opportunity to be heard on that application.

## **COSTS**

**[106]** BGH seeks costs. Unless the parties come to an arrangement on costs, the following timetable is to apply:

**[106.1]** BGH is to file her submissions (no more than five pages) within 10 working days after the date of this decision.

**[106.2]** Any submissions (no more than five pages) for Mr Kumar are to be filed within the 10 working days which follow. BGH will then have the right of reply within five working days after that, any reply submissions are to be no more than five pages.

**[106.3]** The Tribunal will then determine the issue of costs based on the written submissions without further oral hearing.

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

.....  
**Ms SJ Eyre**  
**Chairperson**

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**Dr SJ Hickey MNZM**  
**Member**

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**Ms SP Stewart**  
**Member**