

[2010] NZHRRT 9

Reference No. HRRT 24/09

BETWEEN

EN

Plaintiff

AND

KIC

First Defendant

AND

THE PARTNERSHIP

Second Defendant

BEFORE THE HUMAN RIGHTS REVIEW TRIBUNAL

Mr R D C Hindle	Chairperson
Ms J Grant, MNZN	Member
Ms P J Davies	Member

HEARING: 15, 16, 17 and 18 February 2010

APPEARANCES:

Mr R M Hesketh for plaintiff.
KIC, first defendant in person and as representative of second defendant.

DATE OF DECISION: 19 April 2010

DECISION

Introduction

[1] This is a claim brought under s.62 of the Human Rights Act 1993.¹ The plaintiff says that she was a victim of sexual harassment by the first defendant when she worked as an employee of the second defendant in a period between April 2008 and August 2008.

[2] The first defendant appeared at the hearing to represent both himself and the second defendant. The second defendant is a partnership comprised of the first defendant and his wife. As a partnership, the first defendant and his wife own and operate a small bakery and cafe business. The first defendant works in the business as its manager and as a baker, in general food preparation and otherwise.

[3] For reasons which follow, we have found in favour of the plaintiff. The orders that we have made will require the defendants to compensate her. We think it fair to say at the outset, however, that the case is not without its subtleties. One of those is that ultimately we do not believe the first defendant ever had any sexual intentions in relation to the plaintiff; we do not see this as a case of sexual predation. Instead it demonstrates the dangers of running a business without any understanding of the provisions of the HRA relating to sexual harassment, and with no insight whatsoever

¹ The HRA.

that some behaviours can be unwelcome to others no matter how innocent they may be thought by the perpetrator to be.

[4] We discuss the evidence in more detail below, but we begin with three preliminary matters.

Preliminary matters

[5] The case includes discussion of some personal and sensitive information. At an early stage of the proceedings the Chairperson made interim orders under ss.95 and 107(3) of the HRA prohibiting any publication of the name of the plaintiff and/or of any details that might serve to identify her in connection with the litigation. The Chairperson made similar orders in respect of the first defendant², and the second defendants³ as well. In addition, the events giving rise to this claim occurred in a small town in New Zealand. Identification of the place in which the events occurred of itself carries some risk of identifying the parties. There is therefore also an interim order prohibiting publication of the place in which the events at issue occurred.

[6] These orders will remain in place until this decision has been issued, and the parties have had an opportunity to make further submissions as to whether and to what extent the orders prohibiting publication should be given more permanent effect, or otherwise altered.

[7] In the meantime, and although there are no formal orders prohibiting publication of the identity of any of the witnesses who gave evidence at the hearing, it will be obvious that naming the witnesses would be likely to compromise the orders that have already been made. For these reasons this decision is written in a way that is intended to leave not only the parties but also all those who gave evidence anonymous.

[8] The second preliminary matter concerns the position of the second defendant in this case.

[9] All of the interactions that form the basis of the plaintiff's complaint of sexual harassment took place between her and the first defendant, KIC. At all relevant times KIC was not only one of the plaintiff's co-workers, but also one of the two partners who owned the business in question. He was an agent of the partnership. The partnership is thus liable for his conduct by virtue of s.68(2) of the HRA, unless it can show that his actions were without its authority. But there is no factual basis for such a conclusion in this case. As a result the partnership effectively shares the first defendant's liability to its full extent.⁴

[10] This is in substance a case about how KIC behaved towards the plaintiff. In the circumstances it is convenient to simply refer to KIC as 'the defendant' in the analysis of the evidence that follows.

[11] The third preliminary matter we note is that, after the second day of the hearing, the Tribunal members viewed the defendants' premises and saw the areas in which the events of concern took place.

² Who is identified in the intituling as 'KIC', and elsewhere in this decision only as 'the first defendant' (or, more commonly and simply, as 'the defendant' – see para [10] below).

³ The initials that have been allocated to the plaintiff and the first defendant are not their real initials.

⁴ We add that the defence in s.68(3) of the HRA is not available to the partnership unless the first defendant is regarded as having been not only a partner but also an employee of the partnership. However even assuming that the defence in 68(3) might somehow be available as a matter of law, there is no factual basis to support a conclusion that the defence is established in this case; the defendants took no steps that might have been effective to prevent what occurred.

[12] We do not think it is necessary to provide a detailed description of the layout of the workspaces. It suffices to note that the spaces in the food preparation areas, the 'office' and around the sink and other cleaning areas are quite small. It would be difficult to move around them without making some contact with other people working in the same areas. There is a small courtyard at the back of the cafe, which is accessed by those working at the cafe. There is also a storage area which contains some the freezers and refrigerators, and a washing machine, below the street level on which the cafe stands. All of these areas (that is, the food preparation areas, sinks, office and other areas including the courtyard and underfloor area) are all behind the 'front of shop' cafe frequented by customers.

Background

[13] The plaintiff had worked as an assistant at the cafe for 13 or 14 years prior to April 2008. The business was sold to the partnership, and the first defendant began working as the owner/manager of the cafe, on 4 April 2008.

[14] It is clear that the acquisition of the business by the partnership represented a significant change for the plaintiff. Nonetheless she continued to work in the cafe after the partnership acquired the business in much the same way as she had done before. She was obviously quite capable of managing the business when required. The defendant soon came to see her as one of his best workers, willing to do long hours when required, and as a capable and trusted employee.

[15] There is little evidence as to what discussion there was (if any) about the terms and conditions of the plaintiff's employment by the partnership after the partnership took over the business in April 2008. On 19 June 2008, however, the plaintiff signed a document relating to her employment at the cafe.⁵ It is a detailed document which specified hours of work, rates of pay, standard of dress, entitlement to holidays and so on. The document also contains a clause which deals with sexual harassment. It envisaged that, where an employee was concerned about sexual harassment, then they would and should talk to 'the employer' in strict confidence. But in this case the employer was the defendant (who was said to be the harasser) and his wife (who was also an owner of the business, and in any event hardly likely to be a sympathetic or truly objective person to talk to about her husband's behaviours). The potential for an employee to be reluctant to raise matters of sexual harassment in the way provided for by the employment document is obvious. It is not, however, a matter that we need to deal with in any detail. That is because the evidence made it clear that none of the plaintiff, the defendant or the partnership ever referred to that provision of the employment document at any time until after the plaintiff had resigned and left her job at the cafe.

[16] The plaintiff remained in the employ of the partnership as a cafe assistant until 12 August 2008. By then the events which form the basis of her claim had reached a point at which she felt she could no longer remain. In fact, she did not even feel able to deliver her letter of resignation in person. Instead she retained a private investigator. The private investigator delivered a letter to the defendant on 12 August 2008 which contained the plaintiff's resignation, with immediate effect. The letter said that the defendant had made the working environment untenable by his physical touching and sexual comments. The letter records that the plaintiff was so concerned about his behaviours that her health had been affected, and that she was no longer prepared to work in such an environment.

⁵ The document we saw had been signed by the plaintiff but not by the defendant and/or by anyone else on behalf of the partnership. That is why we have not referred to it as an agreement.

[17] During the hearing the defendant suggested that he had not received that letter at all. He alleged that there was a different resignation letter, which did not contain any reference to physical touching or sexual comments. He said that the plaintiff's resignation was a total surprise to him. She had been a trusted and valued employee, and it is clear the defendant was disappointed and even angered by what he saw as an improper resignation given without any notice whatsoever.

[18] We regret to say that this was one of a number of respects in which we found the defendant's evidence to be completely unreliable. The private investigator who delivered the letter gave evidence that the letter he had delivered to the defendant on behalf of the plaintiff on 12 August 2008 contained all of the paragraphs that were in the document that was shown to us as being a true copy of the letter in question. There is no reason we can see to disbelieve what the private investigator told us. We therefore reject the defendant's evidence that a letter of some other sort was received, and that he did not receive the letter that the private investigator said he had delivered. Nonetheless we accept that the plaintiff's resignation came as a bolt out of the blue to the defendant. We do not think that he had the faintest notion about the effect that his behaviours towards the plaintiff had had on her.

[19] After the plaintiff left the defendants' cafe she found work in another nearby cafe, but that was not a particularly happy arrangement and in any event there were far fewer hours of work available to her. The plaintiff's claim in this case asks (amongst other things) for an award to compensate her for the loss of wages that she suffered when she left the defendants' cafe. We deal with the detail of that below.

[20] Apart from loss of wages, the plaintiff says that she also suffered humiliation, injury to feelings and loss of dignity, both while she was working at the defendants' cafe and being harassed by the defendant and also afterwards, when she had left the cafe, and reflected on her experience.

[21] A number of witnesses confirmed that when the defendants' took over the cafe the plaintiff had been a confident, bubbly and capable person, but that by the time she left the cafe on 12 August 2008 she had become withdrawn and unhappy. On 3 October 2008 she saw her doctor and was diagnosed as suffering from reactive depression.⁶ Again, we deal with issues of compensation for the emotional harm she suffered later in this decision. It suffices to say here that the period of the plaintiff's most acute depression was reasonably short-lived. Both her doctor and her counsellor reported that her situation had substantially improved by early November 2008. She has, however, continued on anti-depression medication since 3 October 2008 and there has been a residual level of anxiety remaining while these present proceedings have been taking their course.

The allegations of sexual harassment

[22] We heard a good deal of evidence over three days of hearing time about the incidents and events giving rise to the plaintiff's claim. We do not think it is necessary to deal with each incident one by one. The overall pattern of behaviour is clearly established on the evidence given not only by the plaintiff but, importantly, by others who worked in the cafe at the same time, and who corroborated much of what the plaintiff had to say.

[23] For about a month after the plaintiff and the defendant started working together there were no significant issues, although the plaintiff said that she did notice that there were some 'innuendoes' in things that the defendant said to her from time to time. But then on 3 May 2008 the plaintiff was sitting in the lunch-room used by staff at the cafe,

⁶ Specifically, depression brought on as a reaction to the way in which she had been treated by the defendant at the cafe.

at lunch time, and alone with the defendant. The defendant was sitting to her right. He unexpectedly put his left hand on her right knee. The plaintiff was surprised, and after a second or two she crossed her right leg over her left leg so as to get the defendant's hand off her. But the defendant's hand stayed on her knee. She then got up, and gave the defendant what she described as a 'funny look' intending to indicate that she was not happy with what he had done. From that time on she began to feel that the defendant was invading her space, and paying her more attention than was appropriate, and saying or suggesting things to her that she was not comfortable with.

[24] We accept that the following events then occurred between 3 May 2008 and 12 August 2008:

- [a] At about the time of the incident on 3 May 2008 the plaintiff asked the defendant if he wanted her to make him a coffee, to which he replied to the effect that she (the plaintiff) knew what he wanted, he wanted her;
- [b] About the same time there was an accident in which the defendant's hand was injured. As he was lying on the floor waiting for an ambulance to arrive the plaintiff asked him if he was OK. He responded to the effect that he would be better if she was lying beside him;
- [c] One morning (the plaintiff thought this event probably occurred late in July 2008) the plaintiff arrived at her usual start time of 5.45 a.m. She said she had a very stiff and sore neck. The defendant said that a neck rub would help. She said that it might, not thinking that the defendant would then touch her. However, as she was standing at a sink, the defendant came up close behind her and started to massage her neck and shoulders. She went to pull away, but the defendant was very firm and made her stay in place. The plaintiff said she was 'frozen to the spot', and frightened. She did not want the defendant touching her;
- [d] The plaintiff said that the defendant was always putting his arm around her, near her bottom. Often when the defendant touched the plaintiff he had flour on his hands and so would leave a floury mark behind. All of the others who worked in the cafe at the time and who gave evidence to the Tribunal (including a witness who was called by the defendant himself) confirmed that the defendant often left floury hand marks on the plaintiff's clothing (in many cases the marks were on the plaintiff's shoulders, lower back and waist);
- [e] The plaintiff also said that the defendant repeatedly kissed her on the back of the head, or touched her leg and that "*... he kept touching my bum and on one occasion I was crouched down he came up behind me and pinged the elastic on my knickers*";
- [f] On one occasion the song 'Moondance' was playing on the radio with lyrics about making love and romance. The defendant looked at the plaintiff and said to the effect that he would like to be doing that with her;
- [g] The defendant would often and unnecessarily sit very close to the plaintiff, for example when in the lunch-room or when working at book work together. In his evidence the defendant suggested that this had to do with the plaintiff's poor hearing. However, even accepting that the plaintiff does suffer from some loss of hearing, we accept the plaintiff's evidence that the defendant had a habit of sitting closer to her than she was comfortable with;

- [h] There were occasions on which the defendant and the plaintiff worked across a table from each other. The plaintiff said that on some occasions the defendant would simply reach out and hold her hand. She would always pull her hand away. On other occasions the defendant would come over to her and brush his hand across her bottom. The plaintiff said this occurred on an ongoing basis. She also said that on occasions the defendant would ask to hold her hand, or if she would sit beside him (she declined to do so);
- [i] The defendant tickled and rubbed the plaintiff's back from time to time. She would try to get away, but the plaintiff said he would then 'hem her in' so that she could not;
- [j] At a point in May 2008 the defendant was injured in a motor accident. Afterwards the plaintiff noticed that he was very quiet, and asked him if he was alright. He said that a cuddle from her would help him;
- [k] One day there was a conversation about saunas. The defendant asked if the plaintiff liked saunas, and she said she did. The defendant then suggested that they should have one together. The plaintiff did not answer. The defendant then asked why she did not answer. She said that she did not want to⁷;
- [l] The plaintiff said that on one occasion the defendant said that he would like to 'have her' 24 hours a day;
- [m] There was an occasion on which the plaintiff had to travel to another locality nearby, and took some sausage rolls with her. She asked the defendant what she should pay for them. He replied to the effect that just a hug would do. She said that as she left work on this occasion the defendant told her that he loved her;
- [n] The plaintiff also gave evidence that on one occasion the defendant said that he wanted to 'eat her'. She then said that she was 'not on the menu', at which he repeated that he wanted to eat her⁸;
- [o] Towards the end of the plaintiff's time at the cafe, on many mornings the defendant would hug the plaintiff, on one occasion even lifting her off her feet.

⁷ With respect to this incident, the defendant remembered that there had been a discussion about saunas but rejected the suggestion that he had ever invited the plaintiff to have a sauna with him. He said that as a diabetic it would be dangerous for him to have a sauna. Even if that is so, however, we prefer the plaintiff's evidence that the subject was discussed and that – whether or not it was the meaning the defendant intended to convey – the message the plaintiff got was that the defendant wanted to have a sauna with her.

⁸ We have more to say about the defendant's lack of understanding about his behaviours below; but we note here that he was not New Zealand-born or raised. Although he has lived and worked in New Zealand for 30 years or so he still has a very heavy foreign accent, and his turn of phrase and use of English suggested to us that he probably did not recognise the connotation that others might see in this kind of comment.

[25] This is not an exhaustive list of all of the incidents described by the plaintiff and other witnesses who gave evidence in support of the claim.⁹ It is, however, a sufficient description of the pattern of behaviours that we find to have been imposed on the plaintiff by the defendant.

[26] The defendant generally denied that these events had taken place, and of the few incidents that he could remember, he said his words and behaviour had been misunderstood by the plaintiff. We have already indicated that we did not find him to be a reliable witness, but in fairness we also thought that the plaintiff's evidence was not without some difficulties of its own.

[27] One example will serve to illustrate. The plaintiff said that after the defendant first put his hand on her knee on or about 3 May 2008 she spoke to a friend about what had happened. They discussed the situation. The friend advised the plaintiff to keep notes about what was happening at work. The plaintiff started to keep notes. It was her evidence that she then kept notes of all the interactions that were of concern to her over the next three and a half months. But at some point before she resigned on 12 August 2008 she disposed of what must have been the majority of her notes. The result was that, by the time of the hearing in the Tribunal, there were a few contemporaneous notes of what had occurred in May 2008, and then in the last days of July 2008 and early August 2008. But there was a gap in the notes running through the whole period of June 2008 and up to about the 26th July 2008.

[28] The plaintiff explained¹⁰ that the main purpose of writing the notes had been a therapeutic one; it helped her to record what was happening at work in writing to 'get it out of her system'. The plaintiff also said that when she reviewed the notes she found many of them were simply repeating behaviours that she had already noted, and so she saw no point in keeping them. But even accepting both of those things, we did not find the plaintiff's explanation as to why she had kept notes throughout the whole period, but then disposed of the notes for such a significant part of the period, to be entirely satisfactory. After all, the defendant's unwanted behaviour was continuing throughout the period, and the detrimental effect it was having on her was compounding.

[29] Mr Hesketh submitted that we ought not to judge the plaintiff's decision to discard so many of her notes as she did from a lawyer's perspective but, again, even giving the benefit of all those kinds of reservations and doubts to the plaintiff it does seem surprising that she disposed of any of the notes in the circumstances.

[30] The assessment of credibility as between the plaintiff and the defendant in this matter might have been more difficult but for two factors.

[31] The first is that the plaintiff's description of what the defendant was saying and doing to her was substantially corroborated by other workers at the cafe at the time. Their evidence was independent and credible, and their description as to the effect of

⁹ We were offered a number of different accounts incorporating different incidents: for example, one of the other workers at the cafe recalled that the defendant would call the plaintiff 'darling'. But not all of these incidents were mentioned by the plaintiff in terms in her own evidence in chief. The list of incidents we have set out at para [24] above has therefore been taken from and is limited to the plaintiff's evidence in chief. We add, however, that even if we were to add all of the incidents noted by other witnesses, and/or which were described by the plaintiff under examination at the hearing, our overall sense of the outcome and our assessment of remedies would not have been different. The general pattern of behaviours with which we are concerned is, in our view, sufficiently described in para [24].

¹⁰ This aspect of her evidence was corroborated by the evidence given by her friend.

the defendant's behaviours on the plaintiff also served to support the plaintiff's account of events.

[32] The second factor is that any reservations about aspects of the plaintiff's evidence pale into insignificance when compared to the manifestly unreliable evidence that was given by the defendant. We have already noted a concern about his evidence in connection with the letter that was delivered to him on 12 August 2008. Two more examples will further illustrate our concerns.

[33] When it came time for the defendant to give his evidence, he took the usual oath to tell the truth. He then read out a pre-prepared statement. At a point, he read out that he had been suicidal as a result of the pressure brought to bear on him by the plaintiff's case. When examining the defendant, Mr Hesketh asked if it were really the case that the proceedings had left him feeling suicidal. The defendant recoiled, and appeared to be surprised and even shocked by the suggestion. It was as if he had not read his pre-prepared statement at all (much less that he had just read it out aloud to the Tribunal as a true statement). When asked to explain why he had told the Tribunal in his evidence in chief that he had been suicidal, but was now saying in vigorous terms that was not so, the defendant said that it was something that must have been written by one of his previous lawyers. The defendant did not appear to have any inkling of what it meant to have given an oath to tell the truth. Nor did he demonstrate any understanding that he was ultimately responsible for the evidence that he gave to the Tribunal. As Mr Hesketh observed in his closing submissions, in this and a number of other significant respects the defendant purported to blame various statements that he (the defendant) had clearly been responsible for on previous advisors and others.

[34] The defendant's lack of insight into the hearing process was also demonstrated by an incident involving a witness whose statement the defendant wanted to produce. The witness in question was a person who had been working at the cafe at the time the plaintiff was there, and who was still employed by the partnership (and therefore still working with the defendant) at the time of the hearing in the Tribunal.

[35] It seems that at some point before the hearing the worker had been asked by one of the defendant's former lawyers to prepare a statement about the events at issue. The worker had done so, and sent the statement to the lawyer. The defendant and that particular lawyer then parted company, but the defendant obviously obtained the file from the lawyer. The worker's statement must have been amongst the materials on the file.

[36] The defendant produced an envelope at the hearing. It contained the worker's statement. The defendant said he wanted to produce the statement. He was therefore asked to show it to Mr Hesketh first. The defendant had to open the sealed envelope, and take the statement out, in order to do so. Mr Hesketh read the statement and, very fairly, indicated that it might not be in the defendant's best interests to produce it as evidence. Even then the defendant did not read the statement for himself, or make any effort to check to see why Mr Hesketh might have said such a thing. He was undeterred, and adamant that the statement should be produced. It was therefore received by the Tribunal.¹¹

[37] As far as we could tell, the defendant had never opened the envelope, or read the statement it contained, before he submitted it to the Tribunal. But when the statement was read, it made it clear that this worker too had seen floury marks put on the plaintiff's clothing by the defendant, and other incidents in which the defendant had been very close to the plaintiff. The defendant appeared to be completely surprised by what the statement said. He therefore contacted the worker in question during the next

¹¹ It was produced as Exhibit F.

adjournment. When he returned to the hearing after the adjournment, he explained that the worker had told him that the statement contained 'mistakes' which the worker wanted to 'correct'. He added, however, that the worker was only willing to give evidence by telephone, not in person.

[38] However the worker was still working at the cafe, which was not far from the venue of the Tribunal hearing. We directed that any evidence would have to be given by the worker in person. A witness summons was issued to the defendant to compel the worker's attendance, and the author of the statement gave evidence to the Tribunal the next morning. The worker essentially stood by the written statement.

[39] The defendant's behaviour in respect of all of this demonstrated an extraordinary naivety, and an unrealistic optimism that the Tribunal might have accepted his suggestion that the statement was 'mistaken' when it became clear to him that the document did not support his case as he had imagined it would.

[40] These are only examples of the kind of evidence and conduct that lead us to conclude that the defendant's account of events was not to be trusted. Overall his evidence was vague and at points he was clearly being disingenuous. In an odd way, however, the defendant's woeful lack of appreciation about the importance of at least trying to give reliable evidence served to establish one point that is somewhat in his favour.

[41] We do not think the defendant ever understood, or even really had the capacity to understand, that his behaviours towards the plaintiff might have been unwelcome and offensive to her.

[42] It was the plaintiff's evidence that she had communicated to the defendant that his behaviours were unwelcome to her in various ways. She said, for example, that she had suggested to the defendant at times that she did not like what he was saying or doing, and that she had asked him to stop on a number of occasions. She said the defendant took no notice, and just continued on. But at the same time the plaintiff also gave evidence "*...I could not face him straight and tell him to stop. I had seen how he had reacted at different times when things had happened and I was scared of the reaction I would get from him. I felt overpowered by him.*"

[43] On most occasions when incidents occurred, the way in which the plaintiff conveyed her feelings to the defendant was by leaving the room, or ignoring him, or even on occasions making a joke about what had happened. There does not appear to have been any moment in time at which the plaintiff (or someone acting for or with her) ever confronted the defendant about what he was doing, in the sort of blunt terms that referred to sexual harassment in as many words.

[44] We are not making this point to devalue the plaintiff's concerns, or to suggest that the defendant's behaviour was not upsetting to her, or that she had any duty to confront the defendant. But our overall impression was that this defendant had no chance of understanding anything subtle. We do not think he had any notion whatsoever that his behaviours were so deeply unwanted by the plaintiff and others who worked at the cafe at the time, or that there was an issue that he as an employer needed to deal with, or indeed that there was anything going wrong in his business at all.

[45] For these reasons we have concluded:

- [a] Although the dates, accounts and details are at points uncertain, the events and incidents set out at paragraph [24] above occurred substantially as the plaintiff described them; and

- [b] In almost all respects we prefer the evidence given by the plaintiff and the the other witnesses who were called to give evidence in support of her complaint, over the evidence that was given by the defendant; but
- [c] Contrary to what the plaintiff suggested, we do not think the defendant ever understood that his behaviour towards her was so unwelcome to her, or what impact it was having on her, or what its consequences might be.

Sexual Harassment?

[46] The claim is brought under section 62(2) of the HRA which provides:

“(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) of this section) 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) of this section.”*

[47] The events of concern to us occurred during the course of the plaintiff’s employment by the partnership, which is an area to which s.62(2) applies by virtue of s.62(3)(b) of the HRA. The plaintiff’s claim is that the defendant used language of a sexual nature and/or physical behaviour of a sexual nature that was unwelcome or offensive to her and which was repeated, or of such a significant nature, that it had a detrimental effect on her.

[48] There is no doubt that the defendant’s behaviours were unwelcome and offensive to the plaintiff, that they were repeated, and that they had a detrimental effect on her in her employment.¹² Whilst she remained at the cafe she obviously found the defendant’s behaviour humiliating and upsetting – so much so, that in the end she felt she had no choice but to leave.

[49] Although the assessment of whether or not behaviour is of a sexual nature is an objective one¹³, we have no doubt that behaviours like sitting close to the plaintiff, touching her, and speaking to her as the defendant did, had the necessary elements of sexuality to bring section 62(2) of the HRA into play. Beyond that, the question of whether the behaviours are unwelcome or offensive to the person who is subjected to them is a matter to be viewed subjectively from the standpoint of the victim: see (for example) *Proceedings Commissioner v Tony Woodward and Carlyon Holdings Limited*¹⁴. The evidence in this case makes it overwhelmingly clear that the defendant’s behaviours were unwelcome and offensive to the plaintiff.

[50] It is of course no defence that the behaviours or any of them may have been unintentional: see s.92I(4) of the HRA.

¹² Sexual harassment under s.62(2) of the HRA can be established by a single interaction, if of a sufficiently significant nature. But in this case we do not need to decide whether or to what extent any of the individual elements of behaviour listed at paragraph [24] might have been sufficiently significant to constitute sexual harassment without more. That is because the alternative element of repetition is clearly established by the evidence: see s.66(2)(b) of the HRA.

¹³ See *Lenart v Massey University* [1997] ERNZ 253.

¹⁴ *Proceedings Commissioner v Tony Woodward and Carlyon Holdings Limited* CRT Decision 8/98, 22 May 1998; also see *Shiu v Naseeb* [2004] NZHRRT 17.

[51] We therefore find that the plaintiff has been a victim of unlawful sexual harassment by the defendant in respect of each and all of the incidents summarised at paragraph [24] above.

[52] That said, this is not the most egregious sexual harassment case. While we do not condone any of the things that the defendant said or did, there is no evidence of the kind of outright sexual assault seen in some cases. The defendant's behaviour towards the plaintiff was ill-advised, unacceptable and (as we have found) unlawful. We do not, however, go so far as to say that the defendant was a sexual predator who would have taken sexual advantage of the plaintiff had the opportunity arisen.

Effect on the plaintiff

[53] We have already noted that the plaintiff was described as a happy, bubbly and enthusiastic worker when the defendant took over the cafe, but by the time she resigned in August 2008 she was withdrawn, depressed and unhappy. We find that change in personality was substantially caused by the defendant's behaviour towards her. We accept her evidence that she felt powerless in the situation that developed. It was clear, for example, that she had come to work long hours at the cafe. Her income reflected that situation. It was never very likely that she would be able to duplicate those hours (or income) if she moved to another cafe – certainly not in the short term. We can also see that, despite her mounting sense of unhappiness about the way the defendant was behaving, it would have been very difficult for her to complain to him, or to his wife. But at the same time she had good financial reasons not to leave her employment with the defendants. It is not surprising that she came to feel devalued and powerless in the situation. We have no doubt that she suffered significant loss of dignity, humiliation and injury to her feelings while she was still working at the cafe. In addition, in the end the plaintiff saw no choice but to leave the job.

[54] We agree with Mr Hesketh that an award of special damages is indicated in the circumstances, to compensate the plaintiff for earnings that she would have expected to have but for the fact that defendant's behaviours drove her from the job. We deal with quantification issues in the next section of this decision.

[55] We also accept that even after the plaintiff left the cafe on 12 August 2008 she continued to feel humiliated and depressed. There is no reason to doubt the evidence that was given both by her doctor and by a counsellor whom she went to see, to the effect that the cause of her depression in and about October 2008 was substantially what the defendant had said and done to her when she was working at the cafe.

[56] At the same time, our assessment of adverse effects on the plaintiff must try to reflect of a number of other factors:

- [a] The plaintiff's doctor described how, about a month after he first saw her in relation to depression on 3 October 2008, she was much improved;
- [b] When the plaintiff first went to counselling in relation to these events on 5 November 2008 her counsellor indicated that a course of six sessions of counselling would likely be appropriate. In fact the plaintiff brought the counselling sessions to an end after only three sessions.¹⁵ The counsellor's notes show that the plaintiff felt that by then (i.e., 3 December 2008) she could cope on her own;

¹⁵ There were sessions on 5 and 11 November 2008; the plaintiff was scheduled for an appointment on 19 November but she postponed that; and the last session took place on 3 December 2008.

- [c] The counsellor's notes also make it clear that there were other factors at work in the plaintiff's life (low self-esteem, an unfortunate relationship with her children, lack of confidence issues, issues still relating to her marriage which had ended some 15 years earlier) that may have informed her reaction to events in her life;
- [d] On 18 October 2008 the plaintiff learned that one of her grandchildren was severely ill with leukemia;
- [e] About a year after the events of concern to us, but before the hearing, one of the plaintiff's sons was badly injured in a serious motor accident.

[57] We accept that there has been some residual and ongoing anxiety for the plaintiff arising out of the events of April to August 2008 and during the period leading up to the hearing in the Tribunal. We also note that at the time of the hearing she was still taking medicine for depression that had been prescribed in October 2008. At the same time, we think that there may well now be other factors at work in her emotional situation and for which the defendant cannot be held accountable.

[58] In our assessment the emotional harm that the plaintiff ought properly to be compensated for is the humiliation, loss of dignity and injury to feelings that she felt:

- [a] while still having to work for the defendant during the period leading up to 12 August 2008;
- [b] when she decided that she could not continue in the job because of the defendant's behaviours, and left on 12 August 2008; and
- [c] during a period of depressive illness that lasted in its most acute form for a period of about a month after the plaintiff left the cafe, but which was substantially (if not entirely) ameliorated by December 2008.

Remedies

[59] We make a declaration pursuant to ss.92I(3)(a) and 62(2) of the HRA that the defendant has committed a breach of Part 2 of the HRA. In particular the defendant has by the use of language of a sexual nature and/or by physical behaviour of a sexual nature (as particularised at paragraph [24] of this decision) subjected the plaintiff to behaviours that were unwelcome and offensive to her, and which were repeated, such that they had a detrimental effect on the plaintiff in her employment.

[60] The plaintiff has asked for an award of damages to compensate her for the financial loss that she suffered after she left the defendants' cafe: see ss.92I(3)(c) and 92M(1)(a) of the HRA. The calculation suggested by Mr Hesketh compared the actual gross income received by the plaintiff from her work at the defendants' cafe between 4 April and 12 August 2008 (in round terms, \$19,000) with her earnings from such work as she had in the period from 13 August 2008 to the end of that working year on 21 December 2008 (in round terms, \$6,800).¹⁶ There was no suggestion that we should look beyond 21 December 2008 in the calculation. The period from 4 April 2008 to 12 August 2008 (just over 4 months) is not far different from the period 13 August to 21 December 2008 (just under 4 months). On that basis an award of just on \$12,200 was suggested as appropriate.

[61] There is an inevitable element of estimation, and a particular uncertainty around whether or not the holiday pay entitlement the plaintiff had accrued when she left the

¹⁶ The plaintiff's combined earnings from two other cafes during the period 13 August to 21 December 2008 came to \$6,819.25.

defendants' cafe should be taken into account as offsetting any damages otherwise attributable to the period 13 August 2008 to 21 December 2008. However, as Mr Hesketh noted, even though this is a claim for special damages it is legitimate to arrive at a figure that reflects some uncertainties and hypotheses, and that moderation is appropriate. We agree with him that in this part of our jurisdiction we are to be guided by the approach to the assessment of financial loss that was articulated by the Court of Appeal in *Telecom New Zealand Limited v Nutter*,¹⁷ notwithstanding that the decision in that case was under the Employment Relations Act 2000.

[62] Apart from the question as to how long the period in which damages ought be assessed should run, there is also an uncertainty in this case arising out of the fact that the plaintiff's income was paid on an hourly rate basis and her hours varied from week to week. While at the defendants' cafe the plaintiff averaged about 60 hours of work per week.¹⁸ An award of close to \$12,000 dollars depends on an assumption that she would have continued to do that many hours. Maybe so, but it is only an assumption.

[63] All in all, we think that an award of \$9,000 under this heading is appropriate. Certainly we do not think that the plaintiff will have been over-compensated at that figure. We add that this is a sum that is intended to compensate her for the loss of pre-tax earnings. The sum is to be paid to the plaintiff, and both the defendant and the partnership are jointly and severally liable to pay it.

[64] Aside from damages for financial loss, the plaintiff also asked for an award of damages under ss.92I(3)(c) and 92M(1)(c) of the HRA for the emotional harm that she suffered as a result of the defendant's behaviour.

[65] Fixing a sum of money to compensate for the kind of distress that we are considering here is an inherently difficult exercise:

*"[T]he assessment of compensation for an injury or loss, which is neither physical nor financial, presents special problems for the judicial process, which aims to produce results objectively justified by evidence, reason and precedent. Subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on, and the degree of their intensity are incapable of objective proof or of measurement in monetary terms. Translating hurt feelings into hard currency is bound to be an artificial exercise. As Dickinson J said in *Andrews v Grand & Toy Alberta Ltd* (1978) 83 DLR 452 at 457 – 456 ... there is no medium of exchange or market for non-pecuniary losses and their monetary evaluation:*

'... is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must of necessity be arbitrary or conventional. No money can provide true restitution.'

Although they are incapable of objective proof or measurement in monetary terms, hurt feelings are nonetheless real in human terms. The courts and tribunals have to do the best they can on the available material to make a sensible assessment, accepting that it is impossible to justify or explain a particular sum with the same kind of solid evidential foundation and persuasive practical reasoning available in the calculation of financial loss or compensation for bodily injury."¹⁹

¹⁷ *Telecom New Zealand Ltd v Nutter* [2004] NZCA 154.

¹⁸ Afterwards her average was closer to 37 hours a week. This drop in hours is the single most significant factor in her financial loss, rather than any reduction her rates of pay.

¹⁹ *Vento v The Chief Constable of West Yorkshire Police* [2002] EWCA Civ 1871 at [50] & [51].

[66] In addition to these difficulties, there is also a concern that awards for loss of dignity in this part of the Tribunal's jurisdiction should keep up with inflation over the years, and ought generally to be calibrated appropriately with awards in other contexts but which are, essentially, for much the same kinds of harm. It is now over ten years since Gallen ACJ urged a review of these kinds of awards in *Laurson v Proceedings Commissioner*.²⁰ Even in 2004 the Tribunal described the exercise as being 'long overdue'.²¹ To date, however, there has been no such review.²²

[67] However, as Mr Hesketh said, it is at least difficult – and possibly inappropriate – to engage in that kind of exercise in a case like this where the defendants were not represented. We agree with that, but we will indicate that the time is fast approaching when the Tribunal will have to take an initiative. Specifically, we have in mind the possibility of appointing an *amicus* to furnish submissions if and when another case raises the issue again.

[68] For the present, however, we confine ourselves to dealing with this case as it was presented. We have summarised the harm suffered by the plaintiff at paragraphs [53] to [58] above. We do not repeat that, but our award must of course reflect those conclusions. And, to state the obvious, the fundamental object of the exercise here is to compensate the plaintiff for the harm suffered, not to penalise the defendant/s for their conduct (although, under s92(4) of the HRA, we are obliged to take into account our finding that this was not a case of sexual predation).

[69] There have been comparatively few awards made in respect of claims under s.62 of the HRA in recent years:

[a] In *Ngapera v Reddick*²³ \$5,000 was awarded in respect of seven months of sexual harassment not altogether dissimilar to that at issue in this case;

[b] In *Sinclair v Chhetri*²⁴ 3,000 was awarded in respect of three weeks of sexual harassment, including two occasions on which the defendant touched the plaintiff's breasts;

[c] In *Main v Topless*²⁵ \$5,500 was awarded in respect of 5 months of abusive jokes and language;

[d] No monetary award was made in *Shiu v Naseeb* [2004] NZHRRT²⁶;

²⁰ (1998) 5 HRNZ 18, 27-28.

²¹ *Main v Topless* [2004] NZHRRT 6 at para [111].

²² See in this context, Hammond J, '*Beyond Dignity*', Proceedings of the Second International Symposium on the Law of Remedies (Auckland, November 2007). The paper is at www.courtsofnz.govt.nz/speechpapers. His Honour noted in specific relation to awards in this Tribunal that there is " ...a strong concern at the Bar and amongst trial judges to have what might be described as a 'scale more certain' and a concern on the part of appellate courts to see that there is an appropriate range. However there is the concurrent difficulty of keeping that range current, and not operating as an unduly artificial ceiling." For example, what (if anything) should it mean for awards that are made in respect of emotional harm under the HRA that the High Court is now routinely awarding sums in the vicinity of \$25,000 to each owner of a leaky building (and around \$15,000 to non-occupying owners) as general damages for the stress and anxiety associated with that kind of problem? See (for example) *White v Rodney District Council & Kerkin* (Auckland High Court, CIV 2009-404-001880, 19 November 2009, Woodhouse J); *Body Corporate 188529 & Ors v North Shore City Council & Ors (No.4)* (Auckland High Court, CIV-404-,Heath J) and *Body Corporate 111608 v Jontashya Investments Ltd & Ors* (Auckland High Court, CIV 2008-404-002-358, 19 February 2009, Asher J).

²³ *Ngapera v Reddick* [2004] NZHRRT 5.

²⁴ *Sinclair v Chhetri* [2003] NZHRRT 17.

²⁵ *Main v Topless* [2004] NZHRRT 6.

²⁶ *Shiu v Naseeb* [2004] NZHRRT 17.

[e] No award was made in *Williams v Pacific Plastic Recyclers Ltd*²⁷ either, but that was because the plaintiff had already received compensation of \$4,500.

[70] In addition, Mr Hesketh referred us to *Read v Mitchell*²⁸ in which \$10,000 was awarded in 1999 in respect of conduct that lasted for over two years, including frequent offensive jokes, patting the plaintiff's bottom, and even simulated sexual intercourse. *Proceedings Commissioner v Read and Wayby Telecommunications*²⁹ was also mentioned, involving another award of \$10,000 for three months of repeated and graphic sexual talk and requests for sex, and a promise of preferential treatment if requests for sex were complied with.

[71] We have also been referred to *Carlyon Holdings v Proceedings Commissioner*³⁰ not only for the award made in that case³¹, but also for the list of factors that we ought to take into account in setting damages in this kind of case, including for example the nature of the harassment; the degree of aggressiveness and physical contact it involved; whether or not it was ongoing; the frequency of the behaviour; the age of the victim; the vulnerability of the victim, and the psychological impact of the harassment on the victim.

[72] In *Carlyon* a work supervisor had, over a period of a month or so, indicated that he wanted to have an affair with the complainant, suggested that they walk together and hold hands, and sent the complainant a birthday card of a kind that might have been sent if the two were in an intimate relationship. The decision in that case is thus a reminder that even what might be regarded as 'lower order' sexual harassment can properly attract a full award – we would have thought that the present value of the award of \$7,000 award made in that case in 1998 must now be in the vicinity of double that figure.

[73] No case is identical, of course. We also bear in mind that, in the end, the award in any given case must respond to the evidence of the harm suffered in the particular case: of itself, comparing different circumstances in which liability has been found is of limited value. And in this case there is clinical evidence of depression that needs to be factored in, albeit that it was reasonably short-lived in its acute form.

[74] Under ss.92I(3)(c) and 92M(1)(c) of the HRA, we award damages in the sum of \$10,000. This sum is to be paid to the plaintiff, and both the defendant and the partnership are jointly and severally liable to pay it. This award is made independently of and therefore in addition to our award of \$9,000 under ss.92I(3)(c) and 92M(1)(a) of the HRA.

[75] Finally, Mr Hesketh asked for an order under s.92I(3)(f) of the HRA to compel the defendants to attend training of an appropriate kind, so as to assist them to comply with the HRA in future. In doing so he referred to *Ontario Human Rights Commission & Sanford v Koop (No.2)*³², a decision of the Human Rights Tribunal of Ontario in 2005. The decision of the Tribunal in that case makes the point that, where training is indicated, then there is a public interest element to the making of such an order. We accept that. Further than that, we think it would be dangerous for the defendant and/or the partnership to continue in business without learning something more about the

²⁷ *Williams v Pacific Plastic Recyclers Ltd* [2004] NZHRRT 47.

²⁸ *Read v Mitchell* (1999) 5 HRNZ 537 (High Court)

²⁹ *Proceedings Commissioner v Read and Wayby Telecommunications* (CRT Decision 17/2001; 26 July 2001).

³⁰ *Carlyon Holdings v Proceedings Commissioner* (Auckland High Court, AP 104/98, 12 October 1998 per Potter J).

³¹ \$7,000 for what, as Mr Hesketh noted, was reasonably low-level harassment. The award was made in 1998.

³² *Ontario Human Rights Commission & Sanford v Koop (No.2)* (2005) 55 CHRR D/102.

provisions of the HRA that relate to sexual harassment. The making of an order requiring them to attend appropriate training is not just in the public interest, it is in their own interests as well, so that they can take steps to avoid any repetition of what has happened in this case.

[76] Mr Hesketh informed us that the Human Rights Commission offers training programmes of a kind relevant to this case, and indicated that he did not anticipate any insurmountable practical difficulties that might prevent the defendants from attending such a programme if directed by the Tribunal to do so.

[77] That said, there were a number of suggestions by the defendant during the hearing that his wife has been and is very ill. Although she did manage to attend two days of the hearing in the Tribunal, we do not know whether her medical condition is such as to make it oppressive to require her to undertake training of the kind we envisage.

[78] We therefore make the following orders under s.92I(3)(f) of the HRA:

- [a] Within three months of the date on which this decision is issued, the first defendant and his wife are at their own cost to attend a Human Rights Commission-led training programme designed to assist individuals in identifying and addressing sexual harassment in the workplace;
- [b] The first defendant's wife may be excused from the operation of this order upon production to the Chairperson of the Tribunal of a satisfactory medical certificate, to confirm that she is unable to comply for health-related reasons;
- [c] The first defendant must file written confirmation provided by the Human Rights Commission that he and (if she is able to attend) his wife have attended such a training programme, such confirmation to be forwarded to the Secretary of the Tribunal as soon after the training has been completed as is reasonably practical;
- [d] Otherwise we leave it to the Chairperson of the Tribunal to deal with any issues arising out of the implementation of this order as he may consider appropriate.

Conclusion

[79] There is a declaration under ss.92I(3)(a) and 62(2) of the HRA that the defendant has committed a breach of Part 2 of the HRA. In particular the defendant has by the use of language of a sexual nature and/or by physical behaviour of a sexual nature (as particularised at paragraph [24] of this decision) subjected the plaintiff to behaviours that were unwelcome and offensive to her, and which were repeated, such that they had a detrimental effect on the plaintiff in her employment by the second defendants.

[80] Pursuant to ss.92I(3)(c) and 92M(1)(a) of the HRA, we award damages to compensate the plaintiff for financial loss in the sum of \$9,000.

[81] Pursuant to ss.92I(3)(c) and 92M(1)(c) of the HRA, we award damages to compensate the plaintiff for loss of dignity, humiliation and injury to her feelings the sum of \$10,000.

[82] The first defendant and second defendants are jointly and severally liable to pay the awards at paragraphs [80] and [81] above to the plaintiff.

[83] We make the following orders under s.92I(3)(f) of the HRA:

- [a] Within three months of the date on which this decision is issued, the first defendant and his wife are at their own cost to attend a Human Rights Commission-led training programme designed to assist individuals in identifying and addressing sexual harassment in the workplace;
- [b] The first defendant's wife may be excused from the operation of this order upon production to the Chairperson of the Tribunal of a satisfactory medical certificate, to confirm that she is unable to comply for health-related reasons;
- [c] The first defendant must file written confirmation provided by the Human Rights Commission that he and (if she is able to attend) his wife have attended such a training programme, such confirmation to be forwarded to the Secretary of the Tribunal as soon after the training has been completed as is reasonably practical;
- [d] Otherwise we leave it to the Chairperson of the Tribunal to deal with any issues arising out of the implementation of this order as he may consider appropriate.

[84] The issues of name suppression and costs remain.

[85] With respect to the issue of name suppression, our preliminary view is that permanent orders are likely to be appropriate in this case. The position with respect to the plaintiff seems clear; the case obviously involves discussion of information about her that is of a personal and sensitive kind. Even acknowledging the importance of the transparency of procedures such as ours, and the importance of open reporting, it is difficult to see that there can be any sufficient public interest reason to outweigh the plaintiff's private concerns in this respect.

[86] The issue of ongoing name suppression for a defendant in a case like this raises slightly different considerations, but one immediately obvious concern in the particular circumstances of this case is that identification of the defendant may have the effect of disclosing the identity of the plaintiff. This is because the events have taken place in a small town. We suspect that many people in the locality who read this decision and know the name of the defendants might be able to discern who the plaintiff is.

[87] That said, we have no final view of these issues.

[88] If either of the parties has any objection to the existing interim orders becoming permanent, then they should file submissions in accordance with the following timetable.

- [a] Any submissions in opposition to orders being made to permanently prohibit publication of the identity of any of the parties and/or the place at which these events took place are to be filed and served within 21 days of the date in which this decision is issued to the parties;
- [b] Any reply/replies to be filed and served within a further 21 days;
- [c] The issue will then be determined by the Tribunal on the papers and without any further *viva voce* hearing;
- [d] As a precaution, we leave it to the Chairperson of the Tribunal to vary this timetable if he considers that it is appropriate to do so.

[89] Any application for costs will be dealt with on essentially the same timetable, that is to say:

- [a] Any application for costs is to be filed together with any supporting materials within 21 days of the date this decision is issued to the parties;
- [b] Any reply is to be filed and served within a further 21 days;
- [c] The Tribunal will determine the issue of costs on the basis of the papers that have been filed and without any further *viva voce* hearing;
- [d] In case it is necessary, we leave it to the Chairperson of the Tribunal to vary this timetable if he is persuaded to do so.

Mr R D C Hindle

Chairperson

Ms J Grant, MNZN

Member

Ms P J Davies

Member