(1) ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS OR IDENTIFYING PARTICULARS OF THE PLAINTIFF, OF THE THREE SEX WORKERS AND OF THE RECEPTIONIST WHO GAVE EVIDENCE

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

IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2014] NZHRRT 6**

	Reference No. HRRT 018/2011
UNDER	**THE HUMAN RIGHTS ACT 1993**
BETWEEN	**DML**
	PLAINTIFF
AND	**AARON MONTGOMERY**
	FIRST DEFENDANT
AND	**M & T ENTERPRISES LIMITED**
	SECOND DEFENDANT

AT WELLINGTON

BEFORE:
Mr RPG Haines QC, Chairperson
Ms WV Gilchrist, Member
Ms M Sinclair, Member

REPRESENTATION:
Mr RM Hesketh and Ms JM Ryan for Plaintiff
Mr JW Howell for First and Second Defendants

DATE OF HEARING: 5, 6 and 7 March 2012

DATE OF DECISION: 12 February 2014

DECISION OF TRIBUNAL

Introduction

[1] At the relevant time the plaintiff was a sex worker providing commercial sexual services at the Kensington Inn (the Kensington), a brothel in Wellington managed by Mr Aaron Montgomery, the first defendant. The brothel is owned and operated by M & T Enterprises Limited, the second defendant. The shareholder and director of this company is Ms Tara Elizabeth Brockie, the partner of Mr Montgomery.

[2] The plaintiff was employed as a sex worker (though styled as an "independent contractor") by M & T Enterprises Limited from approximately October 2009 to June 2010. She alleges that from approximately March 2010 to June 2010 Mr Montgomery subjected her to sexual harassment by the use of language of a sexual nature. Mr Montgomery denies the allegation. The primary issue in these proceedings is credibility and whether the plaintiff has satisfied the Tribunal, to the civil standard, that sexual harassment as particularised in the statement of claim has been established by the evidence.

[3] The plaintiff is represented in these proceedings by the Director of Human Rights Proceedings under s 90(1) of the Human Rights Act 1993 (HRA).

Non-disclosure orders

[4] By interim orders made on 4 August 2011 under s 107 of the HRA the Chairperson prohibited publication of the names of all the parties and of any details which might identify them. During the currency of the interim order the plaintiff was to be referred to as DML, Mr Montgomery as ABC and M & T Enterprises Limited as HJF Ltd. Those interim orders were continued by the Tribunal on 24 January 2012 until further order of the Tribunal.

[5] Having now heard all the evidence we are of the view that the interim order should be made final only in relation to the plaintiff. By consent we also make final non-publication orders in relation to four other persons who gave evidence at the hearing, namely three sex workers and a receptionist. This order does not include Ms Catherine Healy who did not seek a non-publication order.

An apology to the parties

[6] Before the evidence is addressed the long delay in publishing this decision is acknowledged and an apology offered to the parties. This case was not overlooked. Rather delays regrettably occurred because all members of the Tribunal are part-time appointees and despite best endeavours it is not always possible to publish decisions timeously.

The witnesses heard by the Tribunal

[7] The plaintiff gave evidence on her own behalf and called three other witnesses. The first, whom we shall we refer to as Sex Worker A, also worked for a time at the Kensington. The second was Ms Catherine Healy, National Coordinator for the New Zealand Prostitutes' Collective (NZPC) and finally an accountant whose brief of evidence was admitted by consent to establish certain uncontested facts relating to a business operated by Sex Worker A.

[8] Mr Montgomery was the primary witness for the defendants but Ms Brockie, his partner and director of the second defendant, also gave evidence. The defendants

called as witnesses three workers employed at the Kensington, the first two were sex workers and the third a receptionist. We shall refer to them as Sex Worker 1, Sex Worker 2 and the Receptionist respectively.

[9] The defendants raised as a preliminary issue the admissibility of the evidence intended to be given by Ms Healy. Argument was heard at the commencement of the hearing on 5 March 2012 following which the Tribunal ruled that the evidence was admissible with the reasons for the ruling to follow as part of the Tribunal's substantive decision. Those reasons are set out when we address the evidence of Ms Healy.

THE EVIDENCE GIVEN BY THE PLAINTIFF – OVERVIEW

[10] It is not practical to provide a comprehensive summary of the evidence given by the plaintiff herself. An overview only follows.

[11] After the birth of her first child the plaintiff, who has two children, developed post-natal depression and also has symptoms of post-traumatic stress disorder as a result of childhood sexual abuse. It will be necessary for that abuse to be referred to again shortly.

[12] The plaintiff started working as a sex worker at the Kensington in October 2009. On her first day a woman in charge of reception spoke to her about the sexual services she was willing to provide, including such information as her race, age, height, bust size and whether she was "shaved". This information was recorded on a card which, along with cards relating to the other sex workers, was kept at the reception desk for reference should a client enquire. The plaintiff's card relevantly recorded:

> Euro 22 years
> Natural white blonde above waist length
> Blue eyes
> SZ12
> 36C
> 5'7"
> WB4
> Pass/open
> ST8 & BI doubles
> ...
> No tatts
> No anal

[13] At first the plaintiff enjoyed working at the Kensington and got on well with most of the other sex workers. After a while she would often be asked to help new workers and to show them the ropes. She would always tell them about the support they could get from the NZPC such as free health checks, cheap condoms and lubricant. It was also a place where problems could be discussed, such as difficult clients.

[14] Mr Montgomery, manager of the Kensington, was not happy about this and on several occasions yelled at the plaintiff and instructed her not to tell other workers about the NZPC. Approximately once a week he would take the plaintiff aside and "have a go at her" about something. At first it was mostly about the NZPC. Later he would criticise her for hanging out with the other women outside work and letting other workers stay at the house she (the plaintiff) was then renting. The plaintiff found Mr Montgomery intimidating, he being large in size and of very loud voice.

[15] Then in about March or April 2010 the plaintiff learnt that a person charged with sexual offending against her and two other girls would stand trial and that she (the

plaintiff) would have to give evidence. To that end she would need about two weeks off work.

[16] In a discussion in the carpark as she arrived at work one day, she told Mr Montgomery of the circumstances. He initially appeared understanding and supportive. However, it was from about this time that the plaintiff says the sexual harassment began.

The "comfort zone" statement

[17] In early April 2010 the plaintiff moved into new rental premises with her then boyfriend. Also living at the house was another sex worker and the driver for the Kensington. Other sex workers would visit the home from time to time. Mr Montgomery had a "rule" that sex workers at the Kensington were not allowed to socialise with each other outside work and the plaintiff was aware that he was not happy with the visitors to her home.

[18] One morning when Mr Montgomery picked up the plaintiff after an all-night job he took her back to the Kensington to collect her things and then drove her home. On parking the car he asked the plaintiff if she was selling "P" to the other "girls". The plaintiff said that she was not. He replied that he was watching her house and that if she didn't look out, something would happen. He said he knew who walked in her front door. Mr Montgomery then told her that no one had taken the plaintiff out of her comfort zone before and said that someone needed to. The plaintiff felt that Mr Montgomery was hinting that it was he who would take her out of her comfort zone and that he wanted to make her uncomfortable. The plaintiff felt scared after this conversation because Mr Montgomery was her boss and because of his large size. She was worried that he would hurt her or send someone around to her home to hurt her.

Sexual comments

[19] In late April 2010 Mr Montgomery took the plaintiff off her Saturday night shift and placed her on Sunday day shifts. The plaintiff was not happy with this change as Sundays were usually quiet; there was only one other woman working the Sunday shift. As a result the plaintiff spent a lot of time in the lounge and would often be alone there when the other woman was upstairs with a client or outside having a cigarette.

[20] On most of the Sundays worked by the plaintiff Mr Montgomery came up to her when she was by herself in the lounge and said things that made the plaintiff feel uncomfortable. He would usually speak quietly, which was unusual for him. He made comments to her about him having sex with other sex workers. He also made comments to her about her body. The plaintiff did not want him to say these things to her. Once or twice Mr Montgomery made these sexual comments to the plaintiff when she was working the night shift. But most of the time he made the comments when she was working the Sunday day shift.

Comments about sex with other sex workers

[21] A number of times Mr Montgomery told the plaintiff that he liked to have sex with other sex workers. He told her that weekends were his play time and he would take girls into his special room and get stoned and have sex with them. By his special room he meant a room at the Kensington on the ground floor next to the lounge. The plaintiff had seen Mr Montgomery take other sex workers into that room several times.

[22] Once or twice Mr Montgomery told the plaintiff exactly what he had done with other sex workers. He said that he "went down on them" and that they gave him "blow jobs". He would also tell the plaintiff that he liked "young, skinny girls with perky breasts". On one occasion he told her that he could do what he liked with girls and that "most girls will do anything for me anyway".

[23] The plaintiff felt really uncomfortable when Mr Montgomery said these things to her and told him that she did not want to know about it. Mr Montgomery replied that if she had a problem then she should leave. He also told her that he would make it hard for her to get work in the city.

Comments about the plaintiff

[24] Several times the plaintiff was asked by Mr Montgomery whether she was "shaved". By that she understood him to be asking whether she had a "Brazillian" bikini wax. He also asked her several times whether she would have anal sex with clients and whether she "swallowed" when performing oral sex.

[25] When asked these questions the plaintiff told Mr Montgomery that it was none of his business. She knew that the information was kept at reception. The card would have been available to Mr Montgomery and to clients and she knew there was no need for the questions to be asked.

[26] The plaintiff did not mind clients asking the questions because she knew they were paying for her services and it was part of the job. But she felt it was entirely different when it was her boss asking these kinds of questions repeatedly.

[27] Mr Montgomery also told the plaintiff that she needed to work out. He would make comments to her such as "you should give up your burgers", "you should walk into work and not get driven" and "you should get the hula hoops out more often". These comments made the plaintiff feel really bad about herself and to feel that she was fat. In addition she did not think it was fair because she knew that her regular clients liked cuddly girls and not girls who were "skin and bones".

[28] Mr Montgomery never touched the plaintiff and she did not think that he was sexually interested in her at all because he kept saying that he liked skinny girls.

The effect of Mr Montgomery's comments

[29] After Mr Montgomery started making these sexual comments to the plaintiff she felt really uncomfortable working at the Kensington. She also felt scared. In the back of her mind were his comments that he was watching her and she felt she was always having to watch her back both at work and at home. She began to feel on edge.

[30] Because of the stress she had difficulty sleeping and eating. Sometimes she would go through a whole day without eating and would survive on coffee and cigarettes. Although she did not usually drink much alcohol, once Mr Montgomery started making the comments to her the plaintiff began to need one or two drinks at the pub each night. She also started spending a lot of time at the pokie machines.

[31] The plaintiff has had depression since she was approximately 12 years of age. After Mr Montgomery began making sexual comments to her she felt more moody and depressed than usual. She would look forward to her clients coming in because it "sort

of numbed" her. A couple of her regulars picked up on it and told her that she had changed and that something was wrong.

[32] The plaintiff felt that Mr Montgomery was trying to break her and to control her, just as he wanted to control all the women working at the Kensington. He made the plaintiff feel degraded and she did not like the way Mr Montgomery thought he could have power over women. She came to wish that she had not told him about the forthcoming trial because she felt he used it against her. It seemed the sexual comments started after she told him about the case.

Steps taken by the plaintiff

[33] The plaintiff found it hard to talk to other people about what Mr Montgomery had been saying to her. She did, however, talk to Sex Worker A because she found her easy to talk to and felt that she could trust her. Sex Worker A told the plaintiff about the Human Rights Commission and her ability to make a complaint of sexual harassment.

[34] The plaintiff also spoke to Ms Catherine Healy at the NZPC. She spoke to her a number of times and would go into the NZPC regularly, probably every couple of weeks. Ms Healy also told the plaintiff about her ability to lodge a complaint with the Human Rights Commission.

[35] Although the plaintiff put up with Mr Montgomery's comments for a while, she eventually decided she had had enough and could not work at the Kensington any longer. Her last shift there was in late June 2010. Approximately a week later she lodged a complaint with the Human Rights Commission.

The evidence of Sex Worker A

[36] Sex Worker A has worked at the Kensington on and off from about 1995. She first met Mr Montgomery when she was working behind the desk at one of the Kensington's other premises, known as the Quarry. At that stage (about 2005) she was not a sex worker but was doing administrative work, including behind the desk duties, for the Kensington.

[37] She described Mr Montgomery as physically a very big man and very loud. She found him intimidating and said that he had a habit of getting very close to one physically, invading one's personal space. He did this often to Sex Worker A and she saw him do it to other women who were working at the Kensington.

[38] She also said that Mr Montgomery was in the habit of saying inappropriate and sleazy things to all of the women. He liked to talk about the fact that he had sex with some of the women. She thought it was "like a power thing" in that he wanted the women to know that he was the boss and could have his way with them. He used to talk to all the women about this and Sex Worker A felt disgusted by it. She found everything about him "really sleazy". She made it clear to him that she was not interested in either hearing about his activities or being part of any "arrangement" with him.

[39] In 2007 Sex Worker A set up her own business as a personal trainer and during 2008 and 2009 was trying to get it established. At this time Mr Montgomery came to her for personal training and offered her additional money if they could have a regular "arrangement" that is, he would pay her to have sex with him. She made it clear to him, as she had done on other occasions, that she was not interested and that she did not like him asking her. She told him how repugnant she found him and that no amount of

money would be enough for her to have sex with him. She was upset that he had asked her for help as a trainer solely as an opportunity to ask her to have a private arrangement with him. He made this request on more than one occasion but when he finally realised that she would not provide him with sex he stopped coming for training.

[40] During this time, on a night when she was working at the Kensington, Sex Worker A was walking upstairs with a client. Mr Montgomery, who was at the bottom of the stairs called out to her, looked her up and down (including up her skirt) and asked if "they matched". He was asking whether her hair colour matched her pubic hair as she had recently dyed her hair. She had heard Mr Montgomery ask other girls whether their "pubes matched their hair". Sex Worker A had a client with her so could not say anything but gave him a look of disgust. Mr Montgomery knew she hated him saying these sorts of things and in her opinion, he took opportunity to do so at times such as this when she was unable to talk back or respond to him. In her opinion he seemed to thoroughly enjoy humiliating women and often laughed at Sex Worker A when taunting her. The women at the Kensington often talked about how disgusting Mr Montgomery was and they felt sorry for the women who were having sex with him. Those women said they hated it.

[41] Sex Worker A was herself working at the Kensington when the plaintiff started working there. The two got on well. Sex Worker A saw the plaintiff as a very vulnerable young woman. She saw many interactions between the plaintiff and Mr Montgomery and noticed that he would pull her aside to speak to her. Although Sex Worker A could not hear what Mr Montgomery was saying every time, it was obvious to her that he was standing over and intimidating her, giving her a hard time about something.

[42] The plaintiff told Sex Worker A about some of the things that Mr Montgomery said to her. She reported that he told her about the women at work he was having sex with (she said that he brought this up a lot, which accorded with Sex Worker A's own experience). He asked her if she did anal sex. He also asked her if her pubes matched her hair.

[43] Sex Worker A noticed that the plaintiff was often on the verge of tears when talking about the things that Mr Montgomery said to her. She became withdrawn and was clearly unhappy. She told Sex Worker A that after an all night "job" it was Mr Montgomery who had collected her instead of the driver and that he had informed her that she "needed to be taken out of her comfort zone".

[44] In early 2010 Sex Worker A received text messages sent either by Mr Montgomery or sent at his instruction. In one he asked her if she did anal. Other messages pressured her to have sex with him. In May 2010 she resigned. It was about this time that she received a telephone call from the plaintiff who sounded upset and asked Sex Worker A to come and collect her straight away. She said that Mr Montgomery had been hassling her and that she felt unsafe around him. The plaintiff stayed with Sex Worker A for about a week.

The evidence of Catherine Healy – the admissibility challenge

[45] At the commencement of the first day of the hearing the Tribunal heard a challenge to the admissibility of Ms Healy's intended evidence as set out in her first brief of evidence dated 19 October 2011 and in her second brief of evidence dated 22 January 2012. The submission for the defendants was that the evidence was inadmissible by

reason of it being irrelevant and hearsay and that to admit the evidence would be contrary to the interests of justice.

[46] The evidence intended to be adduced by Ms Healy was largely directed at the following:

> **[46.1]** A description of what the New Zealand Prostitutes' Collective is and what it does both by way of advocacy for sex workers and by way of promoting a range of services to sex workers and to brothel operators.
>
> **[46.2]** Ms Healy's background and experience which qualified her to comment on certain matters relevant to the sex industry. In this regard it was not disputed by the defendants that Ms Healy had experience and knowledge of the sex industry in areas relating to advocacy and support for sex workers. The challenge by the defendants was in relation to her qualifications to give opinion evidence about brothels and their operators.
>
> **[46.3]** The receipt by the NZPC of a steady stream of complaints by sex workers from the Kensington about Mr Montgomery.
>
> **[46.4]** Whether it was industry practice for a brothel operator to ask a sex worker about her physical appearance (eg whether she is "shaved") or the sexual services she provides.
>
> **[46.5]** Ms Healy's meetings with the plaintiff at which she (Ms Healy) was told by the plaintiff of the problems the plaintiff was having with Mr Montgomery.

[47] The principal focus of the admissibility objections by the defendants was on relevance and on hearsay. The principal submissions were:

> **[47.1]** The Tribunal, in applying s 106(1) of the HRA, should adopt the parameters set by the Family Court in relation to s 164 of the Family Proceedings Act 1980 which provides that the Family Court "may receive any evidence that it thinks fit, whether it is otherwise admissible in a court of law or not". That is:
>
> > **[47.1.1]** To consider first whether the evidence is admissible pursuant to the Evidence Act 2006; and
> >
> > **[47.1.2]** In the event that the evidence is found to be inadmissible, to then determine whether that evidence can be received under s 164 of the Family Proceedings Act.
>
> **[47.2]** A large portion of Ms Healy's intended evidence was not material to the issues to be determined by the Tribunal as that evidence did not relate to sexual harassment as defined in s 62 of the HRA. Insofar as Ms Healy made reference to allegations that other sex workers at the Kensington had told her that Mr Montgomery was intimidating, overbearing and scary and had paid them for sex, those allegations were not in relation to conduct of a sexual nature and could not reasonably be interpreted as being comments or behaviour envisaged by s 62 of the HRA. Insofar as Ms Healy's intended evidence related to industry practice as to the circumstances in which a brothel operator could ask a sex worker about her physical appearance, this was opinion evidence.

[47.3] The statements of other sex workers at the Kensington as reported by Ms Healy were hearsay.

[47.4] Sections 105 and 106 of the HRA require the Tribunal to take a cautious approach when giving consideration to the admissibility of evidence where that evidence is hearsay or irrelevant to the issue at hand. To admit hearsay and irrelevant evidence would be highly prejudicial to the defendants and was contrary to the interests of justice particularly if that evidence could not be tested.

[48] The submissions for the plaintiff in response were:

[48.1] Section 106 of the HRA is not a "final consideration" for the Tribunal as submitted by the defendants but rather the primary consideration. The governing test is whether the evidence will assist the Tribunal to deal effectively with the matter before it.

[48.2] A "technical" approach by the Tribunal to evidentiary matters is inappropriate: *Carlyon Holdings Ltd v Proceedings Commissioner* (1998) 5 HRNZ 527 at 533 (Potter J).

[48.3] In the context of a preliminary objection to evidence, the Tribunal should only rule the evidence inadmissible if it is certain that the evidence could not possibly assist it to deal with the matters at issue. Otherwise, the Tribunal should receive the evidence and then decide what weight (if any) to attach to it once all the evidence has been heard: *Director of Human Rights Proceedings v Smith* (2004) 7 NZELC 97,425 (NZHRRT) at [10].

[48.4] The Family Court decisions relied on by the defendants were unhelpful as s 164 of the Family Proceedings Act is less specific than s 106(1)(d) of the HRA which permits the Tribunal to receive as evidence any statement which in the opinion of the Tribunal may assist the Tribunal "to deal effectively with the matter before it" whether or not it would be admissible in a court of law.

[48.5] In any event there was no challenge to Ms Healy's experience and knowledge of the sex industry. Furthermore, there could be no challenge to her direct evidence as to what she was told by the plaintiff and what she observed of the plaintiff's demeanour in terms of the effect of the alleged sexual harassment on the plaintiff. The objection was therefore mainly related to complaints made to Ms Healy by other sex workers from the Kensington about Mr Montgomery having sex with them and allegedly behaving in a sexualised or controlling manner toward them.

Discussion

[49] Section 106(1) of the HRA provides:

> **106 Evidence in proceedings before Tribunal**
>
> (1) The Tribunal may—
> (a) call for evidence and information from the parties or any other person:
> (b) request or require the parties or any other person to attend the proceedings to give evidence:
> (c) fully examine any witness:

(d) receive as evidence any statement, document, information, or matter that may, in its opinion, assist to deal effectively with the matter before it, whether or not it would be admissible in a court of law.

[50] The Tribunal's discretion under s 106(1)(d) of the HRA to receive otherwise inadmissible evidence is a wide one and it is not appropriate to lay down any prescriptive rule for the exercise of that discretion. This much is clear from the language of the provision which emphasises the case-specific context in which the exercise of the power arises. The issue is whether the challenged evidence will assist the Tribunal to deal effectively with the matter before it. It must also be borne in mind that the stated purpose of the HRA, as found in the Long Title, is to provide better protection of human rights in New Zealand. That purpose must not be overlooked when assessing whether the evidence will assist the Tribunal to deal effectively with the matter before it. As both this provision and the judgment in *Carlyon Holdings Ltd v Proceedings Commissioner* at 533 recognise, a technical approach by the Tribunal to evidentiary matters is inappropriate.

[51] The Family Court cases provide no assistance as the statutory language in s 106 of the HRA is different, as is the statutory context. Section 106(1)(d) of the HRA is not a secondary or fall-back provision which comes into play only if the challenged evidence is inadmissible under the Evidence Act 2006. Rather it is the primary provision under which admissibility decisions are made. This is clear from s 106(4) which stipulates that the Evidence Act applies to the Tribunal "subject to" s 106(1) of the HRA. In turn s 5(1) of the Evidence Act states that if there is any inconsistency between the provisions of that Act and any other enactment the provisions of that other enactment, prevail unless the Evidence Act provides otherwise.

[52] In the present case, at the conclusion of the admissibility hearing and prior to the opening of the plaintiff's case and the calling of witnesses by the parties, we were of the clear view that all of the evidence set out in the two briefs of evidence by Ms Healy could assist the Tribunal to deal with the case before it, or to express the point in the language of the Tribunal in *Director of Human Rights Proceedings v Smith*, we were unpersuaded by the defendants that the evidence could not possibly assist the Tribunal.

[53] The objections of the defendants were more properly to be seen not as admissibility objections per se, but as cautions going to the weight to be given to certain aspects of the intended evidence. In this regard it will be seen that after seeing and hearing Ms Healy give evidence we accept that she is a careful, credible witness and we accept her evidence in its entirety. While we have relied on that evidence to establish what the plaintiff said to her about Mr Montgomery's actions and as to Ms Healy's direct observations of the effect of those actions on the plaintiff, we have found it unnecessary to rely on her evidence as to the complaints made to her by other sex workers at the Kensington about Mr Montgomery allegedly having sex with them and as to him acting in a sexualised or controlling manner toward them. This acknowledges the defendants' complaint that no direct evidence of the alleged experiences of the other sex workers has been given and the defendants have not had an opportunity to test or to challenge that evidence.

[54] Against this background we now summarise the evidence given by Ms Healy.

The evidence of Catherine Healy – overview

[55] Ms Healy has been the National Coordinator of the New Zealand Prostitutes' Collective since 1988. The NZPC was established by sex workers in 1987 as an

organisation dedicated to equal rights for sex workers. It advocates for the human rights, health and well-being of all sex workers and is committed to working for the empowerment of sex workers. Since October 1988 the NZPC has held a contract with the Ministry of Health to provide a sexual and reproductive health programme to sex workers. In addition it provides a range of services to sex workers and brothel operators including:

[55.1] Information about working in the sex industry and the rights of sex workers.

[55.2] Support for sex workers, including referrals to other agencies where appropriate.

[55.3] Assisting sex workers who want to change direction, including leaving sex work.

[55.4] Drop-in community centres.

[55.5] Free sexual health clinics and information on HIV/AIDS and other sexually transmitted infections.

[55.6] A condom distribution programme.

[55.7] Information for people starting a brothel, including occupational health and safety guidelines and contracts.

[56] Ms Healy is in regular contact with brothel operators and considers that the NZPC has a positive relationship with most brothel operators. The NZPC does not see brothel operators as "the enemy", it being understood that they have an important role to play. Brothel operators in turn frequently ask the NZPC for advice on matters relating to sexual health, contracts or city council bylaws.

[57] The NZPC aims to take a neutral, impartial stance in relation to the different brothels. It never recommends particular brothels over others, rather it advises sex workers about the different experiences they might have at each.

[58] The Kensington is one of the largest brothels in Wellington. Ms Healy regularly meets with sex workers from the Kensington. Mr Montgomery is the only brothel operator in Wellington that Ms Healy is not in contact with. By contrast, the NZPC had a positive relationship with the previous operator of the Kensington who is now deceased. He would regularly call Ms Healy for advice on different matters.

[59] However, the NZPC has had a steady stream of complaints from sex workers at the Kensington about Mr Montgomery. Those complaints did not start immediately when he took over as operator but the complaints have been received since approximately four years prior to the Tribunal hearing. Not every sex worker at the Kensington has complained about Mr Montgomery but Ms Healy said that if she comes across a Kensington sex worker, there is a reasonable likelihood that there will be a complaint about Mr Montgomery. In particular:

[59.1] She has been told that Mr Montgomery is intimidating, overbearing and scary. There have been complaints that he has made sexualised comments to them at work.

[59.2] She has also been told by some sex workers at the Kensington that Mr Montgomery pays for sex. In the experience of Ms Healy it is very unusual for a brothel operator to pay for sex with women at the brothel.

[59.3] Sex workers at the Kensington have also complained to Ms Healy that Mr Montgomery withholds money from them, that they are accused of taking drugs and that they are not allowed to refuse customers.

[59.4] It has also been complained that sex workers are told by Mr Montgomery not to share information about clients with each other. However, Ms Healy told the Tribunal that talking about clients is an important safety mechanism for sex workers because it enables them to be aware of any risks associated with a particular client. Sex workers at the Kensington have also told Ms Healy that Mr Montgomery discourages them from being friends outside work.

[59.5] Some sex workers at the Kensington have said to Ms Healy that Mr Montgomery does not want them to visit the NZPC.

[59.6] Mr Montgomery stands out among brothel operators in terms of the kinds of complaints the NZPC has received. The matters complained about are not "normal practice" in the industry.

[60] In Ms Healy's opinion it is not industry practice for a brothel operator to ask a sex worker about her physical appearance (eg whether she is "shaved") or the sexual services she provides. In her opinion the normal practice would be for a sex worker to be asked these sorts of questions when she is hired. The information would be kept on a card held at reception so that details could be provided to clients over the phone or in person. Once a sex worker had been hired, however, it would not be normal practice for a brothel operator to ask the sex worker personal questions about her physical appearance and the sexual services she provided in a context unrelated to making a specific booking with a specific client. Occasionally cards are updated and information is sought from sex workers about their current practices and physical features.

[61] Ms Healy can recall meeting the plaintiff at the NZPC office in Wellington to discuss problems the plaintiff was having with Mr Montgomery. Ms Healy met with the plaintiff at least three or four times. While Ms Healy has met with many sex workers in the course of her work, she said the plaintiff stood out because of her level of distress.

[62] Ms Healy can recall the plaintiff telling her that Mr Montgomery was making her feel uncomfortable, that he used inappropriate sexual language towards her, that he made comments about how she had sex and that he was creepy towards her. The plaintiff told her that Mr Montgomery had said that certain people should not flat with her and she can recall that the plaintiff felt undermined and that Mr Montgomery was invading her personal space. She was also told by the plaintiff that Mr Montgomery would drop her home to create a space when they were alone.

[63] Ms Healy said that she would describe the plaintiff as being very affected by her experience with Mr Montgomery. She was intensely upset and distressed. She can recall her being angry to some extent but her overall impression was that she was upset. When the plaintiff came to speak to Ms Healy about Mr Montgomery she (the plaintiff) was very agitated and talking very fast, although she was not hysterical. Ms Healy would describe the plaintiff as being very on edge and hyper-alert where Mr Montgomery was concerned. She also gained the impression that things seemed to be getting

worse. The plaintiff was given an information sheet about sexual harassment taken from the Human Rights Commission website. Ms Healy was aware that the plaintiff wished to pursue a complaint to the Human Rights Commission.

[64] In Ms Healy's experience it is extremely difficult for a sex worker to make a complaint of workplace sexual harassment. Although sex work has been decriminalised, there is still a culture of enormous secrecy and vulnerability and sex workers are often concerned that their name will be made public if they bring a complaint. Sex workers can also feel scared about the potential consequences of upsetting brothel owners if they make a complaint, including being "outed" as a sex worker to their family and friends.

[65] When giving evidence Ms Healy was asked to comment on evidence to be given by Mr Montgomery that the NZPC often referred the Kensington's best girls to a rival business. She was also asked to comment upon the following passage from the brief of evidence by Ms Brockie:

> We regard Ms Healy as a supporter of another rival business, who has enticed contractors away from our business, and who bears us ill will.

Ms Healy said that there was no truth to these allegations. Neither she nor the NZPC favoured one brothel over another. Nor was there any truth to the allegation that the NZPC refers the "best girls" to rivals of the Kensington.

THE EVIDENCE FOR THE DEFENDANTS

The evidence given by Mr Montgomery - overview

[66] Without attempting to summarise Mr Montgomery's evidence in full, the following are the main relevant points.

[67] Mr Montgomery described himself as "the boss" at the Kensington. He acknowledges that physically he is "big" and that in the face of threats which occur frequently in the business, he stands his ground. But he is not intimidating to the sex workers. His job is to protect them. He said that the plaintiff had a quiet and pleasant nature and he does not remember ever raising his voice to her at all. Sex Worker A, however, he described as "a very confronting person". He said that he did not yell at the plaintiff about the NZPC, or at all. He did not dislike the NZPC because of instructions they gave to girls or advice, it was because, in his experience, the NZPC often referred "our best girls" to a rival business.

[68] Mr Montgomery denies that in March or April 2010 the plaintiff took him aside in the carpark and told him about her need to take time off work to give evidence against a caregiver who had allegedly sexually abused her as a child. He acknowledges, however, that at some point he would have asked the plaintiff if she had been a victim of sex abuse because "we generally always do ask this, usually when someone is starting in the business". He said that it was important to ask this question because "it influences the way a girl may cope with the business". He is "quite sure" that the plaintiff did not tell him any of the details that she described in her evidence. Asked whether he accepted that it was inappropriate for a male boss to ask a female sex worker whether she had been sexually abused in the past, Mr Montgomery said that he did not accept it was inappropriate and that "we ask a lot of questions normal people don't".

[69] Mr Montgomery accepted that on one occasion he drove the plaintiff to her home and was concerned about her flatmates as he believed one was involved in drugs and may have been supplying them to the girls at the Kensington. He does not recall saying anything about a "comfort zone" and certainly did not say that he wanted to take the plaintiff out of her comfort zone, or suggest anything like that.

[70] As to the plaintiff's claim that Mr Montgomery transferred her to the Sunday shift, Mr Montgomery said that shifts were organised by the (female) manager, not by him. He further stated:

> **[70.1]** He did not tell the plaintiff that he liked to have sex with other sex workers and he did not take sex workers into the downstairs bedroom to have sex with them, or claim that he did so.
>
> **[70.2]** He did not make the statements claimed by the plaintiff, namely:
>
> > **[70.2.1]** That weekends were his play time and that he would take girls into his special room on the ground floor and get stoned and have sex with them.
> >
> > **[70.2.2]** That he "went down" on other sex workers and that they gave him "blow jobs".
> >
> > **[70.2.3]** That he liked "young, skinny girls with perky breasts".
> >
> > **[70.2.4]** That he could do what he liked with girls and that "most girls will do anything for me anyway".
>
> **[70.3]** He accepted that he did ask the plaintiff some of the questions described in her evidence namely:
>
> > **[70.3.1]** Whether she was "shaved".
> >
> > **[70.3.2]** Whether she would have anal sex with clients.
> >
> > **[70.3.3]** Whether she was good at blow jobs. However, he does not remember if he asked her if she swallowed.

[71] Mr Montgomery said that when he did ask the plaintiff about sexual matters it was always work related, particularly if a client asked for the information. It was the responsibility of the sex worker to keep her card (held at reception) up to date. But this was not always the case and he felt that the sex worker should always be given the choice when a client enquired and so the particular question had to be asked.

[72] Mr Montgomery said that he had never had sex with a sex worker at the Kensington nor had he ever made comments to the plaintiff about having sex at the Kensington. The plaintiff was wrong in her evidence. In addition, Sex Worker A was also wrong when she said that he had sex with some of the girls.

[73] Asked about the plaintiff's evidence that she was told by Mr Montgomery to "give up your burgers" and to "get the hula hoops out more often", Mr Montgomery said that he does not recall making these comments but did suggest to the plaintiff that she visit Sex Worker A who was "supposedly" running a unisex gym as it was a way of finding out if Sex Worker A was "taking clients from the Kensington". Mr Montgomery said that he did not comment about the plaintiff's appearance.

[74] In addition to insisting that any comments he made to the plaintiff and to Sex Worker A were strictly for work related purposes, Mr Montgomery said that both the plaintiff and Sex Worker A were disgruntled employees and the allegations they have made against him are "pay back". He did not accept that they had given truthful evidence on any significant issue relevant to the case. In relation to Sex Worker A he accepts that he did visit her business but only to ascertain whether she had set up a brothel and whether she was going to try to take Kensington clients. He did not try to contract sex with her. As to the incident at the Kensington in which he allegedly asked Sex Worker A if her hair colour matched her pubic hair, he said that he did not recall and therefore did not acknowledge the incident.

The evidence of Ms Brockie

[75] Ms Brockie told the Tribunal that she is the shareholder and director of M & T Enterprises Ltd. She has known Mr Montgomery since she was 15 years of age. They are currently in a relationship. There are two children of that relationship.

[76] Mr Montgomery has been the manager of the Kensington and of the Quarry since 2003. In that time the company has contracted with literally hundreds of women. She said that Mr Montgomery does not harass, let alone sexually harass company staff or contractors.

[77] In relation to the evidence given by the plaintiff and by Sex Worker A, Ms Brockie says that she observed Mr Montgomery working in the business long before she and he formed their relationship. The type of conduct alleged against Mr Montgomery has never occurred and she does not believe the statements made by the plaintiff and Sex Worker A.

[78] Ms Brockie also said that in running a brothel there was a perennial problem of "girls setting up and soliciting our clients" for their own purposes. Specifically she said that "we regard Ms Healy as a supporter of another rival business who has enticed contractors away from our business and who bears us ill-will".

[79] Ms Brockie said that when the company was served with the statement of claim she did not ask Mr Montgomery if any of the allegations were true. She had no need to. Asked whether she knew why the plaintiff left the Kensington, Ms Brockie said that the plaintiff had been under the influence of another contractor and that they had both decided to leave. Asked whether there had been any suggestion that either the plaintiff or the other worker had been disgruntled, Ms Brockie said that neither had reason to be.

[80] Ms Brockie conceded that she has never met the plaintiff or dealt personally with her.

The evidence of Sex Workers 1 and 2 and of the Receptionist

[81] Sex Worker 1 said that she was a sex worker at the Kensington and had known Mr Montgomery for about five years. During her time at the Kensington Mr Montgomery had never tried to take advantage of her (the witness). Nor had he behaved inappropriately towards her. Mr Montgomery had never made sexualised comments to her of the kind alleged by the plaintiff and she had never heard him speak in these terms to anyone else. She added that sometimes managers asked the sex workers directly about what types of sexual acts they would perform or not perform when clients telephoned. Even though this information is written on cards and kept at reception, it sometimes needed to be checked. While she sometimes worked the same shifts

(including the Sunday day shift) as the plaintiff, she accepted that there would be times when she would not be with the plaintiff and could not speak to what had been said by Mr Montgomery to the plaintiff in her (the witness') absence.

[82] Also called to give evidence for the defendants was an employee of the Kensington who works night shift as a receptionist. She has held this position for approximately five years and knows both the plaintiff and Sex Worker A. The Receptionist has always seen Mr Montgomery deal with sex workers, staff and clients in a professional way. She has never heard Mr Montgomery talk to any of the women at the Kensington in the way described by the plaintiff or by Sex Worker A. In addition she says that all the women working at the Kensington know that they can talk to her (the witness) about any problems but none of them had said anything like what the plaintiff or Sex Worker A have said about Mr Montgomery in their evidence. Nevertheless the Receptionist conceded that in the past four years she has not worked day shifts and in the past four years has only worked on three nights of the week. She accepted that she was not aware of what Mr Montgomery said or did when she was away from the Kensington premises. She also accepted that as part of the management team she worked closely with Mr Montgomery.

[83] The second sex worker (Sex Worker 2) gave evidence that she is a sex worker at the Kensington Inn and has known Mr Montgomery for three to four years. In that period Mr Montgomery had never sought to take advantage of her or behaved inappropriately towards her. In her opinion Mr Montgomery would not talk to her or anyone in the manner alleged by the plaintiff and Sex Worker A. She added that questions about things like "Brazilians" are asked all the time and everywhere. The information may be written on a card but the manager had to check. She accepted, however, that she was not working at the Kensington from approximately March 2010 until September 2011. In this period (during which the behaviour complained of by the plaintiff allegedly took place) she was not associated with Mr Montgomery. In addition she did not claim that she had worked the same shifts as the plaintiff.

EVIDENCE ASSESSMENT

[84] On virtually all material points the evidence given by the plaintiff and her witnesses is in direct conflict with the evidence given by Mr Montgomery, Ms Brockie and their witnesses. As to this we are satisfied that the evidence of the plaintiff's witnesses is to be preferred. We now explain why.

[85] The evidence of the plaintiff was compelling. Her responses in cross-examination were direct, frank and forthright. There was no prevarication, awkward hesitation or exaggeration. She readily conceded when she did not know the answer to a question or could be mistaken. Her evidence is consistent with her actions at the time in that she complained to Sex Worker A and to Ms Healy. Her complaint to the Human Rights Commission was lodged contemporaneously with her decision that she had had enough of Mr Montgomery's behaviour.

[86] The evidence of Sex Worker A was clear, concise and frank. Full and direct answers were given in cross-examination. We similarly found her to be a compelling witness.

[87] We have already commented that Ms Healy was a persuasive and credible witness. Her evidence was careful and direct. She impressed as a conscientious and professional person.

[88] It was suggested by Mr Montgomery and Ms Brockie in their evidence (and by their counsel in cross-examination of the plaintiff's witnesses) that the plaintiff and Sex Worker A were disgruntled sex workers whose evidence was motivated by "pay back". However, we saw no evidence to justify this allegation. The baseless nature of the allegation and of the related claim that the NZPC referred the Kensington's "best girls" to a rival business was revealing of the mindset with which Mr Montgomery and Ms Brockie approached their evidence.

[89] We address now the evidence given by the witnesses called by the defendants.

[90] Mr Montgomery is a large man. He is also supremely confident of his own importance to all those with whom he comes into contact. His evidence was given in a condescending and patronising manner. The strong impression gained by the Tribunal was that he is a person over-confident of his abilities, if not arrogant. His self-described role as "protector" of the sex workers at the Kensington has led him to be overbearing and exploitative, thinking that his sex, size and management role have given him a licence to do as he wishes and to behave as he likes towards the sex workers at the Kensington. The manner in which he gave his evidence before the Tribunal and his demeanour were entirely consistent with the person described by the plaintiff and by Sex Worker A. His hostility to the NZPC is also consistent with the yelling reported by the plaintiff when Mr Montgomery expressed his disapproval of her referring sex workers to the NZPC.

[91] Mr Montgomery's misplaced confidence in his abilities as a man of the world and as a "manager" of the sex workers at the Kensington is perhaps illustrated by his confident assertion that it is necessary to ask sex workers if they have been sexually abused in the past. On being cross-examined on this point he acknowledged that he had no formal qualifications in counselling sexual abuse victims, that victims of sexual abuse were "most definitely" traumatised by what had happened to them, that it could be extremely hard for some victims of sexual abuse to tell even their closest friends and family about the abuse and that it could be embarrassing and upsetting for a sexual abuse victim to be asked out of the blue whether she had been sexually abused. Yet he did not accept that it would be inappropriate to ask a new female sex worker whether she had been sexually abused. He appeared unaware, if not uncaring, of the risks inherent in opening up sexual abuse outside a therapeutic environment. Nor was any consciousness shown of his complete lack of qualifications to ask the question or to deal with the answer.

[92] This almost complete absence of sensitivity to time, place and context reinforces our conclusion that Mr Montgomery works in an artificial environment in which he is a big fish in a small pond and which he believes gives him license to observe neither personal nor professional boundaries. He believes he can say what he likes, when he likes to any sex worker he cares to pick on at any particular time. This does not mean that he treats all sex workers equally in this manner. But the plaintiff and Sex Worker A were two of his victims. He enjoys controlling women and at times humiliating them.

[93] In conclusion we found Mr Montgomery a most unpersuasive witness. We have no hesitation in preferring the evidence of the plaintiff and Sex Worker A to his.

[94] In arriving at this conclusion we have, for the reasons given earlier, not taken into account the complaints made by other sex workers to Ms Healy about Mr Montgomery's behaviour. Our finding is based on the evidence of the plaintiff and Sex Worker A and

on our assessment of Mr Montgomery as a witness after seeing and hearing him give evidence.

[95] Addressing now the evidence given by Ms Brockie, she was not at the Kensington on any of the occasions narrated by the plaintiff and Sex Worker A. She has taken on trust that Mr Montgomery is blameless. He is of course her partner and the father of her two children. Ms Brockie's assessment of him is not one to which weight can be given particularly given that she too believes, without any foundation, that the plaintiff and Sex Worker A are "disgruntled" and that they, along with the NZPC, are somehow involved in the stealing of the Kensington's "best girls".

[96] We turn now to the three witnesses called by the defendants. The fact that none of them heard Mr Montgomery speak to either the plaintiff or to Sex Worker A in the manner alleged does not establish that the plaintiff and her witness are not telling the truth. We accept that Mr Montgomery did not behave as alleged all the time to every sex worker at the Kensington. Rather, he singled out women who either displeased him (as in the case of the plaintiff who told other workers about the NZPC and who had a body size not to Mr Montgomery's liking) or who were strong and stood up to him (Sex Worker A who refused to have sex with him). In addition, much of the harassment occurred after the plaintiff had been transferred to the "slow" day shift on Sundays and when Mr Montgomery could find the plaintiff alone. On these occasions he would also speak to her in a quiet voice. The Receptionist did not work this shift and Sex Worker 2 was not working at the Kensington in the critical period from April to June 2010. Sex Worker 1 acknowledged that there were times when she was not working the same shifts as the plaintiff and furthermore, even when their shifts coincided, there would often be times when she was not with the plaintiff.

[97] We accordingly find nothing in the evidence given by these three witnesses to fault or to doubt the evidence given by the plaintiff and Sex Worker A.

[98] Having been satisfied on the balance of probabilities that the facts occurred as narrated by the plaintiff, Sex Worker A and by Ms Healy, we address now the legal elements of sexual harassment in s 62 of the HRA. We do so on the basis that it has been established that Mr Montgomery used the language pleaded in para 18 of the statement of claim and that that language had the detrimental effect on the plaintiff as pleaded in para 19 of the statement of claim:

> 18. The First Defendant subjected the Plaintiff to language of a sexual nature including:
> a. Asking whether she "shaved" her public hair;
> b. Asking whether she preformed anal sex;
> c. Asking whether she "swallowed" when performing oral sex;
> d. That weekends were his "play time";
> e. That he would take other sex workers out the back and have sex with them;
> f. That he "went down on" other sex workers;
> g. That other sex workers gave him "blow jobs";
> h. That he could do what he liked with girls;
> i. That most girls would do anything for him;
> j. That he liked to have sex with "young, skinny girls with small perky breasts";
> k. That the Plaintiff needed to work out;
> l. That he wanted to take the Plaintiff "out of her comfort zone".
>
> 19. The First Defendant's repeated sexual language was unwelcome to the Plaintiff and/or of such a significant nature that it had a detrimental effect upon her in the course of her employment by the Second Defendant, including that the Plaintiff experienced humiliation, loss of dignity and injury to her feelings ("emotional harm"). Particulars of emotional harm;
> a. The Plaintiff felt uncomfortable working for the Second Defendant;
> b. The Plaintiff felt moody;

c. The Plaintiff's depression worsened;
d. The Plaintiff felt as if the First Defendant was trying to break her and control her;
e. The Plaintiff felt that the First Defendant was preying on her;
f. The Plaintiff became stressed;
g. The Plaintiff felt on edge and on guard all the time;
h. The Plaintiff had difficulty sleeping;
i. The Plaintiff found it hard to eat and she lost weight;
j. The Plaintiff's self-esteem suffered;
k. The Plaintiff didn't care about herself;
l. The Plaintiff felt bad about herself;
m. The Plaintiff felt degraded.

SEXUAL HARASSMENT AND SECTION 62

[99] Sexual harassment is defined in s 62 of the HRA. Only s 62(2) and (3)(b) are relevant:

> **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
> (b) is either repeated, or of such a significant nature, that it has a detrimental effect on that person in respect of any of the areas to which this subsection is applied by subsection (3).
> (3) The areas to which subsections (1) and (2) apply are—
> (a) …
> (b) employment, which term includes unpaid work:
> (c) …
> (d) …
> (e) …
> (f) …
> (g) …
> (h) …
> (i) …
> (j) …
> (4) …

[100] As the liability of M & T Enterprises Ltd is vicarious, it is relevant to note also the terms of s 68 of Act:

> **68 Liability of employer and principals**
>
> (1) Subject to subsection (3), anything done or omitted by a person as the employee of another person shall, for the purposes of this Part, be treated as done or omitted by that other person as well as by the first-mentioned person, whether or not it was done with that other person's knowledge or approval.
> (2) Anything done or omitted by a person as the agent of another person shall, for the purposes of this Part, be treated as done or omitted by that other person as well as by the first-mentioned person, unless it is done or omitted without that other person's express or implied authority, precedent or subsequent.
> (3) In proceedings under this Act against any person in respect of an act alleged to have been done by an employee of that person, it shall be a defence for that person to prove that he or she took such steps as were reasonably practicable to prevent the employee from doing that act, or from doing as an employee of that person acts of that description.

[101] It was common ground that the effect of these provisions is that the plaintiff must establish, on the balance of probabilities, the following:

[101.1] that by the use of spoken language of a sexual nature Mr Montgomery subjected the plaintiff to behaviour;

[101.2] that was unwelcome or offensive to the plaintiff; and

[101.3] that behaviour was either repeated, or of such a significant nature that it had a detrimental effect on the plaintiff in respect of her employment at the Kensington; and

[101.4] that this occurred in the course of Mr Montgomery's involvement in employment;

[101.5] and in relation to M & T Enterprises Ltd, that Mr Montgomery's actions were done as the employee of M & T Enterprises Ltd.

[102] We address each of these elements in turn but as a preliminary point observe that by virtue of s 92I(4) of the HRA it is no defence to these proceedings that the breach was unintentional or without negligence on the part of the party against whom the complaint is made.

"the use of language … of a sexual nature"

[103] The test whether the spoken words used by Mr Montgomery were of a sexual nature is an objective one. See *Lenart v Massey University* [1997] ERNZ 253 at 267 (EMC) and *EN v KIC [Sexual harassment]* [2010] NZHRRT 9, (2010) 7 NZELR 350 at [49] (NZHRRT). The intention of the person complained against is irrelevant. See s 92I(4) HRA.

[104] Whether language is of a sexual nature will be influenced by the context in which the words are used. See *B v New Zealand Amalgamated Engineering Union Inc* [1992] 2 ERNZ 554 at 564 (ET) and *L v M Ltd* [1994] 1 ERNZ 123 at 153 (ET). In the latter case it was said:

> I accept … that in principle the context in which the words are used will affect whether they constitute harassment. I would not rule out, however, that sexual words or pictures which are appropriate within their immediate context (eg a reference work) might constitute harassment if displayed to a complainant in suggestive, oppressive, or abusive circumstances.

[105] This passage is of particular relevance to the present case given that one of the principal submissions for the defendants was that owing to the nature of the business of a brothel the sexual language used by Mr Montgomery to the plaintiff was necessary to determine what services the plaintiff was able to offer clients of the Kensington. In this regard the plaintiff accepted that there were rare occasions when Mr Montgomery did ask her "business" related questions in respect of a particular client and it was accepted by her that had the sexual comments made to her been in this category there would be no case to answer.

[106] But context is everything. Even in a brothel language with a sexual dimension can be used inappropriately in suggestive, oppressive, or abusive circumstances. The evidence of the plaintiff (which we accept) is that on the occasions when Mr Montgomery used the language complained of in para 18 of the statement of claim, Mr Montgomery had no "business" purpose for asking the questions or making the particular comment to her. We find that the following language as pleaded in para 18 of the statement of claim was used by Mr Montgomery and was of a sexual nature:

[106.1] Asking whether she "shaved" her pubic hair;

[106.2] Asking whether she performed anal sex;

[106.3] Asking whether she "swallowed" when performing oral sex;

[106.4] That weekends were his "play time";

[106.5] That he would take other sex workers out the back and have sex with them;

[106.6] That he "went down on" other sex workers;

[106.7] That other sex workers gave him "blow jobs";

[106.8] That he could do what he liked with the girls;

[106.9] That most girls would do anything for him;

[106.10] That he liked to have sex with "young, skinny girls with small perky breasts";

[106.11] That the plaintiff needed to work out;

[106.12] That he wanted to take the plaintiff "out of her comfort zone".

[107] Given our findings, with one exception, this language is self-evidently language of a sexual nature. The only language used by Mr Montgomery which has given us cause to pause is the statement that he wanted to take the plaintiff out of her comfort zone. It was submitted for Mr Montgomery that this comment was made when he was questioning the plaintiff about the use of drugs in her house and there was no sexual context. To a degree that is correct but the comment was made in April 2010 when most of the sexual language complained of began. In context, the statement that Mr Montgomery wished to take the plaintiff "out of her comfort zone" was part of Mr Montgomery's efforts to manipulate and control the plaintiff as a sex worker at the Kensington. On the account given by the plaintiff (which we accept though Mr Montgomery denies speaking the words) the phrase had no contextual relevance to the discussion about drugs. It did have relevance to Mr Montgomery's overall message that he was in control of the women who worked at the Kensington and unless this was accepted they would be in for a hard time, which included being sexually harassed. The point was more forcefully made in *L v M Ltd* at 154:

> … I find that sexuality should not be limited to sexual propositions or unwanted physical libidinous contact. Objectionable and offence sexual conduct can occur in a variety of circumstances. By way of example, it may be to importune sexual favours, or it may be in a power context to put down or oppress someone in a subordinate position. It may also be a form of abuse. I want to make it clear I make no distinction or assumption that any one of those forms is less objectionable than another – merely that offensive sexual conduct can be manifested in various ways. I, therefore, reject the first submission that the words "sexual nature" should be limited in the way suggested.

[108] Context was also emphasised in *Proceedings Commissioner v H* (1996) 3 HRNZ 239 at 247-248 (CRT):

> The context here was the workplace and the relationship between employer and employee. In this case the employer was a middle-aged married man and the employee an 18-year-old single woman. A clear power imbalance, in favour of the employer, existed. There was nothing in the work required of the employee which involved physical contact with her employer. There was

> something of the subtle sexual proposition in his conduct, notwithstanding the superficially harmless nature of much of what was said or done. In combination and frequency it became physical behaviour and spoken language of a sexual nature.

[109] Seemingly innocent words and behaviour are capable of taking on a sexual nature. See *Lenart v Massey University* at 270-271. We find that in context the "comfort zone" comment was language of a sexual nature.

"unwelcome or offensive to that person"

[110] In addition to establishing that the spoken language complained of was of a sexual nature, the plaintiff must also show that the language was either unwelcome or offensive to her. Whereas the test for the first element is objective, the test for the second is subjective. That is, it is the complainant's perception that is relevant. It is immaterial whether the person complained about (or any other person) considered the language to be unwelcome or offensive. See *Proceedings Commissioner v Woodward* [1998] NZCRT 8 at 6 (CRT, 22 May 1998) and *EN v KIC [Sexual harassment]* at [49]. There is no "reasonable person" test. The harasser must take the consequences of the victim's sensibilities. See *Lenart v Massey University* at 267.

[111] It follows that it is not possible to ask whether a "reasonable sex worker" would find the behaviour unwelcome or offensive. If the Tribunal accepts the plaintiff's evidence that she did indeed find Mr Montgomery's language unwelcome or offensive, that is sufficient. If in a brothel language or behaviour of a sexual nature could never be considered unwelcome or offensive sex workers would be denied the protection of the Human Rights Act.

[112] In her evidence the plaintiff clearly distinguished between sexual language which had a legitimate work purpose and sexual language which was unwelcome or offensive. She gave evidence that in relation to the language not related to work that:

> **[112.1]** She felt uncomfortable when Mr Montgomery made the sexual comments to her.
>
> **[112.2]** When Mr Montgomery made comments to her about his having sex with sex workers, she told him that she did not want to know about it.
>
> **[112.3]** When Mr Montgomery asked the plaintiff questions about her body and particular sexual acts, the plaintiff told him it was "none of his business".
>
> **[112.4]** The plaintiff gave evidence that she did not want Mr Montgomery to make the sexual comments to her.
>
> **[112.5]** Ms Healy gave evidence that the plaintiff told her that Mr Montgomery made her feel uncomfortable and that he was being "creepy" towards her. She also recalled that the plaintiff said that she felt undermined by Mr Montgomery and that she was intensely upset and distressed.
>
> **[112.6]** Sex Worker A gave evidence that the plaintiff was often on the verge of tears when talking about the things Mr Montgomery said to her and that she was clearly unhappy.

[113] On this evidence we find that the plaintiff found Mr Montgomery's behaviour both unwelcome and offensive.

"either repeated, or of such a significant nature"

[114] Next the plaintiff must establish that Mr Montgomery's behaviour was "either repeated, or of such a significant nature, that it had a detrimental effect on her".

[115] The plaintiff's evidence was that:

> **[115.1]** The sexual comments made by Mr Montgomery to her were made repeatedly. The comments were made once or twice while she was working night shifts and on most of the Sunday day shifts. She worked at least six such shifts in April, May and June 2010. Mr Montgomery accepted that the plaintiff worked those Sunday day shifts.
>
> **[115.2]** In relation to the sexual comments admitted by Mr Montgomery (whether she shaved her pubic hair and whether she performed anal sex), he told the Tribunal that he had asked those questions "at any time".
>
> **[115.3]** The sexual harassment was of a significant nature. This is reflected, in part, by the fact that the plaintiff stopped working at the Kensington as a result of Mr Montgomery's behaviour. Ms Healy's evidence supported the plaintiff. Her evidence was that the plaintiff's complaint stood out because of her level of distress, that the plaintiff was very affected by her experience with Mr Montgomery and that she was intensely upset, distressed, very agitated and on edge.

[116] Bearing in mind that we have found that Mr Montgomery used the language of a sexual nature pleaded in para 18 of the statement of claim and that that language took at least 12 different forms and also bearing in mind the content of the spoken words, we are more than persuaded that not only was the language repeated but also that it was of a significant nature and that it had a clear detrimental effect on the plaintiff in the context of her employment.

"that it has a detrimental effect"

[117] Detriment is a term which is not to be read down. It readily includes dismissal from employment (actual or constructive) but does not have to go that far. A strained, tense work atmosphere or the undermining of the complainant's health are also sufficient. If the conduct has a detrimental effect, the case is made out. See *Read v Mitchell* [2000] 1 NZLR 470 at 480:

> In our view, those words should not be read down in such a way that they have no effect in circumstances where a parallel and more immediate employment-related detriment is also being suffered. Nor should the fact that the victim either voices robust objection on the one hand or elects to tolerate the harassment, however unwelcome and offensive on the other, make any difference. If the conduct has a detrimental effect the case is made out.
>
> … Detriment did not have to go to the extent of dismissal, actual or constructive, nor was it an answer to the claim that the issue of sexual harassment was not raised earlier or in another forum. Many women, in particular, will put up with an environment in which unwelcome or offensive conduct is prevalent rather than run the risk of losing employment, getting offside with fellow workers or having a confrontation with a dominant employer. For many, making a formal complaint will be the last resort.

[118] There is detriment in having to work in the demeaning atmosphere created by unwelcome sexual conduct. See *Williams v Pacific Plastic Recyclers Ltd* (2004) 7 NZELC 97, 678 at 97, 697 (HRRT).

[119] In the present case we find that the plaintiff suffered detriment in the following ways:

> **[119.1]** She had to work in a demeaning and hostile work environment created by Mr Montgomery's sexual comments.
>
> **[119.2]** She felt uncomfortable working at the Kensington and also scared. She had difficulty sleeping and eating, drank more alcohol than she usually did and started spending a lot of time at the pokie machines. She also felt more moody and depressed than usual. She felt Mr Montgomery was trying to break her and to control her. He made her feel degraded.
>
> **[119.3]** She ultimately stopped working at the Kensington as a direct result of Mr Montgomery's sexual comments.
>
> **[119.4]** The plaintiff was also dealing with the stress of preparing to give evidence at a criminal trial as a victim of childhood sexual abuse. Mr Montgomery was aware of this fact. Rather than being a factor reducing the detriment attributable to the sexual harassment, it increased the level of detriment. See *Main v Topless* [2004] NZHRRT 6 where the Tribunal at [82] noted that because at the time the particular plaintiff was dealing with the difficulties of pregnancy and possibly even a miscarriage, the comments made to her "would only have seemed to her to be worse".

Employment – that of the plaintiff and that of Mr Montgomery

[120] The employment issue is relevant to both the plaintiff and to Mr Montgomery. It must be established:

> **[120.1]** That the detrimental effect on the plaintiff was in respect of her employment.
>
> **[120.2]** That in the case of Mr Montgomery, he used language of a sexual nature in the course of his involvement in one of the areas to which s 62(3) applies, namely employment.

[121] As to the plaintiff, she signed a document headed "Personal Services Disclaimer" in which she acknowledged that she was an independent contractor and not an agent or employee of M & T Enterprises Ltd.

[122] For the purposes of the HRA, however, M & T Enterprises Ltd was her employer. This is because "employer" is defined in s 2 of the Act to include the employer of an independent contractor:

> *employer*, in Part 2, includes—
>
> (a) the employer of an independent contractor; and
> (b) the person for whom work is done by contract workers under a contract between that person and the person who supplies those contract workers; and
> (c) the person for whom work is done by an unpaid worker

[123] This definition ensures that an employer cannot escape his or her obligations under the Act by setting up a relationship of independent contractor. See *TAB v Gruschow* (1998) 4 HRNZ 493 at 500 (Gallen ACJ and Gendall J):

> In our view, the inclusion of the relationship of employer and independent contractor within the definition of "employer", is designed to ensure that an employer cannot escape the obligations which are imposed upon him, her or it by setting up a relationship of independent contractor. In other words, the definition is extended in order to ensure that independent contractors are also entitled to the protection of the Act, if they suffer discriminatory practices at the hands of their employer.

See also *Northern Regional Health Authority v Human Rights Commission* [1998] 2 NZLR 218 at 247.

[124] We turn now to Mr Montgomery's position. The point is a short one. There was no dispute that he was employed as the manager of the Kensington and that all his dealings with the plaintiff were in that capacity. It follows that this element of s 66(2) has been satisfied.

[125] We turn now to the question whether M & T Enterprises Ltd is liable for Mr Montgomery's actions.

The liability of the second defendant

[126] Section 68(1) of the HRA provides that anything done by a person as the employee of another person must be treated as done by that other person (as well as by the first-mentioned person) whether or not it was done with that other person's knowledge or approval. Under s 68(3) of the HRA it is a defence for the employer to prove that he, she or it took such steps as were reasonably practicable to prevent the employee from doing the act in question.

[127] In the present case M & T Enterprises Ltd has not produced any evidence to show either that Mr Montgomery was not an employee or to establish the statutory defence under s 68(3). Indeed in his closing submissions counsel for the defendants accepted that if the Tribunal found against Mr Montgomery, a finding against M & T Enterprises Ltd would follow on the basis of its vicarious liability.

Section 62 – findings – summary

[128] For the reasons given we find that all of the elements prescribed by s 62 of the HRA have been established. That is, in the course of Mr Montgomery's involvement in employment he used language of a sexual nature to subject the plaintiff to behaviour which to the plaintiff was both unwelcome and offensive and was either repeated or of such a significant nature that it had a detrimental effect on the plaintiff in respect of her employment by M & T Enterprises Ltd as a sex worker.

[129] It is our further finding that M & T Enterprises Ltd is vicariously liable for Mr Montgomery's actions by virtue of s 68 of the HRA.

[130] Having found the plaintiff's case established against both Mr Montgomery and M & T Enterprises Ltd we now turn to the question of remedy.

REMEDY

Remedy – submissions by plaintiff

[131] In the statement of claim the plaintiff seeks the following remedies:

> **[131.1]** A declaration that the defendants have committed a breach of s 62 of the HRA.

[131.2] An order restraining the defendants from continuing or repeating the breach.

[131.3] An order requiring the defendants to undertake training to assist or to enable them to comply with the provisions of the HRA, in particular s 62.

[131.4] Damages for humiliation, loss of dignity and injury to the feelings of the plaintiff.

[131.5] Costs.

[131.6] A final order that the plaintiff's name and identifying details not be published.

[132] The plaintiff is not seeking damages for pecuniary loss.

[133] Because the grounds on which these remedies are sought are discussed below, we do not intend repeating them here.

Remedy – submissions by defendants

[134] The submissions by the defendants on the question of remedies emphasised the following:

[134.1] The sexual harassment occurred over a short period of time, namely "one and a half months".

[134.2] The sexual harassment was limited to spoken words. Mr Montgomery did not request sexual favours and did not physically touch the plaintiff.

[134.3] The plaintiff was suffering from depression at the time she began working at the brothel. There is no evidence that the plaintiff made either defendant aware of this fact and the defendants should not be held liable for depression not caused by the defendants.

[134.4] The language used by Mr Montgomery must be considered in the context of the nature of the employment. This was a brothel where the daily business operated around the provision of sexual services. Although not formulated precisely in these terms, the submissions for the defendant appeared to suggest that the language constituting the behaviour of a sexual nature was to a degree mitigated by the fact that the context in which the behaviour occurred was a brothel.

[134.5] It was accepted that should the Tribunal find that sexual harassment did occur, there was no reason why a training order should not be made.

[134.6] The sexual harassment was at the lower end of the spectrum. The defendants should be jointly and severally liable for a sum of no more than $3,000.

[134.7] The names of all parties to the case should be suppressed, including the names of all the witnesses.

Remedy – assessment

[135] We address first the question of a declaration. In *Geary v New Zealand Psychologists Board* [2012] NZHC 384, [2012] 2 NZLR 414 (Kós J, Ms SL Ineson and Ms PJ Davies) at [107] and [108] it was held that while the grant of a declaration under the Privacy Act 1993 s 85(1)(a) is discretionary, the grant of such declaratory relief should not ordinarily be denied and there is a "very high threshold for exception". Given that the jurisdiction to grant a declaration under s 92I(3)(a) of the HRA is indistinguishable from the remedy possessed by the Tribunal under the Privacy Act, we see no reason why the same principle should not apply. On the facts we have heard nothing that could possibly justify the withholding from the plaintiff of a formal declaration that the defendants committed a breach of Part 2 of the Human Rights Act 1993 in that the plaintiff was subjected to language of a sexual nature which was unwelcome and offensive to the plaintiff and was repeated and of such a significant nature that it had a detrimental effect on the plaintiff in the course of her employment.

[136] We believe that the request for a restraining order under s 92I(3)(b) is properly made. Neither Mr Montgomery nor Ms Brockie (the shareholder and director of M & T Enterprises Ltd) displayed any insight into:

> **[136.1]** The reasons why sexual harassment is prohibited both by s 62 of the HRA and by s 108 of the Employment Relations Act 2000; and
>
> **[136.2]** The particular vulnerability of sex workers to sexual harassment in the workplace.

In these circumstances a restraining order is necessary to prevent the defendants from continuing or repeating the breach, or from engaging in, or causing or committing others to engage in, conduct of the same kind as that constituting the breach established in these proceedings.

[137] Addressing now the question of a training order under s 92I(3)(f) we are of the view that the defendants are in need of assistance to understand why sexual harassment is unacceptable in any context and to ensure that they and their employees receive appropriate training. Such training will reinforce the restraining order we have made. We accordingly order that the defendants, in conjunction with the Human Rights Commission, provide training to the management staff of the second defendant (which is to include Mr Montgomery) in relation to their and the defendants' obligations under the Human Rights Act 1993 in order to ensure that those employees (including Mr Montgomery) are aware of those obligations.

Damages for humiliation, loss of dignity and injury to feelings

[138] We come now to the request for an award of damages under s 92M(1)(c) for humiliation, loss of dignity and injury to the feelings of the plaintiff. Not each of these heads of damages need be established for there to be jurisdiction to make an award.

[139] There must be a causal connection between the breach of s 62 and the damages sought. See by analogy *Winter v Jans* HC Hamilton CIV-2005-419-854, 6 April 2004 at [33] and [34]. Here the facts we have found establish such causal connection.

[140] Provided a causal connection between the breach of s 62 and the damages sought is established, damages in sexual harassment cases must be genuinely compensatory and should not be minimal. See *Laursen v Proceedings Commissioner*

(1998) 5 HRNZ 18 at 26 (Gallen ACJ). In that case it was also held that the real question is what is an appropriate response to adequately compensate the complainant for the behaviour which she suffered and the compensation should meet the broad policy objectives of the legislation. In the subsequent *Carlyon Holdings Ltd v Proceedings Commissioner* (1998) 5 HRNZ 527 at 535 Potter J agreed with Gallon J that the appropriate starting point is to ask what is an appropriate response to adequately compensate the complainant for the behaviour which she suffered. In addressing this question the criteria appropriate for the Tribunal to take into account included such matters as:

[140.1] The nature of the harassment.

[140.2] The degree of aggressiveness and physical contact in the harassment.

[140.3] The ongoing nature.

[140.4] The frequency.

[140.5] The age of the victim.

[140.6] The vulnerability of the victim.

[140.7] The psychological impact of the harassment upon the victim.

Potter J at 535 went on to comment:

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

[141] On the facts we accept that at the time she began working at the Kensington the plaintiff was suffering from depression and she cannot be compensated by the defendants for this fact. The defendants are liable only for the humiliation, loss of dignity and injury to the feelings of the plaintiff caused by them (the defendants).

[142] We were referred to previous sexual harassment awards made by the Tribunal in recent years. We approach the list bearing in mind the caution noted in *EN v KIC [Sexual harassment]* at [73] that no case is identical and that the award in any given case must respond to the evidence of the harm suffered in the particular case. Comparing different circumstances in which liability has been found is of limited value:

[142.1] *EN v KIC [Sexual harassment]* [2010] NZHRRT 9, (2010) 7 NZELR 350. $10,000 was awarded for sexual harassment lasting a period of three months. Described as “not the most egregious sexual harassment case”. The plaintiff became withdrawn, depressed and upset.

[142.2] *Ngapera v Reddick* [2004] NZHRRT 5. $5,000 awarded for sexual harassment taking place over a six to seven month period. Plaintiff experienced a “very unpleasant and demeaning” work environment.

[142.3] *Main v Topless* [2004] NZHRRT 6. $5,500 described as a “modest response” reflecting that the case was “far from the most serious of sexual harassment cases”.

[142.4] *Shiu v Naseeb* [2004] NZHRRT 17. Although the plaintiff succeeded in establishing liability no award of damages was made because any humiliation, loss of dignity or injury to feelings suffered by her was "at most ephemeral".

[142.5] *Sinclair v Chhetri* [2003] NZHRRT 17. $3,000 awarded for sexual harassment taking place over three weeks. Described as "not the most serious case of its kind". The plaintiff was upset at the time but did not suffer any ongoing or long term harm.

[142.6] *Proceedings Commissioner v Read* [2001] NZCRT 17. $10,000 awarded for three months of repeated graphic sexual talk and requests for sex, along with a promise of preferential treatment if the requests for sex were complied with. Complainant became depressed and withdrawn.

[142.7] *Read v Mitchell* [2000] 1 NZLR 470 (Smellie J). $15,000 awarded for humiliation, loss of dignity and injury to feelings which was "very real". The sexual harassment was also compounded by the false denial that it had occurred, followed by victimisation of the complainant when she acknowledged that she was contemplating complaining to the Human Rights Commission.

[142.8] *Laursen v Proceedings Commissioner* (1998) 5 HRNZ 18 (Gallen ACJ). The High Court upheld a Complaints Review Tribunal award of $20,000. It was described as a "very serious case" where the defendant had taken advantage of the complainant's vulnerability. The High Court observed that the award might well have been very considerably higher than was made by the Tribunal.

[142.9] *Carlyon Holdings Ltd v Proceedings Commissioner* (2000) 5 HRNZ 527 (Potter J). An award of $7,000 upheld in a case where the offending behaviour might appear to amount to low-level sexual harassment but where there was serious harm to the complainant.

[143] In assessing whether the plaintiff suffered injury to her feelings we have taken into account the following passage in *Director of Proceedings v O'Neil* [2001] NZAR 59 at [29]:

> [29] The feelings of human beings are not intangible things. They are real and felt, but often not identified until the person stands back and looks inwards. They can encompass pleasant feelings (such as contentment, happiness, peacefulness and tranquillity) or be unpleasant (such as fear, anger and anxiety). However a feeling can be described, it is clear that some feelings such as fear, grief, sense of loss, anxiety, anger, despair, alarm and so on can be categorised as injured feelings. They are feelings of a negative kind arising out of some outward event. To that extent they are injured feelings.

[144] As to loss of dignity, we refer to the description given in *Law v Canada (Minister of Employment and Immigration)* [1999] 1 SCR 497 at [53] where Iacobucci J delivering the judgment of the Supreme Court of Canada stated:

> 53 … Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits… Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued….

[145] We are satisfied on the facts that the plaintiff has established to the required standard all three of "humiliation, loss of dignity and injury to feelings". See particularly:

[145.1] The plaintiff's evidence that she experienced the following as a result of sexual harassment:

[145.1.1] She felt uncomfortable working for M & T Enterprises Ltd.

[145.1.2] She felt scared, "on edge" and that she needed to "watch her back".

[145.1.3] She had difficulty eating and sleeping.

[145.1.4] She drank more alcohol than usual and began gambling.

[145.1.5] She felt moody and more depressed than usual.

[145.1.6] She felt "majorly degraded" that Mr Montgomery was trying to "break" and "control" her.

[145.1.7] Her contemporaneous complaint to the Human Rights Commission refers to her feeling physically ill, disturbed and angry; not feeling safe at work; and having her sleep and eating patterns affected due to the added stress.

[145.2] Ms Healy observed that:

[145.2.1] The plaintiff stood out because of her level of distress.

[145.2.2] The plaintiff was "very affected" by her experiences with Mr Montgomery.

[145.2.3] The plaintiff was intensely upset and distressed.

[145.2.4] The plaintiff was "very agitated and talking very fast" when she spoke about Mr Montgomery.

[145.2.5] The plaintiff was "very on edge and hyper-alert where [Mr Montgomery] was concerned".

[145.3] Sex Worker A gave evidence that:

[145.3.1] The plaintiff was often "on the verge of tears" when speaking about the things Mr Montgomery said to her.

[145.3.2] She observed the plaintiff "became quite withdrawn and was clearly unhappy".

[146] Given the particulars of the sexual language we have found to have been used by Mr Montgomery and which are set out in paragraph 18 of the statement of claim and further given our finding that there was no business-related reason for asking the questions, we are of the view that the sexual harassment here is at the more serious end of the spectrum though not approaching the most serious. Contrary to the submission for the defendants, the sexual harassment spanned a period of nearly three months from the beginning of April 2010 until 23 June 2010 when the plaintiff worked her last shift at the Kensington. Sex workers are as much entitled to protection from sexual harassment as those working in other occupations. The fact that a person is a sex worker is not a licence for sexual harassment, especially by the manager or employer at the brothel. Sex workers have the same human rights as other workers. The special

vulnerability of sex workers to exploitation and abuse was specifically recognised by the Prostitution Reform Act 2003 which not only decriminalised prostitution but also had the purpose of creating a framework to safeguard the human rights of sex workers and to promote their welfare and occupational health and safety:

> **3 Purpose**
>
> The purpose of this Act is to decriminalise prostitution (while not endorsing or morally sanctioning prostitution or its use) and to create a framework that—
> (a) safeguards the human rights of sex workers and protects them from exploitation:
> (b) promotes the welfare and occupational health and safety of sex workers:
> (c) is conducive to public health:
> (d) prohibits the use in prostitution of persons under 18 years of age:
> (e) implements certain other related reforms.

[147] While it is not the purpose of an award of damages under s 92M(1)(c) to punish the particular defendant, the Tribunal must not underestimate the degree to which a sex worker can experience humiliation, loss of dignity and injury to feelings by being subjected to sexual harassment in the course of her or his employment in a brothel. It matters little whether the harassment was through the use of language or by physical behaviour. Humiliation, loss of dignity and injury to feelings is just as real and serious as harm caused by physical behaviour.

[148] Taking all these factors into account and taking into account only the humiliation, loss of dignity and injury to feelings caused by the behaviour of the defendants we are of the view that a proper award of damages under s 92M(1)(c) is $25,000. In our view this is the appropriate response to adequately compensate the plaintiff for sexual harassment sustained over a period of three months and in which the plaintiff was asked the most intimate of questions and suffered real damage to her self-esteem. The effect of Mr Montgomery's behaviour was substantial and included causing the plaintiff to leave her employment at the Kensington. Accepting (as we do) that damages in sexual harassment cases must be genuinely compensatory and should not be minimal we believe that an award in this sum is an appropriate response to adequately compensate the plaintiff for the behaviour which she suffered. We have not found the other cases cited to us of any great assistance particularly given the difficulty in drawing true comparisons and further given that the awards are now somewhat dated.

Non-disclosure orders

[149] As to the plaintiff, we have found her to be the victim of sexual harassment. She has given evidence of a highly personal nature, including being sexually abused in the past. She has received automatic name suppression in criminal proceedings as a victim of sexual offending and there is a risk of that name suppression order being breached if her identity in these proceedings is disclosed. On these grounds the interim non-publication order must be made permanent. This much was conceded by the defendants.

[150] As to the other witnesses who gave evidence in these proceedings, being Sex Worker A, Sex Worker 1, Sex Worker 2 and the Receptionist, it was common ground between the parties that there should be final orders regarding non-publication of their names and identities. The identity of the plaintiff would otherwise be at risk of being revealed. In addition, their position is analogous to those of the innocent third parties protected by non-publication orders in *R v Liddell* [1995] 1 NZLR 539 (CA) at 546. This

means that only Ms Healy will not have name suppression. In fairness, no order was sought by her.

[151] We turn now to the issue whether the first and second defendants should receive the benefit of non-disclosure orders. They were also granted interim name suppression by the Chairperson in the *Minute* issued on 4 August 2011. However, as the Chairperson indicated in that *Minute* at [11], the only factor advanced in support of the defendants' name suppression application which had "any real weight" was Ms Brockie's then pregnancy and the risk to her health and that of her unborn child. It was on this ground alone that the interim order was made. But as in *Re Victim X* [2003] 3 NZLR 203 (CA), circumstances have changed and there is no longer any threat of mishap to Ms Brockie who has now safely given birth.

[152] As emphasised in both *Liddell* and in *Re Victim X* the principle of open justice dictates that there should be no restriction on publication of information about a case except in very special circumstances. No evidence at all has been called by the defendants to establish special circumstances and we see none. The Kensington is one of the largest brothels in Wellington. Publication of its name along with the name of Mr Montgomery, Ms Brockie and M & T Enterprises Ltd could not possibly lead to the identification of the plaintiff. Reference was made in submission to the possibility of the press photographing clients and sex workers arriving at the Kensington's premises. However, that is a risk which the defendants and their business face every day and in any event, with the decriminalising of prostitution there is no reason why a lawful business should receive name suppression simply because an employee has been found to have been sexually harassed. The submission that Mr Montgomery, Ms Brockie and M & T Enterprises Ltd and their business might suffer adverse consequences from publicity about the Tribunal's finding of sexual harassment was unsubstantiated and wholly speculative.

[153] Not only is there a complete absence of evidence which would justify a finding of "compelling reasons" or "very special circumstances" justifying departure from the open justice principle there is also, by analogy with *Lewis v Wilson & Horton Ltd* [2000] 3 NZLR 546 (CA) at 559, a public interest in knowing the character of the persons seeking name suppression. We agree with the submission for the plaintiff that current or intending sex workers and clients have a particular interest in knowing the findings which have been made against Mr Montgomery and M & T Enterprises Ltd.

[154] The application by the defendants for non-publication orders under s 107 of the Human Rights Act 1993 is accordingly dismissed.

FORMAL ORDERS

[155] For the foregoing reasons the decision of the Tribunal is that:

> **[155.1]** A declaration is made under s 92I(3)(a) of the Human Rights Act 1993 that the first and second defendants have committed a breach of Part 2 of the Act in that the plaintiff was subjected to language of a sexual nature which was unwelcome and offensive to the plaintiff and which was repeated and of such a significant nature that it had a detrimental effect on the plaintiff in the course of her employment.
>
> **[155.2]** An order is made under s 92I(3)(b) of the Human Rights Act 1993 restraining the defendants from continuing or repeating the breach of s 62 of the

Act, or from engaging in, or causing or permitting others to engage in, conduct of the same kind as that constituting the breach.

[155.3] An order is made under s 92I(3)(f) of the Human Rights Act 1993 that the first and second defendants, in conjunction with the Human Rights Commission, provide training to the first defendant and to the management staff of the second defendant in relation to their obligations under the Human Rights Act 1993 in order to ensure that the first defendant and the management staff of the second defendant are aware of those obligations, particularly the obligations under s 62 of the Act.

[155.4] Damages of $25,000 are awarded against the first and second defendants under ss 92I(3)(c) and 92M(1)(c) of the Human Rights Act 1993 for humiliation, loss of dignity and injury to the feelings of the plaintiff.

FINAL NON-PUBLICATION ORDER

[156] A final order is made prohibiting publication of the name, address and any other details which might lead to the identification of the plaintiff, Sex Worker A, Sex Worker 1, Sex Worker 2 and the Receptionist. There is to be no search of the Tribunal file without leave of the Tribunal or of the Chairperson.

COSTS

[157] Costs are reserved.

[157.1] The plaintiff is to file her submissions within fourteen days after the date of this decision. The submissions for the defendants are to be filed within a further fourteen days with a right of reply by the plaintiff within seven days after that.

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

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

.....	.....	.....
Mr RPG Haines QC	**Ms WV Gilchrist**	**Ms M Sinclair**
Chairperson	**Member**	**Member**