(1) ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS OR IDENTIFYING PARTICULARS OF THE PLAINTIFF AND OF THE DEFENDANT

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

IN THE HUMAN RIGHTS REVIEW TRIBUNAL **[2013] NZHRRT 25**

	Reference No. HRRT 029/2012
UNDER	**SECTION 51 OF THE HEALTH AND DISABILITY COMMISSIONER ACT 1994**
BETWEEN	**ABC**
	PLAINTIFF
AND	**XYZ**
	DEFENDANT

AT AUCKLAND

BEFORE:
Mr RPG Haines QC, Chairperson
Ms GJ Goodwin, Member
Mr RK Musuku, Member

REPRESENTATION:
ABC in person supported by Ms Montgomery as *McKenzie* friend
Mr GM Harrison for defendant

DATE OF HEARING: 24, 25 and 26 June 2013

DATE OF DECISION: 12 July 2013

DECISION OF TRIBUNAL

Introduction

[1] In 2000 the plaintiff sought counselling services from the defendant and a counselling relationship was established at that time. The plaintiff alleges that in 2003, while that

relationship was continuing and at the instigation of the defendant, a sexual relationship began and lasted until mid-2006. She alleges that by initiating and continuing a sexual relationship while he was still counselling her, the defendant breached Right 2 of the Code of Health and Disability Services Consumers' Rights (the Code) (the right to be free from sexual exploitation), Right 4(2) (the right to services that comply with legal, professional, ethical and other relevant standards) and Right 4(4) (right to services that minimise the potential harm to and optimise the quality of life of the consumer).

[2] On the other hand, the defendant says that the counselling relationship was ended by him in early 2004 following severe health problems. A friendship with the plaintiff nevertheless continued and in 2006 that friendship resulted in a sexual relationship which came to an end in that same year. While accepting that he should not have had a sexual relationship with a former client, the defendant denies that the plaintiff was a client at the relevant time.

[3] The parties being in conflict over the essential facts, the primary issue in these proceedings is whether the plaintiff has satisfied the Tribunal, on the balance of probabilities, that any action of the defendant was in breach of the Code.

Non-disclosure order

[4] By application dated 23 May 2013 Mr Harrison sought an order that the defendant's name and identity not be published. The grounds advanced were:

> **[4.1]** Such an order was made by the Deputy Health and Disability Commissioner in her report dated 1 April 2011. Circumstances have not changed since that time, and the order should be permitted to operate without being compromised by publication of the name of the defendant in the present proceedings before the Tribunal.
>
> **[4.2]** The defendant has ceased practice and at his age will never again practise with the result that there is no threat to potential patients.
>
> **[4.3]** Publication would cause unnecessary distress and anguish to the defendant's wife, children, grandchildren, other relatives and close friends who have had no involvement in the alleged incidents complained of by the plaintiff.
>
> **[4.4]** The proceedings involve allegations of sexual impropriety which are personal to the parties and which would ordinarily attract non-publication orders in respect of both parties, either in the Family Court or in the criminal jurisdiction.
>
> **[4.5]** There would be no educational gain or value were publication to be permitted.

[5] The plaintiff advised she had no objection to the application. While she did not initially seek a similar order for herself, the fact remains that it is not possible to make an effective non-publication order in relation to the defendant while simultaneously permitting publication of the identity of the plaintiff.

[6] Based on the grounds advanced by Mr Harrison an interim non-publication order in relation to both the plaintiff and defendant was accordingly made at the commencement of the hearing on 24 June 2013. That order was expressed to continue in force until the delivery by the Tribunal of its final decision.

[7] The plaintiff thereafter gave evidence that she has been the victim of sexual and other forms of abuse at the hands of family members as well as others with whom she has had intimate relationships. The Tribunal has heard intimate details of the counselling and sexual relationships between the plaintiff and defendant.

[8] Evidence was also given that a Police process is currently in train concerning allegations of sexual abuse made by the plaintiff against a family member. To avoid prejudicing that process and any proceedings which might eventuate (including the possible application of ss 199 to 205 of the Criminal Procedure Act 2011) it is inevitable that a non-publication order must be made in relation to the plaintiff.

[9] Having now heard all the evidence, the Tribunal is of the clear view that the interim order should be made final. The terms of that final order follow at the conclusion of this decision. In this decision the plaintiff will be referred to as ABC and the defendant as XYZ.

The parties

[10] The brief description of the parties which follows is largely taken from their respective accounts and is subject to our ultimate findings of fact.

[11] The plaintiff is middle aged, holds a Masters degree in psychology and is currently studying for a Bachelors degree in an unrelated field. She claims to have been sexually abused by her father and by another close family member. As mentioned, a Police process is currently in train in relation to that family member. She also claims that when 19 years of age she was sexually abused by a psychologist 13 years older than herself. That relationship was terminated by the psychologist after the plaintiff had lived with him for 18 months. The plaintiff then met her former partner (also a psychologist) and that relationship lasted 17 years and resulted in two children. The relationship came to an end in September 2004 with the plaintiff making allegations that her partner had been violent towards her and suffered from a gambling and life-long pornography addiction which he had kept secret from her.

[12] Almost immediately the plaintiff commenced a relationship with a poet she had come to know in 2004 and commenced an intimate relationship with him following the September 2004 separation from her partner. The plaintiff became pregnant to the poet within weeks of the separation but suffered a miscarriage on 2 January 2005. The poet broke off with the plaintiff in early 2007.

[13] The defendant says that he first met the plaintiff in or about 1993 when she was a student at the tertiary institution at which the defendant was then teaching. At the end of 1993 the defendant retired from his academic position and commenced counselling. He registered with the New Zealand Psychologists Board in 1983 and last held an annual practising certificate as a psychologist in 1995. He did not practise as a psychologist after that time and so notified the Board and resigned. Thereafter he ceased receiving notices, membership renewals and similar communications from the Board. However, owing to what he described as an administrative error, his name still appeared on the register kept by the Board until August 2006. He was not able to practise as a psychologist without a current annual practising certificate. He was not affiliated with any New Zealand counselling or psychotherapy association.

[14] In 2000 the plaintiff contacted the defendant seeking counselling services. The defendant was then working from his home with his then life partner, also a psychologist. The plaintiff sought, primarily, counselling services to address issues of claimed past

sexual and emotional abuse by her father. Because many of her issues related to sexual abuse the defendant felt it would be better and gender appropriate for her to work with the defendant's partner on abuse issues. The defendant, on the other hand, saw the plaintiff for professional issues, career and professional training discussions.

[15] In March 2003 the defendant had a quadruple heart bypass and valve replacement operation which was followed by bouts of ICU Delirium (a condition developed in hospital intensive care units) which kept the defendant hospitalised for more than 3 weeks. After he left hospital he continued to have irregular experiences of delirium characterised by false beliefs, strange visual disturbances, confusion and amnesia. It seriously impaired his judgment. His partner remained with him for approximately six weeks after the operation. She then travelled overseas for some months before returning to New Zealand. She ended their relationship in October 2003. The defendant said that he was devastated by this.

[16] The defendant returned to counselling at the end of 2003 and the beginning of 2004. He counselled four to six clients, including the plaintiff. Because he continued to experience hallucinations, delusions, confusion and memory problems, in early 2004 he began closing down his small practice as a counsellor. One of the first clients to be terminated was the plaintiff. He recommended that she engage a counsellor in the city in which she was then living. As he did not know any counsellors in that city, he could not refer her to anyone.

[17] It took some time for the defendant to fully close his practice. Some clients would reduce the number of visits very slowly, others found it difficult to stop seeing him. He turned away clients and refused to accept new referrals. By mid to late 2005 his practice had ceased entirely.

[18] After the counselling relationship terminated in early 2004 the plaintiff subsequently returned to visit the defendant occasionally, perhaps about once or twice a year as a friend with similar interests in art and writing. There was no more counselling.

The witnesses heard by the Tribunal

[19] The plaintiff was the only witness called in support of her case. The defendant gave evidence on his own behalf and called two witnesses, being Ms JM McPherson and Dr AR Coates.

The plaintiff's evidence – overview

[20] The plaintiff has filed:

> **[20.1]** A statement 48 pages in length (144 paragraphs).
>
> **[20.2]** A 23 page statement in reply to the brief of evidence filed by the defendant (93 paragraphs).
>
> **[20.3]** An 8 page statement in reply to the brief of evidence filed by Ms JM McPherson (32 paragraphs).
>
> **[20.4]** A 4 page statement in reply to the brief of evidence filed by Dr AR Coates (12 paragraphs).

[21] With the exception of a 6 page document (the clinical notes relating to the defendant's ICU Delirium), the agreed bundle of documents comprises documents the plaintiff has selected to support her case. There are approximately 321 pages.

[22] Faced with this volume of material it is not possible to provide a comprehensive summary of the plaintiff's evidence. An overview only follows.

[23] In 2000 the plaintiff's partner (the one with whom she had a relationship lasting 17 years) threatened to separate and both sought counselling. The plaintiff was counselled not only by the defendant but also by the defendant's partner. The plaintiff says that the effect of sexual abuse was the primary reason she sought therapy from the defendant and his partner. There was no separation of issues, only technique. Body work would be undertaken by the defendant's partner and metaphorical exploration by the defendant. Counselling sessions began early in 2000 and alternated between the partner and the defendant.

[24] After the defendant's surgery in March 2003 the plaintiff acknowledges that he did mention delirium to her, albeit "somewhat light-heartedly", describing how he mistook his sons for sides of meat. He gave no indication he was having any ongoing problems or that he was intending to close his practice. Though the plaintiff did anticipate he might do so, in which case she would rely upon the defendant's partner. She says that the defendant never terminated the counselling relationship. It simply merged into a sexual one.

[25] At a post-surgery appointment in 2003 the defendant revealed to the plaintiff that the defendant's partner was separating from him. When they stood to say goodbye the defendant hugged the plaintiff but in doing so moved his hands to the plaintiff's buttock and pressed his groin area into hers. In her statement at para 42 the plaintiff says that on the next occasion the defendant asked the plaintiff "to lie with him after talking". The plaintiff felt that a deeper level of affection from the defendant in this way would benefit her therapeutically. She says that the defendant said things that led her to think so. The notion of a spiritual bond was revisited during sexual intimacy. After the sexual relationship commenced, there was no discussion about a fee for the counselling sessions nor was there discussion about the counselling relationship ending. The plaintiff says that sexual acts were always initiated by the defendant.

[26] The plaintiff says that in mid to late 2003 she revealed to a close friend, Ms JM McPherson, that she was in a sexual relationship with the defendant. Ms McPherson disputes that evidence. The differences between the plaintiff and Ms McPherson are addressed later in this decision.

[27] It is the plaintiff's evidence that when in September 2004 she separated from her former partner the defendant was aware that the separation was a violent one, involving a women's refuge and the Police. The plaintiff leaned strongly on him for support, phoning and texting yet the defendant made it obvious that he was looking forward to resuming their sexual relationship. The plaintiff had her unplanned pregnancy shortly after separation from her former partner.

[28] In mid-December 2004 the plaintiff was overwhelmed with the pressures caused by her separation from her long-term partner, her new relationship with the poet and her becoming pregnant to him all in the space of a few weeks. She admitted herself, overnight, to a psychiatric hospital. She said that her separation, pregnancy and psychiatric admission were highly significant events in her life at the time. The defendant was in frequent contact with her. He knew about everything going on in her life at that time and took a leading role in her decisions. She cites this as evidence that the defendant did not end the counselling relationship or commence a friendship. Instead he "wove a counselling relationship into a sexually intimate relationship". When she visited the defendant in December 2004 he pressed her for sex notwithstanding

knowledge that she was pregnant to the poet. There was a miscarriage on 2 January 2005.

[29] In addressing the year 2005 the plaintiff said that despite considerable ongoing turmoil in her life, she and the defendant continued their sexual relationship. She cited sexually explicit emails sent by the defendant to the plaintiff in 2005 (most are in the period from September 2005) as being consistent with her evidence that he initiated sexual contact rather than the plaintiff and that he used his counselling role to manipulate her into having sex. She submits that the defendant's assertion that the sexual relationship began late in 2006 lacks credibility.

[30] The plaintiff says that there was sexual contact with the defendant in February 2006. The last was in mid-2006, though she recites an incident in that year when the defendant telephoned to ask for phone sex. It was on the same evening that the plaintiff received a call from a member of the Board of Trustees of a school then attended by one of her children. That person was also pursuing the plaintiff for sex. The behaviour of this individual combined with that of the defendant led the plaintiff to see an ACC counsellor on 14 September 2006.

[31] By January 2007 the plaintiff's relationship with the defendant had broken down. In that month the plaintiff told the defendant in a telephone conversation that she was confused by his sudden loss of interest in her. He responded clearly that he did not want to have sex with her. Following this rejection the plaintiff continued to communicate with the defendant but never visited him again. The sexual innuendos in email correspondence ended. In an email dated 21 April 2007 the defendant advised the plaintiff that he had married.

[32] In May 2007 the plaintiff made contact with Dr Nicola Gavey, Associate Professor of Psychology, University of Auckland and also with the defendant's former partner. As a result of these discussions the plaintiff decided to end communication with the defendant and to "consider [her] options".

[33] In late 2007 the plaintiff's daughter was unwell and was admitted to Starship Children's Hospital. By email dated 29 January 2008 the plaintiff wrote to the defendant reporting that her former partner was alleging that the plaintiff was (inter alia) "mad, borderline personality disorder" and intended seeking custody of both children. She asked the defendant for an affidavit or a letter of support "vouching for [her] sanity". By email dated 1 February 2008 the defendant provided a draft letter and asked, before it was tidied up, whether the plaintiff approved. The draft letter described the author as "Retired Senior Lecturer in Psychology". In an email response dated 2 February 2008 the plaintiff replied "Looks very good to me" but asked the defendant to mention or address four specific matters which she then detailed in her email. On 15 February 2008 the defendant provided the plaintiff with an amended draft, advising that if someone official was working for her (eg a lawyer) he would print the draft and mail it to that person. The second draft was not signed and did not contain any description or title of the author.

[34] The plaintiff says that she did not use the letter "because amongst other things it was a dishonest account of our relationship" and in addition the defendant, in the draft, describes himself "as a psychologist". We return to the draft letters shortly.

[35] Eventually a complaint against the defendant was lodged with the Health and Disability Commissioner (HDC). The complaint was not made by the plaintiff. Rather, by letter dated 16 October 2009 Dr Gavey lodged the complaint on her behalf, reciting

Dr Gavey's understanding of the facts as given to her by the plaintiff. Upon receiving notice of the complaint the defendant by letter dated 13 December 2009 offered the plaintiff an apology but his letter apparently did not reach the plaintiff. He then forwarded the apology to the HDC who, in turn, passed it on to the plaintiff. She did not accept the apology because she believed that the apology did not "reflect the true state of the defendant's view of where responsibility lies, his obligations and fiduciary duty". When the HDC wrote to the plaintiff on 8 January 2010 with his preliminary view that no further action should be taken, the plaintiff and Dr Gavey responded, arguing that any such decision would be wrong. Consequently, by letter dated 2 March 2010 the HDC notified the defendant that he had decided to investigate the matter and required from the defendant certain information.

[36] Eventually, on or about 1 April 2011 the HDC published *Decision 09HDC01937*. While it was concluded that the defendant had breached Right 2 and Right 4(2) of the Code, the Commissioner did not refer the defendant to the Director of Proceedings and further determined that apart from publishing an anonymised copy of the report, the matter would be pursued no further.

[37] Just prior to publication of the report the defendant on 7 March 2011 sent a further apology to the plaintiff together with a cheque for $1,680 as a refund of fees. The plaintiff rejected both the apology letter and the cheque. Her explanation to the HDC was that if she had accepted them she would be accepting the defendant's version of events. In her evidence to the Tribunal the plaintiff gave the same explanation.

[38] On learning that the HDC had decided not to refer the defendant to the Director of Proceedings the plaintiff expressed her dissatisfaction by letter dated 10 February 2012. This resulted in a five page letter dated 23 April 2012 from the Chief Legal Advisor to the HDC explaining why there were no grounds to revisit the decision. The plaintiff's brief of evidence filed in the present proceedings devotes no fewer than 8 pages to challenging the HDC decision and the evidence provided by the defendant in the course of the investigation by the HDC.

[39] The current proceedings were instituted when the plaintiff filed her statement of claim on 30 November 2012. Her case is that the defendant breached the Code in three respects:

> **[39.1]** Right 2 by denying the plaintiff the right to receive counselling free from sexual exploitation.
>
> **[39.2]** Right 4(2) by denying the plaintiff the right to trust and rely on the defendant to fulfil his fiduciary obligations and to comply with legal, professional, ethical and other relevant standards.
>
> **[39.3]** Right 4(4) by failing to provide counselling in a way that minimised the potential harm to and optimised the quality of life of the plaintiff.

[40] In the statement of claim the plaintiff seeks the following relief under s 54 of the Health and Disability Commissioner Act 1994:

> **[40.1]** A declaration that the defendant's conduct was in breach of the Code.
>
> **[40.2]** Damages of $30,000 for travel expenses, loss of therapeutic benefit and emotional harm.
>
> **[40.3]** $20,000 exemplary damages.

[41] We turn now to the defendant's evidence.

The defendant's evidence – overview

[42] The defendant accepts that in 2000 the plaintiff contacted him seeking counselling services. Because many of her issues related to past sexual abuse the defendant felt it would be better and gender appropriate for her to work with his then partner (a psychologist). While the defendant was aware that the plaintiff alleged that she had suffered abuse from her father, it was not until he read the complaint to the HDC that he clearly learnt that the abuse by her father was sexual. In his evidence the defendant said that it was never made clear to him "who did what to whom". He presumed that the plaintiff spoke to the defendant's partner about it but she (the partner) never told the defendant what had been said. The defendant saw the plaintiff for professional issues, career and professional training discussions. Following the March 2003 quadruple heart bypass and valve replacement operation as well as bouts of post-operative delirium the defendant returned to counselling at the end of 2003 and the beginning of 2004. He counselled four to six clients, including the plaintiff. However, in early 2004, continuing to experience hallucinations, delusions, confusion and memory problems, he began closing down his small practice as a counsellor. One of the first clients to be terminated was the plaintiff. By mid to late 2005 his practice had ceased entirely.

[43] The defendant recalls discussing with the plaintiff his decision to stop counselling, advising her that he could no longer cope with providing professional counselling but wished to remain friends. He says he made it clear to the plaintiff that he would no longer be providing her with counselling and that their friendship would be as equals with common interests. The plaintiff subsequently returned to visit the defendant occasionally, perhaps about once or twice a year as a friend with similar interests in art and writing. There was no more counselling.

[44] By 2006 the friendship, which was initially cool, gradually strengthened and became warm and affectionate to the point where it became briefly physically sexual. The defendant said that at this time he was still experiencing episodes of delirium characterised by false beliefs, strange visual disturbances, confusion and amnesia. Delirium seriously impaired his judgment. Had there been no delirium the sexual relationship with the plaintiff would not have happened.

[45] The defendant does not accept the plaintiff's allegation that their sexual relationship commenced in 2003. At that time his health was poor and he was still in a relationship with his (then) partner. He was also counselling the plaintiff and was fully aware of his professional obligations. He says that it is unthinkable that he would have engaged in sexual activity with the plaintiff. By 2006, when he acknowledges there were several sexual encounters, he had ceased practice as any type of health provider and was unattached.

[46] In short, while the defendant accepts that he and the plaintiff engaged in sexual conduct, he says he was not counselling her at the time, having ceased to do so more than one year previously. He had closed his practice and was not acting as a health provider, nor holding himself out as one.

[47] As to the plaintiff's claim that the relationship was sexualised in 2003, the defendant says that in 2003 he was experiencing a "sad and reluctant" separation from his then partner and was desperate at that stage to win back her love for him and would never have dreamt of having a sexual relationship with a client, let alone one who was also a client of his partner. He describes the plaintiff's allegation as "totally unthinkable. It is

just a preposterous, outrageous, insulting, cruel lie". He describes her view as "distorted and self-serving":

> It is like my telling her I could no longer be her counsellor in 2004 – she just didn't "hear" things which didn't fit her view of herself as a perpetual victim.

[48] The defendant says that at most, he believes there were only two occasions when something sexual took place with the plaintiff and both of these were in 2006.

[49] The defendant called as a witness Ms JM McPherson, a counsellor and sex therapist who has been a close friend of the plaintiff for a large number of years. The plaintiff described their relationship as a "long and supportive friendship". Ms McPherson also knows the defendant, having in 1985 taken one of his papers at the tertiary institution at which he was then teaching. In the period 2000 to 2003 the defendant was one of her supervisors. Ms McPherson does not accept and rejects the plaintiff's evidence that in mid to late 2003 she (the plaintiff) revealed to Ms McPherson that she (the plaintiff) was in a sexual relationship with the defendant. Ms McPherson is clear that that disclosure was not made until some time after she last saw the defendant in mid-2004. Furthermore, Ms McPherson says that when the plaintiff did disclose her sexual relationship with the defendant, the plaintiff did not express any concern, seemed happy about it and seemed in control and Ms McPherson did not understand her to be still a client of the defendant.

[50] Ms McPherson told the Tribunal that she does not accept the implications in the plaintiff's evidence that she (Ms McPherson) considered the defendant to be a sexual partner. The plaintiff's suspicion that Ms McPherson had a sexual relationship with the defendant was completely without foundation. She (Ms McPherson) never made inappropriate advances to the defendant and at no time did Ms McPherson ever consider the defendant to have acted unprofessionally. After the plaintiff commenced the present proceedings the plaintiff asked Ms McPherson to be a witness for her. When the plaintiff realised that Ms McPherson would not be giving evidence favourable to the plaintiff, the conversation as well as the relationship deteriorated.

[51] The third and final witness called by the defendant was Dr AR Coates, a psychotherapist who has known the defendant for many years. He was aware of the 2003 heart surgery and ICU Delirium. In 2004 he was told by the defendant that he intended to give up his practice. When the HDC investigation commenced in late-2009 the defendant talked to Dr Coates about what had happened. Dr Coates gave the following description of what followed:

> … although he went over exact details in extraordinary honesty his recall of his actions was patchy, vivid in parts but vague to the point of incomprehensibility in others.

EVIDENCE ASSESSMENT

The plaintiff

[52] In the initial stages of the hearing, particularly when opening her case and when giving evidence, the plaintiff overtly portrayed herself as a woman who has suffered serial abuse in nearly all her relationships with men, particularly her father, another family member, the psychologist with whom she lived for 18 months, her partner of 17 years, the defendant and the member of the school Board of Trustees who allegedly pestered her for sex. She complained also about the process and outcome of the HDC investigation.

[53] But upon hearing her give evidence and upon observing her conduct of her case over three days, the plaintiff impressed as an individual prone to exaggerate and of fixed and dogmatic views. We formed the clear impression that to her there is only ever one possible interpretation of events or circumstances, namely her own. She will concede the validity of no other point of view and is completely certain of herself. In almost every situation described in her lengthy evidence she portrays herself as a victim and from that moral high ground criticises everyone who is perceived to have done her wrong, including her former close friend, Ms McPherson. To discredit Ms McPherson's view of the plaintiff, the plaintiff challenged Ms McPherson's competence as a counsellor and as a registered health professional. The quote which follows is taken from the plaintiff's "reply" statement to Ms McPherson's brief of evidence:

> 23. I felt that McPherson's view of me reflected a poor understanding of the fiduciary obligations and relationship between counsellor and client. Her view seems at odds with current thinking as reflected in the relevant standards practitioners are expected to adhere to in the field of counselling and social work (see section 2.5, 3.5.1, 3.5.2 of the Code of Ethics, ANZASW).

This criticism of Ms McPherson has no foundation in fact and we do not accept that it has any validity.

[54] When cross-examining the defendant the plaintiff's persona visibly and audibly transformed from powerless victim of abuse into a strong, if not aggressive individual who not so much put questions to the defendant as demanded answers from him. Her tone was such that she appeared to scold him for his actions (and for any answer not to her satisfaction) and interrogated him in a forceful manner in relation to his perceived failings. When on the second day of the hearing the Tribunal adjourned at 5pm at a point when the plaintiff was only half way through her cross-examination of the defendant, the defendant was visibly exhausted and confused.

[55] We are of the view that contrary to the impression that the plaintiff at times cultivates, the plaintiff is a mature, intelligent, articulate and strong-willed individual who is adept at controlling situations rather than being controlled by them. We find that in this case she has advanced a highly subjective, unbalanced and distorted account of her relationships with others, including the defendant.

[56] Our concerns about the credibility of her evidence and the weight that can be given to it are increased by the points which follow:

[57] First, the plaintiff's entirely baseless suspicion that the defendant and Ms McPherson were in a sexual relationship. We accept Ms McPherson as an truthful witness and without reservation prefer her evidence to that of the plaintiff. It follows that we accept the evidence of Ms McPherson that there was no such relationship and that at no time did she ever consider the defendant to have acted unprofessionally.

[58] Second, there is the plaintiff's dogmatic insistence not only that her sexual relationship with the defendant commenced in 2003 but also that she told Ms McPherson that it had commenced in that year. Ms McPherson is certain that she was not told of the sexual relationship until some time after mid-2004.

[59] Third, Ms McPherson said that when the plaintiff told her of her (the plaintiff's) relationship with the defendant the plaintiff did not express any concern and seemed "happy about it and seemed in control". The plaintiff did not tell Ms McPherson that she was also a client of the defendant.

[60] Fourth, Ms McPherson described the plaintiff as a person capable of "gross exaggerations". Coming as it does from a witness who has known the plaintiff for a large number of years, this assessment is one which cannot be lightly put aside given our view that Ms McPherson is a credible witness. The plaintiff's gratuitous and baseless attack on Ms McPherson's professional competence reinforces our concerns as to the plaintiff's judgment as well as to her credibility.

[61] Fifthly, the plaintiff says that in late 2004 she was experiencing a violent separation from her partner of 17 years and at the same time commenced a relationship with another man (a poet), almost immediately falling pregnant to him. In addition, in December 2004 she was admitted to psychiatric care. Yet she claims that with all these highly stressful, if not traumatic events in her life, she was also engaging in an intimate relationship with the defendant. We doubt the credibility of this claim.

[62] Sixth, the Tribunal has seen no emails from 2003 and 2004 which provide any real support for the plaintiff's claim that she was in a sexual relationship with the defendant during this period. The plaintiff says this is because she shared her then partner's computer for sending and receiving emails and did not want any emails to betray the fact that she was in a sexual relationship with the defendant. This is one explanation for the absence of the emails. Another is that the sexual relationship did not begin in 2003. The evidence of Ms McPherson that the plaintiff did not in 2003 tell her of the sexual relationship leads us to reject the plaintiff's evidence that the relationship began in 2003.

[63] Seventh, the plaintiff says that in May 2007, after speaking to Dr Gavey and with the defendant's former partner, she decided to end communication with the defendant and was "considering [her] options". Yet upon the plaintiff's daughter being admitted to Starship Children's Hospital in late 2007, the plaintiff on 21 January 2008 sent an email to the defendant asking for his help in relation to a custody battle which was then anticipated after the plaintiff's former partner alleged that the plaintiff had psychological difficulties. Not only did the plaintiff elicit from the defendant a very helpful first draft of the letter of support, she proceeded to request amendments with a view to strengthening the terms of the defendant's support for her.

[64] Eighth, on the defendant providing the requested amended draft, the plaintiff asserts she did not use the reference "because amongst other things it was a dishonest account of our relationship". We do not believe the plaintiff. Her response dated 2 February 2008 to the first draft was not one of rejection on the basis that it was a dishonest account of their relationship. Rather, she opened her reply to the defendant with the following sentence:

> Looks very good to me.

She then asked that the letter be strengthened by addressing four numbered categories of information. The fourth was in the following terms:

> 4. I'm not sure about the wording "normal range of emotional feeling and expression" or the word sanity. Gosh I sound fussy and critical don't I? Normal range could be read as bordering don't you think? I think emphasising patience and psychological robustness in context of a very controlling partner and may be steadfast commitment to caring for her children's needs and um I'm not sure what else, can I have more? I'll let you turn over those ideas for a while. If you decide to include any of the above I could jog your member further.

[65] In our view this incident illustrates how the defendant distorts and "interprets" events to achieve her own ends which in the present case is to ensure that, irrespective of the facts, the defendant is punished for each and every misdeed which, in her eyes, she now believes he has committed. The facts are of secondary importance. If the

plaintiff had indeed broken off communication with the defendant and was "considering her position", it is remarkable that the email exchange over the reference took place at all.

[66] Ninth, her claimed reasoning for not using the reference does not withstand scrutiny. She says that it was "a dishonest account of our relationship". No particulars are given by her in her statement. She also complains in her evidence that the defendant refers to himself in this letter "as a psychologist". What this overlooks is that in the first draft the defendant does not anywhere use the word "psychologist". He refers only to seeing the plaintiff in his capacity as a counsellor. It was only after the plaintiff herself asked that the draft be amended to emphasise "patience and psychological robustness" that in the next draft the defendant added the following:

> Having looked at a lot of [the plaintiff's] painting, and having read much of her poetry and other writing, I thought, both as a psychologist and as an artist, it was pretty far-fetched to call it evidence of a psychological disorder. In fact I was impressed with the extent of her talent and her skills. I was particularly struck by the acuity and apparent accuracy of her observations.

We have difficulty in seeing any merit to the plaintiff's criticism of the use of the term "psychologist" in the context in which this term is used in the draft letter. There is no suggestion that the defendant is holding himself out as a registered psychologist or as a person practising psychology. Read as a whole, it is clear from the draft that the defendant mentions his psychology background to provide a foundation for the opinion he is offering about the plaintiff.

[67] On 9 April 2007 the plaintiff wrote to a person called Ian Brooks in which she spoke favourably of the defendant:

> Thankfully, [the defendant] has provided me with great support … He has encouraged me to write and paint and to remain confident in my own sanity.

This praise is at odds with the terms in which the plaintiff now portrays the relationship.

[68] Eleventh, the plaintiff's intensely subjective interpretation of events is illustrated by her pointed refusal to accept both letters of apology from the defendant on the grounds that, as she told the Tribunal, the defendant, in making his apology, had not accepted her version of events. It seemed that nothing short of complete capitulation by the defendant would satisfy the plaintiff. Yet the Health and Disability Commissioner in his letter to the plaintiff dated 8 January 2010 described the first letter of apology as "a reasonable letter of apology" and the final decision of the Commissioner at [92] referred to the defendant's "apology and sincere expressions of shame and regret". We agree with these descriptions. The plaintiff's uncompromising rejection of the apologies is another reason why we hesitate to accept her judgment.

[69] Twelfth, the delays for which the plaintiff alone is responsible have done little to assist her credibility. The plaintiff accepts that she did not see the defendant after mid-2006. In May 2007 she took advice from Dr Gavey and the defendant's former partner. But the complaint with the HDC was not lodged until October 2009, a delay of nearly two years and five months from the taking of that advice. There was a further delay after release of the HDC determination in April 2012 in that it was not until 30 November 2012 that the statement of claim in these proceedings was filed.

The defendant

[70] We have few concerns about the evidence of the defendant and believe he has given as truthful and as frank an account as he can of his counselling and sexual relationships with the plaintiff. His forthright evidence before the Tribunal was consistent

with his immediate and full apology on 13 December 2009 when he first learnt of the complaint to the HDC and with the further apology he offered on 7 March 2011 when the HDC process was approaching a conclusion. The defendant was a credible witness. His evidence was given in a direct and open manner. We detected no element of evasion, manipulation or reconstruction of events to suit his case.

[71] However, the defendant has always conceded that owing to pockets of amnesia throughout the period in question he does not have full recall of events. While he has consistently said that the sexual relationship with the plaintiff did not begin until 2006, the fact of the matter is that in the period from about September 2005 there are approximately two emails of a sexual nature sent by the defendant to the plaintiff and which are suggestive of a sexual relationship. We refer to the emails dated 29 September 2005 and 20 October 2005 in particular. It is therefore possible (we put it no higher) that the sexual interaction began as early as late 2005. We have not overlooked the evidence of Ms McPherson that the disclosure by the plaintiff of the sexual relationship was "some time after" she last saw the defendant in mid-2004. We are not prepared to infer from this that the disclosure by the plaintiff was **in** mid-2004. It was some time **after** that date and it is not permissible to speculate how long after mid-2004 that disclosure was made. However, having regard to the totality of the evidence we accept the possibility (not probability) that the sexual relationship could have begun as early as late 2005.

Findings

[72] Drawing the foregoing elements together, we have serious misgivings as to the veracity of the plaintiff's evidence. Because of these concerns we feel unable to rely on her evidence with any degree of confidence. Our conclusion is that in relation to the central issues in this case, the plaintiff's evidence has lacked any degree of cogency.

[73] The significance of this finding lies in the fact that the plaintiff carries the burden of proof. The Tribunal cannot grant any remedy under the Health and Disability Commissioner Act 1994 unless, in terms of s 54(1), it is satisfied on the balance of probabilities that any action of the defendant is in breach of the Code. Those remedies include a declaration, a restraining order, damages (both compensatory and exemplary) and specific performance. Because of the seriousness of the potential consequences of these statutory remedies the Tribunal requires stronger evidence before being satisfied to the balance of probability standard. As recently expressed in *Director of Proceedings v Emms* [2013] NZHRRT 5 (25 February 2013) at [45]:

> **[45]** In making our findings of fact and in determining whether the Director has established the breaches of the Code as alleged in the amended statement of claim we have applied the civil standard of proof (balance of probabilities) as explained by Blanchard, Tipping and McGrath JJ in *Z v Dental Complaints Assessment Committee* [2008] NZSC 55, [2009] 1 NZLR 1 at [101] to [107]. Given the serious nature of the allegations, made against Mr Emms and the equally serious consequences of upholding the Director's complaints we have required a high degree of cogency before accepting any of the evidence called by the Director.

[74] As McGrath J put it in *Z*:

> [102] The civil standard has been flexibly applied in civil proceedings no matter how serious the conduct that is alleged. In New Zealand it has been emphasised that no intermediate standard of proof exists, between the criminal and civil standards, for application in certain types of civil case. Balance of probabilities still simply means more probable than not. Allowing the civil standard to be applied flexibly has not meant that the degree of probability required to meet this standard changes in serious cases. Rather, the civil standard is flexibly applied because it accommodates serious allegations through the natural tendency to require stronger evidence before being satisfied to the balance of probabilities standard.

[75] Preferring as we do the evidence of the defendant and of Ms McPherson to that of the plaintiff we conclude that:

> **[75.1]** The counselling relationship between the plaintiff and defendant was brought to a clear end in early 2004.
>
> **[75.2]** Thereafter their relationship was one of friendship.
>
> **[75.3]** By mid to late 2005 the defendant had ceased practising as a counsellor.
>
> **[75.4]** In 2006 the friendship between the plaintiff and defendant led to a sexual relationship which came to an end by mid-2006. There is a bare possibility that the sexual relationship commenced in late 2005.

THE ALLEGED BREACHES – ANALYSIS

[76] We address next the question whether, in light of our findings, the prior client-counsellor relationship made it inappropriate for there to be any subsequent sexual relationship between the plaintiff and defendant.

[77] We refer first to the terms of Rights 2 and 4:

> ***Right 2***
> *Right to freedom from discrimination, coercion, harassment, and exploitation*
> Every consumer has the right to be free from discrimination, coercion, harassment, and sexual, financial, or other exploitation.
> …
>
> ***Right 4***
> *Right to services of an appropriate standard*
> (1) Every consumer has the right to have services provided with reasonable care and skill.
> (2) Every consumer has the right to have services provided that comply with legal, professional, ethical, and other relevant standards.
> (3) Every consumer has the right to have services provided in a manner consistent with his or her needs.
> (4) Every consumer has the right to have services provided in a manner that minimises the potential harm to, and optimises the quality of life of, that consumer.
> (5) Every consumer has the right to co-operation among providers to ensure quality and continuity of services.
> …

Right 2

[78] With regard to Right 2, the term "exploitation" is defined in Regulation 4 of the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996 in the following terms:

> **exploitation** includes any abuse of a position of trust, breach of a fiduciary duty, or exercise of undue influence.

[79] The plaintiff has also drawn attention to the *Code of Ethics of the New Zealand Association of Counsellors* (2002) and in particular paragraph 5.13:

> **5.13 Sexual and Other Inappropriate Relationships with Clients**
>
> (a) Counsellors shall not engage in sexual or romantic activity with their clients.
>
> (b) Counsellors shall not exploit the potential for intimacy made possible in the counselling relationship, even after the counselling has ended.
>
> (c) Counsellors shall not sexually harass their clients.

(d) Counsellors shall not provide counselling to persons with whom they have had a sexual or romantic relationship.

[80] Reference was also made to the *Code of Ethics for Psychologists Working in Aotearoa/New Zealand* (2002) at para 2.1.10:

> Sexual relationships with clients, supervisees and/or students are unethical. Psychologists do not encourage or engage in sexual intimacy, either during the time of that professional relationship, or for that period of time following during which the power relationship could be expected to influence personal decision-making.
>
> **Comment:** It is not appropriate to terminate a professional relationship in order to facilitate an intimate relationship.

[81] We leave aside for the moment the binding nature of these two codes of ethics as well as the absence of independent expert evidence to assist in their interpretation (as to which see *Director of Proceedings v Emms* at [53] to [56] and *Director of Health and Disability Proceedings v Peters* [2006] NZHRRT 36 (25 September 2006) at [73] to [80]). They will be regarded as material which permissibly aids the interpretation of Right 2. It is to be seen that neither asserts that there is an absolute prohibition on a health care provider entering into a relationship with a **former** client once the professional relationship has come to an end. The *Code of Ethics for Psychologists* does state that following termination of the professional relationship, a sexual relationship should not be entered into "for that period of time following during which the power relationship could be expected to influence personal decision-making". This *Code of Ethics* does not stigmatise as unethical the entering into of a sexual relationship once the stipulated period of time has run its course. The *Code of Ethics of Counsellors* is similar. Paragraph 5.13(b) stipulates that a counsellor shall not exploit the potential for intimacy made possible in the counselling relationship, even after the counselling has ended. The emphasis is on exploitation of the client. Provided this rule is not breached, the ban is not absolute.

[82] In his first letter of apology dated 13 December 2009 the defendant makes an admission to breaching a duty of care higher than that contained in either of the two codes of ethics. He said:

> I should not have made love with you because my duty of care as a counsellor did not end just because our counsellor/client relationship ended. Really it never ends.

[83] The "never ends" standard is not found in either of the two codes of ethics or in the Code of Health and Disability Services Consumers Rights, unless, of course, it is established on the particular facts that nothing short of a life-long prohibition is required for the consumer to be free from discrimination, coercion, harassment and sexual, financial or other exploitation. Such is not the case here.

[84] Whether there has been "exploitation" as defined in the Code is fact specific. Our findings of fact are:

> **[84.1]** The plaintiff holds a Masters degree in Psychology, is mature, intelligent and articulate. She is a strong-willed individual who is adept at controlling situations rather than being controlled by them.
>
> **[84.2]** When she disclosed her sexual relationship to Ms McPherson she (the plaintiff) did not express any concern and seemed happy about it and also seemed in control. Ms McPherson did not understand her to be still a client of the defendant.

[84.3] By the time the sexual relationship began, the counselling relationship had been at an end for (approximately):

[84.3.1] Eighteen months (if time is calculated from early 2004 to late 2005); or

[84.3.2] Nearly 24 months (if time is calculated from early 2004 to the beginning of 2006).

[84.4] Given the personalities of both the plaintiff and of the defendant we are of the view that during the time which elapsed between the ending of the counselling relationship and the beginning of the sexual relationship, any imbalance in the power relationship had dissipated and could not be expected to influence personal decision-making by the plaintiff. The plaintiff entered into the sexual relationship willingly, without coercion and most importantly, without exploitation.

[84.5] We accept the defendant's evidence that while he was aware that the plaintiff claimed to have been abused by her father, he was not aware, until the HDC inquiry, that such abuse had been sexual.

[85] It follows that we are not satisfied on the balance of probabilities that the two key elements of Right 2 have been made out, namely:

[85.1] That at the time the sexual relationship commenced the defendant was a health care provider vis-à-vis the plaintiff and that the plaintiff was a consumer; and

[85.2] That the plaintiff's right to be free from discrimination, coercion, harassment, and sexual, financial, or other exploitation was violated.

[86] Before we leave Right 2, it is necessary to address an issue which arises from the defendant's statement of reply to the statement of claim. In relation to Right 2 there is an admission that Right 2 was breached. However, that admission was accompanied by denials which negative the admission:

> 1. He admits that he breached Right 2 of the Code of Health and Disability Services Consumers Rights, but save as is admitted he denies paragraph 1 of the Statement of Claim, and says that the plaintiff ceased to be a client of the defendant in 2004, and that a friendship, which then began to develop very slowly, did not become sexual until mid-late 2006.

[87] The pleading being internally inconsistent we do not place any reliance upon it. At best it is ambiguous and at worst it is no admission at all.

Right 4(2)

[88] The plaintiff is required to establish, on the balance of probabilities, that the defendant failed to provide services that complied with legal, professional, ethical, and other relevant standards. We have already referred to the standards relied on by the plaintiff as set out in the *Code of Ethics of the New Zealand Association of Counsellors* and *Code of Ethics for Psychologists Working in Aotearoa/New Zealand*. Leaving aside the point that we have had no expert assistance in interpreting the Codes, it must be shown:

[88.1] That at the time the sexual relationship commenced the defendant was a health care provider vis-à-vis the plaintiff and that the plaintiff was a consumer; and

[88.2] That the defendant failed to comply with legal, professional, ethical and other relevant standards.

[89] As to the first requirement, we have found that the professional relationship ended in early 2004 and that the sexual relationship commenced much later. As to the second point, we have also found that at the time the sexual relationship was entered into a sufficient period of time had elapsed during which the power relationship had dissipated and could not be expected to influence personal decision-making by the plaintiff. It follows that a breach of Right 4(2) has not been established in terms of the *Code of Ethics for Psychologists*.

[90] As to the *Code of Ethics of Counsellors*, para 5.13(a) has no application as there was no counselling relationship at the time the sexual relationship began. As to para 5.13(b), for the reasons given at [84] above, there was no exploitation, after counselling had ended, of the potential for intimacy made possible in the counselling relationship.

Right 4(4)

[91] It is for the plaintiff to establish on the balance of probabilities:

[91.1] That at the time the sexual relationship commenced the defendant was a health care provider vis-à-vis the plaintiff and that the plaintiff was a consumer; and

[91.2] That the defendant provided services in a manner that did not minimise the potential harm to, or optimise the quality of life of the plaintiff.

[92] For the reasons given we have already found that when the sexual relationship commenced the plaintiff and defendant were not in a consumer-provider relationship.

[93] As to the second element, our findings in relation to Right 2 explain why potential harm was minimised.

[94] Although not strictly necessary, we point out that the plaintiff has provided little or no credible and reliable evidence of harm being caused by her sexual relationship with the defendant. She conceded that at any time she could have stopped seeing and communicating with him and that she chose to continue seeing and communicating with him. More particularly, she conceded that the defendant had nothing to do with and was not responsible for the abuse she claims to have suffered at the hands of her father, other family member, the psychologist with whom she lived for 18 months, the psychologist with whom she had a 17 year relationship, her pregnancy to the poet and the subsequent miscarriage.

[95] In her statement of evidence at paras 120 to 124 the plaintiff alleges that the defendant breached an array of other duties owed to her. Reference is made (inter alia) to four further provisions of the *Code of Ethics for Psychologists* and no fewer than 13 further provisions of the *Code of Ethics of Counsellors*. However, no evidence of any substance has been produced in support of these allegations. It follows that they have not been established to the balance of probability standard.

CONCLUSION

[96] For the reasons given we are not satisfied on the balance of probabilities that any action of the defendant was in breach of the Code. It follows that the Tribunal has no jurisdiction to grant any of the remedies sought by the plaintiff and her claim is dismissed.

[97] We are aware that we have come to a different conclusion to that arrived at by the Health and Disability Commissioner. We have done so, however, after an oral hearing (cf "on the papers") at which the defendant has been represented by counsel and given an opportunity not only to challenge the plaintiff by way of cross-examination but also to present himself for examination and to call two other witnesses. Neither of those witnesses participated in the inquiry by the Commissioner. The Commissioner's findings are in any event relevant only for the purpose of establishing jurisdiction of the Tribunal under s 51 of the HDC Act. The Commissioner must find a breach of the Code. However, once it has been established that the proceedings have been properly instituted before the Tribunal, a fresh or de novo hearing takes place. Section 54(4) reinforces the point.

Costs

[98] Costs are reserved. If the defendant is to apply for costs he must file a memorandum within 14 days of this decision. The submissions by the plaintiff are to be filed within a further 14 days with a right of reply by the defendant within seven days after that.

FORMAL ORDERS

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

> **[99.1]** The proceedings by the plaintiff are dismissed.
>
> **[99.2]** Costs are reserved.
>
> **[99.3]** A final order is made prohibiting publication of the name, address and any other details which might lead to the identification of the plaintiff or of the defendant. There is to be no search of the Tribunal file without leave of the Tribunal or of the Chairperson.

.....	.....	.....
Mr RPG Haines QC	**Ms GJ Goodwin**	**Mr RK Musuku**
Chairperson	**Member**	**Member**