



# THEMES IN EMPLOYMENT LAW

November 2005

## ***WORKPLACE BULLYING***

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## ***INTRODUCTION***

Everybody knows that, sometimes, workmates just do not get along. But what happens when that “personality clash” is in fact caused by one employee’s continued harmful behaviour towards another? For an employee who is targeted by such bullying, the workplace can become a place to fear; for an employer, the hidden costs of such behaviour may soon mount up. Increased job dissatisfaction, stress and turnover all lead to a less productive workplace, not to mention the costs associated with claims against the employer by employees who have been bullied beyond what they can bear. This editorial will briefly tackle a fundamental question: what is workplace bullying? It will then go on to outline the rights and obligations of employees and employers when workplace bullying does occur.

### ***I. “BULLYING” DEFINED***

#### **Technical Definitions**

Despite the increasing prevalence of cases in the Employment Relations Authority involving allegations of bullying behaviour, workplace “bullying” has not yet been specifically defined by the Employment Court. In the absence of judicial statements about the matter, a number of authors have put forward their own definitions.<sup>1</sup> One recent definition stated that workplace bullying is “unwanted and unwarranted behaviour that a person finds offensive, intimidating or humiliating and is repeated so as to have a detrimental effect upon a person’s dignity, safety, and well-being.”<sup>2</sup> Elements of that definition were reflected in comments in a recent determination of the Authority.<sup>3</sup> The Authority pointed to some overseas definitions of bullying which referred in particular to the imbalance of power commonly found in bullying relationships, and went on to comment that “[b]ullying may be seen as something that someone repeatedly does or says to gain power and dominance over another, including any action or implied action, such as threats, intended to cause fear and distress.” The Authority stressed that “[t]he behaviour has to be repeated on more than one occasion and there must be evidence that those involved intended or felt fear.”

#### **Case Examples**

In addition to establishing technical definitions, it can also be useful to “define” a term by reference to case examples. For that reason, this section will focus on examples of the types of behaviour that the Employment Court and the Authority have found did, or did not, amount to bullying. The cases deal with instances of “horizontal” bullying (bullying by workplace peers), as well as instances of “vertical” bullying (bullying of subordinate employees by those higher in the workplace hierarchy, or vice versa).

##### *1 Bullying found*

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<sup>1</sup> See in particular Andrea W Needham *Workplace Bullying: The Costly Business Secret* (Penguin Books (NZ) Ltd, Auckland, 2003) 21-31 and appendix A which contains a useful collection of definitions from various sources.

<sup>2</sup> Hayden Olsen *Workplace Bullying and Harassment* (CCH New Zealand Limited, Auckland, 2005) 8.

<sup>3</sup> *Evans v Gen-i Limited* unreported, D King, 29 August 2005, AA 333/05.

A relatively recent Court case, *McGowan v Nutype Accessories*,<sup>4</sup> concerned an overt case of bullying. The Court commented that “[b]ullying can be insidious but in this case it occurred under the noses of management.” The case involved repeated verbal abuse and name-calling by a member of staff to his general manager. For a period of three months, every time the staff member passed the manager’s office he would call out words and threats such as “idiot,” “f...ing bastard,” “you’re f...ing disgusting, dead man,” and “I’m gonna f...ing drop you, bastard.” The reason for the abuse and the toleration of it by other staff was their perception that the manager had been involved in internet pornography, an allegation which had not been made out by an investigation by the employer. The behaviour caused the manager a great deal of stress and upset.

The Court noted that the manager was treated “in what can only be described as an extremely bullying manner” and said that “[a]lthough the frequency and seriousness of the verbal abuse of [the manager] by the [staff member] was disputed [there was] no doubt that it was persistent, offensive and bullying.” The Court found that the manager was “deeply and repeatedly humiliated in front of management and staff without any justification” and that that constant humiliation “rendered [the manager] powerless.”

The recent Authority case of *Harbord v Waste Management*<sup>5</sup> concerned similar behaviour in the sense that it was overt rather than subtle or insidious. In that case the applicant’s colleague threatened to kill the applicant following a disagreement at work. The applicant took the threats seriously as his colleague was heavily built and understood to be connected to a well-known gang. The intimidating and threatening behaviour continued over time. The applicant described gestures used by his colleague such as throat-cutting or forming with his fingers and thumb the shape of a pistol that he put to his own head. The applicant’s colleague would also go out of his way to appear at the place where the applicant was working at the time he was scheduled to finish and would deliberately park his vehicle close to where the applicant was required to wash down his work truck. He would then stare at the applicant and make comments like “I’ll get you,” and “I haven’t forgotten.” The applicant became extremely nervous and stressed. The Authority described the applicant’s colleague as a bully, a description that the employer agreed with.

An example of managerial bullying occurred in *Roberts v Japan Auto*.<sup>6</sup> In that case the applicant’s manager made repeated and cruel comments about the applicant having psychological problems. He also implied in numerous ways that the applicant was not wanted in the workplace and, in particular, told him that he would not have his sales approved by the manager. As the applicant was a commission only sales person, refusal of approval would have denied him any income at all.

In *O’Brien v Renton Chainsaws*<sup>7</sup> the applicant had a poor relationship with the employee in charge of the shop in which he worked. The applicant complained of various bullying behaviours on the part of the employee in charge. On a number of

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<sup>4</sup> *McGowan v Nutype Accessories Limited* [2003] 1 ERNZ 120.

<sup>5</sup> *Harbord v Waste Management Limited* unreported, D Asher, 23 February 2005, WA 30/05.

<sup>6</sup> *Roberts v Japan Auto (NZ) Limited* [2003] 1 ERNZ 439.

<sup>7</sup> *O’Brien v Renton Chainsaws and Mowers Limited* unreported, H Doyle, 27 February 2003, CA 21/03.

occasions the employee in charge pushed the applicant out of the way, particularly when the applicant was serving customers at the till. The Authority commented that while one incident of pushing may have been accidental, here there were several incidents and they could be categorised as violence toward the applicant.

In *McFarlane v Quantum Chemicals Limited*<sup>8</sup> the applicant's manager began behaving abusively towards her after the end of a personal relationship between them. After disagreeing with a decision the applicant made at work, the manager swore at her and told her she was fired. He later apologised for that incident but continued to be unhelpful, impatient and aggressive when the applicant sought his advice or assistance. The manager subsequently apologised again for being a "manipulative bully." After that apology he called the applicant at home and sent various text messages to her outside office hours. On one occasion he left her a message saying that he was going to upload her photo onto a website where visitors to the site would "rate" her. He became angry and abusive towards the applicant when she refused to look at the website with him at work. He threatened to prevent an upcoming business trip that the applicant was going to take to China and told her that there were a lot of other things he could take away from her. The Authority commented that the manager "frequently crossed the line" and described his behaviour as "overly familiar, manipulative and bullying."

## *2 Bullying not found*

It is clear from decisions of the Authority that strict management or some kind of personality clash will usually not be enough to support a claim of bullying. In *Briggs v New Zealand Gem Trading Company*<sup>9</sup> the applicant complained that the combination of various behaviours of her new manager amounted to bullying. She pointed to his dominant and blunt management style, his condescending and over-bearing manner, his negative tone of voice and frequent derogatory comments about her, and the way in which he dealt with her habit of talking to herself and difficulties with her work. The applicant referred in particular to an incident in which the manager had told her that if she was not prepared to discuss things she "might as well pack her bags and go." The Authority accepted that the manager's style was very businesslike and efficient, his manner could be very brusque, and that there were some specific incidents that had caused the applicant some unhappiness or resentment. However, the Authority found that the applicant was a sensitive person who had taken offence at behaviours which fell within the normal range of what could be expected in the workplace.

Similarly, in *Voisey v Age Concern*<sup>10</sup> the applicant objected to her new manager's manner and the way in which he dealt with a number of matters relating to her work practices. She complained that the manager, among other things, used offensive words in her presence; made critical comments about his predecessor, who was a personal friend of the applicant; excluded the applicant from meetings; required the applicant to keep her cell-phone on her at all times; complained about her work without provision of written verification; demanded that she provide details of ill-

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<sup>8</sup> *McFarlane v Quantum Chemicals Limited* unreported, L Robinson, 29 April 2005, AA 155/05.

<sup>9</sup> *Briggs v New Zealand Gem Trading Company Ltd* unreported, V Campbell, 4 June 2004, AA 194/04.

<sup>10</sup> *Voisey v Age Concern Counties/Manukau Incorporated* unreported, YS Oldfield, 16 September 2003, AA 282/03.

health causing absence from work; commissioned a review of operations that contained unwarranted criticisms of her performance; and communicated with her in a tone that indicated a disdainful attitude towards her. The Authority made very similar comments to those in *Briggs v New Zealand Gem Trading Company*. The Authority accepted that the manager's manner could be very brusque and insensitive and even, at times, rude. However, the Authority found that the applicant was "an extraordinarily sensitive person who took offence at behaviours which fell within the normal range of what can be expected in the workplace, even a workplace which might be considered less robust than some others."

In *Nagai v Carlton Hotel*<sup>11</sup> the Authority again found that the behaviour complained of amounted to firm management rather than bullying. The applicant alleged that the head chef in the restaurant where he worked singled him out for criticism in front of other staff, blamed him for deficiencies that were not his responsibility, and yelled at him. The Authority considered that the behaviour of the head chef amounted to nothing more than firm directions or rebukes in respect of minor misdemeanours on the applicant's part. The case also indicated that the Authority may sometimes take into account the nature of the workplace environment when determining whether the conduct complained of amounts to bullying: in the Authority's view, although some of the exchanges complained of caused the applicant unhappiness, they came "well within the scope of expected and acceptable conduct between a supervising chef and an employee in a busy kitchen."

In *Sharma v Vehicle Testing NZ Ltd*<sup>12</sup> the Authority accepted that the applicant's area manager spoke to him about his customer relations in a "matter of fact" way and also asked the applicant whether he was in the right job. It also accepted that the area manager asked the applicant on more than one occasion "are you going to go or stay?" The Authority was not persuaded that those incidents described by the applicant amounted to harassment, threats, or bullying.

Behaviour that would not normally be expected in a workplace, even if distressing to an employee, will not always be of a serious enough nature to amount to workplace bullying. In *Sherwin v Fletcher Challenge*<sup>13</sup> the applicant claimed he was ritually humiliated on a regular basis by being made to wear a joke beanie hat with a propeller. The hat was given to anyone who made minute changes to log demands during a particular workplace process. The Authority member stated that "[w]hile that sort of behaviour is infantile and I accept that [the applicant] found it distressing I do not think it falls within the ambit of what can be described as workplace bullying."

## **II. THE LAW**

### **A. Common Law**

Every employment agreement contains certain fundamental terms implied by common law. The most relevant implied duty in the context of workplace bullying is the duty

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<sup>11</sup> *Nagai v Carlton Hotel (Auckland) Limited* unreported, J Scott, 19 October 2004, AA 339/04.

<sup>12</sup> *Sharma v Vehicle Testing NZ Ltd* unreported, L Robinson, 4 June 2004, AA 195/04.

<sup>13</sup> *Sherwin v Fletcher Challenge Forests Limited* unreported, D King, 14 September 2004, AA 293/04.

on an employer to provide a safe and secure workplace.<sup>14</sup> In order to provide such a workplace, an employer is required to take reasonable steps to protect employees from physical or mental harm. In addition, an employer is under an implied duty not to conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of trust, confidence and fair dealing which exists between employer and employee.

If an employer fails to adequately deal with complaints of workplace bullying, it leaves itself open to allegations that it has breached one, or both, of those implied terms. In that situation, if the employee has resigned as a result of the employer's failure, the employee may be able to bring a claim for unjustified constructive dismissal under the personal grievance provisions of the Employment Relations Act 2000 ("ERA"). Alternatively, whether the employee has resigned or not, he or she may be able to bring a claim for unjustified disadvantage under the same statutory provisions. Another option open to the employee would be to bring a claim for breach of contract, which the Authority has jurisdiction to determine under s161(1)(b) of the ERA.

### ***B. Statute: The Health and Safety in Employment Act 1992***

An employer's common law obligation to provide a safe workplace is now broadly reflected in the Health and Safety in Employment Act 1992 ("HSE"). Under s6 of the HSE, an employer must take all practicable steps to ensure the safety of employees while at work. That safety includes protection from both physical and psychological harm. Of particular relevance to workplace bullying are the specific obligations of an employer in s6(a) and (d) of the HSE to take all practicable steps to provide and maintain for employees a safe working environment, and to ensure that while at work employees are not exposed to certain hazards.

A 2002 amendment to the definition of "hazard" in the HSE highlighted employers' potential liability for workplace bullying: the amendment provided that "hazard" includes "a situation where a person's behaviour may be an actual or potential cause or source of harm to the person or another person." The recent Authority case of *Harbord v Waste Management*<sup>15</sup> referred specifically to the employer's obligations under the HSE and said that the hazard alleged by the applicant was personal harassment and potential violence from another employee. The Authority commented that violence could be physical or non-physical and that the bullying endured by the applicant amounted to psychological assault.

The statutory obligations on an employer under the HSE may be used by an employee to support a claim for constructive dismissal, unjustified disadvantage, or breach of contract as discussed above. Failure to comply with the requirements of the HSE may also be an offence under that Act for which a fine may be awarded.

### ***C. Bullying and Harassment: One and the Same?***

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<sup>14</sup> The existence of that duty was confirmed by the Court of Appeal in *A-G v Gilbert* [2002] 1 ERNZ 31; [2002] 2 NZLR 342.

<sup>15</sup> *Harbord v Waste Management Limited* unreported, D Asher, 23 February 2005, WA 30/05.

Some obvious similarities exist between workplace bullying and sexual and racial harassment. Both bullying and harassment involve behaviour which is unwelcome or offensive to the employee and which has a detrimental effect on his or her employment. However, there are also differences. For example, harassment is unlawful under both the Human Rights Act 1993 and the ERA while bullying is not specifically unlawful; harassment may be a one-off incident while bullying tends to be repeated behaviour; and harassment focuses on an aspect of the target employee such as race, colour or gender while bullying does not necessarily do so.

If behaviour within the workplace that appears to be bullying has sexual or racial undertones, and the employer fails to adequately deal with complaints about the behaviour, an employee may be able to bring a claim against the employer specifically for sexual or racial harassment under the personal grievances provisions in the ERA. Alternatively, in some circumstances the employee may be able to make a complaint under the Human Rights Act 1993. Where an employee has a choice between the two statutory procedures he or she must elect which procedure to follow. Once the choice of procedure is made, the other avenue of redress will no longer be available to the employee.<sup>16</sup>

### ***III. DEALING WITH THE PROBLEM: PRACTICAL OBLIGATIONS OF EMPLOYERS AND EMPLOYEES***

#### **Obligations of the Employee**

In practice, when workplace bullying occurs both the employer and the employee targeted by the bullying must do their part to deal with the situation. Generally, the employee is required to report instances of bullying to the employer so that the employer can take steps to eradicate the behaviour. Where an employee fails to do so, that may affect the outcome of any claim the employee later makes against the employer in relation to the bullying. The general obligation on an employee to adequately alert the employer to the alleged bullying is reinforced by s19 of the HSE which requires every employee to take all practicable steps to ensure their own safety at work.

In *McGowan v Nutype Accessories*<sup>17</sup> the Court said that “the obligation on an employee [who has been subjected to workplace bullying] is to bring the concerns to the attention of the employer.” The employee in that case had fulfilled that obligation by making repeated verbal complaints, and one written complaint, to his managers about the verbal abuse he had been subjected to and his fears for his safety. Similarly, in *Harbord v Waste Management*,<sup>18</sup> the Authority found that the employee had met his obligations under s19 of the HSE by advising the employer of the hazard he faced, namely repeated threats of harm by another employee.

In addition to adequately raising the alleged bullying, the employee must also give the employer an adequate opportunity to address the concerns. In *Nicholl-Jones v The*

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<sup>16</sup> ERA s112.

<sup>17</sup> *McGowan v Nutype Accessories Limited* [2003] 1 ERNZ 120.

<sup>18</sup> *Harbord v Waste Management Limited* unreported, D Asher, 23 February 2005, WA 30/05.

Loaded Hog<sup>19</sup> the Authority found that the applicant declined to take up any ongoing concerns about the behaviour of her supervisor in a considered manner as she had been invited to do by the assistant manager. Further, after the applicant did raise a complaint about having been “picked on” by her supervisor by being assigned to a difficult duty, she resigned before the employer had the chance to investigate her concerns, which it had offered to do. In that situation the Authority found against the applicant’s claim for constructive dismissal.

What amounts to an adequate opportunity to address the employee’s concerns will depend on the circumstances. In *O’Brien v Renton Chainsaws*<sup>20</sup> the Authority found that the applicant’s resignation after repeated complaints of bullying amounted to a constructive dismissal even though the resignation took place before the latest investigation into the matter was completed. The Authority considered that the inadequate manner in which the applicant’s earlier complaints had been dealt with, and certain comments made to the applicant, led him to believe that no appropriate action would be taken in terms of his latest complaint.

## **Obligations of the Employer**

Once an employer is aware of the existence of the bullying behaviour, it is required to take affirmative steps to deal with the bullying. Under s2A of the HSE that duty extends to situations where the employer ought reasonably to have known about the circumstances in question. The Court in *McGowan v Nutype Accessories* affirmed those principles. The Court stated that the duty to take all reasonable and practical steps to provide the applicant with safe working conditions arose from the time the employer first knew of the bullying employee’s violence towards the applicant. The Court went on to elaborate: “Even if [the employer] didn’t have full knowledge it should have. [The applicant’s] repeated verbal complaints as well as the size of the business and the layout of the premises, including close working conditions, meant that any employer mindful of its responsibilities should have had such knowledge of the persistent bullying which was taking place.”<sup>21</sup>

The kind of steps an employer should take once aware of the bullying behaviour will generally include investigation into the allegations and thereafter will depend largely on the circumstances of the case. The Court in *McGowan v Nutype Accessories*<sup>22</sup> stated “it is the duty of a responsible employer properly to investigate the concerns and to take necessary steps to protect its employee.” The Court also commented that “[i]n the case of its general manager who had no other staff member or supervisor to turn to, the employer had a particular responsibility.” In that case the employer failed to take the necessary steps to protect the applicant. In particular, following an incident of bullying which occurred after the bullying employee had been given a final warning, the employer made no attempt to enforce a previous undertaking by the bullying employee that he would resign if he bullied the applicant again. Although the employer arranged a meeting to talk with the bullying employee, it gave no indication to the applicant that any action was being taken. The Court found that in those

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<sup>19</sup> *Nicholl-Jones v The Loaded Hog Auckland Ltd Bar and Brewery* unreported, J Scott, 9 June 2003, AA 171/03.

<sup>20</sup> *O’Brien v Renton Chainsaws and Mowers Limited* unreported, H Doyle, 27 February 2003, CA 21/03.

<sup>21</sup> *McGowan v Nutype Accessories Limited* [2003] 1 ERNZ 120, para 56.

<sup>22</sup> *McGowan v Nutype Accessories Limited* [2003] 1 ERNZ 120.

circumstances the applicant was entitled to resign and upheld his claim of unjustified constructive dismissal.

In *Harbord v Waste Management*<sup>23</sup> the employer also failed to meet its obligations to take all practical steps to ensure the applicant's safety. Despite the fact that the employer clearly accepted the applicant's honestly held fears and its obligation to talk to the bullying employer, it did not do so until one month after the applicant's initial complaint. The Authority considered that the employer should have acted immediately in response to the applicant's serious allegation and that, in failing to do so, it unnecessarily subjected the applicant to an unhealthy and unsafe working environment.

In *O'Brien v Renton Chainsaws*<sup>24</sup> the Authority found that the action taken by the employer in response to at least four complaints by the applicant was inadequate and ineffective. The employer had spoken to the bullying employee but when complaints continued to be made after that time the employer should have seen that matters were not improving and dealt with the complaints more effectively. The Authority also commented that any investigation of the bullying employee was tainted by the investigator's view of the applicant as an exaggerator and a whinger, and the investigator's own permissive attitude towards pushing or elbowing other employees, which may have minimised the seriousness of the behaviours.

By contrast, in the case of *Nicholl-Jones v The Loaded Hog*<sup>25</sup> the Authority found that the employer had a "demonstrated history of responding to [the applicant's] concerns" and that her situation stood "in stark contrast" to cases where workers faced employers with a cavalier attitude to their concerns. The employer in that case investigated the initial complaint raised by the applicant, warned the bullying employee, and transferred the applicant so that she was no longer under the direct supervision of that employee. The employer also encouraged the applicant to raise any ongoing concerns after that time.

#### ***IV. THE FLIP SIDE: DEALING WITH THE BULLY***

While this editorial has dealt primarily with the rights and obligations of an employee who complains of bullying behaviour, part of the employer's response to the complaints must be to consider the best way to deal with the perpetrator of the behaviour. If the employer decides that some form of disciplinary action or dismissal is the appropriate sanction for the bully's behaviour, the employer must be able to justify that action both substantively and procedurally. If the employer's actions cannot be justified, the bully may succeed in a claim of unjustified disadvantage or unjustified dismissal under the personal grievance provisions of the ERA.

A number of claims have been brought in the Authority by employees subjected to disciplinary sanctions for bullying behaviour. The applicant in *Job v Attorney-*

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<sup>23</sup> *Harbord v Waste Management Limited* unreported, D Asher, 23 February 2005, WA 30/05.

<sup>24</sup> *O'Brien v Renton Chainsaws and Mowers Limited* unreported, H Doyle, 27 February 2003, CA 21/03.

<sup>25</sup> *Nicholl-Jones v The Loaded Hog Auckland Ltd Bar and Brewery* unreported, J Scott, 9 June 2003, AA 171/03.

General<sup>26</sup> brought a claim for unjustified dismissal after having been dismissed for serious misconduct. The employer had concluded as a result of investigation that the applicant was responsible for bullying and harassment of staff at his workplace and that his behaviour had caused or contributed to a climate of fear and intimidation. The Authority found that the dismissal was justified as the nature of the applicant's misconduct was such as to "strike at the heart of a relationship [the employer] and [the applicant] had intended to be based on mutual trust and confidence."

The employer in *Goldstone v Cogent Communications*<sup>27</sup> described the applicant's management style as "direct, blunt, abrasive and aggressive." It dismissed the applicant after concluding that it could no longer trust him as his behaviour amounted to bullying, victimisation and harassment of a number of managers under his supervision. The Authority found that the applicant had been unjustifiably dismissed as there were serious procedural flaws in the employer's disciplinary process. However, the Authority reduced the remedies payable to the applicant by 50 percent due to his creation of a climate of fear and mistrust among managers.

## **V. CONCLUSION**

When workplace bullying occurs, common law and statutory obligations both apply. It is clear that as a general rule both the bullied employee and the employer must take certain active steps to improve the situation. The employee must adequately inform the employer of what is occurring so that the employer can then fulfil its obligations to properly investigate the matter and take the necessary steps to ensure the safety of the employee. For the employer, dealing with a problem of workplace bullying involves walking a fine line: do too little to address the targeted employee's concerns and risk facing a claim by that employee; inappropriately discipline the bully and risk facing a claim from that quarter instead. As recognised in a recent Authority determination, formulating comprehensive and appropriate policies concerning workplace bullying may be the first step in the right direction: "As in more recent times there has grown a better understanding of the nature and incidence of workplace bullying, it would seem desirable for any employer the size of [the respondent] to have...policies [which extend to cover bullying in the workplace]. They may serve to prevent an occurrence of this type of conduct, as well as show how cases of it are to be properly dealt with."<sup>28</sup>

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<sup>26</sup> *Job v Attorney-General in respect of the Director-General of Conservation* unreported, A Dumbleton, 20 January 2003, AA 18/03.

<sup>27</sup> *Goldstone v Cogent Communications Limited* unreported, A Dumbleton, 13 May 2004, AA 170/04.

<sup>28</sup> *Daniels v Maori Television Service* unreported, A Dumbleton, 29 August 2005, AA 330/05.