

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Ngarimu Daniels (Applicant)
AND Maori Television Service (Respondent)
REPRESENTATIVES Ken Mair for Applicant
Eska Hartdegen for Respondent
MEMBER OF AUTHORITY Alastair Dumbleton
INVESTIGATION MEETING 7,8,21,22 and 25 July, 1 and 9 August 2005
DATE OF DETERMINATION 29 August 2005

DETERMINATION OF THE AUTHORITY

Employment relationship problem

[1] The problem between the applicant Ms Ngarimu Daniels and the respondent Maori Television Services (referred to as "MTS") is really a series of problems which began to affect the employment relationship in November 2004 and grew from that time. Much time and effort has been expended by MTS and Ms Daniels and their representatives in trying to resolve the problems by themselves. They have also undertaken mediation but have still not been able to agree on a settlement of all of their differences.

[2] The resolution now by the Authority of the employment relationship problem requires consideration and determination of the existence and extent of fundamental rights and obligations between Ms Daniels and MTS under their particular employment relationship and applicable statute law. Shared cultural values at the heart of the relationship have also to be examined.

[3] Despite being racked by the problems the employment relationship survives. The primary aim of the Authority throughout its extensive involvement with Ms Daniels, and MTS and their many supporters and whanau, has been to promote the restoration of that relationship and its continuation, in accordance with the object of the Employment Relations Act 2000 and the Maori Television Service Act 2003.

[4] Much has been seen and heard by the Authority to convince it that Ms Daniels and MTS have a common goal in wishing to overcome the adversity between them, so that they can resume a successful and productive relationship for their own benefit as well as for that of the wider community to whom each are committed in their work.

[5] At the end of the investigation meeting Ms Daniels and Mr Jim Mather, CEO of MTS, made encouraging remarks to each other. Ms Daniels expressed her strong attachment to her work and

her wish to continue with MTS. Mr Mathers' spontaneous "offer of goodwill" with regard to Ms Daniels current leave situation, was a further demonstration of the commitment he displayed and lead he took at other times during the meeting, towards resolving the problems. In the same spirit, Mr Mathers acknowledged to Dr Leonie Pihama, Ms Daniels' partner and a former appointed director of MTS, that she was due an apology for at least one of the problems which has caused a profound deterioration of the employment relationship. What Mr Mather, Ms Daniels and Dr Pihama were able to say to each other raised greater hope for the future than had been present at some times earlier on during the long investigation meeting.

[6] It is clear that to make progress Ms Daniels and MTV need to have this determination of the legal issues that are inherent in the overall problems between them. After that, the outcome will lie in their own hands, but they have already begun to discuss plans for the re-entry by Ms Daniels into her place of work and the rebuilding of severely strained professional, personal and family relationships.

Maori Television Service – MTS Act 2003

[7] As a legal entity, MTS was created by the Maori Television Service (Te Aratuku Whakaata Iirangi Maori) Act 2003 (the "MTS Act"). That Act gives legislative recognition to the mutual obligation of the Crown and Maori under the Treaty of Waitangi to preserve, protect and promote te reo Maori and tikanga Maori.

[8] Under the MTS Act at s.8, the principal function of MTS is described as the promotion of te reo Maori and tikanga Maori;

.....through the provision of a high quality, cost-effective Maori television service, in both Maori and English, that informs, educates and entertains a broad viewing audience, and, in doing so, enriches New Zealand's society, culture and heritage.

[9] In the performance of its statutory functions MTS is required to comply with statute law and general law; s.9 of the Act. Provision is made at Part 4 of the Act for MTS to become an employer, and in that event it will therefore be subject to the Employment Relations Act 2000.

[10] In relation to the employment of staff by MTS, the following provisions of the MTS Act have particular significance to a consideration and determination of this case;

41 Personnel policy

The Service must, if it employs personnel,-

- (a) be a good employer; and*
- (b) operate a personnel policy that complies with the principle of being a good employer; and*
- (c) report in the annual report on its compliance with that policy (including its equal opportunities programme).*

42 Meaning of good employer

*(1) For the purposes of clause 41, a **good employer** is an employer who operates a personnel policy containing provisions generally accepted as necessary for the fair and proper treatment of employees in all aspects of their employment, including provisions requiring –*

- (a) good and safe working conditions; and*
- (b) an equal employment opportunities programme; and*
- (c) the impartial selection of suitably qualified persons for appointment; and*

- (d) *recognition of –*
- (i) *the aims and aspirations of Maori; and*
 - (ii) *the employment requirements of Maori; and*
 - (iii) *the need for involvement of Maori as employees of the Service; and*
- (e) *opportunities for the enhancement of the abilities of individual employees; and*
- (f) *recognition of the different aims and aspirations, and of the cultural differences that may exist among employees; and*
- (g) *recognition of the employment requirements of women; and*
- (h) *recognition of the employment requirements of persons with disabilities.*
- (2) *For the purposes of the Act an **equal employment opportunities programme** is a programme aimed at identifying and eliminating all aspects of policies, procedures and other institutional barriers that cause or perpetuate, or tend to cause or perpetuate, inequality in respect of the employment of any persons or group of persons.*

MTS Statement of Intent

[11] MTS's accountability for achieving its legislative commitments is provided under the MTS Act by requiring the organisation to prepare a Statement of Intent for tabling in Parliament. This "key document" was prepared in August 2004 to cover the period 1 July 2004 to 30 June 2005.

[12] Parts of the Statement of Intent for 2004/2005 have relevance to a consideration of the obligations of MTS as an employer, as they are a portrayal by MTS of its history-identity, and its values and aspirations.

[13] A significant statement in the document about the place where MTS stands is the following;

He Turangawaewae

As Maori Television begins to build its operation as well as its operating tikanga, we are ever mindful that as a Maori television service we are different and different imperatives guide our actions. What differentiates us from other broadcasters, other businesses, other employers, includes:

- *the journey taken to our creation*
- *the reason for our being*
- *the accountabilities that we have to a diverse constituency*
- *the obligations against which we must deliver, and*
- *our very existence being founded in te reo and tikanga Maori*

What also marks Maori Television's point of difference is the way in which te reo and tikanga Maori are reflected in our programming, our scheduling timeframes, the make up and skills of our staff, the frameworks, systems, policies and procedures for how we operate as well as the space in which we work.

.....

We are committed to operating our business from a tikanga Maori base so that it is a reflection of the value that we place on, and the respect that we give to, the language and culture of all people.

[14] The Statement of Intent expresses the single major outcome that MTS will pursue, to be the following;

Te reo and tikanga Maori are taonga that define and enrich New Zealand's identity, society, culture & heritage.

[15] An intermediate outcome to be pursued by MTS is expressed to be the following;

The public is aware of, and engages in a healthy dialogue about, Maori issues that affect New Zealanders.

This is expanded upon, as follows;

This is a critical outcome for Maori Television and all New Zealanders. It recognises that there is limited public awareness of Maori issues that affect New Zealanders.

Maori Television is well placed to play a key role in promoting public awareness and encouraging the kind of public dialogue and debate needed in a time when many people are asking searching questions about ethnicity and the place of the Treaty in a 21st century New Zealand.

Maori Television is also well placed to provide independent coverage of Maori current affairs, and feature programmes that serve an increasing diversity of interests not generally catered for by other national broadcasters.

Annual Report

[16] The Authority has also read the MTS Annual Report for 2004, which was signed off by the Chairman and Chief Executive of MTS in October last year. In discharging its obligation under s.41(c) of the MTS Act to report in the Annual Report on compliance with its good employer policy, MTS stated the following;

16. Good Employer Policy

Maori Television continues to discharge its obligations as a good employer by providing fair employment contracts and policies which provide for proper conduct of the business and opportunities for team members to consult on matters of concern to them.

(extract from page 48 of the Notes To The Accounts)

Kaupapa Maori

[17] A complaint made by Ms Daniels common to all of the employment relationship problems, was that in the way she was treated as an employee MTS did not observe or reflect the values of Maori that her employer professes to embrace. Those values too must be considered in this case.

[18] Professor Ranginui Walker gave evidence to better the Authority's understanding of the values and philosophy that is Kaupapa Maori. There was no challenge to his qualifications and standing to be able to give this particular evidence, which I accept was given by him as an expert. Professor Walker described and explained the following values in detail;

Rangitiratanga
Whanaungatanga
Manaakitanga
Kotahitanga
Wairuatanga

Ukaipotanga
Pukengatanga
Kaitiakitanga
Whakapapa
Te Reo Maori

[19] Rangitiratanga, Manaakitanga, Whanaungatanga and Wairuatanga have been referred to by MTS in a Code of Conduct for its employees, as being among “the principles that guide and rule how we will operate and work together.” Although the Code was not published until June 2005 after the problems had arisen between Ms Daniels and MTS, there is no suggestion that those principles, and the others listed with them in the Code, had not been shared values prior to its publication as well. I accept that they were regarded by MTS as ruling principles to be observed between the parties, from the beginning of Ms Daniels employment.

[20] As well as having regard to the MTS Act, the Statement of Intent, the Annual Report and Kaupapa Maori, the Authority must consider the employment relationship problems according to the provisions of the general law of employment including the provisions of the Employment Relations Act 2000, and also other statute law. One of the problems in particular requires some consideration of the New Zealand Bill of Rights Act 1990 and the Broadcasting Act 1989.

Ms Ngarimu Daniels

[21] Ms Daniels joined MTS with extensive Maori radio broadcasting experience as a reporter, presenter and producer. She has also acted in film and television, particularly Maori language productions, and she has featured in radio and television documentaries. Her accomplishments have been recognised with broadcasting industry awards, including the Maori Media Awards “Best Radio Presenter” which she was first to receive upon its inception. She is widely recognised as a highly skilled exponent of te reo Maori.

[22] Ms Daniels is of Tuhoe iwi. She is a descendant of women who took part in historical land protests of Tuhoe, some of whom were imprisoned without trial in earlier years during settlement and land acquisition by European. Her ancestral history and upbringing have provided Ms Daniels with strong beliefs and personal values that have lead to her approaching her work for MTS as a calling as well as a job.

[23] She was actively sought for employment by the MTS General Manager – News and Current Affairs, Ms Tawini Rangihau, who is also of Tuhoe. She has had a long involvement in and a deep commitment to Maori broadcasting. Despite setbacks suffered by earlier initiatives she was involved in, such as Aotearoa Television, she has continued campaigning for this cause. Ms Rangihau has played a vital part in the creation and success of Maori Television. She was on the board of directors from October 2002 until her appointment as General Manager – News and Current Affairs. Recently Ms Rangihau has been given a new appointment as General Manager – Language and Programmes. As was noted by Professor Walker, equally with Ms Daniels she too is an exemplar of te reo Maori and its promotion.

[24] An individual employment agreement was entered into in writing between MTS and Ms Daniels in January 2004 and it remains current. The terms of that agreement are comprehensive and include the description of her position as “Weekday News Presenter.”

[25] Ms Daniels presents Te Kaea, a news programme which goes to air every night. MTS proudly regards this as a “flagship” programme of the channel. Responsibility and accountability for the newsroom and for Te Kaea, rest with Ms Rangihau.

The employment relationship problems

[26] It is convenient to list these under the headings given to them in Ms Daniel's application which was lodged in the Authority at the end of January 2005. They are as follows;

- 5.1 *Homophobic comments related directly to the Applicants whanau relationship and sexuality.*
- 5.2 *Discriminatory practices and unfair treatment in regards to attendance at protest activities.*
- 5.3 *Being marginalised in the Applicants role as News Presenter.*
- 5.4 *Lack of communication in regards to key issues affecting the Applicants Employment Agreement.*
- 5.5 *Inconsistency in regard to decision making related directly to the Applicants employment conditions.*
- 5.6 *Unprofessional and unreasonable dealings by management towards the Applicant.*
- 5.7 *An ongoing experience of isolation and stress within the Applicants working environment.*

[27] The problems have been presented as personal grievances, with particular emphasis given to the discrimination and disadvantage types of grievance. However when considering these problems the Authority must have regard to s.160(3) of the Employment Relations Act under which it is not bound by the way they have been framed or presented but must concentrate on resolving the employment relationship problem however described.

[28] The problems are considered below in about the order they arose.

Discriminatory practices and unfair treatment in regards to Ms Daniels attendance at protest activities

[29] When it was before Parliament, Ms Daniels was opposed to the Foreshore and Seabed Bill. Along with many other New Zealanders she believed it would be a law permitting the unjust confiscation of land to which Maori had customary title and right of use.

[30] On 18 November 2004 she gathered with others outside the Prime Minister Helen Clark's electoral office in Mt Albert to protest at the Bill, which was due to be passed into law later that day. Earlier in the morning an axe had been thrown at the building, embedding itself in a window frame. The axe throwing incident received publicity through media reports.

[31] Ms Daniels was not present when this act of violence occurred and there has been no suggestion that she was in any way associated with its perpetrator, who was apparently later arrested and charged by the Police. Ms Daniels participation in the gathering outside the electoral office was lawful and peaceful, involving the use of whistles, banners and flags but not weapons. The protest she attended occurred outside her hours of employment. She had not sought permission from MTS before taking part.

[32] When Ms Rangihau learned on the same day of Ms Daniels attendance at the protest she asked Ms Daniels to meet and discuss her conduct. Ms Rangihau told the Authority that the concern of senior management and herself about it was that if Ms Daniel's action had been filmed, photographed or reported on by the media, MTS, by association, could have been seen as supporting the protest.

[33] Ms Rangihau said that the management view of MTS was that at all times the channel had to;

.....report news objectively and not be seen to align itself with any particular political causes.

The view of MTS was also that;

.....the risk existed that were one of our presenters to be televised during a protest meeting, the viewing public could view their political affiliations and protest actions as being representative of those of Maori Television.

[34] On 19 November, to address these management concerns, Ms Rangihau instructed Ms Daniels not to take part in "protest meetings" because, as the recognisable "face" of Maori Television she should not be seen actively involved in news-making events.

[35] There is no dispute that not only did Ms Rangihau forbid Ms Daniels from taking part in protests but that she, (in her own words);

.....made it clear that [Ms Daniels] would be jeopardising her employment with Maori Television if she participated in such protest actions in the future.

[36] This was taken by Ms Daniels to be a clear threat to the continuation of her employment. I find that perception was a reasonable one.

[37] Given orally and in writing, Ms Daniels response to her employers concerns about participation in protests included the following;

- she had always attended them, including several in the previous few months, and she would continue to attend them;
- there was nothing in her employment agreement preventing her from doing so;
- MTS had not formulated and published any policies forbidding any employees from protesting in any way or for any cause;
- colleagues, including her co-presenter on Te Kaea, Mr Julian Wilcox, had taken part in similar protests without interference from MTS;
- because Maori Television provides a Maori viewpoint, even with programmes such as Te Kaea their presentation is subjective and not objective;
- her participation in any protest was an exercise of her right to freedom of association, as affirmed and protected by the New Zealand Bill of Rights Act 1990;
- she had the right to make a choice as to how she used her own time, particularly as she was normally employed for only 20 hours a week.

[38] After making her stance clear in discussion with management, Ms Daniels requested in writing certain outcomes she wanted in relation to this issue. These were, confirmation that her employment agreement did not prohibit her from protesting and that any such future activity would not jeopardise her employment, current or future. She sought agreement that any amendments to the operating procedures, policies and rules of MTS would only occur after there had been

consultation with employees affected by the changes, as expressly required by a term of her employment agreement. She also sought agreement that;

.....we will all work to ensure a healthy, respectful and comfortable working environment.

[39] A further meeting was held on 26 November to discuss the protest issue. MTS's express concerns about Ms Daniel's participation in protest action were expanded to include a risk that government funding of MTS might be withdrawn and that the activity might bring MTS into disrepute.

[40] At the end of the meeting Ms Rangihau remained unchanged in her view and, as she said in her evidence;

I confirmed that my decision was that [Ms Daniels] was not to participate in future protests as this could compromise Maori Television's objectivity in the minds of the public.

[41] Ms Daniels took her grievance about this instruction to the CEO of MTS, who at that time was Mr Ian Withrington. He too was ultimately unswayed by her objections to Ms Rangihau's instruction and he reconfirmed it in an email message sent to Ms Daniels on 15 December 2004. He wrote;

As one of the more visible "faces" of Maori Television, people will inevitably draw a connection between your public comments and actions and the attitudes of Maori Television as a whole. If we are perceived as promoting a particular viewpoint, especially with regard to contentious issues, we put that widespread support, and therefore our future, at risk.

.....the test for us is to ask ourselves – "Is your attendance at public protests in the best interests of Maori Television?" The answer to us is a clear "No" and therefore we cannot support your participation.

We understand that you have strong personal views on some of the issues of the day affecting Maori and as an individual you may want to publicly express those views, but we hope you can understand that in doing so, you could also be causing damage to Maori Television.

[42] Ms Daniels said at the beginning of her evidence that the necessity for an Authority investigation could be traced back to the "protest" problem. I tend to agree with her. The stance she had taken over that issue in my view was the spark for a succession of other problems she has complained about. Unfortunately conflict between Ms Daniels and Ms Rangihau caused by the protest issue escalated as a result of the further problems that arose.

Determination of the "protest" problem

[43] I conclude that in prohibiting Ms Daniels from protesting, MTS did not act fairly and reasonably as required of it. MTS's action was unjustified and I find it caused disadvantage to Ms Daniels in her employment. She therefore has a sustainable personal grievance in relation to this particular problem.

[44] I find that the instruction not to publicly protest was unreasonable because it was bald and absolute in its terms and did not provide any guidance to Ms Daniels as an employee as to what sort

of conduct constituted a “protest” or whether the ban applied to everything and anything capable of being the subject of protest or whether it applied specifically to contentious issues affecting Maori. While the issue arose in the context of the Foreshore and Seabed Bill it seems to me that the reasoning put forward by Ms Rangihau and Mr Withrington and others as justification, showed clearly enough that the instruction was intended to be of blanket application.

[45] Ms Daniels was actually present at the site of the protest held outside the Prime Ministers electoral office on 18 November 2004, but would MTS have regarded her as “protesting” if instead she had been away from the site, but still within public view, in a nearby park helping with arrangements for food and shelter for those at the site? If she had added her name to a list published prominently in the newspaper of ‘Television Industry Workers Opposed to the Bill’, or, ‘Okahu Bay Residents Opposed to the Bill’, would her conduct fall within MTS’s idea of public protesting?

[46] MTS knew that Ms Daniels was not a protest addict but a person who had acted according to conscientiously held beliefs and opinions. Mr Withrington acknowledged as much in his email of 15 December. In my view the sweeping and vague instruction not to take part in protest action was not the response of a fair and reasonable employer to what Ms Daniels had done on 18 November outside Helen Clarks’ electorate office. The debate over the Foreshore and Seabed Bill was engaged in throughout the country by the widest cross-section of New Zealand society. It transcended politics as it was also a debate about a social, legal and moral issue and about giving tangible recognition to Maori as the original inhabitants of New Zealand.

[47] It is a declared intention of MTS to promote public awareness and to encourage, ...*public dialogue and debate needed in a time when many people are asking searching questions about ethnicity and the Treaty.* Therefore it seems paradoxical that one of its own employees as a member of the public should be banned from taking part, with other members of the public, lawfully and in her own time, in a form of debate about closely related matters.

[48] In its 2004/2005 Statement of Intent MTS professed to be mindful in building its operating tikanga of the differences between itself and other employers. One of those differences is “the journey taken to our creation,” which was a 30 year struggle at times involving activism and protest by proponents of Maori broadcasting. The value of such means to try and achieve a particular end that Ms Daniels believed in, was not recognised by MTS in banning her from participating in all protest action.

[49] I have seen no basis on which MTS could have believed that a Maori Television viewer of average tolerance, understanding, awareness and discernment, would not separate the Ms Daniels seen professionally presenting Te Kaea, from the Ms Daniels who might have been seen lawfully assembling as a private person with others over the extraordinary issue of the Foreshore and Seabed Bill. The employers instruction to her gave no reasonable guidance as to how far she could go in what she did in her own time while obeying the law. I find that the instruction was not a justified response by the employer to the particular conduct it became aware of.

[50] Mr Mather, the CEO of MTS, in his evidence said the instruction is not one that would be given now and he said it was no longer in place.

[51] I find that the employers actions caused disadvantage to Ms Daniels in her employment, by placing a blanket prohibition on absolutely all public protest action carried out in her own time. This was an unwarranted intrusion in her private life and it also lessened her security of employment, as the instruction was accompanied by a clear threat that her job would be jeopardised if there was any further similar conduct by Ms Daniels. On this account she has a personal

grievance which MTS should remedy.

Discrimination

[52] The actions of MTS have been complained of by Ms Daniels as being discriminatory. I find that they did amount to unlawful discrimination on the grounds of political opinion, within the meaning of ss.103 and 104 of the Employment Relations Act 2000. While for itself MTS, I find, was not concerned about Ms Daniels' political affiliations, it was concerned about what viewers might think if, through participation in protests within public view, she became identifiable and associated with any particular political cause. The prohibition by MTS against her taking part in protests was in my view imposed indirectly, if not directly, because of political opinions MTS supposed Ms Daniels held, because of the fact that she had publicly demonstrated what her particular beliefs were.

[53] The statement in reply from MTS alleges that Ms Daniels by her conduct on 18 November 2004 had placed Maori Television at risk of being viewed as endorsing "her political views". For this reason MTS claims it was justified in instructing her not to participate in "public protests". The term "political rally" was also used by Ms Rangihau in this regard.

[54] Ms Donnarae Raukawa-Doughty, who as a human-resources officer for MTS had attended the meeting held with Ms Daniels on 26 November 2004, said in evidence that her concern had been about the venue of the protest action as much as the subject of it. That venue was the electoral office of the Prime Minister. Ms Rangihau said in evidence that she had told Ms Daniels that she could not protest because her actions might compromise or jeopardise the funding MTS received from the government. The same government was the sponsor of the legislation that Ms Daniels protested about.

[55] I consider it far-fetched to suggest that the government would have reacted to Ms Daniels conduct by cutting the funding of MTS, but nevertheless this was one the reasons she was given for the instruction that she was not to take part in protest action outside the electoral office of the Prime Minister. I conclude that this instruction was given so that Ms Daniels through her actions would not be regarded by others as being anti-government in her political opinion. The definition of "political opinion" is incorporated into the Employment Relations Act by reference to the Human Rights Act 1993 under which the term includes the lack of a particular political opinion or any political opinion; s.21(1)(j).

[56] As well as the presence of prohibited grounds, unlawful discrimination in employment requires different treatment among employees by reason of those grounds. MTS subjected Ms Daniels to a ban on protesting in her own time accompanied by a threat to her employment security. Others employed by MTS on similar work to Ms Daniels and who had participated in protests, were not subjected to that detriment. One of those was Mr Julian Wilcox, who is also a presenter of Te Kaea. I accept however that if MTS had known that he had been on a hikoi against the Bill the employer is likely to have taken the same or similar action against him as it took against Ms Daniels. His treatment would have been consistent with hers; under s.104(1)(b) of the Act this is something about which prediction may be made.

[57] Ms Semi-Ramus Holland a Maori Television employee who reports news items on Te Kaea, took part in the hikoi against the Bill in Taranaki. I find that she was not subjected to the same detriment as Ms Daniels. MTS knew about her conduct because while on the hikoi she was asked by her supervisor to switch roles from marching to reporting the event. I find that unlike Ms Daniels, Ms Holland was not told, expressly or impliedly, that she could jeopardise her job by taking part in such protests. At the most she and other reporters were advised that when reporting

protest activities, they were to stand in front of the camera in such a way that viewers would not mistake them for protesters in the background.

[58] While it is true that Ms Daniels as a presenter of Te Kaea is seen on air for a longer time than Ms Holland and is intended to be the front person on that programme, I do not accept the argument that the size of Ms Daniels “profile”, or degree of exposure her “face” was given, justified separate and more detrimental treatment than was given to Ms Holland. I find that on the grounds of political opinion Ms Daniels was discriminated against in her employment, in breach of the Employment Relations Act.

New Zealand Bill of Rights Act 1990

[59] Ms Daniels maintained to Ms Rangihau and management of MTS, that she had a right to protest under the New Zealand Bill of Rights Act 1990 (“NZBORA”). The right she specifically referred to was freedom of association.

[60] I find that under s.3(b) of the legislation, NZBORA applies only to acts of MTS carried out in the course of performing the public function that has been imposed or conferred on it by statute law. While entry into employment relationships generally is a private function of MTS, in relation to its complained of act towards Ms Daniels in my view MTS was acting in the performance of its public function of television broadcasting. As well as being the “face” of Maori Television, Ms Daniels was quite literally the voice of it and therefore a vital component in the communication of news to viewers by television broadcast. Whether she was an employee, a contractor or a volunteer, was not important to the objective of MTS in acting to prohibit her from publicly protesting.

[61] On that basis prima facie Ms Daniels was entitled to protection from acts of MTS carried out in breach of NZBORA. Among the rights and freedoms she was entitled to enjoy were freedom of expression (s.14), freedom of peaceful assembly (s.16) and freedom of association (s.17).

[62] However under s.5 of NZBORA the rights and freedoms contained in that Act may be subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” The Employment Court has held that a direction or instruction given by an employer to an employee may qualify as a limit “prescribed by law”; see *Poole v Horticulture & Food Research Institute of NZ Ltd* AC 82/02, 18 December 2002, Colgan J. However the direction or instruction must still meet the statutory test of reasonableness given in s.5.

[63] I have found that that the instruction given to Ms Daniels not to take part in public protest action was unreasonable because it was too vague and too wide and it also was discriminatory. It was therefore not a justifiable limitation under s.4 of NZBORA. Had the instruction been given in narrower and more precise terms and applied in a non-discriminatory way, it might have been reasonable and unobjectionable. It was up to MTS to formulate the instruction in a way that did not breach Ms Daniel’s rights specifically as an employee and generally as a person entitled to fundamental freedoms under NZBORA.

Broadcasting Act 1989

[64] MTS called in aid the Broadcasting Act 1989 to justify the ban on protesting it had imposed on Ms Daniels. Under that Act and applicable codes of practice, MTS as a broadcaster is responsible for maintaining balance, impartiality and objectivity in its programmes at all times. This applies to the content of programmes as well as to their presentation, and it applies to news and current affairs broadcasts as much as to other kinds.

[65] To meet this particular statutory requirement MTS is lawfully able to issue reasonable instructions to presenters such as Ms Daniels. A ban on all public “protest” action, particularly in private time, in my view went further than was reasonable for achieving the standards set for broadcasting.

[66] I accept that through a combination of circumstances the involvement of an MTS presenter in public protest activities, or particular conduct in the course of such activities, could threaten to compromise the objectivity, impartiality and balance required of Maori Television in presenting a programme like Te Kaea. For that to occur there would need to be something linking Ms Daniels’ private lawful conduct with viewers’ responses to the way a Maori Television programme had been presented.

[67] I am not persuaded that there was a link between Ms Daniels participation in the Foreshore and Seabed Bill protest of 18 November 2004, given the particular circumstances of that activity, and viewer’s perceptions of balance, impartiality and objectivity in the presentation by her of Te Kaea. That is not to say that a different activity in different circumstances might lead to a breach of the standards by MTS. It is up to MTS as an employer to set reasonable guidelines for behaviour in this regard and to express them in a way that they can be understood by employees.

Personnel policies and the Code of Conduct of June 2005

[68] When the protest issue arose Ms Daniels looked for the “policies” referred to in her employment agreement, but found there was none to give her guidance. The lack of relevant personnel policies published by MTS was I find a major cause of this particular problem and the inability of the parties to resolve it.

[69] The suggestion in Ms Daniel’s employment agreement that policies existed, was made as follows;

12.1 The team member [Ms Daniels] shall comply with all operating procedures, policies or rules in place from time to time and as amended by MTS.

Policies were also referred to in relation to misconduct as a ground for dismissal, as follows;

15.4 Examples of misconduct are contained in the policies, procedures and rules accompanying this agreement and as amended by MTS from time to time.

[70] As soon as the problem arose over her attendance at the 18 November protest, Ms Daniels sought the policies and rules referred to, only to discover none had been developed to the stage of being accessible to her. They were still in developmental stage because other matters had required priority of management time during the start-up phase of MTS at the beginning of 2004.

[71] Contrary to the suggestion in the Annual Report at paragraph 16, MTS had provided no policies to Ms Daniels or other employees about “the proper conduct of the business” in so far as private lawful activities were concerned. In this respect at the end of 2004 it had not met its statutory obligation to be a “good employer.”

[72] In the last few months however MTS has worked to overcome that deficiency and in my view has succeeded with the recent publication of the Code of Conduct. Its stated purpose is to provide “clear” guidelines to employees of the standards of conduct they are expected to observe.

[73] Of particular relevance to this case is the plain statement, repeated several times in the new Code, that;

Maori Television personnel must not bring the organisation into disrepute through their work and private activities.

[74] There is nothing legally objectionable about this policy or its implementation. It reflects what was said by the Court of Appeal in *Smith v The Christchurch Press Company Ltd*, a judgment delivered by Gault J on 21 November 2000 under CA 292/99, that;

It has long been recognised that conduct outside the work relationship but which brings the employer or his business into disrepute may warrant dismissal.

[75] Mr Mather in evidence said that MTS was not brought into disrepute by Ms Daniels participation in the protest on 18 November 2004.

[76] The recently issued MTS disrepute policy is some acknowledgement by the employer that a universal ban on conduct loosely described as “protest” action in public is legally unsupportable. The employer has now undertaken through its new policy to give consideration to “the circumstances in each case” before deciding whether any private (or work) activity constitutes misconduct. The policy reasonably places responsibility on employees to consider in advance how any activity proposed to be undertaken in their private time might adversely reflect on MTS, both from the point of view of the nature and circumstances of that activity and the particular position, duties and responsibilities of any employee.

[77] It must be a relevant factor in the exercise of assessing particular conduct, that anyone employed as a news presenter or a reporter will potentially be identifiable by a larger section of the public and be linked to MTS if seen or heard of to be carrying out any particular private activities. Therefore before engaging in some activities, a presenter or reporter may need to exercise his or her judgement more carefully than other MTS employees not in the public eye.

[78] The entitlement of Ms Daniels to remedies to resolve this particular employment relationship problem will be considered after the rest of her stated problems have been determined.

Inconsistency in regard to decision making related directly to Ms Daniels employment conditions

[79] This complaint is about the circumstances in which Ms Daniels went on leave over the 2004/2005 holiday break and did not return until 18 January 2005. During that time a training and induction week for all MTS staff was held, between 9 and 14 January. For Ms Daniels to have attended she would have had to cancel non-refundable air tickets booked for her to travel with Dr Pihama and their whanau to Australia.

[80] Another part of this complaint is about the selection and employment of a new stylist to work with Ms Daniels and other presenters.

[81] The Christmas holiday season in 2004/2005 offered the first and probably only opportunity to suspend Te Kaea so that all MTS staff could be brought together for training. The first months of going to air by MTS were no doubt hectic and perhaps even chaotic at times, as could be expected with any start-up operation. Decisions needed to be made at different levels by different people about the temporary close down and the training week, and it seem to me asking too much to expect that there would be no glitches in communication and coordination.

[82] Ms Daniels elected to go on her pre-arranged holiday to Australia, rather than take the inconvenient and expensive option of cancelling it. It could not reasonably be expected that the arrangements for the many staff who were to attend the training week should have been changed to accommodate just one person. There is more substance in her separate complaint about the way the changes to the presenter format were announced during that week, and that matter is dealt with next.

[83] Employees of MTS were entitled to make known their views of any particular skills, qualities and work methods they wanted to see in a stylist employed to work with them, but in my view they had no right under their terms of employment to take any part in the selection and employment process unless invited to by management.

[84] I find nothing in these two particular matters that gives rise to a grievance or problem for which MTS should be held legally responsible.

Lack of communication in regards to key issues affecting Ms Daniels employment agreement

[85] Since Te Kaea was first put to air at the end of March 2004, on weekdays a two-presenter format has been used; Ms Daniels presenting the current daily news alongside Mr Wilcox presenting the Sports News. Ms Rangihau said in evidence that this format was decided upon partly to allow Ms Daniels to gain experience and confidence in television presenting, which she was new to, and partly as a feature to distinguish Maori Television's news service from those offered by other channels.

[86] Ms Rangihau said that from the beginning she had intended that once Ms Daniels was trained and had developed enough experience and confidence, Te Kaea would be changed to a one-presenter format, with Ms Daniels and Mr Wilcox presenting on their own. I accept that Ms Rangihau's plans to address Ms Daniels training needs as she perceived them to be, were not discussed with Ms Daniels at the beginning of the employment as they should have been.

[87] Ms Rangihau and MTS made the decision to change the format without consulting Ms Daniels or speaking to her at all about it. Mr Wilcox and the other staff were not consulted either. The decision was announced to Te Kaea staff during the staff training and induction week held between 10 and 14 January 2005. Ms Daniels was on leave in Australia during that week and not due back at work until 18 January. She was not told of the decision by management of MTS and found out only when a colleague rang her in Australia.

[88] Even when she had returned to work Ms Rangihau did not approach her about the change. Ms Daniels had to initiate discussion and this quickly led to a scene with raised voices and Ms Daniels becoming upset. It was then decided by MTS not to immediately implement the decision but to consult with Ms Daniels and other affected Te Kaea staff about it. This was an instruction from the acting CEO, Mr Withrington, to Mr Rangihau. For various reasons the hurried discussions that then took place were unsatisfactory and inconclusive. One major reason is that is that Ms Daniels and MTS had retained different views as to whether the format change was purely an operational matter for management to make decisions about, or whether it was an employment related matter requiring communication and consultation with Ms Daniels, Mr Wilcox and other affected staff, and their representatives, before any final decision was made.

[89] I regard the latter view as the correct one and I find that MTS did not deal with Ms Daniels in good faith in its handling of the change of format. A significant change to the conditions in which Ms Daniels performed her work was decided upon. No doubt technically one person can present just as well as two, but if as Ms Rangihau said the two presenter format had been decided upon

partly because of considerations of training, confidence and experience, Ms Daniels should have been consulted before the decision was made. These matters were personal to Ms Daniels and directly affected her in her employment.

[90] I consider that the change would not have required her to perform a different job so that her agreement had to be obtained, but it did affect her working conditions and therefore communication and consultation with her was required before any decision to change was finally made.

[91] Events for which nobody should be blamed led to approval being given for Ms Daniels to take leave at the same time as the training and induction week. Given the view MTS had that the format change was not an employment issue but a resources issue, her absence from that week would have made no difference to what happened. MTS was intent on implementing a decision already made rather than consulting about it first.

[92] Before the decision had probably been made, on 1 December 2005 an amendment to the Employment Relations Act was passed to clarify the scope of the duty of parties to any employment relationship to deal with each other in good faith. The amendment provided at s.4(1A)(b) that good faith requires the parties;

.....to be active and constructive in establishing and maintaining a productive employment relationship in which the parties are, amongst other things, responsive and communicative;

(my emphasis)

[93] I find that MTS was inactive and uncommunicative in relation to the change of presenter format, which I find also was an important aspect of the employment relationship and its performance. Mr Withrington said he had seen the change as a resources issue but in my view it extended further than the number of cameras available and affected a human resource, an employee Ms Daniels. To be active in maintaining a productive employment relationship MTS should have sought dialogue with the Te Kaea presenters and other staff before making a decision. Communication by MTS of the ideas it had for Te Kaea was required. Even after the decision was made there was no communication of it by MTS to Ms Daniels. She found out through a different channel.

[94] The lack of communication and consultation caused suspicion, distrust and resentment on the part of Ms Daniels and Mr Wilcox about the real reason Ms Rangihau had for deciding upon the format change. It is not surprising that Ms Daniels considers that a power game was being played with her by Ms Rangihau. Neither is it surprising that she complained of feeling unsafe in her workplace due to the behaviour of Ms Rangihau.

[95] In the circumstances the failure to observe a statutory duty owed to an employee was unreasonable and was therefore unjustified. That failure caused disadvantage in the employment and conditions thereof, and consequently the actions of MTS, I find, gave rise to a personal grievance. Remedies will be considered further on in this determination.

[96] Mr Mather in his evidence acknowledged that Ms Daniels had rightfully understood the format change to be a change in her employment and to be a change of significant degree. However the change has not been implemented while this case has been proceeding and Mr Mather said there will be consultation about it first. Recently MTS has commissioned a survey, the results of which apparently support the two presenter format currently being used.

[97] Although Ms Daniels was not to blame for this problem Ms Rangihau did not see it that way and her regard for Ms Daniels as a willing and co-operative employee, already dented by the protest issue, decreased even further as a result.

Homophobic comments related directly to Ms Daniels whanau relationship and sexuality

[98] There is no dispute about the comments themselves that were made by Ms Rangihau to another MTS employee, who was also a close friend of Ms Daniels. There can be little dispute that the making of the comments gave rise to a personal grievance. This particular problem has lingered on unresolved, further contaminating the employment relationship.

[99] On Friday 14 January 2005, Ms Rangihau was in a poolroom and bar nearby to MTS's premises. Quite a few other MTS employees were also present winding down after the intensive week of staff training and induction. During a discussion Ms Rangihau had opened up with Ms Annabell Lee-Harris about particular issues with the latter's employment at MTS, Ms Rangihau warned or advised Ms Lee-Harris not to involve herself with other people's problems. This was a clear reference to the single presenter format announced to staff earlier in the week. At a meeting Ms Lee-Harris had spoken up for the pair of Te Kaea presenters who would be affected by the proposed change of format in the programme. Ms Lee-Harris responded to Ms Rangihau by saying she had loyalties to Ms Daniels who was her best friend and godmother to her son.

[100] There is no dispute that in continuing this discussion Ms Rangihau referred to Ms Daniels partner Dr Leonie Pihama as "that dyke Leonie" and said that she was "the problem" because she was "fucking up Ngarimu." Ms Rangihau added that Ms Daniels and Dr Pihama "couldn't control their pillow talk."

[101] These remarks were quickly reported to Ms Daniels and just as quickly became the subject of a personal grievance raised by her. Dr Pihama was also incensed by the remarks but, as a director of MTS rather than an employee, endeavoured to have them addressed through the Board. The dispute was reported in a newspaper.

[102] Ms Daniels grievance, which covered earlier issues that had arisen as well as Ms Rangihau's remarks, went to mediation in early February. Apologies tendered then by Ms Rangihau have not been accepted by Ms Daniels because they did not extend to Dr Pihama and their whanau. A whanau hui was agreed to be appropriate but has not yet taken place because of issues over where it should be held and who should attend. However Ms Rangihau and Ms Daniels now have some greater certainty about what must happen in this regard, following the intervention of an elder of their iwi who spoke forcefully during the investigation meeting.

[103] Ms Rangihau's remarks were deeply offensive to Ms Daniels and discriminatory of her and her partner Dr Pihama. The remarks were made by a person who was Ms Daniels' employment supervisor and from her iwi, they were made to her work colleague who was also a close friend, and they were made about a person who was her partner and also in a position of governance at MTS.

[104] The remarks strongly denigrated Ms Daniels with regard to her sexual orientation, family status, intelligence and her honesty and integrity. The same is true of Dr Pihama. The meaning of the remarks was that Dr Pihama was sexually perverse, that she had exploited and controlled Ms Daniels who was not capable of thinking freely and independently, and that the pair had no regard for the separation between their respective roles as director and employee of MTS and no regard for obligations of confidentiality attaching to those roles.

[105] The fact that recent conflict remained unresolved between Ms Rangihau and Ms Daniels over the protest issue, inevitably coloured the way Ms Daniels felt about Ms Rangihau's remarks when she was told of them. They were unlikely to be regarded benignly as throwaway remarks that had been made by Ms Rangihau thoughtlessly while letting off steam and when lubricated by alcohol. She had made the remarks despite the bond of family and the responsibility of her senior managerial employment position.

[106] It is clear that Ms Rangihau regrets the remarks and makes no excuse for uttering them. Undoubtedly she had been under a huge burden since the beginning of MTS and became frustrated by the issues that had arisen with Ms Daniels. I accept that she is not homophobic, but I also consider it was reasonable in the circumstances for Ms Daniels to believe that she was.

[107] If Ms Rangihau had had a concern about information passing improperly between Dr Pihama and Ms Daniels, the appropriate person for her as a manager to take that up with was the CEO. Instead she took up her concerns in completely the wrong place and with the wrong person. For that reason her concerns themselves cannot justify her actions. I find that Ms Rangihau at best could only infer from circumstances that information about the appointment of the new CEO had been passed on to Ms Daniels by Dr Pihama, but I find that inference was not a reasonable one.

[108] I accept from the evidence of Ms Daniels and Dr Pihama that this information was not shared between them before the announcement was made to the staff generally, and that Dr Pihama was well aware of and had observed her obligations as a director. Under s.28 of the MTS Act a director must not disclose to any person confidential information, being information about MTS that the board has determined must be treated in confidence.

[109] Mr Mather, who was present throughout the investigation meeting and heard all of the evidence of MTS employees and also that of Dr Pihama, accepted when giving his evidence that there had not been a breach of confidentiality in relation to any information shared between Dr Pihama and Ms Daniels.

[110] In its statement in reply MTS has asserted that the relationship between Dr Pihama and Ms Daniels "is problematic." That relationship was however known to Ms Rangihau even before she approached Ms Daniels to ask if she would work for MTS. Dr Pihama was already a director of MTS at that time. MTS cannot later be heard to say that the cause of this problem was the existence of the relationship, when they were well aware of it at the time of engagement. If there was a problem, it was one that MTS had invited.

[111] A compounding factor in this particular problem is that although Ms Daniels asked to be told what action MTS had taken against Ms Rangihau over her complained of remarks, she was denied that information, apparently on the grounds that it was protected by the Privacy Act 1993. That reason it seems was also given to the Board of MTS when it sought the same information on behalf of Dr Pihama. Ms Daniels complains that the silence of MTS over the action it took has denied her closure of this particular problem. I agree that she was entitled to be given some idea of how Ms Rangihau had been dealt with and not merely told that privacy considerations prevented her from being given that information.

[112] I accept that Mr Mather the CEO of MTS acted on legal advice, but I find it unlikely that a CEO required to perform his functions "subject to the control and direction" of the board of directors could have legal grounds for withholding information directly relevant to those functions from those who had been appointed to governance roles in the organisation. Sections 36 and 38 of the MTS Act make the roles of the CEO and the board clear in this regard. As the directors were the mind of MTS, the agency retaining the private information, there could be no external

disclosure if the CEO communicated that information to them.

[113] Ms Daniels sense of grievance about Ms Rangihau's remarks has been exacerbated by the extent to which MTS took any appropriate disciplinary action over the conduct. The action it did take is referred to in the notes dated 17 March 2005 made by Mr Mather who answered some questions about the way he had dealt with the conduct. Ms Daniels regards his action as inadequate action, and I agree. As Mr Mather wrote in his notes (which remain suppressed from publication by order of the Authority) Ms Daniels had expressed a concern to him "that it appeared Ms Rangihau was not made accountable for the offensive personal comment." Dr Pihama from her position as a director of MTS had also requested "appropriate action" to be taken.

[114] In his evidence Mr Mather said that Ms Daniels had made her view clear to him that Ms Rangihau should be severely reprimanded for making the remarks. Although those remarks had been uttered off-site and after work, they were directly to do with work-place matters and they should have been dealt with more strongly as misconduct within the employment relationship.

[115] Although some apology has been made by Ms Rangihau to Ms Daniels, it is clear that this particular employment relationship problem is not yet settled and now must be resolved by the Authority with an appropriate remedy.

Being Marginalised in Ms Daniels role as News Presenter

[116] Two instances in particular of this were highlighted in the evidence; the presentation of a news break announcing Mr Mathers appointment as CEO, and participation in special productions such as the Christmas programme. I do not find a specific grievance arising under this particular head of complaint.

[117] Contractually Ms Daniels is employed as a "Weekday News Presenter," with normal hours of work from 5pm to 9 pm. Contractually therefore she has no entitlement to take part in Specials that are not News programmes. If the selection process is regarded by MTS as an exercise of management discretion or prerogative, the process should at least be transparent so that employees like Ms Daniels are given some idea of how they too might be chosen for extra-contractual work. Secrecy around the process may only engender in employees a feeling that management has no confidence in them, if they are not considered for the work. Employees may also have reasonable expectations that a good employer in a large organisation will make available to them opportunities, if they arise, for increasing their skills and gaining wider experience.

[118] The circumstances surrounding the CEO-News Break seem to me to have been symptomatic of the breakdown in the relationship between Ms Rangihau and Ms Daniels. The root of that problem is dealt with under other heads of complaint in this determination. It was also an exceptional event because of uncertainty as to when the announcement would be made during the day and Ms Daniels did not usually arrive at work until 3.30pm or later.

[119] Not just this particular complaint but several others made by Ms Daniels have highlighted the unsatisfactory situation that exists while Ms Daniels still has no job description, or "Role Profile" as it is called in her employment agreement. I therefore recommend that one is drawn up as quickly as possible. Ms Daniels is entitled to be consulted about its contents, as it was intended to be a part of her agreement and under ss.64 and 65 (before the December 2004 amendment) of the Employment Relations Act, she had a right to have this information in writing and to have time to consider it before entering into the agreement.

[120] The absence of personnel policies and a job description have contributed to many of the problems that have arisen in this case. Ms Daniels looked for greater certainty and precision about her terms of employment, but was unable to find it. Policies are now being introduced. The contents of employment agreement should be reviewed and finalised between Ms Daniels and MTS as a matter of urgency.

[121] Another term of employment that has been neglected by MTS is Ms Daniels right to have, at least once a year, a “formal performance review.” She has not had one, apparently because there is no job description or role profile to base a review upon.

[122] Many of the matters raised against Ms Daniels by MTS in the course of the Authority’s investigation, were matters of performance. Whether or not there was any basis in fact for these criticisms of her, Ms Daniels should not have been subjected by her employer to a public performance review in this way. There is a procedure in the agreement and it should have been followed. Presenting evidence critical of Ms Daniels performance was not a proper response to her employment relationship problems. I refer to the evidence about her styling on air – clothes and jewellery – her attendance at briefing sessions, and her inclination to raise issues she may have with her employment and performance of it, and her off-air manner and the way she carried herself.

[123] MTS’s presentation of its response to Ms Daniels has unnecessarily added to her embarrassment and will be taken into account in considering remedies.

Unprofessional and unreasonable dealings by management towards Ms Daniels

and

An ongoing experience by Ms Daniels of isolation and stress within her working environment

[124] I deal with these heads together. I have found that in three respects Ms Daniels was treated unreasonably and unfairly. The actions cumulatively have undoubtedly made the working environment unpleasant for her. This has inevitably increased while the problems remain unresolved in relation to the protest issue, the presenter format and Ms Rangihau's offensive personal remarks made on 14 January. The last problem and the lack of resolution to it has probably had the greatest effect on workplace relations.

[125] Ms Rangihau is in an invidious position, being the maker of the remarks and also being a senior manager of Ms Daniels. It is understandable that she has wished to keep out of the way of Ms Daniels to avoid exacerbating the problem she caused.

[126] The resolution of the employment relationship problem lies in addressing the matters that caused the deterioration in the working environment. That will be done with consideration given to appropriate remedies.

[127] I do not consider that Ms Rangihau acted with the deliberate intention of forcing Ms Daniels to resign. In my view she was motivated by her strong desire to see Maori Television succeed and build its reputation. Her intention was to mould Ms Daniels into Maori Television, according to the particular vision and the aspirations Ms Rangihau has in relation to it. Bitter experience no doubt led her to try and avoid mistakes that contributed to the collapse of forerunners of MTS.

[128] I do not find that Ms Rangihau consciously bullied Ms Daniels in any physical sense but I do consider that she sought to exert her management power to overcome the strong will that Ms Daniels obviously demonstrated she had. It is obvious that Ms Rangihau too is a person with a

strong will, but the handling of the change to presenter format was autocratic and seems intended to show to Ms Daniels who the boss was.

[129] That all these problems arose during the birth of Maori Television, is some explanation but is not an excuse for them. Understandably during this start-up phase priority had to be given to getting programmes to air rather than bringing rigour to reporting lines, good communication from and with employees and the attending to general human resources matters that any large employer has to make proper provision for. If senior managers made themselves approachable too readily and informally by employees, it is in the hands of MTS now to bring a change to the structure and make it clear to employees.

Determination

[130] For the above reasons the Authority finds that in a number of significant respects MTS acted without justification towards Ms Daniels in her employment and that by doing so MTS caused her disadvantage in that employment or in the conditions of it.

[131] Applying basic principles of law that employment relationships generally are subject to, the Authority has found that MTS acted unfairly and unreasonably and in breach of the employment agreement and statute law. At the heart of this particular employment relationship there is much more governing the parties conduct towards each other than these general rules. There is the kaupapa of MTS, originating from the nature and purpose of MTS as an organisation. MTS has been accused of ignoring its kaupapa in the way it treated Ms Daniels.

[132] MTS has expressly undertaken to operate and work according to a number of the ten values that Professor Walker said formed the matrix of kaupapa Maori. The values of Rangitiratanga, Manaakitanga, Whanaungatanga, and Wairuatanga have been referred to in the recent Code of Conduct for employees of MTS. The Code is a charter that MTS as a fair and reasonable employer can be expected to follow, as well as its employees.

[133] From my understanding of those values as they were explained by Professor Walker, the conclusion is inescapable that they have not been observed, at least in so far Ms Daniels and her particular problems are concerned. The qualities of chieftainship were not displayed towards Ms Daniels by MTS through its senior management with ennobling behaviour. Neither was there behaviour exhibiting kindness, care and support towards her in relation to the matters that gave rise to her grievances. The offensive personal remarks of Ms Rangihau were not made in the spirit of wider kinship. Values incorporating qualities of respect, integrity, compassion, wisdom, keeping people reasonably informed, communication face to face, and others were disregarded at times in connection with the complained of behaviour of MTS towards Ms Daniels.

[134] The failure of the employer in this regard has added to Ms Daniels sense of grievance, because she is committed to tikanga Maori and was an employee of an organisation which is intended to have the same commitment as its foundation.

Compensation

[135] The remedies sought by Ms Daniels are compensation, an apology, costs and specific recommendations to be made to MTS by the Authority. It is accepted however that the Authority cannot legally impose on anyone a requirement to give an apology. An apology that is forced waters down its effect and is also impracticable as a remedy.

[136] The statement of problem specified \$30,000 as the amount of compensation sought for injury to the integrity of Ms Daniels and humiliation suffered by her. At the end of the investigation meeting Mr Mair asked the Authority to disregard that sum as an upper limit on compensation and award a higher amount, if I found the circumstances warranted that.

[137] I am invited to fix a global sum to compensate for the accumulated harm caused to Ms Daniels by the several grievances that have been established against MTS. I agree that is the most realistic and practicable way of addressing the question in the circumstances where a series of grievances have arisen close in time and are connected to some extent.

[138] There is evidence of the makeup of Ms Daniels and the extent of her ability to take in her stride the conduct she experienced and complained of. It is clear to me that she does not have any special or above average ability in this regard. Her personal sensitivities are well illustrated by the request she made by memorandum to MTS management on 25 November 2004, for agreement “that we will all work to ensure a healthy, respectful and comfortable working environment.” At that stage the problems she would experience had barely begun. For her the workplace proved to be anything but healthy, respectful and comfortable and regrettably this case has been a gruelling reminder of what she has experienced.

[139] Mr Mathers in his evidence accepted that Ms Daniels had suffered whakama as a result of the protest issue, the issue over Ms Rangihau’s remarks, and other conduct complained of. I note in the description of whakama contained in *Good Health Wanganui v Burberry* [2002] 1 ERNZ 668, at page 682; it is said that “to be whakama is to be ‘put out of one’s place’, ‘pushed off a secure base’. It seems to me that the remarks made by Ms Rangihau about Ms Daniel’s sexuality, intelligence and relationship with Dr Pihama were received as out-casting and destabilising.

[140] I too am satisfied that Ms Daniels has suffered shame, embarrassment, humiliation and general distress and anxiety, as a result of the unjustified action and conduct MTS has been found by the Authority to be responsible for. That humiliation has been deep, prolonged and public. There is compelling evidence of it from Ms Daniels herself and from her mother Mrs Harata Day, Dr Pihama, her colleague Mr Wilcox, and others.

[141] The remarks made by Ms Rangihau on 14 January 2005 caused significant distress to Ms Daniels when she heard about them soon after. There have been newspaper articles about those remarks and other aspects of the case. Some of that reporting has been inaccurate. The children of Dr Pihama and Ms Daniels learned of the remarks. Ms Daniels observed the further strain that was placed on her grandfather’s already frail health when he had to be told about what had happened to her, in trying to spare him the shock of reading about it in the paper. During the investigation meeting Ms Daniels learned what action had been taken against Ms Rangihau. She found it to be inadequate, increasing her sense of not being valued and respected by MTS.

[142] Given the commitment of Ms Daniels to the cause of MTS, the failures in respect of its kaupapa has also aggravated her hurt feelings.

[143] The nature of the investigation meeting and its process inevitably added to her trauma, but some of the conduct of MTS while taking part in it caused unnecessary further grief. Mr Mathers was genuine and sincere when he said on at least two separate occasions, without prompting, that Ms Daniels was a “dignified, respected and professional broadcaster.” However it could only have perplexed and dismayed Ms Daniels to hear by contrast the opinions others put forward about her on behalf of MTS. While Mr Mathers was doing his best to be conciliatory others were pulling MTS in the opposite direction so that it appeared there was a lack of coordination in the drive to resolve this dispute in the most constructive way for all concerned. People are entitled to

their opinions about Ms Daniels but in my view it was unhelpful and harmful for some them to be aired to the extent they were.

[144] The investigation meeting was deliberately structured by the Authority to allow everyone a say in addressing what had taken place, but with the overall objective of reconciling employer and employee. This carries with it a need for some discipline in deciding what should be said and what is better left unsaid. What seemed to be performance issues raised by MTS against Ms Daniel should, if they had substance, have been addressed under the employment agreement in a performance review. Some of these issues – styling and attendance at afternoon meetings – were said by MTS witnesses to be no longer a problem, and another – location of Ms Daniels desk in the newsroom was accepted not to have been something she was responsible for.

[145] The prolonging and adding to Ms Daniels humiliation during the investigation meeting will be reflected with an increase in the compensation that should be awarded. I make my assessment of compensation on the basis that there has not been a dismissal and that it is likely the employment relationship will in time become successful and productive again.

[146] I find that there has been no contribution within the meaning of the Employment Relations Act to the situation that gave rise to her grievances. Her remedies are not to be reduced on that account.

[147] I consider \$16,000 to be the sum appropriate to compensate for the accumulated harm caused by MTS to Ms Daniels in her employment. MTS is ordered to pay that sum under s.123(1)(c)(i) of the Employment Relations Act.

Recommendations

[148] The Authority acknowledges that MTS has put much resource into trying to resolve the employment relationship problems of Ms Daniels. A further indication of the seriousness with which MTS has treated this has been the attendance of its CEO, Mr Mathers, throughout the seven days of the investigation meeting. He participated actively and constructively several times and when he was not speaking he listened attentively to all that was said. From the leadership he demonstrated he was seen by Ms Daniels and the Authority to have a vital part to play in the immediate future in restoring her employment relationship and workplace harmony in general. As he did not start with MTS until February it may also be an advantage that Mr Mather was not involved in any way in the earlier events that led to this case.

[149] The damaged personal and family relationships between Ms Daniels and Ms Rangihau and their repair, are matters beyond the scope of the Authority's determination. They are appropriately to be addressed away from the workplace, at Ruatoki the house of their whanau, as their elder has guided.

[150] As far as the equally important work relationship goes, as I mentioned during the meeting my view is that its repair may require the assistance of a person they both can trust to act as an intermediary between them. Drawing up a charter of the conduct they can agree should be displayed towards each other in the workplace, may help. That is not to say that Ms Rangihau can be limited in the proper exercise of the powers, duties and responsibilities she has in her managerial position. It should be some reassurance to MTS that at the end of the investigation meeting Ms Daniels emphasised that she does not question the prerogative of management to make decisions affecting her in her work for the organisation. She does ask for communication, consultation where appropriate – she asks to be kept informed of what is happening, in accordance with the shared value and guiding principle of Kia Marama.

[151] It seems likely that MTS of its own motion has already made it a priority to complete and publish all necessary and desirable workplace procedures, policies and rules, if there are any that remain unavailable to employees. Nevertheless it can do no harm, and the circumstances of this case support this approach, for the Authority, as requested by Ms Daniels, to recommend that those procedures, policies and rules, extend to cover bullying in the workplace. 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 MTS to have such policies. 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.

[152] I recommend to MTS that in formulating policies about workplace bullying that it incorporates the particular values and kaupapa of the organisation, that it gives recognition to this conduct as a workplace health and safety issue and that it makes provision to educate management and staff so that they may recognise particular conduct and behaviour that constitutes bullying and so that they become aware of the harm that such conduct may cause.

Costs

[153] The question of costs is reserved to allow MTS and Ms Daniels or their representatives, an opportunity to decide for themselves how costs should best be defrayed between them. If they cannot come to their own arrangement the parties may apply in writing to the Authority for orders.

A Dumbleton
Member of Employment Relations Authority