IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2004-485-2035

UNDER	The Broadcasting Act 1989
IN THE MATTER OF	A determination of the Broadcasting Standards Authority in decision No. 2004-115 dated 3 September 2004
BETWEEN	RADIO NEW ZEALAND LIMITED Appellant
AND	PETER ELLIS Respondent

Hearing: 7 September 2005

Appearances: P McKnight and W Potter for Appellant
J Ablett-Kerr QC and M Phelps for Respondent
A Scott-Howman for Broadcasting Standards Authority

Judgment: 15 September 2005

RESERVED JUDGMENT OF RANDERSON & MILLER JJ

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Introduction

[1] Radio New Zealand broadcast an interview with a young man and his mother on its *Nine to Noon* programme on National Radio. He was identified only as 'Nathan'. The subject of the interview was their claim that Peter Ellis sexually abused Nathan in 1985.

[2] The Broadcasting Standards Authority held the broadcast was unfair to Mr Ellis and lacked balance. It ordered Radio New Zealand to publish a statement summarising its decision and apologising to Mr Ellis. The statement was to be broadcast by Radio New Zealand and published in the four major metropolitan newspapers.

[3] In this appeal, Radio New Zealand takes issue with the Authority's orders that the statement include an apology and that it be published in media other than Radio New Zealand itself. It says the Authority did not give notice that it was contemplating either order. And it contends that the Authority's powers under s 13 of the Broadcasting Act 1989 do not extend to forcing a broadcaster to apologise. Underlying Radio New Zealand's opposition to an apology was a belief that an apology would prejudice its defence to a defamation action the issue of which Mr Ellis was then considering.

The *Nine to Noon* Interview

[4] In the pre-recorded interview, Nathan and his mother, who was not identified, claimed that Mr Ellis abused Nathan when he attended the Christchurch Civic Crèche for several months in 1985. Mr Ellis was convicted in 1993 on 16 counts of committing sexual offences against young children at the crèche. Nathan was not one of the complainants in respect of whom Mr Ellis was charged or convicted.

[5] Mr Ellis has always maintained his innocence, and the circumstances surrounding his conviction have attracted public controversy. The *Nine to Noon* interview was broadcast on 25 August 2003, and followed the presentation of a petition to Parliament by his supporters on 24 June. That led to a number of reports

in the media, including an interview with two of the children who attended the crèche. On 21 August the crèche supervisor was interviewed on *Nine to Noon*. She maintained that Mr Ellis did not commit the crimes for which he was convicted.

[6] On the evening before the programme was broadcast, Radio New Zealand invited Mr Ellis to participate in a "sympathetic interview" with the presenter of *Nine to Noon*. Mr Ellis was not told of the nature of the following day's programme or the allegations against him. He declined the invitation.

[7] During the interview, Nathan and his mother said that he attended the crèche for a short time at the end of 1985, at the age of four. He began to display behaviour that led his mother to suspect something untoward was happening. The behaviour alleged is said to be consistent with sexual abuse, but no specific allegations were made in the interview. His mother said that on one occasion two crèche staff, one of whom she was sure was Peter Ellis, brought Nathan to her place of business before the end of the crèche day and left him there without explanation. Nathan eventually disclosed the abuse to his parents when he was about 16. The police initially told his mother that it could not have been Peter Ellis because he did not work at the crèche in 1985, but later they said they had a "reliable witness" who stated Peter Ellis was associated with people at the crèche at that time. The police declined to proceed with a prosecution on Nathan's evidence alone.

[8] The interviewer mentioned that Mr Ellis denied abusing children, that the women who worked with him at the crèche said the abuse could never have happened, and that Lynley Hood, author of a book on Mr Ellis' story, claimed the crèche children had false memories and had been manipulated by their parents or experts into thinking they had been abused. The interviewer also invited the mother's comments on the fact that, according to Ms Hood's book, Mr Ellis did not begin working at the crèche until 1986, and inquired whether Nathan's mother was in any doubt that Mr Ellis was the man who brought Nathan to her place of business.

The Broadcasting Act 1989 and the Radio Code of Broadcasting Practice

[9] The long title to the Act states that its purpose is to provide for the maintenance of programme standards in broadcasting. Section 4 provides:

> (1) Every broadcaster is responsible for maintaining in its programmes and their presentation, standards which are consistent with—
>
> > (a) The observance of good taste and decency; and
> >
> > (b) The maintenance of law and order; and
> >
> > (c) The privacy of the individual; and
> >
> > (d) The principle that when controversial issues of public importance are discussed, reasonable efforts are made, or reasonable opportunities are given, to present significant points of view either in the same programme or in other programmes within the period of current interest; and
> >
> > (e) Any approved code of broadcasting practice applying to the programmes.
>
> ...
>
> (3) No broadcaster shall be under any civil liability in respect of any failure to comply with any of the provisions of this section.

[10] Radio New Zealand follows the Radio Code of Broadcasting Practice, which has been approved for purposes of s.4(1)(e). In this case, Mr Ellis invoked principles 4, 5, and 6 of the Code. The principles and associated guidelines provide so far as relevant:

> **Principle 4**
>
> In programmes and their presentation, broadcasters are required to maintain standards consistent with the principle that when controversial issues of public importance are discussed, reasonable efforts are made, or reasonable opportunities are given, to present significant points of view either in the same programme or in other programmes within the period of current interest.
>
> *Guideline 4b*
>
> Broadcasters may have regard, when ensuring that programmes comply with Principle 4, to the following matters:
>
> > (ii) Any reasonable on-air opportunity for listeners to ask questions or present rebuttal within the period of current interest. Broadcasters may have regard to the views expressed by other broadcasters or in

the media which listeners could reasonably be expected to be aware of.

Principle 5

In programmes and their presentation, broadcasters are required to deal justly and fairly with any person taking part or referred to.

Principle 6 and *Guideline 6c* of the Radio Code of Broadcasting Practice provide:

In the preparation and presentation of news and current affairs programmes, broadcasters are required to be truthful and accurate on points of fact.

6c Factual reports on the one hand, and opinion, analysis and comment on the other, shall be clearly distinguished.

[11] Sections 5 to 7 of the Act provide that broadcasters have a responsibility to deal with complaints relating to broadcasts and must establish an appropriate procedure to deal with them. Section 8 provides that a complainant who is dissatisfied with a broadcaster's decision may refer the complaint to the Authority.

[12] The Authority may determine a complaint without a formal hearing if it has given the parties a reasonable opportunity to make written submissions and has had regard to those submissions. Section 10(2) states that the Authority must provide for as little formality and technicality as is permitted by the requirements of the Act, a proper consideration of the complaint, and the principles of natural justice. The Authority has certain powers of a Commission of Inquiry.

[13] Section 13 sets out the sanctions available to the Authority:

(1) If, in the case of a complaint referred to the Authority under section 8 of this Act, the Authority decides that the complaint is justified, in whole or in part, the Authority may make any one or more of the following orders:

(a) An order directing the broadcaster to publish, in such manner as shall be specified in the order, and within such period as shall be so specified, a statement which relates to the complaint and which is approved by the Authority for the purpose:

(b) An order to direct the broadcaster to refrain—

(i) From broadcasting; or

(ii) From broadcasting advertising programmes (including any credit in respect of a sponsorship or underwriting arrangement entered into in relation to a programme),—

for such period, not exceeding 24 hours, in respect of each programme in respect of which the Authority has decided the complaint is justified, and at such time as shall be specified in the order:

(c) An order referring the complaint back to the broadcaster for consideration and determination by the broadcaster in accordance with such directions or guidelines as the Authority thinks fit:

(d) If the Authority finds that the broadcaster has failed to maintain, in relation to any individual, standards that are consistent with the privacy of that individual, an order directing the broadcaster to pay to that individual, as compensation, a sum not exceeding $5,000.

(2) If, in the case of a complaint referred to the Authority under section 8 of this Act, the Authority decides that the complaint is justified, in whole or in part, or is not justified, in whole or in part, the Authority shall give notice in writing of the decision—

(a) To the broadcaster by which the programme was broadcast; and

(b) To the complainant.

(3) If a complaint is found to be justified, in whole or in part, the broadcaster by which the programme was broadcast shall—

(a) Comply with any order made under subsection (1) of this section; and

(b) Give notice in writing to the Authority and the complainant of the manner in which the order has been complied with.

(4) Every statement published pursuant to an order made under subsection (1) of this section shall be deemed for the purposes of clause 13 of Part 2 of the Schedule 1 to the Defamation Act 1992 to be a notice published on the authority of a Court.

[14] Under s16 the Authority may award costs to a party and, where it finds a complaint is justified, to the Crown.

[15] Lastly, s19A provides that evidence before the Authority and its decision are not admissible as evidence in other proceedings:

Except in any proceedings for perjury within the meaning of the Crimes Act 1961 in respect of sworn testimony given before the Authority or in any proceedings for the enforcement of an order made under this Part of this Act,—

(a) No response made by a broadcaster to any complaint made under this Part of this Act; and

(b) No statement made or answer given by any person—

(i) In the course of the consideration of any complaint made under this Part of this Act; or

(ii) In the course of any proceedings before the Authority in relation to any complaint made under this Part of this Act; and

(c) No decision of the Authority on any complaint made under this Part of this Act; and

(d) No determination of the High Court on any appeal made under section 18 of this Act,—

shall be admissible in evidence against any person in any Court or in any inquiry or other proceedings.

Mr Ellis' complaint

[16] Mr Ellis complained to Radio New Zealand, through his lawyers, that the interview was grossly unfair and lacked balance, and that he had not been given an opportunity to respond to the allegations. He said there was clear evidence that the allegations made in the broadcast were untrue. He advised that defamation proceedings were being prepared, and requested a public retraction and an apology. His lawyers stated:

> The format and content were particularly unbalanced and unfair to Mr Ellis in that an unidentified accuser made unproven allegations of criminal conduct on his part, which your interviewer uncritically accepted and broadcast nationally without any of these allegations being put to him for his response. Further your interviewer formulated several of the most serious allegations and invited "Nathan" and his mother to confirm them.

[17] Radio New Zealand took the view that balance could be achieved through other programmes and publications in the 'period of current interest', and rejected the allegation that the interview was unfair. It noted that Mr Ellis had declined to participate in the programme, and that Radio New Zealand had issued a further invitation to appear on *Nine to Noon*. Mr Ellis then referred his complaint to the Broadcasting Standards Authority.

The Authority's decisions and process

[18] On 29 July 2004 the Authority issued a 'Decision in Part', in which it concluded that principles 4 and 5 had been breached but left the question of sanctions for later decision.

[19] In the 'Decision in Part' the Authority reviewed the facts and submissions at length, noting as it did so that Mr Ellis had asked Radio New Zealand for an apology. It recorded that it had asked Radio New Zealand what inquiries, if any, were made to substantiate Nathan's and his mother's allegations, and that Radio New Zealand had said it was reluctant to respond because the information might be used in a defamation action.

[20] The Authority upheld the complaint that Radio New Zealand breached principle 5 by failing to treat Mr Ellis justly and fairly. The Authority said the broadcast consisted of a young man, identified only as Nathan, and his unidentified mother accusing an identified person of unspecified criminal offending of a very serious kind. Such a programme was likely to be inherently unfair to the person accused. Although Radio New Zealand invited Mr Ellis on the evening before the broadcast to participate in a "sympathetic" interview, it did not disclose the nature of the allegations that were to be broadcast. As a matter of fairness, it should have informed him of the reason for his proposed participation, and the role expected of him. Although Nathan and his mother were interviewed at length, the interviewer did not attempt to identify the exact nature of the alleged criminal acts or when or where they were committed, making it impossible for Mr Ellis to defend the allegations. The interviewer did not seriously challenge the discrepancy between Nathan's attendance at the crèche and Mr Ellis' employment there. The suggestion that Mr Ellis was associated with people at the crèche in 1985 was hearsay and ought to have been investigated. Lastly, Radio New Zealand broadcast the interview without making any further effort to substantiate the allegations. The Authority rejected a submission that other media publications remedied any deficiencies by putting Mr Ellis' point of view.

[21] The Authority also held that principle 4 was breached, in that the interview lacked balance. In response to the suggestion that balance was supplied by other publications at the time, the Authority found that the broadcast concerned previously unpublicised allegations of serious criminal offending against Mr Ellis. These allegations were distinct from the offences in respect of which Mr Ellis had been convicted.

[22] The Authority declined to determine whether the broadcast breached principle 6, which deals with accuracy. It held that it was not the Authority's function to determine the truth or otherwise of allegations of criminal behaviour.

[23] A letter from the Authority accompanied the 'Decision in Part'. It invited submissions from Radio New Zealand and Mr Ellis with respect to orders and drew their attention to sections 13 and 16 of the Act. Radio New Zealand responded on 4 August 2004. It suggested that the Authority should require Mr Ellis to state his position, with Radio New Zealand responding as it saw fit, and explained that it wished to know what Mr Ellis sought before formulating its response. It noted that according to Mr Ellis' solicitors, counsel had been instructed to prepare defamation proceedings against Radio New Zealand. To the extent that Mr Ellis' submissions in relation to penalty, and any penalty itself, might affect the threatened defamation proceedings, it wanted an opportunity to respond.

[24] The Authority agreed to sequential exchange of submissions. Mr Ellis' solicitors made submissions on 16 August seeking costs and, in relation to penalty, asking that orders should be imposed that properly reflected the seriousness of the breaches and the wrong done to Mr Ellis. They suggested that Radio New Zealand be required to broadcast a statement under s 13 as to the Authority's findings. This statement should summarise comprehensively the Authority's decision on the complaint. The solicitors also suggested that but for Radio New Zealand being a public service broadcaster which does not advertise, a penalty of up to 24 hours without advertising would have been appropriate. As an alternative, they suggested that the Authority might require that the *Nine to Noon* programme be shelved for a day. Lastly, they suggested that the Authority should order costs of $5,000 to the Crown under s 16(4) of the Act.

[25] Radio New Zealand's solicitors responded, accepting a reasonable contribution to costs and an order requiring Radio New Zealand to broadcast a statement summarising the Authority's findings. They submitted that the Authority might wish to re-consider the use of one word in the decision and argued that the proposed "shelving" of the *Nine to Noon* programme was inappropriate. They did not oppose an order for costs to the Crown. The solicitors suggested that the content of the statement ought to be settled between the Authority and Radio New Zealand, and that Mr Ellis' solicitors had no role to play in it.

[26] Mr Ellis' solicitors replied that they wished to be heard on the content of the statement, but at no point in their submissions on penalty did they specify that the statement should include an apology.

[27] The Authority issued its decision on 3 September 2004. It differed from the 'Decision in Part' only in that it added the Authority's decision and reasons with respect to sanctions. The Authority ordered Radio New Zealand to broadcast a statement approved by the Authority. The statement was to be broadcast within one month of the decision, at a time and date to be approved by the Authority. It was to contain a comprehensive summary of the Authority's decision. And it was to "make an apology to Mr Ellis". In its reasons, the Authority determined that there was no compelling reason to depart from its usual procedure, which required that the statement be drafted by the broadcaster to the satisfaction of the Authority. It added without elaboration:

> The Authority considers that this statement must also include an apology to Mr Ellis.

[28] The Authority ordered Radio New Zealand to publish a statement in a display advertisement, approved by the Authority, in the four major metropolitan newspapers. It too was to contain a comprehensive summary of the Authority's decision and an apology to Mr Ellis. The Authority explained that it was not appropriate to order that Radio New Zealand refrain from broadcasting, so the Authority had considered other appropriate means by which to mark its concern. Publication of a statement in the four major metropolitan daily newspapers was the most appropriate way to acknowledge the serious breach of standards.

[29] Radio New Zealand was also ordered to pay costs of $5,300 to Mr Ellis and $5,000 to the Crown.

The appeal

[30] A right of appeal lies to this Court under s 18 of the Act:

> (1) Where the Authority makes—
>
> > (a) A decision under section 11 of this Act; or
> >
> > (b) A decision or order under section 13 [or section 13A] of this Act,—
> >
> > the broadcaster or the complainant may appeal to the High Court against the whole or any part of the decision or order.
>
> (3) Every appeal under this section shall be made by giving notice of appeal within one month after the date on which the appellant was notified of the decision or order appealed against or within such further time as [ ] the High Court may allow.
>
> (4) The Court shall hear and determine the appeal as if the decision or order appealed against had been made in the exercise of a discretion.
>
> (5) In its determination of any appeal, the Court may—
>
> > (a) Confirm, modify, or reverse the decision or order appealed against, or any part of that decision or order:
> >
> > (b) Exercise any of the powers that could have been exercised by the Authority in the proceedings to which the appeal relates.
>
> (7) Subject to the provisions of this section, the procedure in respect of any appeal under this section shall be in accordance with rules of Court.

[31] In an admirably clear and succinct argument, Mr McKnight contended that the Authority erred by going beyond the penalty that Mr Ellis sought, without notice to Radio New Zealand that it was considering an apology or publication of a statement in media other than Radio New Zealand itself. He also argued that the Authority lacks jurisdiction to order a broadcaster to publish an apology.

[32] The content of the statement and the apology remain unsettled pending this appeal. In the meantime, Mr Ellis has chosen not to sue in defamation, saying that he prefers to pursue an appeal to the Privy Council in relation to his convictions.

Jurisdiction to order that a broadcaster publish an apology

[33] Section 13(1)(a) of the Act provides that the Authority may order the broadcaster to publish in such manner as shall be specified in the order, and within such period as shall be so specified, "a statement which relates to the complaint and which is approved by the Authority for the purpose".

[34] Mr McKnight submitted that the phrase "a statement which relates to the complaint" does not extend to an order that a broadcaster tender an apology. He referred to the *Concise Oxford Dictionary* (9th ed) definition of "statement":

> The act or an instance of stating or being stated; expression in words.

[35] An apology, according to the same dictionary, is:

> 1. A regretful acknowledgement of an offence or failure. 2. An assurance that no offence was intended. 3. An explanation or defence.

[36] Mr McKnight submitted that a statement is an unemotional declaration to the world at large while an apology by its nature is an act of contrition to a specific party. By asserting jurisdiction to order a broadcaster to apologise, the Authority is assuming a role tantamount to an arbiter of morality.

[37] We are content to adopt Mr McKnight's definition of 'statement' as an expression in words. Thus defined, the term says nothing about the content of the words expressed in it. The section is expressed in broad terms. The only constraint that s 13(1)(a) imposes is that the statement must relate to the complaint. So nothing in the language of the section suggests that a statement may not include an apology. Of course, an order under s.13(1)(a) must follow a finding that the complaint is justified because the broadcaster has breached applicable broadcasting standards, and because it is a statement of wrongdoing by the broadcaster an apology could not reasonably be required to go beyond those findings.

[38] Nor does the Act's purpose compel the conclusion that a statement excludes an apology. The Act is concerned with maintenance, in the public interest, of programme standards in broadcasting. The Authority may find that a broadcaster

has treated a person unfairly or in an unbalanced or untruthful way, and any statement broadcast under s.13(1)(a) may reflect those findings. When broadcast, a statement not only reinforces the standards but also serves a remedial purpose. As an expression of contrition, an apology is also remedial in nature, and a natural consequence of findings of that kind.

[39] Nor do we accept that there is something abhorrent about ordering a broadcaster to express contrition in an appropriate case. As Mrs Ablett-Kerr pointed out, the broadcaster may appeal if it believes the substantive decision is wrong. In this case, Radio New Zealand accepts the decision, in which the Authority recorded its deep concern at the broadcaster's serious disregard for Mr Ellis' rights. We add that Radio New Zealand will have the opportunity to draft the apology for the Authority's approval.

[40] We conclude that the Authority has jurisdiction to order an apology as part of a statement under s.13(1)(a), where such apology is limited to the issues upon which the Authority has made findings adverse to the broadcaster.

Breach of natural justice

[41] Mr McKnight submitted that the Authority set a timetable for an exchange of submissions on penalty, reflecting its obligation to observe the principles of natural justice. Mr Ellis sought neither an apology nor publication of a statement in the press, and the Authority did not tell Radio New Zealand that it was considering going beyond what Mr Ellis sought. In the circumstances, he submitted, there was a breach of natural justice.

The Authority's natural justice obligations

[42] The Authority's role is not that of a tribunal settling private disputes between an injured party and a broadcaster. Its role is to ensure that broadcasting standards are established and observed. The Authority's jurisdiction under s.13 is invoked on complaint, but the complaint need not be made by a person injured. Any member of

the public may refer a complaint to it. We accept Mr Scott-Howman's submission that the Authority is not confined to the sanctions sought by a complainant.

[43] Section 10 provides that when considering complaints the Authority shall provide for as little formality and technicality as is permitted by, *inter alia*, principles of natural justice. Accordingly, the Authority is bound to apply the principles of natural justice, but there can be no general requirement that the Authority will give notice of sanctions that it may be considering, or that it must accede to a request for sequential exchange of submissions. The requirements of natural justice may vary with the circumstance of the case: *Peters v Collinge* [1993] 2 NZLR 554, 556-7.

[44] We accept that in some cases natural justice may require that the broadcaster be told of the orders that a complainant has sought or the Authority is contemplating, so that the broadcaster may make submissions. The question in any given case is whether the circumstances are such that the broadcaster ought to have been put on notice and, if so, whether the Authority has done enough to put it on notice.

[45] On the facts of this case we are satisfied that Radio New Zealand was on notice, for several reasons. First, Mr Ellis had demanded an apology of Radio New Zealand, and the Authority had referred to that demand in its 'Decision in Part'. Second, the possibility of an apology was implicit in the Authority's findings that Radio New Zealand had treated Mr Ellis unfairly. The Authority plainly considered that the breach was an extremely serious one. Third, Radio New Zealand was alive to the possibility of an apology and the potential effect of the findings on a defamation action. It knew the Authority had ordered broadcasters to apologise in other cases. It chose not to make submissions on the point, beyond pointing out that any statement required of it could affect the proposed defamation action. Fourth, it was represented by experienced counsel, and must have appreciated that the Authority is concerned with the maintenance of broadcasting standards and not with the settlement of private disputes.

The threatened defamation proceedings

[46] Mr McKnight submitted that the Authority's failure to give notice was particularly significant because an apology would prejudice Radio New Zealand in the threatened defamation proceedings. He submitted that the Court has no power in defamation law to order a defendant to apologise, and contended that an apology has particular significance in defamation proceedings. By its very nature an apology is a voluntary action and an admission of liability. As such, a plaintiff may deploy it as evidence of the defamatory nature and untruthfulness of the publication complained of.

[47] The Court may restrain an inquiry by the Authority where it would amount to interference with the course of justice: *TV3 Network Services Limited v Broadcasting Standards Authority* [1992] 2 NZLR 724, 733. In that case the complainants sued in injurious falsehood and defamation before complaining to the Authority. McGechan J held that in the circumstances of that case the Authority's inquiry could prejudice the trial, which was to be by jury. Such a risk may arise notwithstanding s19A of the Broadcasting Act, because the Authority's findings are publicised and so may influence jurors. But the Court will not intervene unless, as a matter of practical reality, there is a substantial risk of serious injustice. In *TV3 Network Services Limited v Broadcasting Standards Authority* [1999] NZAR 452, Gendall J declined to restrain the inquiry, in circumstances where TV3 did not apply until the Authority was in a position to issue its decision and no defamation action had been commenced. He held that, while the Authority must use common sense when confronted with parties who are in litigation over the subject matter of the complaint, the public has an interest in the Authority being allowed to go about its work.

[48] In this case, defamation proceedings had not been issued when the Authority made its decision, so no question arose of Mr Ellis electing to use the Court process in preference to the Authority. Radio New Zealand did not try to restrain the Authority's inquiry on the ground that its findings would become public knowledge and so might influence a jury. Mr McKnight's point before us was that an apology,

which s19A would not protect, would risk injustice of a different kind or degree in the threatened defamation proceedings.

[49] In the absence of full argument on the point, we prefer not to determine whether s.19A would permit a plaintiff to use an apology in evidence in defamation proceedings. It is difficult to envisage a situation in which the text of an apology ordered by the Authority would not refer to the Authority's decision, which is inadmissible. The apology is likely to form part of a statement summarising the decision, as the Authority envisaged in this case. But we accept that the apology would become public knowledge in the same way as the Authority's findings, and so might influence a jury. That is a relevant consideration for the Authority in a case where the broadcaster can point to a real risk of prejudice in defamation proceedings. But an apology ordered by the Authority must be confined to its findings that a complaint is justified by reason of a breach of applicable broadcasting standards. In this case, the breaches involved unfairness to Mr Ellis and lack of balance. The Authority expressly declined to deal with his complaint that the content of the interview was untrue. That being so, Mr McKnight's concern that an apology would amount to an admission that the publication was untrue is ill-founded. In all the circumstances, the Authority had no reason to suppose that an apology would cause any real risk of prejudice to Radio New Zealand in this case.

Publication in other media

[50] Mr McKnight accepted that the Authority has power to order publication of a statement in media other than Radio New Zealand itself. He argued that notice of the Authority's intention to do so ought to have been given.

[51] On the facts, the Authority had clearly held that the breach of broadcasting standards was a serious one, and Radio New Zealand appreciated that orders in the nature of penalties were likely. Suspension of advertising for a period was not possible, and Radio New Zealand submitted that suspension of *Nine to Noon* for a day was inappropriate as being a penalty on Radio New Zealand listeners rather than Radio New Zealand itself. For that reason the Authority opted to order wider publication of the statement, in the form of advertisements in the four newspapers.

[52] We have reservations about use of such an order as a penalty, if that is what the Authority intended. But as Mrs Ablett-Kerr pointed out, the order to publish in newspapers could have been justified on remedial grounds. The wider controversy surrounding Mr Ellis had received extensive publicity, and Nathan's allegations were reported in the Dominion Post and the Christchurch Press following the Radio New Zealand interview. It ought to have been in the reasonable contemplation of Radio New Zealand that the Authority might think publication in other media was necessary to remedy the damage done by the interview.

[53] We find there was no obligation on the Authority in the particular circumstances of this case to give Radio New Zealand express notice that it was considering an order for advertising in other media.

Decision

[54] The appeal is dismissed. The Authority and Mr Ellis are entitled to costs on a 2B basis. Counsel may file memoranda if costs cannot be agreed.

Delivered at 9.00 am this 15th day of September 2005.

A P Randerson J
Chief High Court Judge

Miller J

Solicitors:
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J Ablett-Kerr QC for Respondent