IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2008-485-514

IN THE MATTER OF	section18 Broadcasting Act 1989
AND IN THE MATTER OF	an appeal against a decision of the Broadcasting Standards Authority
BETWEEN	RADIO NEW ZEALAND LIMITED Appellant
AND	WELLINGTON CITY COUNCIL Respondent

Hearing: 6 June 2008

Counsel: J W Tizard for Appellant
R J B Fowler for Respondent
M McGoldrick for Authority (abides decision)

Judgment: 9 June 2008

JUDGMENT OF SIMON FRANCE J

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[1] On 20 April 2007 the Morning Report show of Radio New Zealand ran an item about the Wellington City Council's alleged consideration of scrapping free parking for evenings and the weekends. Retailers were described as furious, and motorists who were interviewed expressed their concerns.

[2] The difficulty with the item is that the story was based on an incorrect reading of Council documents. The Council had commissioned a background report by a consultant. One recommendation, of ten in that report, included the proposition that the Council should consider charging for parking on weekends and evenings. This recommendation was not picked up in any of the Council's own documents. Indeed the primary paper to the Council noted that discussions had occurred with stake-holders, and noted that as a consequence a set of recommendations emerged

that were reflected in the draft policy. One of those recommendations was that the Council:

> "...continue Free Weekend Parking policy (but enforce on Saturdays and Sundays)".

[3] Surprisingly, Radio New Zealand for some time defended its report in the face of Council complaints, and declined to acknowledge what can only be regarded as a poor piece of journalism. It relied on the passing reference to the payment option contained in the background report, and the fact that the Council had released the background report as part of its papers.

[4] Ultimately the matter went to the Broadcasting Standards Authority which inevitably upheld the complaint on the basis of breaches of the fairness and accuracy principles. It ordered the broadcaster to publish:

> "a statement approved by the Authority containing a comprehensive summary of its decision. The statement shall be broadcast during Morning Report on a Friday morning on a date to be approved".

[5] Radio New Zealand does not dispute the substantive findings, but now appeals the order to publish a correcting statement. It submits that the publication of the Authority decision was remedy enough. Any such appeal is to be treated as an appeal from an exercise of discretion (s18(4) of the Broadcasting Act 1989).

Competing submissions

[6] Mr Tizard submits that to do an item on the decision would be difficult and confusing because, even by the time of the Authority decision, the Council had already implemented its parking policy which included no change to the Free Weekend Parking policy. Any statement about the April 2007 news item would inevitably create confusion, or require too extensive an item in order to avoid such confusion. The topic was not one of national interest and the underlying error was the product of misreading lengthy documentation.

[7] It was submitted that the Authority had to be consistent in its remedies, and the Court was provided with a number of decisions where no order to correct was

made because events had moved on, or because the situation/subject matter did not lend itself to easy correction. This was submitted to be a like case.

[8] Finally, reference was made to the paucity of the reasons in the decision under appeal as to why Radio New Zealand's submissions to the Authority on remedy were not accepted. I took this ground to be not so much an appeal point in itself, but something which assisted the appellant in its task of disturbing on appeal a exercise of discretion.

[9] For the respondent Mr Fowler submitted:

a) the Authority's reasons as to its choice of remedy were not extensive but were adequate, and had to be read in the context of the overall reasoning contained in the decision;

b) the normal remedy imposed by the Authority was to require a corrective statement. Mr Fowler supplied 3 cases where not only was such an order made, but where the Authority in those decisions described that remedy as being the normal or usual response;

c) the Authority's standard practice reflected the statutory scheme as set out in s13 of the Act. The first named remedy is to order a correction, and the other identified remedies, such as ordering the broadcaster to go off the air, are likely to be much rarer;

d) there was no reason in this case for the Authority to have departed from its usual practice. Correction was not at all difficult, since the error related to a false claim that the Council was considering doing something it never was.

Decision

[10] The starting point must be identification of the purposes of a remedy such as a corrective statement. Without suggesting these are exhaustive, the two obvious

reasons are to correct the misinformation, and to require acknowledgement of the error by the broadcaster. That latter function has a deterrence aspect to it, which in turn fuels confidence in the system. It reinforces that the Codes of Practice matter, and that where errors occur, the broadcaster will be held to account in a way that matters. Whilst publication of the Authority decision is one aspect of that accountability, it is not surprising that the Authority takes as a starting point the need for a broadcaster to itself correct the error in a like setting.

[11] I am sure that the cases provided by Mr Fowler accurately reflect the Authority's practice. No doubt there are many similar statements, but those provided to me were *Viking Homesware Limited* (2006-021, 19/10/06 at para 55), *Pharmac* (2006-127, 11/9/07 at para 85) and *Eyeworks Touchdown Ltd* (2007-009, 27/6/07 at para 41).

[12] In this regard I note also that Professor Burrows, in a commissioned review of the Authority's decisions, records at page 19 of that review that in the majority of cases where a complaint was upheld, a correcting statement was required to be published. (Professor Burrow's report is on the Authority's website.)

[13] Of the cases provided by the appellant, it is possible to argue that 4 decisions reflect the type of principle for which Mr Tizard contends. However, at best they represent four individual decisions rather than a principle. There is nothing in the decisions or their language that suggest they represent a wider principle. Further, two relate to a mis-statement of one aspect of the effect of the original Electoral Finance Bill. By the time of the Authority's decision, the Bill had been redrafted and the redraft had itself been subject to public comment. Another of the decisions concerned a mis-statement, 20 years after the event, of the number of deaths caused by the Chernobyl tragedy. A characteristic of those cases, when compared to the present case, is that there the error related to a detail in the context of a wider issue. Here the entire story was based on a misconception.

[14] Concerning the claim that the Authority has given inadequate reasons in support of the chosen remedy, a reading of the 17 decisions provided by counsel, plus other decisions read in the context of other cases, establishes clearly for me that

normally one would see fuller reasons on the choice of remedy than occurred here. Those reasons might often be no more than to identify the usual practice, and to indicate that the Authority does not accept that any identified considerations require a departure. That approach seems entirely adequate, and if the present decision is more frugal in its reasoning on this aspect, it is not a matter requiring comment.

[15] The reality is that this was a mistake by Radio New Zealand that required correction. In my view no basis has been identified that would have supported a different order, let alone go so far as to meet the appeal standard of establishing that the Authority's decision was an unavailable exercise of discretion. The fact that, due to the appeal process, even longer has elapsed since the error cannot provide a reason for not requiring the broadcaster to do what could have been properly done early on.

[16] I do not accept there is any complexity in the correction. The error related not to the details of the parking policy, but to the allegation that as an aspect of that policy the Council was contemplating doing something it plainly was not. There is little difficulty in correcting that error by a statement which makes the Authority's findings plain, and which acknowledges that the story was without a factual basis.

[17] The appeal is dismissed and the Authority's order confirmed. As provided in the original order, the proposed statement must be approved by the Authority.

[18] I did not hear from counsel on costs, and can do so if required, by way of memoranda. Scale costs in favour of the respondent would seem the likely outcome.

Simon France J

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