THERE WILL BE AN ORDER PROHIBITING PUBLICATION OF RESPONDENT/SECOND DEFENDANT'S NAME IN CONNECTION WITH THIS APPEAL AND HER COMPLAINT TO THE AUTHORITY

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2004-485-1299

UNDER	the Broadcasting Act
IN THE MATTER OF	a determination of the Broadcasting Standards Authority
BETWEEN	TELEVISION NEW ZEALAND LIMITED Appellant
AND	BA Respondent

CIV 2004-485-1300

AND UNDER	Part 1 of the Judicature Amendment Act 1972
IN THE MATTER OF	an application for review
BETWEEN	TELEVISION NEW ZEALAND LIMITED Plaintiff
AND	BROADCASTING STANDARDS AUTHORITY First Defendant
AND	BA Second Defendant

Hearing: 6 December 2004

Appearances: W Akel for Appellant/Plaintiff
A Scott-Howman & J Sneyd for Respondent/Defendants

Judgment: 13 December 2004 at 11.00 am

RESERVED JUDGMENT OF MILLER J

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[1] In these proceedings, Television New Zealand ("TVNZ") appeals against a decision of the Broadcasting Standards Authority, and also seeks judicial review of the Authority's decision. The Authority found that TVNZ had breached the privacy of the complainant, BA, by broadcasting footage that identified her giving evidence before the Medical Practitioners Disciplinary Tribunal, which had suppressed her identity. The Authority found that the broadcast would be highly offensive to a reasonable person. It ordered TVNZ to pay $1,500 compensation.

Factual background

[2] The background to the complaint is succinctly recorded in the Authority's decision:

> The release from Kew Hospital's Mental Health Unit of a patient who later killed his mother resulted in charges against Dr Peter Fisher before the Medial Practitioners Disciplinary Tribunal (MPDT) in Invercargill. BA gave evidence before the Tribunal. The Tribunal suppressed her name. The hearing was covered in an item on *One News* and *Late Edition* broadcast on TV One at 6.00 pm and 10.30 pm on 17 October 2003. In covering part of

> the evidence she gave, the item noted BA's occupation, showed her hands and the midsection of her torso, and included an audio of her voice.

[3] The Medical Practitioners Disciplinary Tribunal took no action in response to the broadcast, although it was drawn to the attention of counsel prosecuting the disciplinary matter. It appears that TVNZ staff believed they had complied with the suppression order by not identifying BA by name or showing her face. There was evidence that the TVNZ reporter discussed the proposed broadcast with prosecuting counsel in advance.

[4] BA complained to the Authority, saying that she was identified by her voice, the visual depiction of her hands and torso, and the fact that she was only one of two people of her occupation employed by the District Health Board. She said that she had been identified to her clients and other professionals with whom she worked. TVNZ responded that BA's identity was not disclosed, and her privacy was not invaded. Only family members and colleagues, who already knew she was giving evidence, might have recognised her.

[5] The Authority viewed the tape of the One News item and determined the complaint without a formal hearing. It advised the parties of its decision by letter of 6 May 2004, and invited submissions on relief. TVNZ responded by inviting the Authority to reconsider its decision. The Authority then issued a final decision dated 17 June 2004.

The Authority's decision

[6] In its final decision, the Authority recorded that under s.4(1)(c) of the Broadcasting Act 1989, broadcasters are required to maintain standards consistent with the privacy of the individual. This requirement is repeated in Standard 3 of the Free-to-Air Television Code of Broadcasting Practice. Standard 3 incorporates Privacy Principles which were developed by the Authority. Principle (i) records:

> The protection of privacy includes protection against the public disclosure of private facts where the facts disclosed are highly offensive and objectionable to a reasonable person of ordinary sensibilities.

[7] The Authority held that its first task when determining a complaint when a broadcast involves a breach of privacy is to decide whether the complainant is identifiable from the broadcast. The complainant must be identifiable beyond immediate family and close acquaintances who may reasonably be expected to be aware of the activities for which the complainant has received publicity.

[8] The Authority found the complainant was identifiable to people with whom she worked, both fellow professionals and patients, who were not previously aware that she had give evidence. It relied on the fact that her job title was given in the item and she was at the time only one of two people employed by the Southland District Health Board in that capacity. She would have been distinguishable from the other employee in the same position because an audio of her voice was included in the news item. Further, the complainant had advised that she had been recognised both by clients and by others with whom she worked.

[9] The next question was whether the broadcast involved a breach of privacy. The Authority recorded that the Medical Practitioners Disciplinary Tribunal had ordered name suppression, unusually, because all witnesses had been subject to intense pressure as a result of the event giving rise to the hearing.

[10] The Authority emphasised that it was not its task to enforce the name suppression order; whether the broadcast breached that order, and if so, what action should be taken was a matter for the Tribunal. However, it relied on the suppression order to ascertain the reason for the name suppression. The Tribunal had found that most witnesses employed in the Southland Mental Health Service were very distressed by the case, and that their ability to function effectively in their roles was at risk without name suppression.

[11] The Authority next considered whether it is the disclosure of private facts, or the facts themselves, that must be highly offensive to a reasonable person. It held that BA's participation in the Tribunal hearing was not highly offensive and objectionable to the extent that its disclosure amounted to a breach of privacy. But in light of the reasons given by the Tribunal for suppression of all the witnesses

names, it was possible to understand why BA considered that disclosure of her participation could breach the standard.

[12] The Authority referred to the Court of Appeal decision in *Hosking v Runting & Another* (CA 101/03, 25 March 2004) and cited the following passage:

> We consider that the test of highly offensive to the reasonable person is appropriate. It relates, of course, to the publicity and is not part of the test of whether the information is private.

[13] The Authority held that taking into account the reasons given by the Tribunal for name suppression – that BA would be at risk unless she received the protection of suppression – the disclosure was highly offensive. The risk identified by the Tribunal was realised, in that BA's ability to continue to function as an effective member of the Southland Mental Health Service was jeopardised by the broadcast. The Authority concluded that "as the broadcast disclosed private facts and their disclosure was highly offensive and objectionable", the broadcast breached standard 3 of the Television Code.

[14] The Authority then recorded that it had invited submissions as to the orders that might be made under s.13 and s.16 of the Broadcasting Act. TVNZ had invited the Authority to reconsider the complaint, pointing to two matters. The first was that BA had been identified by name and occupation in a One News item broadcast on 28 November 2001, which reported the coroner's inquest into the death of the woman killed by the patient. Second, TVNZ had referred to *Hosking v Runting* and contended that the Authority had erred in a way that it interpreted the privacy of Principle (1), arguing that the phrase "highly offensive" applied to the facts disclosed and not the disclosure.

[15] The Authority rejected these submissions. It referred to several of its previous decisions in which it had addressed the question whether disclosure was highly offensive.

[16] Turning to relief, the Authority held that it would not be an appropriate case to require TVNZ to broadcast a reference to its decision. It decided instead to order compensation of $1,500. It considered the maximum of $5,000 available to the

Authority, repeated that it was not enforcing any order made by the Medical Practitioners Disciplinary Tribunal, noted that BA had now left her job with the Southland Mental Health Service, and took into account TVNZ's efforts to ensure that the item complied with the suppression order.

The Broadcasting Act

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

> **Responsibility of broadcasters for programme standards**
>
> (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.

[18] TVNZ follows the Code of Broadcasting Practice under s.4(1)(e), and the Code has also been approved by the Authority under s.21(1)(g), which allows the Authority to approve codes of practice that it has encouraged broadcasters to adopt after consulting with interested persons.

[19] Under ss.5-7, a broadcaster is required to establish complaints procedures, and to receive and consider complaints. Section 8(1)(c) provides that the complainant may refer a complaint directly to the Authority where it concerns a breach of privacy under s.4(1)(c).

[20] The Authority may determine a complaint without a formal hearing if it has given the parties an appropriate opportunity to make submissions and has had regard to those submissions. Section 10(2) provides 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.

[21] Section 13 provides that the Authority may order the broadcaster to pay up to $5,000 compensation if it has failed to maintain, in relation to any individual, standards that are consistent with the privacy of that individual.

[22] There is a right of appeal to this Court under s.18 of the Act. Section 18(4) provides that 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. The Court may confirm, modify, or revise the decision, and may exercise any of the powers that could have been exercised by the Authority.

The proceedings

[23] The appeal is brought on a number of grounds. First, it is said that the decision was plainly wrong because the Medical Practitioners Disciplinary Tribunal took no action in relation to the breach of the suppression order, while the Authority's decision has the effect of enforcing it and punishing TVNZ.

[24] Second, it is said that the Authority failed to apply and interpret Standard 3 and the privacy principles in a manner consistent with s.14 of the New Zealand Bill of Rights Act 1990.

[25] Third, it is said that the Authority misapplied the decision of the Court of Appeal in *Hosking v Runting*, which established two fundamental requirements for a breach of privacy. The first was the existence of private facts, and the second was publicity given to those facts.

[26] Fourth, TVNZ contends that there was no widespread publicity of personal and private matters.

[27] Lastly, TVNZ contends that it was wrong to impose a penalty when the Tribunal did not do so, that any disclosure of identity was "marginal", and the complainant had previously been identified.

[28] The application for judicial review is based on the proposition that the Authority breached the principles of natural justice by failing or refusing to reconsider its decision of 6 May 2004 when asked. It is said that the decision was not a final one and the Act requires that the Authority's procedures are to be as informal as possible. Specifically, it said that the Authority failed to have regard to the fact that the complainant's identity was already in the public domain by reason of previous publicity on One News and in the Southland Times in November and December 2001, some two years before the Medical Practitioners Disciplinary Tribunal hearing, and failed to consider TVNZ's submission that it had misinterpreted *Hosking*. TVNZ also complains that the Authority did not give reasons for refusing to reconsider.

Approach to the appeal

[29] Counsel were agreed that the orthodox approach to an appeal against the exercise of a discretion is found in *May v May* (1982) 1 NZFLR 165 (CA) at 169-70:

> ... an appellant must show that the Judge acted on a wrong principle; or that he failed to take into account some relevant matter or that he took account of some irrelevant matter, or that he was plainly wrong.

[30] However, Mr Akel also submitted that the grounds on which an appellate Court may interfere with a discretionary decision are somewhat wider than this, referring to *Shotover Gorge Jet Boats v Jamieson* [1987] 1 NZLR 437, 439. The point made in that case was that the leading authorities on judicial review were not relevant to determining the scope of statutory appeal rights, because they are directed solely to the Court's supervisory judicial review jurisdiction. Cooke J cited a passage from the speech of Lord Fraser in *G v G* [1985] 2 All ER 225, 230 to

illustrate the proposition that the grounds on which the Court may interfere on appeal from a discretionary decision are wider than those available in judicial review. That passage established that the appellate Court's power to interfere is not confined to *Wednesbury* unreasonableness. It remains the position that the appellate Court in a case such as this can interfere only if the decisionmaker exceeded the limits of its discretion or, as Lord Fraser put it (at 229), "the generous ambit within which a reasonable disagreement is possible." Put another way, to the extent that reasonableness is in issue, TVNZ must show the Authority was plainly wrong.

[31] Mr Akel also invited me to adopt the 'hard look' or 'adequate consideration' approach to reasonableness that has been discussed in a number of judicial review applications involving human rights: *Pharmaceutical Management Agency v Roussel Uclaf Australia Pty Ltd* [1998] NZAR 58, 66; *R v Secretary of State for the Home Department, Ex Parte Simms* [1999] 3 All ER 400; *Daly v Secretary of State for the Home Department* [2001] 2 AC 433, 445; *R (on the application of the Pro Life Alliance) v BBC* (2003) 23 EMLR 457, 498; *Wolf v Minister of Immigration* (2004) 7 HRNZ 469. These cases establish that the more substantial the interference with human rights, the more searching the Court's scrutiny.

[32] This submission invites the response given in *Shotover Gorge Jet Boats*, that judicial review authorities are directed to a separate jurisdiction. Addressing the submission on its merits, however, a "hard look" approach to appeals from the Authority is unlikely to require a degree of scrutiny more searching than the "plainly wrong" formulation in *May v May*. I accept that freedom of speech is a freedom of fundamental importance. However, the Broadcasting Act itself recognises that it must be reconciled with other values. The Act is addressed to maintenance of broadcasting standards that reflect the value the community attaches to privacy, among other considerations. The task of reconciling the competing norms has been entrusted to the Authority, the membership of which is required under s.26 to reflect the views of the broadcasting industry and public interest groups. The Code was established after consultation with interested parties and approved by the Authority. Its powers should result in swift and informal resolution of complaints. Lastly, the remedies available to the Authority are modest.

Whether the Authority considered s.14 of the New Zealand Bill of Rights Act 1990

[33] Mr Akel submitted that the Authority was obliged to apply sections 5, 6 and 14 of the New Zealand Bill of Rights Act by interpreting the Code of Broadcasting Practice in a way that involves the least possible interference in human rights. He contended that there was no evidence that the Authority undertook a balancing exercise of the kind described in *Moonen v Film & Literature Review Board* [2000] 2 NZLR 9, at para 16-20.

[34] Mr Scott-Howman accepted that the Authority is obliged to have regard to s.14 because it performs a public function for purposes of s.3 of the New Zealand Bill of Rights Act. However, he contended that a *Moonen* balancing exercise is not required because the Code is not an 'enactment' for purposes of s.6, relying on *TVNZ v Viewers of Television Excellence* (VOTE) (High Court Wellington, CIV 2004-485-2658, 23 July 2004, Wild J) at para 33. I accept that submission for the same reasons that appealed to Wild J. He went on (at para 56) to observe that most Authority decisions will pass the 'justifiable limitations' test imposed by s.5 of the New Zealand Bill of Rights Act, given the content of the Code and the relatively "tame" sanctions involved.

[35] In this case, the Authority did not expressly refer to the New Zealand Bill of Rights Act. I was told from the bar that it had taken to heart a criticism of its previous practice of including a standard reference to the New Zealand Bill of Rights Act in its decisions. The Authority should record its reasons unless they are self-evident, including s.14 where that has been taken into account. The reasons may be succinct: *Murphy v Rodney District Council* [2004] 3 NZLR 421.

[36] Looking at the decision as a whole, I am satisfied that the Authority did consider whether its finding of breach of privacy was proportional to the imposition on TVNZ's freedom of expression. It recorded that TVNZ had not suggested there was a public interest in revealing BA's identity. That is an important consideration, because it established that there was no restriction on TVNZ broadcasting anything that was of public interest: *TV3 Network Services Ltd v ECPAT New Zealand Inc*

[2003] NZAR 501 at para 42. The Authority also considered the decision of the Court of Appeal in *Hosking v Runting*, which examined the New Zealand Bill of Rights Act and decisions involving the Authority.

Whether Authority's findings were precluded by failure of Medical Practitioners Disciplinary Tribunal to sanction TVNZ for breach of suppression order

[37] Mr Akel contended that the Authority 'enforced' the suppression order, in circumstances where the Tribunal had not done so notwithstanding that the broadcast had been drawn to the attention of counsel appearing before the Tribunal. He contended that the Authority exceeded its powers in doing so, and that enforcing a suppression order in this way exposed TVNZ to double jeopardy.

[38] I accept that it was the suppression order that lent a private quality to the otherwise public fact that BA had given evidence. The Authority also adopted the Tribunal's finding that disclosure of witnesses' names would cause them stress. Accordingly, the suppression order was an important part of the context against which the Authority reached its findings.

[39] It does not follow, however, that the Authority was 'enforcing' the suppression order, still less that it was precluded from finding TVNZ had breached the Code because the Tribunal omitted to impose sanctions on TVNZ. From the Tribunal's perspective, the broadcast was a question of contempt. It might take no action if satisfied TVNZ had acted in good faith and attempted to comply with the order. The issue for the Authority was quite different. Its concern was with maintenance of programme standards that are consistent with privacy. The Authority was at pains to make it clear that it was not enforcing the suppression order. Mr Akel's argument would effectively preclude the Authority from exercising its jurisdiction under the Broadcasting Act in circumstances where the complaint concerned information that was private by reason of a suppression order. This ground of appeal fails.

Whether the broadcast breached Privacy Principle (i)

[40] Privacy Principle (i) states:

> The protection of privacy includes protection against the public disclosure of private facts where the facts disclosed are highly offensive and objectionable to a reasonable person of ordinary sensibilities.

[41] Mr Akel contended that the Authority erred in applying this principle, in two respects. First, it wrongly concluded that BA was identified by the broadcast. Second, it departed from its established practice of requiring evidence of facts that would be highly offensive to a reasonable person. Instead, it accepted that disclosure of inoffensive facts could be highly offensive to a reasonable person, based on a misunderstanding of *Hosking v Runting*.

(i) Whether BA was identified

[42] The Authority held that the complainant had to show she was identified beyond immediate family and close acquaintances who may reasonably be expected to know of the activities for which she received publicity. Mr Akel accepted this test. However, he contended that the broadcast did not in fact identify her.

[43] There was evidence on which the Authority could reasonably come to its conclusion. It relied on the reference to BA's occupation, her voice, the visual depiction of her hands and torso (which depicted distinctive jewellery), and her own statement that others had identified her. It is true that she had been identified by name in a TVNZ broadcast and two newspaper reports two years earlier, but that did not preclude a finding of invasion of privacy. In *TV3 Network Services v Broadcasting Standards Authority* [1995] 2 NZLR 720, at 731, Eichelbaum CJ held:

> ... for purposes of this legislation "privacy" is not an absolute concept. The term should receive a fair, large and liberal interpretation; and although in the first instance this is a matter for the authority it would certainly not be wrong to adopt a similar approach to its definition of private facts. On any sensible construction the meaning of that expression cannot be restricted to facts known to the individual alone. Although information has been made known to others a degree of privacy, entitled to protection, may remain. In determining whether information has lost its "private" character it would be appropriate to look realistically at the nature, scale and timing of previous publications.

[44] I am not prepared to interfere with the Authority's decision on this ground.

(ii) Offensive facts or offensive disclosure?

[45] The Authority's reasoning and conclusions are set out at paras 17-21 of its decision.

> 17. Privacy Principle i) requires the disclosure of the private facts to be highly offensive and objectionable in order for a breach to occur. There has been some uncertainty in the past as to whether it is the disclosure of the facts, or the facts themselves, which must be objectionable. In many instances these two matters are identical.
>
> 18. BA's complaint highlights the difference. It is difficult to envisage a situation where the giving of evidence to a statutory tribunal is "highly offensive and objectionable" to the extent that its disclosure amounts to a breach of privacy. The Authority does not accept that BA's participation in the MPDT proceedings meets that criterion. Nevertheless, taking into account the "offensiveness" of disclosure rather than the "offensiveness" of the facts, and in light of the reasons given by the MPDT for suppression of all the witnesses' names, it is possible to understand why BA considered that the public disclosure of her participation could transgress the standard.
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> 19. In the recent Court of Appeal decision *Hosking v Runting et al*, Gault P and Blanchard J explained which aspect was relevant when they wrote (at paragraph [127]):
>
> > We consider that the test of highly offensive to the reasonable person is appropriate. It relates, of course, to the publicity and is not part of the test of whether the information is private.
>
> 20. The Authority considers that the news item complained about disclosed the fact that BA had given evidence to the MPDT, and disclosed that information beyond her immediate family and others who could reasonably be expected to know of her participation. The item did not disclose her identity to all viewers throughout New Zealand, but the information disclosed enabled her to be identifiable to some fellow professionals in Invercargill and to some clients who did not know of her role in the MPDT inquiry. TVNZ, correctly in the Authority's opinion, did not argue that there was a public interest in revealing BA's identity.
>
> 21. Taking into account the reasons given by the MPDT for name suppression – that BA would be "at risk" unless she received the "protection" of name suppression – the Authority accepts that the disclosure was highly offensive. It notes that the risk identified by the MPDT in granting name suppression was realised, in that BA's ability to continue to function as an effective member of the Southland MHS was jeopardised by the broadcast which identified her, albeit to a limited number of people. The Authority concludes

> that, as the broadcast disclosed private facts and their disclosure was highly offensive and objectionable, the broadcast breached Standard 3 of the Television Code.

[46] In this passage, the Authority appeared to depart from its established practice of requiring disclosure of offensive facts, relying on *Hosking* for the proposition that the test of 'highly offensive' relates to the publicity and not whether the information was private. It concluded that the broadcast disclosed the private fact that she had given evidence, and that the disclosure was highly offensive.

[47] The judgment of Gault P and Blanchard J in *Hosking*, with which Tipping J was in general agreement, contains an analysis of the elements of the tort of breach of privacy. It is said (at para 117) that:

> In this jurisdiction it can be said that there are two fundamental requirements for a successful claim for interference with privacy:
>
> > 1. The existence of facts in respect of which there is a reasonable expectation of privacy; and
> >
> > 2. Publicity given to those private facts that would be considered highly offensive to an objective reasonable person.

[48] This formulation owes much to US jurisprudence, from which the Privacy Principles developed by the Authority are also derived: *TV3 Network Services v Broadcasting Standards Authority,* at 725. The disclosure must be of private facts. And the matter made public must be one that would be offensive and objectionable to a reasonable person of ordinary sensibilities: *Hosking* at para 71-2.

[49] Gault P and Blanchard J went on to hold (at paras 125-7):

> [125] In theory, a rights-based cause of action would be made out by proof of breach of the right irrespective of the seriousness of the breach. However, it is quite unrealistic to contemplate legal liability for all publications of all private information. It would be absurd, for example, to consider actionable merely informing a neighbour that one's spouse has a cold. By living in communities individuals necessarily give up seclusion and expectations of complete privacy. The concern of the law, so far as we are presently concerned, is with wide-spread publicity of very personal and private matters. Publication in the technical sense, for example as applies in defamation, is not in issue.
>
> [126] Similarly publicity, even extensive publicity, of matters which, although private, are not really sensitive should not give rise to legal

> liability. The concern is with publicity that is truly humiliating and distressful or otherwise harmful to the individual concerned. The right of action, therefore, should be only in respect of publicity determined objectively, by reference to its extent and nature, to be offensive by causing real hurt or harm. In the Restatement the requirement is "highly offensive to a reasonable person"; the formulation expressed in Australia by Gleeson CJ (drawn from the United States cases) and referred to by the English Court of Appeal in Campbell imbues the reasonable person with "ordinary sensibilities". In similar vein the Privacy Act, in s66 defining interference with the privacy of an individual, requires "significant" humiliation, loss of dignity or injury to feelings.
>
> [127] We consider that the test of highly offensive to the reasonable person is appropriate. It relates, of course, to the publicity and is not part of the test of whether the information is private.

[50] The Authority cited para 127 for the proposition that it is the disclosure that must be highly offensive. To the extent that the Authority relied on this proposition, I accept Mr Akel's submission that it erred in law. In para 127, the Court was merely emphasising that the test of highly offensive to the reasonable person is not the test of whether the facts disclosed are private. The scope of privacy is wider. But it is only where the private facts are such that their disclosure would be highly offensive to a reasonable person that the common law may supply a remedy in tort.

[51] Mr Scott-Howman dealt with the issue by inviting me to ignore the Authority's discussion of *Hosking* on the ground that it was immaterial to the decision. He contended that its findings show that it identified a private fact, which was the fact that BA gave evidence. The fact was private because of the suppression order: *TV3 Network Services v Broadcasting Standards Authority* [1995] 2 NZLR 720. It was a fact the disclosure of which the Authority found was highly offensive.

[52] The difficulty with these submissions is that the Authority did rely on its analysis of *Hosking*. It focused on the disclosure because it found (in para 18) that the fact that BA gave evidence before a statutory tribunal was not highly offensive such that its disclosure amounted to a breach of privacy. Having made that finding, the Authority was able to find a breach of the Code only relying on its analysis of *Hosking*.

[53] I have considered whether the Authority's decision might be justified if the facts were analysed in a slightly different way. The Authority may have reasoned

that public disclosure of the fact that BA gave evidence was offensive because of a further fact that was not made public, namely the severe stress that witnesses were under. But an objective observer, not knowing of the witnesses' stress, would still conclude that the fact that BA gave evidence would not cause offence by reason of its disclosure.

[54] Mr Scott-Howman also sought to discount the Authority's reliance on *Hosking* by submitting that breach of broadcasting standards is not synonymous with liability in tort. I accept that submission. But Privacy Principle (i) protects against the public disclosure of private facts where "the facts disclosed are highly offensive and objectionable ...". As a matter of construction, it is the "facts disclosed" that must be highly offensive. In addition, the Authority's analysis of the Privacy Principles was rightly informed by developments at common law, particularly since both can be traced to a well-known article by William Prosser: 'Privacy' (1960) 48 Cal L Rev 383.

[55] I conclude that the Authority's finding that the disclosure of BA's identity would be highly offensive was based on errors of law in its interpretation of *Hosking* and the Code. I agree with the Authority that disclosure of the fact that a named witness gave evidence is not in itself highly offensive to the reasonable observer. Nothing about the content of BA's evidence was said to be private or liable to cause her offence. Accordingly, there was no breach of Standard 3. The appeal must be allowed.

Judicial review

[56] The application for judicial review focused on the Authority's alleged refusal to reconsider its initial decision when confronted by further evidence and submissions for TVNZ. The complaint was prompted by the Authority's statement that it declined to reconsider the matter when TVNZ invited it to do so.

[57] I do not need to deal with the application, in light of the conclusions I have reached on the appeal. However, I record my conclusion that, although its reasons could have been better stated, the Authority did consider the fresh evidence and

submissions, and decided on the merits that they did not alter its earlier decision. I add that the application was unnecessary. The Act itself requires that the Authority observe the rules of natural justice, and a failure to do so may afford grounds for appeal. Counsel accepted that the Court's powers on appeal extend to remitting the matter to the Authority for reconsideration, which is the normal remedy on judicial review.

Name suppression

[58] The Authority has suppressed BA's identity. Mr Scott-Howman invited me to order continued suppression on the ground that there is a public interest in ensuring that complainants may come to the Authority with a grievance about breach of privacy in the knowledge that the act of lodging a complaint will not result in further publicity. Mr Akel did not oppose, and TVNZ accepted before the Authority that there is no public interest in disclosing BA's identity. There will be an order prohibiting publication of BA's name in connection with this appeal and her complaint to the Authority.

Decision

[59] The appeal is allowed, and the order for compensation set aside. The application for judicial review is dismissed. Having succeeded in the result, TVNZ is entitled to costs against the Authority. If costs cannot be agreed, counsel may file memoranda by 2 February 2005.

Delivered at 11.00 am this 13th day of December 2004

F Miller J

Solicitors:
Simpson Grierson, Auckland for Appellant/Plaintiff
Bell Gully, Wellington for Respondent/Defendants