

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

AP99/01

01/2282

1700



IN THE MATTER of an appeal against a decision of the
Broadcasting Standards Authority

BETWEEN JOHN WATSON

Appellant

AND TELEVISION NEW ZEALAND
LIMITED

Respondent

Hearing: 19 September 2001

Counsel: P D McKenzie QC for Appellant
N J Russell for Respondent
No appearance for Broadcasting Authority

Judgment: 25 September 2001

RESERVED JUDGMENT OF RONALD YOUNG J

Solicitors:

Robert Brace, Porirua, for Appellant
KPMG Legal, Wellington, for Respondent
Bell Gully, Wellington, for Broadcasting Authority

Introduction

[1] The Appellant says the Broadcasting Standards Authority should control the type and amount of advertising within programmes because it affects broadcasting standards.

[2] On Christmas Eve 2000, Television One (between 10.15 pm until after midnight) screened carols, Christmas music and bible readings. Mr Watson, the Appellant, complained to Television New Zealand (“TVNZ”) about the advertisements played during these programmes. In his letter of complaint he said:

“I maintain that the two programmes set exclusively in recognised holy places of many faiths, including The Church of the Holy Sepulchre the reputed birthplace of Jesus Christ, should never have been chosen as vehicles for loud overreaching advertising featuring Boxing Day bargain and an exhortation to end prostitution, among others.

The result was a gross breach of the observance of good taste and represented in my humble opinion, an offensive affront to viewers, considering the content of the respective and otherwise admirable programmes”.

[3] TVNZ rejected Mr Watson’s complaint. Mr Watson dissatisfied with their response referred the complaint to the Broadcasting Standards Authority under s8(1)(a) of the Broadcasting Act 1989.

[4] The Broadcasting Standards Authority declined to consider the complaint because it considered the complainant was expressing a preference about the amount and type of advertising and thus pursuant to s11(b) of the Broadcasting Act it should not determine the complaint.

[5] The relevant statutory provisions are as follows:

(1) Section 4(1)(a):

“4 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; ...”

(2) Section 5(c):

“5 Principles ...

(c) Complaints based merely on a complainant’s preferences are not, in general, capable of being resolved by a complaints procedure:...”

(3) Section 6(1)(a):

“6 Formal complaints about programmes

(1) Subject to subsection (2) of this section, it is the duty of every broadcaster—

(a) To receive and consider formal complaints about any programme broadcast by it where the complaint constitutes, in respect of that programme, an allegation that the broadcaster has failed to comply with section 4 of this Act; ...”

(4) Section 8(1)(a):

“8 Right of complainant to refer formal complaint to Authority

(1) Subject to section 9 of this Act, where—

(a) The complainant, in respect of a complaint under section 6(1)(a) of this Act, is dissatisfied with the decision or with the action taken by the broadcaster;

... the complainant may refer the complaint to the Authority.”

(5) Section 11(b):

11 Power of Authority to decline to determine complaint

The Authority may decline to determine a complaint referred to it under section 8 of this Act if it considers— ...

(b) That, in all the circumstances of the complaint, it should not be determined by the Authority.

(6) Section 18(4)

18 Appeal against decision of Authority ...

(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.”

And Standard G2 of the Codes of Broadcasting Practice which says:

“...broadcasters are required:...

G2 To take into consideration currently accepted norms of decency and taste in language and behaviour, bearing in mind the context in which any language or behaviour occurs.”

[6] As to s18(4) the exercise of a discretion may be overturned on appeal where the Court is satisfied that the tribunal below proceeded on a wrong principle, gave undue weight to some factor or insufficient weight to another factor, or was plainly wrong. See *Fuehrer v Thompson* [1981] 1 NZLR 699 (CA).

The appeal

[7] The Appellant’s case is that the Authority erred in holding that a complaint regarding the type and volume of advertising during a television programme goes only to the complainant’s preference and was thus not a matter which was directed to Broadcasting standards.

[8] And a complaint the Authority failed to go on to consider in fact whether the type and volume of advertising actually shown on the evening of 24 December was in breach of Broadcasting standards.

[9] Thus the essential first issue can be recast as whether s4(1)(a) of the Act is concerned solely with the standards of programmes or whether the section requires the broadcaster to consider the interaction of advertisements with programmes in assessing whether its standards are consistent with good taste and decency.

Authority's decision

[10] Some background first. Mr Watson's initial complaint to TVNZ focused primarily on his objection to any advertising at all during the programmes (his letter 26 December 2000). At p2 of that letter he said:

“The inappropriateness of commercial advertising being associated with the two programmes did not change just because the time slot moved from one day to the next.”

[11] He did in passing in the same letter mention as objectionable an advertisement which was as he saw it;

“an exhortation to end prostitution...”.

[12] Television New Zealand initially replied on 8 January and then further on 23 January and in part said:

“Before looking at the substance of your complaint, the Committee discussed whether the placement of advertising breaks, and the content of the advertisements, come under the jurisdiction of the formal complaints process outlined in the Broadcasting Act.

Although it acknowledged that a subsequent review by the Broadcasting Standards Authority might reach a different conclusion, TVNZ's Committee felt that by defining the formal complaints procedure as being about “programmes and their presentation”, there is an inference in the Act that the placement of advertising breaks within programmes is a matter which could be considered under the programme standards obligations outlined in Section 4 of the Act. Accordingly the Committee decided to proceed with this matter on the basis of this being a formal programme complaint.

In considering your complaint, the Committee acknowledged that it is easy to see how either a devout Christian, or even a Christmas traditionalist, might see the interruption of carol singing and bible reading by advertisements for commercial products as crass and insensitive. ...

The Committee felt that there was nothing inherently offensive about the activity of advertising. It represents, after all, nothing more than an evolution from the peasant farmer's call that he had potatoes to sell, or the cry of the village thinker. The Committee believed that if it were to accept that there should be no advertising during the broadcast of religious material, TVNZ might open itself to pressure to move advertising from other view preferences – such as serious dramas, thoughtful documentaries – even sport.

The Committee studied the commercial log carefully and noted that during the two religious programmes to which you refer, TV One did show restraint by including only five advertising breaks between 10.15 pm and midnight. The longest of these was 3 minutes and 50 seconds long, while the last (and shortest) was only of two minutes duration. While most of the advertisements were routine sales messages, some contained positive community interest content such as one which drew attention to a campaign against child prostitution. As a Wellington viewer you will also have seen one promoting safe sex.”

[13] Mr Watson was dissatisfied with the response. He wrote to the Authority. He reiterated his view that there should be no advertising during such programmes. He also underlined his objection to advertisements which appealed for funds to end child prostitution in the context of the programmes that evening. He said in his complaint to the Authority (7 February 2001):

“Hopefully, any advertising deemed suitable by the broadcaster would not include loud overreaching advertising (my description) that had the intention of drawing attention to Boxing Day bargains and such things as child prostitution, as were included in the subject broadcasts and formed part of my complaint to TV One.”

[14] Television New Zealand replied to those submissions. It expressed doubt about whether the placement of advertising breaks and the content of the breaks fell under the jurisdiction of the Authority. But it responded to the substance of the complaint by Mr Watson in any event.

[15] Although never the subject of any complaint by Mr Watson directly, the fact that an advertisement dealing with Clymedia through the Family Planning Association was shown that evening during the programmes has before this Court become the subject of objection.

[16] The reasons for the Authority’s decision is contained under the subheading “The Authority’s Findings”. I reproduce it in full.

“The Authority’s Findings

Taking into consideration the points raised in the correspondence, the Authority is firmly of the opinion that the complainant is expressing a preference about the type and amount of advertising which should have been broadcast in the commercial breaks during *A Christmas Dream from a Holy Land* and *Christmas Glory from Westminster Abbey* screened at 10:15pm and 11:15pm on Christmas Even on TV One.

The Broadcasting Act 1989, s5(c), records that:

Complaints based merely on a complainant's preferences are not, in general, capable of being resolved by a complaints procedure.

The complainant clearly expresses a preference in regard to a matter of broadcasting philosophy and practice. It is an issue which could well be addressed in the proposed Charter for TVNZ. However, it is not a matter of broadcasting standards and, accordingly, does not fall within the Authority's jurisdiction. In the circumstances, the Authority declines to determine the complaint.

For the above reasons, under s11(b) of the Broadcasting Act 1989, the Authority declines to determine the complaint in all the circumstances."

[17] The decision therefore concludes that a complaint about the type and amount of advertising around a particular programme is a complaint based on complainant preference, and therefore properly rejected under s5(c) of the Broadcasting Act. The Appellant submits "programmes and their presentation" naturally includes all that surrounds the programme including the volume and content of advertisements shown. Thus the Appellant says the broadcaster is responsible for maintaining standards consistent with good taste and decency in relation to the number and content of advertisements as they relate to a particular programme.

[18] Although reserving its right to challenge this principle later, TVNZ in its correspondence with Mr Watson recognised that in including "programmes and their presentation" in s4 there was an inference that the placement of advertisements within programmes was part of the presentation of a programme. Counsel for the Respondent said TVNZ for the purpose of this hearing accepted that principle. This was a concession properly made. In my view for the reasons argued by the Appellant and identified by TVNZ s4(1) does encompass the placement of adverts within programmes. The section itself anticipates more than just the content of programmes being subject to standards by the use of the phrase "and their presentation". "Presentation" in the Concise Oxford Dictionary (8th Edition) includes within its meanings "the manner or quality of presenting". This also anticipates more than just the content of the programme being subject to standards.

[19] If the Authority in its interpretation was correct then there would be control over programmes and advertisements but none over the conjunction between the

two. An example to illustrate the problem can be constructed. It could be an absence of good taste and decency to advertise “funeral homes” during television pictures of a public funeral of a much loved citizen. Neither the programme nor the advertisement would breach any standards but shown together they could offend good taste and decency. Interpreting the section in this way protects the jurisdiction of the Advertising Complaints Authority. It is not the content of the advert per se that is relevant here, that is the preserve of the Complaints Authority. It is its position in relation to the programme shown which is the essence.

[20] The Authority rejected the complaint because it considered complaints about the volume and type of advertising in relation to particular programmes were not issues of Broadcasting Standards but of personal preference. As a matter of interpretation in the Broadcasting Act I have concluded the Authority was wrong in this. The Authority was required to consider the content of the programmes and the volume and type of advertisements and consider whether there was a breach of standards of good taste and decency in relation to their conjunction. Its failure to do so was an error of law.

[21] Two further matters.

[22] The Appellant in this appeal did not suggest that no advertising was the proper standard. Nor could it. TVNZ had already pointed out it had taken into account the actual programme shown when it reduced the number of advertising breaks presumably to aid the continuity of the programme and enhance viewers’ enjoyment. It is difficult to see what more could be expected of TVNZ given the balance it must strike between commercial reality and good taste and decency standards. If volume of advertising had been the only complaint by the Appellant I would have exercised by discretion and not allowed the appeal even though the Authority clearly proceeded on a wrong basis in law. But neither the Authority nor TVNZ considered the question of the content of the advertising objected to in relation to the programme shown when considering questions of good taste and decency.

[23] Having concluded that the Authority made an error of law the question now is how the complaint by Mr Watson is to be properly resolved.

[24] I propose to return this case to the Authority for reconsideration. They are in a much better position to consider standards of broadcasting conduct than this court. The mechanism by which I do so is as follows.

[25] Section 18(5) of the Act states as follows:

- “(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.”

[26] No specific power is given to the Court to refer the case back to the Authority for rehearing. However, nor is there any prohibition from doing so. Rule 718A of the High Court Rules empowers the court in such circumstances as follows:

“718A Powers Of Court Hearing Appeal

- (1) In allowing an appeal, the Court may-
...
- (2) Notwithstanding subclause (1), the Court may remit to the tribunal or person whose decision is appealed from, for further consideration and determination by the tribunal or person, the whole or any part of the matter to which the appeal relates.
- (3) In remitting any matter to the tribunal or person under this rule, the Court shall-
 - (a) Advise the tribunal or person of its reasons for so doing; and
 - (b) Give to the tribunal or person such direction as it thinks just as to any rehearing or to the reconsideration or determination of the whole or any part of the matter that is so referred.”

[27] Thus the court is specifically empowered to refer the matter back for reconsideration.

[28] I therefore allow the appeal and remit the case to the Authority to rehear. It may need further information to assist its decision.

[29] The Authority will hear the case with the proposition in mind that the conjunction of advertisements and programmes is a matter that potentially effects standards of good taste and decency as detailed in s4(1) of the Act.

[30] Counsel should provide memoranda as to costs within 21 days.

“Ronald Young J”

Signed at 10.00 am this 25th day of September 2001