

**IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY**

CIV 2011-485-1836

UNDER the Broadcasting Act 1989

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

BETWEEN DONALD MCDONALD
Appellant

AND TELEVISION NEW ZEALAND
LIMITED
Respondent

Hearing: 16 April 2012

Counsel: T Ellis and G K Edgeler for Appellant
W Akel and H Wild for Respondent
A Scott-Howman for Broadcasting Standards Authority

Judgment: 30 April 2012

JUDGMENT OF SIMON FRANCE J

Introduction

[1] This is an appeal against a decision of the Broadcasting Standards Authority holding that a complaint filed by Mr McDonald was frivolous and trivial, and accordingly would not be determined. Pursuant to s 18(4) of the Broadcasting Act 1989, this Court must treat Mr McDonald's appeal as one from the exercise of a discretion.

The broadcast

[2] On 6 January 2011 One News carried an item about the discovery by a 10 year old Canadian girl of a supernova. The text of the 37 second story reads:

(Presenter)

A 10 year old Canadian girl has won herself some star power, becoming the youngest person to discover a supernova.

Amateur astronomer Kathryn Aurora Gray, yes that is her middle name, won what experts are calling ‘The Astronomy Jackpot’ when she spotted the exploding star.

(Kathryn Gray)

A supernova is a star at the end of its life actually. It’s actually a star blowing up, ripping itself to pieces.

(Presenter)

Finding a supernova involves checking old images of star fields against new ones, and ruling out asteroids and known supernovas.

The Canadian Astronomical Society says Kathryn’s supernova was in a galaxy 240 light years from Earth.

The complaint

[3] The last sentence contains an error. The distance is approximately 240 million light years from Earth; the million was omitted.

[4] Mr McDonald is someone who believes it is important to be accurate, particularly in the area of science and statistics. He complained about the error to TVNZ, alleging a breach of “Standard 5: Accuracy” of the Free-to-Air Television Code of Broadcasting Practice. The applicable standard provides:

Broadcasters should make reasonable efforts to ensure that news, current affairs and factual programming:

- is accurate in relation to all material points of fact; and/or
- does not mislead.

Guidelines –

5a The accuracy standard does not apply to statements which are clearly distinguishable as analysis, comment or opinion;

5b In the event that a material error of fact has occurred, broadcasters should correct it at the earliest appropriate opportunity;

5c News must be impartial.

[5] TVNZ's Complaints Committee considered Mr McDonald's complaint and advised him:

The Committee acknowledges that the figure given in the item was incorrect – the correct distance should have been given as 240 million light years, however, the Committee also finds that this distance is not a material point of fact in the item which concerned the discovery of the supernova by the 10 year old.

No breach of Standard 5 has been identified.

Referral to Broadcasting Standards Authority

[6] Section 8 of the Broadcasting Act 1989 allows a complainant who is dissatisfied with the decision of a broadcaster to refer the matter to the Broadcasting Standards Authority. Mr McDonald did so, attaching the decision of the TVNZ Committee.

[7] The Authority invited submissions from TVNZ. TVNZ referred to a precedent decision but otherwise did not comment further. The Authority advised Mr McDonald of this and said it would proceed to consider the matter.

[8] On 7 June 2011 the Authority issued a decision in part. Pursuant to s 11 of the Act it determined that the complaint was frivolous and trivial, and that accordingly it would not determine it. Section 11 of the Act provides:

The Authority may decline to determine a complaint referred to it under s 8 of this Act if it considers:

- (a) That the complaint is frivolous, vexatious or trivial; or
- (b) That, in all the circumstances of the complaint, it should not be determined by the Authority.

[9] In declining to determine the complaint because it was frivolous and trivial (but not vexatious), the Authority noted that it considered the accuracy standard only applied to material points of fact. That was not the case here as the distance of the supernova from Earth was peripheral to the story about a 10 year old girl being the one who discovered the supernova. Second, it noted its view that the broadcaster had accepted there was an inaccuracy. In the Authority's view, TVNZ had dealt with Mr McDonald's complaint adequately and appropriately.

Costs

[10] The Authority invited submissions on costs. In two previous decisions about trivial complaints, the Authority had put Mr McDonald on warning that costs would be considered. The Authority cited from earlier decisions:

[12] We have noted in two previous decisions regarding trivial complaints made by Mr McDonald that:

... over a number of years, Mr McDonald has repeatedly referred complaints about trivial accuracy points to the Authority, and he has recently been warned that an order for costs may be made against him if he continues to do so. We acknowledge that, at the time Mr McDonald lodged this complaint, he had not yet received our decisions on those previous complaints. However, we reiterate our warning that if we continue to receive complaints of a similar nature, we will consider an order for costs against Mr McDonald.

[13] Following those two decisions, we again declined to determine an accuracy complaint from Mr McDonald, and we invited submissions from the parties on whether an order for costs against Mr McDonald was appropriate. The Authority concluded that;

Mr McDonald wishes to apply standards of scientific or mathematical accuracy where these are not required. We have allowed him some consideration in the past and with considerable reservations will do so again on this occasion. We will not impose a costs order against Mr McDonald in this instance, but we signal very clearly that this leniency is unlikely to be repeated.

[14] We note that this latest complaint by Mr McDonald was made after he had received that decision.

[11] Submissions were received. Mr McDonald apparently disputed the substantive decision, but also indicated costs would impact on him significantly as he was a beneficiary. TVNZ made full submissions, the culmination of which was that it did not seek costs on this occasion, and preferred to work out an informal complaints process with Mr McDonald.

[12] Section 16 contains the power to award costs. Subsections (1) and (2) provide:

16 Power to award costs

- (1) Subject to subsection (2), the Authority may, in any proceedings, order any party to pay to any other party such costs and expenses (including expenses of witnesses) as are reasonable, and may apportion any such costs between the parties in such manner as it thinks fit.
- (2) No award of costs shall be made under subsection (1) against the complainant unless,—
 - (a) in the opinion of the Authority, the complaint is frivolous or vexatious or one that ought not to have been made; or
 - (b) the Authority considers it proper to do so by reason of the failure of the complainant to prosecute any proceedings related to the complaint at the time fixed for its hearing or to give adequate notice of the abandonment of any proceeding related to the complaint.

[13] The Authority concluded in relation to Mr McDonald:

[23] Having considered the parties' submissions, we have reached the conclusion that an order of costs against Mr McDonald is warranted. He has now been warned numerous times about lodging complaints of this nature, and it is evident that his complaints expend a significant amount of both TVNZ's and the Authority's time and resources.

[24] We appreciate that Mr McDonald has limited income. However, we have reached the view that some form of deterrent is necessary. In these circumstances we consider that ordering him to pay TVNZ costs in the amount of \$50 is appropriate.

Submissions on appeal

[14] Mr McDonald appeals both the s 11 decision not to determine his complaint, and the decision to award costs.

[15] By way of background to the appeal, Mr Ellis submitted that people such as Mr McDonald play an important role. He likened Mr McDonald to what he called a legal agitator – a person who agitates for change in an area, in this case for greater accuracy in news broadcasts. The submission had two facets:

- (a) it is not correct to dismiss inaccuracies as trivial, and taking complaints by people such as Mr McDonald seriously could lead to a desirable improvement in journalistic standards;
- (b) visiting a complaint with a costs award was a fetter on this role, and on Mr McDonald's right to freedom of expression.

[16] As noted, s 18(4) of the Act says the appeal is to be treated as being from an exercise of discretion. That means it must be shown the decision maker considered irrelevant matters, failed to consider relevant ones, acted on a wrong principle, or was plainly wrong. Mr McDonald submits the decision was plainly wrong. It is also submitted that the decision is flawed due to a lack of reasons. This deficiency in reasons is said to flow from an innate bias against Mr McDonald stemming from the number of complaints he has previously made. In other words the merit of his complaints is pre-judged, and not adequately considered.

[17] In support of the wider proposition that the Authority's decision was plainly wrong, Mr Edgeler advanced two primary points – first, that the Authority overlooked that the Accuracy Standard contains an independent basis for breach, namely the capacity of the programme to mislead. This independent inquiry is not governed by the materiality of the error to the story, and so the Authority's reliance on materiality was flawed. Second, the assessment of immateriality reached both by the broadcaster and the Authority was premised on an incorrect view that this was only a human interest story. Whilst it is plainly that, it is also a scientific story, and in this regard accuracy matters. The distance given was wrong by 239,999,760 light years and that is a material error in the context of scientific fact. Taking these two factors together, the complaint merited not only a determination, but indeed a finding of breach of the Accuracy Standard.

Decision

(a) *The s 11 decision declining to determine complaint*

[18] I address first the point about predetermination, and a lack of reasons. When a person complains as regularly as Mr McDonald does, and especially when the complaint is unusually of the same type – here scientific or statistical inaccuracy – obviously a panel such as the Broadcasting Standards Authority will be aware of the maker of the complaint, and his or her track record. That is inevitable. That does not matter as long as each complaint is assessed on its own merits.

[19] I am satisfied that is what has occurred here. Whilst the Authority does consider Mr McDonald's history of complaints when addressing the issue of costs, it does not do so in relation to its preceding s 11 decision about the merit of the complaint. Rather, in relation to that inquiry, it identifies two specific reasons why this complaint does not need a formal determination.

[20] TVNZ acknowledged that Mr McDonald was correct and that the item contained an error. So there was this amount of common ground. Where the parties differed was in relation to TVNZ's view that, because the incorrect fact was peripheral to the story, no breach of the Accuracy Standard had arisen. Mr McDonald disagreed, and referred the matter to the Authority. Given that the inaccuracy of the fact was not in dispute, the reason for the referral to the Authority could only be TVNZ's conclusion that, notwithstanding the inaccuracy, there was no breach of Standard 5.

[21] However, when referring the complaint on to the Authority, Mr McDonald said:

A supernova star at such close distance would barbecue the earth. Distance to neighbour Andromeda galaxy is 2 million light-years plus. So distance of Kathryn aurora gray SN possibly millions of ly. one million times distance (inverse square law) would be million million intensity. Thur 6 January 2011. ONE NEWS. Code accuracy. Discussed with john talbot astron kapiti and ross powell astron Newtown. Try vicki irons Denis Sullivan prof. VUW victoria university of wellington. talbot indicate DOMPost*** similar error.

Therefore possible international newswire corrupted. v good interview Rowan RadioNZ 9 am 10pm. Thurs 6 Jan 2011. several astronomers query supernova distance 240 light-years. code accuracy. careless. poor respect.

[22] It can be seen that Mr McDonald's focus remained on the accuracy of the story. Mr McDonald did not comment at all on why the error, in his view, involved a material point of fact.

[23] Against that background the Authority briefly indicated its agreement with the broadcaster. It too viewed the distance error as peripheral to the main story and therefore not being a breach of the Accuracy Standard. In focussing on this aspect of the broadcaster's decision, the Authority was addressing the only basis on which a complaint could have been referred. Given the complainant had not advanced any contrary points, in my view the Authority's reasons were sufficient in the circumstances.

[24] The next issue raised by the appellant is the failure of the Authority to consider the alternative limb of the Accuracy Standard, namely the obligation to not mislead. Mr Edgeler submits this inquiry is not subject to a materiality test.

[25] It is important here to focus on what was complained about. Mr McDonald said that the broadcaster had got a specific fact wrong. There was no complaint or suggestion that this meant the whole programme was misleading. In *Attorney General of Samoa v TVWorks Ltd*,¹ Joseph Williams J held that to mislead in the context of the Accuracy Standard meant "to give another a wrong idea or impression of the facts". I agree with the focus there on the impact of the programme as a whole, or a portion of it. I doubt the obligation to not mislead provides an alternative way to avoid the materiality inquiry in relation to a specific factual error.

¹ *Attorney General of Samoa v TVWorks Ltd* [2012] NZHC 131 at [98].

[26] The present Code came into effect on 1 July 2009.² As regards the Accuracy Standard, materiality of the error was for the first time made part of the requirements for establishing a breach. Previously the requirement to be accurate was regarded as absolute, although Steven Price notes the Authority would often nevertheless undertake a materiality inquiry, and dismiss complaints where the error was peripheral or incidental to the story.³

[27] The decision to make materiality a precondition to a breach in relation to a point of fact would be undermined by an approach that effectively says all errors can mislead, regardless of whether they are material to the story. However, if mislead is given the broader focus adopted by Joseph Williams J,⁴ the intent of the changes is more likely to be implemented. Accordingly, I do not consider that given the focus of the complaint, the Authority erred in not addressing the alternative basis for challenge.

[28] The final issue concerning the background to the s 11 decision relates to the Authority's assessment of the programme as a human interest story. Assessing the context of a programme is something very much within the specialised skills of the Authority. It is a formidable task to try and establish the Authority was plainly wrong in such an assessment, and I do not consider the appellant has overcome that hurdle. One can obviously point, as Mr Edgeler did, to the inclusion in the story of associated facts such as the distance of the supernova from the Earth. But the addition of these matters does not change the essential characteristic of the story which is, as the Authority says, a short human interest piece on the remarkable achievement of a ten year old.

² A submission that the preceding Code was the one applicable to Mr McDonald's complaint was not pursued at the hearing.

³ Steven Price *Media Minefield : A Journalists Guide to Media Regulation in New Zealand* (New Zealand Journalists Training Organisation, Wellington 2007) at 202.

⁴ *Attorney General of Samoa v TV Works Ltd*, above n1.

[29] Finally, one turns to the s 11 assessment itself. The two bases which the appellant advanced to undermine the Authority's assessment that the complaint was trivial have not been accepted. I can see no other basis on which one might consider the Authority erred in principle, and a submission that the assessment of triviality was plainly wrong cannot succeed.

[30] The statutory requirement is that the complaint be frivolous or trivial. The background for that assessment can now be confirmed as being that an error was made in relation to the distance of a supernova from the Earth. It arose in the context of a story about the achievement of a ten year old girl in discovering the supernova. The incorrect fact was peripheral to this story. It arose because a figure ("million"), that was present in the source document, was omitted in the TVNZ broadcast.

[31] Beyond recitation of these facts, attaching (or not) a label of trivial to the complaint is not a matter requiring much explanation. It is an assessment to be made by a specialist body which considers hundreds of complaints. The Authority's conclusion was certainly open to it. Few would be surprised by it. The appeal on this aspect of the Authority's decision must be dismissed.

(b) Costs

[32] The costs decision was a central focus of the appeal. As noted, Mr Ellis contended that it was a fetter on Mr McDonald's right to use the processes of the Act, and arose in circumstances of unacceptable uncertainty as to when a complaint would be viewed as vexatious or frivolous. The background submissions he made about the role played by individuals such as Mr McDonald were most directed to this component of the appeal.

[33] Normally a Court would wish to respond to the various points that have been made. But there are present here two factors which, when combined, make it inappropriate to do so:

- (a) first, I am of the view for a different reason that the order must be quashed;
- (b) second, I am advised there has only been one other occasion when a costs order has been made. It is plain the power is being used sparingly, and I see no justification in the Court providing general guidance.

[34] The costs power used by the Authority is s 16(1) of the Broadcasting Act 1989. This is a power only to make an award *inter partes*. Here, the Authority initiated the costs issue, and invited submissions from the parties. Notwithstanding this initiative, when TVNZ responded it expressly said it did not seek costs.

[35] In deciding nevertheless to award costs the Authority did not focus on this feature, nor give reasons why costs were being ordered despite TVNZ not wanting an award. The Authority was expressly influenced by the fact that it had previously warned Mr McDonald. I accept this is relevant, and may no doubt assist a broadcaster or other party who in the future seeks an award of costs. But given that this broadcaster did not seek costs, and expressly said so, I am of the view that the costs award should not have been made.

[36] In indicating a reluctance to comment further, I am conscious that it may be just deferring matters. Mr McDonald seems committed to his campaign for what he sees as higher standards. If, in pursuing that campaign, he does not discriminate between errors, and continues to view all mistakes as being significant, then it is likely the costs issue will again occur. A limited observation may assist. I noted earlier in the judgment that Mr McDonald had made no effort to address the requirement that it be a material inaccuracy. It seems reasonably clear that the Authority does not accept that all errors of a statistical nature, or arising in the field of science, meet the Accuracy Standard threshold of materiality. Mr McDonald may not agree with this viewpoint, but it is one the Authority is entitled to take. If Mr McDonald were to focus, when referring a matter to the Authority, not only on the error but on why he considers the error is material to the programme in which it has arisen, then all parties may be assisted.

Conclusion

[37] The appeal against the decision to dismiss the complaint without determination is dismissed. The appeal against an order to pay \$50 costs is allowed, and the order quashed. The parties wished to confer on costs. Memoranda may be filed, if necessary.

Simon France J

Solicitors:

T Ellis, Blackstone Chambers, Wellington, email: ellist@ihug.co.nz

W Akel, Simpson Grierson, Auckland, email: william.akel@simpsongrierson.com

A Scott-Howman, Luke Cunningham & Clere, Wellington, email: ash@lcc.co.nz