IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

98/310

AP 298/94

BETWEEN TELEVISION NEW ZEALAND LIMITED

Appellant

A N D SOUTHLAND FUEL INJECTION LIMITED

Respondent

Hearing: 16 March 1998

Counsel: M.F. McClelland with J. Forsey for appellant
P. McCarthy as amicus curiae

Judgment: 16 March 1998

JUDGMENT OF DOOGUE J

INTRODUCTION

This is an appeal against a decision of the Broadcasting Standards Authority ("the Authority") given as long ago as 29 September 1994. The appeal is against three aspects only of that decision. The appeal is against two findings of the Authority which Television New Zealand Ltd ("TVNZ") says it had no opportunity to rebut and against a further finding which TVNZ says was outside the jurisdiction of the Authority. The appeal is entirely without merit and I am surprised that the Court has been asked to spend time on it.

BACKGROUND

The appeal arises out of a "Fair Go" programme on 23 February 1994. During the course of that programme statements were made about the

respondent. The respondent took exception to the statements and had its solicitor take steps on its behalf to further its complaints to TVNZ. On 18 March 1994 the solicitors wrote to TVNZ enclosing a notice of formal complaint signed by a director of the respondent which was accompanied by two separate statements by that director, one of which was headed "The Approach by 'Fair Go'" and the other of which was headed "Background Information".

Paragraphs 8 to 11 of the document headed "The Approach by 'Fair Go'" are germane to the present appeal. They read:-

> "8. IN the course of the conversation, it was also explained to her that every effort had been made with [the complainant customer] to try to come to a suitable arrangement. We couldn't do this. It was explained to her [the "Fair Go" interviewer]. I said that the head on the particular vehicle was absolutely worn out. It was too badly damaged and not by anything with regards to the glow plug. I told her in full, that the pump timing was out and had to be set and there were other areas, such as the manifold which had to be corrected. None of this had anything to do with the glow plug. All these matters were pointed out to [the "Fair Go" interviewer].
>
> 9. I felt that we had made a very good case for [the "Fair Go" interviewer] to realise that there was another aspect to this case but she chose to totally ignore everything that she had been told.
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> 10. FOR instance, she was told quite clearly that The complainant customer was supplied a company vehicle for the period of time that his own was down but on television she stated that he never had his vehicle for the whole week which to the viewer it would mean that he was without a vehicle - he was not without a vehicle. Also, [the complainant customer] had been made the offer, although I told him straight that I did not accept the full responsibility for this vehicle and I did not even admit liability. Because of the condition of his engine there has got to be other aspects that should be considered but on a goodwill basis I was prepared to make a compromise with him. We just could not come to any arrangement. [The complainant customer] was not asked, as the television programme said, to pay nearly $600.00 - The complainant customer was asked to pay $293.00.
>
> 11. THE reporter was fully aware of all these facts but did not take them into consideration. She went ahead and produced a programme that was biased and untrue. She was told quite clearly in the first part of the interview that we did accept the fact that the

> glow plug was broken off in our workshop. It was never ever denied as she presented on the television programme."

TVNZ upheld part of the complaint which went further than the paragraphs set out above and arranged for a correction to be made. Before that occurred, the respondent's solicitors had written to TVNZ as to the outcome of the dispute between the complainant customer relied upon by "Fair Go", the respondent and the vendor of the vehicle that the complaint related to. The letter enclosed a copy of the order of the Disputes Tribunal in relation to the parties and noted that it was a consent order, which appeared to vindicate the position of the respondent. On 18 May 1994 "Fair Go" purported to deal with the matters where TVNZ had upheld the complaint of the respondent. However, from the respondent's point of view the programme of 18 May 1994 exacerbated matters rather than solving them. Once again the respondent's solicitors wrote to TVNZ, who responded that the complaint should be pursued with the Authority. As a result, on 31 May 1994 the solicitors for the respondent wrote to the Authority enclosing the documentation which had passed between it and TVNZ, including the documents already referred to. The letter specifically stated:-

> "The complaint relates not only to the initial broadcast of 23 February 1994, but also the purported apology of 18 May 1994."

In the light of its present appeal the attitude of TVNZ to that complaint was curious. It wrote to the Authority on 10 June 1994 stating that so far as the "Fair Go" programme of 23 February 1994 was concerned:-

> "we have nothing to add to the letters sent to [the solicitors for the respondent] on 13 May and 27 May. In the latter, we quoted the specific words which were used in the 18 May piece to correct the impression left by the earlier broadcast."

The Authority had the letters in question.

The solicitors for the respondent replied to that response by TVNZ, noting among other things that the vendor of the vehicle in question, having agreed to pay a certain sum as a result of the Disputes Tribunal order consented to by the vendor, could not issue proceedings against the respondent.

The Authority, in accordance with its practice, determined the complaint without a formal hearing and on 29 September 1994 issued its decision. Its decision was:-

> "For the reasons given above, the Authority upholds the complaint that the broadcast by Television New Zealand Ltd of an item on *Fair Go* on 23 February 1994, in addition to the broadcaster's acknowledgement of some errors, breached s. 4(1)(d) of the Broadcasting Act 1989 because:
>
> (a) it did not record that [the complainant customer] was asked to pay approximately $293 - not nearly $600 as stated; and
>
> (b) it did not give the reasons for the size of the repair account.
>
> In addition it upheld the complaint that the broadcast on 18 May 1994 was not satisfactory as action on the broadcaster's part on the aspects of the complaint upheld by the broadcaster.
>
> The Authority declined to uphold any other aspect of the complaint."

The Authority then considered the appropriate outcome of that decision and made an order that TVNZ broadcast a brief summary of the decision approved by the Authority arising from the complaints. The Authority ordered that the statement should make particular reference to certain points including:-

> "(4) While some of the erroneous impressions were corrected, the 18 May broadcast wrongly implied that the dispute had not been resolved and could be the subject of further legal action when the Disputes Tribunal's decision, which was known to *Fair Go*, recorded that the matter had been fully settled."

THE APPEAL

The appeal is against:

1. The finding that TVNZ breached s. 4(1)(d) of the Broadcasting Act 1989 ("the Act") because

> "it did not record that [the complainant customer] was asked to pay approximately $293.00 - not nearly $600.00 as stated";

2. The finding that TVNZ breached s. 4(1)(d) of the Act because

> "it did not give reasons for the size of the repair account";

3. The finding that the 18 May 1994 broadcast by TVNZ was not satisfactory as an action on the broadcaster's part on the aspects of the complaint upheld by the broadcaster as it

> "wrongly implied that the dispute had not been resolved and could be the subject of further legal action when the Disputes Tribunal's decision, which was known to Fair Go, recorded that the matter had been fully settled".

STATUTORY PROVISIONS AND NATURE OF APPEAL

It is unnecessary for present purposes to do more than refer to ss 4(1)(d), 4(1)(e) and 18(4) of the Act.

Section 4(1)(d) and (e) provide:

> "(1) Every broadcaster is responsible for maintaining in its programmes and their presentation, standards which are consistent with--
>
> (a) ...
> (b) ...
> (c) ...
>
> (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.

...."

Section 18(4) provides:-

"(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."

The limited nature of the appeal was emphasised by the Court of Appeal in Comalco New Zealand Ltd v Broadcasting Standards Authority (1995) 9 PRNZ 153, 161-162, where it was said:-

> "This means that the appeal should only be allowed if the Authority has proceeded on a wrong principle, given undue weight to some factor or insufficient weight to another, or is plainly wrong: *Fitzgerald v Beattie* [1976] 1 NZLR 265, 268 (CA); *Havelock-Green v Westhaven Cabaret Ltd* [1976] 1 NZLR 728, 730 (CA).

INCIDENTAL MATTER

Before dealing with the substance of the appeal, it is necessary to note that TVNZ has sought to adduce in support of its appeal evidence which was not before the Authority. I have refused to consider such evidence. I cannot see how it could be properly considered by this Court when the extent of this Court's jurisdiction is to determine the appeal as if the decision appealed against had been made in the exercise of a discretion. This is not an appeal by way of rehearing in any ordinary sense. This Court can only consider the matter upon the basis of what was before the Authority.

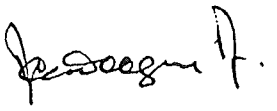
It is true that the Court has apparent power in appropriate cases to hear and receive further evidence by virtue of Rule 718(4) of the High Court Rules. The issue was considered in this Court in Comalco New Zealand Ltd v

provision may prevent it from continuing a new business of the same type in the area where it previously carried out its business. It is suggested therefore that it would be appropriate, given the passage of time, for there to be no corrective broadcast in the manner which occurred in Television New Zealand Ltd v Ministry of Agriculture and Fisheries (unreported, High Court, Wellington Registry, AP 89/95, 13 February 1997, McGechan J). I do not regard that as a satisfactory outcome. The nature of the statement was to be determined by the Authority. It may be that a different statement is now more appropriate than that envisaged by the Authority at the time of its decision. It would still seem appropriate that there should be such a statement so that the public are aware not only that there is a mechanism for challenging errors, but also that errors are corrected. In addition, the broadcaster must be kept aware of the need to ensure that its broadcasts are fair and balanced.

Both the broadcaster and the Authority will no doubt consider, in the light of the time that has elapsed and the change of the position of the respondent, what the appropriate format of the statement should be at this time. It may no longer be appropriate for it to focus upon the particular facts of the case. The substance of the matter may need emphasis.

COSTS

Mr McCarthy was appointed as amicus curiae by the Solicitor-General at the instance of TVNZ, which is to be complimented on its responsible approach in that regard. It is appropriate, however, that the costs of the amicus be paid for by TVNZ. In the event of there being any dispute as to such costs, leave is reserved to the parties to further apply.



Solicitors for appellant:
Kensington Swan, Wellington

Solicitors for amicus curiae:
Crown Law Office, Wellington

Television New Zealand Ltd (1996) 10 PRNZ 573, where no bar was seen to the application of that rule in cases such as this. For myself I find more difficulty than the Judge in that case for considering the introduction of new evidence in a case such as this, where, as I have said, the appeal is from the exercise of a discretion, rather than where the appeal is a true general appeal and a rehearing, in whatever sense that word is used.

In any event, in the circumstances of this case there is no suggestion that what is now sought to be tendered was not available to TVNZ for it to put before the Authority. The problem for TVNZ, on this issue as on the substantive issue, is that it determined to deal with the respondent's complaint to the Authority in one way but on receiving the Authority's decision wished it had dealt with it in a different way.

GROUNDS OF APPEAL

The first two heads of appeal overlap because they arise in the same way, with TVNZ's concern being that it was not given an opportunity by the Authority to rebut the matters upon which the Authority relied. The problem is of TVNZ's own making. It had the respondent's complaint, as did the Authority. It chose for its own reasons not to address the paragraphs in the document headed "The Approach by 'Fair Go'" lodged in support of that complaint. It made plain in its letter to the Authority that it did not wish to add to what it had previously said in its letters about the complaint about the 23 February 1994 "Fair Go" item. It may have misled itself, but it can hardly be said that the Authority should have in some way foreseen that it may have misled itself. TVNZ says that it should have been foreseeable by the Authority that it would have wanted to address those issues and that the Authority should have drawn them to its attention in some way before making its decision. TVNZ is not some simple, unsophisticated litigant in person. Even if it had been, it would have been impossible on the basis of what it had put before the Authority for the Authority to imagine that it

may wish to have been heard in respect of the matters which are the essence of TVNZ's present complaint. The Authority has not relied in any respect upon material within the programme not raised by the complainant. It has relied solely on the material put before it by the complainant, material held by TVNZ throughout. It was open at all times to TVNZ to traverse each and every paragraph within the complaint, but it chose not to do so. It can hardly now be heard to complain that the Authority breached natural justice in not ensuring that TVNZ did respond when it chose by its own actions not to respond.

There is thus no substance whatever in respect of the first two heads of appeal.

It is true, as is raised as a subsidiary matter by TVNZ, that in its finding that the complainant was asked to pay $293 and not nearly $600 as stated the Authority slightly truncates and misstates what was earlier said by it within the reasoning for its decision. However, read as a whole the decision is clear and accurate because the emphasis of the "Fair Go" programme was that the respondent put out a bill for nearly $600, rather than an expected account for $30, without any corresponding emphasis that the complainant customer was later asked to pay only $293, with the work necessarily covering much more than the item which might have been expected to have cost $30.

So far as the second matter that the appeal relates to is concerned, TVNZ states that the programme did set out the detail of the repair account, but it did this in the context of statements which minimised the work covered by the account and failed entirely to balance that minimisation with the position explained to TVNZ by the respondent.

There is no basis therefore, however the first two heads of appeal are considered, for this Court to interfere with the decision of the Authority. Both aspects of the decision were well within the Authority's proper discretion.

The third head of appeal relates to the jurisdiction of the Authority to make the finding that the broadcast on 18 May 1994 was not satisfactory as an action

on the broadcaster's part on the aspects of the complaint upheld by the broadcaster in that it wrongly implied that the dispute had not been resolved and could be the subject of further legal action when the Disputes Tribunal decision, which was known to "Fair Go", recorded that the matter had been fully settled. This part of the appeal relates to the second television item on "Fair Go" in which a representative of TVNZ made a statement to the effect that the decision from the Disputes Tribunal had been given, with the comment, "and it is probably not what anyone expected". A little later it was properly stated:-

> "The car yard he bought his Toyota from has agreed to pay that money into court".

Then, however, the item was concluded by the following:-

> "But now the car yard's thinking of taking Southland Fuel Injection to court. They say if Southland's mechanic hadn't broken the glowplug in the first place, the cracked head would have stayed in place. So any problems it caused would have been covered by the vehicle's mechanical warranty insurance."

TVNZ submits that the Authority did not link this finding to any breach of the provisions of s. 4(1) of the Act. TVNZ acknowledges that it could arguably amount to a breach of the broadcasting standards, principally:-

> "(g)(1) To be truthful and accurate on points of fact; or
>
> (g)(4) To deal justly and fairly with any person taking part or referred to [in] any programme."

It is submitted that under the Disputes Tribunals Act 1988, notwithstanding that the order of the Disputes Tribunal in issue was a result of a consent, the vendor of the motor vehicle could have appealed the decision under s. 50 of the Act or applied for a rehearing under s. 49 of the Act. Thus it is

submitted that the Authority was wrong in law in stating that the car yard could not subsequently issue proceedings against Southland Fuel as it could do so by applying for a rehearing or appealing. It is further submitted that TVNZ was not required to satisfy itself with the accuracy of the expressions of intention of the vendor

However, what is clear is that at the time of its programme on 18 May 1994 TVNZ was aware that the dispute had been settled by agreement with a consent order of the Disputes Tribunal and yet it made a broadcast which suggested that fresh litigation would arise. It did not give a balanced broadcast in the light of the facts known to it. The Authority was fully entitled, therefore, to reach the conclusion that it did and to take the view, even if it is not expressed directly, that the comments relied upon by the Authority were not truthful and accurate on points of fact and did not deal justly and fairly with the respondent.

Thus once again there is no basis for this Court to say that the Authority did not act within its proper discretion. As in respect of the first two matters complained of by TVNZ, there is no real merit in the complaint about the decision of the Authority. The Authority's determination is precisely the type of determination one would expect of an expert body endeavouring to uphold standards of responsible broadcasting. In the light of the decision as a whole it is plain that the Authority was fully aware of its jurisdiction and there is nothing to indicate that it has gone beyond that jurisdiction.

DECISION

The appeal must be dismissed.

SUBSIDIARY ISSUE

The issue arises of what should occur in respect of the order of the Authority that TVNZ should broadcast a brief summary of the decision. It appears that the respondent has now sold its business and a restraint of trade