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AP 298/94

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

AP 35/95

BETWEEN G A M MOONEN

Appellant

AND THE BROADCASTING STANDARDS AUTHORITY

Respondent

AP 298/94

BETWEEN TELEVISION NEW ZEALAND LIMITED

Appellant

AND THE BROADCASTING STANDARDS AUTHORITY

Respondent

In Chambers

Hearing: 30 May 1995

Counsel: A E Howman for The Broadcasting Standards Authority
S J Price for Television New Zealand Limited
G A M Moonen in person

Decision: 30 May 1995

ORAL DECISION OF McGECHAN J

These are two applications, heard together, both by the Broadcasting Standards Authority, for orders striking out its name as respondent in appeals to this Court

from its decisions brought pursuant to the Broadcasting Act 1989, and in the case of the appeal by Mr Moonen for the striking out of his name also.

I record immediately that the Authority properly does not resist any substitutions of correct parties or parties correctly described either as appellant or respondent. I record also that Television New Zealand Limited is aware of the possibility of a substitution as respondent within the Moonen proceeding.

The point seems at first glance a somewhat dry one, but is not so. I am informed by counsel for the Authority that a practice is developing under which it is becoming named as respondent, or as a respondent, in appeals which are brought, and that puts it to inconvenience and expense in relation to obtaining advice and considering its position as a named party in such proceedings. There is also perhaps a wider public interest consideration in relation to the name of a decision making body itself in respect of appeals brought against its decisions on matters of merit, as opposed to process. However, essentially the question is one to be decided in the light of the intention underlying the Broadcasting Act 1989 and applicable Part X of the High Court Rules.

The Act in essence establishes a system under which complainants, so-called, may make complaints about programmes. Those complaints are made in the first instance to the broadcaster concerned, which is obliged by law to consider and decide and advise outcome. If, as often will be the case no doubt, the complainant is dissatisfied with that outcome the Act provides that the complainant may refer the complaint to the Broadcasting Standards Authority. The Authority then considers and determines the complaint so referred in the appropriate manner, and ultimately gives public notice of its decision. From that point rights of appeal arise from the decision of the Authority to this Court. Under s18 of the Act, as amended, it is provided in 18(1) that the broadcaster or the complainant "may appeal to" the High Court against the whole or any part of the decision or order. There is some further specific statutory provision as to how this will be done. A "notice of appeal" is to be given within one month from the date of notification of the decision. The appeal is to be decided as if it were as if the decision were made in the exercise of a discretion. The Court may confirm, modify or reverse the decision and exercise any powers which could have been exercised by the Authority. Then, specifically, it is provided that otherwise the procedure shall be in accordance with Rules of Court.

One turns, therefore, to Rules of Court; and under r701 the new Part X is applicable.

It is worth noting, before turning to the precise provisions of Part X, that this is of course an appeal against the merits of a decision, and is not an application for review under the Judicature Amendment Act 1972 against, broadly speaking, the manner in which a decision was reached. Applications for review in which deciding parties necessarily are named are not in issue.

Part X commences for present purposes with obligation in r703 to bring the appeal by filing notice of appeal in this Court and, interestingly, serving a copy of the notice of appeal on the decision making body, in this case the Authority. Given that is the mode of initiation, it might be taken as indicating the Authority is intended to be a party in its own right, and should be named as such. However the rules must be read as a whole. There is a concurrent obligation in r708 to serve, as it is put, "every other party to the matter in which the decision was given" with a copy of the notice of appeal either before or immediately after filling and service on the Authority. So there is a concurrent obligation to notify not only Authority but others involved, and there seems no special inference to be drawn from timing. There may also be reasons for so immediately serving the Authority, other than regarding it as a party in a strict sense. It has obligations to forward documents under r712 to the Court. Early service sets that immediately in train. It may also have obligations to provide a transcript or reports if so ordered, and there is obvious advantage in early warning. Further, under the provisions of the Act, itself the filing of an appeal operates as a stay, and obviously the Authority should be aware of that from the earliest convenient moment. The requirement, therefore for initiation with immediate service upon the Tribunal does not necessarily infer it is intended to have an active party status, as opposed to others involved in the complaint before it.

Rule 706 also raises questions. It says the notice of appeal is to specify, amongst other matters, grounds; with sufficient particularity to give full advice of issues to this Court, other parties and interestingly, the tribunal which made the decision appealed from. That might be taken as signalling some intended active party involvement on the part of the Tribunal. Again, however, that is not necessarily so. Such information could be very relevant to the Tribunal's functions in selecting documents to be sent to the Court, necessary transcript, and most particularly in preparing any report under r715.

The clearest indication in my view as to the role which it was envisaged the Authority would have is through r716(2) and 718(9). Under 716(2) the parties to an appeal are the appellant and any "respondent" who has given a notice of intention to appear and be heard. That is the notice envisaged earlier in r716(1). 718(9) provides that the decision-maker in this case, the Authority, shall be "entitled" to be represented and heard on the appeal, unless the Court otherwise directs. The scheme appears to be that the Tribunal may, at its option, unless the Court otherwise directs, give notice and be treated as if a respondent; but is not regarded in the first instance as a party respondent. That is not surprising given its essential decision making function.

I am not with respect persuaded by certain public interest factors put forward said to point in the same direction, beyond that already mentioned; but it seems to me the interpretation of Part X taken as a whole does point, on balance, towards the Authority (and other decision making bodies) not being parties in the first instance; as opposed to being served and having the right to come in and be heard "as if" a respondent party if so desiring, subject in that respect to the Court's overall control.

In that light the correct procedure to my mind is for the notice of appeal to be drawn in terms of form 1 to the High Court Rules referring (i) to the appeal being under the Broadcasting Act 1989 and (ii) to it being "in the matter" of an appeal from a decision of the Broadcasting Standards Authority, dated as may be the case, and between the complainant and the broadcaster as may be the case, and then to state the complainant or the broadcaster as may be the case as the appellant, and the broadcaster or complainant as may be the case as the respondent. Specifically, it is not correct to name the Broadcasting Standards Authority itself as a respondent, whether sole or one of a number. I must say I am not surprised to hear there has been some variation in practice, as the correct approach regrettably was not made plain on the face of the rules themselves.

I turn next to the question which arises in the appeal by Mr Moonen as to the correct identification of the appellant. Of course it is the disappointed complainant, or in some cases disapointed broadcaster, which should be the onward appellant to this Court. One does not shift from a complainant before the Broadcasting Standards Authority to somebody else as appellant to this Court in the same matter. However, in this case it becomes a fine point.

I was informed in course of submissions by Mr Moonen of a close relationship between himself and the asserted complainant AMBLA. AMBLA stands, as I understand it, for "Australasian Man Boy Love Association". It was said:

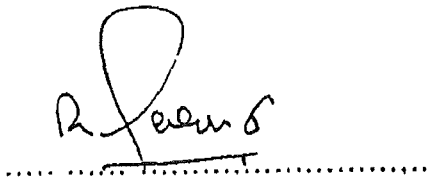
> "I am fully authorised to speak for AMBLA in this way because AMBLA is not an incorporated society but an informal organization with only one office; that of Chairman. AMBLA also does not have any subscription paying members, as membership has been used in the past as a tool of oppression by the police and media, therefore the organization of AMBLA survives with donations. So basically: "AMBLA c'est moi". I have the full authority to speak for AMBLA and it does not make any difference that my name is on the notice of appeal or that of AMBLA's, for it is all the same, but I do not have any objections to having AMBLA on the notice of appeal if this is necessary. However if this interferes with the efficiency of proceeding with the notice of appeal I would rather leave it as it is at present."

The letter instituting the complaint could be read as either a complaint by ABMLA, or as a complaint by Mr Moonen individually. The emphasis appears to be on a complaint by ABMLA. Given the close identification between both, I see no fault in allowing the proceeding to continue on the basis Mr Moonen is appellant but I believe his capacity as representing AMBLA, which indeed he equates to himself, should be plain on the face of the proceeding to ensure the full position is known.

It would not be appropriate in relation to either of these proceedings to allow them to fail for want of parties. Correct descriptions and substitutions should be directed under the Court's power to add or strike out parties and correct these descriptions.

In relation to the Moonen appeal the appellant will be described as "Geraldus Adrianus Maria Moonen as and as representing Australasian Man Boy Love Association (AMBLA)". That is an alteration in description and not a substitution of a separate party. The respondent Broadcasting Standards Authority will be struck out. There will be substituted in place Television New Zealand Limited. Should that involve any extension of time for appeal, a point which I leave open, then such extension is granted. Television New Zealand Limited appeal is amended by striking out the name of the Broadcasting Standards Authority, and substituting the name of the complainant Southland Fuel Injection Limited. Likewise should that involve any necessary extension of time, a point which I leave open, time is so extended.

I will formally reserve costs on both matters but I will not be taken as encouraging in that respect any further applications.



R A McGechan J

Solicitors:

Bell Gully Buddle Weir, Wellington for The Broadcasting Standards Authority
Kensington Swan, Wellington for Television New Zealand Limited

BROOKERS

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

AP No 35/95

BETWEEN GERARDUS ADRIANUS MARIA MOONEN

Appellant

AND TELEVISION NEW ZEALAND LIMITED

Respondent

Hearing: 16 July 1996

Counsel: Appellant in person
M F McClelland for Respondent

Judgment: 14 August 1996

JUDGMENT OF GREIG J

Solicitors:
Kensington Swan, WELLINGTON, for Respondent

The appellant complained to Television New Zealand Limited, the broadcaster of a programme which appeared on 27 November 1994 and which examined a therapy unit for convicted child sex offenders (and others) in Rolleston Prison. In the course of the programme the word "paedophile" was used on a number of occasions by the presenter in describing and referring to the men convicted of crimes and referred to in the programme. The appellant's argument is that broadcasting standards require accuracy and balance and that these had been breached by the use of the word "paedophile" as a synonym for criminals and child molesters It was his claim that, by the misuse of the word "paedophile", people who were not criminal had been treated as inferior and discrimination against them had been encouraged Television New Zealand Limited rejected the appellant's complaint. Dissatisfied with that he applied to the Broadcasting Standards Authority The Authority, after receiving submissions from the appellant and Television New Zealand Limited, declined to uphold the complaint in a written decision dated 13 February 1995. The appellant now appeals that decision of the Authority to the Court.

The appeal is brought pursuant to s 18 of the Broadcasting Act 1989. By subs (4) of that section the Court is to hear and determine the appeal as if the decision or order appealed against had been made in the exercise of a discretion. That constitutes a somewhat narrower right of appeal than is generally understood by way of a general right of appeal by way of rehearing. The appellant must satisfy the Court that the Authority, in this case, has made an error of law or that it has failed to take into account some relevant consideration or that it has wrongly taken into account some irrelevant consideration or that the decision is plainly wrong. The Court, in considering this matter, is also entitled to have regard to the fact that the Authority is a specialist tribunal with wide and continuing experience in dealing with complaints and in considering and applying the Code of Broadcasting Standards promulgated under the Broadcasting Act.

The appellant has appeared throughout in person. He has brought these proceedings on his own behalf but, in addition, presenting himself as Chairman of the Australasian Man/Boy Love Association, an unincorporated association of persons which the appellant describes as an assembly of boy lovers and their

supporters. The Association has, among its purposes, the mutual support of those persons and an aim to dispel what the Association considers are myths which exist about boy love. It is asserted in material presented by the appellant that the Association "strives to educate society about the positive and beneficial nature of man/boy love and gives support to men and boys who are alienated and persecuted because of their desire for consensual sexual and emotional relationships with each other." It is the appellant's contention that the Association is against coercion, violence, non-consensual sex abuse, molestation and child prostitution. It is necessary to say, however, that in New Zealand virtually every form of sexual activity and conduct between a man and a boy up to the age of 16 is an offence under the Criminal Code and in most cases consent is not a defence.

The programme was an item in a series of programmes entitled "Frontline". The programme in question was broadcast between 6.30 pm and 7.30 pm on 27 November 1994. The programme began with an introduction by the presenter in these words:

> " To most of us such a despicable crime as the sexual abuse of a child is a mystery. We are totally baffled as to how anyone can violate a child's innocence and rob them of their trust in adults. Tonight "Frontline" brings you a rare opportunity to look inside the minds of probably the most hated men in the country - paedophiles. "

In the course of the hearing I viewed the programme on a video recording. It referred on a number of occasions and made use of the word "paedophiles" to refer to convicted child sex offenders and, in particular to the persons who appeared and were referred to in the course of the programme being some of those who were undergoing the treatment at the Kia Marama unit at the Rolleston Prison. The identity of all of the men involved was suppressed by one means or another but there were interviews with them and with others who were involved in the Kia Marama Unit.

The appellant, in extensive and wide-ranging submissions, not all of which were relevant to the appeal and in particular an appeal against an exercise of

discretion, canvassed what he contended were breaches of a number of the broadcasting standards, namely, the requirement that broadcasters are -

" G1 To be truthful and accurate in points of fact.

G5 To respect the principles of law which sustain our society.

G6 To show balance, impartiality and fairness in dealing with political matters, current affairs and all questions of a controversial nature.

G13 To avoid portraying people in a way which represents as inferior or is likely to encourage discrimination against any section of the community on account of sex, race, age, disability, occupational status, sexual orientation or the holding of any religious, cultural or political belief This requirement is not intended to prevent the broadcast of material which is:

i) factual, or
ii) the expression of genuinely-held opinion in a news or current affairs programme, or
iii) in the legitimate context of a humorous, satirical or dramatic work.

G21 Significant errors of fact should be corrected at the earliest opportunity. "

The essential focus of the complaint and the submissions on appeal was the contention that the programme used the word "paedophilia" as a synonym for the criminal conduct of a child sex offender or for criminal offending when it was argued paedophilia had and included a neutral and non-criminal meaning of sexual attraction to pre-pubescent children. Reference was made to dictionaries and other literature in support of the contention It was plain, however, from a reading of the literature that was produced, that in ordinary usage, at least in recent times, paedophilia has come to connote, in particular, criminal activity including what is sometimes referred to in the dictionaries as "paederasty". For example, in a report by the Parliamentary Joint Committee on the National Crime Authority in the Commonwealth of Australia in November 1995 described, under the title "Organised Criminal Paedophile Activity", the conclusion was that the word paedophile had no

agreed meaning but it was noted (para 2.7) that "most popular discussion in the media and elsewhere uses 'paedophile' without any clear definition but seemingly to refer to acts against children of up to at least 16 years of age" and in 2 11 that "the categories of child molester and paedophile overlap, but are not identical." In another item submitted by the appellant, an extract from a work *Perspectives on Paedophilia*, Taylor et al (ed) 1981, in a reference at p 24 in Chapter 2 under the heading "The Adult" by one Peter Righton, this appears:

> " Most of the studies on paedophilia, however, treat as paedophile any sexual relationships entered into by adults with young people up to at least the point of mid-adolescence: so, for the purposes of this chapter, I shall do the same - albeit with some reluctance "

And in other documents and references it is clear that paedophilia can be and may be classified and extend to criminal activity.

In its the decision the Authority said this:

> " In determining the complaint, the Authority considered that it was not necessary to enter the debate about the appropriate dictionary definition or current use of the words paedophilia and paedophile. It was of the view that in the specific context in the broadcast in which the word paedophiles was used, the term had referred to the convicted child sex offenders who were confined to the Kia Marama unit. "

That decision in the second sentence was clearly open to it and, indeed, as the appellant accepted, the use of the word in the programme was to refer to child sex offenders His objection was that it did so generally, widening the scope beyond what he contended the word connotes In my opinion the word now does have a wider connotation What may once have been limited to a psychiatric or other expert meaning has now become a broader meaning which, in common usage, includes and refers to those who commit criminal offences between men and boys and other young people.

On either basis, therefore, the broadened meaning of the word "paedophile" or the limited context of its use in the programme could not be said that there was any breach of the standards G1, G5 and G6, and there being no significant error there could be no application of G21. The remaining issue was whether there was a breach of standard G13.

Any discrimination was required to depend upon the meaning and application of the words "sexual orientation" in the code standard. The Authority applied the definition contained in s 21 (1) of the Human Rights Act 1993, which is as follows

> " (m) Sexual orientation, which means a heterosexual, homosexual, lesbian, or bisexual orientation "

That is an exclusive definition and does not include paedophilia. It was held, therefore, that this was not a subject upon which there could be a breach of that code standard. It may not always be proper to use the statutory definition of a term in one statute as applying in another in the absence of any specific reference or correspondence between the statute. In this case, however, it is clear, as the Authority noted, that the reference to sexual orientation, was not originally included in the code standards or the functions of the Authority in s 21 of the Broadcasting Act. It was added to the code G 13 at the same time and clearly as a result of the alterations and the additions to the Human Rights legislation in 1993. That clearly has a limited definition, one which would not and can not include paedophilia as an inclination or tendency or as a sexual activity. In its context the programme was about convicted criminals, not a section of the community which falls within the ambit of the prescription of discrimination in the Broadcasting Act or, indeed, the reference in the Human Rights Act. To the extent that the programme referred to other sexual activity between adults and young persons or children it was also criminal in this country and equally outside the ambit of the provisions that I have mentioned.

The decision of the Authority was founded on a correct view of the law. There was no error of law involved, nor was there any irrelevant consideration

taken into account or relevant consideration ignored. In the end the decision was plainly right and the appeal must be and is dismissed.

I think costs in a case such as this should follow the event. There will be an order for costs in favour of the respondent against the appellant in the sum of $1,000 together with disbursements and other expenses to be fixed by the Registrar.