

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

CIV 2010-485-2161

UNDER THE JUDICATURE AMENDMENT ACT
1972

IN THE MATTER OF AN APPLICATION BY TVWORKS
LIMITED FOR JUDICIAL REVIEW OF A
DECISION OF THE BROADCASTING
STANDARDS AUTHORITY

BETWEEN TVWORKS LIMITED
Applicant

AND BROADCASTING STANDARDS
AUTHORITY
First Respondent

AND THE MINISTER FOR SOCIAL
DEVELOPMENT AND EMPLOYMENT,
HONOURABLE PAULA BENNETT
Second Respondent

Hearing: 19 April 2011

Counsel: J G Miles QC and B J Curry for Applicant
A E Scott-Howman for First Respondent
M T Scholtens QC and T Hallett-Hook for Second Respondent

Judgment: 6 May 2011

JUDGMENT OF SIMON FRANCE J

Introduction

[1] The issue in this case is whether the Broadcasting Standards Authority has jurisdiction to inquire into the way in which the broadcaster handled a complaint by the second respondent, the Hon. Paula Bennett. The Authority issued a preliminary ruling and by a majority held there was jurisdiction. TVWorks challenges that by way of judicial review. None of the parties dispute the amenability of the decision to review. The issue is whether the statutory pre-conditions to jurisdiction are present.

Issue described

[2] The Broadcasting Act 1989 establishes a complaints process. For the purposes of this case it can be described in these terms:

- (a) a formal complaint made within twenty working days of the broadcast;
- (b) a decision by the broadcaster. That decision should be made within twenty working days of receiving the complaint but the broadcaster can extend that period;
- (c) the complainant has twenty working days from receipt of the broadcaster's decision to refer the matter to the Authority for further consideration.

[3] Bearing in mind that process, what happened here can be set out in several steps.

- Step one – The Minister complained about a broadcast. She said it was inaccurate. The letter sought an immediate on-air apology, and warned against repetition of the error that night.
- Step two – The Director of News for TV3 emailed a reply the same day saying he had looked into it and had spoken to the reporters. He was generally satisfied with what happened. If the Minister's staff wished to talk about it further, he suggested they contact him.

- Step three – The Minister did not contact TV3 again. Rather, on the Monday the Minister’s adviser contacted the Broadcasting Standards Authority asking it to look into it. Authority staff said that there needed to be a formal response from the broadcaster before the Authority could act. The Minister’s adviser said she had such a response but after reviewing the material, the Authority staff advised that a formal decision should be requested of the broadcaster.
- Step four – The Minister submitted a rewritten formal complaint to the broadcaster. The complaint expanded the scope of the original complaint to now include the subsequent night’s coverage of the topic.
- Step five – The broadcaster issued a formal decision rejecting the complaints.
- Step six – The Minister did not refer this formal decision to the Authority within twenty working days. It seems the Minister’s advisers thought that the step three discussion constituted a referral of the matter.

[4] In a preliminary decision a majority of the Authority have held that:

- (a) there is no jurisdiction in relation to the formal decision (step five) because it was not referred to the Authority within twenty working days and there is no power to extend time limits;
- (b) however, steps one to three represented a complete process of complaint, decision, and referral and there was jurisdiction to inquire into that. What happened afterwards – steps four and five – were unnecessary.

[5] It is this analysis that the broadcaster challenges.

Decision

[6] Before me there was considerable focus on whether the Minister’s initial letter could be treated as a “formal complaint” as required by s 6(1) of the Act. Then, if so, whether the News Director’s email response of the same day could be treated as “the broadcaster’s decision” as contemplated by s 7 of the Act. The

necessary third step of referral was not in dispute; it was accepted that if there was a formal complaint and if the email reply was accepted to be the broadcaster's decision, then the events noted at step three were sufficient to constitute referral of the complaint and decision to the Authority.

[7] I will latter address the arguments concerning those first two documents but I consider undue focus on them has obscured the correct answer. What happened here was a single process leading to step six. It was orthodox and I venture to suggest exactly what the Act contemplates. There was a complaint wanting an immediate response in relation to an ongoing story. There was a prompt reply from the relevant employee explaining why the complaint was not accepted. There was confusion over how to take the matter further and undoubtedly correct advice from the Authority's secretariat that the informal exchange that had occurred needed to be formalised.

[8] Properly this advice was accepted by the Minister and acted on. The Minister could have just relied on her original complaint and asked for a formal reply. (This was what the Authority staff suggested.) Instead the Minister, as she was fully entitled to do, recast the complaint, bringing a second programme within its scope.

[9] Next, the broadcaster referred the rewritten complaint to its Standards Committee and that Committee issued a formal decision addressing all the complaints, and dealing with the broadcasting standards that were said to have been breached.

[10] Thus far, I suggest this is copybook stuff. It is how most people would want the process to work. First, a quick exchange, timely enough to deal with the matter and to correct it had there been agreement that there was a problem. Next, a more focussed complaint with reference to specific broadcasting standards, and then a more considered response, explaining why it was considered the standards had not been breached. Up to now all has worked well.

[11] The hiccup, as it were, has arisen because the broadcaster's decision was not referred within twenty working days. Unfortunately the Act's time limits are absolute; whether it is anyone's fault or not, they cannot be extended. Twenty working days is all there is, and to miss it is to end the process.

[12] That is what has happened here, but I cannot see any good reason why one should attempt to divide this sequence of events up and find a completed process at some earlier point. It is to ignore the reality that there was a formal complaint and there was a formal decision in relation to the complaint, namely steps four and five.

[13] Looking at the process as a whole, in my view it is not possible to suggest that the broadcaster's decision which triggered the twenty working days rule was anything other than the decision described at step five. That being so, the failure to refer it to the Authority within time is fatal, and the Authority has no jurisdiction.

[14] Whilst that is sufficient to dispose of the application in the broadcaster's favour, it is appropriate to address the submissions made about the first two documents. I do so with the caveat that, as I have made plain, at least in my view there are dangers in considering them independently and in isolation from their place in the overall process.

(a) *The initial complaint*

[15] The context in which this dispute arose was that a member of the public had alleged that the second respondent was responsible for breaching that person's privacy. TV3 ran a story suggesting the Minister had sought, in secret meetings, to make the problem go away. The Minister was unhappy with this allegation.

[16] The day after the broadcast, her ministerial adviser emailed Mr Mark Jennings who is the Director of News at TV3. The email appended a letter from the Minister. It was on Ministerial letterhead and stated:

Dear Mark, [Mark Jennings, Director of News]

I am writing in response to the story aired on 3News on Thursday 29 April by Rebecca Wright.

The story made serious allegations against me – allegations that are unfounded, untrue and have been completely rejected by both the parties involved. In addition, the conduct of your reporter fell far short of the standards expected of a journalist.

The introduction stated “3News believes a decision on that complaint is imminent. But we’ve also learned Bennett this week made Fuller an offer to make the complaint go away”.

The story also stated 3News was in possession of emails showed that “a meeting took place yesterday between Bennett and Fuller. A monetary settlement was discussed, and the idea of Fuller dropping the complaint was floated”.

Despite continual requests from my staff, no evidence was provided of this claim, either to this office, the Minister or even in the story itself. Despite being promised the ‘evidence’ would be provided this morning, it has still not appeared.

To make matters worse, I understand that TV3 is planning to run a further story this evening based on this so-called ‘evidence’.

I can assure you that the claim is malicious, completely without merit and worse, it is defamatory. On that basis I am seeking advice on options for legal action against 3News.

This story makes an extremely serious allegation against a Minister; namely it makes an allegation that ‘hush’ money was offered to make a complainant withdraw a Privacy Commission complaint.

In my view, the story was potentially in breach sections 4b, 5a, 5b, 5c and 6c of the Broadcasting Act, specifically relating to fairness, accuracy, and balance.

Without prejudice to other legal options, I strongly suggest an apology to both the complainant and myself should be run on 3News in this evening’s programme.

In addition I would like to express my disappointment at the conduct of the reporter involved.

Rebecca Wright’s handling of this story over the course of the day was unprofessional; she lied and obfuscated to my staff trying to get me on camera and despite four conversations over the space of a few hours she refused to give any information on the substance of the claim on which her story was based.

As you know Mark, politics is a long game and political journalists are only able to do a decent job because they have fostered good relationships with

politicians and process secretaries. Rebecca Wright has clearly chosen not to operate in this time-honoured way.

On the other hand, when another TV3 reporter Richard Langston turned up and was prepared to reveal the allegations that Facebook comments suggested a financial settlement had been discussed – I was happy to go on camera and answer his questions.

I look forward to hearing from you.

Yours sincerely

Paula Bennett

[17] In relation to this letter, the issue debated before me was whether it could be treated as a “formal complaint” under the Act. What the Act means by formal complaint is somewhat elusive with the legislation only saying that it is a written complaint. The cases have stressed that the idea of complaint should not be burdened with undue formalities, and given the context of the legislation, that seems plainly right.

[18] In my view there is no real dispute to be had about this initial letter. It could easily be a complaint triggering the process, if that is what the complainant wanted. Had it ended with the words:

Please treat this as a formal complaint under the Broadcasting Act 1989

I do not consider anyone would have rejected it for technical deficiency. The substance of the complaints contained in the letter are easily referable to standards prescribed in the applicable “Free-to-Air Television Code of Broadcasting Practice”, and the letter more than adequately identifies the grievances.

[19] Equally plainly, it was not intended to be a formal complaint under the Act. The letter came from a Minister and the choice of weapon was threatened legal action of significance well beyond breaches of the Broadcasting Act. The letter’s only mention of the Act is qualified by the claim of “potential breaches”. In my view the word potential is used advisedly to indicate that there are other matters that could be looked at, but for now the focus is on the allegation being malicious and defamatory.

[20] I agree with the minority member of the Authority who felt the letter was a typical letter focused on obtaining an immediate on-air apology. It was not focussed on broadcasting standards.

[21] My assessment, therefore, is that whilst the letter is sufficient to be a complaint that was not its purpose.

(b) *Mr Jennings' response*

[22] Mr Jennings emailed back to the Minister's staff that day. His reply said:

Hi Belinda and Sia, I have now had a chance to discuss the events of yesterday with Rebecca Wright and Gordon McBride.

As far as I can ascertain, Rebecca met with you, Sia, in your office, at 4.45pm. You asked her to hand over the emails and she declined to do so.

I believe at that point she should probably have told you that there was a claim within the emails that a financial settlement had been discussed and what was the Ministers reaction to that. She decided not to do that because she felt she needed advice from a more senior colleague either Gordon McBride or Patrick Gower.

Having done that she then tried to call Sia to tell her the contents of the email Her own phone was flat so she used the cameraman's phone and her landline at Abel Smith. Rebecca says she called Sia up to 5 times and left at least 3 messages.

She made the first of those calls at 4.55.

Sia has already told me that by then she was already dealing with Richard Langston and a camera crew.

Richard has told me that he did the interview with Minister at 5.35 but I accept that Sia was probably busy between 5 and 6pm.

Once Rebecca knew the contents of Richard's interview she was to able to refer to it in her live cross and, of course, Richard's interview was run on Campbell Live at 7pm.

While there are some issues around Rebecca's handling of this I don't think there is a major issue here, in fact if Rebecca and Sia had connected between 5 and 6pm then we may not be having this discussion.

I thought that tonight's story was very clear and fair to all the parties involved.

However if the Minister remains unhappy I am happy to talk to her or indeed have further dialogue with either of you.

Yours,

Mark

[23] Were it not for the late referral of the formal decision to the Authority, I venture to suggest no-one would be arguing that this reply was the broadcaster's formal decision. Some background may assist to explain this observation.

[24] The Act requires that the broadcaster establish a process for dealing with formal complaints. It is also required to publicise what those processes are. Pursuant to this, it seems the major broadcasters provide the public with options of a formal complaint under the Act, or an informal complaint. Informal complaints go to the employee responsible for the particular broadcast – e.g. the News Director.

[25] Formal complaints are referred to the organisation's Standards Committee, and a formal written decision is issued. The broadcaster has twenty working days in which to complete this formal process. The Act also requires that formal decisions on a complaint conclude with advice to the complainant about their rights of referral to the Broadcasting Authority, and that they have twenty working days to do so.

[26] Bearing these requirements in mind, when one looks at Mr Jennings reply, several features can be noted. It is immediate; it is informal in structure; it lacks any reference to relevant broadcasting standards, or to the applicable Code; it invites on-going dialogue; and it does not contain the requisite advice about referral to the Authority.

[27] The majority decision under appeal makes the fair point that just because a response has deficiencies, it does not mean it is not a response. It may be just a bad one. However, it is clear this email was not intended to be a formal decision on behalf of the broadcaster. I make the same point about this response as I do about the initial complaint. It could be a broadcaster's decision, albeit a deficient one, but it was not. It is why I take the view that one has to analyse these things from the viewpoint of what did happen, rather than reconstruct events to find a completed process that was not intended to be such.

[28] If one goes back to step three when the Authority's secretariat advised the Minister's office to seek a formal decision, what could have then happened is that the Minister could, as suggested to her, just have emailed TV3 and said that she wanted a formal decision on her letter. It is unlikely, but equally the broadcaster could, if it had wanted, have replied to the Minister that Mr Jennings' email was to be taken as its decision, and advised her that the Minister had twenty working days to refer it to the Authority. This hypothetical exchange, had it occurred, would have made the first letter a complaint and the email reply a formal decision. They might not be the best examples of their type, but they would, in fact, then be the complaint and the decision.

[29] But it did not happen this way, and the first two steps were not at any stage a complaint and a decision. This is not because they could not be, or because they were technically deficient. It is just because they were not, and the subsequent complaint of 10 May and reply of 10 June show that.

Conclusion

[30] In terms of the second respondent's submission, this judgment in effect accepts Ms Scholtens QC's argument that both the initial complaint, and Mr Jennings' reply could (in other circumstances) be a complaint and a decision. Where I have differed is that in my view, in this case, they were not intended to be such, and were not.

[31] The application for relief is granted. The Authority's decision is quashed to the extent that it says that the initial letter, Mr Jennings' reply to that letter and the May 3 discussion with the Authority together represent a completed process giving jurisdiction to the Authority.

[32] The only decision of the broadcaster is its formal decision of 10 June. I agree with the Authority that this decision was not referred within the statutory time limit. The Authority, therefore, does not have jurisdiction in relation the only decision issued by the broadcaster. Accordingly, it cannot inquire into the broadcasts of 29 and 30 April.

[33] Costs memoranda may be filed if the parties cannot agree.

Simon France J

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