

BEFORE THE BROADCASTING STANDARDS AUTHORITY

Decision No: 1999-054

Dated the 14th day of May 1999

IN THE MATTER of the Broadcasting Act 1989

AND

IN THE MATTER of a complaint by

MICHELLE LOOS

of Auckland

Broadcaster

TELEVISION NEW ZEALAND LTD

S R Maling Chairperson
L M Loates
R McLeod
J Withers

DECISION

Loos – TVNZ Decision No: 1999-053

This decision was issued to the parties on 13 May 1999 under seal of the Authority. It will be released publicly on Monday 24 May 1999.

The decision deals with the issue of costs in relation to the withdrawal of a complaint. TVNZ has been ordered to pay a sum for costs to the Crown pursuant to section 16(3) of the Broadcasting Act 1989.

By letter dated 13 May 1999, Simpson Grierson for TVNZ have requested that “the decision be recalled and that it not be issued for publication”. In support of that request TVNZ contends:

1. That the Authority has made some wrong assumptions in respect to TVNZ’s actions in relation to its settlement with Ms Loos and;
2. The Authority is wrong to conclude that TVNZ can be categorised as a “party in default” for the purposes of Section 16(3) of the Act and;
3. TVNZ says it was given assurances (by the Authority’s Complaints Manager) from which it says it understood that there would be no publication of any decision with regard to costs.

The Authority notes first that the decision referred to has been sealed and published to the parties. It concludes that, even if it has powers to recall, those powers can only be exercised some time prior to the sealing of its decision incorporating any order. There is a parallel here with the practice in both the High Court and the Court of Appeal. The Authority has noted the Court of Appeal decision in Comalco v TVNZ (Court of Appeal 148/95) a case in which recall was an option for the Court but expressly so in a situation where no formal order of the Court had been sealed. The Authority concludes that even if it has the power to recall, it is too late now for that to occur in the present case. If TVNZ is aggrieved by the process, then it must pursue such other options as might be available to it.

In any event, lest it be wrong in its conclusion that there is now no power to recall the decision, the majority of the Authority is quite clear that this is not an appropriate case in which to exercise that power.

First, the Authority's views on the essential matters of fact and law remain unchanged.

Secondly, the majority is not aware of any special reason why it should exercise such a power other than the contention by TVNZ that it has been misled by the Authority's staff as to publication of any decisions as to costs. In this respect, the majority notes that the recollections of its Complaints Manager are quite different to the views expressed by TVNZ staff members. In the Complaints Manager's view, TVNZ staff are mistaken as to the position. She says that on each occasion on which she discussed the possibility of a withdrawal of the complaint with TVNZ staff, she pointed out the Authority's residual jurisdiction to order payment of costs pursuant to section 16. She is clear that she gave no assurance that there would be no publication of any decision with regard to costs.

The minority's view differs. It believes that in the event the Authority has power at this stage to recall the decision, the circumstances of this matter would constitute the "very special reason justice requires that the judgment be recalled" as described by Wild CJ in *Horowhenua County v Nash (No 2)* [1968] NZLR 632, 633.

First, the minority believes that the complainant is, in this instance, the party in default for the purposes of section 16(3) of the Act.

Secondly, the minority believes the broadcaster had reached a negotiated settlement with the complainant under the mistaken impression that all details relating to the outcome would be a private matter. The ambiguity surrounding the information imparted to the broadcaster's representatives by the Authority warrants similar consideration as a "very special reason".

Whatever the true position may be as to the exchanges between the Complaints Manager and TVNZ and their respective understandings of the position, the Authority for its part is clear that where it makes any decision then it is required by law to give reasons for so doing and to give public notice of that decision. (See Section 15 of the Broadcasting Act 1989). In the Authority's view that requirement extends to any decision it makes incorporating an order for costs.

For the above reasons, TVNZ's request to the Authority to recall its decision and not to issue that decision for publication is declined.

Signed for and on behalf of the Authority



Sam Maling
Chairperson

14 May 1999