IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2008-485-1465

UNDER	The Broadcasting Act 1989
IN THE MATTER OF	an appeal against a decision of the Broadcasting Standards Authority dated 4 June 2008
BETWEEN	BENJAMIN MORLAND EASTON Appellant
AND	RADIO NEW ZEALAND Respondent

Hearing: 8 March 2010

Counsel: Appellant in Person
J W Tizard and A J Connor for Radio New Zealand
C Sophocleous for Broadcasting Standards Authority (abiding the Court's decision)

Judgment: 11 March 2010

JUDGMENT OF WILD J

Introduction

[1] Mr Easton's motive for wanting to bring this appeal is his concern that the media foster the belief that all family violence in New Zealand is committed by men.

[2] I say "wanting to bring this appeal", because Mr Easton needs special leave to appeal. The granting of leave is opposed by the respondent, Radio New Zealand Limited (RNZ). Mr Easton's appeal, if permitted, is against a decision of the Broadcasting Standards Authority given on 4 June 2008. The Authority declined to uphold Mr Easton's complaint under s 8(1B)(b)(i) Broadcasting Act 1989 against RNZ.

[3] Mr Easton had complained about an interview broadcast on the Nine to Noon programme on National Radio on 27 February 2008. Ms Kathryn Ryan, who hosts Nine to Noon, interviewed a lawyer commentator, Ms Catriona MacLennan (incorrectly spelt McLennan in the Authority's decision). Ms Ryan discussed with Ms MacLennan a review of the Domestic Violence Act 1995 published by the Ministry of Justice in December 2007. The discussion centred on some of the main recommendations in the review for amendment to the Act.

Application for special leave to appeal

[4] The chronology is this:

Date	**Event**
4.6.08	Authority's decision.
3.7.08	Mr Easton files notice of appeal "against Broadcasting Standards Authority".
5.7.08	The one month time limit for appeal expires.
9.7.08	Mr Easton serves his Notice of Appeal on the Authority.
10.7.08	Authority's solicitor writes to Mr Easton (with a copy to RNZ) pointing out defects in the appeal: it wrongly names the Authority as respondent (should be RNZ); the appeal is out of time (only served, and on incorrect respondent, five days after time for appealing expired); relief sought is not available under s 18(5) of the Act.
11.7.08	Mr Easton e-mails Authority and RNZ advising he will apply to amend his appeal so it complies with the Rules.
15.7.08	Mr Easton files amended Notice of Appeal, naming RNZ as respondent.
29.7.08	Associate Judge Gendall directs Mr Easton to file and serve an application for special leave to appeal out of time within 10 working days.
7.8.08	Mr Easton files his application for special leave to appeal out of time.
27.8.08	RNZ files notice and affidavit in opposition to Mr Easton's application for special leave to appeal.

[5] Based on this chronology, Mr Easton submitted that he had made a simple mistake, suing the Authority rather than RNZ. As soon as the mistake was pointed out to him he rectified it. He filed his leave application as directed by Associate Judge Gendall. He had not earlier realised such an application was required; he thought it sufficient to amend his Notice of Appeal.

[6] Opposing special leave, Mr Tizard for RNZ conceded the delay was not great. He said it would not normally be of moment, but in this particular case RNZ opposed leave on three grounds. First, Mr Easton had caused a lengthy delay in the interim by "going off in another direction". Secondly, the appeal lacked merit. Thirdly, the relief Mr Easton sought – an apology and retraction – was not available in terms of s 18(5) of the Broadcasting Act.

[7] The first of these grounds is a reference to the application for judicial review Mr Easton brought in the interim. The genesis of this is probably what occurred when this appeal proceeding originally came on for hearing before me on 8 September 2008. When vacating that fixture, and adjourning the appeal, I issued a Minute in which I recorded this:

> [12] The upshot of my lengthy and ultimately fruitless attempt to keep this appeal on track, was that Mr Easton indicated that he intended to bring a judicial review proceeding against Radio New Zealand and also the Advertising Standards Authority.
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> [13] He asked that this appeal be adjourned, so that he could apply to have it heard at the same time as that proposed application for judicial review. Although she did not oppose adjournment of the appeal, Ms Moran quite understandably reserved all Radio New Zealand's rights in respect of the hearing of this appeal with some yet to be brought application for judicial review. I record that all Radio New Zealand's rights in that respect are reserved.

[8] Mr Easton filed his application for judicial review on 17 October 2008. He named the Broadcasting Commission and the Broadcasting Standards Authority as respondents. Because neither respondent had exercised a statutory power of decision capable of review, Dobson J struck out the application in a judgment he gave on 1 December 2008. Mr Easton filed an appeal from that judgment on 22 December 2008, but that appeal was deemed abandoned (under r 43(3) Court of Appeal (Civil) Rules 2005) on 24 September 2009. I anticipate that Mr Easton was unable to raise the $3,000 security for the cost of the appeal, fixed by Arnold J in a judgment he gave on 17 June 2009.

[9] Mr Tizard did not suggest that the unsuccessful foray by Mr Easton into judicial review had prejudiced RNZ. If the relief Mr Easton seeks is not available in

terms of the Act, then Mr Easton cannot have it. However, Mr Easton changed tack somewhat on this: (see [20] below).

[10] All in all, particularly given that the appeal was filed in time, and served only a few days out of time (although in each case against the wrong respondent), and the lack of any prejudice to RNZ, I grant special leave to appeal. My decision to do that is more influenced by a desire to consider and decide the merits, rather than by any tentative assessment of the merits, to which I now turn.

The merits

[11] The nub of Mr Easton's complaint to RNZ was this:

> I write in question of your interview yesterday of Catriona [MacLennan] on Nine to Noon. I ask whether or not you feel in balanced journalism that Ms [MacLennan] should have been entitled to continually, directly discriminate against men through her assumption men commit all notable domestic violence in New Zealand?

[12] The pertinent parts of the Authority's decision are these:

> **Referral to the Authority**
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> [8] Dissatisfied with RNZ's response, Mr Easton referred his complaint to the Authority under section 8(1B)(b)(i) of the Broadcasting Act 1989.
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> [9] The complainant argued that RNZ had overlooked "the proper answer", which was that women are as able to commit domestic violence as men. Mr Easton maintained that the item, by exclusively discussing the protection of women, portrayed men as the only perpetrators of the violence. He argued that the interview imparted the sentiment that this was an accepted and reasonable fact.
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> [10] The complainant disagreed with RNZ that the majority of the language was gender-neutral. He said that it had not considered how many times in the overall interview men were portrayed as the violent offenders, and women as the victims.
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> **Authority's Determination**
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> ...
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> [12] Principle 4 requires broadcasters to provide balance when discussing controversial issues of public importance. The item complained about discussed the release of a report by the Ministry of Justice,

> which contained recommendations to improve the implementation of the Domestic Violence Act 1995. The programme offered the opinions of one lawyer, Ms [MacLennan], regarding some of the more noteworthy recommendations in the report.
>
> [13] The Authority finds that this broadcast did not constitute a discussion of a controversial issue of public importance to which the balance standard applies. The programme did not purport to be a general discussion about domestic violence and who was responsible; it simply gave information about the Ministry's review and offered the opinions of one lawyer based on her own experiences.
>
> [14] Even if the balance standard did apply, Mr Easton's complaint is that the programme portrayed men as the only perpetrators of domestic violence, and women as the victims. In the Authority's view, it was not necessary for either the interviewer or Ms McLennan to expressly acknowledge that men could also be victims of domestic violence.
>
> ...

[13] The Authority then noted that Ms MacLennan's references to women were generally in the context of her recalling the difficulties she had experienced in practice in relation to protection orders, and expressing her opinion as to how the recommendations in the report might overcome those difficulties. The Authority's decision gave four examples, drawing from what Ms MacLennan had said during the broadcast.

[14] I have listened, twice, to the broadcast. Whilst Ms Ryan was scrupulous in framing her questions in a gender neutral way, on almost every aspect of the interview, Ms MacLennan equated "abusers" with men, and "victims" with women and children. I make that point both in fairness to Ms Ryan (although she did not attempt to remedy the taint imposed by Ms MacLennan), and because it is germane to the appeal. Acceptance of this point was implicit in Mr Easton's submissions: his arrows were aimed at Ms MacLennan.

[15] Submissions at Monday's hearing were made orally. Mr Easton did not file written submissions as directed, and for that reason RNZ did not file written submissions in response. As Mr Easton's submissions unfolded, it became clear that he considered the broadcast breached both Broadcasting Standard 4 (BS4), and Broadcasting Standard 7 (BS7). These two standards are, respectively:

Standard 4 Controversial Issues – Viewpoints

When discussing controversial issues of public importance in news, current affairs or factual programmes, broadcasters should make reasonable efforts, or give reasonable opportunities, to present significant points of view either in the same programme or in other programmes within the period of current interest.

Guideline

4a The assessment of whether a reasonable range of views has been allowed for takes account of some or all of the following:

- The programme introduction;
- The approach of the programme (e.g. taking a particular perspective);
- Whether listeners could reasonably be expected to be aware of views expressed in other coverage;
- The programme type (e.g. talk or talkback which may be subject to a lesser requirement to present a range of views)

...

Standard 7 Discrimination and Denigration

Broadcasters should not encourage discrimination against, or denigration of, any section of the community on account of sex, sexual orientation, race, age, disability, occupational status, or as a consequence of legitimate expression of religion, culture or political belief.

Guideline

7a This standard is not intended to prevent the broadcast of material that is:

(i) factual

(ii) a genuine expression of serious comment, analysis or opinion; or

(iii) legitimate humour, drama or satire.

Broadcasting Standard 4 – Balance

[16] First, Mr Easton contended the Authority had misconstrued his complaint. The Authority had treated it as a complaint that BS4 had been breached, whereas Mr Easton's complaint was that the broadcast discriminated against men – a breach of BS7. Indeed, in response to a question I put to him, Mr Easton accepted that the

whole thrust of his appeal was that the Authority had wrongly interpreted his complaint as a breach of BS4 rather than BS7. Amplifying this, Mr Easton contended it was quite wrong for the Authority to "get the wrong standard", and then to "change the wording (of his complaint) to mitigate it". Mr Easton submitted that the gravamen of his complaint had simply not been considered by the Authority, and he sought, by way of remedy, a direction that the Authority re-determine his complaint as one of a breach of BS7.

[17] I do not think the Authority can be criticised for treating Mr Easton's complaint as one of a breach of BS4. Mr Easton quite properly conceded his complaint had not specified which broadcasting standard he maintained had been breached. If there is a lesson in this appeal for the future, it is that a complaint should specify the relevant standard or standards alleged to have been breached. Mr Easton's complaint posed the question whether, "in *balanced* journalism", Ms MacLennan should have been entitled, continually and directly, to "*discriminate* against men ..." (my emphasis). Certainly, the question mentions discrimination, but it primarily questions the balance of the broadcast. The highest I think Mr Easton can pitch this misinterpretation point is that his complaint was equivocal as to which standard or standards he alleged were breached.

[18] Responding to this point, Mr Tizard drew my attention to an e-mail Mr Easton sent RNZ on 26 March 2008. Mr Easton was responding to an e-mail he had received earlier that day from Mr Bignell, the Complaints Coordinator at RNZ. In his e-mail, Mr Bignell advised that RNZ had treated Mr Easton's complaint as alleging a breach of BS4. Mr Easton responded:

> Given that I do not have the time to better develop the complaint further, I ask that the Broadcasting Standards Authority accept the letter below, mistakes inclusive as my further rejection of their unbalanced broadcasting.
> ...

Mr Tizard pointed out that Mr Easton first referred specifically to BS7 in the memorandum he filed in this proceeding on 12 October 2009.

[19] For the reasons I have given, I do not accept Mr Easton's submission that the Authority wrongly construed his complaint, and I certainly do not accept that it

deliberately, wrongly construed his complaint. In short, the broadcast was not a discussion of a controversial issue of public importance which engaged BS4.

[20] For the reasons it explained in [12]-[13] of its decision, the Authority decided that BS4 did not apply to the broadcast. I agree with that, and for the reasons given by the Authority.

[21] In [14] of its decision, the Authority held that BS4 was not breached, even if it did apply. The Authority does not further explain other than to say:

> ... it was not necessary for either the interviewer or Ms MacLennan to expressly acknowledge that men could also be victims of domestic violence.

I guess that view followed from what the Authority had said in [13]:

> This was not a general discussion about domestic violence and who was responsible for it, but rather the views of one lawyer on the recommendations in the Ministry's review of the Domestic Violence Act.

[22] As I am guessing here, and as this is an inessential part of the Authority's decision, I will not deal with it in detail. But I record that I do not necessarily agree with the Authority. Fundamentally, the subject of the broadcast was the recommendations in the review for amendments to the Domestic Violence Act to improve its effectiveness. Ms MacLennan's comments conveyed that it was men who committed domestic violence. I reiterate, she consistently equated abusers with men, and victims with women and children. Contrary to the view that the Authority expressed in [15] of its decision, I consider Ms MacLennan did that, both when referring to her own experience, and in her general remarks. Here is one example (this is Ms MacLennan discussing developments since the Ministry's Report):

> [In] the Prime Minister's statement to Parliament she announced that ... the Government is going to provide additional funding for essential community services. So that should be a real help to Women's Refuge, which as we all know struggles terribly to fund refuges as well as dealing with all of the work they have to do... The addition funding will also mean that Stopping Violence Services can provide more programs to men. There is a huge problem at the moment because when ... there has been an incident and the police have been called, perhaps the man has been charged, ... that's the time when he is the most motivated to change, but if he goes seeking out a Stopping Violence Program himself he will have to pay for it.

[23] The Family Court Statistics in New Zealand in 2006 and 2007 indicate that that it is not accurate to equate the committers of domestic violence with men. It suffices to quote one section of the Statistics:

> *Gender*
>
> Table 2.18 shows the gender of parties to protection order applications in 2006 and 2007. As there was no difference in the proportions between 2006 and 2007 only one table has been drawn here. The proportions reported here show little or no difference to those reported for 2005, with a drop of less than a percent for applicants that were female.
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> **Table 2.18: Gender of parties to protection order applications in 2006 and 2007**

Year		Female (%)	Male (%)	More than one party (%)
2006	Applicants	91	8	1
	Respondents	9	90	1
2007	Applicants	91	8	1
	Respondents	9	90	1

> As shown in the table, around one percent of applications were made by more than one applicant, and around one percent of applications were made regarding more than one respondent.

Broadcasting Standard 7 – Discrimination

[24] As I have mentioned, Mr Easton contended the gist of his complaint was that RNZ breached BS7. Although I have rejected that, I deal briefly with Mr Easton's submission that the broadcast breached BS7. I do not accept it did. I agree with the Authority that the broadcast "simply gave information about the Ministry's review and offered the opinions of one lawyer based on her own experiences". I hold that the broadcast came squarely within Guideline 7a, in that it was factual (Ms MacLennan recounting in a factual way her professional experience), and involved Ms MacLennan commenting and offering her views on the Ministry's review in a genuine and serious way.

[25] Mr Easton referred to the Authority's function, in s 21(1)(e)(iv) of the Broadcasting Act, of encouraging the observance of a code of broadcasting practice which safeguarded against "the portrayal of persons in programmes in a manner that encourages ... discrimination against sections of the community on account of sex

...". That provision reflects the right to freedom from discrimination (including on the grounds of sex) guaranteed by s 19(1) New Zealand Bill of Rights Act 1990. Guideline 7a reflects another important right guaranteed by the New Zealand Bill of Rights Act:

> **14 Freedom of expression**
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> Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

[26] Let me draw this together. Ms Ryan interviewed Ms MacLennan, seeking her views on recommendations made in the Ministry of Justice's review of the effectiveness of the Domestic Violence Act. Ms MacLennan commented, and expressed her views, in a genuine and serious way, drawing on her professional experience. Certainly, she equated abusers with men and victims with women and children. She did not acknowledge that women were also domestically violent and/or that men were amongst the victims of that violence (presumably, some domestic violence is by women against women). I do not accept that that constituted RNZ "encouraging discrimination against ... any section of the community on account of sex".

[27] What occurred in the course of argument before me supports this view. I asked Mr Easton whether he accepted that Ms MacLennan inferred that most (as opposed to all) domestic violence was committed by men, which was the fact of the matter. Mr Easton responded that he was not saying Ms MacLennan should not be expressing her view, his complaint was that there was no counter to it. That reinforces two things. First, that the gravamen of Mr Easton's complaint was indeed that the broadcast lacked balance. Secondly, that Mr Easton really had to accept that the broadcast came within Guideline 7a, and that Ms MacLennan was entitled to express her view.

Result

[28] I have not accepted that the Authority misconstrued Mr Easton's complaint, as alleging a breach of BS4 rather than BS7.

[29] I have upheld the Authority's view that BS4 did not apply to the broadcast.

[30] I have held that there was no breach of BS7 (the Authority did not consider this point).

Costs

[31] Amongst Associate Judge Gendall's directions of 29 July 2008, was one that Mr Easton give security of $800 for the costs of his appeal, on the basis that 2B costs were appropriate for the appeal. Mr Easton paid that security on 7 August 2008, but on the same day applied to waive security for costs. Miller J dealt with that waiver application on 12 October 2009, and dismissed it.

[32] Mr Easton submitted that, if his appeal failed, there should be no order as to costs. He relied on the merits, and contended that "this is a matter in the public interest".

[33] I do not accept that this appeal should attract immunity from costs consequences. I do accept that Mr Easton brought his appeal as a man, and on behalf of other men, offended by Ms MacLennan's inference that only men commit domestic violence. But I do not accept that the appeal can be said to be in the public interest, in the way accepted, for example, by the Privy Council in *New Zealand Māori Council v Attorney-General* [1994] 1 NZLR 513 at 525-526. The Privy Council accepted that the Council's appeal had been brought "in the interest of taonga which is an important part of the heritage of New Zealand". For that reason, their Lordships considered it just that there should be no order as to the costs for the appeal to the Privy Council.

[34] Accordingly, I order that Mr Easton is to pay RNZ's costs of this appeal on the 2B basis already determined by Associate Judge Gendall.

Solicitors:
Oakley Moran, Wellington for Radio New Zealand