B Hackwell

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

AP212/00

01/1412

IN THE MATTER of the Broadcasting Act 1989

AND

IN THE MATTER of an appeal against the Decision of the Broadcasting Standards Authority Nos. 2000-121 dated 31st day of August 2000

BETWEEN KEVIN HACKWELL

Appellant

AND TELEVISION NEW ZEALAND

First Respondent

AND BROADCASTING STANDARDS AUTHORITY

Second Resnondent

Hearing: 5 September 200 1

Counsel: Appellant in person
W. Akel for Respondents

Judgment: 13 SEP 2001

JUDGMENT OF ELLIS J.

Solicitors:
Simpson Grierson, Auckland for Respondents

[1] An appeal against a decision of the Broadcasting Standards Authority dated 31 August 2000 in respect of an Assignment programme which examined government policy on defence matters and was broadcast on TV One on 4 May 2000 at 8.30pm. The appellant complained that the programme lacked balance and was therefore in breach of Broadcasting Standard G6, which requires that all programmes must "show balance, impartiality and fairness in dealing with political matters, current affairs, and all questions of a controversial nature". The respondent rejected that criticism and the appellant appealed to the Authority which determined the appeal on the papers and sitting as a panel of three rejected the appeal by a majority.

The programme

[2] The appellant provided a transcript of the programme and I have viewed it myself. The parties agree that the Authority made an acceptable summary of the programme:

> "The Authority accepts that the programme had a particular focus. In the context of the government's review of New Zealand's defence force, the introduction identified the programme's thesis as 'assess[ing] the threats, and examin[ing] the politicians' promises which will dictate our new defence posture'. It began by noting that troops were currently deployed in East Timor on a peacekeeping mission, but that in analysing the lessons learned from that involvement, what emerged was profound disagreement among politicians, defence analysts and military experts as to the future direction of defence policy. These divergent views included a select committee recommendation that New Zealand maintain 'a niche defence force in which a well equipped Army could undertake UN peacekeeping duties supported by a smaller Air Force and Navy', and defence analysts and military experts insisting that adequate funding be provided to ensure that New Zealand forces were properly equipped and retained at the present level.
>
> A variety of participants, including politicians, strategic analysts, defence force personnel and Australian commentators, were of the view that the government's proposed direction would have ramifications for New Zealand in its international relationships and serious implications for regional security and trade. The government's view was articulated by two politicians (the Deputy Prime Minister and Minister of Defence) who maintained that New Zealand's international obligations would be fulfilled by

concentrating on providing a well-equipped peacekeeping force. The point was also made by some of those presently in East Timor that peacekeeping should not be seen as a 'soft option'. The officer in charge of troops there explained that it was still necessary to be trained for combat and to 'have a fully professional focus' to be effective as peacekeepers. A defence analyst explained further that a small country such as New Zealand had a role to play in peacekeeping but should not underestimate what was involved and that defence spending had to be adequate.

The programme concluded with the observation that the troops then in East Timor supported retaining the balanced defence force, and that they considered this was a message the government could not ignore as it embarked on its review."

The approach to this appeal

[3] Section 18(4) of the Broadcasting Act 1989 requires this Court to hear and determine the appeal as if the decision appealed against has been made in the exercise of a discretion. The principles are well settled and I need only quote from the Judgment of Tipping J (for himself and Jaine J) in *Society for the Promotion of Community Standards Inc v Waverley International (1988) Ltd* [1993] 2NZLR 709, 716:

"There are various formulations in the cases of the proper approach for an appellate court to take when dealing with an appeal from a decision involving the exercise of a discretion. A helpful and succinct statement of the correct approach can be found in the decision of the Court of Appeal in *May* v *May* (1982) 1NZFLR 165. This was a matrimonial property case involving a discretionary decision below. McMullin J, who delivered the judgment of the court, emphasised that it was an appeal from a discretionary assessment and in relation to such an appeal said:

> 'An appellant must show that the Judge acted on a wrong principle; or that he failed to take into account some relevant matter or that he took account of some irrelevant matter or that he was plainly wrong.'

That in substance was the test adopted in this court in two previous appeals under section 19(2). . . .However, as the Court of Appeal held in *May,* it is preferable to frame the test as it relates to relevant considerations as being that no weight was given to them. To allow review when no 'sufficient' weight has been given to relevant

considerations invites the re-exercise of the discretion by the appellate court which is precisely what may not be done.

It must be stressed at the outset that an appeal such as this is not a general appeal by way of rehearing. Some of the appellant's submissions were framed on that basis but this court must be careful not to exceed the proper ambit of its powers. We are not entitled to exercise the jurisdiction of the tribunal de novo. This means that we are not entitled to substitute our own opinion of the various magazines for that of the tribunal."

And later at pages 725-6:

"At this point we should remind ourselves again that the task of the Court is not to review the tribunal's decision as if upon a general appeal. It is relatively uncommon for Parliament when giving rights of appeal expressly to state the nature of the appeal right. In this case it has done so in s19(2). In our judgment Parliament has deliberately limited the compass of the appeal because of the specialist nature of the Indecent Publications Tribunal and the fact that its members will undoubtedly accumulate over time a considerable amount of individual expertise arising out of their daily work and the evidence which they hear. For this reason Parliament has clearly indicated that this Court is not to substitute its own views of the subject material for those of the tribunal. An appellant seeking to suggest that the tribunal has been plainly wrong in its classification of material is therefore facing a significantly higher hurdle than an appellant in a general appeal."

The appellant's submissions

[4] The appellant's Notice of Appeal alleges breach of Standard G6 in a variety of ways including:

"a. Of the sixteen people interviewed during the programme only two, the deputy Prime Minister, and the Minister of Defence supported the change of policy. Their interviews were for a combined total of approximately 128 seconds. The remaining fourteen people, who were interviewed all strongly opposed the change in policy, were interviewed for approximately 840 seconds.

b. The vast majority of the programmes' remaining twenty six or so minutes of editorial comment was given over to strong

advocacy against the change of policy and for the retention of the previous 'balanced force' status quo.

c. Very little of the programme was given over to an analysis of the rationale behind the change in defence policy. This was spelt out after a year long review of defence policy by the 1999 parliamentary Defence and Foreign Affairs Select Committee in their report 'Defence Beyond 2000'."

[5] The appellant developed these in argument and submitted that the Authority erred in law by:

"a. not judging whether the programme met each of the components (balance, impartiality and fairness) of standard G6 of the Television Code of Broadcasting Practice.

b. failing to take into account a relevant consideration when it recorded its view that the amount of time given to different sides of an argument can not be used as one of the measures of balance.

c. failing to take into account relevant considerations put before it when finding that TVNZ did not breach standard G19 of the Television Code of Broadcasting Standards.

d. failing to separate the content of an independent complaint about the Assignment programme 'Threats and Promises' when making their decision on the appellant's complaint."

[6] As to (b), the Authority did say that the length of time given to the various contributors was not a means by which the balance can be measured. I agree with the appellant that this cannot be right as a general proposition as in some cases the length of time could be a very good index of balance. I agree too that in this case a disproportionate amount of time was given to the status quo, but in this case the question of balance was addressed on other grounds. This is captured by the passage in the decision expressly criticised by the appellant:

"With respect to the substantive issues, a majority of the Authority considers that the programme's parameters were clearly delineated and that it was indeed legitimate to examine the possible implications of a change to defence policy. Given that the defence review had not then been completed and the outcome was not known, the majority

does not agree that the programme was anti-government. On the basis that it was expected that some parts of the select committee's recommendations would be adopted, and the Prime Minister's known views on defence, the majority believes it **was** appropriate to consider the possible implications of a policy which might result in reducing the numbers of defence personnel, altering the disposition of resources and not maintaining spending on equipment and technology. It was made clear in the programme that even if the government chose to concentrate on its defence force in a peacekeeping role, it was still obliged to **make** a considerable investment in hardware and training for that role to be performed effectively. Taking these matters into account, the majority declines to uphold the complaint that standard G6 was breached."

[7] I should draw attention to Standard G20 which provides that no set formula can be advanced for the allocation of time to interested parties on controversial public issues and that broadcasters should aim to present all significant sides in as fair a way was possible, and that this can only be done by judging every case on its merits.

Discussion

[8] After viewing the programme just prior to the hearing of this appeal, my reaction was that the programme did lack balance as claimed by the appellant. However, my viewing was over 15 months after the broadcast, and while the controversy it covered is still with us, I am unable to assess the state of the political and public debate in May 2000. The opinion of the majority was that the refusal by the Prime Minister and other significant players in the debate to participate was clearly stated, which it was, and that in any event the Prime Minister's and the Government's position was well known following the release of the report of the Foreign Affairs, Defence and Trade Committee of Parliament entitled Inquiry into Defence Beyond 2000. The Authority comprises expert members closely in touch with the dissemination of information to the public and the impact of programmes on viewers. There was no evidence upon which this Court could assess this, apart from a copy of the report provided by Mr Hackwell. The programme gave the Deputy Prime Minister and the Minister of Defence opportunity to state the Government's position, their responses were brief but succinct, and they supported the conclusions

in the report. Notwithstanding the minority opinion and my own appreciation of the programme, this is just such a case where the expert views of the Authority must carry the day. Notwithstanding the error in overstating the lack of significance of time in the presentation, I consider the Authority took all significant matters into account and those overrode the substantial difference in time allocation calculated by the appellant.

Collateral matters

[9] The Authority determined the appellant's complaint and another complaint by a Mr Urlich. It did deal with them in a way that involved some overlapping, and the appellant objected to that. I am satisfied that this did not result in the Authority failing to deal properly with the appellant's claims.

[10] The appellant also submitted to the Authority that the programme breached Standard G19, which requires that care must be taken in the editing of programme material to ensure that the extracts used are a true reflection and not a distortion of the original event or the overall views expressed. There was no evidence as to what editing took place and Mr Hackwell did not press this submission further.

Conclusion

[11] For the above reasons, the appeal must be dismissed. There will be no award of costs.

Delivered at Cast on 13 / 2001.