

BEFORE THE BROADCASTING STANDARDS AUTHORITY

Decision No: ID1/91

Dated the 17th day of December 1991

IN THE MATTER of the Broadcasting Act 1989

AND

IN THE MATTER of a complaint by the

SOLICITOR-GENERAL

Broadcaster

CAPITAL FM LIMITED

Wellington

I.W. Gallaway Chairperson  
J.R. Morris  
R.A. Barraclough  
L.M. Dawson

INTERLOCUTORY DECISION

Introduction

In view of the interlocutory nature of this Decision, the following discussion deals with the procedural issues raised. It does not deal with the programmes complained about.

The Solicitor-General (Mr J.J. McGrath QC) in a letter dated 8 August 1991 complained to the broadcaster of More FM about items broadcast by that station on 17 and 24 July 1991 which, he said, were attempts to influence judicial decisions. Each item involved comment from a Mr Chris Gollins in a segment entitled More Report. Mr McGrath listed the standards in the Broadcasting Act 1989 and in the Radio Code of Broadcasting Practice which, he alleged, the items had breached.

The managing director of Capital FM Ltd (Mr Doug Gold) responded in a letter dated 20 August. Explaining that the items in question were comment programmes, he denied that the station had breached either the Broadcasting Act or the Radio Code of Broadcasting Practice.

In a response dated 13 September, Mr McGrath stated that Mr Gold's letter did not meet his concern that comments such as those broadcast on 17 and 24 July undermined the system of justice. He stated:

I do not however read your letter as formally rejecting my complaint and to that



end I should be pleased to receive your final decision.

A reply was made by the broadcaster's solicitors in a letter dated 3 October. It explained that the broadcaster had difficulty in distinguishing acceptable from unacceptable criticism, a difficulty which the solicitors shared, and it suggested the promulgation of appropriate guidelines by the Crown Law Office. The Crown Law Office's reply dated 8 October pointed out that it was not its role to issue guidelines and added:

I do not think I can usefully add anything further to the letter of 8 August and 13 September and the Solicitor-General awaits the broadcaster's decision on his complaint.

As a reply was not received, on 5 November the Crown Law Office advised the broadcaster's solicitors of the expiry of the 60 working day period prescribed in the Broadcasting Act for broadcasters to respond to formal complaints and stated its intention to refer the complaint to the Broadcasting Standards Authority if a substantive decision was not received within 14 days.

The reply from the broadcaster's solicitors was dated 18 November. It included the following comment:

2. As I discussed with you by telephone I have had some difficulty advising my client in respect of the complaints made by the Solicitor-General and am unable to provide you with any substantive decision.
3. However, as advised the complaints have resulted in several discussions with my client in respect of its obligations pursuant to the Broadcasting Act and the Code of Broadcasting Practice. The result of those discussions is that my client is now far more aware of its obligations in this area and will in future be seeking my advice prior to the broadcast of any matter involving the judiciary.

After receipt of this reply, Mr McGrath referred his complaint to the Broadcasting Standards Authority in a letter dated 20 November. He said in part:

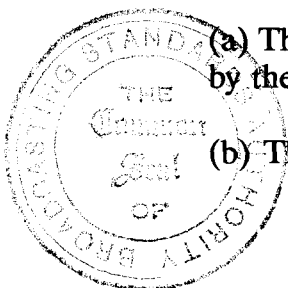
I am not satisfied with the final response which does not give a substantive decision on the complaint. Sixty working days from the receipt of the complaint have now elapsed and the matter is therefore referred to you pursuant to the Broadcasting Act 1989.

Section 8 of the Broadcasting act provides for reference of complaints to the Authority:

8. Subject to section 9 of the Act, where-

(a) The complainant ... is dissatisfied with the decision or the action taken by the broadcaster; or

(b) The broadcaster has not, within 60 working days after receiving the



complaint, notified the complainant of-

- (i) The decision of the broadcaster; or
- (ii) The action taken by the broadcaster in relation to the complaint;

...

the complainant may refer the complaint to the Authority.

Section 9 imposes time limits on the referral of complaints to the Authority:

9. (1) The Authority shall not accept a complaint referred to it under section 8(a) of this Act after the expiry of the period of 20 working days beginning with the first working day after the day on which the complainant received from the relevant broadcaster notice of its decision in relation to the complaint.
- (2) The Authority shall not accept a complaint referred to it under section 8(b) of this Act after the expiry of the period of 80 working days beginning with the first working day after the day on which the programme to which the complaint relates was broadcast.

In a letter dated 22 November, the Authority asked Mr McGrath to clarify whether the complaint was referred under s.8(a) or (b) of the Act because the correspondence suggested that the referral was made under s.8(b) and, if that was so, the time limit for the referral had expired.

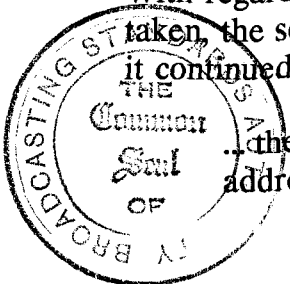
The Crown Law Office stated in a letter dated 26 November that the complaint was referred under s.8(a) of the Act on the basis that the broadcaster's solicitors' letter of 18 November was a substantive decision to reject the complaint. Further, and also under s.8(a), the referral was made as the Crown Law Office was not satisfied with the action the broadcaster had taken as a result of the complaint:

... there is an indication that the broadcaster proposes to take legal advice before making similar broadcasts in the future. There has, however, been no public acknowledgement by the broadcaster that the broadcasts in question were in breach of broadcasting standards.

As is its practice, the Authority sought the broadcaster's response and in a letter dated 5 December, the broadcaster's solicitors argued that the correspondence was entirely consistent with a referral under s.8(b). In particular, it said that its letter of 18 November did not give a decision on the complaint and it pointed out that Mr McGrath's letter referring the complaint to the Authority said that a "substantive decision on the complaint" had not been received.

With regard to the Crown Law Office's references to its dissatisfaction with the action taken, the solicitors noted that this had been raised for the first time in that letter and it continued:

... the general comments about taking legal advice in the future do not in any way address the complaint and are in lieu of any action taken. To be precise what we



are saying is that we did not understand the nature or substance of the complaint and therefore could not address it. However, given that concerns had been raised by the complainant we advised that care would be taken in the future.

The letter concluded by maintaining that the referral was clearly under s.8(b) and, as the time limit had expired, the Authority had no jurisdiction to hear the complaint.

### Decision

In a letter dated 26 November 1991, the Solicitor-General referred his complaint to the Broadcasting Standards Authority under s.8(a) of the Broadcasting Act 1989 on the basis that he was dissatisfied, first, with the broadcaster's decision, and secondly, with the broadcaster's action. The broadcaster's solicitors maintained that the earlier correspondence strongly suggested that the referral was made under s.8(b) as the broadcaster had not notified the complainant of its decision within 60 working days of receiving the complaint.

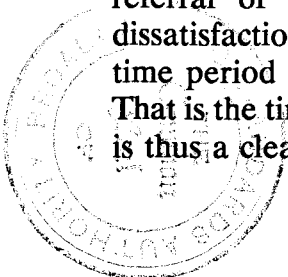
Section 9(1) imposes a limit of 20 working days for the referral of a decision under s.8(a). The Solicitor-General argued that the broadcaster's decision and its record of the action taken were contained in its letter of 18 November, received on 19 November, and referred to the Authority in its letter of 20 November and, accordingly, the referral of the complaint complied with the time limits in s.9(1). If the referral was made under s.8(a) and related to the contents of the broadcaster's solicitors' letter of 18 November (which the broadcaster disputes) there is no question that it was referred to the Authority within the statutory time limit.

Section 9(2) states that the Authority will not accept a referral under s.8(b) after the expiry of the period of 80 working days beginning with the first working day after the day on which the programme to which the complaint relates was broadcast. The Authority accepts that if (as the broadcaster maintains) the reference was made under s.8(b), the statutory time limit has expired and it may not accept the referral.

The first question the Authority considered was whether the broadcaster, in response to the complaint, had made a decision. Although, the broadcaster's initial letter of 20 August 1991 could well have been interpreted as conveying a decision by using the words:

In short, we do not believe that we have breached either the Broadcasting Act or the Code of Broadcasting Practice for radio,

the Solicitor-General specifically rejected that comment as a decision and the broadcaster's subsequent correspondence agreed that no substantive decision had been made. The Solicitor-General continued to seek a substantive response and, in his referral of the complaint to the Authority on 20 November, he expressed his dissatisfaction at having not received one at any time. In addition, he mentioned the time period of 60 working days in his letter referring the complaint to the Authority. That is the time given to broadcasters by s.8(b) in which to respond to a complainant and is thus a clear reference to s.8(b).



As the Solicitor-General, until his letter to the Authority of 26 November, argued that the broadcaster had not made a substantive decision, the Authority declines to accept that the referral of the complaint was made under s.8(a) on the grounds of the Solicitor-General's dissatisfaction with the broadcaster's decision. Further, insofar as the referral was made under s.8(b), the Authority declines to accept it as it is outside the time limit imposed by s.9(2).

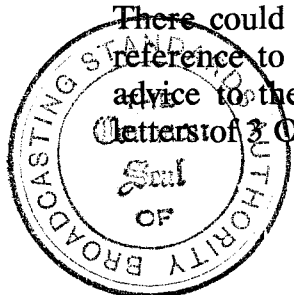
The second question considered by the Authority was whether the referral involved dissatisfaction with the broadcaster's action taken in respect of the complaint (s.8(a)).

In its letter of 20 August, the broadcaster proposed a discussion between its staff and Mr McGrath. That action was rejected by Mr McGrath on the basis that there were fundamental differences between the parties about the broadcaster's obligations. In a letter dated 30 October the broadcaster's solicitors, in view of the difficulties they were experiencing in advising their client on what was acceptable and unacceptable criticism of the judiciary and the judicial system, suggested that the Crown Law Office prepare and publish guidelines. That action was rejected by Mr McGrath as, he said, it was not his responsibility but that of the Broadcasting Standards Authority. In its letter of 18 November, the broadcaster's solicitors advised that the broadcaster would now be seeking legal advice before the broadcast of any matter involving the judiciary but they also advised that they were unable to provide any substantive decision.

In the Solicitor-General's letter of 20 November referring his complaint to the Authority, no mention was made of the complainant's dissatisfaction with the action taken by the broadcaster. Dissatisfaction with that action was first expressed in the Solicitor-General's letter of 26 November when he said there had been no public acknowledgement that the initial broadcasts breached the broadcasting standards. The broadcaster's solicitors, in their response of 5 December, remarked, first, that the point had been raised for the first time, and secondly, that the taking of legal advice in the future is "in lieu of any action taken" in response to the complaint. The Authority records that the failure to note an issue when first referring a complaint to the Authority does not disqualify a later reference to the issue. The Authority frequently requests clarification of the issues before determining a complaint.

In the Authority's view, the fact that the Solicitor-General first expressed dissatisfaction with the action taken by the broadcaster when it was apparent that reference of the complaint to the Broadcasting Standards Authority on any other ground was time-barred, should not disqualify the Authority from investigating and reviewing the complaint if there is merit in the Solicitor-General's (belated) argument. Accordingly, the Authority next considered whether the point first made to the complainant in the broadcaster's 18 November letter, i.e. that several discussions had occurred and that the broadcaster intended to seek legal advice in the future, was an "action taken" in response to the complaint.

There could be substance to the broadcaster's solicitors' submission that it was not a reference to "action taken" on the basis that they had experienced difficulty in giving advice to the broadcaster about criticising the judiciary - as they had noted in their letters of 3 October and 18 November. However, by the time of the latter letter, those



difficulties seem to have been solved, at least to some extent, as it was stated that "in future" the broadcaster would be seeking legal advice on matters involving the judiciary.

Taking a commonsense and equitable approach to the interpretation of the "action taken by the broadcaster" "in respect of a complaint" (both phrases from s.8(a)), the refusal to provide a substantive decision and the procedure which the broadcaster said was put in place for the future, the Authority concludes that the referral of the complaint complies with the requirements of ss.8(a) and 9(1). Thus the Authority is satisfied that the broadcaster's undertaking to seek legal advice in the future was an action taken in respect of the Solicitor-General's complaint and that the Solicitor-General's subsequent referral of his complaint to the Authority was based in some part upon his dissatisfaction with that action. Since the time limit set by s.9(1) for references to the Authority of complaints under s.8(a) had not expired at the time the reference was made, the Authority considers that it has jurisdiction to investigate and review the Solicitor-General's complaint.

**Accordingly, for the reasons set forth above, the Authority accepts the referral of the complaint from the Solicitor-General about broadcasts by Capital FM Ltd on More FM on 17 and 24 July 1991 under s.8(a) of the Broadcasting Act 1989 in that the Solicitor-General is dissatisfied with the action taken by the broadcaster.**

Signed for and on behalf of the Authority

  
Iain Gallaway  
Chairperson



17 December 1991