

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

**CIV-2017-485-7
[2017] NZHC 1130**

UNDER section 18 of the Broadcasting Act 1989
IN THE MATTER of an appeal from a decision of the
Broadcasting Standards Authority
(No 2016-072 dated 2 December 2016)
BETWEEN ARCHIBALD NORMAN LOWES
Appellant
AND MEDIAWORKS TV LIMITED
Respondent

Hearing: 17 May 2017

Counsel: A N Lowes in Person
T E G Turton for Respondent
A E Scott-Howman and N L Hickman for Broadcasting
Standards Authority

Judgment: 29 May 2017

JUDGMENT OF THOMAS J

Introduction

[1] Mr Lowes made a formal complaint to MediaWorks TV Limited (MediaWorks) following an item on TV3's *Paul Henry* on 4 July 2016, Independence Day of the United States of America (the United States). His concern was that Mr Henry, in his interview with Mr Gilbert, then the United States Ambassador to New Zealand, referred to the United States having claimed independence in 1776 "from England". A little later in the interview, Mr Henry referred to a comment the Rt Hon Margaret Thatcher had made when she was the "Prime Minister of England". Both comments were inaccurate. The United States obtained independence from Great Britain. Mrs Thatcher was the Prime Minister of

the United Kingdom of Great Britain and Northern Ireland (the United Kingdom). Mr Lowes views both matters as being of constitutional importance. His complaint to MediaWorks was on the grounds of accuracy and discrimination and denigration.

[2] The MediaWorks Standards Committee (the Committee) accepted the inaccuracies but considered they were made in the context of framing Mr Henry's discussion with the United States Ambassador about the celebration of Independence Day. On that basis, the Committee considered the inaccuracies were immaterial in the context of the item.

[3] The Committee considered the errors were genuine and not intended to discriminate against or denigrate the reputation of a class of people. For those reasons, the Committee declined to uphold Mr Lowes' complaint.

[4] Mr Lowes then complained to the Broadcasting Standards Authority (the BSA). By its decision dated 2 December 2016 (the Decision), the BSA did not uphold the complaint.¹ Mr Lowes has now appealed against the Decision.

Approach to appeal

[5] Pursuant to s 18(4) of the Broadcasting Act 1989 (the Act), this Court must treat Mr Lowes' appeal as one from the exercise of a discretion. This means the Court must be satisfied the BSA, as decisionmaker, made an error of principle, failed to take into account all relevant matters, took into account irrelevant matters or was plainly wrong.²

The interview

[6] The complaint concerns Mr Henry's introduction of Mr Gilbert, when Mr Henry began by saying:

The year was 1776, the 4th of July and the United States just claimed its independence from England. Every year since Americans celebrate the historic event like no other citizens celebrate anything at all, it is the most extraordinary thing if you've ever been there on the 4th of July. So what

¹ *Lowes v MediaWorks TV Ltd* Decision No 2016-072, 2 December 2016.

² *May v May* (1982) 1 NZFLR 165 (CA) at 169-170.

better way to celebrate than to talk to the US Ambassador to New Zealand Mark Gilbert. Mark, good morning to you, and happy celebrations.

[7] After Mr Gilbert returned the greeting, Mr Henry continued:

You know I've been reminded of a quote that Margaret Thatcher made many, many years ago when she was the Prime Minister of England, she said "Europe was great by history, the United States was created by philosophy". And that was very must true, wasn't it?

[8] Mr Gilbert responded by referring to the recognition in the Declaration of Independence of all men being equal, saying that remained important to Americans 240 years later. And there was some further discussion on that topic.

[9] Mr Henry then asked how Mr Gilbert and other expatriate Americans celebrated Independence Day. Mr Gilbert described celebrations at the Embassy and events in Auckland and Wellington, noting the celebrations in 2016 included a celebration of 100 years of the National Park Service. Some discussion on that ensued.

[10] Mr Henry then commented about the level of patriotism in the United States and why it might be so. Mr Gilbert discussed the context of the Declaration of Independence and the seriousness with which Americans viewed those inalienable rights. The links between the United States and New Zealand were also discussed. The interview concluded with Mr Henry making a light hearted comment about his attempts to obtain a green card.

[11] It is fair to say there was no extensive examination of any of the range of topics covered in the interview. The interview lasted slightly longer than four minutes.

Broadcasting Standards in New Zealand Codebook

[12] The Act requires broadcasters to maintain programmes and their presentation to standards which are consistent with a range of matters including any applicable approved code of broadcasting practice.³

³ Broadcasting Act 1989, s 4.

[13] One of the functions of the BSA is to encourage the development and observance by broadcasters of codes of broadcasting practice in relation to, amongst other things, fair and accurate programmes and procedures for correcting factual errors and redressing unfairness.⁴ The BSA is to develop, issue and approve such codes of practice.⁵

[14] The April 2016 Broadcasting Standards in New Zealand Codebook is the current code of practice. It sets out codes for each broadcasting platform: radio, free to air television, and pay television. It describes the standards as the basic rules which apply, with guidelines informing the interpretation. It says:⁶

In relation to each code, this Codebook sets out the standards and guidelines, and elaborates on these in the commentary. It is the wording of the standard and its objectives which are paramount when determining whether the standard has been breached. Guidelines and commentary inform the interpretation of the standard. They will allow flexibility in application and interpretation if circumstances or context require.

[15] Two standards applying to free to air television are relevant in this case. Standard 6, which falls under Part 1 relating to social responsibilities, provides:⁷

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.

[16] Standard 9, which falls under Part 2 relating to information broadcast, provides:⁸

Broadcasters should make reasonable efforts to ensure that news, current affairs and factual programming:

- is accurate in relation to all material points of fact
- does not mislead.

[17] Each standard is followed by guidelines.

⁴ Section 21(1)(e).

⁵ Section 21(1)(f) and (g).

⁶ Broadcasting Standards Authority *Broadcasting Standards in New Zealand Codebook* (1 April 2016) at 8.

⁷ At 37.

⁸ At 39.

The Decision

[18] The BSA began by assessing the complaint relating to Standard 9, noting the objective was to protect audiences from being significantly misinformed.

[19] The BSA observed the accuracy standard is concerned only with material accuracy and unimportant points unlikely to affect the audience's understanding of the programme as a whole are not material.⁹

[20] The BSA noted MediaWorks had acknowledged Mr Henry's error. The BSA observed it would have expected a greater degree of care on this topic from the broadcaster but nevertheless agreed it was not material in the context, saying:¹⁰

... This was a light-hearted item concerned primarily with how Americans, including expats such as the Ambassador, celebrate Independence Day. The item was not focused on the historic detail of America's independence, and Mr Henry's comments simply provided background context for the brief and general discussion. Viewers would not have been misled by Mr Henry's imprecise remark, and would have appreciated his intended meaning. The point being made was not lost.

[21] The BSA then addressed the complaint relating to Standard 6 that the broadcast encouraged the denigration of or discrimination against people of the United Kingdom who were not English as a section of the community. The BSA noted the objective of the standard is to protect sections of the community from verbal and other attacks. It referred to Mr Lowes' submission that the comments at issue suggested "the class of people having the particular attribute of being English are superior beings" and amounted to "virtual ethnic cleansing" of others in the United Kingdom who were not English.

[22] Again, the BSA observed that the comments at issue amounted to careless errors but agreed there was no suggestion Mr Henry intended to denigrate or discriminate against the people of the United Kingdom who were not English, saying:¹¹

⁹ Guideline 9(b).

¹⁰ *Lowes v MediaWorks TV Ltd*, above n 1, at [9].

¹¹ At [14].

... Mr Henry's comments were intended to provide a brief and thought-provoking context to his interview with the Ambassador, and did not carry the level of condemnation required to find a breach under the standard.

Mr Lowes' appeal

[23] Mr Lowes presented several "issues" with the BSA's decision. In relation to Standard 9, Mr Lowes contended the BSA:

- (a) acted on a wrong principle when it considered Mr Henry's errors were material;
- (b) failed to take into account relevant matters of constitutionality;
- (c) took into account irrelevant matters, namely the "Prime Minister of England" is commonly used; and
- (d) was plainly wrong in its decision.

[24] In relation to Standard 6, Mr Lowe submitted the BSA:

- (a) acted on a wrong principle when it considered Mr Henry had no intention to denigrate or discriminate;
- (b) failed to take into account the International Federation of Journalists' Declaration of Principles on the Conduct of Journalists (the Journalists' Principles); and
- (c) was plainly wrong in its decision.

Analysis

[25] In respect of the complained breach of the accuracy standard, the issue is whether the BSA erred in its conclusion the inaccuracy was not material in context.

[26] It is clear the BSA considered relevant matters before it, including Mr Lowes' original complaint and subsequent correspondence to the Committee and his referral

to the BSA. Mr Lowes' documentation included material relevant to the United Kingdom's constitutional status and that of Mrs Thatcher when she was Prime Minister of the United Kingdom.

[27] There is nothing to suggest that the Authority failed to consider relevant matters.

[28] In respect of the question as to whether the BSA considered irrelevant matters, Mr Lowes referred to the BSA's comment:¹²

Viewers would not have been misled by Mr Henry's imprecise remark and would have appreciated his intended meaning. The point being made was not lost.

[29] While the BSA might be correct that, despite Mr Henry's imprecision, viewers would have appreciated his intended meaning, his comments also had the potential to reinforce what might be a common misunderstanding. I make this observation given the objective of the standard is to protect audiences from being significantly misinformed. The Decision, however, did not indicate the BSA had a specific view on common usage which was improperly taken into account.

[30] There was no error in principle in the BSA considering the materiality of Mr Henry's statements under both limbs of Standard 9.¹³ I consider materiality under the wider question of whether the BSA was plainly wrong.

[31] Mr Lowes contended Mr Henry's statements involved material inaccuracy due to the constitutional relevance of using the correct terminology. The point, however, is the materiality of the inaccuracy *in its context*.¹⁴

[32] Mr Turton, who appeared for MediaWorks, pointed out that *Paul Henry* was a programme broadcast during the morning television timeslot. It was light hearted and irreverent, he said, combining news and lighter items but there was no real depth or detail in the coverage of many matters. He emphasised that the whole of the interview in question was only around four minutes long.

¹² At [9].

¹³ *McDonald v Television New Zealand Ltd* [2012] NZHC 1030 at [25] and [27].

¹⁴ Guideline 9b.

[33] While that may be the case, the need for accuracy is more important in a programme which includes news items than for example in a purely entertainment focused broadcast. Mr Henry's remarks were made in the introductory section of the interview, and it is reasonable to expect the introduction, which provides the platform for the interview, to be accurate. It is true, however, that the interview was not about independence of the United States as such, rather it was about Independence Day: how it is celebrated, the principles associated with the Declaration of Independence and their enduring importance to the people of the United States. There were also, as noted above, other matters touched upon in what was a very brief interview.

[34] Seen in context, therefore, I am satisfied the BSA was not plainly wrong in its conclusion that the inaccuracy was not material in the context.

[35] As to whether the broadcast discriminated against or denigrated those subjects of the United Kingdom who are not English, there was no error in the BSA's approach.

[36] The BSA did not make an error of principle, accurately noting the objective of Standard 6 and level of condemnation required. The BSA was under no obligation to consider any of the Journalists' Principles, particularly Principle 7,¹⁵ which in any event does not state a lower threshold for discrimination than that applied. Any denigration or discrimination could only have been inferential and there is nothing in the interview which, even by inference, could be considered as encouraging the different treatment of members of a particular section of the community to their detriment or devaluing the reputation of a particular section of the community.

Conclusion

[37] For these reasons, the appeal is dismissed.

¹⁵ International Federation of Journalists *Declaration of Principles on the Conduct of Journalists* (1954), Principle 7: "The journalist shall be aware of the danger of discrimination being furthered by the media, and shall do the utmost to avoid facilitating such discrimination based on, among other things... political or other opinions, and national or social origins". Mr Lowes also referred to Principle 1 and Principle 5.

[38] As to the question of costs, it is worth noting that MediaWorks has issued new guidance to journalists as to how they refer to the United Kingdom and Great Britain to ensure the mistake will not be repeated. Mr Lowes acknowledged that, although pointed out a similar error in a recent news broadcast on TV3.

[39] I refer to this, given Mr Turton's acknowledgement that MediaWorks does value the role viewers play in drawing attention to mistakes and inaccuracies.

[40] In all the circumstances, MediaWorks might well consider costs should lie where they fall.

[41] Finally, I thank Mr Scott-Howman for his attendance on behalf of the BSA and the assistance he offered the Court.

A handwritten signature in black ink, appearing to be 'Thomas J', with a long horizontal line extending to the right.

Thomas J