IN THE HIGH COURT OF NEW ZEALAND AP 138/01
AUCKLAND REGISTRY

545

IN THE MATTER OF	The Broadcasting Act 1989
IN THE MATTER OF	An appeal from a decision of the Broadcasting Standards Authority
BETWEEN	**MICHAEL HOOKER**
	Appellant
A N D	**TELEVISION NEW ZEALAND LTD**
	Respondent
	(the "Banzai" appeal)

AP SW 6/02

BETWEEN	**MICHAEL HOOKER**
	Appellant
A N D	**TELEVISION NEW ZEALAND LTD**
	Respondent
	(the "Stripsearch" appeal)
Hearing	**11 June 2002**
Appearances	**Appellant in person** **W Akel and Ms Charlotte Fox for respondent**
Judgment	**13 June 2002**

JUDGMENT OF SMELLIE J

Copies to
M Hooker, 7 Rodney Street, Howick
Simpson Grierson, Private Bag 92-518, Wellesley Street, Auckland

Introduction

[1] This judgment deals with two appeals from the Broadcasting Standards Authority. Both were brought by the appellant who appears in person. There are some common features to both. But there was no order for consolidation and I propose to deal with them separately.

Stripsearch: Introduction

[2] This was a serial presentation in seven episodes. An Australian impresario travels to New Zealand looking for male strippers who are sufficiently sophisticated and stylish to be included in a group to perform to fairly exacting standards.

[3] In the four episodes complained of, auditions of male strippers are recorded. One or two were sufficiently stylish, others were described by the impresario as "sleazy" and not what he was looking for.

[4] The clips from the episodes which Mr Hooker, the appellant, asked me to view, show rear views of near nude male strippers. There is a brief shot of one (unsuccessful) contender who finished his sequence nude and was seen briefly covering (if not clutching) his genitals in his left hand.

Stripsearch: The complaint

[5] The Broadcasting Act 1989 provides for the establishment, under the supervision of the Broadcasting Standards Authority, of certain codes. The "Free-To-Air" Programme Code is one such. It provides, inter alia, for the following classifications:

Stripsearch: Broadcasting Standards Authority's decision

[9] The Authority elected to deal with the complaint without holding a formal hearing. Exercising the opportunity secured to him by the Act (section 10(1)(a)) in such circumstances, Mr Hooker filed further submissions. In them he sought to expand the original complaint to include alleged breaches of two other standards, namely G2 and G12. G2 requires the broadcaster to give consideration to currently accepted norms of decency and taste, and G12 requires consideration to be given to the effect the programme may have upon children

[10] While section 10(1)(b) requires the Authority to have regard to "relevant submissions made" all submissions are required by subsection (1)(b) to be relevant "to the complaint". The appellant argued that section 10(1) in its entirety enabled him to introduce allegations of breaches in respect of G2 and G12 before the tribunal. I hold, however, that the correct construction of section 10(1)(a) and (b) restricts the Authority's jurisdiction to a consideration of the original complaint. Without specifically saying so, the Authority proceeded on that basis.

[11] The decision (which also dealt with one or two other complaints from other viewers), whilst setting out all the circumstances in considerable detail, is commendably succinct when expressing its conclusions in respect of the Hooker complaint. They are contained in two paragraphs which are to be found on page 12 of the decision and read as follows:

> [62] The first task of the Authority is to determine the complaints under standard G8. That standard requires broadcasters to abide by the classification codes and their appropriate time bands. Mr Hooker and... complained that the entire series should have been classified AO and should not have been screened before 8.30 pm... .
>
> [63] In relation to the first six episodes which were rated PGR, the Authority considers the broadcaster has only narrowly avoided breaching standard G8. The Authority doubts that a series such as Stripsearch is one where parents could realistically be expected to sit down with, and guide, their children. It accepts, however, that the first six episodes would not necessarily have been unsuitable for younger viewers under the guidance of an adult. Accordingly, the Authority declines to uphold the aspect of the complaints that the broadcaster breached standard G8 when it classified the first six episodes PGR.

Stripsearch: The appeal to this Court

[12] The Court's jurisdiction in respect of the appeal is established by section 18(4) of the Act which reads as follows:

> The Court shall hear and determine the appeal as if the decision or order appealed against had been made in the exercise of a discretion.

[13] That subsection has been the subject of comment and interpretation in various decisions which counsel for the respondent helpfully set out in their submissions. I do not propose to cite all of them but three quotes clearly establish the position.

[14] The first is from the decision of Eichelbaum CJ in *TV3 Network Services v BSA* [1995] 2 NZLR 720 at 727 where the judgment reads:

> Under s18 of the Act there is a right of appeal to this Court. The section provides that the Court is to deal with the appeal as if the decision appealed against had been made in the exercise of a discretion. This means the appellant needs to show the Authority based its conclusion on some error of principle (including an error of law, for example an error in the interpretation of the statute) that it took irrelevant considerations into account or failed to consider appropriate ones, or was plainly wrong. **What the Court is not allowed to do is simply substitute its own view for the Authority's.**
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> (emphasis added)

[15] The second is from the judgment of McKay J in the Court of Appeal in *Comalco New Zealand Ltd v The Broadcasting Standards Authority & Anor* (1995) 9 PRNZ 153, 161-162:

> Section 18(4) of the Broadcasting Act requires the Court to hear and determine an appeal 'as if the decision or order appealed against had been made in the exercise of a discretion.' This means that the appeal should only be allowed if the Authority has proceeded on a wrong principle, given undue weight to some factor or insufficient weight to another, or is plainly wrong, *Fitzgerald v Beattie* (1976) 1 NZLR 728, 730 (CA).

[16] The third is from the judgment of Tipping J, discussing comparable legislation, in *Society for Promotion of Community Standards Inc v Waverley International (1988) Ltd* [1993] 2 NZLR 709 at 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 s 19(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.

[17] On appeal Mr Hooker again sought to expand the ambit of the argument. But as I pointed out during the course of the hearing, the Court's jurisdiction is confined to the well established rules articulated in the passages from the judgments set out above.

[18] The grounds of appeal in the submissions filed before the fixture and relied upon during the hearing, ranged far and wide and well beyond what could be allowed. The only legitimate issue, (stemming from the basis on which the original complaint was laid), was whether the episodes complained of should have been classified AO rather than PGR. On that issue the appellant's contention was that male stripping, (even if intended to be artistic and entertaining), is clearly an adult theme. On that basis it was contended that the Authority's decision was plainly wrong.

Stripsearch: TVNZ's response

[19] For the respondent, counsel emphasised the limited grounds upon which the Court could interfere. The clear intention of Parliament is that the Broadcasting Standards Authority should be the arbiter and that its decision should not be

interfered with unless it could be demonstrated that its discretion had been exercised incorrectly. Further, that the decision itself showed clearly that the Authority had carefully considered the matter and recognised that the episodes complained of were close to the borderline between PGR and AO. Nonetheless, counsel argued, as no error had been disclosed, there was no basis upon which the Court could interfere.

Stripsearch: decision

[20] I am not persuaded that the Authority's decision was plainly wrong or open to attack on any other basis. The decision of a specialised tribunal which Parliament has set up to make decisions on programme specification is to be respected. The Chairman of the tribunal and other members have had a wide experience and are better qualified than the Court to arbitrate on such matters.

[21] It would not be right for me to substitute my own view as to what the classification should have been.

[22] The appeal is dismissed.

Stripsearch: costs

[23] Section 16(2) provides:

> No award of costs hall be made under subsection (1) of this section against the complainant unless –
>
> > (a) In the opinion of the Authority, the complaint is frivolous or vexatious or one that ought not to have been made;... .

[24] Although the provision refers to the "Authority" the same approach is appropriate for the Court. This clearly was not a frivolous or vexatious complaint. The case was borderline as the Authority acknowledged. Accordingly there will be no order for costs against the unsuccessful appellant.

Banzai: Introduction

[25] Banzai is said by TVNZ to be a new generation British comedy series aimed at a young adult audience "which tends towards the anarchic and the rebellious" and which shows particular interest in television programmes that explore new territory. Mr Hooker complained about an episode which was broadcast on TV2 at 10 past 10 pm on 4 August 2001. The Court viewed the portion of the episode in question. In its letter of response to Mr Hooker on 10 September 2001 TVNZ described the portion as follows:

> You objected to a sequence in which imaginary punters were invited to place their bets on which of a group of young men wearing their underpants did not have something stuffed down the front to enhance the bulge. At the end the winner was shown and there was a shot in which the camera panned up from the man's penis to his face.

[26] On this occasion Mr Hooker's complaint was based upon general programme standard G2 which reads as follows:

> **G2** To take into consideration currently accepted norms of decency and taste in language and behaviour, bearing in mind the context in which any language or behaviour occurs.

[27] Mr Hooker's complaint was rather discursive but in essence he contended that the showing of the contestant's penis offended current norms of decency and taste and he also complained that there was no warning given in programme information published in newspapers and magazine but acknowledged that may have been because of a last minute replacement of an earlier advertised programme which for some reason could not proceed.

Banzai: TVNZ's response

[28] Having indicated the nature of the programme as described above and noted the hour at which it was shown, TVNZ relied on those matters plus the classification certificate, the presence of a warning and the anticipated audience. The rating of the programme was AO and it carried the warning "This programme on Two contains

scenes that may offend some people." The caption displaying the warning also carried the AO symbol and was repeated after each commercial break. Having elaborated on those matters TVNZ concluded:

> Taking all these contextual factors into account, the committee took the view that the programme would not have strayed beyond the expectations of its audience and would not be regarded by the audience as moving outside 'currently accepted norms of decency and taste'.

[29] Mr Hooker, being dissatisfied with that response, exercised his right pursuant to section 7(3) of the Broadcasting Act to refer the matter to the Broadcasting Standards Authority.

Banzai: the Broadcasting Standards Authority's decision

[30] The Authority followed the correct procedure and gave both Mr Hooker and TVNZ an opportunity to file further submissions. The submissions filed were not extensive, both sides relying upon the substance of what had been said in the original exchange. In summarising Mr Hooker's referral to the Authority the decision under appeal at paragraph 13 said:

> Mr Hooker's Referral to the Authority
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> [13] In his referral to the Authority, Mr Hooker submitted:
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> - The acceptability of the material he complained about was "totally unaffected by whether or not the comedy was experimental:
> - Although "the camera angle was reasonably static and the duration was reasonably short", the scene was "extremely graphic"
> - The joke "would have been no less effective if the penis had not been shown and as such was shown solely to titillate"
> - TVNZ's claim that "only a particular class of [young adult] viewers were confronted by the genitalia must be treated cautiously", as
>
> ...the prevalence of remote controls and the propensity of viewers to surf the channels, particularly during ad breaks, [means that] the

category of viewers of any given channel at any given time is extremely fluid

- "when assessing material under standard G2 the expectations of the audience should not be taken into account", as this would elevate "the rights of a minority...above the rights of all New Zealanders"

[31] In summarising TVNZ's response the Authority recorded as follows:

> TVNZ's response to the Authority
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> [14] TVNZ disagreed with Mr Hooker's assertion that the joke "would have been no less effective if the penis had not been shown". It considered that in the context of the programme, "the joke would have been virtually impossible without the penis being shown".

[32] In its determination the Authority commenced by identifying its task, namely, to decide whether the episodes breached the norms of good taste and decency observing that "the context is relevant, but not decisive,... ." The core of the Authority's determination, however, is to be found in paragraphs 16 and 17 of the same which read as follows:

> [16] The Authority considers that the relevant contextual factors include the fact that the broadcast was a comedy programme aimed at a young adult audience, which was screened at 10.10pm during AO time and was accompanied by warnings both before and during the broadcast. The Authority also considers it relevant that the material about which Mr Hooker complained was a single, and relatively brief, static shot.
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> [17] The Authority notes that the image of a naked penis which was screened was not something that viewers would normally expect to be confronted with, and was at the outer limits of acceptability for broadcast on free-to-air television at any time. However, taking into account the contextual matters referred to in the above paragraph, the Authority concludes that standard G3 was not breached.

Banzai: the appellant's submissions

[33] These were extensive and detailed. They were advanced under the following headings.

1. The Authority has failed to take into account that the genitalia had no contextual relevance.

2. The Authority has taken the expectations of the audience into account which is an irrelevant factor.

3. The Authority has taken the comedy format of the programme into account which is an irrelevant factor.

4. The Authority has placed undue weight on the time of the broadcast.

5. The Authority has placed undue weight on the fact that the programme was accompanied by warnings both before and during the broadcast.

6. The decision of the Authority was plainly wrong.

[34] Finally, on this appeal, the Court was again asked to go outside its jurisdiction and set aside the decision of the Authority and substitute its own decision that Banzai did breach G2 of the codes of practice.

Banzai: the respondent's submissions

[35] Counsel for TVNZ reiterated submissions made in the Stripsearch case regarding section 18(4) of the Act and the correct approach for the Court, given that the appeal is brought against the exercise of a discretion. The expertise of the tribunal was again emphasised, especially the words of Tipping J in the *Waverley International* appeal set out in the Stripsearch decision above to the effect that Parliament had "deliberately limited the compass of the appeal because of the specialist nature of the ... 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 they hear."

[36] Those submissions apply to points 1, 2 and 3 in the appellant's submissions. So far as points 4 and 5 are concerned, counsel for TVNZ emphasised that the Court should not get into the issue as to whether or not the right amount of weight had been given to any particular aspect. Relying again on the decision of Tipping J in *Waverley International* counsel cited from the decision at page 716 where it was said "to allow review when no 'sufficient' weight has been given to relevant considerations invites the re-exercise of the discretion by the appellant Court which is precisely what may not be done." It was submitted that provided the Court was satisfied that the Authority had taken into account the time of the broadcast (Mr Hooker's point 4) and the warnings both before and during the broadcast (Mr Hooker's fifth point) it was not appropriate for it to then get into the issue as to whether or not "undue weight" had been placed on those factors.

[37] Counsel also addressed the appellant's contention that the Act and not programme standard G2 requires the observance of good taste and decency. Mr Hooker had drawn attention to the provisions of section 4(1)(a) which read as follows:

> PART 1
>
> PROGRAMME STANDARDS
>
> 4. **Responsibility of broadcasters for programme standards** – (1) Every broadcaster is responsible for maintaining in its programmes and their presentation, standards which are consistent with –
>
> (a) The observance of good taste and decency; ....

[38] Mr Akel emphasised the requirement to observe good taste and decency is qualified by the words "in its programmes and their presentation". That qualification, he submitted, is recognised in G2 by the words "bearing in mind the context in which any language or behaviour occurs".

Banzai: decision

[39] First, it is clear that I may not substitute my own opinion as to whether the G2 standard was breached. I accept the submissions of counsel for the respondent

that the Authority was entitled to conclude that the showing of the penis had a contextual relevance and that audience expectation and the comedy format was relevant. Similarly, I accept it is not this Court's function on appeal to attach a different weighting to the timing of the programme and the warnings which accompanied it.

[40] The Authority acknowledged that the naked penis image "was at the outer limits of acceptability for broadcast on free-to-air television at any time". The appellant asks the Court to say that that conclusion was plainly wrong and that the result should have been that it was beyond the limits of acceptability. I am guided in this by the words of McGechan J in *Television New Zealand Ltd v Ministry of Agriculture* (AP 89/95, unreported, Wellington, 13 February 1997) where the learned Judge said:

> Was the Authority's decision 'plainly wrong'? The word 'plainly' means what it says: not 'arguably wrong' or 'debatable' or even 'not the decision I would have reached myself', but plainly in error. That is an exacting requirment.

[41] One other issue should also be mentioned. The appellant also took issue with the Authority's decision to prefer an interpretation of G2 that it saw as being consistent with the Bill of Rights. The argument advanced was that the Bill of Rights did not affect the provisions of the Broadcasting Act and should not have been taken into account. That submission was based upon sections 4 and 5 of the New Zealand Bill of Rights Act 1999 which provide that other enactments are not overridden and that the rights and freedoms contained in the Bill of Rights are to be subject to reasonable limits prescribed by law. There is no basis for concluding that the Broadcasting Standards Authority ignored sections 4 and 5 of the New Zealand Bill of Rights. Clearly, however, the Authority bore in mind and applied section 6 of the Act which provides as follows:

> **6. Interpretation consistent with Bill of Rights to be preferred –** Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, this meaning shall be preferred to any other meaning.

Specifically, the Authority referred to section 14 of the Bill of Rights dealing with freedom of expression, holding that in their view to "find a breach of standard G2 would be to interpret the Broadcasting Act 1989 in such a way as to place too great a limit on the broadcaster's statutory freedom of expression... ." In my judgment that conclusion was in accordance with the provisions of the Bill of Rights and not open to objection.

[42] In all the circumstances and paying due deference to the expertise of the Broadcasting Standards Authority I reach the firm conclusion that the appeal must be dismissed.

[43] Again, however, the matter was borderline and the appeal could not be described as frivolous or vexatious. Accordingly there will be no award of costs.

Robert Smellie J.

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R Smellie J

13/6/02

Delivered at Auckland this 13th day of June 2002 at am/pm