

## DECISION

THIS allegation pursuant to section 950(1)(a) of the Broadcasting Act 1976 is that from 8 November 1983 the Broadcasting Corporation of New Zealand ("BCNZ") breached the condition of its warrants for stations 1ZM, 2ZM, and 3ZM which required the programming of those stations between midnight and 6 a.m. to "be directed predominantly towards minority modern music interests". The complainants say that while the music being played was modern, the requirement that it should have minority rather than mass appeal, was ignored. The complaint was heard by the Broadcasting Complaints Committee (Decision 1/84) which in its report has referred the matter to this Tribunal for consideration and decision.

The background to this matter is as follows.

The BCNZ applied for an extension to its warrants for 1ZM, 2ZM and 3ZM to enable broadcasting to take place for a full 24 hours a day—previously they had broadcast 18 hours a day from 6 a.m. to midnight. The Tribunal, by its decision of 29 May 1980, granted the warrants applied for on the condition mentioned above, and accordingly Radio New Zealand ("RNZ") began to broadcast between midnight and 6 a.m. the ZM All Night programme called the "ZM Allnighter".

The complainants, Mr Jenkin and Mr Congdon, were engaged on contract by RNZ to present this programme. The relationship between RNZ and the presenters became strained because, among other reasons, RNZ was unhappy with the kind of music they were playing on the "Allnighter". As a result, their contracts were terminated by RNZ, new presenters were engaged, and the "Allnighter" continued.

Messrs Jenkin and Congdon then complained to the Broadcasting Complaints Committee about the music being played on the programme after their departure. In its report, that committee has traversed the detail of the complaint and we do not go over it all again here. All relevant factors were taken into account.

In concluding its report, however, the Broadcasting Complaints Committee stated:

"The Tribunal has made it a condition of the warrant that programmes should be directed predominantly towards minority music interests. I find it impossible to determine whether or not there has been a breach of the warrant because I do not have in mind just what the Tribunal meant when it used those words. The proper course before me is I think to refer the matter to the Tribunal for its consideration and this I do."

Like the committee, the Tribunal has had the opportunity of studying some logs and hearing a selection of tapes of programmes Messrs Jenkin and Congdon presented and of programmes presented after they left.

There is no doubt that Messrs Jenkin and Congdon's tapes were overwhelmingly of punk rock music with the occasional top-40 recording included. But what Messrs Jenkin and Congdon played when they were presenting the show is not the immediate issue before us. Those programmes are relevant only to the extent that they provide one particular comparison with the programming under review. Nor are we concerned with matters arising out of their engagement by RNZ, including the way they fulfilled their contracts, and the termination of those contracts. There was considerable media comment at the time and petitions were signed. Again, these can only be of limited relevance.

For it is with the music as recorded on the tapes for the ZM "Allnighter" programmes after the complainants left RNZ, that we are concerned. A review of the musical items played in the period up to May 1984 shows that between one-quarter and one-third of them can be described as falling into the top 48 mass-appeal category of the time. But the balance of the tracks played, two-thirds to three-quarters, were clearly minority in their appeal in that they were overwhelmingly by then unknown or little known groups and the music was new and different from the mainstream. They were not top-40 items at that time nor we believe were they being played by other stations with modern music formats.

It is for RNZ and not the Tribunal, to determine the means of implementing the condition imposed in programme terms. As the condition the Tribunal imposed was that the programming predominantly cater for minority modern music interests, the fact that the smaller proportion of top-40 material was being played did not represent a breach of the condition. In this regard, it may be that the complainants' criticism was in part based on a misunderstanding—for the programmes to contain an element of mass-appeal music did not constitute a failure to meet the condition. To assert that would be to misread it.

In addition, the condition required that such minority interests generally be served, rather than a particular interest and it appears to the Tribunal that, in the context of the music of the time, these were the interests that were being served in the ZM programme under review. There was no requirement that the programming should serve exclusively or almost exclusively one such interest.

Further, that some of the groups being played on the programme later become popular is not indicative of a breach of the condition. Other groups whose music was played have remained of interest only to a minority, if that; in any event, we have tried to examine the programming in the context of the tastes and perceptions of the time it was played.

Accordingly, we find that the condition was not breached and the allegation is accordingly not upheld.

The related complaint was that there has been unjust and unfair treatment of minority alternative rock music in programmes broadcast by the BCNZ. This complaint was made under section 950(1)(b)(i). In the Tribunal's view, the Broadcasting Complaints Committee was correct in not dealing with the issue as a complaint under that subsection because the subsection relates to the unjust and unfair treatment of people, not music, in programmes. (Indeed, section 950(2) prohibits the committee from entertaining complaints which do not fall within subsection (b)(i).)

However, even if the complaint had been of unjust and unfair treatment of the people who signed the petitions, they were not either as individuals or collectively treated unjustly and unfairly in the programmes in the personal way contemplated by the Act, whatever their reactions to and feelings about the music may have been.

It is appropriate for the Tribunal to make the following comments regarding this condition. Principally it was intended to ensure that the more serious modern music listener would be catered for in a way that he or she is not catered for by 1ZM and the other ZM stations during their other broadcasting hours, or by other commercial stations in their broadcasting hours generally. It was intended that the predominance of music played would appeal to such listeners.

We envisaged that the programme could provide an opportunity to play a great deal of new but not broadly popular music. We envisaged that some of this music, even though it was modern, probably never would become popular. Some might. The important thing is that most of the music played on this programme is not being played in any quantity or with any frequency by any other station at any time, apart possibly from the student stations.

Having said that, we should say that we did not intend that the music would serve those who prefer alternative or less popular versions of top-40 items or as an outlet for failed top-40 music. Nor did we intend that it would be sufficient for an item to be a New Zealand recording.

We had in mind types of music, rather than particular recordings, which would appeal to genuine minorities bearing in mind that minorities can be large and small.

"Alternative" minority music, for example, Punk, falls within the condition as does New Wave, Reggae, New Zealand recordings, especially the more progressive and experimental, Polynesian, and other particular types of music which would not normally be played to any significant degree on the commercial stations. To list these types is not to exclude others.

To summarise, the condition envisaged that most of what was played would be distinctly different from that generally available on the other stations and during the other broadcasting hours of the ZM stations in particular.

We recognise that minority tastes in the field of modern music constantly change. We emphasise that our intention was that the ZM "Allnighter" should be a continuing outlet for a variety of such minority material and that the condition requires that such material should continue to dominate the programme without excluding some more popular music.

#### Co-opted Members

The Tribunal co-opted Mr R. M. Carter and Mr Ray Columbus as persons whose qualifications or experience were likely to be of assistance in dealing with the complaint. They took part in the deliberations of the Tribunal but the decision is that of the permanent members.

Dated this 8th day of December 1986.

Signed for the Tribunal:

B. H. SLANE, Chairman.