

Decision No. 14/87
COM 6/84

Before the Broadcasting Tribunal

IN the matter of the Broadcasting Act 1976, and in the matter of an application by the BROADCASTING CORPORATION OF NEW ZEALAND for revocation of a direction relating to liquor advertising:

Chairman: B. H. Slane.

Members: Ann E. Wilson and Robert H. Boyd-Bell.

Co-opted Member: Brian W. Stephenson.

Hearing: 21 January 1987 at Auckland.

Counsel: B. Hudson for Broadcasting Corporation of New Zealand.

Appearance: Mr C. R. Turner.

DECISION

THIS is an application by the Broadcasting Corporation of New Zealand ("the Corporation") for the revocation of a direction to the Corporation issued by the Tribunal in 1981 under section 83 (1) of the Broadcasting Act 1976.

Background

From 1977 onward, Mr Clifford Reginald Turner brought a number of complaints in which the Tribunal held that the Corporation had breached the Rules relating to liquor and tobacco advertising. The Tribunal upheld several more of Mr Turner's complaints in a decision given on 16 May 1980 (Decision 3/80). Early in 1981, the Corporation itself upheld two of Mr Turner's complaints and by June 1981 the Tribunal had upheld a further two.

Because of the number of complaints upheld, the Tribunal had on 16 May 1980 directed the Corporation to:

"... notify staff responsible for accepting advertisements of the limitations imposed by the then Regulation 14 and the Radio Rules and Standards."

In Decision No. 14/81, the Tribunal observed that there were:

"... cases where the advertisements were carelessly accepted and should never have been broadcast."

The Tribunal therefore issued a further direction in more detailed terms:

"(1) No advertisements associated with liquor or mentioning liquor or including a liquor brandname or the name of any vendor of liquor shall be broadcast unless the test thereof has first been approved personally by one of the following persons:

- (a) The Director-General of Radio New Zealand;
- (b) The Advertising Manager of Radio New Zealand;
- (c) The Director-General of Television New Zealand;
- (d) The Advertising Manager of Television New Zealand;
- (e) The person for the time being acting as deputy for any of the above-named persons.

(2) All staff responsible for accepting advertisements shall be informed of this direction and that if any doubt exists as to the application of this direction to any advertisements submitted for broadcast, then approval should be obtained from the person named in paragraph 1 of this direction."

In the same decision, the Tribunal issued a further direction which was a direct consequence of the upholding of a series of complaints by Mr Turner about Lion Breweries advertising:

"(3) No advertisement containing the brand name or corporate title Lion or Lion Breweries shall be broadcast without the prior consent of the Tribunal.

The Tribunal withdrew this last direction of its own motion on 21 September 1981.

The Standard of the Corporation's Compliance

In the course of considering a further complaint by Mr Turner in 1984, it became apparent to the Tribunal that the Corporation was not following the direction relating to the approval of liquor advertising. The officers of the Corporation specified in the direction had purported to delegate their powers of approval without reference to the Tribunal. The Corporation submitted that it had found strict compliance with the direction inconvenient and that it had therefore adopted a different system of approval.

By letter dated 10 July 1984 from the Registrar, the Tribunal expressed the gravest concern at the Corporation's failure to comply with the terms of the direction. It stated that the Corporation's correct course would have been to apply for a variation or cancellation of the direction. Such an application could have been made on the grounds that it was not reasonable to carry out the directions and/or could have suggested an alternative procedure.

The Tribunal warned the Corporation that if its procedures did not accord with the direction, the Corporation risked a finding of breach of warrant.

The Application

The Corporation applied for the revocation of the direction on 16 November 1984. It applied on the grounds that there were practical difficulties faced by executives in Radio New Zealand in endeavouring to comply strictly with the direction. The Corporation has also submitted in a letter dated 3 September 1984 the following policy statement as having been adopted by its Board:

"Interpretation of the rules on liquor advertising should be conservative, so that the Corporation cannot be seen to be promoting the use of alcohol for its own sake."

It then set out a detailed procedure to which the Tribunal will refer later and which, the Corporation said, would be an adequate replacement for the direction.

The Hearing

Counsel for the Corporation, Mr Hudson, submitted at the beginning of the hearing that the direction to the Corporation was defective from the beginning in that:

1. It did not specify any warrants; and
2. The Tribunal had no jurisdiction to give a direction to the Corporation in respect of any of its stations which had not committed a breach of the rules.

He submitted that, while there was no doubt that the Tribunal could give such a direction under section 83 (1) as presently worded, (as amended by section 18 (1) of the Broadcasting Amendment Act (No. 2) 1982) the wording of the subsection in 1981 was more restrictive. Mr Hudson argued that the focus of the subsection in its earlier form was on the operation of a particular broadcasting station, whereas the present wording is broader and directed at conduct by the holder of a warrant.

Mr John Stephen Craig, General Manager, Special Broadcast Services for Radio New Zealand, gave evidence for the Corporation. He was formerly Controller of Programmes. Mr Craig stated that since the direction was issued the volume of liquor advertising had become such as to make personal vetting of liquor copy by the Director-General or Director of Sales and Marketing impracticable. He said that, after several months of close monitoring, interpretations had become standardised and the Corporation decided that it was possible to delegate the day-to-day responsibility for approving liquor advertising to local station managers. He said that in any case of doubt or new commercials that raised questions of interpretation, copy was referred to the Chief Copywriter who is the day to day arbiter of copy policy.

Mr Craig stated that, in considering the practical difficulties faced by executives in endeavouring to comply strictly with the letter of the direction of August 1984, Radio New Zealand adopted a set of house rules which had been approved by the Board of the Corporation. These rules included the policy statement referred to above in the Corporation's application.

Cross-examined by Mr Turner, Mr Craig acknowledged that the Corporation had not complied strictly with the direction. It was believed, he said, that the Tribunal simply wanted to ensure that a responsible system was in place. He acknowledged, however, that in one case there was a failure to comply even with the Corporation's own substituted procedure. This required a signed certificate from the manager of a liquor outlet that an entry for a competition did not require the purchase of liquor. It also required that a copy of the entry form be sighted before an advertisement could be broadcast.

Mr Craig said that in that particular case, of a competition involving a liquor outlet, the advertising agency had given Radio New Zealand an assurance that the purchase of liquor was not a condition of entry. Radio New Zealand accepted this assurance. The entry form had not been printed at that time. It seems that it was Mr Turner who discovered and drew Radio New Zealand's attention to the fact that, although the purchase of liquor was not necessary for entry into the competition, eligibility for the major prizes was limited to contestants who had a dozen cans of Steinlager.

Mr Hudson took a procedural point in the course of cross-examination of Mr Craig by Mr Turner. Mr Hudson objected to Mr Turner's production as cross-examination material of a document disclosed under the Official Information Act 1982. He cited section 48 of the Act and submitted that disclosure of a document under the Act did not authorise its re-publication.

Mr Turner's arguments

In opposing the revocation of the direction, Mr Turner argued that the incident involving the competition was sufficient reason alone for not revoking the direction. He submitted that, as four complaints about liquor advertising on radio had been upheld since January 1983, clearly Radio New Zealand had not considered the rules when it accepted this advertising.