

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

**CASEFILE:** CIV-2008-485-001465

**UNDER:** Broadcasting Act 1989

**IN THE MATTER OF:** Appeal of Broadcasting Standards  
Authority (BSA) Decision No: 2008-029

**BETWEEN**                      **BENJAMIN MORLAND EASTON**  
Appellant

**AND**                              **RADIO NEW ZEALAND**  
Respondent

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**MEMORANDUM OF APPLICANT**

Dated: 12 October 2009

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Next proceeding: 12 October  
Case officer: Michaela Stack

Benjamin Morland Easton  
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Ph: 0273902169  
[laos\\_newzealand@yahoo.co.nz](mailto:laos_newzealand@yahoo.co.nz)

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**TO THE REGISTRAR OF THE HIGH COURT**

1. This memorandum relates to the matter of an appeal by Benjamin Easton against a broadcast aired by Radio New Zealand (RNZ) on Nine to Noon (NTN) February 27, 2008. The broadcast complained about was a programme between the host Kathryn Ryan and a Family Court lawyer Catriona McLeenan about a Ministry of Justice review of the Domestic Violence Act 1995. The appellant (Easton) complained to the Broadcasting Standards Authority (BSA) that the broadcast was unbalanced and gender discriminatory. The complaint was dismissed.
2. Easton was granted leave by Justice Wild on 8 September 2008 to bring a judicial review relative to the matter. On 1 December 2008, Dobson J struck out the proceedings of review. Easton then appealed. The matter concluded in the Supreme Court where on August 5 2009 the application seeking leave to appeal from the Court of Appeal and Justice Arnold's decision on security was dismissed.
3. In the High Court in Wellington, on 2 November 2008, Justice Simon France allowed 10 minutes for the matter of security of the original appeal to be heard at the first call over.
4. Easton paid \$800 and inexperienced applied at the same time for security to be waived on the grounds of public interest.

**Grounds for waiving security**

- Impecuniosity
  - *Merit of appeal*
- Public interest
- Admission by lack of defence.

### **Impecuniosity**

5. On 17 June Arnold J accepted that the appellant is impecunious. Easton's circumstances have not changed <sup>1</sup>. While a payment of \$800 is an exception to the nugatory argument the value in a context of impecuniosity is considerable.

*"It is relevant to consider whether the appellant's appeal rights will be rendered nugatory if no waiver is granted, but it is also relevant to consider the merits of the appeal to see whether the appellant has an arguable case."*

### **Merit of appeal**

6. The Authority directly re-interpreted the complaint mitigating its value failing to establish or consider the controversy.

#### ***The complaint***

*"Whether or not you feel in balanced journalism that Catriona McLennan should have been entitled to continually, directly discriminate against men through her assumption men commit all notable violence in New Zealand?"*

#### ***Findings***

*Principle 4 (balance) – not necessary to expressly acknowledge that men could be the victims of domestic violence – not upheld*

7. The Authority failed to consider the complaint in whole under s13 of the Broadcasting Act 1989, by testing the complaint in respect of openly gender discriminatory comments.

### ***13 Decisions on complaints***

*(1) If, in the case of a complaint referred to the Authority under section 8, the Authority decides that the complaint is justified, in whole or in part, the Authority may make any 1 or more of the following orders:*

- (1) The Authority accepted openly discriminatory commentary from a Family Court lawyer, (the court being a jurisdiction controversially challenged as biased and gender discriminatory against men and fatherhood) as ‘opinion and experience’, without wholly paying due regard to the accuracy or disingenuous nature of those controversial comments.

***Standard 7 Discrimination and Denigration***

*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.*

***Guideline 7a***

*This standard is not intended to prevent the broadcast of material that is:*

- (ii) a genuine expression of serious comment, analysis or opinion; or*

- (2) On considering the complaint for the misleading nature of the programme the Authority should have found for an early correction of the broadcasted information.

***Standard 5 Accuracy***

*Broadcasters should make reasonable efforts to ensure that news, current affairs and factual programming: is accurate in relation to all material points of fact; and/or does not mislead.*

***Guidelines***

*5c In the event that a material error of fact has occurred, broadcasters should correct it at the earliest appropriate opportunity.*

**Public interest**

8. A matter of gender discrimination against men being unashamedly applied by an officer of the Family Court as invited and

accommodated by a public broadcaster, then condoned by the national judicial broadcasting authority must be of significant public interest.

- (1) The pattern of bureaucratic behaviour is not uncommon and should be opened up for its scrutiny and public exposure<sup>2</sup>.

*Justice Randerson [20] "If the decision by the Bank of New Zealand to fund the advertisement is susceptible to judicial review then, arguably, the Bank of New Zealand should have taken into account some or all of these principles".*

### **Admission by lack of defence**

9. Radio New Zealand relies solely on the affidavit of Jane Anthea Hughes, 26 August 2008 for its defence, which is little more than a compilation of the appellant's letters exposing how the patterns of behaviour have been allowed through the neglect of the matter to mature and fester.

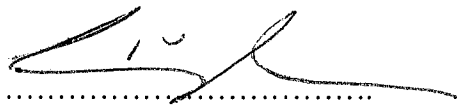
### **Relief**

10. The security order should be rescinded, the security waived as a matter in the genuine public interest and the sum of \$800 returned to the appellant.

<sup>1</sup> Statement of Income 9 September 2009

<sup>2</sup> Easton v Human Rights Commission & ors CIV2009-485-726 13 July 2009

**DATED** this the twelfth day of October 2009.



.....  
**Benjamin Morland Easton**  
(Appellant)

STATEMENT OF INCOME

Client : 361-364-431 EASTON, BENJAMIN MORLAND 23/03/1960 M 610 Cur

SWN [361364431]

INCOME SUPPORT

Benefit	:	190.39
Accommodation Supplement	:	70.00
Disability Allowance	:	
Temporary Additional Support	:	
Family tax credit	:	
TOTAL INCOME SUPPORT	:	260.39

DEDUCTIONS

Child Support	:	25.05
Work and Income	:	20.00
Department for Courts	:	
TOTAL DEDUCTIONS	:	45.05

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Wellington Service Centre

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

**CIV 2009-485-726**

UNDER The Judicature Amendment Act 1972  
IN THE MATTER OF Review of Decision ASA 08/417  
BETWEEN BENJAMIN MORLAND EASTON  
Plaintiff  
AND HUMAN RIGHTS COMMISSION  
First Respondent  
AND THE BANK OF NEW ZEALAND  
Second Respondent  
AND ADVERTISING STANDARDS  
AUTHORITY  
Third Respondent

Hearing: 7 July 2009

Appearances: J A Douglas for Second Respondent in support  
Plaintiff in Person to oppose

Judgment: 13 July 2009

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**RESERVED JUDGMENT OF RANDERSON J**

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This judgment was delivered by me on 13 July 2009  
At 2.30 pm, pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors: Minter Ellison Rudd Watts, PO Box 2793, Wellington  
Copy To: B M Easton, PO Box 24415, Manners Street, Wellington

[1] The plaintiff Mr Easton brings this proceeding by way of judicial review under the Judicature Amendment Act 1972. He challenges a decision of the Advertising Standards Authority as third respondent declining to accept his complaint about a television advertisement funded by the Bank of New Zealand as second respondent.

[2] The Bank of New Zealand has applied under r 15.1 High Court Rules to strike out Mr Easton's statement of claim on the ground that it does not disclose any reasonably arguable cause of action against the bank. Neither the Human Rights Commission as first respondent nor the Advertising Standards Authority appeared at the hearing of the strike out application, each having indicated they would abide the decision of the Court.

### **Background Facts**

[3] The relevant pleading is Mr Easton's amended statement of claim filed on 8 June 2009. He pleads that for a period of some eight to nine years, he has been "a protestor on unlawful gender discrimination against men and fatherhood in New Zealand" describing his activity as being part of a loosely affiliated group or "fathers coalition".

[4] Mr Easton complained to the Advertising Standards Authority about a television advertisement launched on 10 June 2008. The advertisement was promoted by a group known as "Preventing Violence in the Home Incorporated". The amended statement of claim pleads that the Bank of New Zealand funded the advertisement which carried the Bank's logo. Without going into unnecessary detail, Mr Easton's complaint was that the advertisement breached advertising standards and unlawfully discriminated against men in contravention of s 19 New Zealand Bill of Rights Act 1991 and s 21 Human Rights Act 2003. In particular, he complained that the advertisement portrayed men as the only perpetrators of violence against children.

[5] On 9 September 2008 the Advertising Standards Authority issued its decision rejecting the complaint. The Authority noted that the advertiser was a charity



sponsored by the Bank of New Zealand and that the advertisement promoted a social message of raising awareness of domestic violence and helping to break the cycle of such violence. The advertisement provided a website address where further information about the campaign could be obtained. Members of the public were enabled to make a donation through the Bank of New Zealand with the money raised going towards a national help line for battered women. It was accepted that stereotypes had been used to simplify the process of communication. But the Authority found that, taking into account generally prevailing community standards, the advertisement was not reasonably likely to cause serious or widespread offence, hostility, contempt, abuse or ridicule. It therefore complied with the relevant advertising codes.

[6] Mr Easton did not pursue rights of appeal available to him within the rules of the Advertising Standards Authority. Nor has he pursued any complaint with the Advertising Standards Authority or the Human Rights Commission about the Bank of New Zealand's role in the advertisement. Mr Easton informed the Court that a colleague had made a complaint to the Human Rights Commission about the advertisement which apparently was unsuccessful. No steps were taken to bring proceedings before the Human Rights Review Tribunal established under the Human Rights Act.

[7] After the rejection of the complaint to the Advertising Standards Authority Mr Easton approached the Bank of New Zealand. The relevant parts of the amended statement of claim in this respect are:

15. Easton, then, with the assistance of an associate (the Associate), contacted the BNZ asking them to review and reconsider their financial support provided for the Advertisement.
16. The BNZ investigated the matter and replied that as the ASA had dismissed both complaints as "*...about an event to raise money and awareness of an often hidden social problem in New Zealand...*" there was nothing further required.
17. Easton then organised and held two protests outside two different locations of the BNZ.



29.3 The BNZ decision not to fully consider and facilitate in part or whole the scope of observations of Easton (*and other associates*) on matters relative to the human rights breaches and abuse of boys, men and fathers in New Zealand society.

29.4 That the BNZ be ordered to allocate no less equivalent than half of the public gain from the original Advertisement, and then pay that sum to the HRC.

#### **RELIEF AND COST**

29.5 That a basic award of reasonable costs, shared between the respondents in this part in grant against the BNZ is paid to Easton for bringing the proceeding for review.

#### **The Grounds for the Strike Out Application**

[9] Mr Douglas for the Bank of New Zealand accepted that the onus is on the Bank to establish that any cause of action pleaded against it must be clearly untenable citing the well understood principles in *Attorney-General v Prince & Gardner* [1998] 1 NZLR 262 (CA) and *Southern Ocean Trawlers Ltd v Director-General of Agriculture and Fisheries* [1993] 2 NZLR 53.

[10] The broad grounds upon which the Bank relies are:

- a) The amended statement of claim does not identify any act or omission or the exercise of any statutory or public power attributable to the Bank which is capable of giving rise to an application for judicial review;
- b) The amended statement of claim does not plead any acts by the Bank capable of constituting a breach of s 44 Human Rights Act; and
- c) Mr Easton has no standing to bring proceedings in the High Court complaining about the Bank's compliance with the Human Rights Act or to claim the relief sought.

[11] As developed in the course of the hearing, Mr Easton submitted in broad terms that:

- a) By sponsoring the advertisement and taking advantage of the associated publicity, the Bank of New Zealand was either itself breaching s 44(1) Human Rights Act or was a party to a breach of that Act;
- b) In deciding to fund the advertisement the Bank of New Zealand failed to take into account or observe the principles identified in paragraph 24 of the amended statement of claim;
- c) The funding of the advertisement and its content were matters of great public interest and had important public consequences; and
- d) The decision by the bank was therefore susceptible to judicial review either under the Judicature Amendment Act 1972 or at common law.

## **Discussion**

[12] It is immediately apparent that para 28 of the amended statement of claim is an unfortunate jumble of legal concepts. The claim against the Bank of New Zealand appears to rest fundamentally on an alleged duty of care. Reference is also made in para 28.2 to an alleged breach of fiduciary duty. Both the law of negligence and fiduciary duty are private law remedies which have no place in judicial review proceedings. It must follow that, if the amended statement of claim remains in its present form, it could not succeed in judicial review proceedings.

[13] However, particularly where a party is unrepresented, the Court is reluctant to strike out a statement of claim if it is capable of repair by appropriate amendment. To that end, I invited Mr Easton to inform the Court what his real complaint is. In response to that invitation, Mr Easton advised the Court that, in essence, his complaints were those I have described in [11] above.

[14] Against the possibility that Mr Easton may be able to amend his statement of claim to accommodate the grounds as he has identified them, I consider first whether there is any tenable claim that the Bank of New Zealand has, in making the decision to fund the advertisement, breached s 44 Human Rights Act or has been a party to any such breach by the advertiser. Section 44 relevantly provides:

#### 44 Provision of goods and services

- (1) It shall be unlawful for any person who supplies goods, facilities, or services to the public or to any section of the public—
  - (a) To refuse or fail on demand to provide any other person with those goods, facilities, or services; or
  - (b) To treat any other person less favourably in connection with the provision of those goods, facilities, or services than would otherwise be the case,—

by reason of any of the prohibited grounds of discrimination.

- (2) For the purposes of subsection (1) of this section, but without limiting the meaning of the terms “goods”, “facilities”, and “services” in that subsection, the term **facilities** includes facilities by way of banking or insurance or for grants, loans, credit, or finance.

[15] One of the prohibited grounds of discrimination referred to in s 44(1) is discrimination on the grounds of sex under s 21(1)(a) Human Rights Act. I am satisfied that the Bank of New Zealand, in funding the advertisement, has not supplied goods, facilities or services “to the public or to any section of the public”. Mr Douglas appeared to accept that the funding of the advertisement could arguably amount to the supply of “facilities” but I accept his submission that the funding of the advertisement did not amount to the supply of goods, facilities or services to the public or to any section of the public. It was a private supply of money to a private charitable organisation. Nor is there any allegation that the Bank is more generally a supplier of funds for such advertisements.

[16] I also accept the submission by Mr Douglas that there is no allegation or evidence to support any refusal or failure to provide goods, facilities or services under s 44(1)(a) on any ground, let alone by reason of a prohibited ground of discrimination. Nor is there any allegation or evidence that the sponsoring of the advertisement amounted to an unlawful discrimination since there is no pleading that anyone else was seeking similar funding or that anyone else has or might be treated less favourably in terms of s 44(1)(b).

[17] I also accept the submission made by Mr Douglas that there is no tenable basis for a claim that the Bank of New Zealand has been a party to a breach of s 44 by the advertiser. The advertiser cannot be characterised as a person who supplies

goods, facilities or services to the public in terms of s 44. The advertisement merely sought to bring to public attention a matter of concern about violence towards children and sought to raise funds for battered women.

[18] I consider next Mr Easton's second ground relating to the alleged failure by the Bank of New Zealand to take into account the principles identified in para 24 of the amended statement of claim. Mr Easton swore an affidavit in which he exhibited the relevant documents. The first is a document obtained from the website of the Bank of New Zealand's parent company (National Australia Bank). This sets out the Bank's "Community Principles" which are said to guide the Bank's activities in the community. The principles refer to the Bank seeking to be a partner in the communities in which it operates with a focus on activities that build social and economic well-being. To that end, the Bank seeks partnerships that deliver real value to the community which are local in their control and impact but national in their significance and influence. Mr Easton drew particular attention to one of the principles referring to "giving opportunities to all in the community".

[19] Mr Easton also provided a copy of the Consolidated ICC Code of Advertising and Marketing Communication Practice. He relied on all aspects of these principles which refer to marketing materials being "prepared with a due sense of social and personal responsibility and values such as decency, honesty, truthfulness and social responsibility". He drew particular attention to material indicating that marketing communications should respect human dignity and should not incite or condone any form of discrimination. Nor should any marketing communication denigrate any persons or group of persons or bring them into public contempt or ridicule. One of the principles refers to special care being taken in marketing communications directed to or featuring children or young people. Some of these principles are directly related to sponsorship by both commercial and non-commercial organisations relating to corporate image, brands, products, activities or events of any kind. The importance of social responsibility is emphasised.

[20] If the decision by the Bank of New Zealand to fund that advertisement is susceptible of judicial review then, arguably, the Bank of New Zealand should have taken into account some or all of these principles. Whether or not there has been any

breach of those principles is another matter. However, for present purposes, it is sufficient to decide whether the decision by the Bank to fund the advertisement is amenable to judicial review at all.

[21] Judicial review, whether under the Judicature Amendment Act 1972 or at common law, is not restricted to the review of the exercise of power by public authorities. Any decision of a public nature is potentially reviewable if it is in substance public or has important public consequences: *Royal Australasian College of Surgeons v Phipps* [1999] 3 NZLR 1, 11. The courts are less concerned with the source of the power exercised by decision makers than with the nature and consequences of its exercise: *Wilson v White* [2005] 1 NZLR 189 at [21] to [22].

[22] A private organisation may be amenable to judicial review if it has the kind of public elements referred to in *Royal Australasian College of Surgeons v Phipps*. A recent example of the court intervening on judicial review in relation to a private company is the decision of Ronald Young J in *Dunne v CanWest TV Works Ltd* [2005] NZAR 577.

[23] Under the Judicature Amendment Act 1972 the definition of “statutory power” under s 3 means a power or right conferred by any Act or by or under the constitution or other instrument of incorporation, rules or bylaws of any body corporate to take defined actions. The difficulty with Mr Easton’s claim against the Bank of New Zealand is that it is a privately owned incorporated company. While the Bank has a constitution as required for any company incorporated in this country, there is nothing to suggest that the decision to fund the advertisement was a decision made by or under that constitution. Rather, it was clearly a decision taken as part of the day-to-day management or administration of the company.

[24] Matters of internal management or administration not taken under the constitution of a private organisation are not generally regarded as susceptible to judicial review: *Finnigan v New Zealand Rugby Football Union Inc* [1985] 2 NZLR 159, 179 (CA). See also the discussion in Professor Philip Joseph’s text *Constitutional and Administrative Law in New Zealand* (3<sup>rd</sup> ed 2007) para 26.5.2(2) where the learned author discusses the distinction made by the courts between the

exercise of a statutory power (which is reviewable) and a statutory function (which is not). Day-to-day management is generally said to be the exercise of a statutory function, not a power.

[25] Although the court will be slow to deny a meritorious claim on the grounds of lack of standing on the part of a plaintiff, the fact that Mr Easton has no connection at all to the Bank of New Zealand in any capacity is relevant to the willingness of the Court to accept the availability of judicial review in relation to a decision of the kind in question here. At best for Mr Easton, he can claim to be a person who has an interest in addressing the perception he alleges exists in the community of discrimination against men in relation to domestic violence. The decision by the Bank to fund the advertisement has no direct effect on his rights, powers or privileges. Put shortly, any connection between the decision by the Bank and Mr Easton is far too remote to fall within the definition of statutory power (or statutory power of decision) in the Judicature Amendment Act. Any such connection is also much too remote at common law.

### **Conclusion**

[26] I conclude that the Bank of New Zealand's decision at issue is not susceptible to judicial review either under the Judicature Amendment Act 1972 or at common law. I reach that conclusion on the basis of the present amended statement of claim. But I reach the same conclusion in relation to any amended pleading which would incorporate the substance of Mr Easton's claim as he has described it to the Court.

[27] I would add that, even if the decision were amenable to judicial review, the court would almost certainly decline to grant any relief to Mr Easton. The decision has been made, the advertisement has been published and there is no evidence that a re-run of the advertisement is contemplated. This court does not assume jurisdiction in cases which can have no practical effect.

[28] For completeness I accept the submission made by Mr Douglas that the monetary relief sought by Mr Easton against the Bank of New Zealand is not available in judicial review proceedings and his submission that, if Mr Easton has a



complaint on the grounds of discrimination against the Bank of New Zealand, his first port of call is a complaint to the Human Rights Commission and thereafter to the Human Rights Review Tribunal.

## **Result**

[29] The plaintiff's amended statement of claim is struck out and the proceeding against the Bank of New Zealand as second respondent is dismissed.

[30] Mr Douglas sought costs on a 2B basis against Mr Easton if the application was successful. Mr Easton informed the Court that he has no resources and is in receipt of an unemployment benefit. Nevertheless, the Bank of New Zealand has been put to the time and trouble of resisting the claim against it which has been found to be untenable. In the circumstances, Mr Easton must face the usual consequences. I order that he pay to the second respondent the costs of the strike out application on a 2B basis along with any disbursements as fixed by the Registrar.

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A P Randerson J  
Chief High Court Judge