

The Ross-Brand affair stripped bare

What puzzles some employment lawyers is how the BBC was able to suspend Jonathan Ross without pay. **Edward Fennell** reports

With David Cameron surfing in on the wake of the Ross-Brand affair to raise questions about the BBC's size, regulation and commercial activities, it is no wonder that the top ranks of the BBC are running scared about what the row means for the long-term future of the corporation.

On one point at least, however, everyone is agreed. As Sir Michael Lyons, the Chairman of the BBC Trust, admitted, it was the editorial staff involved in the broadcast who had "woefully let down" the licence-fee payers. Or, as Medwyn Jones, of the law firm Harbottle & Lewis, put it: "Talents like [Jonathan] Ross and [Russell] Brand are paid to be edgy and controversial so when they conduct themselves in that way, it's no surprise. The real problem lies in the processes at the BBC that allowed the programme to go out."

On that basis Lesley Douglas, the

The Communications Act prohibits sending of offence messages

Controller of Radio 2, was clearly right to hand in her editing kit because, had the broadcast been more tightly edited, the enormous media hoo-ha would not have followed. However, Manuelgate is slightly more complicated than that.

As soon as Ross and Brand started to talk to the answering machine of the actor Andrew Sachs, they had exposed themselves to the possibility of prosecution. "What no one has commented on so far," says Tony Ballard, of Harbottle & Lewis, "is that there is a rather obscure part of the Communications Act 2003 that prohibits people from using the telephone to send offensive messages — whether they are for broadcast or not."

So unwittingly the first, fatal step had already been taken. The next act of likely illegality was to publicise details of the former sexual relationship between Brand and Georgina Baillie, Sachs's granddaughter. "This was clearly a breach of Article 8 of the Human Rights Act in relation to her privacy over sexual relations and bears comparison to the recent

Mosley case," Caroline Kean, of Wiggin & Co, says.

By capitalising on the case through subsequent coverage in *The Sun*, Kean thought it unlikely that Baillie, a burlesque performer with the Satanic Sluts Extreme, would qualify for any generous damages. However, the issue was clear that — apart from any concerns about taste and decency — the Human Right Act had been breached in a way that "brought the BBC into disrepute".

What about those issues of taste and decency? As Kean points out, a key factor is the timing and location of the broadcast. "In the case of the cable and satellite companies, the audience mostly addressed know what they are letting themselves in for so they have only themselves to blame."

But what about a late-night show on the publicly funded BBC? According to Niri Shan, head of the media group at Taylor Wessing, the key issue is whether the broadcast would be likely to deprave or corrupt the audience. "I don't think that the police would be interested," he says. All right, some of the comments would be regarded as offensive to most people over 65. But would they have been listening?

Finally, what about the penalties and the discipline to which the "talent" has been subjected? What puzzles some employment lawyers is how the BBC has managed to get away with suspending Ross without pay. Usually an individual who falls under suspicion is suspended on full pay while the matter is investigated.

For employment lawyer Ronnie Fox, of Fox Lawyers, it is a clear case of Ross being responsible for "gross misconduct" that would lead normally to a dismissal. His guess is that Ross decided to accept the short-term unpaid suspension as a pragmatic move to ensure that he was kept on for the rest of his contract (and, presumably, hope that things had settled down by the time of renewal).

Equally baffling is the role played by the management companies used as a buffer between the BBC and the individual. Maybe it was Hot Sauce, Ross's own company, which paid the penalty. "The answer must lie in the detail of the contract," Fox says. But, you might ask, which contract is that?



Georgina Baillie: her human rights were breached by Brand and Ross

The one between Hot Sauce and the BBC? Or Hot Sauce and Jonathan Ross? Everyone is now curious to know exactly how the small print in these contracts work — no wonder Cameron is able to complain about too much "bureaucracy".

Looking ahead, Professor Lorna Woods, of City University, feels that what has been lost in the controversy is the vital importance of preserving the independence of the BBC and keeping it safe from political interference. "The BBC is the provider of a public service not a state information service," she says. "It is part of its role to be unpopular."

As to the relationship between the BBC Trust and Ofcom, Ballard comments that the affair has high-

lighted the extent to which the current arrangements are unsatisfactory. "It's high time they sorted it out," he says.

"What we have got is a fudge with the BBC Trustees still being essentially part of the BBC.

The responsibility should lie with Ofcom that then has oversight across the whole broadcasting sector."

If Cameron ever gets to No 10, then that looks like being one of his priorities.

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