IN THE EMPLOYMENT COURT OF NEW ZEALAND
AUCKLAND

I TE KŌTI TAKE MAHI O AOTEAROA
TĀMAKI MAKAURAU

[2024] NZEmpC 93
EMPC 172/2024

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
BETWEEN	TELEVISION NEW ZEALAND LIMITED Plaintiff
AND	E TŪ INCORPORATED Defendant

Hearing:	28-29 May 2024
Appearances:	P Wicks KC, J Hardacre, B Simmonds and N Whiteman, counsel for plaintiff S Mitchell KC and P Cranney, counsel for defendant
Judgment:	31 May 2024

JUDGMENT OF CHIEF JUDGE CHRISTINA INGLIS

Introduction

[1] Television New Zealand Limited (TVNZ) has been experiencing a decline in revenue, predominantly because of the challenges associated with a trend (experienced globally) toward online digital services. It has been in a process of transformation, moving to a digital platform, and has engaged with staff in respect of how this might be achieved. In March 2024 TVNZ advised staff that it proposed cancelling various shows and making a substantial number of positions redundant. Some staff have been given notice that their positions have, or will be, disestablished. E tū Incorporated (E tū), on behalf of various members, was concerned that TVNZ had not complied with

its obligations under the relevant collective agreement and sought a compliance order from the Employment Relations Authority (the Authority).

[2] The Authority determined that TVNZ had breached its obligations under the collective agreement, and found that on balance it was just that a compliance order be made.[1] The Authority member directed the parties to mediation and observed that:

> [37] If after mediation matters have not resolved, a compliance order shall be issued against TVNZ ordering it comply with cl 10.1.1 of the collective agreement.

[3] Mediation did not resolve matters, and the parties advised the Authority accordingly. E tū then sought a compliance order from the Authority. It appears that the Authority was not in a position to deal with the matter for some time and on 22 May TVNZ filed a challenge to the Authority's original determination and coupled that with an application for an urgent hearing. Urgency was sought because a number of staff were due to have their employment terminated on 31 May 2024 (a date that has already been extended once to enable mediation to occur). E tū did not oppose urgency and in the circumstances I considered it appropriate to direct that the challenge be heard on Tuesday 28 and Wednesday 29 May 2024.

[4] It is convenient to note at this stage that Te Pukenga Here Tikianga Mahi Incorporated SA (PSA) is also party to the collective agreement. The PSA was given notice of the dispute (see s 129 of the Employment Relations Act 2000 (the Act)) and is content not to be formally involved in the current proceedings.

[5] A non-publication order was made during the course of the hearing in respect of commercially sensitive information. I have not found it necessary to refer to that material in this judgment.

[6] The point at issue is relatively narrow – it centres on the correct interpretation and application of cl 10.1 of the parties' collective agreement. It is convenient to set cl 10 out at the outset.

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1 *E Tū Inc v Television New Zealand Ltd* [2024] NZERA 276 (Member Fuiava).

Clause 10

[7] Clause 10 of the collective agreement provides that:

> **10.1 Workforce Participation**
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> 10.1.1 TVNZ will support the *active participation of staff* in the *development of the organisation and changes in workplace practices*. This requires acknowledgement and respect for the role of staff organised in the independent organisation of their union and *assisting staff to be involved in the developmental stages of decision making processes* and in the *business planning of the organisation*.
>
> TVNZ acknowledges that change is an evolutionary process and *employees will be involved throughout*.
>
> The aim of this participation will be *to discuss all relevant information openly and honestly and to reach agreement and to make recommendations to management*. *TVNZ will enter these discussions with an open mind and will fully consider options and proposals put forward by staff*. TVNZ *will take any recommendations fully into account* as far as possible when making final decisions.
>
> 10.1.2 *When, following the process outlined in Clause 10.1.1 above*, TVNZ identifies that it has a surplus staffing situation *TVNZ will advise the employees concerned and their Union*. Up to 28 days will be allowed for consultation between TVNZ and the employee's union on the application of the best options in relation to the surplus staffing situation. Should no options be identified other means to resolve the situation may be considered. In the event that no agreement is reached TVNZ may invoke Clause 10.3(i).
>
> …
>
> 10.3(i) Redundancy: Subject to the provisions elsewhere in this Part, where none of the above options are practicable the employee shall be declared redundant and a payment will be made according to the Severance calculation above, or as agreed in the employee's Individual Letter of Terms and Condition, whichever is the greater.
>
> …
>
> (Emphasis added)

[8] The wording of cl 10 is, as the Authority member observed, uncommon.[2] Counsel for TVNZ, Mr Wicks KC, submitted that cl 10.1 was not as prescriptive as the Union contended and the Authority determined. The intention, he said, was for it to apply more generally and that it did not prevent TVNZ from coming up with its

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2 At [28].

own restructuring proposals, and engaging with staff on them, particularly where (as here) TVNZ was facing significant operational challenges. TVNZ had, he said, complied with the substance of cl 10.1.1, including through staff engagement via two initiatives, Te Paerangi and Ideas Week. TVNZ rejects E tū's argument that a compliance order should issue in respect of any established breach. That is primarily because it says that a compliance order would serve no useful purpose and its financial position is such that it cannot afford to delay the restructuring to enable further discussions to take place.

[9] In essence, E tū says that cl 10.1.1 is drafted in deliberately wide terms and requires a round-table approach between TVNZ and staff to workplace change. It submits that cl 10.1.1 places enhanced obligations on TVNZ in respect of those that would ordinarily apply under statute or common law. E tū argues that TVNZ put the cart before the horse in the three month period leading to affected staff being given notice of redundancy – it ought to have actively engaged with staff on the nature and extent of the difficulties facing TVNZ and sought to agree possible options for dealing with those problems. Instead, it says that TVNZ identified available options behind closed doors (from November through to 8 March 2024), and then proceeded to consult on one of them; this approach (it was submitted) bypassed the roundtable requirements in cl 10.1.1.

[10] E tū submits that the Court ought to exercise its discretion to grant a compliance order, requiring TVNZ to start the process again.

Applicable principles: interpretation of collective agreements

[11] The approach is objective. The aim is to ascertain the meaning which the agreement would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the agreement. This objective meaning is taken to be that which the parties intended. While the meaning of a clause in an agreement may appear clear, meaning is informed by context. A provisional conclusion as to meaning is to

be cross-checked against the context provided by the agreement as a whole, and any relevant background.[3]

[12] While these principles were set out in a judgment which related to the interpretation of a commercial contract, a full Court of this Court has since confirmed that the same principles apply when interpreting employment agreements.[4] As I sought to explain in *Le Gros v Fonterra*, the statutory and common law context in which employment agreements are entered into and operate is relevant to the interpretative exercise.[5] Employment agreements are not akin to arms-length business agreements; they involve people and human interactions (not the economic exchange of money for goods); they occur within the framework of multifaceted obligations, both statutory (such as mutual obligations of good faith) and common law (such as the obligation of fidelity and fair dealing). These features provide relevant context when the Court is asked to determine a dispute as to the correct interpretation, application and/or operation of a collective agreement (in this case) or an individual employment agreement.[6]

The meaning of cl 10

[13] I start with the natural and ordinary meaning of cl 10. On the face of it cl 10 places a series of obligations on TVNZ in circumstances involving two situations, namely:

(a) the development of the organisation; and

(b) changes in workplace practices.

[14] It is common ground that the clause was engaged in this case.

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3 *Bathurst Resources Ltd v L & M Coal Holdings Ltd* [2021] NZSC 85, [2021] 1 NZLR 696. See too *Firm PI 1 Ltd v Zurich Australian Insurance Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [60]-[63].

4 *Vulcan Steel Ltd v Manufacturing & Construction Workers Union* [2022] NZEmpC 78, [2022] ERNZ 304 at [27]-[31]. See too the earlier Supreme Court judgment, which did arise in the context of an employment agreement, in *New Zealand Air Line Pilots' Assoc Inc v Air New Zealand Ltd* [2017] NZSC 111, [2017] 1 NZLR 948, [2017] ERNZ 428 at [71].

5 *Le Gros v Fonterra Co-Operative Group Ltd* [2023] NZEmpC 193, (2023) 20 NZELR 112.

6 Above n 3.

[15] The wording of cl 10.1 reflects a sequential approach, differentiating between the developmental stage of decision-making processes and business planning (stage 1); consultation (stage 2); and in the absence of agreement as to options, TVNZ can invoke cl 10.3(i) (redundancies) (stage 3).

[16] Clause 10.1 provides that at the developmental stage (stage 1) TVNZ is required to support staff to actively participate in the development of the organisation and any changes; this in turn requires TVNZ to assist staff to be involved in the developmental stages of decision-making processes and to assist staff to be involved in the business planning of the organisation. TVNZ is to involve staff "throughout" any change process.

[17] The expressly stated aim of cl 10.1.1 participation is three-fold: to discuss all information openly and honestly; to reach agreement; and to make recommendations to management. I do not accept the interpretation advanced by TVNZ that reference to "the aim" indicates that what follows is aspirational, including in respect of the provision of relevant information. Such an interpretation appears to me to strain the plain wording of cl 10.1.1.

[18] The stated purpose of stage 1 is to "reach agreement and to make recommendations to management."

[19] TVNZ is required to participate in these (stage 1) discussions with an "open mind".

[20] The introductory words of cl 10.1.2 reinforce the sequential, stepped approach required by the provision: "When, *following* the process outlined in Clause 10.1.1 above, TVNZ identifies that it has a staff surplus situation, TVNZ will advise the employees concerned…" This makes it clear that stage 2 does not commence until two prerequisites are met: first, the completion of stage 1 participation; second, TVNZ has identified that it has a staff surplus situation.

[21] Stage 2 is expressed to involve "consultation" (between TVNZ and the employee's Union). The consultation required under stage 2 is directed at the

application of the best options in relation to the surplus staffing situation. It is notable that this is the first reference in cl 10.1 to consultation, as opposed to stage 1 references to "involvement", "active participation", "discussions" and "agreement". The word choice appears to be deliberate.

[22] Stage 2 requires TVNZ to advise affected employees and their Union and provide up to 28 days for consultation. Again, the wording (advice) is materially different to the terminology used in respect of the developmental stage of the process.

[23] If no agreement as to available options is reached at stage 2, TVNZ can progress to stage 3 (namely invoking cl 10.3(i) – redundancies).

[24] No evidence was given as to the genesis of the provision. It is however clear that it imposes on TVNZ more onerous obligations than would generally apply under statute or common law, requiring it to actively involve staff at a developmental stage with a view to reaching agreement and making recommendations to management. On its face, there is nothing in cl 10.1 which prevents TVNZ from exercising its managerial prerogative to make decisions relating to the operation of its business; the concluding words of cl 10.1.2 make that clear. The point is further reinforced by the stated aims of the participation process being (amongst other things) to reach agreement and the requirement that TVNZ take any recommendations into account as far as possible when *it* reaches final decisions.

[25] While managerial prerogative has been preserved, what is required is a process of active participation that must be stepped through before getting to the point that such a prerogative is exercised. There is nothing in the provision when read as a whole, or when the individual components of it are analysed, to suggest that the cl 10.1.1 process is optional, that TVNZ reserves to itself the right to decide whether or not it will be followed, dependent on whether TVNZ considers it will reap any good ideas for its business that the Executive team has not thought about or where it considers that it makes more practical or financial sense to revert to the sort of process that might apply in other workplaces.

[26] I agree with the Authority that:

> [30] Clause 10.1.1 envisages a collaborative effort by both parties but something 'co-designed' by them may not always be possible or reasonably practicable and such a scenario is contemplated by cl 10.1.2 which allows TVNZ to invoke the redundancy provision at cl 10.3(i) in the event that no agreement is reached. As such, the ability for TVNZ to manage its business affairs need not be constrained or held up for want of consensus.

[27] While ultimate managerial prerogative remains intact, cl 10.1.1 plainly engages a process that involves more than TVNZ devising an advanced proposal for change, engaging in what might be termed garden-variety consultation on it and then making a decision. If that was what was intended it is unlikely the parties would have formulated the provision in the way they did.

[28] For completeness I note that there was reference in TVNZ's evidence to an understanding that what cl 10.1.1 was geared towards was something of an annual process.[7] That sort of characterisation does not emerge from the wording of the provision and I am not drawn to it.

[29] I now turn to check my provisional view of meaning against relevant contextual factors.

[30] TVNZ places weight on the statutory obligations it is required to operate under, specifically the Television New Zealand Act 2003, which emphasise the objective of maintaining and managing commercial performance.[8] Commercial performance includes, among other things, financial viability. It was said that this was relevant to the interpretative exercise because, if the Union's interpretation of cl 10.1.1 is accepted, it would be impossible for TVNZ to take the necessary steps to maintain financial viability; the restructuring proposed was necessary to meet the statutory requirement.

[31] I have no difficulty accepting the proposition that interpretating the clause in the way advanced by the defendant will have an impact, both operationally and financially, and that this will have a flow-on effect on commercial performance. I do

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7 Per Mr McAnulty in cross-examination.
8 Television New Zealand Act 2003, s 5.

not, however, think that this materially assists in the interpretative exercise having regard to the deliberately broad wording of cl 10.1.1.

[32] In agreeing to cl 10.1 in its current form, TVNZ can be taken to have been well aware of its statutory obligations and to have understood that it was shouldering a more onerous form of engagement than is usual in such agreements, or under statute (notably s 4), or the common law. That is relevant context that a fair and reasonable objective observer would factor into their reading of cl 10.1.

[33] In other words I do not see it as persuasive to seek to rely on business difficulties which would arise if required to comply with extended obligations TVNZ agreed to, as supporting its more constrained interpretation of the collective agreement. As the Supreme Court has previously observed, a provision that may appear to be unduly favourable to one party does not justify the Court concluding that the collective agreement does not mean what it says; the Court does not substitute its own view of common sense when interpreting a collective agreement.[9]

[34] I do however see relational common sense as reinforcing the plain and ordinary meaning in this case, having regard to the apparent underlying intent of cl 10.1. The parties clearly intended to adopt a quasi-partnership model to workplace change. TVNZ presumably saw this as beneficial to its business, drawing on the experience, skill and knowledge of its people to work hand-in-glove to shape proposals for management consideration. Clause 10.1.3 underscores the importance the parties place on a shared understanding of TVNZ's market operation conditions, financial performance and business drivers, and strategy.

[35] Is the fact that TVNZ is subject to the extended good employer obligations contained within the Crown Entities Act 2004 relevant context to the interpretative exercise? Mr Wicks submitted that it was not; Mr Mitchell KC (counsel for E tū) submitted that it was. Mr Wicks submitted that the relevance of those extended obligations was limited to an assessment of the extent to which TVNZ had acted as a

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9 *Air New Zealand Ltd*, above n 4, at [77].

fair and reasonable employer in the context of any personal grievance claim. Mr Mitchell submitted that it was broadly relevant.

[36] There is nothing in the wording of the Crown Entities Act that would suggest the standard of a good employer is restricted only to the context of a personal grievance claim. Indeed, the section requires fair and proper treatment of employees in *all* aspects of their employment. I agree with Mr Mitchell that this points away from a narrow interpretation of cl 10.1.1.

[37] What of prior practice? During the course of evidence a number of witnesses for TVNZ said that E tū had never previously raised an issue in respect of cl 10.1, and that organisational change processes had proceeded as this one had. Mr Wicks submitted that this was relevant context for the interpretative exercise, citing various judgments in support.[10]

[38] I accept that evidence as to the way in which a clause in a collective agreement has been interpreted and applied over time, or reproduced in successive collective agreements, may be relevant as indicative of objective intention.[11] I do not accept that the evidence in this case is materially helpful. The evidence was relatively vague and it was unclear how many change processes were being referred to, what collective agreement applied at the relevant time and whether it contained a cl 10.1 provision in identical form, and what the relevant circumstances were. Against this backdrop I do not see how any sound inferences as to objective intention can be drawn from the evidence.

[39] In summary, while I have considered the relevant contextual matters referred to above, in terms of a cross-check against the plain meaning of cl 10.1, my preliminary view as to meaning remains unaltered.

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10 *Air New Zealand Ltd,* above n 4; *Firm PI 1 Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand* [2014] NZSC 147, [2015] 1 NZLR 432; *Vulcan Steel Ltd v Manufacturing & Construction Workers Union* [2022] NZEmpC 78, [2022] ERNZ 304; *Hansells (NZ) Ltd v Ma* [2007] ERNZ 637 (EmpC); *Fonterra Cooperative Group Ltd v van Heerden* [2007] ERNZ 791 (EmpC).

11 *Le Gros*, above n 5, at [40].

[40] A reasonably informed objective observer would likely conclude that the provision means what it says on its face.

The facts

[41] In order to assess whether TVNZ breached its obligations under cl 10.1.1 it is necessary to understand the facts. The facts can be summarised as follows.

[42] TVNZ has been facing a decline in its audiences for some time, particularly in the period since June/July 2023. This has led to financial pressures and consideration of what options might be available. Moving from a broadcast business to a sustainable media business was, as Mr O'Sullivan (Executive Editor – News and Current Affairs) explained, a priority.

[43] TVNZ undertook two initiatives in 2023, both of which involved staff. In this regard TVNZ commenced the Te Paerangi Transformation Programme and an Ideas Week. Te Paerangi was focused on the move to a digital platform; Ideas Week invited staff to attend workshops to put forward ideas to shape the future of the business. Ideas Week took place in August 2023; Te Paerangi commenced around July 2023.

[44] On 15 September Ms Calver (Chief Transformation Officer at the time) sent out an all staff communication calling for volunteers to help reduce the ideas into initiatives. There was no indication in TVNZ's written communications to staff about this initiative that redundancies were being considered.

[45] Mr Byast, a member of E tū and a producing director for TVNZ's Sunday show, gave evidence (which I accept) that based on what he understood at the time he did not consider that what was being communicated would have any substantial impact on his role. He was busy with the demands of his job and his young family and did not prioritise attendance, fundamentally because he did not consider that the initiatives had any direct impact on him. That was entirely understandable in light of what was being communicated by TVNZ to its staff at the time.

[46] In September Ms Golden (General Manager Business Partnering-People and Culture) forwarded an email to E tū which Mr McAnulty, the Acting Chief Executive, had sent to staff the previous day. The email noted decreasing revenue and cost saving opportunities, and included steps such as pausing travel and requesting employees to use their annual leave entitlements. Aside from a bullet point about the potential cancellation of projects, there was no indication that redundancies were being considered at this stage.

[47] In November TVNZ's finance team advised the Executive team of the need to cut $10m in costs. TVNZ did not advise the Union of this, or staff more generally. It is clear from the evidence that this was a watershed moment for the TVNZ Executive team and it was this advice that prompted what followed.

[48] In November TVNZ restructured the layer 3 roles in its senior management team. Staff were asked for their feedback on the proposal in advance.

[49] On 23 November Mr McAnulty presented a Q and A session to update staff on what was going on with the business. At the meeting Mr McAnulty reiterated that beyond the current round of restructures (which had recently led to the disestablishment of 30 per cent of the General Management group) no changes were planned. He went on to say that February 2024 was the earliest point in time that consideration would be given to further restructures.

[50] On 19 December the Executive team convened a meeting with several people from the People and Capability team and the Transformation Director. As Ms Copeland (People and Culture Transformation Lead) explained, the purpose of the meeting was to discuss the Executive team's initial ideas for labour cost reduction. The Executive team then considered a range of options over the Christmas break. A further meeting was convened on 9 January, again focussing on reducing labour costs. In the event the Executive team decided to proceed with a proposal for a one step, rather than piecemeal, approach, namely show cancellation.

[51] As Ms Copeland, who attended various meetings with the Executive team during this period confirmed, by mid-November 2023 TVNZ was in a crunching,

rather than ideas generating, process. The focus for the Executive team was very much on the $10m TVNZ needed to save, and which staff knew nothing about.

[52] On 5 February Mr O'Sullivan addressed staff at Sunday's annual hui. Mr Byast was present at the meeting. Mr O'Sullivan spoke about the pressures TVNZ was under, without going into detail, and when asked what staff could do to help with the situation, he replied "Nothing, just keep doing what you are doing."

[53] On 20 February staff were updated on Te Paerangi and were advised that some changes were needed. The changes were relatively minor in nature, and focused on efficiency gains: shortening meetings and having an agenda. This was followed by an email on 28 February, which announced changes being made to make the business "simpler, faster and smarter". Again, the focus was on enhancing the efficiency of work practices.

[54] It was against this backdrop that TVNZ made an announcement on 8 March that it was proposing to cancel certain shows, Tonight, Midday, Sunday and Fair Go, with consequential redundancies; it was also proposed that there would be role reductions in Re: and the VCP team. Information packs had, by this stage, been prepared by TVNZ and were provided to the staff for each individual show on this date. The packs stated, under the heading "Why we're proposing change" that approximately 32 per cent of TVNZ's cost base was labour and to offset ongoing declining revenue TVNZ needed to reduce its labour cost. In other words, TVNZ had decided what needed to be done (reduction in labour costs) and was proposing how this would be achieved (the cancellation of a number of shows).

[55] Staff feedback on the proposal was sought. Staff for each individual show were advised that TVNZ Executive would consider feedback on the proposal to stop the show they worked on, and such feedback was to be considered between 20 and 26 March; that TVNZ Executive would then make a decision on 27 March and would then proceed to seek feedback on the proposed structural changes by 3 April. TVNZ would then confirm its decision on structural change by 8 April. The proposed end date for Sunday, Tonight, Midday and Fair Go was 10 May 2024.

[56] The information packs prepared and distributed by TVNZ on 8 March made it clear that they were directed at consultation on the proposed changes; and they reflected well-advanced thinking by TVNZ, focused on one identified option.

[57] On 11 March the then Chief Executive Officer spoke to staff. Reference was made to staff engagement with Te Paerangi and Ideas Week as representative of the "robust" consultation process TVNZ was running. I pause to note that what TVNZ had not done is disclose, or seek discussion on, the range of options it had considered during the period November to 8 March.

[58] Mr Byast later took up the suggestion that Te Paerangi and Ideas Week had been part of the process connected with the proposal to cancel shows and make various positions redundant. He did so at a meeting with Mr O'Sullivan and Ms Hobbs (Senior Business Partner, People and Culture, News and Current Affairs) on 10 April. I accept his evidence, which was not challenged, that Ms Hobbs confirmed that Te Paerangi was not part of the consultation (on the proposal to cut identified shows or on the consequential impact this would have on staff) and that Mr O'Sullivan indicated his agreement with what she had said. The same point was made to staff at a meeting on 12 April.

[59] When the point was put to him in cross-examination, Mr O'Sullivan accepted that asking staff for ideas is different from sitting down and discussing options for a specific purpose. He also accepted that staff may have had some views on the options discussed in the confidential Executive team meetings from November; those options have never been disclosed.

[60] On 13 March E tū wrote to TVNZ formally asking it to withdraw its proposals. The Union advised TVNZ of its view that cl 10.1 had not been complied with, and that communicating an intent to initiate changes did not satisfy the collective agreement requirements to involve staff at the developmental stage of the process. The letter also explained that the clause requires that the employees be involved throughout and that there be open communication with the aim of reaching agreement. While TVNZ did respond to comments by employees, which resulted in some changes to the initial

proposal, it refused to return to the developmental stage as it considered it had complied with cl 10.1.1.

[61] What might relevantly be noted at this point is that prior to receipt of this letter members of the Executive team had no awareness of the existence of cl 10.1. There is no evidence that TVNZ paused and sought further advice on the nature and scope of cl 10.1 at this stage. I return to this issue later.

[62] TVNZ convened further meetings on 11 and 12 April to advise staff that the proposal to disestablish a range of shows would proceed.

[63] At the meeting on 12 April with Sunday staff Mr O'Sullivan confirmed that TVNZ had been "looking at everything back in December" and (in reply to a question from staff as to why staff had not been involved in these discussions) that it was "because we were looking at so many things". In response to the suggestion that if staff had been given more time they could have considered different models, Mr O'Sullivan replied "we don't make these decisions in the open"; and in response to a comment that staff could have helped find solutions, Mr O'Sullivan confirmed that the scale of the problem was such that "we wouldn't be in any different position".[12] In evidence he confirmed his view that the responsibility for the development of a proposal should rest with TVNZ executives, whose role is to make these decisions and that this was a practical approach (rather than, I infer, the approach required by cl 10.1.1). This evidence is key to understanding what went on and why.

[64] E tū then sought compliance orders from the Authority. The Authority agreed that TVNZ had breached cl 10.1.1, that it would be just to order compliance, and directed the parties to mediation.[13]

[65] Prior to mediation taking place TVNZ proposed that mediation could be used to undertake the cl 10.1.1 process. E tū did not see this as a suitable forum to start and finish compliance.

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12 Mr Woods' evidence as to these exchanges was not challenged by TVNZ or disputed by Mr O'Sullivan.

13 *Television New Zealand Ltd*, above n 1.

[66] Mediation occurred (on 17 May) but did not resolve matters. TVNZ then sought to commence discussions under cl 10.1.1 while in parallel filing a challenge to the Authority's determination and seeking an urgent fixture given the looming 31 May date on which numerous redundancies would take effect, while keeping the redundancy notices in place.

[67] I agree with E tū that it is difficult to reconcile the steps TVNZ was seeking to take with a real attempt to engage with its obligations under cl 10.1.1. There is some strength in the suggestion that TVNZ has been attempting to control the process and the amount of time it would take, by seeking to shoe-horn it into its own timeframes for bringing the change process to a conclusion.

[68] Also relevant to an understanding of the factual context is the lack of knowledge within the Executive team of the existence of cl 10.1. As I have already said, under the Crown Entities Act TVNZ is required to be a good employer, the details of which are set out in the Act. I agree with Mr Wicks that whether or not TVNZ has met the standards required of it in the circumstances is one that may come into particular focus on any personal grievance claim pursued by the affected employees. Nevertheless, I do not think it is a stretch to say that a good employer, which operates under the additional public sector legislative good employer overlay (previously described as requiring "exemplary" standards[14]) can be expected to be aware of and understand the obligations it has signed up to and to act consistently with them.

[69] Only one witness who appeared on behalf of TVNZ, Ms Golden, gave evidence that they were aware of cl 10 and familiar with it. Witnesses who were involved at the Executive and decision-making level (notably Mr McAnulty and Mr O'Sullivan) candidly accepted that they were not.

[70] Ms Golden said that it was her role to understand the requirements on TVNZ and that management depended on her to ensure that the process was correct. However, that does not explain why once E tū had formally identified what it contended was a misunderstanding of what cl 10 required, TVNZ did not pause and review its previous stance.

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[14] *Rankin v Attorney-General* [2001] ERNZ 476 (EmpC) at [123].

[71] The evidence disclosed that the 8 March announcements came as a shock – something cl 10.1 is plainly designed to avoid.

[72] I pause to note that Mr McAnulty gave evidence that he did not think that the news should have come as a shock to anyone, because he had made it very clear to staff that TVNZ needed to address costs and that, if it could not get costs under control, labour would need to be the "last lever" to be pulled. Mr McAnulty's perspective is likely informed by the level of understanding and knowledge he had, particularly from November 2023, about the company's financial position and the thinking he and the Executive team had done in period between that time and when the announcement was made.

[73] It is fair to say that the Executive team's thinking was far advanced by 8 March.

Did TVNZ breach cl 10.1.1 of the collective agreement?

[74] The short answer is yes. As at 16 November 2023 TVNZ understood that it had to find very significant savings (in the order of $10m). It did not advise staff of this, provide relevant information and activate the participatory process required under cl 10.1.1. Rather, and as Mr O'Sullivan confirmed in subsequent statements to staff, TVNZ's Executive team started looking at things itself, deciding what the way forward would be. TVNZ did not engage with staff for the simple reason that (as Mr O'Sullivan expressed) "we don't make these decisions in the open". Mr Mitchell described the process adopted by TVNZ as "going behind closed doors" from November through to early March.

[75] TVNZ gave evidence that it did not disclose the situation to staff because of concerns that it would have a destabilising effect on them going into the Christmas break; that it may impact its financial position (in terms of market uncertainty); and the $10m figure was sensitive information.

[76] There are difficulties with this approach. Clause 10.1.1 requires a particular form of participation with staff in respect of workplace change. It requires the disclosure of all relevant information to enable staff to participate in formulating

proposals. That opportunity was denied to them. Even accepting that the disclosure of the $10m figure was commercially sensitive and could not have been shared with staff for the purposes of cl 10.1.1 participation, the significance of the concern and its potential implications could have been shared and formed the basis for round table discussions as to how the problem might be addressed in order for any recommendations to be put (on an agreed basis if possible) to TVNZ for consideration and decision. Further, it remained unexplained why the cl 10.1.1 participatory process could not have commenced in the early new year (so after the Christmas break).

[77] I infer from the evidence given by key TVNZ witnesses that they considered that dealing with the $10m question fell squarely within their own job descriptions, and that nothing would have been gained from the sort of process envisaged by cl 10.1.1. This largely echoed the points made by Mr O'Sullivan in response to staff queries raised at the meeting of 12 April. While I have no doubt that the Executive team felt strongly about the magnitude of the difficulties facing TVNZ, and the options realistically available, engagement with cl 10.1.1 is not expressed to be limited to situations where TVNZ perceives a utility in engaging with it.

[78] Mr Wicks submitted that there was nothing in cl 10.1.1 to prevent TVNZ from developing proposals and then engaging with staff on them. The point that emerges from cl 10.1.1 is that staff *must* be engaged in problem solving at an early stage so that they can actively participate in developing possible solutions and agreeing, where possible, recommendations to put to TVNZ. The sort of process that kick-started on 8 March bunny-hopped over this sort of engagement. A well advanced proposal was put forward by TVNZ for consultation. It focused on one option, although the Executive team had itself been considering a range of possible options between November and March. That is not what cl 10.1.1 requires.

[79] It is also notable that staff from each show were given information relating to their show, not more generally. Mr O'Sullivan accepted that this approach 'narrowed' their ability to respond.

[80] I understood TVNZ to submit that Te Paerangi and Ideas Week were part of the cl 10.1.1 process in the present case. I cannot accept this based on the evidence

before the Court. It was contrary to the way in which Mr O'Sullivan (and Ms Hobbs) viewed the situation when the issue was raised with them by staff. Mr McAnulty accepted that the Te Paerangi and Ideas Week processes were not designed to talk about making positions redundant, and nor were they seen as part of a management of change process. Neither initiative meets the participatory obligations and entitlements conferred by cl 10.1.1 in respect of the issue that arose in November and which prompted what followed.

[81] When questioned, Mr McAnulty accepted that TVNZ had not attempted to consider options and proposals put forward by staff prior to the proposal to cancel shows, with a consequential impact on staff; nor was there an attempt to reach agreement with staff prior to 8 March and it was common ground that there had been no disclosure of the need to save $10m in costs. Ms Golden accepted in evidence that prior to mid-December a decision had been made that the $10m would be found out of labour costs. This was not disclosed to the Union at a confidential briefing on 14 December, and nor was the figure of $10m. That information was kept by TVNZ for its own planning purposes.

[82] It was suggested that the issue confronting TVNZ as at November 2023 was "the same issue" the organisation had been grappling with for some time, namely financial difficulties which had been the topic of staff input prior to that time. The point is that as at November 2023 the issue had become significantly bigger and more pressing that it had previously been and TVNZ needed to respond to the advice from its finance team to cut major costs. That was a trigger for a cl 10.1.1 process.

[83] TVNZ breached cl 10.1.1 of the collective agreement, by effectively bypassing compliance with it.

Should a compliance order issue?

[84] E tū seeks a compliance order from the Court.

[85] There was some discussion at hearing as to the basis on which the Court might make such an order, in light of the fact that the Authority was still seized of the matter

(having found that it was satisfied that a compliance order should be made, but not having yet taken the step of doing so). It was common ground between counsel that there were no jurisdictional issues and I am prepared to proceed on that basis.

[86] On a challenge the Court stands in the shoes of the Authority. The Authority may order compliance under s 137 where there has been non observance or compliance with any provision of an employment agreement (which includes a collective agreement). I have already found that this threshold requirement has been met.

[87] Where s 137 applies the Court may by order require a party to do any specified thing or cease any specified activity, for the purpose of preventing further non-compliance. The Court must specify a time within which the order is to be obeyed. As s 140 makes clear, non-compliance with a compliance order is a serious matter. In such circumstances the Court may order the person in default to be imprisoned; fined and/or their property sequestered.

[88] The power to order compliance is discretionary. As TVNZ submitted, it is not enough for an applicant to simply point to non-observance. The power must be exercised to promote the policy and objects of the Act,[15] taking into consideration a range of relevant factors.

[89] TVNZ identified four factors which it said weighed against the making of a compliance order in this case. First, it was said that such an order would not remedy any prejudice to the affected employees because of the opportunity they had over time to feed into workplace change processes and alternatives. Nothing came out of those processes which suggested viable solutions to TVNZ's worsening financial challenges and there was no evidence to suggest that if TVNZ re-engaged with staff its position would be altered or that re-engagement would provide employees with a benefit they have not already had. The point however is that it would provide the employees with a benefit they missed out on, namely participation in a process that complies with their contractual entitlements.

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[15] See *Unison Networks Ltd v Commerce Commission* [2007] NZSC 74, [2008] 1 NZLR 42, at [53] per McGrath J.

[90] Second, TVNZ submitted that compliance would bring uncertainty to employees, some of whom have been redeployed and others who have left the organisation. The uncertainty that was said to arise related to the length of time engagement would take; the need to unwind the show closures; that the current employees in disestablished roles would have no work to do; and that it would be "highly disruptive" to the bulk of TVNZ's workforce to require TVNZ to re-engage.

[91] The uncertainty issue can be addressed, at least to some extent, via the timeframe for compliance required by s 137(3). The fact that the current employees in disestablished roles would have no work to do during the period of re-engagement appears to me to be a factor minimising the degree of disruption that might overwise be caused by an order of compliance – it would enable those staff to apply their time and energy to actively engage in the process, benefiting TVNZ with their input.

[92] Third, that a compliance order would not be practicable in the circumstances. This concern was said to be based on financial impact, namely the costs associated with retaining staff on the payroll; the engagement process and any costs associated with re-commencing the cancelled shows. I accept that there would be a financial impact on TVNZ if compliance orders were made and it is clear that it is in a very difficult financial position. The impact should not, however, be overstated. The labour costs involved (in respect of the affected employees) is only a small percentage of the total annual spend on salaries, as Mr McAnulty confirmed in cross-examination.

[93] Mr Mitchell confirmed that E tū was not seeking an order that the cancelled shows be recommenced as part of any compliance order and nor would I regard this as a natural corollary in any event. That too goes some way to addressing the concerns identified by TVNZ.

[94] Fourth, that ordering compliance would not do justice to TVNZ or its employees. It would, it was said, create confusion and uncertainty to employees. I agree with Mr Mitchell's observation that if there is genuine compliance with cl 10.1 it would likely address, rather than exacerbate, any uncertainty that might otherwise exist. I anticipate that the parties would work constructively together, with the assistance of counsel as needed, to minimise uncertainty for staff in a timely manner,

including as to what is required, by whom and when. A collaborative approach would likely be helpful, and sit comfortably with each parties' good faith obligations to one another.

[95] It was further submitted that the personal grievance remedies under the Act were sufficient to address any breach of the collective agreement and this weighed against the exercise of the Court's discretion. While it is true that the affected employees have that remedial route available, the route is by no means certain as to the result they wish to achieve via a compliance order; namely engagement with their employer in accordance with a provision in the collective agreement which they were previously denied.[16]

[96] Another factor relevant to the weighting exercise is whether compliance would be likely to occur if no order was made.[17] It is fair to say that TVNZ has been very firm in its view as to the adequacy of the steps it has taken, the options available to it and the practicality of engaging with a cl 10.1.1 process.

[97] A party to a collective agreement is entitled to expect that the provisions of it are complied with and, if not, that they can obtain orders from the Authority or the Court. In this case while I accept that Ms Golden was aware of cl 10 and had a different view of the obligations contained within it, there is no evidence before the Court that once having had E tū's view drawn to her attention, or that once the Chief Executive became aware of cl 10 and the Union's interpretation of it, further steps were taken to clarify the position. Nor is there any evidence that such advice or clarification was sought once the Authority's determination was issued. Rather, the evidence was that TVNZ simply sought to provide E tū with an opportunity, within a compressed timeframe, and under the shadow of redundancy notices, to say anything that "had been left unsaid".

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16 See, for example, *Lye v ISO Ltd* [2021] NZEmpC 120, [2021] ERNZ 550 at [90] where the Court made a compliance order notwithstanding the availability of the personal grievance procedures to address the breach; compliance was considered to be a more effective option.

17 *Norske Skog Tasman Ltd v Manufacturing & Construction Workers Union Inc* [2009] ERNZ 342 (EmpC), at [107].

[98] E tū submits that a compliance order is necessary given that TVNZ is unlikely to engage in the process without an order. I agree that TVNZ's firm stance weighs in favour of a compliance order being made, to make it clear to TVNZ that it has not complied with what I regard as the plain wording of cl 10, and that it is required to do so. That will come at a cost – both in terms of time and money, but it may prove to be beneficial.

[99] As Mr Mitchell made clear, a compliance order would not require TVNZ to immediately reinstate the cancelled shows. It would, however, require good faith participation and the development of proposals, through agreement if possible, to refer to management for good faith consideration and decision.

[100] TVNZ has statutory obligations to maintain commercial performance. I accept Mr Wick's submission that the statutory context is relevant to the exercise of the Court's discretion. It is also in my view relevant that TVNZ has a statutory obligation to be a good employer, and heightened obligations in terms of what can reasonably be expected of it.[18]

[101] Also relevant is the fact that TVNZ entered into a collective agreement which placed extended obligations on it, and there is a broader interest in holding parties to their bargain, including in circumstances in which it would make commercial sense that they not be required to do so. As Mr Mitchell points out, one of the relevant objects of the Act is to promote collective bargaining.[19] Requiring compliance in a case such as this appears to me to be aligned with that objective. Conversely it may well create perverse incentives, and to undermine that objective, if factors such as cost and inconvenience were given too much weight. There is some strength in the Authority member's concluding observation that:[20]

> It has been submitted that requiring TVNZ to redo things now would yield nothing new. There are 46 individuals represented by E tū who would say otherwise and who have not had the opportunity to be engaged in a decision making process as a developmental stage as required by their collective agreement. TVNZ have assumed the risk of making workplace changes

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18 See Crown Entities Act 2004, s 118; *GF v Comptroller New Zealand Customs Service* (2023) NZEmpC 101, [2023] ERNZ 409 at [20]-[35].

19 Employment Relations Act 2000, s 3(a)(iii).

20 At [34].

> without the relevant clause in mind and if having to redo things again comes at a significant cost, that is a natural consequence of its breach.

[102] Finally, the opposition to re-engagement seems to me to minimise the potential benefits that may flow to TVNZ and its business, drawing on the depth of experience, specialist knowledge and expertise that its staff undoubtedly have. I infer this is what cl 10.1.1 is essentially aimed at utilising.[21] The Authority member expressed the position well in his determination:[22]

> Clause 10.1.1 of the collective agreement is an uncommon provision but it reflects an important source of industry knowledge and practice for TVNZ namely its own people, TVNZers. Clause 10.1.1 is the mechanism through [which] potential ideas can be exchanged, discussed, and challenged even, all for the betterment of the employment relationship.

[103] While there are considerations that go both ways, I am satisfied that an order of compliance ought to be made; a number of the concerns that TVNZ raises can, at least to some extent, be ameliorated by the terms of the order. E tū was reluctant to express a view on how long the cl 10.1 process would be likely to take, but indicated weeks rather than months. I accept that it is difficult to predict with accuracy how long the process will take. However, the Court is required to specify a timeframe for compliance.[23]

[104] TVNZ submitted that a two week timeframe would be appropriate, including having regard to the ongoing costs associated with any compliance and TVNZ's financial position.

[105] I consider that an appropriate balance is struck by specifying a 20-working day timeframe for compliance, having regard to TVNZ's entitlement under the Act to apply at an earlier stage for a discharge of the compliance order if compliance is achieved before that date.[24]

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21 See also cl 10.1.3, which is directed at building staff capacity to engage in the cl 10.1.1 participation process.

22 At [34].

23 Employment Relations Act 2000, s 137(3).

24 Employment Relations Act 2000, s 138(3).

[106] I record for completeness that Mr Wicks confirmed that there was no need for the compliance order to restrain the scheduled redundancies as this was a natural corollary of such an order in any event. I agree.

Orders made

[107] TVNZ's challenge is dismissed.

[108] A compliance order is made in the following terms:

> TVNZ is ordered to comply with cl 10.1.1 within 20 working days of the date of this judgment.

[109] Costs are reserved at the request of the parties.

Christina Inglis
Chief Judge

Judgment signed at 2.45 pm on 31 May 2024