

NOTE: This determination is subject to an order prohibiting publication of financial and confidential information at [40]

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI
TĀMAKI MAKĀURAU ROHE**

[2024] NZERA 276
3289580

BETWEEN E TŪ INCORPORATED
Applicant

AND TELEVISION
NEW ZEALAND LIMITED
Respondent

Member of Authority: Peter Fuiava

Representatives: Simon Mitchell KC and Peter Cranney, counsel for the
Applicant
June Hardacre, counsel for the Respondent

Investigation Meeting: 6-7 May 2024

Submissions received: 7 May 2024 from the Applicant
7 May 2024 from the Respondent

Determination: 10 May 2024

DETERMINATION OF THE AUTHORITY

What is the employment relationship problem?

[1] E Tū Incorporated (E Tū) applies for a compliance order under s 137 of the Employment Relations Act 2000 (the Act) to require Television New Zealand (TVNZ) to comply with Part 10 of the parties' collective agreement dated 1 July 2023 to 30 June 2024 (the collective agreement). The application is opposed by TVNZ.

[2] The present case involve interests that are finely balanced particularly as all processes have been completed and decisions concerning redundancies communicated to affected staffed. On the one hand, there are the 68 affected staff members of TVNZ,

46 of whom are represented in this proceeding by E Tū and whose respective roles in Midday, Tonight, Fair Go, Sunday, Re: and video content production have been disestablished. Balanced against these interests is the growing realisation in the television industry that long-form journalism in its present form is financially unsustainable because of its high cost and declining viewership which has a direct adverse effect on advertising revenue, TVNZ's primary source of income.

How did the Authority investigate?

[3] On 9 April 2024, the Authority afforded this employment problem an urgent investigation meeting which became a firm fixture after a case management conference on 17 April 2024 during which time timetabling directions for the filing of witness statements were made by consent.

[4] E Tū's witnesses comprised Fair Go Digital Producer Daisy McWedge and E Tū negotiation specialist Michael Wood. TVNZ's witnesses consisted of People and Culture Transformation Lead Joanne Copeland, Executive Editor of News and Current Affairs Phillip O'Sullivan, General Manager Business Partnering – People and Culture, Antoinette Golden, and Chief Operating Officer Brent McAnulty.

[5] All witnesses answered questions under oath or affirmation and were questioned by me and by counsel who both made oral closing submissions at the end of the investigation meeting and filed written submissions which have been considered. As permitted by s 174E of the Act, this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

Relevant background

[6] Since November 2022 there has been and continues to be, a decline in broadcast advertising revenue for TVNZ whose audiences have increasingly moved to online digital services for their viewing entertainment. Where they have gone, so have the advertisers whom TVNZ rely for revenue.

[7] To meet this new reality, a business case for a reimagined future for TVNZ with an emphasis on becoming a digital media service was made and approved by its Board. Two initiatives were implemented: Te Paerangi, TVNZ's transformation programme in

July 2023 that is still ongoing and ‘Ideas Week’ which was a weeklong nationwide brainstorming session by TVNZ staff held in mid-August 2023. The aim of Te Paerangi was for TVNZ to get ahead of the predicted structural changes for the industry as a result of advertising revenue moving away from traditional linear broadcasting to digital media platforms.

[8] As for Ideas Week, its purpose was to hear from staff about what TVNZ could stop, start, and change as part of its transformation into a sustainable digital media business. The organisation was not only looking for ideas to grow and diversify its revenue and audiences, but also for cost saving ideas to help TVNZ work ‘simpler, smarter, faster’ as was the tagline for Te Paerangi.

[9] 2,089 ideas were generated by TVNZ’s employees from Ideas Week and the opportunity to make further submissions online was offered to staff. There was a broad range of ideas from large transformational macro changes such as stopping broadcast television altogether to micro incremental changes like reducing meeting times.

[10] A common theme that had come through Ideas Week was that TVNZ’s management team was too big and that feedback was passed on and resulted in the Executive team reducing its general managers and ‘layer 3’ roles by approximately 30 percent. Of the over 2,000 ideas gathered, there were only four that related to stopping Midday and Tonight. Sunday and Fair Go were not specifically raised but there were broader suggestions about stopping broadcast television and closing specific channels such as Duke.

[11] Following Ideas Week, TVNZ carried out an eight-week period of business-led planning in which every idea generated was considered against various strategic values. That process saw a gradual reduction in the number of ideas to 834 after week one, 163 after week three and eventually to 75 big initiatives. Staff were not given the opportunity to participate in the whittling down of ideas and none of the 75 initiatives distilled from that process required jobs to be cut or for shows to be cancelled.

[12] In approximately August-September 2023, a call out was made by business leaders for staff volunteers to participate in Te Paerangi. It was during this period that Ms McWedge joined the transformation programme and in the various sessions and

workshops she participated, there was no mention of redundancy or of job losses. After October 2023, Te Paerangi went quiet for a while as a business case was prepared for the Board to consider regarding Phase 1 of the transformation programme. It was during this period that the Executive team was restructured based on ideas received from Ideas Week.

[13] Preceding both the commencement of Te Paerangi and Ideas Week was regular communication by senior business leaders to staff about the ongoing cost pressures for TVNZ. In the first of a series of emails (21 July 2023) Mr McAnulty informed employees that the biggest challenge for the organisation was ongoing pressure on TV advertising revenue and that one way staff could help was by being rigorous in controlling costs and managing spending. Similarly, Mr O’Sullivan held regular NCA (news and current affairs) hui from November 2022 to April 2024 in which it was made clear that revenue was falling away dramatically and that this would affect NCA.

[14] The cost controls business leaders put in place included restructuring several teams in mid-2023, requiring permission from senior management before vacant positions could be readvertised, and restrictions placed on travel and entertainment. In July 2023, Mr McAnulty in his then role of acting chief executive officer, gave a ‘state of the nation’ address to the unions on the first day of collective bargaining in which he advised that TVNZ needed to get costs under control and that it would be looking at other levers to pull before looking at labour costs.

[15] Ms Golden who was involved in the collective bargaining emailed the unions in late August 2023 about TVNZ not replacing vacant roles and that the organisation would be looking at what work it could stop or reduce. She also forwarded an email from Mr McAnulty (18 September 2023) to the unions which stated that the TV advertising market was “tough” with local businesses reducing their advertising spend and because of the economic uncertainty in the lead up to the general election.

[16] At a collective bargaining meeting on 22 September 2023, the unions expressed concerns about job security and requested an embargo on redundancies until 30 April 2024. While TVNZ was not able to commit to that because of its financial position and the economic climate, it agreed in the terms of settlement for the collective agreement that it would not commence further consultation processes until 30 January 2024.

[17] It was hoped that after the general election, TVNZ's financial position would rebound but that did not eventuate but instead declined further by the end of 2023. It is predicted that the organisation will make a significant loss for the 2024 financial year because of a steeper than forecasted decline in advertising revenue. A poor first quarter financial result meant that further cuts in labour costs was required as all other cost levers have already been pulled.

[18] In mid-November 2023, the Executive met to discuss the first quarter financial results in which it was apparent that TVNZ needed to reduce its labour cost base by approximately \$10M (annualised). The recent restructuring of the executive team and layer 3 roles had resulted in a \$3.7M labour cost saving but more was needed.

[19] In a further meeting of the Executive in December 2023, the potential cancellation of Fair Go, Sunday, Tonight, Midday, Re: (an online news and current affairs platform for younger audiences) and the video content production team was discussed as an option. The affected shows, particularly Fair Go and Sunday were not sustainable in their current form due to their high cost and given the scale of the problem, the cost savings from cancelling Midday and Tonight were not nearly enough.

[20] On 14 December 2023, Ms Golden held a confidential meeting with the unions and their delegates to let them know that TVNZ's revenue had dropped significantly and that a further decline in revenue was forecasted. TVNZ was considering its options to reduce labour costs but no decisions had been made and TVNZ was open to further input from the unions who expressed concerns about staff wellbeing.

[21] On 8 February 2024, TVNZ's newly-appointed chief executive officer, Jodi O'Donnell, held an all-staff meeting and advised that changes were coming the following month and that everything was being looked at. Around mid-February 2024, the Executive confirmed that it would propose to shut down the affected shows.

[22] On 8 March 2024, Mr O'Sullivan and TVNZ's NCA general manager held consultation meetings with affected staff. NCA staff had around three weeks to provide their feedback which was considered and resulted in four new roles being established. However, even so, TVNZ confirmed that it was cancelling Fair Go, Sunday, Tonight

and Middy. Because of the feedback received, roles in Re: and in the video content producer team were only reduced.

[23] Overall, it is understood that 20 employees are in the selection process for redeployment, 20 have since left TVNZ, 27 will have received redundancy compensation, and 35 other employees have received notices of termination of employment most of whom will have had their employment end by 24 May 2024.

What is sought?

[24] On behalf of its affected members, E Tū seeks the opportunity for them to be involved in the developmental stages of decision making which TVNZ is obliged to provide under cl 10.1.1 of the collective agreement. TVNZ oppose the application stating that there has been no breach and that it has clearly communicated to staff and the unions that redundancies would occur.

What are the consultation requirements under the collective agreement?

[25] Part 10 of the collective agreement sets out the process that TVNZ has agreed to follow with staff in the management of change. Clause 10.1.1 states that it will support ‘the active participation’ of staff in the development of the organisation and changes in workplace practices. This requires the acknowledgement and respect for the role of staff who are 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.

[26] Clause 10.1.1 further records that change is an ‘evolutionary process’ and that employees will be ‘involved throughout.’ The aim of this participation is to ‘discuss all relevant information openly and honestly’ and to ‘reach agreement and make recommendations to management.’ In addition, TVNZ is to enter these discussions with ‘an open mind’ and that it will fully consider options and proposals put forward by staff and take any recommendations ‘fully into account’ as far as possible when making final decisions.

[27] If after following the process outlined above, TVNZ identifies that it has a ‘surplus staffing situation,’ cl 10.1. 2 requires it to advise the relevant employees and their union of this fact and to provide ‘up to’ 28 days’ consultation between TVNZ and

the union on the best options in relation to the surplus staffing situation. Should none be identified, other means to resolve the situation may be considered and in the event that no agreement is reached, TVNZ may invoke the redundancy provision at cl 10.3(i) which need not be set out in full.

Discussion

[28] 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 ongoing betterment of the employment relationship.

[29] Part 10 of the collective agreement is about workforce participation and what that might look like will inevitably vary. Either TVNZ or staff could be the catalyst for ideas but the obligation rests on TVNZ to actively involve staff in the process while matters are still being developed before it becomes a recommendation for management. In this way, cl 10.1.1 goes beyond the consultation that generally arises in a redundancy situation requiring active participation sooner in the process rather than later.

[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.

[31] It is common ground that the financial challenges before TVNZ did not come as a surprise to staff because of the constant messaging concerning declining advertising revenue and the need for vigorous cost control. However, staff of the affected shows did not know until much later that, in November 2023, the Executive had become aware of TVNZ's first quarter results that necessitated further cuts to its labour base. Nor did they know at the time that the Executive team had met in December 2023 and that an option had been proposed for the potential cancellation of Middy, Tonight, Fair Go, Sunday, Re: and the video content production team. While it is clear that no decisions at that stage were made by business leaders, the idea or concept had formed. At that

point, cl 10.1.1 should then have been engaged but that did not occur as it appears that no one at that meeting considered it.

[32] Ideas Week and Te Paerangi do not achieve what cl 10.1.1 requires. Of the over 2,000 ideas that were generated from Ideas Week, staff were not involved in the eight weeks of business-led planning that followed and of the 75 initiatives that were eventually distilled, none involved the cancellation of shows or the loss of jobs. To say that staff ought to have known from Ideas Week and Te Paerangi that job losses would eventuate assumes that the Executive considered that these initiatives aligned with cl 10.1.1. However, the evidence and information indicates that the clause was not considered at a pivotal time when the initial proposal was being fleshed out by the Executive.

[33] While I accept that TVNZ was not able to let affected staff know of what its Executive had discussed in its December 2023 because of the pending Christmas/New Year Holidays, its agreement with the unions not to propose job cuts until 30 January 2024, and recent restructuring of general management in mid-to-late 2023, there was still time between 30 January 2024 and 8 March 2024 to have involved staff in the developmental stages of decision making as required by cl 10.1.1.

[34] 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 at a developmental stage as required by their collective agreement. TVNZ have assumed the risk of making workplace changes without the relevant clause in mind and if having to redo things again comes at significant cost, that is a natural consequence of its breach.

Conclusion

[35] For the reasons given, the Authority finds that TVNZ has breached cl 10.1.1 of the collective agreement. Compliance orders are a discretionary remedy and on balance it is just that a compliance order under s 137(2) of the Act requiring TVNZ to comply with Part 10 of the collective agreement is made.

[36] During the investigation meeting, I alluded to counsel that if this were the outcome, I was minded to direct the parties to mediation to reflect on my determination

and to use their best endeavours to find a mutually agreeable outcome. An Authority Officer will make contact counsel to ensure this occurs as soon as possible.

[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. Mr Mitchell is to advise the Authority of the outcome of mediation as soon as possible.

What about costs?

[38] The Authority's Practice Direction, effective 1 February 2024 sets out in one document an outline of the steps parties appearing before it can expect which includes the award of reasonable costs and expenses.¹ There are certain categories of cases where there is a presumption that parties bear their own costs. The present case falls within one of these categories: disputes about the application, interpretation or operation of a collective agreement.²

[39] For this reason, my preliminary view on costs is that these should lie where they fall. If either party wish to be heard further on the issue of costs, they are to contact the Authority Officer.

Non-publication Order granted

[40] As part of its investigation, the Authority was provided with confidential and commercially sensitive information by TVNZ about its affairs. By consent and pursuant to cl 10 Sch 2 of the Act, an order prohibiting the publication of this information is granted.

Peter Fuiava
Member of the Employment Relations Authority

¹ <https://www.era.govt.nz/assets/Uploads/practice-direction-of-the-employment-relations-authority.pdf>

² Practice Direction pg.5 at 6.