

Under the Employment Relations Act 2000

**BEFORE THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND OFFICE**

BETWEEN Susan Marie Wood (Applicant)
AND Television New Zealand Limited (Respondent)
REPRESENTATIVES Malcolm Crotty, Counsel for Applicant
Rob Towner, Counsel for Respondent
MEMBER OF AUTHORITY Leon Robinson
INVESTIGATION MEETING 3 November 2005
DATE OF DETERMINATION 7 November 2005

DETERMINATION OF THE AUTHORITY

The Authority determines that this employment relationship problem shall be resolved by the following orders:-

- A. The Authority declares that Susan Marie Wood is entitled to treat the fixed-term provision of her employment agreement with Television New Zealand Limited made on 1 December 2004 as ineffective. The employment is terminable only for cause.**
 - B. The Authority declares that Susan Marie Wood's entitlement to a present salary of \$450,000.00 will expire on 31 December 2005. Television New Zealand Limited is not permitted to impose a new salary as from 1 January 2006 without Susan Marie Wood's consent.**
 - C. The parties are encouraged to resolve costs between them, but failing agreement, Mr Crotty is to lodge and serve a memorandum within 14 days of the date of this Determination. Mr Towner is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination.**
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The problem

[1] The applicant Ms Susan Marie Wood (“Ms Wood”) says her employer Television New Zealand Limited (“TVNZ”) is attempting to change important terms and conditions of her employment in reliance on the purported fixed-term nature of it, when her employment is not fixed-term at all. TVNZ says Ms Wood’s employment is genuinely fixed-term and that it is entitled to negotiate a new employment agreement and salary with Ms Wood.

[2] Ms Wood asks the Authority to resolve the problem by making orders declaring that she is employed on an indefinite basis and that TVNZ cannot not take any steps to unilaterally decrease her salary from \$450,000.00 to \$350,000.00. She also asks for orders that TVNZ pay her compensation for hurt and humiliation, costs, and a penalty.

[3] It is regrettable that these parties were unable to resolve the problem between them by the use of mediation.

[4] This employment relationship problem has attracted significant media attention. In recent times, the salaries TVNZ pays to its on-air presenters has been the subject of considerable public interest. One common misunderstanding is that the presenters’ salaries are paid from public funds. That is advisedly incorrect because the Authority is told that government funding constitutes only 10% of TVNZ’s overall revenue. The presenters’ salaries are said to be paid from advertising revenue and TVNZ’s news and current affairs programmes, with the exception of *Te Karere*, are entirely self-funded. It is true however that TVNZ as a state owned enterprise and its affairs are legitimately the subject of public interest.

[5] I venture to suggest, that ordinary New Zealanders find it very difficult indeed to comprehend how salaries of the present magnitude and several times the average wage, can legitimately be commanded for the work that is performed. There is a view that such salaries are extreme, extravagant and even obscene. Economists diagnose the controversial component of such salaries as economic rent. However contentious, they are nonetheless negotiated terms of legitimate employment relationships governed by the same employment law principles and legislation as all other employments.

[6] The Authority accorded urgency to this investigation because of a 4 November 2005 deadline communicated to Ms Wood. In the afternoon prior to the Authority’s investigation meeting, TVNZ extended that deadline.

[7] I have provided both parties an opportunity to comment on, test and challenge the evidence and information gathered in my investigation.

The factual background

[8] Ms Wood is said to be employed as *Interviewer/Host/Anchor/Presenter* on TVNZ’s *Close-Up at 7* television broadcast which screens each evening from Monday to Friday at 7.00 pm. The terms of Ms Wood’s employment were recorded in an individual employment agreement made on 1 December 2004 but which was expressed to be for a fixed-term commencing from 1 January 2005 until 31 December 2005. The details of the negotiations surrounding the concluded agreement are discussed later.

[9] At about 4.00 pm on 13 September 2005, TVNZ’s head of news and current affairs Mr William Grantley Ralston (“Mr Ralston”) called Ms Wood into an empty office in the TVNZ newsroom. He reassured Ms Wood she was doing a great job and he told her TVNZ wanted her to

continue in her *Close-Up at 7* role. Mr Ralston told Ms Wood he could not negotiate a contract with her until after the general election. Ms Wood tells the Authority she apprehended there was a “political” dimension involved in the exercise. Mr Ralston told Ms Wood her he needed to seek TVNZ’s board approval before an offer could be made to her.

[10] On 20 September 2005, TVNZ’s Chief Executive Officer Mr Ian Fraser together with Mr Ralston and TVNZ’s head of human resources Ms Sidney Smith (“Ms Smith”) met to discuss Ms Wood’s future employment - it being due to expire on 31 December 2005. Mr Ralston produces notes he made at this meeting to the Authority. There was discussion about the Board’s apparent sensitivity to public concern about the level of salaries for its on-air presenters. I find that Mr Fraser made clear his firm opinion that the Board would not approve a salary of \$450,000.00 for Ms Wood and that \$350,000.00 was the ceiling. Mr Fraser too, shared the Board’s general view that presenters’ salaries needed to be lowered. I have interviewed Mr Fraser. Mr Fraser gives this evidence to the Authority:-

<i>Authority</i>	<i>That was your opinion?</i>
<i>Mr Fraser</i>	<i>It certainly was, but I have to say it’s been backed up subsequently. You will have had a very strong sense yesterday of the complexities of the process at TVNZ around these matters. Sidney Smith and I are both attenders at the HR committee of the Board. Bill Ralston isn’t. We operate under a system set up earlier this year called a bargaining licence for staff including presenters who it is proposed to pay more than \$300k pa. The tenor of the meetings that we have had with the remuneration committee are of course, were driven by the Board’s desire and mine myself I have to be frank, its my view that presenter salaries needed to be lowered. Because there is no market. Effectively TVNZ to a very large extent is the market. You know, it is clear that the board has a strong view of this and when we took the bargaining licence proposal to the remuneration committee and I can’t remember when that was ...</i>
<i>Authority</i>	<i>29 September?</i>
<i>Mr Fraser</i>	<i>Sounds right</i>
<i>Mr Fraser</i>	<i>When we took that to the remuneration committee there was a fair bit of discussion of it and one of the committee members said will that be enough? and indicated that if they were pushed the committee might go to \$400k. Certainly not to \$450k. I mean, there was a general endorsement of the commitment of the proposition that the fees should be lowered and ah, I said look, I don’t want to put it up to \$400,000 at this stage, um what I want to do is to get your endorsement of the \$350,000 which seems to me to be a reasonable rate for the job but you know, recognise that we are going into a negotiation and we are keen to keep Susan and if we run into trouble then I reserve our right to come back to the remuneration committee at a higher figure. Now, that I’m certain is Minuted.</i>

[11] Mr Ralston says he had no reason to doubt Mr Fraser’s adamant view, and as a result, it was resolved to seek a “bargaining licence” from the board to negotiate a salary for Ms Wood of no more than \$350,000.00.

[12] The TVNZ board delegates remuneration matters to a sub-committee known as the “Remuneration and Human Resources Committee” (“the committee”). The committee has terms of reference established on 29 April 2005. Two of the specified responsibilities of the committee are these:-

- *To make recommendations to the Board in relation to the remuneration of the CEO and those executives and presenters (whether employed on a contract of service or contract for services) with a total fixed remuneration in excess of \$300,000 per annum*
- *To approve the Head of News and Current Affairs proposed “bargaining licence” for individual presenters in Band 4 which will include recommended parameters for remuneration, including any incentives;*

[13] The terms of reference also prescribe the information to be provided to the committee for remuneration proposals. As prescribed, Mr Fraser, Mr Ralston and Ms Smith formulated a proposal for the committee in the form of an “Approval Paper” for Ms Wood’s employment (“the paper”). The salient aspect of the paper is this:-

Proposal

That an open-ended employment agreement replace the present fixed-term agreement at a rate of maximum \$350,000.00 per annum from 1 January 2006. There would be a mutual three-month notice requirement. Fixed remuneration would be reviewed annually as normal with permanent employees.

[14] There is in the paper this rather prescient statement, as it now turns out, in relation to Ms Wood’s expectations:-

The individual’s anticipated expectations

We believe that there may be a willingness to accept a lower figure in exchange for a permanent employment agreement (and we are, ourselves, very confident about offering permanent employment). However, Susan will judge the value TVNZ places upon her by the dollars we offer. An extremely low offer could be interpreted by her as an insult or an attempt to get her to quit. Susan wants the job but she is unlikely to sacrifice her self-respect to retain the role.

[15] The paper concludes with this recommendation:-

That a bargaining licence be APPROVED for an open-ended employment agreement at a fixed remuneration rate of up to \$350,000.00 per annum for the first year.

Ian Fraser

Bill Ralston

Sidney Smith

[16] The salary range Mr Fraser, Mr Ralston and Ms Smith had decided to offer to Ms Wood was considered by the committee at a meeting held in Christchurch at 8.00 am on Thursday 29 September 2005. In Minutes (to be adopted by the full Board) taken by TVNZ’s Company Secretary/General Counsel Mr Noel Vautier, the following resolution was passed:-

The Committee AGREED that a bargaining licence be APPROVED enabling Susan Wood to be offered an open ended employment agreement at a maximum rate of \$350,000 per annum to replace the present fixed-term agreement from 1 January 2006, with a mutual three month notice requirement and that her fixed remuneration should be reviewed annually in accordance with the normal practice for permanent employees.

[17] At about 7.35 pm on 4 October 2005 while she was on leave, Ms Wood retrieved a telephone message left for her by Mr Ralston. Mr Ralston advised that one Ms Judy Bailey was stepping down as anchor of TVNZ’s *One News* broadcast, but that Ms Wood was not to worry as there were no problems with Ms Wood’s contract and everything would be fine.

[18] At about 3.10 pm on Friday 14 October 2005, Ms Wood was called into a meeting with Mr Ralston and Ms Smith to discuss Ms Wood's employment agreement. Ms Wood was told that TVNZ wished to offer her an "open-ended" contract to continue in her existing role although ideally with more field work. Mr Ralston referred particularly to a story Ms Wood composed about three young Chinese children as an example of work he wanted more of. Mr Ralston said there would be a role for another presenter one Mr Mark Sainsbury ("Mr Sainsbury") but that Ms Wood would be the "senior partner". Mr Ralston assured Ms Wood that an increased involvement by Mr Sainsbury would not alter her role.

[19] Mr Ralston also explained to Ms Wood the environment within which higher salaries are approved by the TVNZ board. He explained the board's "bargaining licences" to her. The process is apparently not widely known within TVNZ as it has only recently been devised and is relevant for only two employees.

[20] Mr Ralston told Ms Wood the board had been very clear about the range in which he could negotiate with her. He then said he would not "mess around" and would give Ms Wood the upper limit up front. He did so and told her it was \$350,000.00.

[21] I find that Mr Ralston advised Ms Wood he could not offer her a salary of more than \$350,000.00 because that was the top of the salary band he had been authorised by the Board of TVNZ to pay Ms Wood and he could not go any higher. He acknowledged this was less than Ms Wood's existing salary.

[22] Ms Smith and Mr Ralston tell the Authority that Mr Ralston told Ms Wood her current salary was based on the uncertainty associated with the launch and future success of *Close-Up at 7* and that she would now be gaining permanent employment. Ms Wood tells the Authority she cannot recall Mr Ralston saying this to her. With Ms Smith's corroboration, the weight of evidence is that he did.

[23] Mr Ralston said the \$350,000.00 salary was an initial salary subject to annual reviews. Ms Wood asked about a car. Ms Smith offered to go through a draft template agreement with Ms Wood. The meeting concluded with Mr Ralston and Ms Wood resolving that it would be a good idea to take the weekend to think things over. They agreed to meet again to continue their discussions on Tuesday 18 October 2005.

[24] Ms Wood says she left the meeting feeling extremely upset and confused. She asks why, if she is doing such a great job and *Close-Up at 7* is to continue, TVNZ wishes to pay her significantly less to continue in the same role.

[25] At 10.30 am on Tuesday 18 October 2005, Ms Wood, Mr Ralston and Ms Smith met again. Mr Ralston confirmed Ms Wood was doing a "fantastic job" and that TVNZ was offering her an open-ended contract on *Close-Up at 7* "for as long as". He confirmed Ms Wood's role would remain the same but with Mr Sainsbury used occasionally.

[26] Mr Ralston again confirmed the top salary he was authorised by TVNZ's board to pay to Ms Wood was \$350,000.00 per annum. That statement repeated what he had said in the meeting on 14 October 2005. They were misleading statements. Although it was what the committee had approved, it was more accurate to tell Ms Wood that it was all that her managers had asked the board to approve for her. I do not consider TVNZ acted in good faith towards Ms Wood because it conveyed to her an inaccurate impression about the parameters or scope of the bargaining in relation to her salary. Her managers were the agents of the employer board.

[27] TVNZ management tell the Authority of a \$300,000.00 salary cap for TVNZ employees. It is actually the case that the committee must approve salaries in excess of that sum and there is no express prohibition of salaries beyond that sum *per se*. That is made clear by the first of the responsibilities set out at paragraph [12] above.

[28] Ms Smith confirmed Ms Wood's other remuneration benefits remained the same. Ms Wood was offered an enhanced redundancy compensation entitlement as a means of ameliorating the reduced remuneration offered to her. The parties eventually agreed that Ms Wood would be entitled to redundancy compensation as from her commencement of service with TVNZ on 1 October 1985, service which included many years during which Ms Wood was engaged by TVNZ through her limited liability company S Wood Holdings Limited.

[29] At the conclusion of the meeting Ms Wood told Mr Ralston she was "gutted" about the money. Mr Ralston told her it was nothing personal.

[30] Ms Wood says TVNZ has never communicated any concern about her performance in her role on *Close-Up at 7*. She refers to numerous testimonials of praise she has received from TVNZ management including from Mr Fraser and Mr Ralston, and an award she won for best presenter.

[31] Ms Wood was not pleased at all with what she had been offered. The offer of indefinite employment did not ameliorate her anxiety about the reduced salary. She felt what she had been offered could not be legal. She consulted lawyers for advice about the situation and her solicitor contacted Ms Smith on the afternoon of 18 October 2005. The solicitor communicated to Ms Smith, Ms Wood's displeasure and also, the solicitor's view that TVNZ was acting unlawfully.

[32] There was a confidential meeting between TVNZ management and Ms Wood's lawyer on 19 October 2005. Nothing turns on that meeting and the problem was not resolved at it.

[33] Ms Smith wrote that same day to Ms Wood. That advice is materially as follows:-

I am writing to confirm what we discussed in the meeting between Bill, you and me yesterday, 18 October 2005.

We have expressed our strong desire to retain you as Anchor of "Close-Up at 7" and have offered you a new permanent employment to take effect from 1 January 2006, after the expiry of your current fixed-term employment agreement.

To confirm, the terms of the new offer are contained in the draft individual employment agreement template we gave to you yesterday. The remuneration will be \$350,000 per annum with an annual review, the first of which will occur after 1 January 2007. Additionally, Bill and I have, at our discretion, decided to provide you with an enhanced redundancy package.

We make this offer sincerely and very much hope that you will accept it. In order for both parties to plan for the future of "Close-Up at 7", I should make it clear that this offer is open for acceptance until Friday 4 November 2005. Should I not have received your acceptance by that time, the offer lapses.

[34] Ms Wood says that TVNZ has placed her in a difficult position. She says it is attempting to coerce her into signing a new agreement with a significant reduction in salary or face termination of her employment.

[35] TVNZ says it is entitled to renegotiate new terms of employment with Ms Wood consequent upon the expiry of her presently continuing fixed-term employment.

The legal principles

[36] The starting point is always the express term of the individual employment agreement. That is because it records the terms of the bargain the parties voluntarily entered into. Ms Wood's employment agreement drafted by TVNZ's former Human Resources manager and expressed to have been made on 1 December 2004, contains the following terms:-

1. *Fixed-term employment*

1.1 *The employment of the Employee will commence on 1 January 2005 and end at the close of a specified date, namely 31 December 2005. There shall be no express or implied obligation on either party to renew this agreement at the expiry of its fixed-term. The term of this agreement is based on the introduction of the News and Current Affairs Department programme "Close-Up at 7" (or any replacement programme) from the time at which this agreement was entered into.*

1.2 *The Employee acknowledges that before she and TVNZ agreed her employment would end in the way specified in clause 1.1 she was advised by TVNZ of when her employment would end and the reason for her employment ending in that way. Further, she acknowledges that TVNZ had a genuine reason based on reasonable grounds for specifying that her employment would end in the way specified in clause 1.1 (the genuine reason being that the Employee has been employed by TVNZ primarily to Host/Anchor/Present "Close-Up at 7" (or any replacement programme)) and(sic) that when she finishes on air in that role, it is appropriate that her employment with TVNZ end. (emphasis added)*

1.3 *The Employee acknowledges that she will receive, in terms of the remuneration package contained in this agreement, consideration for entering into a fixed-term agreement.*

And

5. *Remuneration*

5.1 *In full consideration of all services furnished by the Employee and subject to the faithful and complete performance of the employee's obligations hereunder the Employee shall receive (provided that she is performing the services described in clause 2 at the relevant time):*

(a) *For the period 1 January 2005 to 31 December 2005 a salary of \$450,000.00 gross taxable;*

And

14. *Termination*

...

14.4.1 *both parties shall give the other party 3 months notice prior to the expiry of this agreement of their intention to renew or otherwise.*

And

19. *General*

19.1 *This agreement and the obligations of TVNZ hereunder shall be binding on any Government department, statutory authority, company, person or firm succeeding to the obligations of TVNZ.*

19.2 *For the purposes of this agreement the powers of TVNZ may be exercised by the Chief Executive, TVNZ, or any officer of TVNZ acting on his behalf.*

19.3 *This agreement and all matters and issues collateral to it shall be governed in accordance with the laws of New Zealand.*

19.4 This contract, together with the TVNZ Employment Code and TVNZ Journalists Manual, comprises the Employee's complete terms and conditions of employment and replaces all previous written or oral agreements and undertakings. Any variations to this contract must be agreed in writing.

[37] Fixed-term employments must comply with the very strict requirements set out under section 66 of the *Employment Relations Act 2000* ("the Act"). That section in its entirety, is as follows:-

66. *Fixed-term employment—*

- (1) *An employee and an employer may agree that the employment of the employee will end—*
 - (a) *at the close of a specified date or period; or*
 - (b) *on the occurrence of a specified event; or*
 - (c) *at the conclusion of a specified project.*
- (2) *Before an employee and employer agree that the employment of the employee will end in a way specified in subsection (1), the employer must—*
 - (a) *have genuine reasons based on reasonable grounds for specifying that the employment of the employee is to end in that way; and*
 - (b) *advise the employee of when or how his or her employment will end and the reasons for his or her employment ending in that way.*
- (3) *The following reasons are not genuine reasons for the purposes of subsection (2)(a):*
 - (a) *to exclude or limit the rights of the employee under this Act;*
 - (b) *to establish the suitability of the employee for permanent employment.*
 - [(c) *to exclude or limit the rights of an employee under the Holidays Act 2003.*]
- (4) *If an employee and an employer agree that the employment of the employee will end in a way specified in subsection (1), the employee's employment agreement must state in writing—*
 - (a) *the way in which the employment will end; and*
 - (b) *the reasons for ending the employment in that way.*
- (5) *Failure to comply with subsection (4), including failure to comply because the reasons for ending the employment are not genuine reasons based on reasonable grounds, does not affect the validity of the employment agreement between the employee and the employer.*
- (6) *However, if the employer does not comply with subsection (4), the employer may not rely on any term agreed under subsection (1)—*
 - (a) *to end the employee's employment if the employee elects, at any time, to treat that term as ineffective; or*
 - (b) *as having been effective to end the employee's employment, if the former employee elects to treat that term as ineffective.*

[38] Subsections (4) to (6) were inserted, as from 1 December 2004, by section 27 of the *Employment Relations Amendment Act (No 2) 2004*. That was the same date this employment agreement was expressed to be made.

[39] The Authority is assisted by a recent judgment of the Employment Court in *Saint Kentigern Teachers Association Inc -v- Saint Kentigern Trust Board*¹ where the Chief Judge traces the caselaw relating to fixed-term employments and usefully traverses the background to the legislative amendments. His Honour makes this statement as to the legislative intent behind the amendments:-

Job losses, sometimes after many successive fixed-term agreements, were the undesirable outcomes that Parliament sought to avoid by enacting a regime that was intended to make fixed-term employment

¹ unreported, AC63/05, 26 October 2005, Colgan CJ

transparent and dependent upon the establishment of a series of tests of justification and clear notice imposed on employers.

[40] That statement assists the Authority in adopting a purposive approach to interpreting both the terms of the present individual employment agreement and the strict statutory requirements of section 66 of the Act.

The issues

[41] In resolving the employment relationship problem between the parties, the Authority determines the substantial merits of the problem by having regard to and applying established legal principles to the facts established.

[42] The issues that arise for determination are these:-

- i. Whether Ms Wood is entitled to treat the fixed-term provision of her employment as ineffective;
- ii. Whether TVNZ is permitted to impose a new salary of \$350,000.00 on Ms Wood.

These issues are dealt with in turn.

An Ineffective Fixed-term?

[43] Parliament has expressly provided a more regulated regime for those entering into fixed-term agreements compared to indefinite employments. That makes the opportunity for an employee to take advice all the more essential.

[44] There are two pre-requisites to such agreements being entered into. The first is for the employer to have genuine reasons based on reasonable grounds to specify that the employment is to end in a specified way and, second, that the employee must be advised when and how the employment is to end and the reasons for it.

[45] The law imposes stringent requirements for fixed-term employments because there is a potential for them to be used as a device to deny an employee access to remedies for unjustifiable dismissal. The ending of a fixed-term employment is not a termination or a dismissal, rather the agreement is said to expire by the “mere effluxion of time” as the parties agreed it would. There being no dismissal, an employee is not able to pursue a personal grievance for unjustifiable dismissal. Accordingly, the institutions scrutinize the employment to see that it is genuinely fixed-term and that special requirements as to notice tantamount to informed consent, are met.

[46] Ms Wood’s terms of employment were the subject of negotiations in late November 2004. I find however, those negotiations were addressed almost exclusively to the remuneration rather than the tenure.

[47] Ms Wood had agreed to fill a vacancy left by one Mr Paul Holmes who had previously hosted a nightly current affairs programme styled *Holmes* in the 7.00 pm slot. Mr Ralston had asked Ms Wood to stand in until a permanent replacement was found.

[48] Ms Wood was eventually confirmed as the “permanent” replacement. Mr Ralston asked Ms Wood “*do you want to give it a go*” and she agreed she would. He told her she would get a one year contract.

[49] Ms Wood says that in late November 2004, a few days after she agreed to anchor *Close-Up at 7*, she and Mr Ralston met to discuss the terms of her employment. It is best I quote her prepared evidence on the point in its entirety:-

Initially Bill Ralston, on behalf of TVNZ, offered me an annual salary of \$360,000 for a fixed-term of 12 months, which he said was double the \$180,000 I had earned from TVNZ in 2004. I felt I was worth more than this, and said so to Bill. I knew that it (sic) important to TVNZ that it maintain high ratings in the crucial 7:00 pm timeslot after Paul Holmes' departure. I also knew that TVNZ had paid approximately \$900,000 to the anchors of Holmes in 2004, as Paul Holmes had been on a salary of \$760,000 (with allowances of approximately \$40,000), while I had been paid about \$100,000 for my work on Holmes. I therefore asked for half of this, being \$450,000. Bill agreed to this sum (although he said he would need board approval). At no stage did Bill ever suggest that this salary included a premium for the fact that I was to be employed on a fixed-term.

[50] Mr Ralston's evidence on the negotiations is this:-

At the end of November 2004, I met with Susan and said that the Board had approved me offering her a one year fixed-term employment agreement to host the new news and current affairs show called Close-Up we would be introducing to replace Holmes. We discussed the uncertainty of the situation given the new show and the competition we faced from Prime and TV3. I then asked Susan what she thought she was worth. She said that she thought that a salary of \$500,000 was appropriate, which she based on an extrapolation of her daily rate as a contractor (at that stage, TVNZ had a contract with Susan's company, S Wood Holdings, through which Susan provided her services to TVNZ). I said that \$500,000 was above what I thought TVNZ could appropriately pay. Susan responded by saying that she would be taking a huge career risk given that the new show was an experiment, and if it did not succeed she would face public humiliation. She also said that based on the nature of the fixed-term agreement and the lack of certainty given that two competing shows also being launched, the salary figure she was proposing was appropriate to compensate her for the risk she was taking. We talked further and reached an agreement in principle that she would be paid \$450,000 and her employment would be for a fixed-term of one year. However, I told Susan that I would have to get board approval before the salary figure could be confirmed.

[51] Ms Wood and Mr Ralston disagree about how the salary of \$450,000.00 was arrived at. Ms Wood says that "At no stage did Bill ever suggest that this salary included a premium for the fact that I was to be employed on a fixed-term". There is an attractive logic to Ms Wood's account. However, Mr Ralston's evidence on the point is corroborated by his submission to the committee dated 2 December 2004 seeking board approval for Ms Wood's one year contract at a salary of \$450,000. There Mr Ralston says:-

She believes (correctly) this is a high risk move for her career and that it will require enormous effort from her throughout 2005.

And he concludes with this recommendation:-

That the HR and Remuneration Committee APPROVE a one year fixed-term employee (sic) agreement for Susan Wood at salary of \$450,000 gross taxable with effect from 1 January 2005.

[52] The description therein of the agreement by Mr Ralston as a "fixed-term employee agreement" is interesting. Such agreements are correctly known as "fixed-term agreements". In my considered view, it is not the "employee" that is primarily fixed-term, rather it is the "employment" or the work.

[53] Mr Ralston and Ms Wood both say there was no specific discussion about the one year term of the employment. There was discussion about risk of success but that was only in so far as it related to the salary discussions. I find then that there was no discussion between Ms Wood and Mr

Ralston or any other representative of TVNZ, particularly directed at the term of the employment and the reasons why the employment was to end in that way. Although there are specified acknowledgements set out at clause 1.2 of the employment agreement confirming notification and advice to Ms Wood, I find that as a matter of fact, no such advice was actually given to her. The most that was said was Ms Wood would be given a one year contract and a question as to whether she would like to “give it a go”. There was nothing more.

[54] Ms Wood was provided with a draft agreement but returned it because it contained a three month notice of termination provision. She says she signed a revised version on 1 December 2004 but she did not take legal advice about it because she trusted TVNZ having given it twenty years service. I am not impressed by that evidence. All employees ought to take independent advice prior to entering into an employment agreement. The law specifically provides that employer’s must permit employees that opportunity.

[55] I find that the agreement was not provided to Ms Wood with TVNZ’s standard covering letter which advised Ms Wood of her right to take independent advice before signing the agreement. I further find that the absence of such letter, evidences that no opportunity was provided to Ms Wood to take advice about the agreement. Perhaps if Ms Wood had been informed of her right to take independent advice and done so, she would have been told what her lawyer communicated to Ms Smith on 18 October 2005. This problem might possibly have been resolved much earlier and even averted entirely. I accept however that she chose not to take advice at the time it was presented to her.

[56] I am unable to say that TVNZ brought the relevant reasons to her attention before she signed the employment agreement. I find as a matter of fact, that before signing the employment agreement, Ms Wood was not advised or given notice of the reasons why her employment was to end on 31 December 2005. No reasons were communicated to her as to why her employment would end.

The genuineness of the fixed-term

[57] The term of Ms Wood’s employment is expressed in the employment agreement as “*1 January 2005 and end at the close of a specified date, namely 31 December 2005*”.

[58] If the term of the employment is the year from 1 January 2005 to 31 December 2005, I find that there is nothing special about that end date. There was nothing which was to occur on that date or at the end of the period.

[59] I put it directly to Ms Wood that she knew her employment was not indefinite because she signed it appreciating that it contained an express reference to a defined term ending on 31 December 2005. I put it to her that on 1 January 2006 she knew she would not have a job. I suggested to her it would be rather naïve to not have apprehended that. She responded that there was nothing significant about the date but emphasised that her understanding was that her employment was dependent or contingent upon the continued success of the *Close-Up at 7* programme. When I asked her about her understanding of the significance of the expressed 31 December 2005 date, she told me it was “the last day of the year”. Although naïve, I am persuaded that this is Ms Wood’s sincere and honestly held understanding.

[60] It seems to me that Ms Wood appreciated her employment was indeed of limited tenure, but it was limited only by the continued success or otherwise of the *Close-Up at 7* programme. She says that she understood that her employment could end if the programme failed but the corollary of that,

she says, is her continued employment as a result of the programme's continued success. Ms Wood deals directly with this point in her prepared evidence:-

I know that (sic) employment agreement provides for a 12 month fixed-term. The reason for this, as I understood it, is that TVNZ wanted to be able to end my employment if Close-Up at 7 as not a success and was taken off the air. However, it (and I) have been a success. While the decision to employ me as the anchor of Close-Up at 7 was a risk for TVNZ then, Bill Ralston told me that it was the least risky of the options available, as I was familiar to viewers in the timeslot.

[61] In the circumstances Ms Wood cannot be criticised for the understanding she has because the way in which the purported fixed-term nature of her employment is specified in the written employment agreement is problematic. As well, as I have already said, the reasons for the fixed-term were not advised or brought to her attention before she signed the agreement.

[62] Mr Towner for TVNZ euphemistically refers to the wording of the employment agreement as "inelegant". I have concluded it is defective.

[63] The employment agreement must "state" (not specify) the reasons why the employment is to end at the end of the period from 1 January 2005 to 31 December 2005.

[64] The relevant parts of clause 1 of the agreement are these in terms of stated reasons:-

The term of this agreement is based on the introduction of the News and Current Affairs Department programme "Close-Up at 7" (or any replacement programme) from the time at which this agreement was entered into.

.. (the genuine reason being that the Employee has been employed by TVNZ primarily to Host/Anchor/Present "Close-Up at 7" (or any replacement programme)) and(sic) that when she finishes on air in that role, it is appropriate that her employment with TVNZ end. (emphasis added)

[65] It is correct that there is an attempt to explain the reasons. But what are stated are not reasons at all. What is required is meaningful reasons according to purpose.

[66] It is possible reading the two phrases in combination to form a sense of what is intended, but that exercise should not be necessary. The statements however read, do not make specifically clear the reasons why the employment was to end at all and in particular, on 31 December 2005. In my view the clause is deficient and does not comply with section 66(4)(b).

[67] I accept that Ms Wood was aware of the introductory nature of the *Close-Up at 7* programme and that she was aware of the risk that the programme would not succeed. It is indeed possible to extrapolate from the stated "*introduction of the News and current Affairs Department programme Close-Up at 7*" that there is a contingency involved and that she might be given to understand her tenure in the role would be limited. But Ms Wood should not have to guess as to how her demise might eventually transpire. The law requires that situation be particularly spelt out in writing. The relevant clause of employment agreement does not make the situation clear.

[68] I find therefore that the employment agreement does not sufficiently state in writing the reasons why Ms Wood's employment was to particularly end on 31 December 2005.

[69] My findings are surprising. It is unfortunate that TVNZ could negotiate and conclude this binding legal agreement in such a casual fashion having regard to its standing in our community, as a large employer and the price of the contract. It ought to have taken far more care and attention in its drafting and negotiation especially of such a material clause. I do not impose any lesser standard

on this employer than the Authority does on any other. The difference however, is that TVNZ is better resourced to comply with the very same obligations that all other employers face, the vast majority of which are small to medium sized businesses.

[70] The language of section 66(2) is mandatory by the use of the word “must”. There are consequences for the non-compliance. The provision as to termination is ineffective. The Court of Appeal has previously discussed the consequences of such non-compliance²:-

... it is unrealistic to ascribe to the legislature an intention that a failure to comply with s66(2)(b) should be of no moment. Section 62(a) and (b) are both prefaced by the word “must”. As a matter of ordinary English, it is not possible to construe the language of s66(2)(b) so as to treat the requirements to advise the employee of how and when his or her employment will end as fundamental to the effectiveness of a fixed-term agreement (as they plainly are) but the requirement to advise the employee of the underlying reasons as being of less or no significance.

[71] The very day the parties made the agreement between them, amendments to the Act prescribing consequences for non-compliance with section 66 became coincidentally operative. Those are the amendments at subsections (4) – (6).

[72] I have already said that I find the employment agreement fails to adequately state in writing the reasons why Ms Wood’s employment would particularly end on 31 December 2005. That is contrary to the provisions of sub-section 66(4) of the Act.

[73] Sub-section 66(5) provides that the contravention of section 66(4) does not affect the validity of the employment agreement. The employment relationship remains valid. However, sub-section 66(6) provides that the employee has an election to treat the purported fixed-term as ineffective.

[74] In now seeking the Authority’s assistance and claiming the relief she does, Ms Wood elects to treat the term that her employment will on 31 December 2005 as ineffective. She is entitled to do so.

[75] For the reasons I have outlined above, **I now determine the first issue in Ms Wood’s favour. I declare that Ms Wood is entitled to treat the fixed-term provision of her employment agreement (made on 1 December 2004) that her employment shall end on 31 December 2005 as ineffective.**

[76] I give consideration to whether the fixed-term employment agreement clause, however inelegant, is capable of specifying a legitimate fixed-term according to the life of the *Close-Up at 7* programme (or any replacement programme). I consider the same in an attempt to recognise the parties’ actual intention as I find it on the evidence. That is the significance of the attempted explanation “*.and(sic) that when she finishes on air in that role, it is appropriate that her employment with TVNZ end.*” and what I find Ms Wood understood.

[77] I would have no difficulty in diagnosing such a fixed-term as genuine and based on reasonable grounds. But I would be unable to hold that Ms Wood was given advice of the same and the reasons for ending her employment that way. Those factual elements were simply not present before the employment agreement was entered into. There would not be compliance with section 66(2)(b) in that regard.

² *Norske Skog Tasman Ltd -v- Clarke* [2004] 3 NZLR 323 (CA) para 68

[78] I regret that I would be unable to find compliance with section 66(4) either. I cannot rewrite the employment agreement and impose a material strict term of the contract that simply is not present and nor would it be proper for the Authority to do so.

[79] The result on this analysis is that Ms Wood's employment is indefinite. Her employment can only be terminated for good cause.

Is TVNZ permitted to impose a new salary on Ms Wood?

[80] Consequent upon my finding above, I further find that TVNZ is not at liberty to offer a new contract and salary to Ms Wood commencing from 1 January 2006 on the basis that her employment will end on 31 December 2005.

[81] Mr Towner for TVNZ submits that the salary provision of the agreement remains effective because it is specifically expressed to apply only from 1 January 2005 to 31 December 2005 and is unaffected by any finding that Ms Wood's employment is indefinite or continuous. He submits the Authority has no jurisdiction to impose a new salary in the form of the existing salary of \$450,000 or any other. He says the parties must negotiate a new one although he helpfully suggests that a principle of law known as *quantum meruit* is available as a means of redress. That legal principle applies when a person employs another but there is no agreement as to the compensation to be paid. The law implies a promise from the employer to the employee that the employer will pay the employee for services, "*as much as he may deserve or merit*". Mr Towner's principal submission has some merit.

[82] The salary provision in the agreement is this:-

(a) *For the period 1 January 2005 to 31 December 2005 a salary of \$450,00.00 gross taxable;*

[83] The term and its plain ordinary meaning, is not rendered ineffective by my previous findings.

[84] I detect that there is an underlying implied intention to review that salary outside of the specified period even though in the context of the purported fixed term, the clause would have had no contractual force or meaning beyond 31 December 2005.

[85] It is appropriate to find that that provision will expire on 31 December 2005 in the context of the continuing employment that I have earlier found. It is now incumbent upon the parties to attempt to reach an agreement for a new salary in the same manner as a conventional pay review and which I understand TVNZ conducts in any case for its permanent employees.

[86] I am advised that Ms Wood is willing to negotiate in good faith regarding her terms and conditions of employment. That is commendable. I consider it appropriate that the parties conduct that exercise. They must do so in good faith. Ms Wood should be provided with all information including the terms of reference for the committee and any submission made to the committee on her behalf. She will now better understand her employer's processes in relation to salary bargaining. I trust the parties will use their best endeavours in good faith to reach agreement on a new salary. But that salary cannot be imposed on Ms Wood. It must be attained by agreement.

[87] Accordingly, I find that Ms Wood's entitlement to her present salary of \$450,000.00 will expire on 31 December 2005. A new salary is to be renegotiated between the parties. Television New Zealand Limited is not permitted to impose a salary as from 1 January 2006 without Ms Wood's consent.

The personal grievance

[88] Ms Wood says TVNZ's ultimatum to her as set out in Ms Smith's letter of 19 October 2005, that her purported fixed-term employment would expire if she did not accept a reduced salary, constitutes an unjustifiable action by the employer giving rise to a personal grievance. Ms Wood claims compensation.

[89] She gives evidence that she is shocked and surprised at the situation she now finds herself in. She says she has been a loyal employee of TVNZ for over 20 years, and that she now feels she is being treated callously by TVNZ. Her opinion of TVNZ has changed in the last month as she feels TVNZ is threatening her with termination in order to get her to accept a significant reduction in salary.

[90] She says the whole situation has caused her significant distress and she is now being forced to make decisions about her future in broadcasting with the pressure of the possibility of losing her job. She says she feels like she is being manipulated by TVNZ using the fixed-term to try and get her to perform the same role for less money. She finds this very upsetting.

[91] She says she has poured her heart and soul into *Close-Up at 7* over the past year to the detriment of her relationships with her family and fiancé.

[92] Her fiancé Mr Kevin Stanley gives evidence to the Authority that he has observed Ms Wood make a tremendous commitment to her role on *Close-Up at 7*. He says the past few weeks have been devastating for Ms Wood and her sons and she has not been able to sleep at night. She has been very stressed. He has noticed changes in her behaviour and cites an incident where she shouted at her children in a way that was out of character for her. He says they were unable to attend a recent birthday party because Ms Wood could not face being around people from her industry and lying about how well her job was going.

[93] I am not prepared to find that TVNZ's actions in seeking to renegotiate Ms Wood's employment should be characterised as "unjustifiable". It acted according to its view that Ms Wood's employment was fixed-term. That was an erroneous view as I have now determined it to be. Although I consider Ms Smith's advice of 19 October 2005 was premature and hasty, I do not regard TVNZ's conduct throughout the negotiations the subject of these proceedings as unjustifiable. They were merely "entirely misguided". **Accordingly, I make no orders in relation to Ms Wood's claim for unjustifiable disadvantage.**

Penalties

[94] Ms Wood asks that TVNZ be ordered to pay a penalty. That penalty is pursued under section 134 of the Act and in respect of a breach of the failure to comply with the duty of good faith.

[95] I am not persuaded that the circumstances of this case require the imposition of a penalty and **I decline to exercise my discretion to order the same.**

[96] I would however have entertained an application for penalty in respect of the failure by TVNZ to accord Ms Wood an opportunity to take independent advice about the agreement. A penalty in regard is not however sought on Ms Wood's behalf. There would likely be limitation issues arising as well.

Determination

[97] For all the above reasons, I now determine that this employment relationship problem shall be resolved by the following orders:-

- A. The Authority declares that Susan Marie Wood is entitled to treat the fixed-term provision of her employment agreement with Television New Zealand Limited made on 1 December 2004 as ineffective. The employment is terminable only for cause.**
- B. The Authority declares that Susan Marie Wood's entitlement to a present salary of \$450,000.00 will expire on 31 December 2005. Television New Zealand Limited is not permitted to impose a new salary as from 1 January 2006 without Susan Marie Wood's consent.**

Costs

[98] I record my gratitude to Counsel for their assistance in my investigation and the value they have added to the process.

[99] In the event that Ms Wood seeks costs, I encourage the parties to resolve the matter between them, but failing agreement, Mr Crotty is to lodge and serve a memorandum as to costs within 14 days of the date of this Determination. Mr Towner is to lodge and serve a memorandum in reply thereafter but within 28 days of the date of this Determination. I will not consider any application outside that timeframe.

Leon Robinson
Member of Employment Relations Authority