

**IN THE EMPLOYMENT COURT OF NEW ZEALAND
WELLINGTON**

**I TE KŌTI TAKE MAHI O AOTEAROA
TE WHANGANUI-A-TARA**

**[2024] NZEmpC 250
EMPC 70/2024**

IN THE MATTER OF a challenge to a determination of the
Employment Relations Authority

BETWEEN HIGH PERFORMANCE SPORT NEW
ZEALAND LIMITED
Plaintiff

AND THE ATHLETES' COOPERATIVE
INCORPORATED
Defendant

Hearing: 10–11 September 2024
(Heard at Wellington)

Court: Chief Judge Christina Inglis
Judge Kathryn Beck
Judge BA Corkill

Appearances: K Dunn, counsel for plaintiff
A Scott-Howman, counsel for defendant

Judgment: 16 December 2024

JUDGMENT OF THE FULL COURT

Introduction

[1] The issue for the Court centres on the circumstances in which a union may initiate collective bargaining with an employer under s 40 of the Employment Relations Act 2000 (the Act).

[2] High Performance Sport New Zealand Ltd (HPSNZ) is a subsidiary of Sport New Zealand and is a publicly funded organisation. It works with national sporting

organisations (NSOs) to enable and empower worldclass sporting performances. Relevant NSOs have direct relationships with athletes. They are solely responsible for running that sport in Aotearoa New Zealand. They are affiliated to the international federation for their sport and are therefore responsible for entering athletes and teams into international competitions.

[3] The Athletes' Cooperative Inc (TAC) is a union that represents the interests of some elite athletes. TAC issued a notice initiating bargaining against HPSNZ in July 2022. HPSNZ declined to bargain.

[4] TAC filed an application in the Employment Relations Authority seeking that HPSNZ bargain in accordance with the notice.

[5] The Authority found that the notice was valid and that HPSNZ was required to participate in collective bargaining with TAC.¹ HPSNZ has filed a de novo challenge to the Authority's determination. This proceeding resolves that challenge.

Issues

[6] The parties agree that the issues in this proceeding are as follows:

- (a) whether TAC has validly initiated collective bargaining in accordance with s 40 of the Act via the initiation notice dated 22 July 2022; and
- (b) given it does not employ anyone described in the intended coverage clause in the initiation notice (and has no intention to do so), whether HPSNZ is required to participate in collective bargaining with TAC.

Facts

HPSNZ

[7] HPSNZ is a government-funded kaitiaki (guardian) of the high-performance sport system. HPSNZ works in partnership with NSOs, allocating resources to

¹ *The Athletes' Cooperative Inc v High Performance Sport New Zealand Ltd* [2024] NZERA 43 (Member Anderson).

specific sports and campaigns and delivering support to positively impact performance and wellbeing. In doing so, its stated aim is to enable and empower world class sporting performances that inspire New Zealanders within environments that nurture wellbeing as a critical component of performance.

[8] Some athletes receive support via NSOs as part of HPSNZ's Tailored Athlete Pathway Support (TAPS) programme. TAPS has been designed to support and enable the performance and wellbeing of athletes.

[9] The parties disagree as to whether HPSNZ has a direct relationship with any individual athletes. Rather than focusing on that issue, it is more helpful to address the specific incidences of the relationship.

[10] It was common ground that HPSNZ does not employ athletes in the conventional sense.² On the other hand, it does provide funding to athletes, which it has a hand in allocating across various sports through investment processes. It also allocates TAPS investment to NSOs, and each NSO then contracts directly with athletes. When making investment decisions, HPSNZ does not negotiate directly with athletes, although individual athletes are occasionally involved in discussions between HPSNZ and NSOs on a tripartite basis, and there was evidence before the Court of an historic negotiation with one elite athlete under the former Performance Enhancement Grants system. Even where athletes are involved in negotiations, those negotiations have related to HPSNZ's investments and funding arrangements rather than employment related issues.

[11] While it is a requirement of eligibility for TAPS that athletes have a contract with their NSO, HPSNZ says it does not prescribe the relationship required. That is a matter for NSOs and athletes. Athletes may be employed as employees, engaged as independent contractors or be the recipients of a grant.

[12] The evidence established that HPSNZ provides NSOs with a template agreement that NSOs can tailor with their athletes to better reflect their unique

² There was also no suggestion from TAC that HPSNZ was a controlling third party over its members.

environment, although a copy of that template agreement was not before the Court. A copy of a 2023 agreement between Rowing New Zealand and Tom Mackintosh, a foundation member of TAC, was before the Court. HPSNZ was not a party to that agreement. However, the agreement does require Mr Mackintosh to use support services provided by HPSNZ and to comply with obligations relating to his status as a recipient of TAPS funding as specified by HPSNZ. It also notes that HPSNZ may withdraw funding and amend its terms at any time.

[13] HPSNZ also takes an overarching role in terms of athlete health and wellbeing.³ More generally, athletes are the reason that HPSNZ exists. It celebrates the successes of athletes, and its funding and investment decisions are intrinsically related to the endeavours and successes of athletes.

TAC

[14] TAC is a union representing some athletes. It was registered as an incorporated society and trade union on 3 June 2022.

[15] Its objects include representing its members' individual and collective interests, including in relation to collective bargaining. It also seeks to support its members in understanding sporting and promotional contracts. Further, it is to act as an independent body from HPSNZ, the New Zealand Olympic Committee (NZOC) and any relevant NSO, with its members' concerns foremost.

[16] Any athlete who is funded through HPSNZ, who is an NSO carded athlete, or who is engaged by an NSO to represent their country at the highest level at an Olympics, Paralympics, Commonwealth Games, World Championship, or as part of an international competition or tournament, can apply to be a member of TAC.

[17] At present, the members only come from the sports of rowing and cycling. At the time of the hearing, there were 65 members: 40 rowers and 25 cyclists.

³ Including the development of initiatives such as the athlete wellbeing framework and guidelines, and the provision of performance support expertise (strength and conditioning, nutrition, psychology etc).

The reports

[18] There have been two inquiries into Cycling New Zealand's high-performance programme.

[19] The first inquiry was an independent review by Michael Heron KC, which produced a report dated 12 October 2018 (the 2018 report). Cycling New Zealand and HPSNZ worked to implement the recommendations from that report.

[20] However, in the wake of Olivia Podmore's death on 9 August 2021 (which is subject to a Coronial inquiry) and criticisms about implementation of the 2018 report, Cycling New Zealand and HPSNZ agreed to commission a further independent inquiry to assess the adequacy of that implementation. Its key objectives included identifying areas for further improvement that would ensure the wellbeing of athletes, coaches, support staff and others.

[21] While the second inquiry also focused on Cycling New Zealand, it was expected that any insights might be of value to the wider high-performance system, and HPSNZ agreed to consider how learnings from the inquiry might benefit the wider high-performance system.

[22] The full report was provided to the Court.⁴ The panel made 29 recommendations in the areas of acknowledging responsibility, culture, funding, athlete support services, operations within the high-performance programme, and governance.

[23] One of the report's recommendations was that athletes should be allowed an independent voice, noting the current power imbalance between HPSNZ/Cycling New Zealand and athletes. It noted that any athlete welfare or advocacy body must be

⁴ Michael Heron and others *Cycling New Zealand and High Performance Sport New Zealand Inquiry* (9 May 2022). Although described as the Heron report, the inquiry was carried out by an interdisciplinary panel consisting of Michael Heron KC, Dr Sarah Leberman MNZM, Genevieve Macky, Dr Lesley Nicol ONZM and Charlotte Agnew-Harington.

athlete focused, with its mandate determined by the athlete community. TAC says it is such a body.⁵

[24] The panel recommended that athlete agreements be reviewed and that HPSNZ and Cycling New Zealand consult with athletes on a contractor versus employee model, noting that an employment model was “not impossible”. It stated that athletes “deserve the same protection” as HPSNZ’s and Cycling New Zealand’s employees, given that those athletes are the reason for the organisations existing. It did not purport to outline or describe the detail or structure of any such relationship.

[25] TAC says it is seeking to build a culture in which athletes can thrive and to address what it says is the disconnect between athletes and HPSNZ. It considers this is best addressed through a collective agreement with HPSNZ.

The s 40 notice and response

[26] On 20 July 2022, TAC sent a notice to HPSNZ purporting to initiate collective bargaining. That notice purported to initiate bargaining for athletes with the following proposed coverage:

The collective agreement is intended to cover HPSNZ and any of the following categories of elite athlete who have applied for and been accepted as members of TAC:

1. Any Tailored Athlete Pathway Support (“TAPS”) High Performance Sport NZ or NSO carded athlete (or equivalent if this criteria is amended); or
2. Any athlete that is contracted with an NSO or engaged as part of an NSO high performance squad, team or programme that is funded through High Performance Sport NZ; or
3. Any athlete that is engaged by an NSO to represent their country at the highest level at an Olympics, Paralympics, Commonwealth Games, World Championship or as part of an international competition or tournament; or
4. Any athlete that has met the criteria listed in 1), 2) or 3) above in the preceding 36 months.

⁵ Another body, the Athlete Leaders Network, was also created as a result of the recommendations of the 2018 report.

[27] On 26 July 2022, HPSNZ advised TAC that it declined to participate in collective bargaining as it did not employ any athletes. HPSNZ did, however, say that it was willing to explore ways it could continue to help empower and enhance the voice of athletes within the high-performance sport system and that it was willing to consider any issues TAC wished to table. It repeated this offer in subsequent correspondence.

The first determination of the Employment Relations Authority

[28] The issue came before the Authority as an employment relationship problem. In a determination dated 26 January 2024, the Authority found that the initiation notice was valid and that HPSNZ was required to collectively bargain with TAC.

[29] In reaching this view, the Authority found that for the purposes of s 40(1) of the Act, the definition of “employer” only required that the proposed employer party to the collective agreement be an employer. It did not require that the proposed employer be an employer of any current employee within the proposed coverage clause.⁶

[30] The findings of that determination are the subject of the present proceedings.

Bargaining

[31] HPSNZ did not apply for a stay of the Authority’s determination. Accordingly, despite this challenge, it entered into the Authority-directed process with TAC.

[32] TAC and HPSNZ agreed a protocol for conducting such a process. They attended meetings on 12 March 2024, 19 March 2024 and 9 April 2024.

[33] HPSNZ says it tried to use those meetings as an opportunity to speak with TAC about its proposed strategic direction as well as to create an opportunity for TAC to identify specific issues faced by the athletes it represents.

⁶ *The Athletes’ Cooperative Inc v High Performance Sport New Zealand Ltd*, above n 1, at [62].

[34] At the second meeting, TAC made a proposal for a collective agreement by tabling a draft document for HPSNZ's consideration and response.

[35] In an email dated 5 April 2024, HPSNZ declined to respond to the draft on the basis that "both sides have acknowledged that athletes are not employees, and HPSNZ has made it clear that it has no intention of employing athletes in the future". It said it believed it had genuine reasons for not negotiating the detail of a collective agreement when it had no intention of entering one.

[36] Both parties acknowledged that they were at an apparent impasse.

[37] TAC filed a further application in the Authority alleging that HPSNZ had failed to comply with the Authority's 26 January 2024 determination by failing to respond to proposals, engage in collective bargaining, and conclude, subject to any genuine reason, a collective agreement.⁷

[38] In a determination dated 21 August 2024, the Authority ordered that HPSNZ comply with its good faith obligations, including by considering and responding to proposals put forward by TAC. However, it declined to issue the compliance orders sought, including the compliance order requiring HPSNZ to conclude bargaining.⁸

[39] That determination is not the subject of the challenge currently before the Court. However, it is part of the context of these current proceedings.

Other evidence received by the Court

[40] For the plaintiff, the Court heard from Stephen Tew, who is employed by HPSNZ as its Director of High Performance. He explained how the high-performance sport system currently works in New Zealand, including changes that were made to the funding framework, subsequent to the Heron reports. Mr Tew says he has consistently invited TAC to discuss any specific issues that its members may have

⁷ *The Athletes' Cooperative Inc v High Performance Sport New Zealand Ltd* [2024] NZERA 500 (Member Anderson) at [2].

⁸ At [33].

experienced and the ways in which they can improve the high-performance sport system. He says that he remains willing to have those discussions.

[41] The Court then heard evidence from a number of former and current athletes, namely Mahé Drysdale, Emma Twigg, Tom Mackintosh, and Samuel Dakin. All of them have represented New Zealand internationally, including at the Olympics. They set out their personal experiences in the high-performance sport system. Their evidence focused on funding systems and arrangements, athlete welfare, their motivation for setting up TAC, and their desire to have their own voice within the high-performance system.

[42] Mr Drysdale stated his view that there are many shortcomings in the funding system. He said that the fundamental problem is that the system is not built around the interests and wellbeing of athletes. He suggested that athletes are treated as temporary participants who only matter until they perform below expectation, become injured, or retire, at which point they have their funding removed. He emphasised the Heron report's finding that the funding model "generally prioritises medals over wellbeing".

[43] The Court also heard from Nienke Middleton, the mother of Olivia Podmore, who tragically died in 2021. Ms Middleton referred to Ms Podmore's experiences in the high-performance program of Cycling New Zealand. She outlined the difficulties Ms Podmore faced due to being based away from home, including working part time while training in order to make ends meet, a lack of funding, no clarity around expectations and having to deal with difficult selection decisions. Ms Middleton considered that having an independent organisation like TAC to stand up for her daughter would have provided a protection that would have assisted her in dealing with issues that she faced.

[44] There is clearly a strong desire among the TAC athletes to negotiate not only for an employment relationship but also a collective employment relationship. The question for the Court is whether the path they have chosen is open to them as a matter of law.

[45] The evidence we heard provided helpful context to the situation. However, the issue before the Court is primarily one of statutory interpretation.

The arguments

[46] Mr Scott-Howman, counsel for TAC, submitted that HPSNZ is required to enter into bargaining with TAC.

[47] He noted that HPSNZ is an employer for the purposes of the definition in s 5 because it employs employees. He initially submitted that if the Court was satisfied that this brought HPSNZ within the scope of the term “employer” in s 40, that would resolve the question before the Court.

[48] However, he acknowledged that HPSNZ does not employ any of TAC’s members. During the course of submissions, Mr Scott-Howman clarified his position, stating that he was not submitting that any group of individuals could start a union and initiate bargaining with any employer. He acknowledged that there needs to be a connection or nexus between the intended employer and the union’s members which, in answer to questions from the Court, was described as “some form of relationship”.

[49] Although he acknowledged that there needed to be a relationship or connection, he did not accept that there needed to be an employment relationship. He submitted that appropriate attention should be given to the words which precede all definitions in the Act: “unless the context otherwise requires”. Accordingly, he said the question for the Court was: can it be said that the context of s 40 requires a different meaning to the words “employer” and “employee” than is set out in ss 5 and 6? He submitted that the words should be interpreted to include those who aspire to be employed, so long as a connection or nexus exists, as well as those who are already employed.

[50] Ms Dunn, counsel for HPSNZ, submitted that HPSNZ is not required to participate in collective bargaining with TAC for a collective agreement.

[51] She submitted that even though TAC is a union and HPSNZ is an employer, that is not sufficient for collective bargaining to be initiated. She argued that HPSNZ

cannot be in an employment relationship with TAC because otherwise it would mean that every union is in an employment relationship with every employer in New Zealand.

[52] She said there must be a connection between HPSNZ's status as an employer alongside TAC's status as a union on the one hand, and any collective bargaining that is initiated on the other. She submitted there would only be a sufficient connection where HPSNZ employs employees who are TAC members and who perform work falling within the coverage clause proposed by the initiation notice.

[53] Ms Dunn accepted that HPSNZ employs employees and is an employer under ss 5 and 40 of the Act for the purposes of its relationship with those employees. However, she emphasised that HPSNZ is not in an employment relationship with any of the members of TAC. Thus, she submitted it could not be an employer of TAC's members for the purposes of the proposed collective bargaining in the present case.

[54] Additionally, while acknowledging that the statutory definitions of the words "employer" and "employee" are qualified by the words "unless the context otherwise requires", Ms Dunn submitted that the context does not otherwise require in this case. She submitted that cases where courts have adopted expanded definitions are distinguishable on the basis that in those cases, there was a pre-existing relationship where the parties intended for there to be an employment relationship, whereas in the present case there is no such meeting of the minds.

[55] Broadly, Ms Dunn submitted that the purpose of the Act is to regulate employment relationships. She submitted that it is not an object of the Act to facilitate non-employees entering employment relationships and that there is no stated preference for employment relationships over other relationships.

Analysis

[56] As we have said, the issue for the Court centres on the circumstances in which a union may initiate collective bargaining with an employer under s 40 of the Act.

[57] The meaning of legislation must be ascertained from its text and in the light of its purpose and context.⁹ Even if the meaning of the text is plain in isolation of the purpose, the meaning should always be cross checked against purpose.¹⁰

[58] Section 40 states:

40 Who may initiate bargaining

- (1) Bargaining for a collective agreement may be initiated by—
 - (a) 1 or more unions with 1 or more employers; or
 - (b) 1 or more employers with 1 or more unions.
- (2) However, bargaining for a collective agreement may not be initiated by an employer (whether alone or with other employers) unless the coverage clause will cover work (whether in whole or in part) that is or was covered by another collective agreement to which the employer is or was a party.

[59] There is no dispute that HPSNZ is an employer and that TAC is a union. There are three possible interpretations of s 40(1)(a) in the context of this case. They are that:

- (a) any union may initiate bargaining against any employer; or
- (b) a union can initiate bargaining with an employer with which its members have “some form of relationship” or where there is nexus between them; and
- (c) a union can initiate bargaining where members of the union are employed by the employer.

[60] In relation to the first interpretation, Mr Scott-Howman has accepted that, in order to initiate bargaining, there needs to be some form of nexus or relationship. He accepts that the first interpretation would enable any union to require any employer to

⁹ Legislation Act 2019, s 10(1).

¹⁰ *Commerce Commission v Fonterra Co-operative Group Ltd* [2007] NZSC 36, [2007] 3 NZLR 767 at [22]. That case was decided under the Interpretation Act 1999, but the principle remains unchanged.

bargain, however unconnected. He says that is not his position. The concession was well made. We agree that cannot have been the intention of Parliament.

[61] Although the language of s 40 does not explicitly require an employment relationship between a union and an employer initiating bargaining, s 40 of the Act reflects s 4(2)(b), which states that there is an employment relationship between a union and an employer. Considering the parallel language in those provisions, we consider that s 40 requires there to be an employment relationship between a union and an employer before they initiate bargaining.

[62] We agree that a connection is required in addition to union and employer status. We now turn to consider what that connection must be in light of the parties' submissions concerning the second and third interpretations set out above.

Purpose

[63] The objects of the Act set out in s 3 include building productive "employment relationships", a phrase that is used consistently throughout the section.

[64] Mr Scott-Howman highlighted that s 3(a) states that the Act intends to promote good faith in all aspects of the employment environment and of the employment relationship. He submitted that there is a distinction between the employment relationship and the broader employment environment.

[65] We agree that there is a distinction between employment relationships and the employment environment – that much is clear from the statutory wording. We do not, however, accept that the distinction, which Mr Scott-Howman did not develop, is of material assistance in interpreting the extent to which s 40 may be engaged in this case.

[66] He also noted that s 3(a)(iii) provides that a purpose of the Act is to promote collective bargaining and that s 3(b) states that one of the objects of the Act is to promote observance with the International Labour Organisation's Conventions 87 and

98.¹¹ We have no difficulty accepting the broad proposition that, given their relevance to employment relations in Aotearoa New Zealand, analysis of those conventions may, in many situations, assist the Court in interpreting the Act, particularly where union related issues arise.¹²

[67] However, Mr Scott-Howman did not develop his submissions on either convention, and it remained unclear how they might assist in the interpretation exercise in this particular case. The language of the conventions does not explicitly exclude the type of bargaining proposed, but they also do not explicitly allow it either. In the circumstances, and in the absence of argument, we are not in a position to draw any assistance from these materials.

[68] The object of pt 4 of the Act is set out in s 12. That part deals with the recognition and operation of unions. It includes recognising the role of unions in promoting their members' collective employment interests and conferring on unions the right to represent their members in collective bargaining.¹³ It is correct, as Mr Scott-Howman noted, that the Act refers to unions representing their members rather than employees, but significantly, it goes on to refer to them promoting their members' "employment interests".¹⁴ Further, it refers to the provision of access to the union to workplaces for purposes related to the "employment" of the union's members.¹⁵

[69] Section 40 sits within pt 5 of the Act. The object of pt 5 is set out in s 31. The focus of that section is to promote orderly collective bargaining through the requirements of the duty of good faith. It does not assist in the interpretation exercise as it deals with the conduct and process of bargaining rather than the identity of the parties to that bargaining.

¹¹ Freedom of Association and Protection of the Right to Organise Convention, 1948 (No 87) (opened for signature 9 July 1948, entered into force 4 July 1950); and Right to Organise and Collective Bargaining Convention, 1949 (No 98) (opened for signature 1 July 1949, entered into force 18 July 1951).

¹² *Hosking v Runting* [2005] 1 NZLR 1 (CA) at [6]; *Zaoui v Attorney-General (No 2)* [2005] NZSC 38, [2006] 1 NZLR 289; and *Ye v Minister of Immigration* [2009] NZSC 76, [2010] 1 NZLR 104. The Chief Judge has recently discussed how employment law is influenced by internationally accepted labour standards such as the ILO Conventions, see Christina Inglis "Sailing on Uncertain Seas: Employment Law in Aotearoa New Zealand 2024 – In Search of the Lighthouse" (paper presented to New Zealand Law Society Employment Law Conference, October 2024) 185.

¹³ Employment Relations Act 2000, s 12.

¹⁴ See also ss 7(a), 12(a), 14(1)(a), and 18(1).

¹⁵ Section 12(d)(i).

[70] We note for completeness that counsel did not engage with the Parliamentary materials in any detail. The Court observes that s 14 originally required unions to have two or more members who were employees and that s 40 originally only permitted a union to initiate bargaining if two or more members of the union were employed by the employer and would come within the coverage clause.¹⁶ Those requirements were removed for practical reasons.¹⁷ There is nothing in the Parliamentary materials to indicate that in removing these requirements, Parliament intended to permit non-employees to initiate bargaining. However, as the originally drafted provisions were not enacted for reasons that do not relate to the present issues, it is not possible to place much weight on the draft provisions in favour of either party.

Statutory context

[71] As with the purpose provisions that refer to “employment relationships” and “employment interests”, many of the provisions in pt 5 of the Act imply that unions will be negotiating on behalf of members who are employees.

[72] For example, s 32 refers to the proportion of the employer’s employees who are members of the union and to whom the bargaining relates. Section 43 requires an employer to draw the existence of bargaining to the attention of their employees whose work would be covered by the coverage clause of the bargaining. Sections 45 and 47 refer to secret ballots of union members who are employed by the employer parties to bargaining. Section 51 refers to ratification of collective agreements by the employees to be bound by any such agreement.

[73] These provisions, which guide and regulate the collective bargaining process within the Act, all assume an employment relationship between the employer and members of the union. This relationship must exist for the provisions to have any workability.¹⁸

¹⁶ Employment Relations Bill 2000 (8-1), cls 15 and 47(2).

¹⁷ *Employment Relations Bill: Report of the Department of Labour to the Employment and Accident Insurance Legislation Select Committee* (June 2000) at 27–28; and *Employment Relations Bill 2000 (8-2)* (select committee report) at 8 and 13–14.

¹⁸ But see *Maritime Union of New Zealand Inc v China Navigation Co Pte Ltd* [2016] NZEmpC 111, [2016] ERNZ 473 at [126]–[128].

[74] Ms Dunn referred to the recent decision of the Court of Appeal in *Rasier Operations BV v E Tū Inc*,¹⁹ where the Court cited with approval Chief Judge Inglis’s comments in *E Tū Inc v Rasier Operations BV*:²⁰

Employment status is the gate through which a worker must pass before they can access a suite of legislative minimum employment entitlements, such as the minimum wage, minimum hours of work, rest and meal breaks, holidays, parental leave, domestic violence leave, bereavement leave and the ability to pursue a personal grievance. Importantly it is also the gateway through to union membership and collective bargaining, and the gate through which the Labour Inspector must pass before taking action on behalf of a worker, or against a workplace.

[75] While the comment was obiter in relation to collective bargaining, it is nevertheless a helpful metaphor. Taking into account the purpose and context of s 40, we agree it applies in this instance. The members of TAC must be employees of HPSNZ, within the meaning of that term in s 40, to access collective bargaining.

[76] Having reached that conclusion, we now turn to consider whether TAC’s members were employees of HPSNZ for the purpose of s 40.

The meaning of “employer” and “employee” in context

[77] Section 6 defines an employee, unless the context otherwise requires, as any person of any age employed by an employer to do any work for hire or reward under a contract of service. A person intending to work is also an employee under that section. The parties agree that there is no formal employment relationship between any of TAC’s members and HPSNZ. Further, they are not intended employees, or persons intending to work, as that would require work as an employee to have been offered and accepted.²¹ That has not occurred, and HPSNZ emphatically says it has no intention of employing them.

[78] Ms Dunn submitted that if TAC’s members are saying there is an employment relationship, then they should file proceedings under s 6. Mr Scott-Howman submitted that such proceedings would be unwieldy due to the number of athletes and their

¹⁹ *Rasier Operations BV v E Tū Inc* [2024] NZCA 403 at [18].

²⁰ *E Tū Inc v Rasier Operations BV* [2022] NZEmpC 192, [2022] ERNZ 966 at [4] (emphasis added) (citations omitted).

²¹ Employment Relations Act, s 5 definition of “person intending to work” and s 6(1)(b)(ii).

various situations and brief tenures and that bringing those proceedings would be inconsistent with the object of the Act to reduce the need for judicial intervention. However, in the present circumstances, where neither party suggests that TAC's members are employees of HPSNZ for the purposes of s 6, the spectre of such proceedings is not relevant to the Court's analysis.

[79] Mr Scott-Howman also submitted that the words "unless the context otherwise requires", which precede all definitions in the Act, are key in this instance. He acknowledged that strong contextual reasons are required to justify departure from defined meanings.²² However, he submitted that the words "employer" and "employee", as defined in ss 5 and 6, require an expanded definition for the purposes of s 40 to encompass HPSNZ and the members of TAC as intended or potential employer and employees.²³

[80] There have been cases that have dealt with similar issues previously.²⁴ In *Maritime Union of New Zealand Inc v China Navigation Co Pte Ltd*, the Court applied an extended definition of employee for the purposes of collective bargaining.²⁵

[81] In that case, it was found that the qualifier "unless the context otherwise requires" in s 6 permitted a modified definition of the words "employee" and "employer" for the purposes of s 40 where there was a future, prospective or potential employment relationship.²⁶ The Court indicated that the test in s 6(2) as to whether an individual is employed under a contract of service can, in appropriate circumstances, be extended to ask whether a person "will be" employed under a contract of service.²⁷

²² *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* [2017] NZSC 135, [2018] 1 NZLR 212 at [65].

²³ As an example of where an expanded contextual definition is indisputably required, see ss 63A and 63B, which describes prospective employees as employees for the purposes of negotiating individual terms and conditions of employment. However, those provisions do not apply to the circumstances arising in the present case.

²⁴ The Court of Appeal in *Tucker Wool Processors Ltd v Harrison* [1999] 3 NZLR 576 (CA) engaged with similar issues under the Employment Contracts Act 1991; however, the provisions dealt with in that case were different from those engaged in the present case.

²⁵ *Maritime Union of New Zealand Inc v China Navigation Co Pte Ltd*, above n 18.

²⁶ At [97], [117], and [129].

²⁷ At [116].

[82] The Court was considering a situation where a new business was establishing themselves in New Zealand for the first time with a clear business plan that involved employing new staff. The new business was replacing an existing business and had indicated that it wished to employ at least some of the previous business's staff. Those staff members wished to negotiate for a collective agreement with the business.²⁸ This decision related to circumstances that differ significantly from those in the present case and is of limited assistance where there is no anticipated future employment.

[83] We have found the Supreme Court's judgment in *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc* of assistance.²⁹ In that case the Supreme Court considered whether "persons seeking employment" were employees for the purposes of ss 81 and 82 of the Act, which relate to strikes and lockouts. Although those provisions are not in issue in the present case, strikes and lockouts are only lawful where they relate to collective bargaining or health and safety.³⁰ If a person seeking employment is able to strike or be locked out and the strike and lockout does not relate to health and safety, such persons must necessarily also be able to engage in collective bargaining.³¹

[84] The Supreme Court held that the language of those provisions "is apt to include persons seeking employment".³² However, that finding was subject to a qualification:³³

It is not the case that an employer who refuses to hire a new employee because the two are unable to agree terms of employment will, for that reason alone, have locked out the potential hire. As we have emphasised, the second respondents in this case were not, in contractual terms, strangers to the employer.

[85] The Court then went on to note that the workers had previously worked for AFFCO, that AFFCO owed them ongoing contractual obligations even though their

²⁸ At [104]–[106].

²⁹ *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc*, above n 22.

³⁰ Employment Relations Act, ss 83(b) and 84.

³¹ The Supreme Court was dealing with a collective bargaining type situation in *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc*, above n 22. The present case does not resolve any issues relating to strikes and lockouts on health and safety grounds.

³² At [75].

³³ At [78].

employment had been terminated, and that they were seeking to be re-engaged for the new season. It stated: “That feature of termination plus re-engagement under the umbrella of a number of continuing obligations distinguishes this case.” Therefore, the Court concluded that the relationship between AFFCO and the workers was sufficiently close to bring the latter within the scope of the word “employees” in s 82(1)(b).³⁴

[86] In light of the Supreme Court’s decision, persons seeking employment are capable of being employees for the purposes of s 40 where those persons are not, in contractual terms, strangers to the employer. HPSNZ deals primarily with NSOs rather than with athletes directly. We have already touched on the evidence relating to the connection between athletes and HPSNZ in this case. And, as we have said, while agreements between the athletes and NSOs may refer to HPSNZ as a funder and provider of some services, the references in the agreements relate to funding conditions and the provision of some health and wellbeing services, rather than an employment relationship. Further, HPSNZ is not a party to the agreements. There is also no prior or mutually intended future employment relationship between HPSNZ and TAC’s members. TAC’s members, therefore, do not fall within the extended definition as discussed by the Supreme Court.

Conclusion

[87] At the outset the parties asked the Court to determine two issues. First, did TAC validly initiate bargaining against HPSNZ? Second, is HPSNZ required to participate in collective bargaining with TAC?

Did TAC validly initiate collective bargaining in accordance with s 40?

[88] We have found that for a union to initiate bargaining, it must be in an employment relationship with an employer. There can only be such an employment relationship when members of the union are employed by the employer. We accept,

³⁴ At [78].

applying the *AFFCO* approach, that the categories of employee are broader for the purposes of s 40 than those specifically identified in s 6.

[89] Ultimately, although TAC is a union and HPSNZ is an employer, they are not in an employment relationship for the purposes of s 40 because TAC's members are not sufficiently connected to HPSNZ. Therefore, s 40 does not permit TAC to initiate collective bargaining against HPSNZ, and TAC did not validly initiate bargaining against HPSNZ.

Is HPSNZ required to participate in collective bargaining with TAC?

[90] As TAC did not validly initiate bargaining against HPSNZ, HPSNZ is not required to participate in collective bargaining with TAC.

Outcome

[91] HPSNZ is successful in its challenge, and the Authority's determination is set aside.

[92] Costs are reserved.

Kathryn Beck
Judge
for the full Court

Judgment signed at 4.30 pm on 16 December 2024