IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

I TE RATONGA AHUMANA TAIMAHI
TE WHANGANUI-Ā-TARA ROHE

[2024] NZERA 43
3180760

	BETWEEN	THE ATHLETES' COOPERATIVE INCORPORATED Applicant
	AND	HIGH PERFORMANCE SPORT NEW ZEALAND LIMITED Respondent

Member of Authority:	Rowan Anderson
Representatives:	Andrew Scott-Howman, counsel for the Applicant Kylie Dunn, counsel for the Respondent
Investigation Meeting:	9 February 2023 at Wellington
Submissions and further information received:	Up to and including 27 October 2023
Determination:	26 January 2024

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Athletes' Cooperative Incorporated (TAC) has sought to commence bargaining with High Performance Sport New Zealand Limited (HPSNZ) for a collective agreement covering elite athletes. They have given HPSNZ a notice to initiate bargaining in accordance with s 42 of the Employment Relations Act 2000 (the Act).

[2] TAC contends that HPSNZ is obligated to engage with it in collective bargaining and seeks compliance orders requiring HPSNZ to engage in that process in good faith. None of TAC's member athletes are, or were previously, employed by HPSNZ within the coverage proposed by TAC.

[3] HPSNZ has declined to engage in collective bargaining on the basis that it does not employ athletes, including those that are members of TAC. It says it cannot be required to do so and maintains that there is no relevant employment relationship. It also says that the relevant members of TAC are not employees.

[4] This is not a dispute about status and whether any members of TAC are employees of HPSNZ as opposed to independent contractors. They are not currently employed by HPSNZ and TAC and HPSNZ agree on that. Instead, the contention is whether TAC has validly initiated bargaining, and whether HPSNZ are obligated to engage in good faith bargaining, despite it not employing or intending to employ any of TAC's members.

Issues

[5] The issue identified at the initial case management conference was as follows:

> Is the respondent obligated to engage in collective bargaining with the applicant and/or to comply with the requirements in s 32 of the Act?

[6] The issue can be further outlined as whether collective bargaining can be initiated by TAC, with the good faith obligations as listed at s 32 of the Act therefore attaching, in circumstances where the other intended party, HPSNZ, does not employ any employees that are subject to the intended coverage of the proposed collective agreement.

The Authority's investigation

[7] At a case management conference held on 26 October 2022, it was agreed that the matter of the compliance orders sought by TAC should be dealt with following resolution of the issue as to whether HPSNZ are obligated to engage in collective bargaining.

[8] The Authority invited the parties to lodge an outline of submissions at the same time as lodging any witness statements, that being prior to an investigation meeting.

[9] An investigation meeting was held in Wellington on 9 February 2023. The Authority heard from Mahé Drysdale, foundation member and member of the board of TAC, and from Stephen Tew, Director of High Performance for HPSNZ. The witnesses

gave evidence at the investigation meeting and answered questions under oath or affirmation. Oral submissions were heard at the investigation meeting.

[10] The matter was subsequently adjourned at the request of the parties. After the Authority was advised that a determination would be required, the Authority then invited further submissions from the parties' as to the context qualifier relevant to the meanings of "employer" and "employee" for the purposes of ss 5 and 6 of the Act. Supplementary submissions were received by the Authority on 27 October 2023.

Background and summary of evidence

[11] Athlete members of TAC are not currently employees of HPSNZ. The provision of funding, and the terms and conditions associated with that funding, are not matters in relation to which there is any direct employment or contractual relationship as between the athletes and HPSNZ. Instead, the athletes have direct relationships with their respective national sporting organisations (NSOs). In the present case, at least primarily, the relevant NSO's are Cycling New Zealand and Rowing New Zealand.

[12] Mr Drysdale gave evidence as to the funding arrangements between HPSNZ and NSOs relevant to the elite athletes that are members of TAC. Mr Drysdale says that the design of the funding model for athletes is a cause for concern. Those concerns include that the funding model results to low levels of funding to athletes, associated concerns as to athlete wellbeing, and uncertainty and unfairness said to arise from the way funding can be withdrawn without consultation or warning. Those issues were emphasised and expanded on in letters of support from several other athletes that were annexed to Mr Drysdale's statement. Concerns relating to mental health featured prominently in that evidence.

[13] Mr Drysdale also referred the Authority to the 2022 report of the Cycling New Zealand and High Performance Sport New Zealand Inquiry. The report concluded that the funding model did not provide sufficient priority to athlete wellbeing, included a recommendation that consultation occur with athletes as to a 'contractor v employee model', and recommend that an athletes' representative body be established. It is the later recommendation that Mr Drysdale said led to TAC being established.

[14] There is no relevant collective agreement in place. TAC gave notice seeking to initiate bargaining with HPSNZ on 20 July 2022. The notice of initiation provided as follows:

> **Notice of Initiation of Bargaining**
>
> This notice is issued pursuant to section 42 of the Employment Relations Act 2000, to formally initiate a collective bargaining process between The Athletes' Cooperative Incorporated ("**TAC**") and High Performance Sport New Zealand Limited ("**HPSNZ**").
>
> The intended parties to the collective agreement will be HPSNZ and TAC.
>
> 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.
>
> Signed for and on behalf of The Athletes' Cooperative Incorporated….

[15] Mr Tew's evidence was that various discussions with TAC had taken place regarding collective bargaining, but that he would have preferred that those discussions had focused on specific issues. He said that HPSNZ acknowledged issues raised about athlete wellbeing and that he, with the involvement of NSOs, was willing to discuss those matters directly with athletes. However, he said that HPSNZ is not prepared to do so in the context of collective bargaining as it does not employ athletes.

[16] It is uncontentious that HPSNZ is an employer, in the sense that it employs employees in roles other than those for which TAC has sought to initiate bargaining for. TAC does not have as members any of those employees and those roles are not subject to the coverage proposed.

Initiation of collective bargaining under the Act and the meaning of the relevant provisions

[17] The initiation of collective bargaining is dealt with at ss 40 to 50 of the Act. Section 40 of the Act specifies who may initiate bargaining for a collective agreement and provides as follows:

> **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….

[18] Section 5 of the Act defines "employer" as meaning "…a person employing any employee or employees…". The meaning of both "employee"[1] and "employer"[2] are defined in the Act as being subject to the context qualifier "unless the context otherwise requires".

[19] The meaning of "union" is defined in the Act by reference to registration under Part 4 of the Act.[3]

[20] TAC submitted that the notice issued on 20 July 2022 complied with the requirements of s 42 of the Act. It submitted that TAC is a single union and that it has initiated bargaining with a single employer, that being HPSNZ. It contends that s 41(1) of the Act applies and that bargaining for a collective agreement was initiated on the day on which notice was given to HPSNZ.

[21] HPSNZ submitted that Part 5 of the Act clearly contemplates collective bargaining occurring between an employer and a union representing employees of that employer. It summary terms, HPSNZ submitted that the collective bargaining regime in the Act applies only to employees and consequentially that the establishment of an employment relationship is a precondition. It submitted that the Authority's jurisdiction is limited to employment relationship problems as defined at s 5 of the Act and not other kinds of relationships.[4]

[22] TAC's view is that HPSNZ is seeking to attempt to introduce a new requirement to the initiation of bargaining by asserting that the prior existence of an employment relationship is a prerequisite. In support of its position, TAC referred to the objects of

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[1] Employment Relations Act 2000, s 6.
[2] Employment Relations Act, s 5.
[3] Employment Relations Act, s 5.
[4] For example, such as independent contracting arrangements.

the Act, including the promotion of collective bargaining.[5] TAC submitted that the merits of the matter, including the "vulnerable" position of the athletes under existing arrangements, favours the promotion of collective bargaining.

[23] To determine whether the notice issued was valid, and consequentially whether HPSNZ is required to engage into good faith collective bargaining, it must be determined whether HPSNZ is an "employer" for the purposes of s 40 of the Act. That in turn requires consideration of the term "employee". That also requires consideration of whether term "union" as appears at s 40 of the Act requires that the union seeking to initiate bargaining be representing an employee or employees of the relevant employer.

[24] The meaning of legislation is to be ascertained from its text and in light of its purpose and its context.[6] The text includes indications provided in the legislation.[7]

[25] The meaning of both "employee"[8] and "employer"[9] are defined in the Act subject to the context qualifier. The defined statutory meanings have straightforward application in many cases, including where the Act deals with the individual rights and obligations of employees in relation to their employment with their employer, including where the term "employee" is expressly used in the relevant provision. However, ss 40 to 50 are not as such concerned with the rights of individual employees as they are with collective employment interests.

[26] The role of the context qualifier as it applies to prospective or intended "employees" has been considered in other cases, primarily in the context of applications under Part 8 of the Act or its comparable predecessor provisions relating claims that particular employees, or prospective employees, were subject to unlawful lockouts.

[27] In *AFFCO New Zealand Ltd v New Zealand Meatworkers and Related Trades Union Inc*,[10] in the context of an application related to an alleged lockout, the Supreme Court determined that the term "employee" at s 82(1)(b) extended beyond existing employees having regard to the specified purposes of an employer's actions in having an employee accept terms of employment.[11] Section 82 was held in that context to have

[5] Employment Relations Act, s 3(a)(iii).
[6] Legislation Act 2019, s 10(1).
[7] Legislation Act 2019, s 10(3).
[8] Employment Relations Act, s 6.
[9] Employment Relations Act, s 5.
[10] [2017] NZSC 135.
[11] As specified at s 82(1)(b)(i) of the Act.

application to seasonal workers not employed at the relevant time, albeit in circumstances where there was a conditional contractual right to re-employment.

[28] The approach taken by the Supreme Court in *AFFCO* was summarised as providing that strong contextual reasons would be required to justify a departure from defined meaning, the language used in the relevant provision provides the starting point for consideration of context, the surrounding provisions may also provide context, the relevant competing interpretations may be tested against the statute's purposes, and that the context must relate to the statute and not something extraneous.[12]

[29] In *Maritime Union of New Zealand Inc v China Navigation Co Pte Ltd*[13] the Employment Court determined that the union had lawfully initiated collective bargaining based on an extended meaning of the terms "employee" and "employer" and that the context required an extension of those terms to include a prospective employer or prospective employee.[14] In doing so, regard was had to the context of the statute and its application in practice, including in relation to bargaining in relation to "greenfield" employment.[15]

[30] HPSNZ referred to the Supreme Court's judgment in *AFFCO* in submitting that a modified definition of "employee" applied for the purposes of s 82 of the Act as to the meaning of "lockout", and not generally in relation to the provisions of the Act dealing with collective bargaining.

[31] TAC submitted that a wide interpretation must be given to the term "employer", as taken in *China Navigation,* such as to include a prospective employer. It submitted that the relevant considerations supporting that proposition included HPSNZ being an employer of other staff, the absence of any existing collective agreement, and the object of the Act in the promotion of collective bargaining.[16]

[32] Further, TAC submitted that, in endorsing the observations of Keith J in *Tucker Wool Processors Ltd v Harrison,*[17] the principles of the Act conferring freedom of association "…cannot be sensibly applied if the closely associated provisions for the

[12] [2017] NZSC 135 at [65].
[13] *Maritime Union of New Zealand Inc v China Navigation Co Pte Ltd* [2016] NZEmpC 111.
[14] Above n 13 at [128] to [130].
[15] Above n 13 at [129].
[16] Employment Relations Act, s 3(a)(iii).
[17] [1999] 1 ERNZ 89 (CA) at [45].

initiation of bargaining are confined to those who are already party to an employment relationship".

[33] HPSNZ submitted that both *China Navigation* and *Tuckers Wool Processors* related to situations where there was no contest that both parties wanted an ongoing employment relationship, that both of those disputes went to whether the relationships would be subject to individual or collective agreements, and that both China Navigation and Tuckers Wool Processors were intended employers in that regard. It submitted that, in relation to the present matter, there is no intended employment relationship and no meeting of the minds regarding either any direct relationship nor as to whether any such relationship should be an employment relationship.

[34] I observe at this point that s 82 of the Act, as to the meaning of lockout, directly uses the term "employee".[18] The cases dealing with those, and similar provisions, understandably concerned whether an extended meaning was required by the relevant context. The provisions concerning the initiation of collective bargaining differ somewhat in my view as they do not directly use the term "employee" in describing who may initiate bargaining. Section 40(1)(a) does however provide that bargaining may be initiated by a union with an "employer", and the meaning of employer at s 5 links to the term "employee" and "employees".

A framework excluding other relationships?

[35] HPSNZ submitted that independent contractors are prohibited from joining together to secure terms and conditions by ss 27 to 29 of the Commerce Act 1986. It also referred to the Screen Industry Workers Act 2022 and submitted that such a framework would be entirely unnecessary if independent contractors (or other non-employees) could require an organisation to participate in collective bargaining under the Employment Relations Act.

[36] While s 4 does not define an "employment relationship" as including other types of relationship outside of employment, such as independent contracting, I am not convinced that that is in any way determinative of whether bargaining has been validly initiated in this case. While many of TAC's members are apparently subject to contractual arrangements, that in my view would not necessarily preclude other

[18] See for example, Employment Relations Act, ss 82(1)(a)(iv) and 8(1)(b).

arrangements falling within the definition, nor the prospect of collective bargaining for terms and conditions of employment and the obligations that accompany the same. By way of example, it is not unheard of for an employee to have a separate contracting arrangement with a business or organisation whilst also being in their employ. The existence of one does not entirely preclude the other.

[37] I do not consider that the situation under the Screen Industry Workers Act 2022 is analogous to the present situation. Unless subject to a written agreement confirming the person is an employee, a person engaged in film production work is specifically excluded from the meaning of 'employee' in the Act.[19] The bargaining regime in the Screen Industry Workers Act 2022 applies to the relevant persons in their capacity as independent contractors and sets terms relevant to those arrangements. Provided the collective bargaining related to the proposed terms to apply to employees, as opposed to the terms and conditions associated with independent contracts, the same issue does not arise. There is an additional element of separation here in that the contractual arrangements are with the NSOs rather than HPSNZ.

[38] It is apparent that the bargaining process under the Act could not apply to existing contractual arrangements as between the athletes and NSOs, nor between the athletes and HPSNZ. If bargaining is to proceed, that, and the potential implications arising from the Commerce Act 1986 are matter that TAC would need to be conscious of. However, in my view that in of itself does not preclude bargaining for a collective agreement to terms and conditions that would have application to employment.

Analysis and discussion

[39] The terms "union", "employer" and "employee" have defined statutory meanings.

[40] Part 5 of the Act deals with collective bargaining. Section 32 of the Act, in relation to which compliance is sought, concerns good faith bargaining for collective agreements. It provides that the duty of good faith at s 4 of the Act requires the parties to do, at the least, several specified things. In summary, those things include parties using their best endeavours to enter into a process arrangement for the conducting of bargaining in an effective and efficient manner; meeting, from time to time, for the

[19] Employment Relations Act, ss 6(1)(d) and 6(1A).

purposes of bargaining; considering and responding to proposals; and recognising the role and authority of representatives and advocates. [20]

[41] HPSNZ submitted that Part 5 of the Act is concerned with bargaining occurring in the context of an employment relationship. It says that the existence of an employment relationship is the 'gateway' to employment entitlements, and a precondition to collective bargaining, by reference to the Employment Court's decision in *E Tū Incorporated v Raiser Operations BV*.[21] It contends that it is not in an employment relationship with any of TAC's athlete members and that it has no legal obligation to bargain collectively with TAC. HPSNZ submitted that other provisions of Part 5 are consistent with their asserted application of Part 5 to employment relationships.

[42] TAC submitted that s 42 of the Act recognises that a party to bargaining may not already be party to an employment relationship having regard to the term "intended employer" in that section. HPSNZ submitted that TAC's submission as to the term "intended employer" mischaracterises s 42 which actually uses the term "intended party".

[43] Contrary to the submissions from TAC, s 42 of the Act uses the term 'intended party' in reference to how bargaining is initiated and not 'intended employer'. I do not accept the submissions made by TAC that the reference in s 42 to 'intended' means that bargaining can simply be initiated a party simply because it, or its members, intend for the other party to be the employer in circumstances in which it currently is not.

[44] I find that the reference to "intended party" is used in s 42 simply to identify those that a union or employer intend to be a party to the collective agreement, as distinct from any intention that they be subject to a future employment relationship. I do not consider it assists the analysis as to whether HPSNZ is an employer for the purposes of the initiation of bargaining.

[45] The objects of the Act include building productive employment relationships through the promotion of good faith in all aspects of the employment environment and of the employment relationship by acknowledging and addressing the inherent inequality of power in employment relationships and by promoting collective

[20] Without limiting the duty of good faith in s 4 of the Act.
[21] [2022] NZEmpC 192.

bargaining.[22] Additionally, the objects include promoting observance with the principles underlying International Labour Organisation Convention 87 on Freedom of Association, and Convention 98 on the Right to Organise and Bargain Collectively.[23] Section 31 of the Act sets out the objectives relevant to Part 5 of the Act. One of those objects is "to promote orderly collective bargaining".[24]

[46] Section 12 of the Act, which sets out the objects relating to Part 4 of the Act, includes the objects "to recognise the role of unions in promoting their members' collective employment interests" and "to confer on registered unions the right to represent their members in collective bargaining".[25] Section 18 of the Act provides that a union is entitled to represent its members "in relation to any matter involving their collective interests as employees".[26] However, there is in my view nothing suggesting that employment, how that might look, and the coverage of the proposed agreement, are matters that cannot be subject to bargaining.

[47] I do not consider any of the relevant objects as indicating that the terms "employer" or "employee" should be limited such as to preclude the initiation of bargaining in circumstances where there are no current employees within the proposed coverage.

[48] "Union" is defined in the Act by reference to registration under Part 4.[27] Registration as an incorporated society, at the time TAC applied for registration,[28] required it have not less than 15 members.[29] Registration requires an application be made including, amongst other things, a copy of the union's rules as registered under the Incorporated Societies Act 1908.[30]

[49] While there is a requirement that a union have as an object the promotion of its members' collective employment interests, membership of a union is not restricted other than by application of its own rules and may include persons seeking employment,

[22] Employment Relations Act, s 3(a)(ii) and (iii).
[23] Employment Relations Act, s 3(b).
[24] Employment Relations Act, s 31(d).
[25] Employment Relations Act, ss 12(a) and (c).
[26] Employment Relations Act, s 18(1).
[27] Employment Relations Act, s 5.
[28] The Incorporated Societies Act 2022 now only requires 10 or more persons where application is made under that Act.
[29] Incorporated Societies Act 1908, ss 4 and 7(1)(a).
[30] Employment Relations Act, s 13.

retired members, or other persons.[31] It does not necessarily follow that any of the members be in current employment, nor do I consider that the requirement relating to collective employment interests requires that there be current employment by its members. Collective employment interests may include matters relating to prospective employment.

[50] The coverage proposed in the initiation notice is reflective of TAC's membership as contained in its rules. The rules also include as an object the representation of "its members in relation to any matter involving their collective interests as employees or athletes including, but not limited to, collective bargaining". TAC is a union duly registered in accordance with the Act and there is no contest to its status as such.

[51] The Act does not expressly require that a union must have, as members that would be covered by the proposed bargaining, two or more current employees of the employer to whom the notice is given.[32] Nor does the Act require that conditions relevant to the ratification, application, or form of collective agreements be met as at the time of initiation. I do not consider the provisions relevant to those matters as indicating that current employment is a prerequisite to the initiation of bargaining. They are in my view neutral factors.

[52] Section 56 of the Act deals with the application of collective agreements and, while a relevant employee will be bound by a collective agreement, it is the union and the employer that are the parties to the agreement. It was noted in *NUPE v NZ Customs Service*[33] that a union does not require permission of its members to engage in collective bargaining, subject to the requirements and process and ratification.

[53] Part 5 requires, in order for a collective agreement to come into force, that employees to be bound by the collective agreement ratify the agreement. That would require a union to have a member within the coverage of the agreement. However, the Act does not require that to be the case as at the time of initiating bargaining and I consider that context relevant.

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[31] Employment relations Act, s 18(2) as to classes of membership. Such membership may seemingly include, for example, retired members, unemployed workers, of those seeking employment.
[32] Above n 13 at [124].
[33] [2004] 1 ERNZ 237, at [67].

[54] The good faith requirements at s 32 of the Act applies to "a union and an employer bargaining for a collective agreement". The good faith duties attached to bargaining impose serious obligations on parties and are not trivial. Persons subject to Part 5 of the Act have obligations that extend beyond simply meeting to discuss the views of the parties. Section 33(1) of the Act, for example, requires the parties to conclude a collective agreement unless there is a genuine reason, based on reasonable grounds, not to. Here, there may well objectively be a genuine reason, based on reasonable grounds, why the parties might not conclude a collective agreement. However, that does not in my view suggest that bargaining cannot be commenced.

[55] HPSNZ submitted that the obligations at s 43 requiring an employer to draw the initiation notice to the attention of "all employees" as indicative of the framework being consistent with status being established prior to the commencement of bargaining. I consider that obligation to be neutral, with the consequence of initiating bargaining in circumstances where there is no current employment simply being that the employer party is not required to draw those matters to the attention of any employees. It is not in my view indicative of an interpretation requiring an employer to have a current employee within the proposed coverage, nor does it contribute to a strong contextual basis as to another meaning being required.

[56] HPSNZ has no intention of employing the members of TAC. It is not a case where, such as in *China Navigation*, there is a mutual intention or future employment in a greenfield operation. The underlying issue there was one as to the nature of the terms and conditions, and the type of agreement, that would apply. Here, there is no mutual intention as to future employment, nor does HPSNZ wish to employ any persons within the proposed coverage of the notice issued.

[57] The circumstances in *China Navigation* were such that the Court considered it clear, in the context of the greenfield operation, that multiple employees would be covered by the proposed agreement if engaged by China Navigation and that to interpret the Act such as to require two current employees who would be covered would negate the ability of unions to negotiate for collective agreements with new enterprises.

[58] Here, the parties are not in dispute as to the form of agreement that will operate in an employment relationship, they are fundamentally opposed as to whether there will be an employment relationship. However, I find the reasoning in *China Navigation* is

applicable in this case and that the context, having regard to the statutory objectives, does not require a meaning of "employee" that is limited to "employees within the coverage proposed" or "employees that are members of the union". In my view the reasoning in *China Navigation* supports the view that an expansive meaning of employee is to be taken from the statutory context.

[59] In *Raiser Operations* the issue as to s 6 being a "gateway" to various rights and obligations arose in the context of a dispute as to employment status. It is correct in my view to say that employment is a gateway in that the Act has application to employees and employment relationships. Here, the issue is squarely in relation to employment rather than independent contracting. TAC is seeking to bargain for a collective agreement. Such bargaining clearly applies to employment, as opposed independent contracting arrangements. That does not in my view preclude a union seeking to initiate bargaining in relation to a collective agreement that, if concluded, would set terms and conditions of employment for potential future employees.

[60] Such as the Act contains a "gateway" to collective bargaining, I find that the gateway is passed by a union that is duly registered initiating bargaining with an employer, that being an employer of any employee. I am satisfied that the Authority has jurisdiction in relation to this matter noting that employment relationships include those between a union and an employer,[34] and on the basis that there is a problem arising out of that relationship.[35]

[61] There are several prerequisites or limitations to the commencement of collective bargaining. First, the proposed employer party must be an employer of any employee. Second, only employers and registered unions can initiate bargaining. Third, any bargaining may be subject to limitations, for example, precluding the negotiation of terms and conditions of independent contractors. Those limitations, and the practical implications of them, are sufficient in my view to dispel any notion that the initiation of bargaining in circumstances such as the present would lead to unduly expansive and onerous consequences more generally.

[62] I find that s 40(1)(a) of the Act, having regard to the statutorily defined meaning of "employer" based on the text in the light of its purpose and context, simply requires

[34] Employment Relations Act, s 4(2)(b).
[35] Employment Relations Act, s 5.

that the proposed employer party be an employer. It does not require that the proposed employer be an employer of any current employee within the proposed coverage.

[63] I do not consider there are any strong contextual reasons justifying a restrictive departure from the term "union" statutorily defined as meaning a union that is registered for the purposes of Part 4 of the Act. TAC is a registered union in accordance with Part 4 and, subject to having given notice to an "employer" for the purposes of s 40(1)(a) of the Act, was entitled to initiate bargaining for a collective agreement.

[64] I find the context does not require a restrictive meaning be given to the term "employee" in s 6 such as to exclude from the meaning of "employer" at s 40 of the Act employees undertaking work that is not covered by the proposed coverage clause in an initiation notice. Such an approach is not required by the statutory context in terms of Part 5 of the Act, nor by the objectives of the Act.

[65] I find there are strong contextual reasons why the approach put forward by TAC is correct. I consider the context of the statute requires such an approach. The language used in s 40 does not seek to limit its application by reference to coverage or employment within the proposed coverage. The context of the surrounding provisions are such that the requirements as to ratification and the application of collective agreements are distinct from those at the point of initiation. Further, I find that the wider context, including as to union registration requirements, support an expansive approach to s 40 of the Act.

[66] An approach that permits the initiation of bargaining in the present circumstances is in my view also consistent with the objects and purpose of the Act. In addition to being consistent with the object of promoting collective bargaining, I also consider that that interpretation is consistent with the object of reducing the need for judicial intervention.[36]

[67] A potential consequence of the interpretation proposed by HPSNZ is that judicial intervention is unnecessarily required in resolving employment relationship problems as to the initiation of collective bargaining and whether employees currently employed fall within the proposed coverage of bargaining initiation notices. Related to that is that such disputation would detract from the stated object in Part 5 as to the

[36] Employment Relations Act, s 3(a)(vi).

promotion of orderly collective bargaining. The potential impacts of such disputation should not be overstated but they are nonetheless indicative in my view of an inconsistency between the objects of the Act and the interpretation preferred by HPSNZ.

[68] I conclude that, for the purposes of initiating collective bargaining in accordance with s 40 of the Act, initiation does not require that a proposed employer party have employees within the proposed coverage as identified in a notice of initiation. Nor is it a requirement that the union seeking to initiate bargaining have members that are, at the time of initiation, employees of the proposed employer party.

Was bargaining validly initiated?

[69] Outside of the contested issues dealt with in this determination, there is no contest as to the form and substance of the notice.

[70] I find that TAC gave HPSNZ a valid notice initiating bargaining in accordance with the requirements of s 42 of the Act. Bargaining was validly initiated on 20 July 2022, the day the notice was given and HPSNZ are obligated to comply with s 32 of the Act.

[71] The issue of compliance is reserved, noting that the parties have indicated they would deal with the outcome of this determination.

Costs

[72] As this matter concerns a dispute relating to collective bargaining there is no issue as to costs.

Rowan Anderson
Member of the Employment Relations Authority