IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA12/2025
[2025] NZCA 330

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

Court: Palmer and Collins JJ

Counsel: M J Dew KC and A E Scott-Howman for Applicant
P F Wicks KC and K M Dunn for Respondent

Judgment: (On the papers) 17 July 2025 at 10.30 am

JUDGMENT OF THE COURT

A The application for leave to appeal is declined.

B The applicant must pay the respondent costs for a standard application on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Collins J)

[1] The Athletes' Cooperative Inc (TAC) seeks leave to appeal a judgment of the Employment Court in which the Court determined that TAC could not initiate

collective bargaining on behalf of its members against High Performance Sport New Zealand Ltd (HPSNZ).[1]

[2] HPSNZ is a subsidiary of Sport and Recreation New Zealand, a Crown entity. HPSNZ works in conjunction with sports organisations in New Zealand to develop and fund high performance athletes and teams. HPSNZ does provide funding to some individual athletes. It also runs a Tailored Athlete Pathway Support programme (TAPS) for athletes through national sporting organisations (NSOs).

[3] TAC was established to represent the interests of high performance athletes. The parties agree none of TAC's members are employees of HPSNZ.

[4] The issue is whether TAC can initiate collective bargaining on behalf of its members with HPSNZ.

Procedural background

[5] In July 2022, TAC issued a collective bargaining notice against HPSNZ under ss 40 and 41 of the Employment Relations Act 2000 (ERA). Those provisions state:

> **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.
>
> **41 When bargaining may be initiated**
>
> (1) If there is no applicable collective agreement in force between a union and an employer, the union or the employer may initiate bargaining with the other at any time.
>
> …

[1] *High Performance Sport New Zealand Ltd v The Athletes' Cooperative Inc* [2024] NZEmpC 250 [Employment Court judgment].

[6] Also relevant is the definition of employment relationships in s 4(2) of the ERA as those between:

> (a) an employer and an employee employed by the employer:
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> (b) a union and an employer:
>
> (c) a union and a member of the union:
>
> (d) a union and another union that are parties bargaining for the same collective agreement:
>
> (e) a union and another union that are parties to the same collective agreement:
>
> (f) a union and a member of another union where both unions are bargaining for the same collective agreement:
>
> (g) a union and a member of another union where both unions are parties to the same collective agreement:
>
> (h) an employer and another employer where both employers are bargaining for the same collective agreement.

[7] HPSNZ declined to bargain with TAC on the basis that TAC's members were not employees of HPSNZ. On two occasions however, the Employment Relations Authority held that the collective bargaining notice was validly issued and that HPSNZ was required to participate in collective bargaining with TAC.[2]

[8] HPSNZ challenged in the Employment Court the first of the Employment Relation Authority's determinations.

[9] The Employment Court (sitting as a Full Court) determined that for a union to validly initiate collective bargaining it must be in an employment relationship with the employer and there can only be such a relationship when members of the union are employed by the employer. The Court said "although TAC is a union and HPSNZ is an employer, they are not in an employment relationship for the purposes of s 40 [of the ERA] because TAC's members are not sufficiently connected to HPSNZ".[3]

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2 *The Athletes' Cooperative Inc v High Performance Sport New Zealand Ltd* [2024] NZERA Wellington 43; and *The Athletes' Cooperative Inc v High Performance Sport New Zealand Ltd* [2024] NZERA Wellington 500.

3 Employment Court judgment, above n 1, at [89].

[10] The Employment Court referred to its judgment in *Maritime Union of New Zealand Inc v China Navigation Co Pte Ltd*, in which the Court applied an extended definition of employee for the purposes of collective bargaining.[4] In that case, the Employment Court held that the qualifier "unless the context otherwise requires" in the definition of employee 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.[5]

[11] The Employment Court also considered *AFFCO New Zealand Ltd v New Zealand Meat Workers and Related Trades Union Inc*, in which the Supreme Court considered whether "persons seeking employment" were employees for the purposes of strike and lockout provisions of the ERA.[6] The Supreme Court held that the statutory language in issue included persons seeking employment but did not include strangers who had not agreed on terms of employment.[7]

[12] The Employment Court concluded that there was no prior or mutually intended future employment relationship between TAC members and HPSNZ and that the circumstances of this case did not fall within the extended definition found in *AFFCO*. The Employment Court stated:[8]

> [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.

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4 *Maritime Union of New Zealand Inc v China Navigation Co Pte Ltd* [2016] NZEmpC 111, (2016) 15 NZELR 428.

5 At [86], [97], [117] and [129].

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

7 At [75] and [78].

8 Employment Court judgment, above n 1, at [86].

Jurisdiction for leave to appeal

[13] Section 214 of the ERA provides for appeals to this Court from determinations of the Employment Court only in relation to questions of law and with the leave of this Court. Leave can only be granted if we are satisfied that the proposed appeal is of "general or public importance or for any other reason".[9] A proposed appeal must be capable of being seriously argued.[10]

Basis of application

[14] The basis of the application can be distilled to the following points.

[15] First, TAC submits that the Employment Court erred in its interpretation of s 40 because there are no express words in s 40 that require there to be an existing employment relationship before collective bargaining can be initiated. Importing that requirement runs counter to the objectives of the Act and the principles underlying the International Labour Organisation Convention 98 Right to Organise and Bargain Collectively.[11]

[16] Secondly, the judgment of the Employment Court is not consistent with the legislative history of s 40. The provisions of the Bill which became the ERA included the following sub-cl in what subsequently became s 40:[12]

> (2) A union may initiate bargaining with an employer only if 2 or more members of the union—
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> (a) are employed by the employer; and
>
> (b) will come within the coverage clause of the collective agreement.

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9 Employment Relations Act 2000, s 214(3).

10 *FGH v RST* [2023] NZCA 204, [2023] ERNZ 321 at [53]; and *New Zealand Professional Firefighters Union Inc v Fire and Emergency New Zealand* [2021] NZCA 60, [2021] ERNZ 54 at [20].

11 Right to Organise and Collective Bargaining Convention (signed 1 July 1949, entered into force 19 July 1951). See also Employment Relations Act, s 3(b).

12 Employment Relations Bill 2000 (8–2), cl 47.

[17] The Select Committee report recommended removing this requirement.[13] TAC submits that the removal of this requirement in the ERA demonstrates Parliament intended that an employment relationship was not required before a union can initiate collective bargaining.

Analysis

[18] We are satisfied that the Employment Court's interpretation of s 40 was correct and that the proposed questions of law are not capable of being seriously argued.

[19] It would be inconsistent with the statutory context for there to be no requirement that the persons who are to benefit from a collective agreement be employees of the relevant employer or for there to be no employment relationship between the union and the employer.

[20] The Select Committee's recommendation, adopted by Parliament, simply shows that Parliament intended to remove the proposed requirement that there be two employees at a particular work site, given in multi-party bargaining a union may only have a single member at a site. The report recommended that the clause "be amended to allow one union member on a work site to access collective bargaining, while maintaining the obvious underlying requirement that a collective agreement must always cover at least two employees".[14]

[21] The approach of the Employment Court to its interpretation of the relevant provisions of the ERA is unimpeachable. Nor was there any error in the Employment Court's determination that TAC's members were not employees for the purposes of s 40 of the ERA.

Result

[22] The application for leave to appeal is declined.

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13 Employment Relations Bill (select committee report) at 14.
14 At 14.

[23] The applicant must pay the respondent costs for a standard application on a band A basis and usual disbursements.

Solicitors:
Heimsath Alexander, Auckland for Applicant
Smith Dunn, Auckland for Respondent