IN THE EMPLOYMENT RELATIONS AUTHORITY
WELLINGTON

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

[2024] NZERA 500
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:	21 May 2024 in Wellington
Submissions and further information received:	At the investigation meeting
Determination:	21 August 2024

SECOND DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The Athletes' Cooperative Incorporated (TAC) and High Performance Sport New Zealand Limited (HPSNZ) are engaged in bargaining for a collective agreement.

[2] TAC contends that HPSNZ has failed to comply with its good faith duties and seeks compliance orders requiring it to respond to proposals made by TAC, and to engage in bargaining and conclude, subject to any genuine reasons not to, a collective agreement.

[3] HPSNZ maintains that it has considered and responded to TAC's proposals and that it has not breached any of its good faith duties. It also takes the position that it is not obligated to conclude a collective agreement with TAC.

[4] Central to the issues between the parties is HPSNZ's position that it does not employ any employees who are members of TAC and HPSNZ's position that it has no intention to do so.

Issues

[5] The issues identified at the initial case management conference, and that require investigation and determination, are:

> Has HPSNZ complied with its good faith bargaining obligations? If not, should a compliance order be made in the terms sought by TAC?

[6] The form of the compliance orders sought by TAC are as follows:

1. To respond to TAC's proposal for a collective agreement; and
2. To engage in collective bargaining for, and to conclude, a collective agreement:
   (a) In the absence of a genuine reason, based on reasonable grounds, not to do so; and
   (b) On the basis that its current position is not a genuine reason.

The Authority's investigation

[7] An investigation meeting was held in Wellington on 21 May 2024. 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 answered questions under oath or affirmation at the investigation meeting. Oral submissions were heard at the investigation meeting. An application for reference to facilitation was made but is not pressed at this time.

Background

The Authority's first determination

[8] In a determination issued on 26 January 2024,[1] I found that bargaining had been validly initiated by TAC and that HPSNZ were obligated to comply with s 32 of the

[1] *The Athletes' Cooperative Incorporated v High Performance Sport New Zealand Limited* [2024] NZERA 43.

Employment Relations Act 2000 (the Act) that deals with good faith in bargaining for collective agreements.

[9] The Authority's first determination has been challenged and is currently before the Employment Court. No stay has been sought.

The collective bargaining to date

[10] While HPSNZ have challenged the Authority's first determination, the parties have, appropriately in my view, met and engaged for the purposes of bargaining for a collective agreement. At the outset, they also entered into a collective bargaining protocol agreement dated 13 March 2024.

[11] The parties have met on three occasions for the purposes of bargaining and have also exchanged some correspondence. There are some differences in the evidence before the Authority as to what has been said and what has occurred during the relevant bargaining meetings. However, I do not consider those differences to be of significance in resolving the present matter.

[12] The present issue concerns HPSNZ's approach to the bargaining, and whether that approach is consistent with its good faith obligations.

Has HPSNZ complied with its good faith duties?

[13] Relevant to the compliance orders sought, there are two primary matters relating to good faith that require consideration. First, whether HPSNZ has breached its duty of good faith by failing to consider and respond to proposals made by TAC. Second, whether HPSNZ has breached its duty of good faith by failing to conclude a collective agreement absent a genuine reason not to. Given there is significant overlap between those two issues, I address them together below before considering the issue of compliance.

[14] In the context of bargaining for a collective agreement, parties are required to comply with the good faith requirements. Section 32 of the Act sets out a list of things that parties are required to do in compliance with the duty of good faith in s 4 of the Act:

> **32 Good faith in bargaining for collective agreement**
> (1) The duty of good faith in section 4 requires a union and an employer bargaining for a collective agreement to do, at least, the following things:

(a) the union and the employer must use their best endeavours to enter into an arrangement, as soon as possible after the initiation of bargaining, that sets out a process for conducting the bargaining in an effective and efficient manner; and

(b) the union and the employer must meet each other, from time to time, for the purposes of the bargaining; and

(c) the union and the employer must consider and respond to proposals made by each other; and

(ca) even though the union and employer have come to a standstill or reached a deadlock about a matter, they must continue to bargain (including doing the things specified in paragraphs (b) and (c)) about any other matters on which they have not reached agreement; and…

…

(2) Subsection (1)(b) does not require a union and an employer to continue to meet each other about proposals that have been considered and responded to.

(3) The matters that are relevant to whether a union and an employer bargaining for a collective agreement are dealing with each other in good faith include—

(a) the provisions of a code of good faith that are relevant to the circumstances of the union and the employer; and

(b) the provisions of any agreement about good faith entered into by the union and the employer; and

(c) the proportion of any of the employer's employees who are members of the union and to whom the bargaining relates; and

(d) any other matter considered relevant, including background circumstances and the circumstances of the union and the employer.

(4) For the purposes of subsection (3)(d), **circumstances**, in relation to a union and an employer, include—

(a) the operational environment of the union and the employer; and

(b) the resources available to the union and the employer.

(5) This section does not limit the application of the duty of good faith in section 4 in relation to bargaining for a collective agreement.

….

[15] Section 33 of the Act requires parties to conclude a collective agreement unless there is a genuine reason, based on reasonable grounds, not to, and also sets out certain reasons that are not included as genuine reasons:[2]

33 Duty of good faith requires parties to conclude collective agreement unless genuine reason not to

(1) The duty of good faith in section 4 requires a union and an employer bargaining for a collective agreement to conclude a collective agreement unless there is a genuine reason, based on reasonable grounds, not to.

(2) For the purposes of subsection (1), **genuine reason** does not include—

(a) opposition or objection in principle to—

(i) bargaining for, or being party to, a collective agreement; or

(ii) including rates of wages or salary in a collective agreement; or….

[2] Employment Relations Act 2000, s 33.

[16] The collective bargaining protocol agreement entered into by the parties requires that they consider and respond to proposals and to provide reasons where such proposals are not accepted. The terms of that agreement are broadly consistent with the good faith duties in s 32 of the Act.

[17] HPSNZ are required to respond to TAC's proposals for a collective agreement. The evidence before the Authority is that HPSNZ responded in one form or another to TAC's proposals, including in Mr Tew's email of 5 April 2024. That email, which I consider incorporates in effect the full extent of its response, is set out in full below:

> Kia ora Rob, Mahe and Andrew,
>
> Further to the two formal bargaining meetings we have held and in response to the draft Collective Employment Agreement (CEA) you tabled at our meeting on 21 March we would like to lodge this formal response.
>
> At that meeting we expressed surprise and disappointment that you chose to present the "issues" you wish HPSNZ to consider in the framework of a formal CEA. This is clearly at odds with our well-articulated position that we do not have and do not intend to have a direct relationship with Athletes. We have also made crystal clear that we will not agree that this collective bargaining process, were it to reach conclusion, would result in a formal CEA between Rowing NZ and Cycling NZ Athletes and HPSNZ.
>
> Nonetheless we undertook to take some time to review the CEA and identify the issues we could respond to.
>
> We have considered this very carefully and taken further legal advice.
>
> On balance we do not believe it is appropriate for HPSNZ to respond to your draft or the "issues" captured in the CEA. During the ERA hearing and on multiple occasions since then, 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. We understand fully our obligations to enter bargaining in good faith, until such time as the appeal to the Employment Court is resolved, but believe we have genuine reasons for not negotiating the detail of a CEA when we have no intention of entering one.
>
> Your assertion that 80/85% of the "issues" are straight forward and easy to agree to because they are captured as obligations under employment law further reinforces our position that to respond to your CEA is wrong because it contemplates an employment relationship, when we do not.
>
> It is also worth noting that some of the provisions of the CEA you tabled go much further than many CEAs both we and our legal advisors are familiar with.
>
> In an attempt to move bargaining forward we suggest at our next meeting scheduled for 9 April, HPSNZ presents our proposed Investment Framework and TAPS model for the 2025- 28 cycle and also brings you up to date with the

> initiatives that HPSNZ and our partner NSOs have been implementing throughout the present cycle.
>
> If that is not acceptable then we look forward to discussing other possible next steps.
> ….

[18] HPSNZ submits that it has considered and responded to TAC's proposals. It contends that its response has been transparent in that it has made clear it does not intend to employ any of the athletes. It submits that that is its response, that no other genuine response could be provided, and that it is not required to respond line by line to TAC's proposals. It also says that a review of Mr Tew's full email, as opposed to excerpts in relation to which submissions were made for TAC, makes clear that HPSNZ has considered and responded to the proposals.

[19] TAC contends that HPSNZ has refused to engage in bargaining and has refused to respond to TAC's proposals, particularly a draft collective agreement it tabled on 31 March 2024. It submits that Mr Tew and HPSNZ have made clear they would not respond to any of the issues captured in the draft collective agreement and that there can be no doubt that it has refused to respond to TAC's proposal. TAC submits that HPSNZ's approach is inconsistent with the objects of the Act, including at Part 5, and the duty to conclude a collective agreement absent a genuine reason not to.

[20] The actions of HPSNZ, when considering the approach taken in its email of 5 April 2024, can be considered in two different ways. On one view, the email reflects a refusal to respond to TAC's proposals, being those in the draft collective agreement put forward by TAC. On another view, HPSNZ's response, at least in substance, can be seen as it responding to the proposals made by restating its global position that it does not agree to them on the basis that it does not employ or intend to employ any of the athletes.

[21] TAC contends that HPSNZ's opposition to concluding an enterprise agreement is not a "genuine reason" in terms of s 33(2)(a)(i) of the Act in that it amounts to opposition or objection to bargaining for, or being a party to, a collective agreement. In reliance on *Epic Packaging Ltd v NZ Amalgamated Engineering, Printing & Manufacturing Union Inc*,[3] TAC contends that bargaining is a vehicle for the negotiation of an employment agreement and "…that the bargaining process under the

[3] [2006] ERNZ 617.

Act must be directed at concluding the creation of such an agreement".[4] There can be little doubt as to the correctness of that position generally in my view, the legislative scheme also encouraging the continuation of bargaining in difficult circumstances with settlement to be expected in all but exceptional circumstances.[5] However, whether HPSNZ has been dealing with TAC in good faith also requires consideration of the matters at s 32(3) of the Act. Further, there may ultimately also be a genuine reason not to conclude a collective agreement in terms of s 33(1) of the Act.

[22] In terms of s 32(3)(c) of the Act, there are currently no employees of HPSNZ that are members of TAC and to whom the bargaining relates. HPSNZ submitted that, in terms of the background circumstances to the bargaining and the circumstances of the union and employer, that s 32(3)(d) of the Act is relevant. HPSNZ also submitted that it was relevant that it employed no athletes and that there was no intention to. It also contends that there is no requirement to respond individually and separately to each aspect of TAC's proposals if a general response would suffice.

[23] Having regard to the matters at s 33(3) of the Act, I find that HPSNZ's approach in considering and responding to TAC's proposals is inconsistent with its duty of good faith in terms of s 32(1)(c) of the Act. However, I do not consider that any breach arises from its global approach to the bargaining in maintaining that it does not employ athletes, does not intent to, and in maintaining that it does not intend to be covered by a collective agreement. Instead, I find, such as there has been non-compliance, it arises from HPSNZ's approach of expressly advising TAC that it would not respond to its draft collective agreement or issues, albeit that its global position was stated as the reason for that.

[24] While the response from HPSNZ included its genuine position, I find that it is obligated to consider each of the claims put forward and to respond to them as opposed to declining to respond based on its global position. That does not necessarily mean that HPSNZ's position will change, that it is required to respond to the claims in any particular way, nor that its response to TAC's claims would result in any practical difference. Any response is a matter for HPSNZ and at this stage I put it no higher than stating that it must provide a response rather than declining to do so. While on one view

[4] Above n 3, *Epic Packaging*, at [76].
[5] *New Zealand Public Service Association v Secretary for Justice* [2010] NZEmpC 11, at [24].

the email of 5 April 2024 could be said to be a response to the proposals put, I do not consider that to be sufficiently clear.

[25] It is clear that HPSNZ's position is that it does not want to bargain for a collective agreement under the Act. HPSNZ's position is not simply theoretical, nor do I find that its position could be considered a philosophical objection to bargaining. It is not opposition or objection in principle to bargaining or entering into a collective agreement as such. Instead, HPSNZ's position is founded on the reality of its operating model and the fact it does not employ, and does not intend to employ, the athlete members of TAC.

[26] Even if HPSNZ's position amounted to opposition or objection in principle for the purposes of s 33(2)(a) of the Act, the reality is that an agreement could not be concluded unless HPSNZ took steps to employ employees that could ratify the agreement and 2 or more employees that could be bound by it.[6] I note that the absence of any employee that could vote in terms s 51 at the time of initiating bargaining does not in my view preclude compliance with s 51(2) of the Act in terms of advising of the process to be followed at the future time at which the ratification process has application.

[27] The position taken by HPSNZ does not in my view necessarily mean that HPSNZ is not being fair in its dealings with TAC in the bargaining process. It is not a matter of steps being taken by HPSNZ to unduly protract the bargaining, nor is it the case that HPSNZ is seeking to avoid the application of a collective agreement in favour of individual terms and conditions of employment. One possible outcome of bargaining is that the parties reach agreement on terms and conditions and that they should have application to employees to be bound by such agreement subject to employment of, and ratification by, the athletes. However, HPSNZ maintains its position that it does not wish to employ the athletes.

[28] HPSNZ has, in a transparent manner and from the outset, made clear that it does not want to, and nor does it intend to, employ athlete members of the TAC. Unless it agreed to do so, the reality is that the bargaining could not result in a collective agreement. That reality may amount to a genuine reason, based on reasonable grounds, why the parties would not be required to conclude a collective agreement. However, I

[6] See meaning of collective agreement at s 5 of the Act and s 51 of the Act as to ratification.

consider it would be premature to make such a finding on that issue at this stage where bargaining is ongoing, the matter of initiation is before the Employment Court, and where there are otherwise steps in the bargaining that would be required prior to any conclusion.

Should any compliance orders be made?

[29] Section 137 sets out the power of the Authority to order compliance. Relevant to this matter, the Authority may order compliance with any provision of Parts 1 and 5 of the Act, including the good faith duties set out at ss 4, 32 and 33 of the Act which TAC contends HPSNZ have not complied with. The making of compliance orders is contingent on there having been a breach as opposed to merely an anticipated breach.[7]

[30] Compliance orders are a discretionary remedy. An object of the Act is to promote collective bargaining,[8] and that has been held to be a relevant consideration where the circumstances align with that objective.[9] In exercising its discretion, the Authority should seek to do justice between the parties and to exercise its discretion in a principled manner as in equity and good conscience it sees fit.

[31] Notwithstanding HPSNZ's disagreement with the Authority's first determination, I am satisfied that its actions have to date been directed towards complying with that determination and the consequences of it in terms of good faith bargaining. To the extent that HPSNZ's actions have been inconsistent with its good faith obligations, I am satisfied that they are likely to take further steps in compliance with its obligations consistent with my findings. I also consider that, in seeking to do justice between the parties, the absence of any impact on any currently employed athlete member of TAC to be a factor against the making of any compliance order.

[32] While I have in any event declined to make any compliance order for other reasons, I would also have considered the challenge to the Authority's first determination of 26 January 2024 a relevant consideration. TAC correctly submitted that the challenge to the Employment Court does not operate as a stay of the Authority's determination. However, I consider the views of the parties as to the application of the law are genuinely held, that the matter has in effect moved to another forum, and that

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[7] *Talley v United Food and chemical Workers Union of NZ* [1993] 2 ERNZ 360 at 375.
[8] Employment Relations Act 2000, s 3(a)(iii).
[9] *Television New Zealand Ltd v E Tū Inc* [2024] NZEmpC 93, at [101].

compliance orders would not be appropriate having regard to all of the circumstances at this time.

Conclusion

[33] HPSNZ are required to comply with its good faith bargaining obligations, including by considering and responding to proposals put forward by TAC. While HPSNZ is required to engage in collective bargaining in good faith, I decline to issue the compliance orders sought, including the compliance order sought requiring HPSNZ to conclude bargaining.

Costs

[34] 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