

Introduction

[1] These are appeals from the following decisions:

- (a) ACR 33/22 (Hurricanes): the decision of a Reviewer dated 9 February 2022. The Reviewer dismissed an application for review of the Corporation's decisions:
 - (1) dated 12 March 2021 changing Hurricanes' ACC levy classification unit to CU 93180, and
 - (2) 9 June 2021 declining Hurricanes' request for a new classification unit to be created

- (b) ACR 34/22 (Crusaders): the decision of a Reviewer dated 8 February 2022. The Reviewer dismissed an application for review of the Corporation's decisions:
 - (1) dated 25 February 2021 changing Crusaders' ACC levy classification unit to CU 93180, and
 - (2) 9 June 2021 declining Crusaders' request for a new classification unit to be created.

- (c) ACR 35/22 (Chiefs): the decision of a Reviewer dated 8 February 2022. The Reviewer dismissed an application for review of the Corporation's decisions:
 - (1) dated 12 March 2021 changing Hurricanes' ACC levy classification unit to CU 93180, and
 - (2) 9 June 2021 declining Hurricanes' request for a new classification unit to be created.

Background

[2] The three appellants are Limited Partnerships ("LP") which are each licensed by New Zealand Rugby to provide day-to-day event management and off-field support to a Super Rugby team. Their activities include:

- (a) Selling tickets to Super Rugby games and events.

- (b) Marketing the super rugby team as a brand.
- (c) Securing corporate partnerships that might be either a pure sponsorship arrangement or a leadership and coaching relationships.
- (d) Managing game day events including both rugby games and other events.
- (e) Providing support staff to players.

[3] The appellants employ coaching, operational staff and support staff, as well as administrative staff. The rugby players themselves, the head coaches and the doctor are not employed by the appellants. These employees are employed or contracted to New Zealand Rugby, and Corporation levies for these people are paid by New Zealand Rugby.

[4] When the appellants were established, a classification unit code (“CU code”) was identified by each appellant based on its belief of its core activities. The Hurricanes and the Chiefs were classified as CU84500 (sports and physical recreation instruction) at a rate of \$0.59 per \$100 of liable earnings; and the Crusaders were classified as CU78610 (employment placement and recruitment services (no on-hired staff)) at a rate of \$0.14 per \$100 of liable earnings.

[5] In February-March 2021, the Corporation decided to change the CU code for the three appellants to code CU93180 (sports and physical recreation - professional rugby). This code attracted a much higher levy rate of \$6.43 per \$100 of liable earnings. Other Super Rugby franchises were already under CU93180, and were paying levies accordingly.

[6] In the Corporation’s decision of 25 February 2021 to the Crusaders, it noted the activity of the partnership as the operation and administration of the Crusaders rugby franchise. The Corporation outlined the description of the partnership’s operations as follows:

The operation of the franchise includes the following activities:

- Day to day management of the team both on-field and off-field
- The professional development of members

- Marketing & promotion of matches and the team
- Commercial partnership management
- Contract management
- Player video analysis

The Partnership retains gate and sponsorship income and pays administration staff, additional coaching and management staff, for training facilities, match operations, and marketing costs.

[7] The Corporation then advised:

Accurate levy classification:

93180 Sport and physical recreation – professional, rugby as it specifically includes those who are engaged in professional rugby administration.

The ACC Business Industry Classification Code website provides additional guidance and states, “This includes administering, coaching and/or playing professional rugby only (including the All Blacks, Sevens, Super Rugby, and ITM Cup)”.

[8] The Corporation, added that, whilst it was acknowledged that players and head coaching personnel were employed by New Zealand Rugby Union Incorporated, the Crusaders employed staff engaged in the management and administration of a professional Rugby team. The Corporation added that the levy classification 78693 Administrative services (not elsewhere classified) had been excluded as, even though the Partnership was receiving income from selling tickets, it was only a single task of the entities’ overall business activities, which was the management and operation of the franchise.

[9] In the Corporation’s decision of 12 March 2021 to the Hurricanes, and in the Corporation’s decision of 30 March 2021 to the Chiefs, the Corporation noted the activity and description of the partnership’s operations, and then advised:

Accurate Classification Unit:

Under the Business Industry Classification (BIC) code R911222 Professional rugby administration coaching or playing an employer that is part of the “administering” of a “professional rugby [team]... [including] Super Rugby” would fall under the CU 93180 Sport and physical recreation - professional rugby.

Under the Australian and New Zealand Standard Industrial Classification (ANZSIC) 2006 – which is used by ACC as a guideline for interpretation – it is stated an employer who under class 9112 Sports and Physical Recreation Clubs and Sports Professionals who are “engaged in operating [a professional sports] team” would be accurately classified under the ACC CU 93180.

[10] The Corporation added that the Partnership is the administer of a professional rugby team in New Zealand through the day-to-day management of the Hurricanes Super Rugby Team, and the accurate CU code is 93180 Sport and physical recreation - professional rugby; and that the Corporation understands that the coaches and the players for the Hurricanes Super Rugby team are employed by the New Zealand Rugby Union (NZRU) and the Partnership is responsible for the day-to-day operations of the team.

[11] The appellants did not agree with the decisions and asked the Corporation to reconsider that decision. They also asked the Corporation to consider setting a new CU code to reflect more accurately the risk of their activity, which did not involve the high-risk activity of rugby players or main coaching staff.

[12] On 9 June 2021, the Corporation declined to reconsider its decisions or to consider setting a new CU code for the appellants. The Corporation stated that it could not create a new classification unit under section 239 of the Act. This was because this section concerns the Corporation creating classification units in cases where an activity is not covered by the existing regulations. Given professional rugby clubs already have a classification unit in the regulations, CU93180 Sport and physical recreation – professional rugby, it was not possible to define a new classification unit. This is the classification unit that the Corporation assigned in its decision that it considered most accurately reflected the activity of the club.

[13] On 29 November 2021, Mr Colin Mansbridge, Chief Executive Officer of the Crusaders Limited Partnership, provided a brief of evidence, in which he outlined the functions of the partnership. He noted that there is no employment relationship between any super rugby player and a limited partnership. However, he acknowledged that there are occasions where the limited partnerships will sign a separate agreement with some players to provide specific promotional and sponsorship services.

[14] On 8 December 2021, review proceedings were held in respect of the Corporation's decisions of 25 February, 12 and 30 March 2021 and of the further decision of 9 June 2021. On 8-9 February 2022, the Reviewer dismissed the reviews by the appellants, on the basis that CU93180 most accurately described their business activity.

[15] On 2 March 2022, Notices of Appeal were lodged by the appellants.

Relevant law

[16] Section 6 of the Act provides that "activity":

- (a) means a business, industry, profession, trade, undertaking of an employer, a self-employed person, or a private domestic worker"; and
- (b) includes "ancillary or subservient functions relating to the activity, such as administration, management, marketing and distribution, technical support, maintenance, and product development.

[17] Part 6 of the Act provides for the accounts to fund the ACC scheme. Section 167(1)(a) states that the Work Account is used to finance entitlements provided under the Act to employees, private domestic workers and self-employed persons for work-related personal injuries. Section 168(1) provides for the collection of levies for the Work Account from employers.

[18] Section 170 of the Act provides:

- (1) For the purpose of setting levies payable under sections 168, 168B, and 211, the Corporation must classify an employer and a self-employed person in an industry or risk class that most accurately describes their activity, being an industry or risk class set out in regulations made under this Act.
- (2) If an employer is engaged in 2 or more activities, the Corporation must classify all the employer's employees in the classification unit for whichever of those activities attracts the highest levy rate under the regulations.
- (3) Despite subsection (2), the Corporation may classify the employer's employees in separate classification units for different activities if the employer meets the threshold (if any) specified in regulations and if—
 - (a) the employer so requests; and
 - (b) the employer is engaged in 2 or more distinct and independent activities; and

- (c) each of those activities provides services or products to external customers in such a way that each activity could, without adaptation, continue on its own without the other activities; and
- (d) accounting records are maintained by the employer to the satisfaction of the Corporation that—
 - (i) demonstrate the separate management and operation of each activity; and
 - (ii) allocate to each activity the earnings of employees engaged solely in that activity.

[19] Section 239 of the Act provides:

- (1) This section applies if none of the classifications of industry or risk defined by the regulations made for the purposes of section 170 (Work Account) specifically applies to the activity of a particular employer or self-employed person.
- (2) When this section applies,—
 - (a) the Corporation may define a classification of industry or risk that it considers is appropriate in relation to that employer or self-employed person and decide the levy for that classification of industry or risk; and
 - (b) that classification of industry or risk applies to all employers or self-employed persons involved in that activity who are not covered by a classification defined by the regulations; and
 - (c) that classification of industry or risk has effect as if it were defined by the regulations; and
 - (d) the Corporation must recommend to the Minister whether or not the classification of industry or risk should be incorporated in the relevant regulations when those regulations are next amended.

[20] In *Southern Lakes Building Ltd*,¹ Justice Lang stated:

[3] ... Underlying the classification regime is an assessment of injury risk based on historical records of injuries suffered by persons working in different types of workplace.

...

[11] Levy rates are set by grouping CUs into smaller numbers of Levy Risk Groups (LRGs). This is designed to ensure that CUs carrying a similar level of risk are grouped together to create a pool of risks that also have a reasonably large earnings base. Levies are set using actuarial calculations based on the claims experience of each CU.

...

¹ *Accident Compensation Corporation v Southern Lakes Building Ltd* [2022] NZHC 1288.

[14] Furthermore, the definition of “activity” makes it clear that if a particular business function (such as administration, management, marketing and distribution) is ancillary or subservient to another activity, then it must be considered to be part of that activity and not as a separate activity in its own right.

[21] In *Auckland Rugby Football Union*,² Judge Beattie stated:

[19] I find it is clear from the different classifications in the Schedule that “administration” is regarded as a different type of service to a sport, than other services, and it is only the activities of an employer who provided a service other than administration who would come within 93180 and be an employer providing a service to a particular sport if the playing of the sport itself was not the primary activity. Looking at the issue from another perspective, the only PCUs which have a premium rate approaching rugby and league are those of Forestry and Logging, each with \$5.67. Such employees in those two activities would seem to be in a risk class far greater than the employees of the ARFU. This clearly indicates that the employer activity must be associated with participation in the sport to justify such a premium rate on the employees earnings.

[22] In *On the Go*,³ Judge Beattie placed emphasis on the core activity of the entity.

[23] In *Building Connexion Ltd*,⁴ Judge Sinclair stated:

[43] ... I also do not agree with the Corporation's further submission that as the Act does not require it to determine a predominant activity for levy classification purposes where a business unit is involved in both wholesale and retail trading activities involving the same products, the additional factors can only be relevant to the assessment under s 170 to determine whether those activities are each separately identifiable business activities or whether one is merely ancillary or subservient to the main business activity.

Discussion

[24] The key issue in this case is whether the Corporation erred in deciding that the levy classification unit (“CU”) that most accurately described the appellants’ business activity was CU 93180 (Sport and Physical recreation - professional rugby). rather than another CU.

[25] For the purpose of setting levies payable under the Act, the Corporation must classify an employer in an industry or risk class that most accurately describes the

² *Auckland Rugby Football Union v Accident Compensation Corporation* [2003] NZACC 34.

³ *Accident Compensation Corporation v On the Go (New Zealand) Ltd* [2010] NZACC 78, at [20].

⁴ *Accident Compensation Corporation v Building Connection Ltd* [2021] NZACC 41.

employer's activity, being an industry or risk class set out in regulations made under the Act.⁵ If an employer is engaged in two or more activities, the Corporation must classify all the employer's employees in the CU for whichever of those activities attracts the highest levy rate under the regulations.⁶ "Activity" means a business, industry, profession, trade or undertaking of an employer, and includes ancillary or subservient functions relating to the activity, such as administration, management, marketing and distribution, technical support, maintenance, and product development.⁷ If none of the CUs of industry or risk defined by the regulations specifically applies to the activity of a particular employer, the Corporation may define a classification of industry or risk that it considers is appropriate in relation to that employer and decide the levy for that classification of industry or risk.⁸ The High Court has held that underlying the classification regime is an assessment of injury risk based on historical records of injuries suffered by persons working in different types of workplace, and so levies are set using actuarial calculations based on the claims experience of each CU.⁹

[26] Counsel for the appellants submits as follows. The appellants are primarily engaged in event management rather than rugby activities which attract higher risk. The Corporation's decision to allocate CU code 93180 was incorrect, as there was no assessment of the actual risk associated with the activities of the appellants. If there had been, such a high rate would not have been assessed as necessary, given the low-risk activities and low level of claims. This decision goes against the Corporation's own principles and rules of fairness and transparency. Instead, a more appropriate code would be CU 78693, which is for administrative services (not elsewhere classified) and includes sport, art and recreational event management (without facilities). The Reviewer had the jurisdiction to review a decision by the Corporation that is inconsistent with the core tenet of the Act regarding the levy being paid reflecting the risk associated with the workplace. The Reviewer was incorrect in her analysis of the core activities of the appellants.

⁵ Section 170(1).

⁶ Section 170(2).

⁷ Section 6.

⁸ Section 239.

⁹ *Southern Lakes Building Ltd*, above n 1, at [3] and [11].

[27] This Court acknowledges the above submissions. However, the Court notes the following considerations.

[28] First, there is substantial evidence that, central to the activity of the appellants, is the administration of professional rugby. The Court notes, in particular, the following evidence:

- The appellants' submissions that they are responsible for the day-to-day event management and off-field support of their Super Rugby teams, including:
 - selling tickets to Super Rugby games and events;
 - marketing the super rugby team as a brand;
 - securing sponsorship arrangements or leadership and coaching relationships;
 - managing rugby games and other events;
 - providing support staff to players.
- The licence agreement between the New Zealand Rugby Union Incorporated (NZRU) and the Crusaders Ltd Partnership (which was provided as an example of the licences involving all three appellants, referred to as "Clubs") notes the following:
 - Schedule 4: 32-33: the Club must procure the Team to attend and play in a Match [in the Competition]. The Club is responsible for selecting a squad of 38 players in accordance with the Collective Agreement. The Club is responsible for selecting the Team from the Squad in accordance with the selection policies and procedures adopted by the NZRU and notified to the Club.
 - Schedule 4: 35: 1: the NZRU will enter into contracts with Players (which will be co-signed by the Club in respect of Players who are selected by the Club), the Head Coach, Assistant Coach and doctor for the Team. 2: The Club acknowledges that the Full Squad's manager, physiotherapist, strength and conditioning coach, analyst

and any other members of the management team other than those covered by clause 35.1, will be appointed by, and at the cost of, the Club. 3: The Club will employ a full-time Personal Development Manager ...

- Schedule 6: 58: the Club must employ or appoint a management team, comprising of at least a manager, a physiotherapist and a strength and conditioning trainer, analyst and a mental skills/sports psychologist to work with the coach, assistant coach and doctor appointed by NZRU for the Team.
- Schedule 6: 62.2: NZRU will assess the performance of the Club in relation to the off-field management of the Players having regard to the following: i) the quality of the management of off-field incidents and misconduct in accordance with the policies and procedures adopted by NZRU; ii) the off-field discipline of Players; iii) the quality of the off-field obligations performed by Players; iv) the quality of the systems in place to manage the off-field safety and security; v) the timeliness and quality of reports and other administrative matters reasonably required by NZRU from time to time. ...

[29] Second, CU code 93180 is described as “Sport and physical recreation – professional rugby: professional rugby playing [and] sports administration service – professional rugby”. The ACC Business Industry Classification Code website, which provides additional guidance, states that this code applies to rugby administration, coaching or playing. There is no other code that specifically refers to the administration of professional rugby. The CU code suggested by the appellants, namely, CU 78693, Administrative services (not elsewhere classified), does not refer to rugby administration.

[30] Third, section 170(1) provides that, for the purpose of setting levies payable under the Act, the Corporation must classify an employer in an industry or risk class that most accurately describes their activity, being an industry or risk class set out in regulations made under this Act. In view of the appellants’ rugby administration

function and the applicability of CU code 93180 to rugby administration, the Corporation was required to assign this classification unit to the appellants.

[31] Fourth, section 239(1) applies only if none of the classifications of industry or risk defined by the regulations, made for the purposes of section 170, specifically applies to the activity of a particular employer. In that CU code 93180 specifically applies to the activity of the appellants, section 239 does not apply to their classification, and so the Corporation is not empowered to provide a classification in terms of another code.

Conclusion

[32] In light of the above considerations, the Court finds that the Corporation correctly decided that the levy CU that most accurately described the appellants' business activity was CU 93180 (Sport and Physical recreation - professional rugby), and that it could not create a new classification unit for the appellants under section 239 of the Act.

[33] The decisions of the Reviewer dated 8-9 February 2021 are therefore upheld. These appeals are dismissed. I make no order as to costs.

[34] This Court notes that it has made the above decision with reluctance, and only because the Court and the Corporation are bound by the existing classification provisions applicable to the appellants. As noted by the High Court, underlying the classification regime should be an assessment of injury risk, and that levies should be set using actuarial calculations based on the claims experience of each CU.¹⁰ It appears to this Court to be anomalous and potentially unfair to rugby administrators that their classification should be grouped along with rugby players in the markedly higher levy category of CU93180 (\$6.43 of liable employer earnings). The Court notes that the appellants were, prior to early 2021, classified at a rate of only \$0.59 or \$0.14 of liable earnings, and that the current levy rate for CU 78693 administrative services (including sport event promotion service) is only \$0.24 of liable earnings. The Court expresses the hope that serious attention will be given to

¹⁰ *Southern Lakes Building Ltd*, above n 1, at [3] and [11], per Justice Lang.

reassessing the appropriate classification and levy rates applicable to rugby administrators, to reflect better injury risk in light of actuarial calculations based on claims experience.

A handwritten signature in black ink, appearing to read 'P R Spiller', written in a cursive style.

P R Spiller
District Court Judge

Solicitors: Tompkins Wake for the Appellant
McBride Davenport James for the Respondent