

BETWEEN **WAYNE GEAR**

 Appellant

AND **TABLE TENNIS NEW ZEALAND
INCORPORATED**

 Respondent

**REASONS FOR DECISION GIVEN ON 13 JULY 2010
Dated 15 JULY 2010**

Hearing: In Auckland on 13 July 2010

Tribunal: B J Paterson QC, Chairman
 A Greenwood
 R Cheatley

Counsel: M Smyth for Appellant
 S R Cottrell for Respondent

Registrar: B Ellis

Introduction

1. Two youth table tennis players have qualified for the Youth Olympics to be held in Singapore in August next. The respondent (TTNZ) nominated Mr Finch as coach of the team. Mr Gear, in accordance with the constitution of TTNZ, appealed to the Tribunal against this nomination.
2. The notice of appeal is dated 29 June 2010 and the appeal brief was filed on 30 June 2010. Because the New Zealand team for the Youth Olympics, including the coach, has to be nominated to the Games Organising Committee no later than 15 July 2010, it was necessary to urgently determine the appeal. A hearing was convened in Auckland for 13 July 2010 at which several witnesses gave evidence in person and two by telephone. The Tribunal gave Mr Finch the right to become an interested party but he elected not to do so. He was called as a witness by TTNZ, provided a witness statement for TTNZ and he was cross-examined at the hearing.
3. The Tribunal gave an oral decision at about 5:00pm on 13 July 2010 setting aside the nomination of Mr Finch as coach of the team and referred the matter back to TTNZ for reconsideration. Because of the exigencies of time, it did not give its detailed reasons at that time and now does so.
4. The decision does not reflect on Mr Finch's ability or competence to manage the team, as will be explained below. If TTNZ chooses to re-nominate him, the Tribunal sees no reason why he should not be the coach.

Background

5. On 14 April 2010, after the two players had qualified for the Youth Olympics, the NZOC requested TTNZ to provide by 23 April 2010 *"a long list of officials... so I can put them into the system and get*

them to fill out forms in the interim". The request also included Entry/Eligibility Forms which the athletes and officials would be required to complete but there was no immediate deadline on the completion of those forms.

6. The Board of TTNZ delegated the creation of the long list to the TTNZ High Performance Team (TTNZ HP Team). The evidence was that the two members of that team were Mr Finch, who is the Director of the team, and Mr Seaholme. The latter is a member of the Board of TTNZ. It was suggested in evidence that the TTNZ HP Team consulted Mr Redmond, convenor of selectors, but the delegation was to the TTNZ HP Team comprising Messrs Finch and Seaholme.
7. The TTNZ HP Team produced a short list of six possible coaches. That list included Messrs Finch and Seaholme. The TTNZ HP Team considered the position of Mr Gear but, for reasons which appear later, he was not included on the list.
8. The TTNZ Board appointed a selection committee of its Chairman, Mr Keane, Mr Redmond, the Chairman of Selectors, and Mr Seaholme to make the nomination of the coach.
9. By the time the selection committee considered the long list, there were only two members on that long list available to serve as coach. The two were Mr Hubbard and Mr Finch.
10. The long list had been submitted on 23 April 2010 and it was necessary to make the nomination to the NZOC by about 21 May 2010. The selection panel chose Mr Hubbard but he then became unavailable and Mr Finch was then nominated to the NZOC.
11. Mr Gear, who did not know about the procedure being followed, because TTNZ had not, as in the past, called for expressions of interest, lodged his appeal against the decision when he discovered that Mr Finch was the nominee.

Grounds of Appeal

12. As there are no specific grounds of appeal contained in the TTNZ constitution, Mr Gear relies upon the following grounds set out in r42 of the Tribunal's rules:
- (a) natural justice was denied;
 - (b) the application selection criteria has not been properly followed and/or implemented;
 - (c) the appellant was not afforded a reasonable opportunity to satisfy the applicable selection criteria;
 - (d) the non-nomination of the appellant was affected by bias (specifically, the non-inclusion of the appellant on the long list).

Grounds (b) to (d) apply to selection appeals only.

13. TTNZ submitted that the only ground available to Mr Gear was that of a denial of natural justice. The submission was that the nomination of a coach is not a selection decision for the purposes of the Tribunal's rules.
14. The Tribunal does not accept TTNZ's submission. The grounds in paragraph 12(b) – (d) above refer specifically *"to the Selection or Non-Selection of the appellant as a New Zealand representative in a sport or to a New Zealand representative team or squad."*
15. *"Selection"* is defined in the rules as including nomination and likewise *"Non-Selection"* includes non-nomination. While *"team"* is not defined in the rules, *"squad"* is. It is *"a group of athletes who have been identified for consideration for selection to a New Zealand representative sports team, including reserves and others associated with the squad"*. In the context of the rules, the Tribunal accepts that *"a New Zealand representative team"* includes both players and coaches appointed to represent New Zealand. The team going to the Youth Olympics is, therefore, a

"*team*" in accordance with the rules and a coach who will also have managerial roles at the Youth Olympics is part of that team. Mr Gear was entitled to pursue his four grounds of appeal.

Factual findings relating to non-nomination

16. Mr Gear has had considerable experience as a coach, as well as being a player who attained success in the sport. He has been New Zealand Maori champion and has represented New Zealand on two occasions. He has held numerous coaching positions, including with New Zealand teams at the World Junior Championships in 2003, 2006, 2007 and 2008, the men's team at the 2007 World Individual Table Tennis Championships and teams to the Commonwealth Championships in 2007 and 2009. In 2007, he was the TTNZ National Coach of the Year. He is currently Chairman of the Auckland Table Tennis Association.
17. Mr Gear has over a period of time coached both the athletes in the team going to the Youth Olympics, including coaching them while on international trips. They have both indicated in letters that they would like Mr Gear to be the coach at the Youth Olympics. However, Mr Gear is not their personal coach.
18. It is not for this Tribunal to assess the coaching ability of Mr Gear but it is apparent, as was accepted by some of the TTNZ witnesses at the hearing, that Mr Gear has the coaching credentials to be considered for nomination as a coach.
19. There were various reasons given for his exclusion from the long list. It was suggested that he lacks multiple sports events experience and this is necessary at the Youth Olympics because the coach will assume some managerial roles.
20. However, in the Tribunal's view, Mr Gear would have been on the long list if it had not been for a disciplinary hearing at which he was reprimanded over two incidents. The report from the

disciplinary panel which considered this matter, and which reprimanded Mr Gear, included:

The Chairperson then asked Mr Inns to speak briefly and relate to Mr Gear the commonly held opinion of the panel that Mr Gear had a bright future with TTNZ and was a valued member, but that on two occasions this year his actions had showed a lack of judgment which to his credit he had admitted, and as a result he was only hurting himself.

The report noted that Mr Gear had a right of appeal. He did not exercise this.

21. Mr Smyth, counsel for Mr Gear, submitted that the first occasion should have no bearing on his inclusion in the long list. He submitted that the disciplinary panel had no jurisdiction to hear the complaint and that there were other defects with it. The Tribunal is of the view that it is not for it to consider whether the disciplinary panel was properly constituted and came to the right decision. It considered an incident which Mr Gear admitted and determined that there was bad judgment on his behalf.
22. The second occasion relates to an email exchange over the possible disciplining of a player on an overseas trip. Mr Gear sent an email to Mr Seaholme, signed "*Convenor of Morons*" and copied it to Mr Finch, Auckland Table Tennis and to another official. While Mr Gear said in evidence that he only intended to copy the email to Messrs Finch and Seaholme, it is difficult to see how he could have accidentally sent the email to the other persons. It is obvious from the fact that the matter went to the disciplinary panel, that Messrs Finch and Seaholme, amongst others, were not impressed by its sending, even if it were meant to be "*tongue in cheek*". Mr Seaholme, in evidence, acknowledged his disappointment at the email exchange.
23. Mr Inns, a member of the disciplinary panel, gave evidence on behalf of Mr Gear. His evidence was that the panel unequivocally found that the incident was of minor consequence and the only case that Mr Gear needed to answer was a lack of judgment. This

was reinforced by handing down the lowest possible sentence, a reprimand. Further, he said that the disciplinary panel wanted to ensure that the whole matter was kept confidential and that it would never appear in the "*public domain*". He expressed disappointment that TTNZ's representatives were now bringing the matter into the public domain.

24. Notwithstanding the disciplinary panel's laudable desire to keep the matter confidential, the Tribunal accepts that incidents which lead to a reprimand because of lack of judgment may be relevant to the suitability of a coach for a youth team. It is for the selection panel to assess all relevant factors which would obviously include behaviour which may or may not be appropriate for the coach of a youth team and whom will have some managerial role.

Natural justice and bias

25. Mr Gear relies on both a breach of natural justice and actual bias. If bias is established, there is a breach of natural justice but there can also be a breach of natural justice without there being actual bias.
26. Natural justice in its basic form requires a fair administrative procedure. In a general way, natural justice means simply "*the natural sense of what is right and wrong*".
27. It is a principle of natural justice that a man may not be a judge in his own cause. If he is a party in the cause or has a financial or proprietary interest in his outcome, he is automatically disqualified. As was said by the House of Lords in *R v Bow Street Metropolitan Stipendiary Magistrates & Ors* (the *Pinochet* case) [1999] 1 All ER 577 at 586:

...once it is shown that the Judge is himself a party to the cause, or has a relevant interest in the subject matter, he is disqualified without any investigation into whether there was

a likelihood or suspicion of bias. The mere fact of his interest is sufficient to disqualify him...

28. The fact that the principle disqualifies a Judge without the need to show bias is relevant in this case. This is because there is authority for the proposition that in a judicial review of a sporting body's decision before a court, the court will normally only overturn the decision if actual bias is established. Thus, while apparent bias as distinct from actual bias may be a breach of natural justice, the court authorities if applied to this Tribunal may mean that apparent bias is not available to it. However, it is not necessary in this hearing to determine whether Mr Gear can succeed on the basis of apparent bias.
29. On the facts set out below, the Tribunal is of the view that Messrs Finch and Seaholme were judges in their own cause and, therefore, the decision to exclude Mr Gear from the long list should be set aside.
30. The relevant facts are:
 - (a) The request from the NZOC came before the selection committee had been appointed to nominate a coach. The immediate task allocated to the TTNZ HP Team was to fix the long list.
 - (b) The evidence suggests that the long list is an "*administrative*" requirement of NZOC to ensure that all necessary matters relating to visas, accreditation and other relevant matters are put in place in time to enable the team to compete.
 - (c) TTNZ in the past has called for expressions of interest for coaching positions. It didn't do so at this time because, on the evidence of Messrs Finch and Seaholme, it was thought that there was insufficient time.

- (d) The long list was settled by the TTNZ HP Team either wholly by Messrs Finch or Seaholme or mainly by them. It appears that the delegation was to the TTNZ HP Team which only comprised Messrs Finch and Seaholme.
 - (e) The team removed a candidate from consideration. They considered but did not put Mr Gear on the list. They put themselves on the long list.
 - (f) One member of the TTNZ HP Team was subsequently appointed to the selection panel, although he ultimately withdrew from the long list.
 - (g) The other member of the TTNZ HP Team was subsequently nominated to the NZOC as TTNZ's nominee.
31. The Tribunal appreciates the difficulties which some smaller sporting organisations have in finding appropriate personnel for selectorial and other administrative positions. It suspects that the Board of TTNZ may not have appreciated the consequences of referring the settling of the long list to the TTNZ HP Team. However, the consequences were that it appointed two members who became judges in their own causes.
32. Both members of the TTNZ HP Team were interested in the outcome of settling the long list. They were both "*selected*" for the long list. They excluded Mr Gear from being available for nomination by TTNZ. On the principles referred to above, this leads to automatic disqualification of the TTNZ HP Team as settlers of the long list and leads to the setting aside of the long list. This terminates the whole nomination procedure.
33. The affect of settling the long list was, in part, a pre-selection of the nominee. They operated as selectors by taking into account matters that the selection committee was entitled to take into account in exercising what would appear to be an administrative role.

34. Apparent bias occurs where there may not be actual bias. In other words, a person who is deemed to have apparent bias may not be biased at all. However, apparent bias, if it applies, would also be sufficient to set aside this nomination. In considering bias, it is necessary, after ascertaining the factors which are said to have a bearing on the suggestion that the judge may have been biased, to ask whether those factors would lead a fair-minded and informed observer to conclude that there was a real possibility or a real danger, the two being the same, that the panel was biased.
35. For the reasons set out in paragraph 30 above, the facts do suggest apparent bias. The two persons who excluded Mr Gear had been the subjects of an email sent to other persons which inferred they were morons. This added to the factors in paragraph 30 would be sufficient in the Tribunal's view to make a finding of apparent bias.
36. The decision, however, is not made on the basis of apparent bias, because it is unnecessary to do so and counsel did not address whether or not apparent bias is available to the Tribunal.
37. The nomination was set aside on the principle that a person can not be judge in his own cause.

The other grounds of appeal

38. The Tribunal refers briefly to the other two grounds relied upon by Mr Gear.
39. The first of these grounds was that the applicable selection criteria had not been properly followed and/or implemented. The basis of this allegation was:
 - (a) TTNZ has adopted policies set out in a document entitled "Policies and Position Descriptions".

- (b) The criteria formulated by the TTNZ HP Team was its own creation to suit their own purposes and ignored these policies - the TTNZ HP Team acted outside broad policy.
- (c) The TTNZ HP Team assumed the role of selectors. They were not entitled to do so.
- (d) The failure to call for expressions of interest, when it was time to do so, denied Mr Gear the opportunity of expressing his interest.
- (e) In formulating the long list, the TTNZ HP Team ignored the part of the selection criteria which stated:

All team coaches shall be compatible with and acceptable to likely team members.

- 40. TTNZ's response was that it had a short time to finalise the criteria, the team is not a TTNZ team but an NZOC team and Messrs Finch and Seaholme liaised with NZOC to ascertain its requirements, and that TTNZ was entitled to depart from its normal criteria under a provision in its constitution.
- 41. The provision in the constitution referred to allows the Board to determine the process to apply in respect of appointments of coaches. In this case, the Board determined that the long list would be settled by the TTNZ HP Team. The Board was entitled to delegate this role under the terms of the constitution.
- 42. The team is an NZOC team and NZOC obviously has its requirements which must be melded in with the policies of TTNZ. There was a suggestion that the criteria adopted by the TTNZ HP Team was to suit the interests of Messrs Finch and Seaholme. The Tribunal found no evidence of this. There was, however, no obligation to ask for expressions of interest and normally, unless there are express provisions in the applicable rules, a selector is not required to discuss a potential selection with a candidate or to give reasons for non-selection after the event.

43. In one respect, the TTNZ HP Team did assume the role of a selector. This is an element of the natural justice finding and need not be considered further here.
44. The compatibility issue is only one of the issues to be taken into account. There was evidence that Mr Gear would have been compatible. There were suggestions made in Mr Gear's evidence that Mr Finch may not be compatible. The Tribunal was not satisfied that the evidence establishes the incompatibility alleged. This is, no doubt, a matter that TTNZ will take into account when it reconsiders the nomination.
45. The final ground was that Mr Gear was not afforded a reasonable opportunity to satisfy the applicable selection criteria. As noted, an athlete does not have the right to make submissions. This point is based on the failure to call for expressions of interest. While it would have been prudent to do so and it appears there may have been time to do so, there was no obligation under either the constitution or the applicable policies and position descriptions which required the TTNZ to do so.

Decision

46. For the above reasons, the decision was made on the 13 July 2010. In making that decision, the Tribunal was not indicating any preference between Mr Finch and Mr Gear. That is a matter for TTNZ when it reconsiders the nomination.

Dated 15 July 2010



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B J Paterson QC
Chairman