

**BEFORE THE SPORTS TRIBUNAL
OF NEW ZEALAND**

ST 12/10

BETWEEN **JACK HALKA**

Appellant

AND **BOWLS NEW ZEALAND INCORPORATED
("BNZ")**

Respondent

DECISION OF THE TRIBUNAL

Dated 21 APRIL 2011

Tribunal: Hon Barry Paterson QC (Chairperson)
 Nicholas Davidson QC (Deputy Chairperson)

Registrar: Brent Ellis

DECISION OF THE TRIBUNAL

A Introduction

1. While the incident which gave rise to this Appeal occurred in October 2009 it raises important questions of jurisdiction. Events associated with the Christchurch earthquakes have in part delayed this Decision.
2. This Appeal by Jack Halka stems from the appointment of a Marker for a Singles Championship Match played at Taradale on **3 October 2009**. Mr Halka protested to the Match Convenor and sought a re-match with a more experienced marker.
3. The complaint (sometimes called protest) was first lodged in writing on 3 October 2009 and concluded by Mr Halka saying:

"I have not signed the scorecard and ask that the game be replayed with (an) experienced marker who understands the Laws of the Game".

4. He later expressed "the pivotal question" in his complaint as follows:

"Whether the appointment of a junior bowler as a Marker accompanied by the appointment of a second person, arguably a second marker, to assist the Marker, necessitated for reasons of competence but more accurately the questionable competence of the appointed Marker, and the presence of both the Marker and his assistance (sic) in a coaching capacity on the rink during the course of a singles championship match is a breach of the Rules of the Sport of Bowls?"

5. The record before us shows the complaint went beyond the status of the marker to the involvement of a "second person" and the way the "officials" performed their roles. This is relevant to whether this gives rise to a "dispute" or "misconduct" or both. Mr Halka considers that the marking was not as required under the Laws of the Sport and he was prejudiced by that.

Sequence of the Process

6. A Bowls Taradale Committee rejected Mr Halka's protest on 3 October 2009. No reasons were given and this decision was "*ratified*" by the Executive of Bowls Taradale on 19 October 2009.
7. Mr Halka first attempted to appeal to Bowls New Zealand ("BNZ") on 11 November 2009. BNZ initially took the view that Bowls Hawkes Bay ("BHB") held jurisdiction to hear the appeal. On 13 November 2009, BNZ advised Mr Halka by letter that "*your right of appeal is to the Hawkes Bay Centre*". However, BNZ later took the view an appeal could be heard only within the Taradale Club, under the BNZ Constitution, as it was a dispute within the Laws of the Sport.
8. Mr Halka lodged an appeal with BHB on 18 November 2009. The BHB Judicial Committee conducted a hearing on 16 December and at the hearing Mr Halka was advised for the first time that the BHB Judicial Committee may not have jurisdiction to hear the matter. On 2 March 2010, the BHB Judicial Committee held that it had no jurisdiction to hear the appeal as "*the dispute related to the decision by the controlling body concerning the laws of the sport*" and there did not appear to be any basis for the BHB Judicial Committee to hear it. The Committee considered that Mr Halka's "*avenues for redress remain only with Bowls Taradale and they have been exhausted*".
9. Mr Halka then appealed **that Decision** (no jurisdiction) of the BHB Judicial Committee to the BNZ Judicial Committee. The BNZ Judicial Committee adopted the position referred to above, that the protest could be heard only within Bowls Taradale. This position was formalised in the BNZ Judicial Committee decision of 8 June 2010 where it declined jurisdiction to hear the appeal.

10. Mr Halka says that he had sequential rights of appeal from Bowls Taradale to the BHB Judicial Committee, then to the BNZ Judicial Committee, then to this Tribunal.
11. BNZ submits that this Tribunal has no jurisdiction to consider an appeal from a decision of the BNZ Judicial Committee on Appeal. If the Tribunal considers it has jurisdiction, a further issue is whether it can and should do more than refer the issue back to BNZ with comment, or go into the facts which gave rise to the original protest.

B Sports Tribunal Process

12. By a Minute dated 23 September 2010 a preliminary observation was made:

"If this Tribunal finds jurisdiction is held by BNZ it would return the matter to BNZ for hearing with some comment as to the scope of such appeal".

13. The Tribunal later contemplated whether it can and should go further than simply determining whether the BNZ Judicial Committee held jurisdiction.
14. A considerable volume of written material was filed with the Tribunal, supplemented by submissions at a teleconference on Monday 11 October 2010. Lengthy written submissions were then made for the Appellant dated 28 October 2010, and BNZ replied on 9 November 2010.

C The case for the Appellant

Membership

15. As a member of Bowls Taradale Incorporated, the Appellant has status as an "*Individual Member*" and is subject to the contract established under the BNZ Constitution.

Decisions under Appeal

16. The Appeal is against:
- (i) The Decision of the Judicial Committee of BNZ made on 8 June 2010;
 - (ii) The Decision by the Judicial Committee of Bowls Hawkes Bay Incorporated made on 2 March 2010, subsequently "*ratified*"; and
 - (iii) The Decision of a Committee of Bowls Taradale made on 3 October 2009, subsequently "*ratified*".

Grounds of appeal

17. The grounds of Appeal allege breach of natural justice, that two of the three bodies whose Decisions are appealed against acted ultra vires, and that substantial new evidence became available after the primary Decision (Taradale) was made.

Relief sought

18. The Appellant at heart seeks a declaration that the appointment of a second person to assist the Marker, without consent of the Appellant, breached the relevant Rules and Laws of the Game, so that the results of the match played by the Appellant on that day should be declared "*null and void*". The Tribunal is asked to make

further Orders requiring BNZ to take specified steps associated with application of its Rules and Constitution, and correlation of those within "*Centres and Clubs*".

D The BNZ Constitution and associated Regulations

Dispute/misconduct

19. BNZ Constitution Article 25.2 (as does BHB Constitution Article 27.2) defines a "*dispute*" as relating to a "*grievance or difference about the meaning or effect of any Rule, provision, decision, policy, practice, right, privilege or direction . . . determined by a Controlling Body Club, the Centre or a Member of the Centre*". "*Misconduct*" is defined in Article 24.2 of the BNZ Constitution and includes any breach of the Laws of Sport by a member or official. The facts of this case involve elements of dispute and misconduct. Under Article 25.3 of the BNZ Constitution, an allegation of misconduct is not within the definition of "*dispute*". However, it makes no difference how the complaint is classified as the rights of appeal are identical for both categories.
20. The BNZ Constitution Article 24 provides:

"24.1 Disciplinary Process

The disciplinary process for Misconduct (as defined in rule 24.2) shall be as follows:

- (a) **Laws of the Sport:** *Where a member or Official of a Club, Centre or Bowls NZ engages in Misconduct which is covered by the Laws of the Sport, a person involved in the Game of Bowls in which the Misconduct occurred may take such action as specified in the Laws of the Sport including appealing to the Controlling Body, and if no action is taken, the Controlling Body shall take such disciplinary action as is set out in the Controlling Body's constitution and/or regulations."*

...

24.2 Misconduct Defined

For the purposes of this Constitution, the definition of "Misconduct" shall include, but shall not be restricted to, situations where a Club, Centre, or any other Member or Official of Bowls NZ, or a member or Official of a Club or Centre, as the case may be:

- (a) *Breaches any provision of the Laws of the Sport."*

...

21. Article 25 provides a "Dispute" process as follows:

25.1 Dispute Process

Subject to Rule 25.4, the process for resolving Disputes (as defined in Rule 25.2) shall be as follows:

- (a) **Club Member vs Club Member – Laws of the Sport:** *Where a member of a Club has a Dispute with another member of the same Club and such Dispute is covered by the Laws of the Sport, the Controlling Body responsible for enforcing the Laws of the Sport, shall take such steps for resolving the Dispute as are set out in the Controlling Body's constitution and/or regulations;*

...

- (c) **Club Member vs Club – Laws of the Sport:** *Where a member of a Club has a Dispute with their Club or any official of the club and such Dispute is covered by the Laws of the Sport, the Controlling Body responsible for enforcing the Laws of the Sport, shall take such steps for resolving the Dispute as are set out in the Controlling Body's constitution and/or regulations."*

...

25.2 *Dispute Defined*

For the purpose of this Constitution, the definition of "Dispute" shall (subject to rule 25.3) include situations where a Club, Centre or any other member or Official of Bowls NZ, or a member or Official of a Club or Centre, as the case may be, has a grievance or difference about the meaning or effect of any Rule, provision, decision, policy, practice, right, privilege or direction (including this Constitution, the Laws of the Sport and the Regulations) determined by a Controlling Body, Club, Centre, Bowls NZ or a member of a Club or Centre. A Dispute shall not include any grievance or difference about the meaning or effect of any rule of the Bowls NZ Anti-Doping Regulations, or of any decision by a jury of appeal regarding an umpire's decision in competitions or tournaments where Bowls NZ is the Controlling Body.

25.3 *Disputes Exclude*

*A Dispute shall **not** include:*

- (a) A matter which involves an allegation of Misconduct;*
- (b) A matter which is before, or has been before, the Bowls NZ Judicial Committee or the judicial committee (or equivalent body) of a Centre or a Club; or*
- (c) A matter which is or has been appealed under this Constitution or the constitution of a Club or Centre."*

22. Article 26 provides:

26.2 *Functions*

The functions of the Judicial Committee shall be to:

- (a) hear and determine any allegation of Misconduct properly made to it under this Constitution;*
- (b) hear and determine any Dispute properly made to it under this Constitution;*

- (c) **hear and determine any appeals properly made to it under this Constitution;**
- (d) *peruse, comment on and where necessary amend notices of motion submitted for consideration at a General Meeting;*
- (e) *if delegated by the Board, undertake any inquiry or investigation, on behalf of Bowls NZ.*

26.3 Procedure

In performing its functions, the Judicial Committee shall follow the procedures set out in the Regulations.

26.4 Decisions

Subject to the right of appeal (under Rule 27), all decisions of the Judicial Committee shall be final and binding on all Members, and member of the Members . . .

23. The BNZ Constitution provides an appeal process as follows:

"27.1 Appeal Process

*The appeal process for appeals of decisions involving **Misconduct** or a **Dispute** shall be as follows:*

- (a) *Appeal to Centre: Where a Club (including any committee on its behalf and/or acting as the Controlling Body) has made a decision involving Misconduct or a Dispute, (whether or not it was covered by the Laws of the Sport), any party affected by that decision may appeal to the Centre of which the Club is a member, in accordance with the constitution and/or regulations of the Centre;*
- (b) *Appeal to Bowls NZ: Where a Centre or Bowls NZ (including any committee on its behalf and/or acting as the Controlling Body) has made a decision involving Misconduct or a Dispute, (whether or not it was covered by the Laws of the Sport), any party affected by that decision may appeal to the Bowls NZ Judicial Committee, in accordance with this Constitution and the Regulations.*

- (c) *Appeal to Sports Tribunal of NZ: Where the Bowls NZ Judicial Committee has made a decision involving Misconduct or a Dispute, (whether or not it was covered by the Laws of the Sport), any party affected by that decision may appeal such decision to the Sports Tribunal of New Zealand established by Sport and Recreation New Zealand. The procedure for the appeal shall be as set out in the rules of the Tribunal.*

27.2 *Decisions*

A decision in relation to an Appeal which is determined by the judicial committee of a Club, or by the judicial committee of a Centre or by the Judicial Committee of Bowls New Zealand, or by the Sports Tribunal of New Zealand, shall be final and binding and there is no second or further right of appeal. (emphasis added here and further in this Decision)

BNZ Judicial Committee Regulations

24. BNZ has made Regulations for the BNZ Judicial Committee process ("JCR") pursuant to Article 29.
25. An **originating jurisdiction** exists before the BNZ Judicial Committee as set out in Articles 25.1 (i) and 25.1(j).
26. A **right of appeal** to the BNZ Judicial Committee is set out in BNZ JCR 3 derived from Article 27.1(b) of the BNZ Constitution, referred to above. **It relates to an appeal from a decision involving Misconduct or a Dispute.**
27. By BNZ JCR 3.1.4 the right of appeal is not by way of rehearing, but is limited to a breach of natural justice, the decision making body acting ultra vires, or substantially new evidence becoming available after the decision was made. The Judicial Committee may hear or rehear evidence **in the interests of natural justice.**
28. The Judicial Committee has a wide discretion with regard to sanction, and may refer a matter back to a Centre or Club to rehear a matter with directions.

29. BNZ Constitution Article 27.1(c) provides that an appeal to the Sports Tribunal lies from a decision of the BNZ Judicial Committee but Article 27.2 makes it plain that whenever **an** appeal is determined by a Judicial Committee, whether of a Club, a Centre or BNZ, or by this Tribunal, such is final and binding "*and there is no second or further right of appeal*".
30. Article 27.1(a) allows **an** appeal from **a Club** to **the Centre** but **does not** refer to that being from a "Judicial Committee". Nor does it matter that the Dispute was or was not covered by the Laws of the Sport. Article 27.1(b) is to the same effect and allows an appeal from the Centre to BNZ, including from a Committee on their behalf, and/or acting as the Controlling Body.
31. Article 27 is quite clear, that there is no second right of appeal, so the decision on appeal **of a Judicial Committee** of a Club, or Centre, or BNZ, on appeal is final and binding.

D Analysis of steps in the process

Bowls Taradale

32. The Appellant's protest to the Match Convenor was processed by the Disputes Committee of Bowls Taradale, then ratified by the Executive Committee on 19 October 2009. There was only one **decision** made within Bowls Taradale. The "*ratification*" decision cannot be classified as an appeal. However it is important to identify whether there was a right of appeal at all, and, if so whether it was to a Judicial Committee within Bowls Taradale. We return to this.

The appeal to BHB

33. The BHB Committee held that it had no jurisdiction because of BHB Rule 29.1(a) which states any appeal lies to the Bowls Taradale

Judicial Committee. The Appellant says that there has therefore been no decision made on Appeal, as it was never considered on its merits, when BHB held that it had no jurisdiction. However he did not appeal to the Bowls Taradale Judicial Committee.

34. In effect the appellant says that even if there is no **second** right of appeal that is not the end of the line as he has never had his appeal heard.
35. The Appeal Process within BHB is defined in the BHB Constitution as follows:

"29 *Appeal Process*

The appeal process for appeals of decisions involving Misconduct or a Dispute shall be as follows:

- (a) *Appeal to a Club – Laws of the Sport: Where a Club (or committee on its behalf) is the Controlling Body and that Controlling Body has made a decision involving Misconduct or a Dispute covered by the Laws of the Sport, any party affected by that decision may appeal such decision **to that Club’s judicial committee (or equivalent committee) in accordance with the constitution and/or regulations of the Club;** (emphasis added)*
- (b) *Appeal to the Centre – Laws of the Sport: Where the Centre (or committee on its behalf) is the Controlling Body and that Controlling Body has made a decision involving Misconduct or a Dispute covered by the Laws of the Sport, any party affected by that decision may appeal such decision to the Centre Judicial Committee in accordance with this Constitution and/or the Centre Regulations;*
- (c) *Appeal to the Centre – Other: Where the judicial committee (or equivalent committee) of a Club has made a decision involving Misconduct or a Dispute which is not covered by the Laws of the Sport, any party affected by that decision may appeal such decision to the Centre Judicial Committee in accordance with this Constitution and/or the Centre Regulations;*

- (d) *Appeal to Bowls NZ – Laws of the Sport: Where Bowls NZ (or committee on its behalf) is the Controlling Body and that Controlling Body has made a decision involving Misconduct or a Dispute covered by the Laws of the Sport, any party affected by that decision may appeal such decision to the Bowls NZ Judicial Committee in accordance with the Bowls NZ Constitution and/or the Bowls NZ Regulations;*
- (e) *Appeal to Bowls NZ – Other: Where the Centre Judicial Committee has made a decision involving Misconduct or a Dispute any party affected by that decision may appeal such decision to the Bowls NZ Judicial Committee in accordance with the Bowls NZ Constitution and Bowls NZ Regulations.*

36. The Bowls Hawkes Bay Centre Judicial Committee conducted a hearing on 16 December 2009 and by a decision delivered on 2 March 2010 held that it had no jurisdiction as it considered any appeal lay with the Bowls Taradale Judicial Committee.

BNZ

37. On 19 May 2010 BNZ advised that the BNZ Judicial Committee "have accepted the above appeal" but submissions would be restricted to the "quite narrow ground of the Appeal" as to whether the BHB Centre Judicial Committee had jurisdiction to hear the appeal from the "Taradale Disciplinary Committee". The BHB Judicial Committee held that **it** had no jurisdiction and the BNZ Judicial Committee held that was a decision which could not be further appealed, as the BHB Judicial Committee decision was final disposition of the one appeal right available.

38. Before this Tribunal BNZ did not wish to file submissions or evidence for resource reasons, but has assisted the Tribunal. It submits that this Tribunal does not have jurisdiction to hear the Appeal, or grant the relief sought by the Appellant, but it will abide by our Decision. Consistent with the "one appeal" argument BNZ submits that this Tribunal has jurisdiction only in respect of a

Decision of the BNZ Judicial Committee, where that Committee sat by way of **originating jurisdiction**. It relies on Articles 27.2 and 27.1(c) of the BNZ Constitution, and Section 38(c) of the Sports Anti-Doping Act 2006.

39. BNZ submits that the BNZ Constitution and BHB Regulations reflect a recognition that it is not "*practical or appropriate*" for a dispute or misconduct findings at Club level to be the subject of multiple hearings or appeals.
40. The time limits in Rule 43(a) of the Rules of this Tribunal are also relied on by BNZ.
41. Otherwise BNZ submits that if this Tribunal has jurisdiction, it is **only** to determine whether the BNZ Judicial Committee was correct in determining that **it** had no jurisdiction.

F Discussion

A right of appeal

42. First there must be a right of appeal within the grounds stated in the relevant Articles, Rules and Regulations. There appears to be a right of appeal as such under BHB Article 29(a) to the Bowls Taradale Judicial Committee.

Grounds of appeal

43. Grounds of appeal are restricted **before the BNZ Judicial Committee**. Appeals at that level are not available simply to "*review*" a decision. Natural justice and jurisdictional points may be taken and newly available evidence be considered. Appeals are not a "*re-run*", although appeals against sanction are not so restricted.
44. An appeal to a Judicial Committee at Club level is not so restricted on the material before us. Any appeal he could have made must

fall within the allowable grounds. Our decision is predicated on this basis. Mr Halka has never had his appeal heard on the merits.

One right of appeal

45. The Appellant submits BNZ Constitution Article 27.1 provides a sequential Appellate process so that a Decision of **a Club** can be appealed to a Centre, and a Decision of **a Centre or BNZ** may be appealed to the BNZ Judicial Committee. A Decision of the **BNZ Judicial Committee** may be appealed to the Sports Tribunal.
46. However, a determination **on appeal** is final and binding, whether by the Judicial Committee of a Club, the Judicial Committee of a Centre, the Judicial Committee of BNZ or this Tribunal. The intent is clear, that there be one appeal only.
47. While there is express preclusion **on a second appeal**, an important question remains whether the appeal process is complete simply when an appeal is considered, irrespective of outcome. It would be a curious result if jurisdiction on appeal is wrongly declined yet that is regarded as the disposition of an appeal, which decision cannot be challenged as it would be a second "*appeal*". So too would it be curious if an appellant is led to the wrong appeal body and a finding to that effect, of no jurisdiction, is the disposition of the one appeal right.

S38(c) Sports Anti-Doping Act 2006

48. BNZ refers to Section 38(c) of the Sports Anti-Doping Act 2006 which reads:

"38 Functions of Tribunal

The functions of the Tribunal are to—

. . .

(c) subject to any other enactment, hear an appeal against a decision of a national sporting organisation or the New Zealand Olympic Committee Incorporated if the constitution, rules, or

*regulations of that body **specifically provide for an appeal to the Tribunal in relation to that matter**; and*

..."

49. This section does not take the matter any further as it empowers the Tribunal to hear an appeal where the relevant Constitution, Rules and Regulations of BNZ, allow for such.
50. The Appellant contends that the Appeals by **Lawson v BNZ** (ST 01/10) **McElroy v BNZ** (ST 02/10), **Simcock v BNZ** (ST 03/10), **Hill v BNZ** (ST 04/10) demonstrate that the Decisions of the Judicial Committee of BNZ are appealable to the Tribunal. Those decisions do not address the question here, whether there is more than one right of Appeal.

Time for appeal

51. Rule 43(a) of the Rules of the Sports Tribunal provides:

Procedure

43. (a) The appellant shall complete and file with the Tribunal, the Tribunal's current notice of appeal (Form 3) and pay such filing fee (if any) for the time being prescribed by the Tribunal. Such notice of appeal shall be filed with the Tribunal within the time limit set out in the applicable constitution, rules or regulations of the NSO or the NZOC and in the absence of such time limits, within 28 days of the appellant being notified of the decision against which the appeal is made. A copy of the notice of appeal will be served on the NSO or the NZOC (as the case may be) and the appellant will provide the Tribunal with proof of service."

52. We would apply Tribunal Rule 18(b) to meet any deficiency in this regard.
53. The failure to lodge an appeal within Bowls Taradale cannot count against Mr Halka. He was led to lodging an appeal with BHB.

Does this Tribunal have jurisdiction?

54. This Tribunal has no jurisdiction to address a second or further appeal from a Judicial Committee. Here the BNZ Judicial Committee declined jurisdiction. We think it should have sent the appeal back to Bowls Taradale Judicial Committee where it properly lay. So we see ourselves in the position of doing what had to be done, sending it back to the Bowls Taradale Judicial Committee. This is not to hear a second appeal. There has been no hearing of an appeal at all.

55. Rule 47(a) of the Sports Tribunal provides:

*“47. (a) The decision of the Tribunal shall be consistent with the applicable constitution, rules or regulations of the NSO or the NZOC, if the latter are relevant. Unless such constitution, rules or regulations expressly or impliedly provide otherwise, the Tribunal may make any decision that the body **appealed from** was capable of making on the original application or may refer the matter back to that body for further consideration, with such directions (if any) which the Tribunal determines to give.”*

56. Sports Tribunal Rule 30(c) gives the Tribunal jurisdiction to make orders, or give directions, as it considers to be consistent with the just, speedy and inexpensive determination of the proceeding, where any matter is not otherwise provided for in the Rules.

57. The question devolves back to the earlier process. There has never been an appeal decision of the kind contemplated and available to Mr Halka. It is not for us to make the Decision on appeal nor do we have the jurisdiction. We would require evidence of practice. This is something for the Sport. It should go back to Bowls Taradale to be dealt with.

58. The appeal should be based on:

- (i) The Laws regarding markers;

- (ii) Any protocols which exist in that regard;
- (iii) The qualifications of the marker;
- (iv) The appointment of a "second" marker;
- (v) Communications with the marker by the "second" marker.

59. Only if there has been a breach of the Laws to such a degree as to vitiate the match should the result be affected. It is unlikely the result of the match would be reversed and it may be the appeal does no more than address the above issues to resolve the issue of principle. It should not devolve into allegations of misbehaviour. This is about the Laws of the Sport.

60. We would expect BNZ to assist the Bowls Taradale Judicial Committee with these elements. The Judicial Committee should not include any member previously engaged in the process. It would be assisted by a legally qualified Chair. The members would ideally not be Club members but that depends on the Bowls Taradale Constitution and other Rules. The Judicial Committee should give reasons.

H Disposition

61. The original appeal should be heard by the Bowls Taradale Judicial Committee as set out above, and on the restricted basis identified.

62. No costs are ordered.

Dated 21 April 2011

Nicholas Davidson

Hon Barry Paterson QC, Chairperson

Nicholas Davidson QC, Deputy Chairperson