

BETWEEN **SARAH HER-LEE**

Applicant

AND **TABLE TENNIS NEW ZEALAND**

Respondent

**DECISION OF SPORTS TRIBUNAL
DATED 25 AUGUST 2014**

Hearing: By telephone conference at 9.00am on 20 August 2014

Tribunal: Sir Bruce Robertson (Chairperson)
Alan Galbraith QC (Deputy Chairperson)
Ron Cheatley

Present: Sarah Her-Lee
Alan Tsang and James Won, counsel for Sarah Her-Lee
Warren Pyke, counsel for Table Tennis New Zealand

Registrar: Brent Ellis

Background

1. On 2 July 2014 the Tribunal dismissed an appeal by Sarah Her-Lee against the decision of Table Tennis New Zealand to not nominate her as a member of the women's table tennis team to compete at the 2014 Commonwealth Games in Glasgow.
2. On 17 July 2014 Ms Her-Lee filed an application for a re-hearing. The application relied upon Rule 33 of the Rules of the Sports Tribunal which provides that the Tribunal can order a re-hearing where "in its opinion, there has been a miscarriage of justice that justifies a re-hearing". The grounds alleged were prejudice caused by the introduction of new evidence, an allegation that some of the new evidence was incorrect, and a renewed challenge to the breach of the quorum for selectors.
3. It was subsequently accepted by the parties that it was impractical to hear the re-hearing application prior to the commencement of the table tennis competition at the Commonwealth Games. Accordingly the application was adjourned for re-consideration subsequent to the completion of the Games.
4. Table Tennis New Zealand filed an initial response to the application followed by a second response which raised an objection to the Tribunal granting the re-hearing of the application on the basis that the issue was now moot. These responses were met by a further submission by Ms Her-Lee.
5. A teleconference hearing was held on Wednesday 20 August for the purpose of determining whether the application for re-hearing would be granted and, if so, to set a date for the re-hearing.

Discussion

6. Counsel for Ms Her-Lee, Mr Tsang, submitted that as the re-hearing application prima facie alleged grounds relevant to Rule 33 that the Tribunal was obliged to proceed to a re-hearing. In his submission the fact that the Games had concluded and Ms Her-Lee could no longer become a member of the team was not sufficiently relevant because the Tribunal could still make determinations as to the appropriateness of the selection process which might vindicate Ms Her-Lee's position under her original appeal.
7. Mr Pyke for Table Tennis New Zealand accepted that jurisdiction still existed in the Tribunal under Rule 33 but emphasized that the issue as between Ms Her-Lee and Table Tennis New Zealand was moot in the sense that no remedy could be

granted by the Tribunal which would be of any effect. He drew the Tribunal's attention to the decision of the Supreme Court in *R v Gordon-Smith* [2009] 1 NZLR 721.

8. The original appeal before the Tribunal was against a non selection for the Games. A re-hearing would be about the same question which factually cannot now be dealt with.
9. In the *Gordon-Smith* case the Supreme Court accepted that mootness does not deprive a judicial body of jurisdiction but does give rise to a discretion to be exercised in relation to the particular factual situation. Indeed that same discretion already exists under Rule 33.
10. In its decision of 2 July the Tribunal had noted that there are outstanding issues between Ms Her-Lee and Table Tennis New Zealand. Those are issues that need in the first instance to be dealt with within the internal administration or hearing jurisdiction of Table Tennis New Zealand. The issues raised in Ms Her-Lee's application for rehearing, in the Tribunal's view, similarly raise issues that are more appropriately dealt with within Table Tennis New Zealand's internal administrative and hearing processes.
11. It does seem to the Tribunal that it is important that a robust process be agreed between the parties that enables not only the specific issues raised in the initial appeal and the further application to be dealt with but also the wider relationship difficulties which lie behind the current proceedings. In that respect the Tribunal recommends that the parties consider the introduction of an active mediator/facilitator from outside the sport to promote a resolution of the present difficulties.
12. The Tribunal recognises that it is possible that a decision made by Table Tennis New Zealand about these or associated issues may give rise to a right of appeal which returns some particular matters to this Tribunal. However, the Tribunal would hope that the parties' positive participation in a mediation/facilitation process would avoid that outcome.

Decision

13. Accordingly the Tribunal declines the application for re-hearing.

DATED 25 August 2014

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A R Galbraith
(Deputy) Chair