

BETWEEN **REX JENKINS**

 Appellant

AND **BOXING NEW ZEALAND INCORPORATED**

 Respondent

DECISION
Dated 28 July 2011

Counsel: Michael Smyth, Counsel for Appellant

Tribunal: Barry Paterson QC (Chairman)
 Ron Cheatley
 Rob Hart

INTRODUCTION

1. Mr Jenkins appeals to the Tribunal against a decision of the Appeals Committee of Boxing New Zealand Incorporated (**BNZ**).
2. The Appeals Committee dismissed appeals against the decision of the Executive of BNZ to "appoint" Mr Arkell, rather than Mr Jenkins, as coach of Joseph Parker at the Youth Olympic Games in Singapore in August 2010.
3. Mr Jenkins, in his Notice of Appeal, accepted that because of the proximity of the Youth Olympic Games it was not practical to contest the decision to appoint Mr Arkell. Rather, Mr Jenkins sought clarity on whether the appointment had been correctly made.
4. The relief sought in the Notice of Appeal was to clarify the right of BNZ to make the appointment of Mr Arkell and also, challenged the fairness of the hearing of the Appeal Committee.
5. The relief sought was enlarged in the appeal brief when Mr Jenkins sought:
 - (a) a formal written apology from the Chairman of Boxing NZ for his removal from the position;
 - (b) the opportunity to assist as coach or assistant coach of the next funded international team such as that going to the Commonwealth Games;
 - (c) compensation for time off in travelling to fulfil his role as nominated coach to the Youth Olympic Games, before he was "removed" from that position.
6. It is noted that the apology sought has been given, that Mr Jenkins did attend as assistant coach at the Commonwealth Games in New Delhi and that he has no outstanding claim for

expenses against BNZ. Further, the Tribunal does not have power to make these orders.

7. The BNZ raised an issue as whether in the circumstances it is not now moot to make any decisions in this matter. The outcome sought in the appeal brief has been achieved and Mr Jenkins accepted at the time of filing the notice of appeal that Mr Arkell's appointment to the Youth Olympic Games could not be reversed.
8. The Tribunal, on considering the matter, determined that there were issues upon which Mr Jenkins was entitled to answers. It agreed that it would consider and give rulings on:
 - (a) under his contract with BNZ, did Mr Jenkins have the right to be nominated as coach to the Youth Olympics?
 - (b) did BNZ have the right to appoint Mr Arkell as he was only a Level 1 coach?
 - (c) after BNZ nominated Mr Jenkins to the New Zealand Olympic Committee (NZOC), did BNZ have the right to change its nomination? and
 - (d) did the Appeal Committee breach the principle of natural justice in giving its decision?

PRELIMINARY POINTS

9. There are two preliminary points. First, there is an issue as to the jurisdiction of this Tribunal. Secondly, there is an issue of whether BNZ had the right to "appoint" the coach to the Youth Olympic Games.
10. The relevant rules in the BNZ constitution are:
 79. All decisions of the Executive made in accordance with these Rules and any Regulations annexed hereto shall be open to appeal to the Appeals Committee.

81. Appeals Committee shall have authority to determine its own procedures.
 82. ...Appeals to the Sports Disputes Tribunal of New Zealand may only be made on one or more of the following grounds:
 - (a) that natural justice was denied;
 - (b) the Appeal Committee acted outside of its powers and/or jurisdiction;
 - (c) that substantially new evidence has become available after the decision which is being appealed was made;
 - (d) in respect of a penalty imposed, that the penalty was either excessive or inappropriate.
11. Mr Jenkins' appeal can only fall within either Rule 82(a) or 82(b).
 12. Early in the appeal process, the Tribunal raised with the parties the wording of Rule 82. It appeared to the Tribunal that Rule 82(b) was somewhat unusual. Its effect is that there is no further appeal to this Tribunal against a decision of the Executive Committee, when it has acted outside its power or jurisdiction, unless the Appeals Committee exceeds its powers or new evidence becomes available.
 13. Mr Smyth on behalf of Mr Jenkins submitted that there was an obvious error in Rule 82(b) and that this Tribunal should read "Appeals Committee" as "Executive Committee". It is not necessary to set out in detail Mr Smyth's submissions.
 14. A written submission on behalf of BNZ submitted that Mr Smyth's interpretation was erroneous and misleading as the amendments to the BNZ constitution to include the right of appeal "*were carefully considered and were approved by an annual general meeting as they currently and intentionally stand*".
 15. The Tribunal finds it a little surprising that a National Sporting Organisation (NSO) would exclude an express right to appeal to this Tribunal to challenge the executive if it acts outside its power

and/or jurisdiction. The appeal right is rather hollow without such a right. However, the Tribunal is not prepared, on the evidence before it, to determine that there is a mistake in the constitution.

16. In the circumstances, the Tribunal proposes to treat the four matters on which it is prepared to consider as coming within the ground that natural justice was denied. As will be apparent later in this decision, the Tribunal is clearly of the view that the Appeals Committee denied Mr Jenkins natural justice. The Tribunal is also prepared to treat the other matters as falling within that category.
17. The Tribunal recommends to BNZ that it reconsiders two aspects of the appeal provisions in its constitution:
 - (a) whether Rule 82(b) should be amended to refer to the Executive Committee in addition to or in substitution to the Appeals Committee; and
 - (b) whether it is intended that any decision which the Executive makes can be appealed to the Appeal Committee and then to this Tribunal. This is a very general right of appeal and Rule 79 appears to give a right of appeal against trivial decisions of the Executive.
18. At the request of the Tribunal, BNZ obtained from the NZOC a letter detailing the procedure used to appoint officials to the Youth Olympic Games. Under the Olympic Charter, the NZOC has the exclusive authority for the representation of New Zealand at the Olympic Games and at the regional, continental or world multisports competitions patronised by the IOC. The NZOC had the exclusive authority for the Youth Olympic Games.
19. In respect of the Olympic and Commonwealth Games, the NZOC enters into an agreement with each relevant NSO. This agreement provides that the appointment of officials will be determined by the NZOC in its sole discretion, following

recommendations by the NSO. The NSO may recommend appointment of officials if it believes its nominee fulfils certain criteria. These include the nominee being suitable and qualified to fill the required position and having the capability, skill and experience specified in any guidelines published by the NZOC. There is no evidence of any guidelines having been issued for the Youth Olympic Games but the NZOC had the exclusive authority to appoint the team and coaches.

20. The position therefore is that it was for the NZOC to appoint the coach for the Youth Olympic Games after receiving a recommendation from the NSO. The NZOC was entitled to accept or reject any nomination made by BNZ. It is therefore not correct to say that BNZ appointed Mr Jenkins to be the coach of Joseph Parker.

FACTS

21. In May 2010, the International Boxing Association (AIBA) advised the NZOC that Joseph Parker had qualified to participate in the Youth Olympic Games. The NZOC subsequently selected Joseph Parker in its team for the Youth Olympic Games.
22. The Executive of BNZ discussed the position at a meeting on 7 May 2010, the day after it had learned that Parker had qualified.
23. There was initially some confusion as to the wording of a resolution passed by the Executive on 7 May. The differences between the draft minute and the final minute do not appear to be material to what the Tribunal has to determine. The official minute recorded:

That the Coach of the Youth/Junior Squad be consulted about allowing the Boxer to be accompanied by his personal coach.
24. Dr McKay, as Chairman, discussed the matter with Mr Jenkins, who was the coach of the Youth/Junior Squad. On 10 May 2010,

Dr McKay sent an email to the NZOC advising that after discussions at the meeting "*Mr Rex Jenkins of Rotorua, who is the National Development Boxing Coach, will accompany Joseph Parker to the Singapore Games in August*". Dr McKay appears to have been under the impression that BNZ had the right to appoint the coach.

25. An NZOC representative immediately replied to Dr McKay asking for Mr Jenkins' email address so that he could be contacted for his personal details needed for accreditation.
26. A member of the NZOC emailed Mr Jenkins on 17 May, referring to a conversation earlier that day, and welcomed him "*to the long list for the SYOG team*". The email said "*You are on board pretty late in the piece, so a bit of catch-up to do*". It referred to completing his kit bag so that the NZOC could place the uniform order and it advised that he would have to complete a medical questionnaire.
27. Mr Jenkins was entitled to attend an NZOC support persons workshop in Auckland on 29 June. He attended this workshop and his airfares were paid for by the NZOC.
28. The Tribunal accepts that as at 29 June 2010, Mr Jenkins could have assumed that he was a member of the Youth Olympic Games Team. Whether or not he had been appointed the coach is not an issue for this Tribunal.
29. On 22 June 2010, a week before Mr Jenkins attended the workshop at NZOC's expense, Ms Wong of the NZOC sent an email to Dr McKay. She raised a question about BNZ's "*decision to select Rex Jenkins to accompany Joe Parker to Singapore for the Youth Olympic Games*". She advised that she had spoken to Joe Parker and believed that Grant Arkell as coach "*will add the most value and be of the greatest benefit to Joe's performance*". Mr Arkell was travelling to Singapore to support Joseph but would

not have access to the field of play and would therefore not be able to assist Joe in his warm-up or be ringside during his competition. She said:

I strongly encourage you to revisit your selection and select Grant to be your accredited official to support Joe and be part of the New Zealand Youth Olympic Team.

It is noted that even the NZOC referred to "select" rather than nominate.

30. A matter which is unexplained is that Mr Arkell had evidently signed an NZOC Support Persons Agreement on 10 June, 12 days before Ms Wong contacted Mr McKay and before Mr Jenkins attended the Auckland workshop at the invitation of the NZOC.
31. On 23 June 2010, Dr McKay sent an email to the other Executive members enclosing the email which he had received from Ms Wong the previous day. The email went on to say:

This was the very reason I asked for Grant to be considered for Singapore, rather than Rex. This is not a slight on Rex, but in this instance it makes sense for Joseph's own coach to go and, "NO" I have not orchestrated this!! Please let me know whether we should make the change or not.
32. A majority of the Executive Committee of BNZ supported Arkell going. A minority opposed. The result was that Arkell was then nominated by BNZ and appointed Coach by the NZOC.
33. Mr Parker was verbally advised of this decision by Dr McKay on 2 July 2010.
34. Mr Jenkins appealed the decision of the Executive Committee. The Appeal Committee gave its decision on 26 July 2010 and dismissed the appeal.
35. The Tribunal has sympathy for Mr Jenkins. On the information before the Tribunal, the Executive did not agree to nominate Mr Jenkins but Dr McKay took it on himself to do so after talking to Mr Jenkins. Presumably, because most nominations would be

approved by the NZOC, the NZOC staff acted as though Mr Jenkins had been appointed. They arranged for him to be provided with a uniform and to attend the workshop in Auckland. Mr Arkell had already signed a NZOC contract. It is not necessary for the Tribunal to consider whether the NZOC was estopped from claiming that it had not appointed Mr Jenkins as the coach, but he was perfectly entitled to believe that he had been so appointed.

36. The Tribunal accepts that in the circumstances of this case it may have been appropriate for Mr Arkell to have gone. There was only one boxing competitor and the correct sporting decision may well have been to send Mr Arkell, because he was that boxer's coach. What it does say is that, in the circumstances, through the actions already noted, Mr Jenkins was harshly treated.

DID MR JENKINS HAVE THE RIGHT TO BE NOMINATED AS COACH?

37. This issue is a non-issue in that Mr Jenkins was nominated as the coach by BNZ. Whether or not Dr McKay had the authority of the Executive Committee to unilaterally make the nomination is irrelevant. He had the ostensible authority of BNZ to make the nomination.
38. Mr Smyth's submission is that Mr Jenkins' role as coach of the Junior and Youth high performance squad gave him that right. There was a written agreement between BNZ and Mr Jenkins under which he was appointed as coach of that squad for a specified period which was still in existence at the relevant time.
39. That agreement set out Mr Jenkins' responsibilities. One of those responsibilities was to give a performance assessment and progress update on individual team members, results, tournament details, team conduct and expenditure after international events. The contract included an obligation to accompany and coach the cadet, junior and youth high

performance squad at all training camps for the duration of the position. Immediately after that responsibility appears:

Note: Squad coaches will be given priority by the National Executive when appointments are made to specific events.

40. As Mr Jenkins' position as coach was unpaid, Mr Smyth saw this obligation as being part of the consideration for Mr Jenkins giving his time on an unpaid basis to the relevant squads.
41. It is noted that the note was merely to give priority. It was not a binding commitment. However, this point is irrelevant in that BNZ did nominate Mr Jenkins for the role.

CHANGE OF NOMINATION

42. In the Tribunal's view, BNZ did have the right to change its nomination. The final decision rested with the NZOC. As NZOC's appointment process is not the subject of this appeal, the Tribunal does not have to determine whether NZOC did, in fact, by implication appoint Mr Jenkins. The final appointment was in its sole discretion. On the assumption that it had not made an appointment, it was entitled to ask BNZ to reconsider its nomination.
43. Mr Smyth submitted that there were only four circumstances in which BNZ was entitled to change its nomination. This submission appears to have been based on a further submission that there was no evidence that the Executive Committee of BNZ had any power to change a nomination.
44. The Tribunal does not accept this submission. BNZ's right was to nominate. If the appointer, NZOC, raised relevant issues for consideration, the Tribunal does not see any reason why BNZ was not entitled to reconsider.
45. There was no evidence before the Tribunal as to the extent of the discussions between Ms Wong and Dr McKay, nor is there any

evidence that NZOC declined to appoint Mr Jenkins. If it had declined then BNZ must have been in a position to make a further nomination. The Tribunal is of the view that as the appointment of coach was solely within the discretion of NZOC, NZOC was entitled to raise a legitimate ground as to whether a particular coach should be appointed and on the basis of that ground ask BNZ to reconsider. The suggestion that a sole athlete be accompanied by his own coach is certainly a legitimate reason for reconsideration.

46. It is unfortunate that the request to reconsider was made after Mr Jenkins was led to believe that he had been appointed and that he attended the NZOC workshop after the request was made. Nevertheless, it is the Tribunal's view that BNZ was in the circumstances entitled to change its nomination.

THE ARKELL APPOINTMENT

47. Appendix A of the constitution of BNZ contains a provision dealing with categories of boxing coaching licenses. Mr Arkell was a Level 1 licensed coach and the criteria for the issue of a Level 1 licence states:

Holders of this licence are eligible for nomination as coaches of provincial teams only.

48. If this provision applies to a nomination for an NZOC appointment, on the face of it the Executive breached that rule by nominating Mr Arkell.
49. Mr Smyth submitted that the purpose of the licensing system was to ensure a consistent and high standard of coaching in an inherently dangerous sport. The criteria for a Level 1 licence made a Level 1 coach eligible for nomination as coach of provincial teams only. [Emphasis added]

50. The issues are whether this requirement applies to a coach appointed by the NZOC and whether it applies when one boxer only is in the team.
51. As the final appointment is in the sole discretion of the NZOC, it is for the NZOC to determine the qualifications for appointment. If it does not impose any such requirement, any requirement imposed by an NSO can not be binding on the NZOC. The NZOC reserves the right to publish guidelines as to the capabilities, skills and experience it seeks in considering the appointment of officials but states that these shall not be binding and shall not be construed as nomination or selection criteria. Clearly, Mr Arkell's Level 1 licence was not an impediment for NZOC to make the appointment.
52. It is not known whether Dr McKay drew to NZOC's attention the criteria for a Level 1 coach. It would have been appropriate to have done so. However, NZOC would still have been entitled to have appointed Mr Arkell nevertheless.
53. The second issue which the Tribunal accepts is that generally, in the case of a sole athlete and not a team, it is preferable for the athlete's own coach to accompany that athlete.
54. The combination of the above two factors leads the Tribunal to the view that having received an indication from NZOC that it favoured the athlete's own coach, BNZ was entitled in the circumstances of this case to nominate Mr Arkell notwithstanding his licence status.

NATURAL JUSTICE ON THE APPEAL

55. Mr Smyth submits that Mr Jenkins was denied natural justice because:
 - (a) he had a right to present argument and evidence to the Appeals Committee which was denied to him;

- (b) the decision reached by the Executive Committee and the Appeals Committee was unreasonable based on the evidence available and the law applicable.
56. It will be apparent from the reasons already given that the Tribunal does not accept that the decisions were unreasonable based upon the evidence available and the law applicable.
57. There is however merit in the first submission. When natural justice is considered, either presumed bias or failure to give a fair hearing are two of the most important considerations. There is no suggestion of either actual bias or presumed bias in this case.
58. The relevant issue is whether the Appeals Committee acted fairly by affording Mr Jenkins an opportunity to put his views, information and arguments to the Appeals Committee, and to know the views, information and arguments that were inconsistent with his interests. An Appeals Committee must be seen to have acted fairly.
59. Under the *audi alteram partem* rule, it is necessary to give an appellant the opportunity to be heard, namely make an appropriate presentation of the appellant's case. In the Tribunal's view, this applies to sporting appeals of the type brought by Mr Jenkins to the Appeals Committee.
60. Under Rule 81 of the BNZ constitution, the Appeals Committee has authority to determine its own procedures. This does not mean that it can deny an appellant the right to present his case. It may not be necessary in some circumstances to have an oral hearing but the appellant should be given full opportunity to present his case and to hear the arguments against him.
61. Normally, natural justice is not observed on an appeal unless:
- (a) the appellant presents his case, preferably at an oral hearing but at least by written submissions, and is given

the opportunity to provide any relevant evidence. The respondent is entitled to be made aware of these submissions and evidence.

- (b) The respondent likewise has a right to present its case by way of submission and any relevant evidence and the appellant is entitled to be made aware of these submissions and evidence.
- (c) Both parties should have the right to comment on and question the submissions and, if necessary, the evidence of the other party.

Evidence may not be necessary and may not even be permitted in some appeals. Economic considerations may suggest that an oral hearing is undesirable in some appeals. However, the alternative to an oral hearing is conducting the hearing by a telephone conference call, particularly if issues of credibility are not present.

- 62. In this case, Mr Jenkins was not notified when or where the appeal hearing was to be heard. It was heard in private. He was not asked for submissions or supporting evidence and did not know the matters which were to be considered.
- 63. Further, the Appeals Committee had factual matters clarified by Dr McKay. These clarifications should have been referred to Mr Jenkins as he may have wished to make submissions on them. At the time the Appeals Committee met the minutes of the Executive Committee meeting of 7 May 2010 had not been confirmed and there is some difference between what has been issued as draft minutes and the handwritten notes taken by the minutes secretary.
- 64. A perusal of the Appeals Committee decision suggests it was not appraised of all the facts. It noted that the position was first offered to Mr Jenkins and thereafter to Mr Arkell and both

declined the opportunity for appointment. It did not have before it the Level 1 licence position.

65. In short, the Appeals Committee should have called for submissions from both parties and even invited submissions from Mr Arkell whose position could have been affected by the result. Normally, Mr Jenkins would have been given the right to appear in support of his case and the Appeals Committee should have clarified evidential matters with the knowledge and in the presence of both parties. If the Appeals Committee elected to give a decision without a hearing, as it did here, it must be particularly vigilant to ensure that Mr Jenkins was given adequate opportunity to make submissions, be appraised of the facts and to hear any comments adverse to his case.
66. The finding which the Tribunal now makes that the Appeals Committee failed to follow the principles of natural justice may not have given any relief to Mr Jenkins in view of the Tribunal's other findings. The findings should however indicate to the Appeals Committee that it needs to adopt procedural rules which ensure that appellants are given a fair hearing.

CONCLUSION

67. In view of the findings made, it is not proposed to make any declarations other than to declare that the Appeals Committee denied Mr Jenkins natural justice.
68. For whatever reason, Mr Jenkins was let down. In view of the actions of the NZOC, he was perfectly entitled to believe he had been appointed coach. NZOC is not a party to this appeal, and it has not had an opportunity to give an explanation as to why Mr Jenkins was led to believe he had been appointed coach.
69. It is recommended that NZOC in future either adopt the same procedure as is adopted for the selection of Olympic teams and officials or, alternatively, makes it very clear to an NSO that those

same procedures apply in the case of other teams under the jurisdiction of the NZOC.

70. In this case, it may be that the initiative taken by BNZ in advising of a "selection" almost immediately after Mr Parker became eligible, the short time available to organise the team and the fact that NSO nominations are usually accepted led the NZOC staff into taking action which led to Mr Jenkins' disappointment. The Tribunal understands his disappointment.
71. BNZ is recommended to consider its constitutional provisions as noted above.

Dated 28 July 2011



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B J Paterson QC
Chairman