BEFORE THE SPORTS TRIBUNAL
OF NEW ZEALAND **ST 05/19**

BETWEEN	**KL**
	Appellant
AND	**TABLE TENNIS NEW ZEALAND**
	Respondent

DECISION OF SPORTS TRIBUNAL
1 July 2019

Hearing	28 June 2019
Tribunal	Dr Jim Farmer QC (Deputy Chairman) Chantal Brunner Georgina Earl
Participants	Paul David QC, counsel for Appellant John Lea, Table Tennis New Zealand Christine Young, Table Tennis New Zealand
Registrar	Simon Dunkerley

Introduction

1. This is an appeal against the decision of Table Tennis New Zealand (TTNZ) to remove the Appellant from a national team for which she had been selected to compete in an international table tennis competition and to replace her with another player.

Facts

2. The Appellant is 12 years old. She has been playing competitive table tennis since she was 10. In 2017, she won the National U11 Girls' Singles title and, since then, has been playing in grades much above her age. In November 2018, she was selected by TTNZ to be in the 2019 Cadet (U15) Girls' National Squad, with the consequential opportunity of being selected as one of two girls to represent New Zealand in August 2019 at the Oceania Junior Championships in Tonga. The top finishing New Zealand player at the Oceania event would be eligible to be selected to represent Oceania in a further championship in Poland. A training camp took place for all junior table tennis players, male and female, of all age groups from 19-22 January of this year followed by a competition in the U15 Girls' Group to determine the best player. The Appellant won this convincingly, winning all 28 matches that she played and dropping only one set. She was told that she would be selected to go to Tonga.

3. On 14 February 2019, an email was sent by the TTNZ High Performance Convenor to the Appellant and her grandmother (who attended the Appellant at competitions and also in effect represented her in communicating with TTNZ). That email "confirmed" the Appellant's place in the New Zealand Cadet (U15) Girls' Team to go to Tonga for the Oceania Junior Championships. It advised that national coaches to manage the team were yet to be confirmed. It also said that the prospectus for the event would not be released until May and therefore there was some uncertainty as to whether it would take place at all and for that reason TTNZ was unable to proceed with travel bookings. An approximate costing guide of $3,000 was provided (if the event proceeded), participation being self-funded, including in that respect a contribution by each player towards the costs of the coach-managers who would be leading the team. A deposit "to secure a team place" was required, to be paid by 8 March 2019. In addition, a TTNZ Representatives Team Policy and Agreement and other documentation was required to be signed and returned by various dates between 28 February and 8 March 2019.

4. On 25 or 27 February (the exact date is unclear but not important), at her request, the Appellant's grandmother travelled to Auckland and met with the TTNZ High Performance Convenor. The primary purpose of the visit was to raise concerns about an aspect of the Appellant's health which required monitoring. (Those concerns were allayed by arrangements agreed in a subsequent email exchange that accommodated the Appellant staying with her grandmother in Tonga rather than with the team.) At the meeting the Appellant's grandmother also asked who the coach would be for the Girls' Team at Tonga. She was given the name of a coach who, from the evidence, is clearly highly qualified and regarded. However, this caused consternation with the Appellant and her family. The evidence was that in 2017, when the Appellant was 10 years old, there had been an incident at a tournament when that coach, who we will call Amy (not her real name), had said to the Appellant that she should not use the type of bat (with a pimpled surface) that she was playing with but should use a sponge bat. This proved to be very upsetting to the Appellant who had her own coach who was happy with her

choice of bat. The Appellant left the area in tears and both her mother and grandmother, who were present at the competition, were also very upset. In evidence, the Appellant said that thereafter she had felt very uncomfortable in the presence of Amy and would do her best to keep away from her at tournaments.

5. These concerns were raised by the Appellant's grandmother at the meeting on 25/27 February with the High Performance Convenor who, in evidence, said that, there not previously having been any complaint, she could not comment. Importantly, however, she also said in evidence that she suggested a meeting with Amy, the Appellant and her mother and grandmother. That constructive and sensible suggestion was not however actioned. We say more about it later in this Decision.

6. Amy provided a written statement of evidence to the Tribunal which did not directly address this incident but did depose to a subsequent incident in which she had occasion to speak to the Appellant and her opponent in a match and which led to a confrontation with the Appellant's grandmother who, according to Amy's statement, made statements that she found hurtful and offensive.

7. We do not think we need to make any findings about either incident as we do not think that ultimately the facts of them are decisive of the issues in this case. The Appellant was not cross examined at the hearing on these matters by TTNZ's Executive Director who, in the absence of any legal counsel, led the case for TTNZ. Amy did not attend the hearing. Her statement of evidence was received into evidence by consent (along with a number of statements from TTNZ witnesses who did not attend the hearing) and there was therefore no opportunity for cross examination in any event.[1] All that needs to be accepted is that the Appellant and her family, rightly or wrongly, because of what they perceived to have been an unwarranted and personal criticism and the manner in which it was made, were not willing to contribute to the costs of Amy attending the Tongan tournament. As it was put by the Appellant's grandmother in an email to the High Performance Convenor on 5 March 2019: "We have no problems with [Amy] being the coach but we don't condone her behaviour towards [the Appellant] or us by contributing to her costs".

8. Following the meeting at the end of February between the Appellant's grandmother and TTNZ's High Performance Convenor and the subsequent email exchange of 5 March between them which culminated in the objection to contributing to Amy's costs, the matter was referred by the High Performance Convenor to TTNZ's Executive Director who was copied with that email exchange. He immediately emailed the Appellant's grandmother, on 6 March and advised her that the matter had been discussed at operations level and with the TTNZ Board Chairman. He said that TTNZ

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[1] It was unfortunate that TTNZ, which was not legally represented, was apparently unaware of the need to have witnesses attend the hearing or, alternatively, their statements of evidence received into evidence by prior agreement with the Appellant and the Tribunal. Fortunately, counsel for the Appellant cooperated in agreeing to some six witness statements being received into evidence without the attendance of the deponents in order to avoid what might otherwise have been the need for an adjournment. The problem was alleviated by the presence before the Tribunal of the Executive Director and the High Performance Convenor of TTNZ, both of whom gave evidence and were cross-examined and also answered questions from the Tribunal. They also presented submissions on behalf of TTNZ.

The non-attendance of a witness deprives the opportunity for cross-examination which may be important and for the Tribunal to question the witnesses. Generally, where the case may involve disputed facts, the Tribunal will require the personal attendance of witnesses. In exceptional cases (such as where the witness is overseas), the attendance of a witness by telephone will normally be allowed.

Policy was that all players share the cost of the coach appointed to the team and that under the TTNZ Player Agreement deposits and trip balance "must" be paid to TTNZ by the requested dates (extended to 11 March in the case of the deposit). The email continued by saying that the deposit must be paid and the signed team agreement returned by 11 March or otherwise "we will regrettably have no option but to select a replacement for [the Appellant] in the Cadet Girls Team". It concluded with a request: "Please consider this at your earliest opportunity, and let us know your decision, so that we may complete arrangements for the team."

9. The Appellant's grandmother replied by email on the same day and, as set out above, said that, although they had no problem with Amy being the coach for the team they did not wish to "condone her behaviour towards [the Appellant] or us by contributing to her costs." TTNZ's Executive Director responded by email, also on the same day. He said that the complaint was regarded as a potentially serious one as TTNZ did not condone bullying (not actually a word used by anyone to that point), that it might require a misconduct hearing and that the Appellant's grandmother, in order to have her concerns "officially recognised and considered" would have to complete the official complaints form and for all witnesses to have sworn affidavits completed. The email continued: "Once all paperwork is received we will advise if and when you are required to present at a misconduct hearing, if TTNZ Board agrees to proceed in this manner." It then concluded: "It will not be possible to complete this process by the deadline of 11th March. So, our requirements must remain the same, even though the outcome of the process may subsequently impact on arrangements. i.e. we still need agreement and deposit as requested." We return to TTNZ's position that the deposit had to be paid before the complaint would be dealt with later in this Decision.

10. Nothing further was said about the suggestion made by the High Performance Convenor of a meeting between Amy and the Appellant and her mother and grandmother to try and "work it out". The 11th of March came and went and the deposit was not paid. On 19 March, the Executive Director wrote to the Appellant's grandmother expressing regret that the Appellant "is unable to take her place in the New Zealand team … with the mandatory deposit remaining unpaid". He said that there could be no further extension of time for considering completing the complaint form (notwithstanding that it had previously been said that the complaint process could not be completed by the deadline for payment of the deposit and notwithstanding that the holding of the Event had not be confirmed and would not be confirmed until May). The email advised that TTNZ "have had to seek a replacement player". A statement received into evidence from the mother of that replacement player (who we will call Jane – not her real name) stated that TTNZ had advised her in March that a position in the team to go to Tonga had become available, a matter that, she said, was a surprise. Subsequently that offer was accepted and Jane has been confirmed in the team to go to Tonga.

11. On 23 March, the Appellant's grandmother wrote to the Executive Director expressing distress that TTNZ was "using the unpaid deposit as a reason to bar [the Appellant] from an international event she earned through merit". She objected to the basis on which TTNZ was to deal with the matter – that is, requiring a formal complaint that would not however be dealt with expeditiously and even then, only at the discretion of the TTNZ board. As she put it: "It is incredible you will not investigate our complaint as a matter of urgency…". She concluded however by offering what she called a compromise, namely that TTNZ should appoint an independent mediator to facilitate

an urgent meeting to seek a “fair outcome that addresses our concerns”. In the meantime, as a gesture of good faith, she said, the $500 deposit would be paid into a lawyer’s trust account of TTNZ’s choice. That seems to us to have been a constructive suggestion, consistent with that made earlier by TTNZ’s High Performance Convenor. However, it was responded to, four days later, by the Chairman of TTNZ who said that, because the deposit had not been paid as required, TTNZ had “moved to select another player in [the Appellant’s] place”, suggesting that a written complaint be made if that was still desired and a sub-committee would be appointed to “hear” it but that “this is now too late for us to change our decision for the Oceania Championships”. The Chairman made a written statement of evidence but did not attend the Tribunal hearing. No explanation as to his inability to do so was given, other than that he lived in Christchurch.

12. A complaint was then formally made by the Appellant’s grandmother and correspondence ensued as to the filing of evidence with the “appointed TTNZ Disciplinary Panel”. Subsequently written statements were filed by witnesses to the 2017 incident. We were given copies of them but not of any statement from Amy and do not know if one was provided by her. However, the email exchanges show a continued expectation by the Appellant’s grandmother that a hearing would be held at which she and her witnesses (including the Appellant’s mother who was there at the time) would be able to present the complaint and that that hearing would be held promptly. On 20 May, the Appellant’s grandmother emailed the TTNZ person who had been appointed as the contact point for the TTNZ Disciplinary Panel and repeated previous requests to be advised of the date, venue and time for when the Panel would be “sitting for the hearing so we can organize ourselves to attend” and “be subject to questioning from any member of the Disciplinary Panel”. She also emailed the Chairman of TTNZ seeking urgency and later a further email both to him and the Panel Appointee complaining of the lack of responses to her request for information regarding a hearing date.

13. Regrettably (in the view of the Tribunal), no hearing of the complaint was in fact held.[2] Instead, on 29 May, the Chairman of TTNZ wrote to the Appellant’s grandmother advising that, “following careful and detailed consideration”, the Disciplinary Panel had concluded that there was “insufficient information to uphold any evidence of bullying in this case and has therefore dismissed this complaint as per clause 4.1.1 (d) of the Policy on Misconduct and Disciplinary Procedures”. However, and arguably somewhat inconsistently, the letter then offered an opportunity for a “mediation meeting” between the Appellant and her family, Amy, members of the Panel and national junior coaching team. The purpose of the meeting, it was said, was to resolve the historical matters between the parties and “to agree a positive way forward for [the Appellant’s] future pathway in Table Tennis”. It was said in that respect that Amy “has written an apology which she would be prepared to share in person with you at this mediation meeting” (the acknowledged formal outcome which the Appellant’s grandmother had put forward as resolving the matter).

[2] The validity of the Decision on the complaint, whether procedurally or substantively, is not before the Tribunal but it is clear that the Appellant’s grandmother had signalled consistently that she and the family were expecting that a hearing would be held. She was not disabused of that expectation until the Decision was announced to her.
It should also be noted that rule 4.1.1.(d) of the Policy on Misconduct and Disciplinary Procedures (12 May 2005), upon which the Disciplinary Panel relied for its Decision, would seem to have words missing before (a)-(d) of the Rule. TTNZ might think that, following this Decision it should review its Rules and obtain advice on some aspects of them.

14. It has to be said that had TTNZ pursued the suggestion at the end of February by its High Performance Convenor that a meeting take place between the parties at that time, an outcome acceptable to all might well have been achievable then. In any event, TTNZ's 29 May offer of a mediation meeting was accepted by the Appellant's grandmother, although the subsequent announcement of the team (without the Appellant) and this appeal to the Tribunal would seem to have deferred the holding of that meeting in the meantime. The Tribunal would urge the parties however to pursue such a meeting even at this time but in the light of this Decision, though possibly restricted to Amy, the Appellant and her mother and grandmother and TTNZ's High Performance Convenor as a means of putting relationships back on to a constructive and mutually respectful level. In passing, it is noted that in her statement of evidence provided shortly before the Tribunal hearing, Amy advised that, due to recent changes in her personal work circumstances, she is no longer available to be coach for the New Zealand Junior team in Tonga though will be there in a role not on behalf of TTNZ.

The Parties' Submissions

15. Because this matter is urgent, we will not traverse every argument or the detail of the primary submissions put forward.

16. For the Appellant, Mr David QC argued that:

    (1) The requirement to pay a deposit of $500 (alternatively to pay it by the stipulated date) was not a term of the agreement under which the Appellant was selected in the team:

    (2) If that was a term of the agreement – namely, that her continued selection and membership of the team was conditional on payment of the deposit by the due date, then it was not a term that was fair and reasonable and, because the Appellant is a minor, it was unenforceable by virtue of the provisions of the Contract and Commercial Law Act 2017 dealing with minors[3]:

    (3) If the term survived the scrutiny of that Act and was deemed to be fair and reasonable, the exercise of the power to remove the Appellant from the team for failure to pay the deposit must be exercised in a manner that was fair and reasonable:

    (4) In the circumstances, TTNZ did not exercise its power of de-selection fairly and reasonably.

17. The ultimate order that Mr David QC seeks is one that the Appellant is replaced in the team and that Jane be removed from the team. As to the latter, it would be fair to say that the Tribunal, in approaching this case, has been very unhappy that if we were to grant the relief that Mr David QC argues for, Jane, who is an innocent and unknowing party in all this, will suffer the disappointment of being selected and then removed from the team for no fault of her own. In addition, it seems from the witness statement from

[3] TTNZ argued in response that the agreement was not with the Appellant but with her grandmother as the Appellant's agent or representative. Although not critical to our ultimate reasoning for our Decision, we note that an agent contracts on behalf of his or her principal and the contract is between the latter and the third party.

Jane's mother that she has paid the deposit as required but has also paid over $1600 in fares and accommodation for her to go to Tonga, moneys that are non-refundable.[4] She also referred to the fact that, in the three months since being selected, Jane has trained very hard over and above her normal training regime. At the hearing, however, we were advised for the first time that Jane will be part of a forthcoming TTNZ team that will be competing in Australia. While we do not wish to diminish the disappointment that Jane will feel if the remedy that is sought in this appeal is granted, we have to balance that against the present situation in which the player who was selected on merit as the top player in her class has lost that selection – on her case to the Tribunal, unfairly or unreasonably.

18. In its formal Response to the Notice of Appeal and in oral presentation at the Tribunal hearing, TTNZ relied on its witness statements and on its policies and protocols including its Anti-Harassment Policy and Procedures. It acknowledged the "passionate support" of the Appellant's grandmother in promoting opportunities for her grand-daughter but said that "they are new to this environment". It said that it had kept the Appellant's grandmother fully informed of its policies, protocols, deadlines and the consequences of non-compliance and of payment of the deposit in particular. It emphasised that selection was to a team and not just as an individual and that in the team the coach typically acts as a manager, arranging schedules and acting on behalf of all the team members. For that reason, all team members were expected to contribute to the travel and accommodation costs of the person providing those services.

19. At the hearing, the Executive Director, consistently with the position taken by TTNZ in March, argued that, from an administration perspective, the question of the complaint about Amy's conduct was a completely separate matter from the requirement to pay the deposit by the due date and the consequences of not doing so.

Decision

20. We do not agree with the claim by TTNZ that failure or refusal to pay the deposit on the date fixed could be acted upon by removing the Appellant from the team before the reason for that refusal had been adequately addressed in some effective manner, whether informally or by the formal complaint process. In this case, the very reason for refusing to pay the deposit was because of the grievance that eventually became the formal complaint. It was unsatisfactory and unhelpful to defer consideration of the grievance from the time that it was known, irrespective of whether it had been formally lodged as a complaint, until after the due date fixed for the payment of the deposit and at the same time rigidly adhering to that date[5] and removing the Appellant from the team. We also conclude that, in all the circumstances, it constituted a failure of the obligation to follow a fair process.

21. We have indicated above that the suggestion made by the High Performance Convenor at the end of February of a meeting between the Appellant, her mother and her grandmother and Amy was a sensible and constructive way forward to clear the air and hence resolve the impasse over the deposit. Given the fact that Amy has since said that she has now prepared a written apology for the incident and is prepared to

[4] That will be a matter that will have to be resolved between her and TTNZ.
[5] Other than its extension for 2 days.

present it at a mediation meeting, we have little doubt that had that meeting gone ahead in February or March, the matter would in all likelihood have been resolved then. It is most unfortunate, in our view, that when the matter was elevated from the High Performance Convenor to the Executive Director and from him to the Chairman of TTNZ the suggestion of an informal meeting made by the High Performance Convenor as set out previously was either lost sight of or ignored.

22. It is our view and we so find that TTNZ acted unreasonably in removing the Appellant from the team and failing to explore other solutions to the impasse over the deposit, of which we think the suggested meeting made by the High Performance Convenor was the most obvious one, particularly if it had been pursued in a timely way.

23. While we regret the consequences for Jane, we think that the right thing to do is to order that the Appellant be placed back in the team and that Jane be removed. We make those orders.

24. This will leave outstanding the question of the payment of the $500 deposit and any other outstanding administrative matters such as the signing of the agreement and, presumably by now, payment of the balance of moneys for the trip. Since the time when payment was first refused and since, subsequently, the offer was made by the Appellant’s grandmother to pay the deposit into a solicitor’s trust account pending a mediation, advice has been given by TTNZ that Amy has prepared a written apology for the 2017 incident which she has said she is willing to present at a mediation meeting. We have ourselves suggested that a meeting between Amy and the Appellant’s family and TTNZ’s High Performance Manager at some point would be beneficial with a view to restoring relationships to a constructive and mutually respectful level. Irrespective of whether either suggestion (a mediation or a more informal meeting) is adopted and whether either possibility is able to be implemented before the team goes to Tonga, we would expect that the Appellant’s family will, as a result of the position that Amy has now taken and that she will, for reasons unrelated to this matter, no longer be coaching the team, pay the deposit unconditionally and otherwise comply with TTNZ’s requirements for the trip and move forward in everyone’s interests.

25. By way of postscript, we do want to say that nothing in this Decision should be taken as a criticism of Amy who, as we have said, is on the evidence a dedicated, highly qualified and capable coach. We also want to acknowledge that there is little doubt that TTNZ for its part is committed to upholding the welfare and best interests of junior players and is to be commended for that. However, as we have found with other sporting organisations on occasion, it is important that, when disputes or problems arise, they are resolved in accordance with processes that properly address the merits of the dispute in a manner that is best calculated to achieve the right result but which is also fair to the parties.

26. Finally, we have throughout this hearing either avoided the use of the names of individuals or have used fictitious names (so disclosed). Particularly in the case of players who are as young as these and professional coaches who have well-deserved reputations, we think that course is warranted. While the Appellant when asked said she “did not mind” if her name was disclosed, under rule 25 of the Rules of the Sports Tribunal 2012 we do have the discretionary power to have regard to privacy considerations by not publishing a decision in whole or in part or in suppressing

identities of parties or witnesses. Bearing in mind the youth and future sporting career of the Appellant we have chosen to refer to her as such throughout this Decision and we will intitule the Decision KL v. Table Tennis New Zealand.

Declaration and Orders

(1) The decision of TTNZ to remove the Appellant from the U15 Girls' Team to compete in the U15 Oceania Junior Championships was invalid:

(2) TTNZ is ordered to remove the player who had been selected to replace the Appellant in the team and to restore the Appellant to the team.

Dated: 1 July 2019

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Dr James Farmer QC
Deputy Chairman