BEFORE THE SPORTS TRIBUNAL
OF NEW ZEALAND

ST 07/07

BETWEEN	**Boxing New Zealand Inc**
	Applicant
AND	**Mark Robertson**
	Respondent

DECISION OF TRIBUNAL
5 September 2007

Tribunal:	Nicholas Davidson QC (Deputy Chairperson) Ron Cheatley Carol Quirk
Registrar:	Brent Ellis
Appearances:	Mark Robertson (Athlete) Deirdre Rogers (Boxing New Zealand Inc.) Tui Gallagher (Boxing New Zealand Inc.)

Introduction

1. Boxing New Zealand Inc ("BNZ") made an application to this Tribunal, initiating an anti-doping rule violation proceeding, on 14 June 2007. The application was based on a Notice of Determination and Entry on Sports Drug Register by Drug Free Sport, that Mark Robertson ("the athlete") *"did not have reasonable cause to fail to comply with a request to provide a sample on 18 March 2007, at 14 Roseneath Place, Birkdale, Auckland"*. This was an out-of-competition test.

Anti-Doping Regulations of BNZ

2. The "*Regulations for the Control of Banned Substances*", adopted by BNZ, condemn the use of prohibited substances and prohibited methods in sport, and incorporate certain provisions of the World Anti-Doping Code ("WADA Code"), and apply to:

> "*3.1.1 All Athletes who are within the jurisdiction of Boxing New Zealand or Boxing New Zealand member organisations*."

3. Regulation 4 provides that BNZ forward to the Sports Disputes Tribunal of New Zealand (now Sports Tribunal of New Zealand), for hearing, any determination from the New Zealand Sports Drug Agency (now Drug Free Sport) that an athlete has committed an anti-doping rule violation.

4. All athletes to whom the BNZ policy applies are required to ensure that they are knowledgeable about, and comply with, the policy and all applicable anti-doping policies and Rules pursuant to the WADA Code.

5. Under Regulation 4.4 all international, national, and other athletes in the "*registered testing pool*" must provide BNZ and NZSDA with accurate and up to date contact information to enable out of competition testing to be undertaken.

6. Under Regulation 7.1 all persons to whom the policy applies may be subject to investigation and sanction if they commit or are a party to any one or more of the anti-doping rule violations set out in Article 2 of the WADA code. Regulation 12 provides for the hearing of anti-doping rule violations in accordance with the WADA Code. The burden and standard of proof, and the methods of establishing facts and presumptions are those in Article 3 of the Code. If the Tribunal determines that an anti-doping rule violation has been committed it should impose sanctions in

accordance with clause 10 of the BNZ Policy, which incorporates Article 10 of the WADA Code.

The Athlete's Response

7. Mr Robertson had the right to appeal to the District Court against the determination made by DFS. He was advised of this and that he should act promptly. Mr Robertson did not appeal to the District Court.

8. The notice given to Mr Robertson by the Registrar of this Tribunal, dated 19 June 2007, advised that the application by BNZ would be referred to this Tribunal and asked for his response. He had 5 working days to sign and return to the Registrar a notice of defence, and he was advised by the Registrar that lawyers are available to assist on a free or low cost basis.

9. Mr Robertson did not respond, and the Registrar made contact by telephone. He advised the Registrar that he had not been boxing *"for some time"*. He was told of the process before the Tribunal, and what would likely occur should he not participate in the Tribunal's process.

10. On 12 July 2007, Mr Robertson advised the Registrar that he intended to admit the violation but make submissions about penalty. He said he would return the relevant forms to the Tribunal. He filed a Statement of Defence which said:

> *"I wasn't boxing. It was over a year since my previous bout when I was asked for a urine sample. I was surprised and refused due to the fact I wasn't taking part in any competition, and hadn't been for over a year."*
>
> *"If this happened during my active involvement with the sport I would have understood. I never had any drugs while I was involved in competitions that were illegal, or that I didn't have a doctor's certificate for."*
>
> *"My fights I fought fairly."*

11. In the **Statement** of Defence he denied a violation and in the **Notice** of Defence admitted the violation. At the teleconference hearing his stance was clarified as discussed below.

Hearing Process

12. A teleconference with the Tribunal was convened on Friday 27 July 2007. The procedure was that applicable before the *Sports Anti-Doping Act 2006* took effect.

13. At the teleconference Mr Robertson again had the position explained to him, that he could only contest the determination in the District Court. There was a question of time within which an appeal would be filed. The names of several solicitors on the Tribunal's advisory list were discussed with him. He said he would make contact with somebody. He was urged to take advice.

14. The matter came back to the Tribunal by teleconference on Thursday 2nd August 2007. Deirdre Rodgers and Tui Gallagher attended for BNZ.

15. Mr Robertson advised the Tribunal that he accepted that he had committed an anti-doping violation, and the matter became one of sanction. Notwithstanding the relatively straightforward task for the Tribunal, a discussion about *"retirement"* is warranted.

The Issue of *"Retirement"*

16. This is an important issue for the accurate application of anti-doping policy. The Tribunal is aware that sports have different processes to secure a formal position regarding retirement, which has particular resonance in an anti-doping context. A lack of formality about the status of an athlete as *"retired"*, and what that means, may result in a difficult exercise of judgment for the athlete, the sport, Drug Free Sport, and this Tribunal.

17. BNZ explained to the Tribunal that no athlete can box in any competition unless registered, and there is considerable care exercised to ensure appropriate medical certification before competition.

18. Mr Robertson's *"registration"* had expired on 9th June 2006. It was not clear when he last boxed. Thus he was not entitled to box at the time of the request for a sample in March 2007. He was regarded as a national level athlete in the light welter weight division.

19. BNZ relays information about anti-doping measures and obligations through Association secretaries and coaches. So far as BNZ is concerned, Mr Robertson,

while *"unregistered"* and unable to box, had not "*retired*" in accordance with BNZ Rules.

20. BNZ Regulation 15 provides that *"international"* and *"national"* level athletes who *"retire"* must give notice in writing to the Executive Officer of BNZ. Retirement will not terminate an anti-doping process which began prior to that time. Then, under regulation 15.3 a "*retired*" international or national level athlete must notify BNZ in writing if they seek to return to such competition, and under Regulation 15.4 must be entered in the registered testing pool and provide accurate and updated contact information for a full six months before participating as an international level athlete or national level athlete.

21. The purpose of such Rules is quite clear. It is to prevent manipulation of the anti-doping policy by athletes *"coming and going"* and to avoid application of the policy at times that may be unsuitable to them, and to otherwise provide certainty of application of the anti-doping Rules to athletes and officials.

22. In this case the regulations have application to all athletes within the jurisdiction of Boxing New Zealand and Boxing New Zealand Member Organisations – Regulation 3.1.1. An *"athlete"* is a *"competitor"* as defined (then) by the New Zealand Sports Drug Agency Act 1994. The testing regime under regulation 6.1 requires Boxing New Zealand to provide the names of athletes and classes to whom the policy applies for out of competition testing, and events etc in which in competition testing may be undertaken. Up to date athlete contact information is required for international and national level athletes and other athletes included from a registered testing pool to be tested out of competition. Regulation 6.1.5 requires that BNZ must inform DFS as soon as possible in writing if an athlete retires, or is no longer to be included in registered testing, or no longer to be tested out of competition.

23. The Tribunal had emphasised that Mr Robertson should take advantage of the pro bono advice available, but apart from a perfunctory attempt to contact a lawyer, he did nothing to advance his position and the Tribunal considered he had been given every opportunity to advance his position.

24. Mr Robertson did not advise BNZ that he had "*retired*". He said that he was not boxing at the time he was asked to provide a test, but he had not given away all thoughts of resuming boxing. The Tribunal was satisfied that he was still properly regarded as an athlete under BNZ Rules. He could not leave himself or BNZ *"in*

limbo". He had taken no steps whatsoever to advise his retirement. On his own evidence he was *"taking a break"* but might come back to boxing at some indeterminate time. He was thus a national level athlete clearly eligible for out of competition testing.

25. The Tribunal concludes that in the sense contemplated by the Regulations, Mr Robertson remained an athlete eligible for testing.

26. The Tribunal has considered other cases. In CAS A6/2006, ***Australian Sports Anti-Doping Authority and Omar Al Shaick*** the Final Award of the Court of Arbitration for Sport, addressed the circumstances in which Mr Al Shaick "*the athlete*" was held to be an "*athlete*" for the purpose of the policy adopted by Boxing Australia Inc and was prima facie subject to the operation of that policy. The policy also had an "*acknowledgement and agreement*" form and there was no evidence the athlete had ever signed such a document, and as jurisdiction over the athlete is contractual in nature, the Sole Arbitrator Allan Sullivan QC was concerned about jurisdiction but resolved the point against the athlete based on the acts and conduct of the parties.

27. That these issues are mixed questions of fact and law can be seen in the proceedings against ***Christine Johnson*** brought under the 2006 Anti-Doping Rules of the World Yachting Association (RYA). The athlete was a long standing member of the Olympic windsurfing community, competing at the highest level. By the end of 2006 she was considering retirement. She sold her equipment in 2007 and moved outside the sport. She was in the top 20 world rankings for windsurfers at the end of 2006 but fell out of this group in February 2007. She regarded herself as retired from January 2007. She wanted to know how long she was obliged by RYA rules to submit to testing, and was told that she remained inside the ISAF 20 world rankings, so had to continue to provide her whereabouts. She thought this meant her obligations applied while she was in the top 20 rankings and when she fell out of the list she thought she was no longer subject to doping controls. In March she was asked to provide a sample and refused, based on her understanding. She was charged with having committed a violation by refusing without *"compelling justification"* to submit to sample collection, and she was obliged under the relevant regulations to do so, contrary to her belief. It turned on written notice. Her misunderstanding did not constitute "*compelling justification*". The Tribunal observed that the athlete's misunderstanding did not allow a basis for finding "*no significant fault or negligence*" – and a deliberate refusal could seldom meet that standard.

28. In the case of ***Kelly Heuchan***, CAS A5/2006, the Oceania Registry (David Grace QC) was concerned with the circumstance of the athlete's retirement. The anti-doping policy of Australian Water Polo provided for a notification of retirement, effective upon receipt of the relevant form by the Chief Executive Officer. The athlete did not comply. She continued to play water polo at her club and in the national league. When approached for an out of competition short notice drug test, she was advised that if she had retired she should notify the sport immediately. She refused to give a test that day. A new time was made to meet, or she was to contact the doping control officer. She did not do so. The Award held that the completion of the appropriate form is a pre-condition for removal from the register. The mandatory requirements had not been completed. Her argument was that she was no longer a *"competitor"* at the relevant level. The Tribunal accepted that she was no longer participating at international level, but was competing at the national level. There appeared to be no restriction on the jurisdiction of the relevant authorities to request an out of competition test sample from any competitor, notwithstanding the level at which they competed.

29. This system depends on education, knowledge of obligation and compliance. It will not suffice for an athlete to plead ignorance. There is a clear obligation to know and comply with the Rules. The athlete, the sport, and Drug Free Sport work together. It drives a wedge in the proper application of the anti-doping regime if athletes ignore their responsibilities. Here the athlete went on his own way, not advising his mindset, and adopting an amorphous and uncertain status of his own. That will not do, and the Tribunal is satisfied the athlete was properly required to provide a sample.

30. There is instruction for sporting bodies and athletes arising from this case. The formal processes of retirement, and continuing obligations of an athlete without a clear and formal resolution to retire should be emphasised. A standard retirement form setting out what retirement entails is clearly of advantage.

Sanction

31. Under Article 10.3.1 refusing or failing to submit to sample collection carries a period of ineligibility for two years, which thus applies here unless there is room for a more lenient sanction pursuant to the provisions of Article 10.5.2 of the WADA Code.

32. If the athlete establishes that (he or she) bears "*no significant fault or negligence*" then the period of ineligibility may be reduced to not less than one half of the period prescribed. The commentary refers to this applying in the unique circumstance of the athlete establishing no significant fault or negligence in **connection with the violation** (the refusal). The commentary says that "*Article 10.5.2 may be applied to any anti-doping violation even though it will be especially difficult to meet the criteria for a reduction for those anti-doping rule violations where knowledge is an element of the violation*", and that *"Articles 10.5.1 and 10.5.2 are meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases*".

33. Mr Robertson advanced nothing in this regard. He relied on the fact that he was *"not boxing"* and was no longer registered, and thought that in this context he did not have to provide a sample. That of itself is no answer. While the Tribunal does not disbelieve him in this regard, it does not offer any basis for reduction in the mandatory sanction of two year's suspension. In essence his position is that while he did not challenge the determination, that he had wrongly failed to provide to sample, he did not think he had to comply. He was wrong. He had made no attempt to determine his own obligations under the BNZ regulations and the WADA Code. The Tribunal was left with the clear impression that he simply took no care, nor interest in understanding his obligations.

34. Mr Robertson is ineligible to participate in boxing or any sport which is a signatory to the WADA Code for a period of 2 years from 18 March 2007.

Dated 5 September 2007

Nicholas Davidson, QC
Deputy Chairperson (for the Tribunal)

Ron Cheatley
Carol Quirk