

**BETWEEN**                      **MELONY WEALLEANS**

**Appellant**

**AND**                              **BASKETBALL NEW ZEALAND INC.**

**Respondent**

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**DECISION ON JURISDICTION**

**Dated 12 March 2007**

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**Tribunal Members Participating:** Hon. Barry Paterson, QC  
Kit Toogood, QC  
N R W Davidson, QC  
Tim Castle

**Registrar:** Brent Ellis

## INTRODUCTION

1. The Appellant, Ms Wealleans, is a referee in the Respondent's (BBNZ) National Basketball League. BBNZ runs a FIBA Candidates' Camp and Ms Wealleans applied to be selected for the 2007 FIBA Candidates' Camp. She was not so selected and has appealed to this Tribunal against her non-selection.
2. BBNZ has challenged the jurisdiction of this Tribunal to determine the appeal. Both parties made brief submissions in the formal documents filed in the appeal (Ms Wealleans' Application and BBNZ's Statement of Defence). During a preliminary telephone conference, both parties were given the opportunity to file further submissions on the jurisdictional point. Both declined to do so.
3. Because the jurisdictional issue is one of interpretation of legal documents and may have considerable implications beyond this case, a panel comprising the four legal members of the Tribunal was appointed to consider it. If the appeal proceeds to a substantive hearing, a new panel comprising at least two non-legal members will be appointed to hear the appeal.
4. The issues for consideration are:
  - (a) does this Tribunal have the jurisdiction to hear this appeal?
  - (b) if there is jurisdiction, is the appeal time-barred?
  - (c) if the appeal is time-barred, should leave be given to pursue the appeal out of time?

## IS THERE A RIGHT OF APPEAL TO THIS TRIBUNAL?

5. The position taken by BBNZ is that the matter raised by Ms Wealleans is one of selection and BBNZ has not given to this Tribunal the right to appeal selection or non-selection decisions.
6. The issue of whether or not this Tribunal has jurisdiction requires a consideration of the provisions of the constitution of BBNZ and then the provisions of the rules of this Tribunal.
7. Rule 20.1.5 of BBNZ's constitution is headed "**Disciplinary Matters**". This rule does give a right of appeal to this Tribunal from decisions of BBNZ disciplining members of BBNZ for offences under regulations including doping offences. It

specifically gives a right of appeal from a disciplinary committee. In the Tribunal's view it has no relevance to the present situation.

8. The only other provision in BBNZ's constitution which gives jurisdiction to this Tribunal is Rule 23 which reads:

**“23. NEW ZEALAND SPORTS DISPUTES TRIBUNAL**

23.1 **Recognition:** BBNZ recognises the New Zealand Sports Disputes Tribunal established by Sport and Recreation New Zealand as the appropriate forum to resolve certain sport-related matters as set out **in the rules of that Tribunal.**

23.2 **Appeals:** In addition to the right of appeal under clause 20.1.5 of this Constitution, any member who or which wishes to appeal a decision of BBNZ regarding any other sports-related matter where s/he/it has exhausted their rights of appeal within this Constitution and/or the Regulations of BBNZ, may appeal to the New Zealand Sports Disputes Tribunal. The rules of that Tribunal shall apply to any such appeal.”

9. Rule 23.1 recognises this Tribunal but does not in itself confer upon it jurisdiction to hear Ms Wealleans' appeal. If there is jurisdiction it must, in the view of the Tribunal, arise from the provisions of Rule 23.2. Both Rules 23.1 and 23.2 record that any jurisdiction to be exercised by the Tribunal under those rules can only be if the Rules of the Tribunal so allow.
10. There are four requirements of Rule 23.2 which must be satisfied before this Tribunal can assume jurisdiction. They are:
- (a) the appeal must be from “*a decision of BBNZ*”; and
  - (b) the decision must be “*regarding any other sports-related matter*”; and
  - (c) the appellant must have exhausted “*their rights of appeal within the Constitution and/or the Regulations of BBNZ*”; and
  - (d) “*the Rules of [the] Tribunal shall apply to any such appeal*”.
11. The “*selections*” for the FIBA Candidates' Clinic are made by the National Gradings & Appointment Committee on behalf of BBNZ (“the Gradings Committee”). Under the Constitution of BBNZ, the governance and stewardship of BBNZ is delegated to the Board of BBNZ. Under Rules 20.1.2 and 20.1.3, the Board has a power of delegation and, in particular, may appoint sub-committees of the Board and delegate any of the Board's powers to any such sub-committee of the Board. The decision of the Gradings Committee was made under delegated authority and, in the Tribunal's view, is clearly a decision of BBNZ.

12. The decision was also, in the Tribunal's view, regarding a "*sports-related matter*". Referees are an important component of the sport of basketball and candidates' clinics for referees are "*sports-related*". They come within the term of "*any other sports-related matter*" as referred to in Rule 23.2. The qualifier "*any other*" refers to appeals other than those under Rule 20.1.5.
13. In considering whether Ms Wealleans has "*exhausted her right of appeal within the constitution of BBNZ*", it is noted that the Constitution contains no explicit right of appeal from the decision of the Gradings Committee in this case. The only right of appeal specifically referred to in the BBNZ Constitution, other than under Rule 23.2, is an appeal under Rule 20.1.5 to this Tribunal. There is no internal appeal right contained in the Constitution. This Tribunal considers that if there is no internal right of appeal a person has, in appropriate circumstances, a right of appeal to this Tribunal. To argue that it is only in those cases where there is a specific internal right of appeal where there is a further right of appeal to this Tribunal can not, in the Tribunal's view, be the correct interpretation of Rule 23.2. If this were the correct interpretation, it would mean that, apart from appeals under Rule 20.1.5, there is no other right of appeal to this Tribunal. This can not be the intention of Rule 23.2 as it confers a right of appeal on decisions "*regarding any other sports-related matter*". It is therefore the Tribunal's view that because Ms Wealleans does not have an internal right of appeal she has, in effect, exhausted her internal rights of appeal.
14. In summary, it is the Tribunal's view that Ms Wealleans does have a right of appeal to this Tribunal, provided that the Tribunal's own Rules permit such an appeal. For the reasons given below, this Tribunal has serious doubts as to whether Ms Wealleans can bring the appeal within the provisions of the Rules of this Tribunal.
15. This Tribunal's jurisdictional provisions are set out in Rule 6 of the Tribunal's Rules ("the Tribunal Rules"). There are comments in the documents filed by the parties which suggest that this is a "selection appeal". It is not, in the Tribunal's view, an appeal under Rule 6.1(b) of the Rules which states:

"6.1(b) **National Selection**; where a person wishes to appeal a decision made by a National Sports Organisation (including any person/s or committee on its behalf), and/or the New Zealand Olympic Committee, relating to their Selection or Non-Selection as a New Zealand representative in a sport or to a New Zealand representative sports team or Squad;"

An invitation to go to a FIBA Candidates' Clinic is not a "Selection or Non-Selection" as a New Zealand representative in a sport or a New Zealand

representative sports team or squad. The terms "*Selection*" and "*Non-Selection*" as they are defined in Rule 28 relate directly to the right of appeal under Rule 6.1(b).

16. Rule 6.1(c) of the Tribunal Rules gives a right of appeal from a decision of a National Sports Organisation ("NSO") "*regarding any sports-related matter in circumstances where such person or organisation has their other rights of appeal within the rules of the National Sports Organisation exhausted*". As already noted, it is the view of this Tribunal that Ms Weallean has done this and, on the face of it, has the right to appeal under Rule 6.1(c). However, the grounds upon which such an appeal can be brought are set out in Rule 12.1.3, as there are no grounds of appeal set out in the constitution of BBNZ.
17. Rule 12.1.3(d) of the Tribunal Rules applies if the decision relates to misconduct and therefore is not relevant to this appeal. Nor, in the Tribunal's view, is Rule 12.1.3(e) relevant as it relates to Selection or Non-Selection appeals as defined in Rule 6.1(b) as those terms are defined in Rule 28. It therefore follows that the only possible grounds of appeal which Ms Wealleans has under Rule 12.1.3 are:
  - (a) that natural justice was denied;
  - (b) the decision-maker or decision-making body acted outside of its powers and/or jurisdiction (i.e. acted *ultra vires*);
  - (c) that substantially new evidence has become available after the decision, which is being appealed, was made.
18. It is unlikely that there is a ground based on new evidence becoming available and there is no suggestion of this in the appellant's documents filed with the Tribunal. Ms Wealleans' ground for appeal as presently stated, in summary, is that she should have been preferred to one of the other successful candidates. This is, in effect, arguing the merits of the decision. An argument that natural justice was denied or that the Grading Committee acted *ultra vires* is a quite different argument from one based on the merits of the situation. An NSO or its appropriate committee, which can bring to the deliberations its collective expert knowledge about the sport in question, is usually in a far better position to make judgment calls and apply discretionary factors than is this Tribunal.
19. Natural justice is an administrative law principle which is imported into the present situation by contract. This Tribunal has its jurisdiction as a result of BBNZ's Constitution and the contractual relationship that BBNZ has with its members

through that Constitution. As part of that contract, Ms Wealleans is entitled to appeal on the grounds that natural justice was denied. A claim based on natural justice requires an appellant to establish far more than that the decision was possibly wrong. An oft quoted statement of the principles of natural justice is that given by Tucker LJ in *Russell v. Duke of Norfolk* [1949] 1 All ER 109, where he said:

“The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case.”

20. Natural justice in administrative law is based on two fundamental rules:

- (a) a person may not be a judge in his own cause; and
- (b) a person’s case must always be fairly heard.

Bias stems from the first rule and is relevant in a sporting context. Bias is an attitude of mind which prevents the person making the judgment from making an objective determination of the issue that the person has to resolve.

21. The second fundamental rule of natural justice will apply in some sporting decisions but not in others. In disciplinary proceedings or expulsion proceedings, a member has a right to put that member’s case unless that right is expressly precluded by the rules of the NSO. However, there are many other decisions made under delegated authority by committees of NSO’s which are made without reference to the athlete or official concerned. Selection in a team is one of those decisions. Unless the selection criteria of an NSO or a separate contract between the NSO and the athlete so provide, a selector does not need to consult an athlete before selection, nor does he or she need to give reasons for the selection. Selectors are chosen for their expertise in making such decisions and the practical difficulties of consultation prior to selection are obvious. A player wishing to become a Tall Black does not have a right to make submissions on his selection, nor does he have a right to be told the reasons for his non-selection.
22. There may be a challenge to the selection later if there are specific selection criteria or on other particular grounds, either in the constitution or rules of the NSO for applying appropriate criteria. There are various grounds upon which a selection appeal can be considered if the NSO has specific selection criteria but

these usually go to the procedure followed and include such matters as the selection criteria not being followed or the athlete not being afforded a reasonable opportunity to meet the criteria. This Tribunal has declined to allow selection appeals where the selection criteria is not purely objective. In the circumstances of the present case, it is the Tribunal's view that, on the information currently before it, the Grading Committee was not required to do anything more than ask for applications to attend the relevant clinic and was then entitled to make the decision without inviting further submissions from the applicants or giving them a right of hearing. It did not have to give reasons for its decision.

23. Procedural unfairness can also lead to a breach of natural justice. In the present case, there was no right to make submissions and therefore no procedure to be followed. Even where procedural fairness is an issue, it is only necessary for there to be reasonable standards of fair adjudication and not ideal standards: *Croatia Sydney Soccer Football Club Ltd v. Soccer Australia Ltd* Unreported Decision of NSW Supreme Court (Einstein J) 23 September 1997.
24. In summary, for an appellant to establish a breach of natural justice, it will be necessary to establish either actual bias, or where the circumstances require a hearing, that a hearing was not given, or that there was some other type of procedural unfairness. This is not a case where a hearing was required and the grounds of appeal, although raising the issue of natural justice, do not contain particulars which would indicate that there are grounds for an allegation that there was a breach of natural justice.
25. On the face of the appeal, this is not a case where the decision-making body acted outside of its powers and/or jurisdiction (i.e. acted *ultra vires*). The Grading Committee had delegated power to make the decision and did so.
26. It is also an *ultra vires* act if the decision is so unreasonable that no reasonable decision-maker could have made it. The decision must be so aberrant that it can not be classed as rational. The Tribunal can not detect on the appeal application that there is any grounds for a challenge on the basis that the decision was *ultra vires*.
27. The only other possible ground for appealing is that substantial new evidence has become available after the decision. There is no suggestion of this in the appeal documents.

28. In summary, if the Grading Committee acted honestly in good faith, reasonably and in an unbiased fashion and the decision was not so aberrant that it can not be classed as rational, Ms Wealleans can not bring the appeal within the grounds set out in Rule 12.1.3 of the Tribunal Rules and the Tribunal will not have jurisdiction to hear it.
29. A stated ground for the appeal is "*that natural justice has been denied, and that there is no material on which the Selection decision could be reasonably based*". If the alleged breach of natural justice is that there is no material on which the selection decision could be reasonably based, then Ms Wealleans is relying upon a ground of appeal for Selection or Non-Selection for selection appeals. As already indicated, this is not a selection appeal in accordance with the Tribunal's Rules. It will be necessary for Ms Wealleans to particularise the alleged breach of natural justice. It will need to fall within one of the grounds referred to in paragraph 20 above.

#### **IS THE APPEAL TIME-BARRED?**

30. There is no time limit for bringing appeals under BBNZ's Constitution. Rule 12.2 of the Tribunal Rules apply and these require that the appeal be brought within 15 working days of the appellant being notified of the decision against which the appeal is made. This appeal was clearly not brought within that time as Ms Wealleans was notified of the decision in a letter dated 12 November 2006 and did not file an appeal until early February 2007. The appeal is clearly out of time.

#### **SHOULD AN EXTENSION BE GRANTED?**

31. Rule 10.5 of the Tribunal's Rules deals with time periods. It gives the Chairman or a Deputy Chairman a discretion to extend the time period for doing any act or taking any proceeding or any step in a proceeding set out in these Rules, on such terms (if any) as the Tribunal thinks fit. There is power for such an extension to be given although the application for extension is not made until after the expiration of the time appointed or fixed.
32. In the circumstances of this case, the Tribunal would, subject to what is said later, extend the time within which to bring the appeal. This is because Ms Wealleans made a genuine effort to ascertain from BBNZ the reasons for its decision and sought to have the decision reviewed. BBNZ does not appear to have responded to her requests.



33. Ms Wealleans initially sent an email letter to the Grading Committee on 9 November 2006. This was before she was officially advised of the decision as she had been verbally advised that she had not been selected. In the email she asked for a detailed explanation as to why she had not been selected and raised several points which she asked to be considered. She received no reply, although she did shortly thereafter receive the letter from the Chief Executive of BBNZ, advising her of her non-selection in which a reason for non-selection was given. On 16 November 2006, she forwarded an email to the Chief Executive, asking for an acknowledgment of the letter which she had sent to the Grading Committee, noting that his letter of 12 November had not been a response to that email. She received no reply and forwarded a further email to the Chief Executive on 23 November. No response was received so she then forwarded a further email to the Grading Committee dated 30 November. On 15 January 2007, she wrote to the Chief Executive again, advising that she had approached this Tribunal and was somewhat disappointed at the lack of communication from the Committee. She noted she had had no response to any of her emails which was basically unacceptable. She asked to be advised of the appeal rules that BBNZ had. On the bottom of the email provided to the Tribunal, she noted she had received a verbal response from the Referee Manager to the effect that there would be no response from BBNZ and she was *“either to drop it or take it to the Tribunal”*.
34. On 26 January 2007, she sent an email to the President of BBNZ, advising of the history of her complaints. She received an email response from the President which advised that the recommendation had come from the Grading Committee and had been accepted and processed by the Chief Executive. She said that there was no appeal process for “non-selection” and made a recommendation that Ms Wealleans attend a referees’ education programme so she could participate to improve to a standard that the Grading Committee believed was the benchmark for candidates to be recommended to attend the FIBA Clinic. Clearly, from BBNZ’s point of view, the matter was at an end.
35. Ms Wealleans was, in effect, asking for reasons for her exclusion. This Tribunal is of the view Ms Wealleans was entitled to the courtesy of a reply to her first email and her subsequent approaches. It is not the Tribunal’s view that in matters such as this, either BBNZ or the Grading Committee was required to give reasons for her non-selection. However, if it had acknowledged the first email and advised that the decision had been made by the Grading Committee and that the Board of BBNZ did not propose to have the decision reconsidered, Ms Wealleans could

then have appealed within time to this Tribunal. It is for this reason that the Tribunal would be prepared to exercise its powers and grant an extension of time to bring the appeal.

36. When an application to bring a proceeding out of time is made in a court context, it is quite usual for the court when considering whether to grant such an extension to consider the merits of the case. As indicated above, this Tribunal is of the view that notwithstanding the specific reference to "*natural justice has been denied*" in the appeal documents, Ms Wealleans is in fact attempting to appeal the decision on the merits and not on the traditional grounds of a breach of natural justice or that the Grading Committee acted in an *ultra vires* manner.
37. The Tribunal has provisionally determined that Ms Wealleans is to have an opportunity to specify particular grounds which she alleges establish that there has been a breach of natural justice on the basis referred to above. If she wishes to avail herself of this opportunity, she is to file and serve a document specifying these grounds within 10 days of the date of this decision. These submissions are to be accompanied by the filing fee of \$500. Should she avail herself of this opportunity, BBNZ is to have a further 10 days from the receipt of her submission to file a response. This Tribunal will then finally determine whether or not it has jurisdiction in this case.
38. If Ms Wealleans does not take action within the 10 days allowed, the appeal will be deemed to be abandoned.

Dated the 12<sup>th</sup> day of March 2007



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**Hon B J Paterson QC**  
**Chairman**