BEFORE THE SPORTS TRIBUNAL
OF NEW ZEALAND **ST 05/09**

BETWEEN	**HAND BALL NEW ZEALAND INCORPORATED**
	Appellant
AND	**NEW ZEALAND OLYMPIC COMMITTEE**
	Respondent

DECISION ON CHALLENGE TO JURISDICTION
Dated the 13th day of July 2009

Hearing:	27 June 2009 (by telephone conference)
Counsel:	Kathy Ertel for Appellant Paul David and Rebecca Hooper for Respondent
Tribunal:	Barry Paterson, QC (Chairman) Nicholas Davidson, QC
Registrar:	Brent Ellis

INTRODUCTION and BACKGROUND

1. The appellant (HNZ) appeals "against the decision of the NZOC to continue the suspension of HNZ since suspension of HNZ on 20 July 2006".

2. NZOC, the respondent, does not accept that the Tribunal has jurisdiction to hear and determine this appeal.

3. The underlying issue is whether the appellant or the New Zealand Handball Federation (NZHF) should be recognised as the national sporting organisation for handball in New Zealand.

4. The NZOC Board on 12 April 2006 resolved:

> …that New Zealand Hand Ball Association be suspended from NZOC, on the basis that there are now two national organisations purporting to represent the sport in New Zealand.

5. NZOC, by a letter of 20 April 2006, advised HNZ of the decision. The letter advised that the suspension was of immediate effect and included:

> The NZOC remains keen to see if it is still possible to get the two groups to become one, which would be officially re-recognised by the NZOC, and the IF. To see if that is possible, and to ensure this does not become even more protracted, could I suggest a one month period from the date of this letter, to achieve some unification, and if that fails, then the NZOC would be required to exercise its judgment and make a recommendation to the IF.

6. Discussions between HNZ, the NZHF and NZOC then took place with NZOC advising the International Handball Federation (IF) in May 2006 that HNZ and NZHF were working towards unification. NZHF then withdrew from the discussions.

7. On 24 June 2008, the solicitors for HNZ wrote to the NZOC, stating that HNZ had been "unlawfully suspended" from the NZOC. The letter noted r.23.3(b) of the NZOC Constitution which provided that if a matter had not been resolved within 21 days

from the commencement of negotiations, either party may require that the matter be referred to a mediator by giving the other notice in writing requiring the mediation. It was noted that HNZ had given notice requiring the matter to be determined by mediation on both 28 March and 22 May 2008 and the solicitors were providing final written notice of HNZ's intention to have the issue of the legality of the suspension of HNZ by the NZOC determined by mediation.

8. The evidence of Mr Maister, Secretary General of the NZOC, was that prior to HNZ giving the notices on 28 March 2008 and 22 May 2008, there had been two years of discussions and meetings in which the NZOC and Sport and Recreation New Zealand (SPARC) explored the possibility of combining HNZ and NZHF into one organisation which would be officially recognised by the NZOC.

9. NZOC advised HNZ, by email on 27 June 2008, of the strong desire of the NZOC Board to see hand ball as a unified member sport of the NZOC. It noted that the Board was "quite willing to move to arbitration". It also stated:

> If the parties to mediation are to be confined to the NZOC and HNZ, then the parameters of mediation should relate solely to the matter of suspension of HNZ from the NZOC by the NZOC Board.

The email also advised that a member of this Tribunal would not be an appropriate mediator "given his role on the Sports Disputes Tribunal, and the fact that the right to appeal any decision arising, to that body, might jeopardise him or the parties involved."

10. Mediation took place on 20 July 2008. Mr Maister's evidence was that at all times prior to, during, and after the mediation, the NZOC believed that both parties to the dispute would need to

agree to the referral of the dispute to this Tribunal, should the mediation be unsuccessful.

11. On 4 August 2008, HNZ advised the NZOC that "should resolution not be reached within 30 days of the matter being referred to the mediator (8 July 2008), our client will refer this dispute to the Sports Disputes Tribunal". HNZ was at that stage still endeavouring to settle the matter.

12. HNZ's solicitors wrote a further letter to NZOC on 24 September 2008. It noted that, despite efforts to progress settlement of outstanding issues, resolution had not been reached. It gave notice that HNZ "will be making an application to the Tribunal".

13. The letter of 24 September 2008 noted that the Tribunal required both parties to agree in writing to the matter being referred to it. If NZOC was not prepared to so agree or the Tribunal does not accept the referral "the dispute shall be submitted to the Court of Arbitration of [sic] Sport". NZOC was invited to sign the application form attached, which was the Tribunal's application form for an application to determine sports-related disputes where "all parties to the dispute agree in writing to refer the dispute to the Tribunal".

14. The matter was discussed again by the NZOC Board on 10 December 2008, after which Mr Maister wrote to NZH's solicitors setting out NZOC's position. It expressed frustration that there was little sign of acceptance of NZOC's position or contribution to resolving the matter. For reasons stated in the letter, Mr Maister advised that the Board had resolved that it would not be complying with the request to have this dispute resolved before the NZ Sports Disputes Tribunal.

15. The NZOC was served with a notice of the appeal by HNZ dated 7 April 2009.

16. The notice of appeal does not allege that NZOC has agreed to the jurisdiction of the Tribunal but claims that the Tribunal has jurisdiction because of r.23 of the Constitution of the NZOC. Rule 23 reads:

> **23. ARBITRATION**
>
> 23.1 The New Zealand Olympic Committee recognises the Sports Disputes Tribunal of New Zealand (Tribunal) established by Sport and Recreation New Zealand as the forum to resolve certain sports-related disputes. To the extent permitted by this constitution, the Olympic Charter and the rules of the Tribunal, any dispute or appeal involving or arising from a decision of the New Zealand Olympic Committee may be determined by the Tribunal.
>
> 23.2 …
>
> 23.3 Subject to this constitution, if there is a dispute or difference relating to or involving a question as to the interpretation, application or operation of any agreement contract, rule, constitution, by-law or other written document of the New Zealand Olympic Committee it shall be resolved by the following procedure:
>
> (a) the parties to the dispute will actively and in good faith negotiate the dispute with a view to a speedy resolution of such dispute or differences;
>
> (b) if within, 21 days from the commencement of negotiations in (a) the matter has not been resolved, then either party may require that the matter be referred to a mediator by giving the other notice in writing requiring the mediation. If the other party agrees and a mutually agreed mediator is appointed the parties will then agree the rules for any mediation in full consultation with the agreed appointed mediator before they commence the mediation. Participation in a mediation will not prejudice any other right or entitlement either of them may have;
>
> (c) If within thirty 30 days of the matter being referred to a mediator or the parties cannot agree for any unresolved dispute to be referred to mediation, then either party may refer the dispute or difference to the Sports Disputes Tribunal by giving to the other party notice in writing stating the subject matter of the dispute and the party's desire to have the matter

referred to the Tribunal. If the Tribunal accepts the referral of the dispute, it shall be resolved by the Tribunal in accordance with its rules.

(d) If the Tribunal does not accept the referral, the dispute shall be submitted to the Court of Arbitration for Sport in accordance with the Code of Sports-Related Arbitration. The decision of the Court of Arbitration for Sport shall be final and binding and shall not be questioned in any Court of law.

JURISDICTIONAL CHALLENGE

17. The jurisdictional challenge by NZOC is on three grounds:

(a) On a proper interpretation and application of r.23 of the NZOC Constitution, there is no jurisdiction to hear the appeal. Rule 23.2 provides an appeal in selection matters but r.23 does not give a right of appeal in this matter;

(b) If r.23.3 does provide for an appeal right which can be exercised by a party without agreement, then the conduct of the parties is such that HNZ is prevented, under the doctrine of estoppel by convention from asserting that position.

(c) If there is an appeal right to this Tribunal under r.23.3, then any appeal is time-barred.

THE RULE 23 CHALLENGE

18. Mr David for NZOC submitted that r.23.3(c) of the Constitution, properly interpreted, does not give HNZ a right of appeal. It provides for a process of agreed referral of a dispute or difference, as was contemplated at the time the NZOC Constitution was amended, by the rules of this Tribunal as they stood at that time.

19. When the NZOC Constitution was amended in April 2004, the rules of this Tribunal only allowed appeals from NZOC decisions in selection matters. A dispute of the current type could only be considered by the Tribunal under its jurisdiction to consider

"sports-related disputes" which the parties had agreed could be referred to the Tribunal. It was submitted that the distinction between selection appeals and sports-related disputes is an important part of the context in which r.23 should be interpreted.

20. The NZOC also relies upon s.38 of the Sports Anti-Doping Act 2006 (the Act) which gives jurisdiction to the Tribunal to determine "sports-related disputes if - (i) all parties to the dispute agree in writing to refer the dispute to the Tribunal; and (ii) the Tribunal agrees, at its sole discretion, to hear and determine the dispute."

21. NZOC also submits that consistent with its role in the Olympic movement, the Court of Arbitration for Sport (CAS) is both the ultimate appeal body and the Tribunal which will hear appeals or disputes which cannot be heard by this Tribunal. Rule 23.2 makes express provision for selection appeals, which the NZOC says is not applicable in this case, and therefore the only possible avenue to bring the matter to the Tribunal is r.23.3.

22. In so far as it affects this Tribunal, the NZOC's position on the process under r.23.3 is:

    (a) There must first be good faith negotiation.

    (b) If, within 21 days, negotiation has not resolved the dispute, either party can refer the dispute to mediation and, if the parties agree, there is to be a mediation.

    (c) If, within 30 days of the matter being referred to mediation (or the parties cannot agree to unresolved dispute going to mediation) either party "may refer the dispute or differences to the Sports Disputes Tribunal" by giving the other party notice in writing "stating the subject matter of the dispute and the party's desire to have the matter referred to the Tribunal…"

(d) If the Tribunal does not accept the dispute, the dispute is to be submitted to CAS (provided for in r.23.3(d) which it is not necessary to set out in full).

23. NZOC's position is that r.23.3 does not give a right of appeal but only contains a process for resolving disputes which may end up with the dispute being referred to this Tribunal. Given the provisions of the Tribunal rules and the absence of any reference to appeals and the exercise of appeal rights in r.23.3, the clause is dealing with the process of referring a sports-related dispute or difference to the Tribunal.

24. That reference requires agreement and it was submitted that the agreement is required after the notice has been given under r.23.3(c). Such an agreement is a requirement of the Tribunal rules and it was submitted that the parties clearly intended r.23.3 to work in a manner which conformed with the Tribunal's rules.

25. The Tribunal's rules at the time the NZOC Constitution was amended in 2004 only gave a right of appeal against a decision of the NZOC in selection matters. "Selection" as defined in the rules, is the selection of a person to a team or squad. Clearly, the underlying dispute is not a selection matter.

26. Under s.38(c) of the Act, this Tribunal can hear an appeal from a decision of the NZOC if its Constitution, rules or regulations specifically provide for an appeal to the Tribunal in relation to that matter. Rule 41 of the Tribunal's present rules allows an appeal against a decision of the NZOC if it comes within s.38(c). Given the status of the NZOC in the Olympic movement and the provisions of the Tribunal's rules when the NZOC altered its Constitution, the Tribunal accepts that if HNZ has a right in this matter, it is under the provisions of s.38(b) of the Act and Part D of the Tribunal rules which allows it to consider sports-related disputes. The right of appeal to this Tribunal from NZOC decisions is confined to selection decisions.

27. The following facts do not appear to be challenged by NZOC, and are accepted by the Tribunal:

    (a) The issue between the parties is a "dispute or difference relating to or involving a question as to the … application or operation of any… rule, constitution… of the New Zealand Olympic Committee". Mr Maister, in his statement of evidence, acknowledges that a "dispute" arose in or about October 2004, that on 12 April 2006 a resolution of the Board of NZOC suspended HNZ, and the decision was conveyed on 20 April 2006. NZOC agreed to mediate the dispute in its email of 27 June 2008 and Mr Maister accepts that this was a mediation under r.23.3. He also referred to "arbitration" in the email. Clearly, a process was initiated under r.23.3 and the terms of that rule apply.

    (b) The matter was referred to mediation under r.23.3 and the mediation was unsuccessful.

    (c) While the mediation was still progressing, HNZ gave notice "that should resolution not be reached within 30 days of the matter being referred to the mediator (8 July) that our client would refer this dispute to the Sports Disputes Tribunal."

28. Rule 23.3(c) is difficult to apply. The relevant portion provides that either party may refer the dispute to this Tribunal "if within 30 days of the matter being referred to a mediator". The mediation was still in progress within that 30 day period. The only sensible interpretation is that the referral must be within 30 days of the date that the mediation concludes unsuccessfully. An obligation to refer during a mediation does not make sense.

29. Even if the correct interpretation is that the notice must be given within 30 days of the matter being referred to the mediator, then the Tribunal is of the view that the necessary notice was given. HNZ solicitor's letter of 4 August 2008 advised that if resolution

was not reached within the 30 days, then the matter was to be referred to this Tribunal. That notice was given within the 30 days and is the best that HNZ could have done in the circumstances. It was conditional upon the matter not being resolved. The nature of the dispute was clearly known to both parties.

30. The issue, therefore, is the one identified by the NZOC. Is it necessary that the agreement of the parties to refer the matter to the Tribunal must be entered into after one party has given the notice of referral? Alternatively, did the parties agree to refer the matter to the Tribunal, in accordance with s.38(b) of the Act and the Tribunal's own rules, when the matter was referred to mediation in accordance with r.23.3(b) of the Constitution?

31. The Constitution contains the rules of the NZOC. It is a contract or agreement between the NZOC and its members. It is within that written Constitution that there is an agreement to refer matters to the Tribunal. NZOC agreed with its members in r.23 on how it and a member would resolve certain disputes.

32. In this case there was also an exchange of correspondence. HNZ requested that the matter proceed under r.23.3. In its initial letter of 28 March 2008, it requested mediation of the "unresolved dispute" and gave formal notice as required by r.23.3(b) of the Constitution. The NZOC, by subsequent correspondence and conduct, including the email of 27 June 2008, agreed to the mediation request.

33. HNZ exercised its agreed right under the Constitution and the parties agreed to go to mediation. The Constitution does not require that any agreement to come to this Tribunal must be entered into after the mediation fails. The meaning which the Tribunal gives to the Constitution against the factual matrix at the time that the Constitution was amended is that there was in place an agreement between the NZOC and its members, that

contained a mechanism for resolving disputes. This provided that a party to a dispute which had been referred to mediation under r.23.3(b) could refer the matter to this Tribunal if the mediation were unsuccessful. There is no provision in the Constitution that requires a further agreement be entered into after the mediation fails. The member has been given a right to go to mediation (if the other party agrees) and, if necessary, to this Tribunal.

34. The Tribunal does not read into either s.38 of the Act or the Tribunal's rules an obligation that the agreement in writing to refer the dispute to the Tribunal must come into existence after the mediation fails. It is the Tribunal's view that there was an agreement in writing contained both in the Constitution of the NZOC and also in the exchange of correspondence between March and June 2008 which, by reference, incorporated the provisions of r.23.3, to refer the matter to the Tribunal.

35. The wording of the Tribunal's r.13.1 in 2004 does not alter this view. If the parties "agree in writing", the term then used did not preclude an agreement being entered into before mediation, which provided a party can refer the dispute to this Tribunal if the mediation fails.

36. It is, therefore, the view of the Tribunal that it does have jurisdiction in this matter if it is a referral under s.38(b) of the Act and Part D of the Tribunal's rules.

FORM OF REFERENCE

37. It is correct that the matter was brought as an appeal when it should have been brought as a reference under Part D of the Tribunal's rules. The Tribunal is charged with bringing matters to a just, speedy and inexpensive determination. It takes the view that a party should not be denied bringing the matter to the Tribunal because it brings the proceeding in the wrong form but within time. Although it comes as a referral and not an appeal, it

does have the semblance of an appeal. In the circumstances, the Tribunal intends to treat what was initiated as an appeal as a reference to the Tribunal under Part D of its rules.

OTHER CHALLENGES

38. The Tribunal does not agree that estoppel by convention prevents this matter being referred to the Tribunal or that it is time-barred. While the conduct of the parties may be a factor to be taken into account in exercising the Tribunal's discretion, the conduct of HNZ does not, in the Tribunal's opinion, estop it from bringing this matter before the Tribunal. The matter was only referred to arbitration in mid-2008. HNZ gave notice to the NZOC of its decision to refer the matter to the Tribunal in August 2008. Nothing in its conduct before or after August 2008 can give rise to the estoppel.

39. The manner in which the matter was brought to the Tribunal has not prejudiced the NZOC. It does not amount to an estoppel, any more than does NZOC's indication that it was prepared to go to arbitration.

40. Because of the notice given in August 2008, the Tribunal does not accept that the matter is time-barred. Once the procedure is initiated under r.23.3, the only time bar is the "30 days after the matter being referred to a mediator" in r.23.3(c). As noted above, the Tribunal is of the view that the necessary notice was given within that period.

DISCRETION

41. It is still necessary to comply with the provisions of s.38(b)(ii). This gives the Tribunal a discretion to hear and determine the dispute. It was submitted by the NZOC that the Tribunal should exercise the discretion against the HNZ, if it does have a discretion.

42. The Tribunal is of the view that there is insufficient information before it to exercise its discretion. Further, on the matter of the discretion, NZHF should have a right to make submissions. Apart from possible delays between 2006 and 2008, and any responsibility by HNZ for such delays, the merits of this dispute and the attitude of HIF are all relevant to the exercise of the discretion. The matter may be moot.

43. The Tribunal, therefore, invites both parties to make submissions on the exercise of the discretion within 21 days of the day of this decision. NZHF is also invited to make submissions within that period. The Tribunal will then determine whether it will decide the discretion issue on the papers or will hold a hearing for that matter.

Dated 13 July 2009

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B J Paterson QC
Chairman