

**BEFORE THE SPORTS DISPUTES TRIBUNAL
OF NEW ZEALAND**

SDT/01/03

Anti-doping violation application

BETWEEN THE NEW ZEALAND POWERLIFTING FEDERATION INCORPORATED

Applicant

A N D WAYNE DOYLE

Respondent

Tribunal: C H Toogood QC (presiding member)
N R W Davidson QC
R Cheatley
Dr F R Palmer

Representation: Steve Lousich for applicant
No appearance by respondent

Pre-hearing conference: 11 September 2003 (by telephone)

Draft decision: 12 September 2003

Decision: 30 October 2003

DECISION OF TRIBUNAL

Introduction and background

[1] The Tribunal has received an application by the New Zealand Powerlifting Federation Incorporated (“the applicant” or “the Federation”), ostensibly under the Tribunal’s Rules, alleging that the defendant has committed an anti-doping violation and seeking the imposition of a penalty pursuant to those Rules and the Constitution and applicable rules of the Federation.

[2] At the Pre-Hearing Conference conducted by this Tribunal on 11 September 2003, the presiding member of the Tribunal raised with Mr Lousich the question of whether this Tribunal was properly constituted to be the Tribunal appointed, pursuant to clause

6.1 of the Federation's Anti-Doping Code, to determine the application. After discussion between Mr Lousich and the members of the Tribunal taking part in the conference, the Tribunal released a draft decision to the parties on 12 September 2003, and invited them to provide the Tribunal with any submissions relating to the matters contained in the draft decision within three weeks.

- [3] A copy of the draft decision which was sent to Mr Doyle by registered post was returned unopened. A courtesy copy of the draft decision was then sent to a solicitor who had written to the Federation on behalf of Mr Doyle in respect of this matter. Nothing further has been heard from Mr Doyle or any person representing him. The Federation has not provided the Tribunal with additional submissions.

The Tribunal's jurisdiction

- [4] The Sports Disputes Tribunal of New Zealand is a body constituted on 19 May 2003 pursuant to Rules made under the statutory powers of the Board of Sport and Recreation New Zealand; specifically, under s8(ha) of the Sport and Recreation New Zealand Act 2002. It is not a statutory Tribunal, in the ordinarily accepted sense, in that its jurisdiction and powers are not prescribed by Parliament, or by the Governor-General in Council by way of regulation. Instead, it is intended that the Tribunal's jurisdiction and authority to act in matters such as these will be incorporated into the constitutions and rules of the numerous national sports organisations which are funded by Sport and Recreation New Zealand.
- [5] When a person such as Mr Doyle, the present respondent, becomes a member of a sports club or other sports organisation, they agree to bind themselves to the rules of that club or organisation. The constitution and rules become, in effect, a contract between the organisation and the member. In that sense, then, the jurisdiction of the Tribunal is conferred upon it by reason of the contractual arrangements between sports organisations and their members represented by the various provisions of constitutions, bylaws and rules of national sports organisations and their affiliates.
- [6] It is necessary, therefore, in considering whether or not the Tribunal has jurisdiction to deal with any application made to it, to take into account not only the rules of the Tribunal but also the applicable constitutional rules of any sports organisation which is a party to the proceedings.

The Tribunal's Rules

- [7] Under Rule 6.1(a) of its Rules, this Tribunal has jurisdiction to hear and determine a sports related dispute "where there is an allegation by a National Sports Organisation that an Anti-Doping Rule Violation has been committed by a person under its applicable rules or policies". Rule 6.3 provides that if "there is any dispute between the parties as to whether the Tribunal has jurisdiction to hear and determine a matter, the Tribunal shall determine such dispute. If it considers it necessary, the Tribunal

may request submissions from the parties and/or hold a hearing before making such determination.”

- [8] There is a limitation on the Tribunal’s jurisdiction to deal with an anti-doping rule violation in respect of which there has been a finding of a violation by the New Zealand Sports Drug Agency pursuant to the provisions of the New Zealand Sports Drug Agency Act 1994: rule 6.6 of the Tribunal Rules. This provides that the Tribunal does not have jurisdiction to hear appeals from findings by the Board of the New Zealand Sports Drug Agency that a violation has occurred; that jurisdiction is held by the District Courts and other courts in the ordinary court system.
- [9] There is an important proviso to that rule, however, which reserves the jurisdiction to the Tribunal, “in its discretion, at any time [to] hear and determine the penalty for any anti-doping rule violation where such jurisdiction has been conferred on the Tribunal”, notwithstanding that proceedings under s20 of the Sports Drug Agency Act (ie appeals to the ordinary courts) may be pending or extant and not finally determined.
- [10] The scheme of the Tribunal’s rules, therefore, is that where the New Zealand Sports Drug Agency has determined that a doping infraction has occurred under the 1994 Act, the Tribunal may be given jurisdiction by a national sports organisation to determine the applicable penalty for such an infraction.

The present proceeding

- [11] In the present proceeding, the Federation alleges that the defendant Mr Doyle was found guilty of an anti-doping violation on 12 October 2002 in that the Board of the New Zealand Sports Drug Agency determined, pursuant to its duties and powers under the New Zealand Sports Drug Agency Act, that Mr Doyle “did not have reasonable cause to fail to comply with a request to provide a [urine] sample at the sample collection station at the NZ Benchpress Championships at Sky City, Auckland on 12 October 2002.” It is said that it was held by the Board that Mr Doyle did not have reasonable cause to fail to attend at the sample collection station and that he declined to commence with the procedures prescribed by regulations 19 to 27 of the Sports Drug (Urine Testing) Regulations 1994.
- [12] The Federation, having been notified of the Board’s determination, properly considered that it was bound by its Anti-Doping Code dated November 2001 to deal with the matter on a question of penalty pursuant to its Code.

Decision as to jurisdiction

- [13] On the face of the wording of clauses 6 and 7 of the Federation’s Anti-Doping Code, it is arguable that the Sports Disputes Tribunal could be appointed to be “a Tribunal” in terms of the Code. Clause 6.1 of the Anti-Doping Code reads:

“6.1 Where the NZPF receives information (including notification pursuant to Section 18 of the NZSDA Act) that a person has committed a doping offence it will appoint a Tribunal for the purposes of conducting a hearing into the doping offence and shall refer the matter to the Tribunal for hearing in accordance with the NZPF General Disciplinary and Appeals Procedures.”

- [14] Further, clause 7.3(a) of the Code would appear to entitle the Sports Disputes Tribunal to follow its own procedure, rather than those set out in the General Disciplinary and Appeals Procedures of the Federation.
- [15] Difficulty arises, however, in relation to the provision of rights of appeal. Clause 11 of the Anti-Doping Code provides for rights of appeal from a decision of the Tribunal appointed under clause 6 “to an Appeals Tribunal established in accordance with the NZPF General Disciplinary and Appeals Procedure” and for that decision to be “final and binding”: see clauses 11.1 and 11.2 of the Code.
- [16] Notwithstanding the reference to a “final and binding” decision in clause 11.2, there is then an apparent right of further appeal to the International Powerlifting Federation under Section B of the NZPF Appeals Procedures, with the possibility that the International Federation may refer that further appeal to the Court of Arbitration for Sport for decision.
- [17] These provisions do not sit comfortably with jurisdiction being conferred on the Sports Disputes Tribunal. The scheme of the Rules of the Sports Disputes Tribunal is for this Tribunal to deal with the imposition of penalties for doping infractions at first instance. Rule 24.1 of the Tribunal’s Rules provides that “[e]xcept to the extent set out in ... [the] Rules, which permit a right of appeal, every decision of the Tribunal shall be final and binding and shall not be questioned in any Court of law.”
- [18] Rule 24.2 then provides that, subject to a provision which is not applicable here, a party to a proceeding under the Rules of the Tribunal may appeal to the Court of Arbitration for Sport only if the rules or policies of the relevant international federation or national sports organisation so provide or in any other case if the making of the Tribunal’s decision was induced or affected by fraud or corruption or was in breach of the rules of natural justice.
- [19] It can be seen, therefore, that the Tribunal’s rules do not allow for an intermediate right of appeal before the Court of Arbitration for Sport may become involved. This is inconsistent with the Federation’s rules which confer such a right.
- [20] Rights of appeal go beyond mere procedure. They are substantive rights in respect of which there is an irreconcilable conflict between the Tribunal’s rules and the Federation’s rules; they cannot stand together.
- [21] Referring back to the point made at paragraph [5] of this decision, the real question, therefore, is whether, in terms of the contract between Mr Doyle and the Federation

as represented by the Constitution and Disciplinary Rules of the Federation, there is an effective agreement that this Tribunal is properly constituted to deal with the matter. Having regard to the irreconcilable conflict between the appeal rights provided in the Federation's Constitution and Rules, and the more limited appeal rights provided in the Rules of this Tribunal, it cannot be said that Mr Doyle has accepted a procedure in which this Tribunal can take part.

- [22] In our view, therefore, this Tribunal is not properly constituted to deal with this matter as "a Tribunal" under clause 6 of the Federation's Anti-Doping Code. Accordingly, it declines to hear the application.
- [23] The Tribunal is newly established and the jurisdiction question which has arisen in this case is novel and somewhat complex. The Tribunal recognises also that the Federation does not have substantial resources. In accordance with the power available to it under rule 10.1(a), to "regulate its own procedure in such manner as it thinks fit", the Tribunal waives the filing fee paid by the Federation under rule 11.3.1(e) and directs that it be refunded.

C H Toogood QC

Acting Chairperson, for the Tribunal