

**BETWEEN**            **SARAH HER-LEE**  
  
                             **Appellant**

**AND**                    **TABLE TENNIS NEW ZEALAND**  
  
                             **Respondent**

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**DECISION OF SPORTS TRIBUNAL  
DATED 2 JULY 2014**

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**Hearing:**            By telephone conference at 9.30am on 30 June 2014

**Tribunal:**            Sir Bruce Robertson (Chairperson)  
                             Alan Galbraith QC (Deputy Chairperson)  
                             Ron Cheatley

**Present:**            Sarah Her-Lee  
                             Royal Reed and James Won, counsel for Sarah Her-Lee  
                             John Lea, Murray Finch and Paul Kyle, Table Tennis New Zealand

**Registrar:**         Brent Ellis

## **The Appeal**

1. On 13 June 2014 Sarah Her-Lee filed a Notice of Appeal to the Sports Tribunal against a decision of Table Tennis New Zealand (TTNZ) to not nominate her as a member of the women's table tennis team to compete at the 2014 Commonwealth Games in Glasgow. Five other players were nominated in the women's team: Li Chunli; Karen Li; Annie Yang; Sun Yang; and Jenny Hung.
2. The hearing of the appeal took place by telephone conference on Monday 30 June 2014.

## **Grounds of Appeal**

3. Ms Her-Lee appealed upon the following grounds:
  - (a) That the applicable Nomination Criteria were not properly followed and/or implemented;
  - (b) That she had not been afforded a reasonable opportunity by TTNZ to satisfy the applicable Nomination Criteria;
  - (c) The nomination decision was affected by apparent bias; and
  - (d) Breach of natural justice.

## **The Nomination Criteria**

4. The criteria to be applied by selectors in making nominations are set out in the NSO Agreement which was entered into by TTNZ with the New Zealand Olympic Committee (NZOC). The nomination criteria for Individual Events includes criteria both for the nomination of an athlete or group of athletes and provides:
  - 4.1 **Nomination Criteria:** The Table Tennis New Zealand Nomination Criteria for nomination to the Games Team is made up of two parts:
    - (a) the Over-Riding Nomination Criteria specified in clause 4.2; and
    - (b) the Specific Nomination Factors specified in clause 4.3.
  - 4.2 **Over-Riding Nomination Criteria:**
    - (a) In determining whether or not to nominate an Athlete (or group of Athletes) to Table Tennis Men's and Women's Singles, Men's and Women's Doubles and Mixed Doubles ("Event(s)"), the NSO Selectors must be satisfied overall that:
      - i. the Athlete (or group of Athletes) is or are capable of achieving a top 8 placing at the Games in the Event(s); and

- ii. the Athlete (or group of Athletes) has or have a track record of sufficient quality and depth that the NSO Selectors believes demonstrates the Athlete (or group of Athletes) will be competitive at the Games and will perform credibly in the Event(s).
- (b) **Evidence:** In determining whether or not the Athlete (or group of Athletes) has or have met the Over-Riding Nomination criteria for Event(s) in clause 4.2(a) above, the NSO Selectors shall consider the Athlete's (or group of Athletes') performances and results in the Event(s) at which they seek to be selected for the Games in the following Key Events during the period **5<sup>th</sup> May 2013 to 5<sup>th</sup> May 2014:**
- i. World Individual Championships, Paris, France, May 2013
  - ii. Oceania Cup, Bendigo, Australia, June 2013
  - iii. Womens & Mens World Cup, Belgium, September 2013
  - iv. World Team Championships, Tokyo, Japan, May 2014
  - v. Other ITTF Global Circuit Events qualifying for ITTF ranking points.
- (c) In considering an Athlete's (or group of Athletes') performances and results at the Key Events, the NSO Selectors may take into account an Athlete's exclusion from selection by Table Tennis New Zealand for any Key Event for the purpose of providing other Athletes with international experience.

4.3 **Specific Nomination Factors:** When considering the Over-Riding Nomination Criteria above, the NSO Selectors may also take into account any one or more of the following factors about an Athlete:

- (a) any other performances or results in competitions/events in addition to the Key Events;
- (b) adequate fitness and a commitment to maintain a fitness and training programme as agreed with the applicable coach(es);
- (c) demonstrated good behaviour, including a commitment to training and attendance at training camps;
- (d) demonstrated compatibility with others in a team environment;
- (e) demonstrated compliance with the rules of events and competitions;
- (f) understanding and respect for the obligations that accompany being a member of a New Zealand team when competing at the Games, including respect for team members and support staff;
- (g) willingness to promote Table Tennis New Zealand in a positive manner;
- (h) demonstrated ability to take personal responsibility for self and their results;
- (i) proven ability to be reliable;
- (j) the Athlete's results from the Key Events compared to the relative strength of the Athletes selected to attend each of the Key Events; and
- (k) any other factor(s) the NSO Selectors consider relevant.

5. Clause 4.4 allows the selectors to make any enquiries as they see fit and clause 4.5 provides that the selectors may give weight to any one or more of the Specific Nomination Factors and, if they do, to apply such weighting to one or more athletes. Clause 4.6 in combination with clause 5 provides for extenuating circumstances. In that context clause 5.1(e) is in the nature of a catch-all provision which allows the selectors to take into account any other factors reasonably considered to constitute extenuating circumstances.

### **Appellant's Case**

6. The essence of Ms Her-Lee's challenge was that the selectors had placed insufficient weight on her participation in the key events identified in clause 4.2(b) of the Nomination Criteria and too much weight on world rankings considered as a relevant factor under clause 4.3(k) of the Specific Nomination Factors. It was accepted on behalf of Ms Her-Lee that the selectors were entitled to take into account world rankings but these should have been a secondary consideration given significantly less weight than participation in the key events because of the lack of recent international competitive play of certain of the nominated team members.
7. This latter submission rested in part on the fact that the world rankings are a cumulative assessment over time. While the ranking system does provide for earlier in time results to be given less weight as time passes it appears that only some years of total inactivity results in a ranking being totally lost. Instead just one competitive performance after a lengthy period of competitive inactivity can revive a ranking, albeit that there will be some discount of earlier performances for the effluxion of time.
8. This, it was submitted, was of particular relevance in this appeal because during the key events period from May 2013 to May 2014 Karen Li and Jenny Hung had no international competitive performances until their participation in the May 2014 world teams championships, Annie Yang had limited performances and Sun Yang had no competitive performances recognised for ranking purposes.
9. We set out below a table of the world rankings at various dates from January 2010 to May 2014 of the five nominated players, Ms Her-Lee and a further player, Sophie Shu, who was not nominated for the Glasgow Games but who was on the long list. The reason that the world rankings of all players in that chart reduces so greatly at May 2014 is that at around that date the International Table Tennis Federation culled the world rankings list for inactive players.

<b>Player</b>	<b>Jan-10</b>	<b>Apr-10</b>	<b>Aug-10</b>	<b>Jan-11</b>	<b>Apr-11</b>	<b>Aug-11</b>	<b>Dec-11</b>	<b>Apr-12</b>
Li Chunli								160
Karen Li	157	160	177	176	179	180	171	187
Annie Yang	608	583	501	451	470	469	457	494
Sun Yang	342	342	335	349	352	361	369	
Jenny Hung	709	669	665	645	644	613	612	643
Sophie Shu				911	895	818		
Sarah Her-Lee	1027	959	1006	986	970	881	883	912

<b>Player</b>	<b>Aug-12</b>	<b>Jan-13</b>	<b>Apr-13</b>	<b>Aug-13</b>	<b>Jan-14</b>	<b>Feb-14</b>	<b>Mar-14</b>	<b>May-14</b>
Li Chunli	145	132	138	165	177			126
Karen Li	184							204
Annie Yang	505			505	521			337
Sun Yang								
Jenny Hung	603							433
Sophie Shu				811	837	849	849	520
Sarah Her-Lee	860	894	829	864	892	906	906	572

10. Ms Her-Lee's appeal in this respect rested on her active participation in international competition from January 2010 to May 2014 including her participation in a number of the key events identified in the nomination criteria. She did decline the opportunity to compete in the Oceania Cup, for which she was selected, but the Tribunal is satisfied from the email exchanges between her and Mr Finch that there was reasonable justification for her competing in the Luxemburg Cup which clashed with the Oceania Cup, particularly as TTNZ was unable to provide funding for her to get back from Europe.
11. On behalf of Ms Her-Lee emphasis was placed on the fact that clause 4.2(b) provides that the selectors "shall" consider performances in the key events whereas clause 4.3 provides that the selectors "may" consider any one or more of

the specific nomination factors. Although consideration of the matters listed in clause 4.2(b) is mandatory, these matters are not exhaustive and there is nothing to suggest that other matters cannot be considered. Therefore, while the selectors have a discretion whether or not to take into account any of the Specific Nomination Factors listed in clause 4.3, there is no doubt that these Specific Nomination Factors can be taken into account, as indeed the submissions of behalf of Ms Her-Lee acknowledge.

12. Given that acknowledgement, which is appropriate and consistent with the Tribunal's view as to the inter-relationship of the nomination criteria, it is difficult for the Tribunal to second guess the assessment made by selectors who are undoubtedly more expert in assessing the relevant merits of performances and prospects in table tennis competition than members of the Tribunal.
13. In this respect Ms Reed's submissions on the appellant's behalf did point to other factors which were suggested to cast doubt on the robustness and fairness of the nomination process. The one which has given the Tribunal reason to pause is the fact that a number of members of the team have had limited recent international competitive experience. Usually sporting selections depend upon recent international competitive results. Here we have team members who had world rankings from past performances which were significantly higher than that Ms Her-Lee currently holds but who either have had limited recent international competitive experience or in the case of Sun Yang no recent international competition for several years.
14. The reasons for this lack of recent international competition varied – graduate study and, with two of the nominated athletes, having a child. However, the Tribunal understood from its questioning of Mr Finch, who is the high performance director for TTNZ, that he had kept in contact with and under review the participation of all the persons on the long list, including Karen Li, Annie Yang, Jenny Hung and Sun Yang. His evidence was that he was satisfied that all four were still actively participating, albeit in Sun Yang's case at club level in China. The Tribunal did not understand there to be any real challenge to the position of Karen Li who is ranked almost 350 places above Ms Her-Lee or the position of Annie Yang who is some 230 places above Ms Her-Lee in the world rankings. The issues about absence from competitions seemed to largely focus upon the positions of Jenny Hung and Sun Yang.
15. In respect to Jenny Hung, the Tribunal was advised that she has been competing at university level in Taiwan where she is completing a masters degree. She did

represent New Zealand at the World Teams Championships in 2014 and, while she lost her match, that has kept her world ranking alive at 433 as against Ms Her-Lee's 572. We also understood from Mr Finch that Jenny Hung had attended a training camp in New Zealand earlier this year for junior players and that at that camp he had the opportunity of assessing her performance level. Our understanding is that the selectors would have taken account of information supplied by Mr Finch in terms of their assessment.

16. The position of Sun Yang is somewhat different. She has not competed for a lengthy period and instead acted as bench coach for the women's team at the World Teams Championship in 2014. We were told by Mr Finch that TTNZ sees her role at the Games as a player coach but with the emphasis on coach. The Tribunal was also told that TTNZ contemplated only nominating four players for Glasgow, would otherwise have appointed Sun Yang as coach, but saw the opportunity of her being nominated as a player which would allow the team a further option. Apparently Sun Yang is a defensive player which is unusual in table tennis, and therefore offers a strategic option against certain teams. It was said that Ms Her-Lee, if nominated, would not offer any such option.
17. Ms Reed was critical of the fact that Mr Finch's evidence in respect to his monitoring of Jenny Hung and Sun Yang's recent competitive participation was not referred to in documents provided by TTNZ but only emerged from questioning by the Tribunal. Obviously it would be preferable if all relevant matters were appropriately documented but in the Tribunal's experience smaller sports, largely reliant on people giving time on a voluntary basis, rarely are able to maintain the quality of documentation of larger professional sports bodies. It would have been preferable for these matters which are relevant to the nomination decision to have been documented but the Tribunal does not doubt Mr Finch's genuineness in the evidence which he gave.
18. There is nothing to suggest that TTNZ in nominating the women's team did not properly apply clause 4.2(a) which is the ultimate requirement.

### **Lack of Opportunity**

19. The second ground of appeal was that Ms Her-Lee had not been afforded a reasonable opportunity to satisfy the applicable nomination criteria because she had not been selected for the world teams event in 2014. Because TTNZ now places weight on the team's performance at that event it is said that Ms Her-Lee

was deprived of the opportunity to benefit from that performance. However, it is accepted that TTNZ did not breach any selection criteria in selecting that team.

20. It does appear that the team's performance in this event has been a material factor in persuading the NZOC to accept the nomination of a women's team for the Glasgow Games. While Ms Her-Lee may have benefited if she had been a member of that team the Tribunal is unable to find any breach of an obligation specific to her from the selections made for that event. TTNZ was entitled to nominate the players who it thought most appropriate which may have included consideration of exposing those players again to international competition.

### **Apparent Bias**

21. This ground of appeal arises from an in-competition dispute between Ms Her-Lee and Ms Li Chunli in May 2013 at the Commonwealth Championships. The Tribunal is simply not in a position to adjudicate on the rights and wrongs of the dispute. What is clear from the material before the Tribunal is that Mr Finch and later Mr Fenwick, who was mentoring Ms Her-Lee, did go to some lengths to encourage Ms Her-Lee to apologise in a fulsome way that would resolve any ongoing issues. Ms Her-Lee has in March 2014 provided a written apology but in TTNZ's view this was belated and insufficient to avoid tensions that might be exacerbated by the pressure of competition at the Games.
22. In the Tribunal's view it is unfortunate that a one off disagreement some time ago should still be considered a difficulty in integrating Ms Her-Lee into New Zealand representative teams. The Tribunal does not want to preach but resolution of such an issue requires a positive attitude not only on Ms Her-Lee's part but also on the part of TTNZ and the other person to the disagreement. There will be nominations and selections in the future for New Zealand teams and Ms Her-Lee may well be a candidate. We would not like to see this issue re-appear before the Tribunal.
23. Unfortunately it does seem that this disagreement has had a lingering effect. We accept that a teams event, which includes doubles combinations, does entail unreserved co-operation between all team members and officials. Clause 4.3(d) specifically recognises this as a factor that may be relevant in team nomination. Again the Tribunal is not in the position to second guess the selectors' decision as to the best combination of relationships to assist the team perform to medal winning levels at Glasgow.



### **Natural Justice**

24. In the nomination criteria there was an express requirement for a quorum of three selectors to convene to nominate the team. Two selectors were named and one was to be advised.
25. Apparently TTNZ had difficulties in avoiding conflicts and so being able to nominate a panel of three selectors for its Commonwealth Games selection. Accordingly the nomination was made by only two selectors. A third selector was nominated solely for the purpose of appointing the support staff.
26. The failure to have three selectors was a breach of the nomination criteria. While the Tribunal appreciates that TTNZ felt that it was premature to appoint one of its then current selectors, who were recent appointees for TTNZ's other selection processes, it would have been more appropriate in the Tribunal's view to have complied with the specifics of the nomination criteria.
27. While the Tribunal understands the submission that a greater number of selectors would have allowed for more input and debate, the Tribunal is not persuaded that the appointment of a third selector would have altered the decision which was ultimately made.

### **Conclusion**

28. The Tribunal has considerable respect for Ms Her-Lee's efforts to achieve her goal of Commonwealth Games selection. There is an issue that TTNZ should endeavour to resolve so that Ms Her-Lee can continue with her sport without uncertain consequences from the 2013 incident. However, for the reasons expressed, the appeal is dismissed. There will be no order as to costs.

**DATED** 2 July 2014



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A R Galbraith QC  
(Deputy) Chair