

## **The Role and Conduct of Private Sporting Tribunals —The Tribunal's Perspective**

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### **Introduction**

Sport has progressively become more commercial, more professional (both on and off the field) and more technological. Sponsorships apply to individuals, teams, clubs and provincial and national bodies. There is often much more at stake than simply participating in the game, race or event.

The rapid growth of the business of sport in New Zealand and its effect on judicial procedures, was perhaps illustrated with the suspension in October 1992 of Richard Loe by the New Zealand Rugby Football Union Disciplinary Committee. He was allowed by the Committee to commence his suspension at a later date which would enable him to meet his commitments to play and coach overseas.

If an amateur sportsperson is suspended from play he/she loses out on the enjoyment of participation, and their team or crew miss out on the particular skills of the person. For the professional sportsperson a suspension means the loss of a match fee or earnings. With the inexorable moves towards professionalism in a range of sporting codes it is therefore timely to reflect on the role of private sporting tribunals as they form part of the growing business of sport.

As a member of the New Zealand Rugby Football Union Disciplinary Committee, I have had some experience from the perspective of the tribunal in the discipline of New Zealand Rugby Union players. Accordingly, I propose to examine the role of a private sporting tribunal from that perspective. I will discuss first the role of private sporting tribunals and their relationships with the courts, and second the procedure and conduct of a hearing before a sporting tribunal.

### **The role**

The role of a private sporting tribunal is to adjudicate upon disputes and impose discipline within the rules or constitution of the organisation concerned.

Tribunals can be called upon to deal with two basic issues. The first relates to administrative matters which deal with the way in which the particular sport is structured and administered, eg rules of competition including eligibility for teams or events. The second issue relates to dealing with persons who have breached the rules of the game.

The rules and procedures of the tribunal can generally be found in the constitution of the sports organisation. The form of the rules and procedures should be appropriate to the

particular sport. For example, you would not expect the disciplinary rules of a bowling or croquet club to be the same as for an organisation whose members are involved in body contact sports such as rugby and rugby league.

However, the basic disciplinary structure used should be the same. The rules should establish the tribunal and provide the jurisdiction for it to deal with complaints and disputes within the particular sport concerned. tribunals must act within the rules and also be sensitive enough to ensure that sporting practices and community standards are compatible.

A tribunal has to strike a balance between providing a prompt, practical and accessible forum for dealing with complaints and disputes and ensuring that the individual “accused” is given a fair hearing and dealt with in accordance with the principles of natural justice.

Traditionally, tribunals have comprised, in the main, lay persons who have not been expected to measure up to the substantive and procedural requirements of the public judicial system. However, at least in the body contact sports, the early procedures typified as “Kangaroo Courts” or “rough justice” have certainly been overhauled in recent years in response to the demands arising from violence on the sports field and to public expectation.

The distinction between the role of the tribunal and the role of the court should be recognised. On occasions both forums may be involved in proceedings which result from the same incident, eg an assault on the field of play. However the two systems are quite distinct and each forum is controlled by different rules. The rules and law in each are established for different purposes. Essentially the tribunal deals with private procedures which have been accepted by the participants as members of the organisation.

However, overseas there have been many examples of players who have indulged in on-field violence ending up in Court as well as having been dealt with by their sporting organisation. Some examples are:

- (i) *Rogers v Budgen* (Supreme Court of New South Wales, 14 December 1990, Lee J) in which Steve Rogers, a great international rugby league player, was awarded \$68,000 in damages as a result of a head-high tackle received in a club game (Cronulla) by Mark Budgen (Canterbury-Bankstown). Rogers had his jaw broken, which meant he could not tour England with the Kangaroos, and he also missed a significant part of his Winfield Cup season. He sued Budgen for assault and negligence and also Budgen’s club which was also found liable for the damages.
- (ii) *R v Heke* (Supreme Court of Queensland, 6 February 1992). The jury found Heke guilty of manslaughter arising out of an incident which occurred during a subdistrict game of rugby league in Brisbane. A player in the opposing team was injured and subsequently died following a head-high tackle.
- (iii) *R v Birkin* (1988) 10 Cr App R(S) 303 and *R v Shervill* (1989) 11 Cr App R(S) 284. In each case soccer players had kicked an opposing player and were convicted on a charge of assault occasioning actual bodily harm. Shervill received a sentence of imprisonment

for eight months which was reduced by the Appeal Court to six months. Birken was sentenced to eight months reduced on appeal to two months.

(iv) *R v Tevaga* [1991] 1 NZLR 296. The Court of Appeal allowed an appeal by Tevaga against his sentence of periodic detention imposed following a conviction for assault during a game of rugby. The Manawatu Rugby Football Union suspended him for eight matches as well. The Court reduced his sentence to one of community service.

(v) *Crichton v Police*, an unreported decision of Tipping J, High Court, Christchurch, AP 32/92. His Honour Mr Justice Tipping upheld the conviction of Crichton, who in a game of rugby league had grabbed an opponent by the testicles causing him considerable pain for some while and an inability to walk properly for a week or so. The act was described by the Judge as being “well outside the range of fair play. It was a deliberate piece of foul play of a particularly unpleasant kind”. His Honour however reduced the term of imprisonment from five to three months.

### Procedures

The New Zealand Rugby Football Union has developed a detailed Code of Rules for Disciplinary Hearings, known as the “Black Book”. The initiative was taken because it was apparent from appeals heard by the Disciplinary Committee against decisions of provincial unions, that the standard of documentation was poor. Many administrators were lacking in experience and expertise in dealing with disciplinary matters and there were considerable differences among unions as to the procedures used and the approach taken to the imposition of penalties.

During the period of research and preparation of the Code, it was found that there was little in the way of documented procedures available in rugby either in New Zealand or internationally. The procedures for other sporting codes were in a similar position.

I am pleased to say that generally the Code has been well received throughout rugby circles in New Zealand and overseas. The Code has been amended several times so that it is very comprehensive and easy to understand. While no doubt it is not yet perfect, it does represent a significant improvement for all parties.

As a domestic private body, the procedures of the NZRFU are not as strict as those required in a court of law. The foreword to the Code states that it is “a fundamental principle of our system of justice that anyone charged with an offence shall have a fair hearing before any decision is made”.

In the preface to the Code it states that the procedures have been devised “to ensure that firstly, disciplinary hearings will be conducted expeditiously, fairly and in compliance with the rules of natural justice”.

### The principle of natural justice

The rules of “natural justice” give protection to the accused in the following three ways:

- (i) the accused must know the nature of the charge or accusation made;
- (ii) the accused should be given an opportunity to state his or her case; and

(iii) the tribunal must act in good faith.

### 1 *Notification of charge and proceedings*

The first two of these rules mean that the accused must have a proper hearing, which must be conducted within the rules of the organisation. Before an accused can have the opportunity to state his or her case, they must know in advance the details of the actual charge or charges and the rules to which those charges relate.

It is not satisfactory to refer in a general way to the fact that the player has for example “brought the game into disrepute” unless there is some reference to the specific conduct to which such a charge relates.

The accused must be given proper notice of the hearing. The period of notice is often specified in the body’s rules and the details of that notice must be properly complied with. That is: the notice should include a time and place and date for the hearing, and full details of the charge which has been laid. It is not sufficient for one charge to be set out in a notice within the requisite period before a hearing and then for a second charge to be brought to the attention of the accused at the date of hearing.

This situation occurred in the A J Whetton hearing which was the first major test of the public citing provisions in the NZRFU Code. In his case A J Whetton was given notice of the hearing on the basis of one charge and then at the hearing he was told of another separate charge. The hearing proceeded with the consent of Mr Whetton’s lawyer because he was equipped to deal with the new charge, on the spot. However with an unrepresented accused, to proceed with a second charge notified on the day in my opinion would be a clear breach of natural justice.

While tribunals should not become entangled in the nets of legal technicalities and procedure, the importance of ensuring that the accused has adequate notice of the charges brought against him or her is fundamental to the principle of natural justice.

If the period of notice is not given in the rules, what amounts to proper notice will depend upon the circumstances of the particular case. In the Loe case, the incident occurred on a Sunday, notice of the hearing was given on the following Tuesday and the hearing took place the following Thursday. The “Black Book” does not detail a set period. The important point is that tribunals are designed to be prompt but at the same time allowing appropriate time for preparation and therefore a fair hearing.

### 2 *Opportunity to state case*

A further element of natural justice requires that the accused be given an opportunity to state his or her case. This is also known as the right to a fair and proper hearing. The right to a fair hearing requires the tribunal to ensure that the appropriate evidence is before it and that all parties are aware of that evidence.

This means that in any contentious case the referee, touch judge, umpire or judge involved in the game should be present at the hearing. Officials’ reports and medical reports must be made available to the accused, and in a contentious case it is advisable to make them available to the accused in advance of the hearing.

(i) Evidence

The rules of evidence applied in the courts are not necessarily binding on tribunals and there is often no objection to hearsay evidence in its strict sense. The NZRFU Code states “hearsay evidence, that is second-hand accounts of what occurred, and evidence not given at a hearing should not be admitted and not be considered by the Committee in reaching its decision”.

I doubt anyone would argue that a tribunal should be able to take into account evidence which it did not hear. However not everyone would agree with the NZRFU that hearsay evidence should be excluded. For some organisations, such a rule may be considered unduly legalistic. However in a sport which receives a remarkable amount of media coverage, I believe it is prudent not to admit hearsay evidence.

The tribunal must however control the evidence carefully, and give appropriate weight to the evidence put before it. The introduction of video records of an incident has greatly assisted the fact-finding role of tribunals. The traditional evidence of referees’ reports, doctors’ reports and recollections by the player is now readily susceptible to invalidation or validation. Video evidence has been used in the disciplinary hearing of the NSWRL for some time. Richard Conti QC the former Chairman of the NSWRL Judiciary Committee in an address to the 1991 Australian and New Zealand Sports Law Association Conference said:

... experience also demonstrates that video evidence is sometimes inconclusive, or indeed of no value at all, due often to the angle from which the video happened to have been operated, or because of the video’s own range of visionary operation was at least partially obscured.

In these circumstances the weight of the video evidence must be assessed in line with all the other evidence before the tribunal. The “Black Book” contains rules relating to the use of videotape evidence. Such evidence has been the basis for complaints from members of the public to the NZRFU Disciplinary Committee arising out of incidents of alleged foul play which have not been observed by the referee or linesperson during the match.

(ii) Cross-examination

Another aspect of the right to a fair hearing may include the right of cross-examination. The Court of Appeal in *Perry v Feilding Club Incorporation* [1929] NZLR 529 found that the fact that a club member whose conduct was being investigated was denied an opportunity of cross-examining witnesses was not a breach of the natural justice principle.

However the right to ask questions of witnesses may be made available. In the “Black Book” questions through the Chairman are allowed and with the increased number of accused with legal representation this has certainly been permitted.

(iii) Legal representation

A further aspect of the right to a fair hearing is the question of whether the accused may be legally represented. In some organisations this may be a requirement in the rules, and in others not mentioned at all. The Courts have generally concluded that where a case

concerns a matter of a person's livelihood and the person charged is inexperienced, a tribunal exercising its discretion will usually be wise to accede to representation. The "Black Book" provides for representation by legal counsel as a right. This right is increasingly being exercised even by players at club level.

(iv) Reasons for decision

It has been contended that it is a principle of natural justice that the accused be given reasons for the decision made by the tribunal.

While this may not, in a strict sense, affect the fair hearing, I believe it is an important part of the whole process. The "Black Book" requires brief reasons to be given initially and a written report must be given to the defendant within 48 hours of the decision.

3 *Unbiased tribunal*

The final requirement for compliance with the principle of natural justice is the right to an unbiased tribunal. Members of a tribunal must enter into a hearing with an open mind and without predetermined views or with a bias. It would be improper, for example, for an adjudicator to be the person who made the complaint or to give evidence in the proceedings. The body must be independent from the incident and the people involved, and each member must honestly be able to say that they have given the matter an objective assessment.

The "Black Book" has rules specifically prohibiting a member of any Disciplinary Committee from taking part in a case if they are a member of the same club or province as the player in the hearing.

The NZRFU decided in August last year to give its Disciplinary and Appeals Committee the power to co-opt persons with judicial/legal backgrounds. That decision was unable to be implemented until this year's AGM.

I believe the Richard Loe case has shown the wisdom in future of having such independent and trained persons available for the hearing of contentious cases involving high profile players.

As stated previously, Disciplinary Committees are generally made up of lay persons, although on occasions a local lawyer involved in the sport will serve on such committees. Lord Denning, referring to private tribunals, observed in *Enderby Town Football Club v Football Association Ltd* [1971] Ch 591:

Justice can often be done in them better by a good layman than by a bad lawyer. This is especially so in activities like football and other sports, where no points of law are likely to arise and it is all part of the proper regulation of the game.

With great respect to Lord Denning I believe that this statement has become outdated. Good lawyers are increasingly appearing on behalf of players. Lawyers citing the Bill of Rights Act 1990 can make the determination of judicial matters by a lay person very difficult. Therefore, I believe it is important for Disciplinary Committees to have the

expertise and experience of lawyers available as independent committee members in contentious and high profile cases.

### **Conclusion**

In summary, it is the role of the tribunal to ensure that the principles of natural justice are complied with. Failure to do so may result in the accused seeking judicial review of the decision. This undermines the purpose of the tribunal in the sense that at the heart of its rules is the desire to allow individuals to enjoy a particular sport.

The growth of sport as a business means that sports organisations need to set up the appropriate bodies to determine disciplinary matters in an environment where justice can be done. The tribunals then need to ensure that the principles of natural justice are complied with so that any disciplinary action is able to be implemented quickly, and is of a form which is appropriate to the specific sport. The ultimate role of the tribunal is to ensure that the practice of the particular game or pastime can continue in an appropriate and proper manner.