

BETWEEN **SCOTT COLUMB**
 Appellant

AND **MOTORCYCLING NEW ZEALAND**
 Respondent

AND **HAMISH HARWOOD**
 First Interested Party

AND **JOSIAH NATZKE**
 Second Interested Party

**DECISION OF SPORTS TRIBUNAL
DATED 9 SEPTEMBER 2016**

Tribunal: Sir Bruce Robertson (Chairperson)
 Dr Jim Farmer QC
 Ron Cheatley

Hearing: 9 September 2016 by telephone conference

Present: Scott Columb, Appellant
 Andrew McCormick, counsel for Appellant
 Vicky Hicks, Howard Lilly and Neil Ritchie, Motorcycling New
 Zealand
 Nigel Stirling and Richard Gordon, counsel for Respondent
 Hamish Harwood, First Interested Party
 Josiah Natzke, Second Interested Party
 Denis Columb and Michael McLeod, in support of Appellant
 Karl Brabant, in support of Hamish Harwood
 Janine Natzke and Tom Young, in support of Josiah Natzke

Registrar: Megan Lee-Joe

INTRODUCTION

1. Scott Columb appealed the decision of Motorcycling New Zealand (MNZ) not to select him as a member of the New Zealand team to compete in the Motocross of Nations Event (MXoN) to be held in Maggiora, Italy on 24 and 25 September 2016. The annual MXoN is of special importance to the motocross community and is known as the "Olympics of Motocross".
2. MNZ's Constitution enables MNZ to refer matters to the Tribunal for determination but there is no express right of appeal to the Tribunal for selection matters in its Constitution, selection policy or other rules. To its credit, at Mr Columb's request, MNZ agreed to the Tribunal having jurisdiction to determine this appeal. The parties were also supportive of an abbreviated timetable to enable a prompt hearing of the appeal given the proximity of the MXoN and logistical requirements involved. This decision is provided within ten days of the initial filing of the appeal as the event is to be held in a fortnight.
3. The selected MXoN team consists of three riders – Cody Cooper, Josiah Natzke and Hamish Harwood. Mr Columb accepted Mr Cooper's selection on the basis of his better ranking and results at the relevant selection events. Mr Columb also did not object to Mr Natzke's selection on the basis that he has performed well on the European circuit and is an up and coming rider of great promise.
4. The focus of his appeal was therefore Mr Harwood's selection ahead of himself based on ranking and results. Messrs Natzke and Harwood were joined as interested parties to this proceeding, both provided written statements, and were present at the hearing.

SELECTION CRITERIA

5. MNZ's selection criteria for the 2016 MXoN team (Selection Criteria) were identified in its selection policy "Motorcycling New Zealand Selection Criteria 2016 Motocross of Nations" as:
 1. Placement in the top five of the Selection Events namely:
 - (a) 2016 New Zealand Senior Motocross Championship
 - (b) 2015/16 Major Senior MNZ permitted events
 - (c) 2015 Motocross of Nations
 - (d) Consideration to be given to competitors who have performed outside the above events and have achieved success at the highest level;
 2. Consideration to be given to "development riders" being those riders who were competitive at the listed selection events although not within the top 5.

6. In addition, MNZ notified its General Selection Criteria (in no particular order of priority) on its website as:
 - (a) Age of rider where there is a restriction
 - (b) Availability and desire
 - (c) Rider availability, current National rankings
 - (d) Financial ability to travel
 - (e) Rider conduct
 - (f) Potential for future return
 - (g) Team compatibility.
7. The guidelines in MNZ's selection policy referenced the use of General Selection criteria to support its selection decisions. It also provided that the final selection was at the sole discretion of the selectors.

GROUND OF APPEAL

8. The grounds of appeal relied upon were those set out in Rule 42(e)(i) and (iv) of the Rules of the Sports Tribunal of New Zealand 2012:
 - (a) the applicable Selection Criteria have not been properly followed and/or implemented; and
 - (b) there was no material on which the selection decision could reasonably be based.
9. Mr Columb is 32 years old and has been competing in World Cup and Championship events since 2004 and won a number of motocross and supercross national titles. He competed in the MXoN in 2008, 2009 and as team captain together with Mr Harwood in 2014.
10. In the relevant selection events, Mr Columb submitted his results have been superior to Mr Harwood's:
 - (a) At the 2016 MX1 New Zealand Motocross Championships he placed 4th behind Cody Cooper and two international riders. Mr Harwood placed 6th. Mr Columb beat Mr Harwood in nine out of the ten races during these national championships.
 - (b) At the 2015 MX1 New Zealand Motocross Championships Mr Columb placed 6th and was the only rider to beat Mr Cooper, the eventual winner. Mr Harwood competed in his specialty event MX2 at this event.
11. Since December 2015, Mr Columb said he has placed higher than Mr Harwood at five out of six events and beaten him a total of 16 times out

of 20 races. They both were part of the 2014 New Zealand MXoN team. At this event, Mr Columb finished 7th in the B final despite a crash, compared with Mr Harwood's position of 22nd also in the B final.

12. Aside from Mr Columb's results under the Selection Criteria, Mr McCormick submitted that Mr Columb satisfied the General Selection Criteria with the possible exception of "potential for future return" because of his age. However, it was emphasised that Mr Columb's age in itself was not a restriction to his ability to compete at this level. A reference commending Mr Columb's conduct and team compatibility at the 2008 and 2009 MXoN from the New Zealand team manager at those events, Michael McLeod, was filed the evening before the hearing.
13. Another factor which Mr McCormick asserted should have been taken into account by the selectors was the "steep, hilly and technical" nature of the 2016 MXoN course and the experience and suitability of the riders for this course. In Mr Columb's view, it would be advantageous to ride the more powerful 450cc motorbike in this MX1 event to better secure a good start and position for racing. Mr Columb said he had much greater experience and success racing on 450cc motorbikes than Mr Harwood whom he understood would likely ride a 350cc motorbike at the MXoN event.

RESPONSE FROM MNZ AND INTERESTED PARTIES

14. MNZ filed statements from both the selectors for the MXoN team and its General Manager Operations. The views of Messrs Harwood and Josiah were also presented in writing to the Tribunal.
15. The different MXoN classes and the format for the MXoN race was helpfully set out for the Tribunal by the MNZ General Manager Operations.
16. The MNZ selectors received applications from seven riders, two of whom were subsequently not considered for selection due to injury or lack of experience at the international level. The selectors acknowledged that, apart from Mr Cooper who stood out as the top candidate, it was a difficult decision between the other four riders whom to select for the other two berths. They therefore went to considerable effort including interviewing every rider, obtaining input from each of the riders' national and international race team managers and MNZ team managers for recent MXoN campaigns. Specific inquiries were not made of Mr McLeod as the selectors focussed on more recent performances.
17. Each rider's performances at the relevant selection events were considered – not just the results but also the circumstances behind each performance. The selectors took into account the performance effects of

Mr Harwood having ridden in both the MX1 and MX2 classes in those events. The selectors also gave consideration to successful performances by riders at other international events and especially in the months since the end of the New Zealand season. It was also emphasised by the selectors that, unlike Mr Columb, all three selected riders will have the advantage of having their factory team bike and mechanic at the MXoN event.

18. The conclusion the selectors reached having gone through an assessment of the Selection Criteria and taking into account all the circumstances was there was "only the smallest of differences between the riders". They then turned to the General Selection Criteria as matters within their discretion. Their assessment of each of the riders was usefully provided to the Tribunal under the following headings:
 - (a) Availability and desire
 - (b) Rider ability and current national rankings
 - (c) Financial ability to travel
 - (d) Rider Conduct and team compatibility
 - (e) Potential for future return
 - (f) Other factors.
19. The evaluation of the selectors, having made inquiries of other persons noted earlier, was finely balanced but ultimately a less favourable assessment was formed of Mr Columb's potential contribution to the New Zealand team's ability to achieve the best result at the MXoN compared with the other riders taking into account a number of factors.
20. We noted the selectors put forward an initial selection of three riders (which did not include Mr Columb) to the MNZ Board and subsequently changed their decision but provided detailed reasons to the Board based on a number of relevant factors.
21. Mr Harwood addressed his performances in the MX1 class at the selection events and the 2014 MXoN event. He also provided evidence as to his experience on a 450cc motorbike which he and the selectors acknowledged he would be riding at the 2016 MXoN.
22. Mr Natzke's statement outlined his successful performances as a professional full-time motocross racer on the European Motocross Championship events.

Decision

23. This is a classic case of several competent and eligible athletes who could have properly been in the team but there has to be a selection made among them. It is common ground that Mr Cooper was the leading contender once Ben Townley had to withdraw because of injury. There were, in the final analysis, four strong contenders for two places.
24. The selectors (who had an impressive track record of experience in the sport) clearly undertook their task in a professional and objective manner. As is so often the case in a small sport the people were not merely known to each other but there were close personal relationships. After some chopping and changing the selectors decided on Mr Natzke and Mr Harwood. By the time the Tribunal was asked to consider the matter there was not a challenge to the selection of Mr Natzke and no-one else who had initially been in contention required further consideration. Mr Columb's challenge was to the selection of Mr Harwood ahead of himself.
25. Having carefully considered the written material, the oral evidence arising from cross examination and the submissions of counsel we are satisfied that the selection criteria were properly recognised and applied in all the circumstances. These, although referring to performance which naturally had to be assessed and evaluated, included a number of discretionary factors. The particular weight to be given to individual matters is by the nature of a selection process an issue for the selectors to consider. The appellant did not persuade us that any relevant matter had been overlooked or that their process had been infected by irrelevant considerations.
26. Although Mr Columb had a strong case for selection it could not be concluded that the selection of Mr Harwood ahead of him was not an available option when the selection process was properly carried out. The selectors clearly considered what had happened up to the end of the New Zealand season including the history of the potential participants and not unreasonably also looked at the most recent six months during which Mr Harwood has been competing regularly on an Australian circuit with success and which the selectors considered indicated he would be race ready for the Event.
27. We heard a great deal during the telephone conference about team compatibility but when all relevant material is assessed we are not persuaded this was a critical factor in the actual selection process.

28. Accordingly, the appellant has not been able to demonstrate that the course of action adopted was not reasonably available and the appeal cannot succeed.

Dated 9 September 2016



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Sir Bruce Robertson
Chairperson