BEFORE THE SPORTS TRIBUNAL
OF NEW ZEALAND **ST 03/15**

BETWEEN **ZAC QUICKENDEN**

Appellant

AND **CANOE RACING NEW ZEALAND**

Respondent

REASONS FOR DECISION OF SPORTS TRIBUNAL

23 April 2015

Tribunal: Sir Bruce Robertson (Chairperson)
Chantal Brunner
Ron Cheatley

Hearing: 7.30 pm on 21 April 2015 by teleconference

Present: Nicola Graham, counsel for Appellant
Zac Quickenden, Appellant
Paul David QC, Maria Clarke and Shaun Maloney, counsel for Respondent
Mark Weatherall, CEO, Canoe Racing New Zealand

Registrar: Brent Ellis

Proceedings and Decision of the Sports Tribunal

1. Zac Quickenden wanted to appeal against the decision of Canoe Racing New Zealand (CRNZ) "to not proceed" with sending a men's K2 team to the 2015 World Cups as had been recommended by the CRNZ selectors and his non-selection in such a crew.

2. We heard a challenge by CRNZ that the appeal could not be entertained because of a lack of jurisdiction as a matter of extreme urgency on the evening of 21 April.

3. We upheld that challenge that evening. We now provide reasons for our decision.

Background

4. The Open Sprint Selection Policy (2015 Season) of CRNZ relevantly provides:

> ***8. Appeals***
>
> *8.1 An athlete may lodge an appeal against their non-selection ("Appellant") to a team in accordance with clause 8.2 of this Policy on one or more of the following grounds (but no other grounds):*
>
> *a. this policy has not been properly followed and/or implemented;*
>
> *b. this Appellant was not afforded a reasonable opportunity to satisfy the requirements in this Policy;*
>
> *c. the decision not to select the Appellant was affected by actual bias; and or*
>
> *d. there is no material on which the selection decision could reasonably be based.*

8.2 Any appeal must be made as follows:

a. the athlete must notify the Chief Executive in writing of their wish to appeal the decision within 48 hours from the date the non-selection was notified to the Athlete, or the Team was publicly announced (whichever is the earlier);

b. on receipt of such notice the Chief Executive shall, as soon as practicable, convene a confidential and "without prejudice" meeting between the Chief Executive, as many of members of the applicable Selection Panel as are available, the Athlete, and the Athlete's authorised representative (if any). The purpose of the meeting is to allow the Selection Panels to explain the selection decision and see whether the matter can be resolved by agreement;

c. if the appeal is unresolved after the process in clause 8.2b is followed, the Athlete may appeal directly to the Sports Tribunal provided that any notice of the appeal has been given in writing to the Chief Executive within 48 hours after the conclusion of the meeting in clause 8.2b; and

d. there is no further right of appeal from any decision of the Sports Tribunal.

5. On Wednesday 18 March the NZ Team for the World Cups was announced by a press release at 5.23 pm. It did not include a Men's K2. All athletes seeking selection for that class were advised by text that a "decision on K2 had not yet been decided."

6. On Friday 20 March between 10am and noon all athletes involved, including Mr Quickenden, were advised by telephone that it had been decided that no K2 boat would be sent.

7. The factual position thereafter was helpfully detailed by CRNZ in its submissions:

- *Mr Quickenden sent an email to Mr Weatherall, CEO at 1.28 pm the same day (Friday 20 March) in which he stated that "after been given official notification about the non-selection of the men's K2 crew, I hereby place an appeal in accordance with the selection policy".*

- *Mr Weatherall informed Mr Quickenden by email at 2.54 pm on 23 March that no crew had been selected and that his appeal must fit within the Selection Policy.*

- *Mr Quickenden replied by email at 1.49 pm on 24 March stating that "my appeal must stand as it is against "non-selection" as an athlete" and that his "appeal would be based on one or more of the reasons listed" in clause 8.1 of the Selection Policy.*

- *By email on 30 March, Mr Weatherall proposed a without prejudice meeting with Mr Quickenden and his representatives in terms of clause 8.2b of the Selection Policy to be held on Wednesday 1 April at 8.30 am by telephone. This was agreed to by Ms Graham (counsel for Mr Quickenden) by letter of 31 March 2015.*

- *The without prejudice meeting was held as scheduled on 1 April 2015. It was attended by CRNZ CEO, the selectors, Mr Quickenden and his counsel Ms Graham.*

- *At the meeting it was agreed that the selectors would review their decision and inform Mr Quickenden of the outcome of that review as soon as practicable. It was agreed that the time period for the giving of notice of an appeal to the Sports Tribunal under clause 8.2c would start when he received the selectors' review of the decision, and not from the conclusion of the meeting, as stated in the Policy.*

- *This agreed change was confirmed by Ms Clarke (counsel for CRNZ) with Mr Quickenden by email to his counsel, Ms Graham, on Thursday 2 April at 5.49 pm. No reply was received to that email.*

- *By email dated Thursday 9 April 2015, at 5.26 pm, the decision of the selectors confirming their original decision was sent to Mr Quickenden's counsel. The letter stated that "any appeal rights you are entitled to are set out in the CRNZ Open Sprint Selection Policy. As agreed at the meeting, any such appeal rights must be made within 48 hours of you receiving this letter".*

- *By email at 2.40 pm on Monday 13 April 2015, Ms Graham served Notice of Appeal (Form 4) on Ms Clarke. There was no notice given before this time that an appeal to the Tribunal would be made.*

8. There was no substantive dispute about this factual summary.

Submissions of parties

9. CRNZ submitted that the failure to give notice within 48 hours means there is no jurisdiction for the Sports Tribunal to consider the proposed appeal. The words are clear, are unequivocal and mean what they say was the core of CRNZ's submission.

10. In response Ms Graham, for Mr Quickenden, relevantly stressed:

> *The Policy then provides that on the receipt of this notice the Chief Executive shall, as soon as practicable, convene a confidential and without prejudice meeting. This meeting took place on 1 April 2015 (12 days later). I attended that meeting with Mr Quickenden and the respondent was advised that I was now acting as his representative.*
>
> *At the meeting on 1 April 2015 (the contents of which were advised by the respondent to be confidential and without prejudice) the respondent advised that they wanted some time to consider a potential resolution to the appeal that had been put forward by the appellant. It was therefore agreed that the time period in the Policy would not begin until the respondent advised their position.*

An email was received at 5.26 pm on Thursday 9 April 2015 (eight days later) advising that the respondent stood by their original decision. Due to work commitments I was not in a position to take full instructions from Mr Quickenden the following day (Friday). Following my return to work on Monday 13 April 2015 I was able to confirm instructions and prepare the notice of appeal for filing with the Sports Tribunal. It was served on the respondent at the same time.

11. The issue was whatever may appear to be the fairness, equity, common sense or reasonableness of the CRNZ approach, could we entertain the appeal?

12. CRNZ emphasised the need for certainty in a short time period and rejected the suggestion that it had taken almost three weeks to reach a final decision notwithstanding the strictures in clause 8.2 of the Policy.

13. CRNZ submitted there was no relevance in the fact that on 29 April it will be engaged in an appeal by another rower relating to the same episode. CRNZ contended that it did not matter that Mr Quickenden could have his day in court with little or no additional effort than will have to occur next week anyway in hearing the other appeal.

14. Ms Graham argued it was "simply petty" to take this point when CRNZ knew Mr Quickenden was represented by counsel, that he wanted to appeal and it was unfair to seek to deny him that right because there was not a written notification by 5.26 pm on a Saturday afternoon.

Discussion

15. There is no power in the CRNZ Selection Policy for the Tribunal to grant extensions of time. There is no reference as to how the computation of 48 hours is to occur with regard to weekends, public holidays or the like.

16. We have looked at the comprehensive article by Professor Urlich Haas on *The "Time Limit for Appeal" in Arbitration Proceedings before the Court of*

Arbitration for Sport (CAS) (CAS Bulletin 2/2011, pp 4-18) which emphasises the competing interests in these sorts of cases.

17. CRNZ emphasised that the selection policy was the deal or contract between CRNZ and its athletes but we accept that it is unrealistic to suggest that there is equal bargaining power. The policy is created by CRNZ. An athlete has no option but to sign up to it or they cannot participate.

18. The provisions of clauses 8.2(b) and (c) were modified in this case to meet the particular circumstances in two respects. First with the time taken in convening the meeting and secondly the delay in delivering a decision for eight days after the conclusion of the meeting. Just as happened with those aspects, the parties could have mutually agreed to accept the notice given immediately after the weekend on Monday 13 April, as founding our ability to consider the merits of the case. CRNZ was not interested in doing so.

19. It was accepted that if Mr Quickenden had given written notice to the Chief Executive by 5.23 pm on Saturday but delayed initiating the appeal to the Tribunal for some days, there would be no ground for CRNZ to complain. The fact that Mr Quickenden took both steps (giving notice and commencing the appeal) on the first working day after the weekend, which had the potential for certainty to be achieved in a more timely way, was of no interest to CRNZ.

20. There was an understandable mistake made as to the calculation of the 48 hours. CRNZ determined to take advantage of that error although it could have accepted a modification of the time frame just as all the parties did on the time at which a result of the meeting had to be advised.

21. Although we cannot discern any rationale for the absolutist approach adopted by CRNZ, we regrettably must conclude that the second notice was not given within 48 hours. Ms Graham's endeavour to imply into the plain words of the contract the Interpretation Act 1999 provisions relating to the computing of days cannot assist her. This is a private contract, not a statute. The principle we noted in *Jarrod Mudford v New Zealand*

*Shooting Federation and New Zealand Olympic Committee (*SDT 05/06, reasons for decision 28 February 2006) must apply. The parties can allow for a mistake but we cannot require them to do so.

22. It is a sad day for sport when circumstances like this arise and a 20 year old is left without an opportunity to air his grievance. However we have no power or even discretion to provide a remedy when we are without jurisdiction. The appeal had to be struck out.

23. It would have been much better for everyone if we could have assessed and evaluated the circumstances. Taking advantage of a simple error with no real consequences flowing from it is unhelpful. The way CRNZ has drawn up the policy meant it had the whip hand and it was able to insist on absolute compliance with the letter of the law in its contract.

Dated 23 April 2015

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Sir Bruce Robertson (Chair)