

BETWEEN DARRYL FITZGERALD

Appellant

AND CANOE RACING NEW ZEALAND

Respondent

AND ZAC FRANICH

Interested Party

REASONS FOR DECISION OF SPORTS TRIBUNAL

4 May 2015

Tribunal: Sir Bruce Robertson (Chairperson)
Chantal Brunner

Hearing: 29 April 2015 in Auckland

Present: Liam Collins, counsel for Appellant
Darryl Fitzgerald, Appellant
Paul David QC, Maria Clarke and Shaun Maloney, counsel for
Respondent
Mark Weatherall, CEO, Canoe Racing New Zealand (CRNZ)
Grant Restall, High Performance Manager, CRNZ
Steve Richards, Selector, CRNZ
Peter Dallimore, Chairperson, CRNZ Board
Zac Franich, Interested Party
Wayne Franich, in support of Zac Franich

Registrar: Brent Ellis

Proceedings and Decision of the Sports Tribunal

1. Darryl Fitzgerald appealed against a decision of Canoe Racing New Zealand (CRNZ) not to send a Men's K2 1000 boat to the forthcoming World Cup series regattas. There was an initial management conference by telephone on 18 April 2015 when procedural directions were given by the Chairperson of the Tribunal. Statements were filed by all substantially involved in the case including: Darryl Fitzgerald, Mark Weatherall, Grant Restall, Steve Richards, John Trotter, Peter Dallimore and Zac Franich.
2. An urgent in person hearing was convened in Auckland on Wednesday 29 April 2015 the Tribunal being Sir Bruce Robertson, Alan Galbraith QC and Chantal Brunner.
3. Having heard the opening submissions for the appellant and some oral testimony from Mr Fitzgerald, the Tribunal raised issues as to what was anticipated to be achieved by the hearing and what outcomes might be either available or appropriate.
4. Following the lunch adjournment, the Tribunal was informed that there was a willingness to enter into immediate mediation notwithstanding that a similar suggestion the previous weekend had not been taken up. It was agreed that Mr Galbraith would conduct the mediation. The hearing was adjourned to enable the mediation to occur.
5. After an hour or so the Tribunal was informed that there had been no progress and the hearing would have to proceed. Mr Galbraith advised that he would recuse himself. Because of the time constraints, and the presence of all relevant parties in Auckland from around New Zealand, the Chairperson ruled that the Tribunal would sit as a panel of two.
6. Full oral submissions were presented. After retiring, and mindful of the time sensitive nature of the matters under consideration, the Tribunal announced that the appeal could not succeed and was accordingly dismissed. In the circumstances it said that reasons would be given as soon as possible. We now provide reasons for our decision.

Background and Submissions of parties

7. The 2015 Canoe Racing New Zealand Open Sprint Policy sets out in 8.1 the grounds for appeal:

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. The grounds of appeal identified in the Form 3 Notice of Appeal filed were:

Pursuant to Cl 8.1 (a)-(d) – the Selection Policy was not properly followed and/or implemented; and/or there is no material on which the selection decision could be reasonably based (CRNZ Selection Policy); natural justice was denied (Rule 42(a) Sports Tribunal's Rules).

9. There was at the time of the management conference the possibility of an issue of jurisdiction but that did not materialise.

10. The response in the Form 5 Statement of Defence from CRNZ was:

CRNZ conducted a selection process in order to determine whether a K2 pair could be selected to form a crew which would in the opinion of the CRNZ selectors meet the performance criteria for selection at the World Cup Regattas.

[In its submissions to the Tribunal, CRNZ advised that at the NZ Nationals no world class times which would meet the selection standards were recorded by any Men's K2 crews. CRNZ decided to run an additional K2 trial to see whether a more competitive boat could be found. To that end]... *the selectors conducted trials as part of that selection process involving 5 paddlers. After assessing the results of the trials the selectors determined that they would select a pair of paddlers for the K2 boat – Darryl Fitzgerald and Zac Franich.*

CRNZ was concerned to have confirmation that Mr Fitzgerald would commit to paddle with Mr Franich in the selected K2 pair and to the training plan required to prepare for the World Cup Regattas.

CRNZ contacted Mr Fitzgerald and sought this confirmation. The responses from Mr Fitzgerald were to the effect that he was not prepared to confirm his commitment to Mr Franich in the K2 as selected and the training plan before any appeal by any other non-selected athlete had been heard and determined.

As a result of Mr Fitzgerald's responses CRNZ decided that it would not send a K2 boat to the World Cup Regattas.

In so far as it is relevant on this appeal, CRNZ acted promptly in accordance with its selection criteria in choosing the K2 pair of Mr Fitzgerald and Mr Franich after the trials.

CRNZ acted properly under the selection criteria by its selectors, High Performance Manager and CEO in deciding to obtain confirmation from Mr Fitzgerald that he would commit to paddling with Mr Franich in the selected K2 Pair and to the training plan.

The responses given by Mr Fitzgerald to the CRNZ requests provided a basis upon which it was reasonable for CRNZ to decide not to send the K2 boat to the World Cup.

Any obligation of natural justice or due process owed to Mr Fitzgerald did not require CRNZ to delay any decision on whether to send the K2 boat until an appeal by a non-selected athlete had been heard and determined (at which time Mr Fitzgerald would be prepared to indicate his commitment or otherwise to paddle in the K2 with Mr Franich).

CRNZ acted properly in accordance with its express or implied obligations under the policy in deciding not to send the K2 boat to the World Cup Regattas.

11. A large amount of material was filed including substantial amounts of email traffic between various actors during March. Much of this was not directly relevant to the critical matters requiring adjudication but was useful background.
12. Mr Collins summarised the appellant's case in this way:

Mr Fitzgerald had been recommended for selection in the K2 crew by the CRNZ selectors;

This K2 crew would travel as part of the New Zealand team to the World Cup series regattas in Europe in May 2015;

Mr Fitzgerald was identified as the first choice athlete in the K2 crew, and "needed to be consulted before the crew was formalised";

CRNZ referred to Mr Fitzgerald as having been selected (it was on this basis that CRNZ subsequently advised Mr Fitzgerald of their view he did not have a right to appeal);

Mr Fitzgerald had and gave his opinion that another athlete (Mr Zac Quickenden) was a better crew option than the selectors' choice (Mr Zac Franich);

Mr Fitzgerald also raised concerns about the proposed tour plan and lack of coaching for the K2 crew;

CRNZ required Mr Fitzgerald to demonstrate that he was "100% committed to the crew, the training and the coaching + management set up around this boat";

CRNZ gave a deadline for this undertaking;

In his own words Mr Fitzgerald confirmed to CRNZ that he wished to be selected for the K2 crew;

Mr Fitzgerald confirmed to CRNZ that he would be committed to any fairly selected crew but felt unable to give the undertaking CRNZ required until all due process had been followed and any appeals resolved;

Mr Fitzgerald had reminded CRNZ that he had been a New Zealand representative in the sport since 2007, that he was a finalist at the 2012 London Olympic Games, and that he had never been subject to any disciplinary proceedings or complaints – in short, he was 100 percent committed to CRNZ and the team;

Mr Fitzgerald advised that he would continue to follow all CRNZ regulations and policies;

These responses were deemed insufficient by CRNZ, who made and announced the decision not to select any K2 crew.

13. In our view of critical importance were the circumstances which developed between 16 and 20 March. When on Monday 16 March Grant Restall, the High Performance Manager, advised Mr Fitzgerald that he was to be part of a team with Mr Franich there was an immediate response that he considered Zac Quickenden would be a better partner for him. We need not traverse the detail of the interactions throughout the week but Mr Fitzgerald was constantly and consistently advised that the team had been selected and that Mr Quickenden was not in it.
14. Mr Fitzgerald's inability or unwillingness to commit as required until Mr Quickenden had an opportunity to appeal his non-selection became the stumbling block. He was adamant.

15. On 18 March Mark Weatherall the CEO could not have made the position clearer when he said:

CRNZ has supported the selection of a Men's K2 1000m – the crew selected is Zac Franich and yourself. Grant has clearly outlined that the best crew has been selected. This was again clarified after your questions around Zac Quickenden's involvement. Should you not wish to take up your seat in the boat that is your decision. You will note this boat has not been formally announced because of the ongoing challenges. We however have moved to name the wider team as per the timelines in the 2015 Selection Policy. With this in mind and in fairness to the other four paddlers who trialled I would like to give you until 3.00 pm Thursday 19 March 2015 to make your decision as to whether you would like to take up your seat in the K2 1000. If it is a yes then Zac Franich would be your partner and you would need to demonstrate to Grant and myself that you are 100% committed to the crew, the training and coaching and management set up around this boat.

16. Mr Fitzgerald continued to equivocate.

17. Mr Weatherall communicated again:

...therefore please let me know by 3 pm today should you wish to take the seat in the boat. If the answer is yes we will need to be confident that you are 100% supportive of the plan as outlined by Grant on Monday in particular coaching, training and support to your selected partner.

18. To which Mr Fitzgerald responded:

I have ... followed all team management directions... I have been an exemplary team member and 100% committed to the team. After all due processes have been followed I will continue to follow CRNZ policies and regulations.

19. Mr Weatherall sent an email later in the day asking:

Are you able to confirm if you are prepared to be considered for NZ team selection as outlined below (paddling with Zac F). I am not sure if that was a yes or no after reading your email below.

20. Mr Fitzgerald responded by email:

I have taken legal advice and I feel it is in my best interests to confirm my interest in being selected for the K2.

However, while likely appeals are pending around this K2 selection I cannot confirm nor deny my interest in being involved with the plan outlined by Grant Restall until these appeals have been resolved and due process has been followed.

21. After full consultation between the selectors, CEO and the CRNZ Board the decision was taken to not send a Men's K2 1000 to the World Cup Regattas.

Discussion

22. The appeal to the Tribunal is not an opportunity for us to put ourselves in the shoes of CRNZ to assess anew the merits of the matter. We must be satisfied that decisions have been taken in terms of the policy in a fair and rational manner. No evidence emerged before us of any lack of a reasonable opportunity to satisfy the requirements in the policy nor was there any suggestion of, let alone evidence of, actual bias.
23. It was not demonstrated to us that the policy had not been sensibly, sensitively and sympathetically followed.
24. Rather than there being no material on which the decision of CRNZ could reasonably be based there was an available rationale for its position.
25. Had there been material suggesting perversity, capriciousness or fundamental unfairness the Tribunal would have had to carefully consider that and its potential effect on CRNZ's decision making. None existed. There was a clear scenario which supported and justified the eventual

decision taken after the ongoing and persistent stance of Mr Fitzgerald. The material before us suggested and alluded to reasons for and influences upon the Appellant's position but they are irrelevant to our inquiry. On an independent and objective assessment of the acts and omissions of the critical five days there was a solid foundation for the decision taken and no basis for our intervention.

26. In light of the constraints which emerged because the team as a whole was due to leave NZ within days, interesting possibilities were floated as to remedy and reaction if there had been a basis to allow the appeal. It is not helpful for us to speculate on matters which do not arise and which were only partially developed in the hearing before us.

Dated 4 May 2015



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Sir Bruce Robertson (Chair)