

BETWEEN **SARA WINTHER (ST 04/16)**
 Appellant

AND **YACHTING NEW ZEALAND**
 Respondent

AND **NEW ZEALAND OLYMPIC COMMITTEE**
 Interested Party

BETWEEN **NATALIA KOSINSKA (ST05/16)**
 Appellant

AND **YACHTING NEW ZEALAND**
 Respondent

AND **NEW ZEALAND OLYMPIC COMMITTEE**
 Interested Party

**REASONS FOR DECISION OF SPORTS TRIBUNAL
DATED 1 June 2016**

Hearing: 30 May 2016 in Auckland

Tribunal: Sir Bruce Robertson, Chairperson (sitting alone at the
request of, and with the consent of, all parties)

Present: Sara Winther, Appellant (ST 04/16)
 Natalia Kosinska, Appellant (ST05/16)
 Aaron Lloyd, counsel for Sara Winther and Natalia Kosinska
 David Abercrombie and Terry Nicholas, Yachting New
 Zealand
 John Rooney and Ashton Welsh, counsel for Respondent

Registrar: Megan Lee-Joe

Introduction

1. On 20 May 2016, each of the appellants filed appeals to the Sports Tribunal against their non nomination to the New Zealand Olympic Committee (NZOC) to be members of the Yachting team attending the forthcoming Olympics in Rio. Their cases had differences in the factual circumstances but there were sufficient similarities in the high level issues applicable to both parties that they should be treated together.
2. I convened an initial telephone conference on 24 May and of relevance now made orders.
 1. *Each Appellant is to file and serve all documentation for her appeal by 5pm on Thursday 26 May 2016.*
 - (a) *The Respondent is to file and serve any further documentation in response by 11am on Monday 30 May 2016.*
 - (b) *A mediation / directions conference will be held with the Tribunal Chairperson at 4pm on Monday 30 May 2016 at the offices of Yachting New Zealand.*
 - (c) *If the matter is not resolved by mediation, the Tribunal Chairperson will set the matter down for a hearing as soon as may be possible.*
 2. *It was noted that Tara Pryor will make inquiries with World Sailing as to an extension of time for confirming the quota allocation for Yachting New Zealand at the Rio Olympics.*
3. I had taken steps immediately to have a Tribunal panel available at the first available opportunity to conduct a formal hearing. This was in place for 9.30am on Friday 3 June 2016. Meantime we learnt that the international bodies had confirmed that there could be no extension of the deadline of 1 June 2016 (UK time) within which New Zealand was required to confirm whether it would take up all the 10 slots which it had achieved for the games. This created major problems. Although maintaining our country's integrity and reliability internationally was important, so was providing the sailors with a meaningful application of the right of appeal to the Sports Tribunal which they were entitled to exercise. The NZOC was sensitive to and sensible about finding a proper and just balance.

4. Although there was some slippage in the timetable requirements, necessary material was available when the group convened on 30 May. By then I had taken further preliminary steps in the hope that a Tribunal panel could be available for the evening of 1 June. Due to member availability it would have needed to include me which limited what I could do on the 30th by way of preparation or in mediation.
5. We initially discussed the time factors and their implications. Mr Lloyd for the two appellants suggested that all parties should agree to my conducting a binding arbitral exercise there and then so that a final outcome was immediately available. Although initially unsettled at the suggestion, Yachting New Zealand (YNZ) after consultation amongst themselves embraced the proposition and consensually I proceeded immediately to hear everything the parties directly, and their lawyers, wanted to advance. No restrictions were applied although the lawyers chived each other from time to time as to some aspects. I was clear that everyone should be able to have a full and unrestrained opportunity to tell their story.
6. The process extended over many hours and at the conclusion I informed the parties that I was in no doubt but that the appeals could not succeed but that I would subsequently review the critical factors I had assessed although not in a lengthy footnoted document. This I now do.

Selection Policy

7. The relevant YNZ selection policy is set out in a document titled "Yachting New Zealand 2016 Rio Olympic Games Olympic Selection and Nomination Policy". The relevant provisions of this policy are:

- 1. Goal**

The overriding goal of this Olympic Selection and Nomination Policy (Policy) is to assist Yachting New Zealand Incorporated (YNZ) to select for nomination to the New Zealand Olympic Committee (NZOC), those sailors / teams of sailors who are likely to win medals at the 2016 Rio Olympic Games.

2. Policy

YNZ will nominate to the NZOC those sailors they consider to have the best medal prospects at the 2016 Rio Olympic Games. YNZ also reserves the right to nominate to the NZOC, those outstanding sailors YNZ considers to have good medal prospects at the 2020 Tokyo Olympic Games, provided that those sailors shall still meet the NZOC Selection Policy, including, but not limited to, being capable of achieving a top 16 performance at the Rio Olympic Games.

5. Eligibility for Nomination by YNZ

5.1 Must meet Eligibility Criteria: *In order to be nominated by YNZ, sailors must first meet the eligibility criteria outlined in this clause 5.*

5.3 YNZ Criteria: *In addition to the requirements set out in clauses 5.1 and 5.2, to be eligible for nomination by YNZ sailors must:*

- (a) be actively campaigning in highly competitive international regattas (such as World and European Championships and ISAF World Cup regattas) between 1 September 2014 and 1 May 2016 (inclusive), considered by the YNZOC as suitable preparation for competition in the class they intend to sail in at the 2016 Rio Olympic Games; and*
- (b) have signalled their intention to compete by completing the YNZ Intention to Compete Form (attached), which must be delivered to YNZ by 1 March 2015 (or such other date as YNZ determines) and which must be acknowledged by YNZ; and*
- (c) have finished in the top ten places in at least one Olympic Class World Championship event in the period between 1 September 2014 to 1 May 2016 (inclusive) in the class they intend to sail in at the 2016 Olympic Games.*

5.4 Alternative YNZ Criteria: *Notwithstanding clause 5.3 above, the YNZOC may deem any sailor eligible that it, in its sole and absolute discretion, considers has the potential to win a medal at the 2016 Rio or 2020 Toyko Olympic Games.*

5.5 Notification: *The YNZOC will endeavour to notify those sailors that have satisfied the eligibility criteria within eight weeks of the sailor meeting such eligibility criteria, and that they may now be considered for selection and then for nomination to NZOC.*

5.6 No Guarantee: *It should be noted that meeting the eligibility criteria in clause 5, and receiving notification pursuant to clause 5.5, will not guarantee selection by YNZ for nomination to NZOC.*

The factual background

8. Ms Winther and Ms Kosinska are both experienced sailors who qualified 2016 Olympic berths for New Zealand in their respective Women's Laser Radial and RS:X Windsurfing Classes at the September 2014 World Championships in Santander. New Zealand was one of only three countries to qualify all ten classes at this event.
9. Both sailors have been unable to achieve a top ten place in a World Championship Event at a nominated selection regatta in the timeframe specified in the policy. Ms Winther's best result was an 11th individual / 10th country place at both the 2014 and 2016 World Championships and Ms Kosinska's was 16th individual / 11th country place at the 2016 World Championships. A lack of support from Yachting New Zealand and in the case of Ms Winther injuries, were cited as factors which have hindered their efforts to achieve a higher top ten finish.
10. Both athletes viewed the decision by YNZ to not send them to the 2015 Rio test event as a serious blow to their Olympic campaigns on a number of levels. I accept with the benefit of hindsight that this was the beginning of the end for the two sailors. Concerns were raised over the selection process for that test event which may well have given rise to an arguable appeal before the Tribunal, but this was not formally pursued. I reject the submission that because of a questionable approach by YNZ at that time, the sailors should be given a compensatory benefit now.

Grounds for Appeals

11. The grounds for both appeals put forward by Mr Lloyd were essentially the same and permitted under clause 16.2 of the selection policy:
 - (a) YNZ failed to properly follow and / or implement its selection policy in that it:
 - (i) failed to apply the nomination criteria under clause 5.3;
 - (ii) failed to reasonably exercise its discretion under clause 5.4;

- (iii) was wrong to rely on clauses 1 and / or 2 as a basis for its decisions.
 - (b) YNZ failed to provide both Ms Winther and Ms Kosinska with a reasonable opportunity to satisfy the eligibility criteria set out in clause 5.3; and
 - (c) the nomination decisions were affected by either apparent or actual bias.
- 12. In my view clause 1 is the starting point for the policy and sets out that the overriding goal or focus is nominating those sailors who are likely to win medals at the 2016 Rio Olympics. I do not agree with Mr Lloyd's contention that this is merely an aspirational goal. Nor do I consider it is inconsistent with the wording in clauses 2 and 5.4 which use slightly different language but do not alter the overriding thrust of the nomination criteria.
- 13. Clause 5.3 sets out certain eligibility criteria for nomination. The parties accepted that both appellants had satisfied the criteria in clause 5.3(a) and (b).
- 14. The eligibility criteria under clause 5.3(c) which, if to be relied upon, Mr Lloyd accepted was a mandatory requirement to finish in the top ten places at one of the nominated events. His contention however was that the reference to top ten place should be read as a top ten country place. His reasoning was that an ambiguity was created which could not have been intended in that the Olympic regatta restricts a country to only a single entry in a particular class whereas the nomination events allow entries from multiple sailors from a country.
- 15. YNZ argued there was no such ambiguity. It claimed the policy had been intentionally drafted not to refer to country positions and the clause should be given its plain meaning. Further, clauses 5.5 and 5.6 show that this was merely the criteria to be eligible for nomination and no guarantee of nomination.

16. There is no reason to read clause 5.3(c) as having anything other than its plain meaning of a top ten individual place in one of the specified events. While Ms Winther was exceedingly close to achieving this at the 2016 World Championships, YNZ was entitled to have a cut-off point for this eligibility criteria. Consistency by the selectors across all classes is vital. I do not consider that YNZ erred in its application of clause 5.3. Further the clause 5.3 route is solely about eligibility for nomination and is not a guarantee of nomination in any event.
17. As an alternative, under clause 5.4 YNZ has, in its sole and absolute discretion, the ability to deem that a sailor meets the eligibility criteria if it considers that sailor has the potential to win a medal at the 2016 Rio or 2020 Tokyo Olympic Games. As Mr Lloyd pointed out, this requires a careful assessment of the individual circumstances of each sailor who has potential to win a medal at Rio or Toyko.
18. As part of the appeal preparation, and again during the hearing, Mr Lloyd sought confirmation from YNZ as to what evidence the selectors had based their decisions not to nominate Ms Winther and Ms Kosinska. It appears that the principal information that the selectors relied upon was a report prepared in collaboration with High Performance Sport New Zealand known as the Funnel Update 2016. This report analyses the statistical probability of an athlete medalling at the Olympics based on results at pinnacle events during that four year Olympic cycle. While I agree with Mr Lloyd that this information is basically of an objective nature, it was not unreasonable for YNZ to rely on such technical analysis as part of its decision making process, provided this was not viewed in isolation or the sole determinant for the nomination. Again this is important in ensuring a consistent approach.
19. YNZ pointed to further information on which it based its nomination decisions. Mr Abercrombie referred to the general knowledge of the selectors who although having not personally observed regattas at which Ms Winther and Ms Kosinska competed would have through their network. The High Performance team leader, Mr Fanstone was said to have provided verbal feedback to the selectors about the appellants' results. A

former coach of Ms Winther, Allan Coutts also provided his observations to the selectors as to Ms Winther's performance at the 2016 World Championships.

Decision

20. As I stated at the hearing, I have concerns about the inadequacy of communication by YNZ to both athletes. While the selection policy is drafted to provide huge discretion to YNZ, this does not obviate its obligations to abide by the rules of natural justice and to ensure basic fairness in its implementation. In particular, athletes in contention for nomination should be aware of what information they are being judged by and be given a reasonable opportunity to provide feedback on this. I am not sure the athletes were given this opportunity or that the individual circumstances of the athletes in question and how they would perform at the Rio Olympics venue were adequately assessed in arriving at their decisions.
21. As part of the internal appeal process, I was told that the YNZ selectors have subsequently considered further information including a report by Rachel Basevi viewing Ms Winther's performance at the 2016 World Championships favourably. Notwithstanding, the selectors still concluded that their non nomination decision would not change. As troubled as I am by the lack of consultation, support, and communication with the athletes by YNZ, on the basis of the information presented to me, I am not satisfied that this inadequacy meets the high threshold to justify intervention and overturning the YNZ nomination decisions on either appeal.
22. I considered whether I should set aside the decisions and require the selectors to comprehensively assess the personal circumstances of each sailor in more detail and not to be so heavily reliant on the material available from the Funnel. However having carefully weighed all the information which was now presented I concluded that realistically this would not lead to a different outcome.

23. There was no evidence to suggest that the selectors were incapable of making a new independent and objective decision on all relevant material. Accordingly there was no basis which could have led me to consider making a selection decision myself as urged by Mr Lloyd for the sailors. Considering all the information now available I concluded there was a clear and adequate foundation for the selectors' conclusion. The policy requires their assessment on the basis of their experience, knowledge, and expertise and it could not be concluded that the path they adopted was unreasonable or not available.
24. Nor can I accept Mr Lloyd's argument of bias demonstrated through YNZ's lack of support and treatment of the appellants compared to sailors in other classes who were nominated. Mr Lloyd pointed to a chart presented by ISAF on its website in June 2015 which suggested that YNZ had differentiated between the seven classes YNZ had nominated to compete at Rio and the three classes which have not been nominated including Laser Radial and RS:X Womens Windsurfing. YNZ denied any involvement in the preparation of this report. Mr Lloyd also referred to the missed opportunity to send the appellants to the 2015 Rio Test Event while crews in other classes were allowed multiple crews to assist with their training programme prior to this event.
25. I do not accept that this demonstrates bias on the part of the selectors. It was common ground that while the appellants performed creditably to secure the qualification slots, this did not give the sailors a right to the slots nor commit YNZ to accepting the slots. As is the case in other sports, it was not surprising to hear that YNZ are under financial constraints resulting in it taking a targeted approach to funding. This they were entitled to do and the treatment complained of was part of this strategy rather than being actual or apparent bias.
26. Appeals about non selection or non nomination are by their nature difficult and emotion charged. Selectors and national sporting organisations must be constantly vigilant to ensure that processes are inclusive and transparent. Sailors (and all other athletes) must be fully aware of what is being considered and have proper opportunity to challenge and respond.

Individuals must never be just widgets in a machine like process. They are invariably women or men who have given their all to achieve participation at the pinnacle of their sport. While there must be consistency of approach and realism about limited resources the need for sensitive and sensible communication at all times cannot be minimised.

Dated: 1 June 2016



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Sir Bruce Robertson
Chairperson