

BETWEEN MICHAEL BIAS

Appellant

AND CYCLING NEW ZEALAND

Respondent

DECISION OF SPORTS TRIBUNAL

3 July 2015

Tribunal: Sir Bruce Robertson (Chairperson)
Chantal Brunner
Paula Tesoriero

Hearing: 29 June 2015 in Auckland

Present: Matthew Gale, counsel for Appellant
Michael Bias, Appellant
Cathleen Bias, in support of Appellant
Isaac Hikaka and Maria Clarke, counsel for Respondent
Ryan Hollows, Selector and Head BMX Coach, Cycling New
Zealand (CNZ)
Body Nelson, Selector, CNZ
Mark Elliott, High Performance Director and convenor of BMX
Selection Panel, CNZ

Registrar: Brent Ellis

INTRODUCTION

1. This Appeal is against the decision of Cycling New Zealand (CNZ) not to select Michael Bias (the Appellant) in the New Zealand men's BMX team to compete at the 2015 World Championships in Zolder, Belgium.
2. The Appellant contends that he should have been selected in place of Mr Daniel Franks, who has been notified as an interested party in this appeal. Mr Franks was served with the proceedings and he advised he would not take part in the appeal hearing.
3. The New Zealand team selected for the 2015 World Championships is: Marc Willers, Trent Jones and Daniel Franks. The reserve for the team is Matt Cameron. These four riders are members of the CNZ BMX High Performance programme. Mr Bias is not.
4. The Appellant asked that the Tribunal select him to compete in the 2015 World Championships as he is not confident that CNZ can properly assess the selection criteria. The Tribunal was advised that a decision in favour of the Appellant would need to involve a re-consideration of the selection of the whole New Zealand team, not just Mr Franks.
5. The hearing of the appeal took place in person on the basis of prepared statements of evidence upon which there was cross-examination. The Tribunal heard from the Appellant himself and for the Respondent, from Ryan Hollows (Head BMX coach for CNZ), Boyd Nelson (appointed by CNZ as an independent selector) and Mark Elliott (High Performance Director at CNZ).
6. The Selection Panel established under clause 3.1 of the Selection Regulations was Mr Hollows and Mr Nelson. As provided for in clause 6.1 of those Regulations, Mr Elliott was consulted prior to final selection of the team.

GROUNDINGS OF APPEAL

7. The appeal was advanced upon the following grounds:
 - a. The Selection Regulations were not properly followed or implemented;
 - b. The Appellant was not afforded a reasonable opportunity to satisfy the requirements in the Selection Regulations; and
 - c. The decision not to select the Appellant was affected by actual bias.

THE SELECTION CRITERIA

8. The overriding document in making selection decisions is the "Selection Regulation for BMX Teams" ("the Selection Regulations"). The relevant parts are:

a. Clause 2.2 – the overall purpose:

The overall purpose of this Regulation is to select BMX Teams to attend international BMX competitions which will in turn, assist in the qualification of New Zealand riders for the 2016 Olympic Games and assist in the development of riders so that New Zealand can win medals at the 2016 Olympic Games.

b. Clause 7.1 sets out 8 general factors that may be taken into account by the BMX Selection Panel. The main factor referred to by both parties was a) "*the results and performance of the rider at any national or international competitions*".

c. Clause 6.2 (d) provides that the Panel:

In making selection decisions for each BMX Team attending an International BMX competition, shall put more weight on any ranking, results and performances as specified in clause 7.3.

d. Clause 7.3 sets out the events in the order of priority (from most to least importance) that the Panel must consider:

- I. Supercross results
- II. UCI CI and CC event results
- III. BMXNZ CSE results

e. Clause 9 provides that the Panel may take into account extenuating circumstances (the relevant circumstance in this case being that of an injury) in making selection decisions, providing the rider notifies BikeNZ (re-named CNZ) in writing.

Failure to follow or implement the Selection Regulations

9. The Appellant argued that, had the Selection Panel followed the Selection Regulations, their consideration would have demonstrated that the Appellant had a better ranking and results on the basis that:

a. The Appellant is ranked 59th in the world, compared to Mr Franks who is 65th

- b. The Appellant and Mr Franks had similar results at Supercross events;
- c. The Appellant had better results at UCI CI and CC events than Mr Franks; and
- d. The Appellant had better BMXNZ CSE results than Mr Franks

UCI Rankings

10. There was no dispute that the Appellant is ranked ahead of Mr Franks in the UCI rankings. What was disputed is the weight to be attached to them. The Tribunal heard from Mr Hollows that the UCI ranking system is not always a helpful or accurate method to assess how well a rider will do because: it is compiled over a period of time meaning that the system is not always accurate in terms of current ability; is compiled in a way that does not account for the field quality at C1 events; and can favour riders who enter into a large number of events.
11. It was submitted on behalf of the Appellant that the Selection Panel had considered historical results as the basis for current performance in the case of Mr Franks, and therefore the argument that rankings cannot be used to indicate present performance because they are a year old cannot be sustained. The Appellant argues that his higher ranking indicates better results than Mr Franks.
12. This Tribunal has previously expressed caution in using ranking systems in selection decisions (*Garth Shillito v Fencing New Zealand* ST 13/10, reasons for decision 29 September 2010) because of their formulaic approach. We see no reason to depart from this cautionary approach. In this case, the UCI ranking system is not a mandatory criterion for selection. As outlined in Mr Hollows' evidence the Selection Panel considered the rankings amongst a number of considerations in line with the Tribunal's earlier guidance on the use of rankings.
13. Given the rankings were applied in favour of the Appellant indicates a lack of actual bias in the decision-making process, a point we return to later. At any rate, the difference between being ranked 59th and 65th does not appear significant enough to attach particular weight to. The Tribunal is satisfied with the weight attached to the UCI rankings by the Selection Panel.

Supercross results

14. Clause 7.3 of the Selection Regulations provides that Supercross results are to be afforded priority over results from other events. It was contended on behalf of the Appellant that he and Mr Franks had achieved similar results in Supercross events. This is correct in that they both had achieved quarterfinal results.
15. However, the Tribunal heard that Mr Franks had achieved two quarterfinal results (Manchester 2014 and Papendal 2015), while the Appellant had achieved one quarterfinal (Manchester 2015). Mr Hollows also indicated that Mr Franks had competed in more Supercross events than the Appellant, which meant the Selection Panel had more data to consider for Mr Franks than the Appellant.
16. The Appellant injured his shoulder during a training session in Papendal and was not able to race. This is regrettable, as the Tribunal heard from Mr Hollows that if the Appellant had backed up his good result from Manchester, he may well have been selected for the 2015 World Championships.
17. The Tribunal is concerned about CNZ's consideration of the Appellant's injury given the Supercross results were the most important for selection purposes, a point to which we return under the heading of actual bias.
18. The Selection Panel took into account as permitted by clause 7.2 of the Selection Policy, the type of track and strength of the field in Papendal. The Selection Panel was able to see Mr Frank's performance at Papendal, which the Tribunal was told is a similar track to the upcoming 2015 World Championships in Belgium.
19. The Selection Panel also considered that Mr Frank's splits and technical riding was better for the Belgian track and that his riding was stronger over the first straight, a factor the selectors considered important for the Belgian track. These were factors the Selection Panel were entitled to take into account under clause 7.2 of the Selection Policy.
20. While regrettable that the Appellant was not able to race at Papendal, the Selection Panel were limited in the data from Supercross events for him. The Selection Panel was able to conclude that Mr Franks had better Supercross results than the Appellant and to afford those results priority in their overall selection decision.

UCI C1 and CC events

21. Clause 7.3 of the Selection Regulations provides that UCI C1 events are to be afforded second priority in the list of the three priority selection events.
22. The Appellant submitted that his results in the UCI C1 events were better than Mr Franks. CNZ disagreed with this proposition, instead submitting that Mr Franks had the better results.
23. Evidence from Mr Hollows showed that the Appellant had more results at UCI C1 events and his best places were higher than Mr Franks' best places. However when both the Appellant and Mr Franks competed in the same C1 events, Mr Franks had better times. The Tribunal was advised that between them Mr Hollows and Mr Nelson were either at or watched on-line all the relevant UCI C1 events.
24. CNZ contended that comparing different results in different fields can be problematic. The Tribunal agrees this makes sense and is satisfied that when comparing the results of the Appellant and Mr Franks over the same C1 events, Mr Franks had better results.

BMXNZ Champion Selection Events (CSE) results

25. The Appellant in his submission attached information about the BMXNZ CSE which was introduced to assist in the selection of riders who wish to represent New Zealand in the championship classes at the UCI BMX World Championships. Clause 7.3 of the Selection Regulations provides that results from these events are to be afforded the least priority in the list of three events for selection.
26. It was not disputed that the Appellant had better results in the BMXNZ CSE than Mr Franks. Indeed, the Appellant won the entire series. Both Mr Hollows and Mr Nelson indicated that they took these results into account when making their selection decision.
27. Mr Hollows accepted in his evidence that the decision on who to include in the men's team was not an easy one. The Tribunal considers the Selection Panel followed the criteria set out in the Selection Regulations and did not err in selecting Mr Franks ahead of the Appellant.
28. We base this conclusion on the following: Mr Elliott's evidence that he was satisfied Mr Nelson and Mr Hollows made their decision by reference to the criteria under the Selection Regulations, along with the records of selection considerations produced at the Hearing; the evidence that Mr Franks performed better at the Supercross events which as prescribed by

Clause 7.3 of the Selection Regulations, the Selection Panel must afford the greatest priority to.

29. The Tribunal also accepts the Selection Panel's decision to use data from the UCI C1 races that both riders raced in. While it will be disappointing for the Appellant that his results in the BMXNZ CSE events do not attract a greater weighting since he won the series, the Selection Regulations are clear that the least priority is to be afforded to them after the Supercross and UCI C1 events.
30. In addition the Selection Panel was entitled to consider factors such as type of track, and the strength of field as contemplated in clause 7.2 of the Selection Regulations. Despite not being a mandatory consideration, the Selection Panel also took into account the UCI rankings, which were in favour of the Appellant.
31. Accordingly, this ground of the appeal fails.

Failure to afford a reasonable opportunity to satisfy the requirements in the Selection Regulations

32. It was submitted on behalf of the Appellant that because he is not a member of the High Performance Squad, he has not had the same opportunity as those within the HP Squad to satisfy the criteria under clauses 7.1 (b), (e) and (f) of the Selection Regulations. Mr Franks is a member of the HP Squad.
33. Both parties accept that clause 5.1 of the Selection Regulations is outdated and was not taken into account. That clause provides that*the BMX Selection Panel will select teams from the HP Squad to attend* [among other events] the 2015 World Championships in Belgium. This section of the Selection Regulations needs updating to avoid doubt in the future.
34. The Appellant contended that clauses 7.1 (b), (e) and (f) are of limited application to riders outside the HP Programme. CNZ accepted that sports science data referred to in clause 7.1 (e) is not available to the Selection Panel for riders not in the HP Squad, however disputed that the remaining clauses are of limited application to riders such as the Appellant. While not an expectation, there was nothing to prevent the Appellant from undergoing sports science testing and provide the Selection Panel with the results; equally the Selection Panel did not ask for such information. This does not suggest a weighting in favour of Mr Franks, rather as becomes

clear later, these factors were not given much weight in the selection decision.

35. Mr Hollows gave evidence that training sessions at the Cambridge facility are open to all elite riders, not only those in the HP Squad. Mr Hollows said that of the nine athletes considered for selection, all but the Appellant had trained at the facility, even though only 5 of the 9 are part of the HP Squad. It became clear during the Hearing that the Appellant did not know about these training sessions and CNZ witnesses confirmed they had not advised the Appellant. It would be useful in the future for this information to be available to all those seeking selection.
36. Mr Hollows contended that a broad assessment of 'team fit' (clause 7.1 (f)) was able to be made.
37. Both Mr Hollows and Mr Nelson indicated that, with the exception of the riders' results and performances under clause 7.1(a), the factors in clause 7.1 were not given much weight by the Selection Panel. They both said that the overwhelming factor was results and performance data from the international and national events weighted in accordance with the priority set out in clause 7.3 of the Selection Regulations. Information about the performance of both riders was available to the Selection Panel and as outlined earlier the Tribunal is satisfied that the Selection Regulations were not misapplied.
38. Accordingly, this ground of the appeal fails.

Decision affected by actual bias

39. It was contended on behalf of the Appellant that the decision to not select him for the New Zealand team was affected by actual bias. The reasons advanced by the Appellant were bias in favour of riders involved in the HP Squad and Mr Hollows' involvement in the selection process.
40. This Tribunal said in *Daisy Thomas v Surfing New Zealand* (ST 09/06, decision 19 April 2006) at [61] the requirements to show actual bias as:

Actual bias requires proof that the decision maker has prejudged the case against the athlete or has acted with partisanship or hostility to show the decision maker has a mind made up against the athlete, and is not open to persuasion.

41. Dealing first with the issue of Mr Hollow's involvement in the selection process: Mr Hollows is the Head Coach for the CNZ BMX team. The Appellant contended that bias arose because of Mr Hollow's involvement with the HP Squad. We do not agree.
42. First, the Tribunal understands from CNZ that it is usual practice to have a coach involved in selection decisions. Clause 3.1 of the Selection Regulations requires the Head BMX coach to be on the Selection Panel. Mr Elliott confirmed that having the coach involved in selection decisions is applied in the other cycling disciplines managed by CNZ.
43. Secondly, and importantly, evidence was provided by Mr Nelson that Mr Hollows ranked the Appellant as second pick (behind Marc Willers) and Mr Nelson ranked the Appellant ahead of Mr Franks.
44. This evidence, which was a handwritten note following the Manchester event earlier this year, demonstrated that the Selection Panel had an open mind to selecting the Appellant. Indeed, if the selection had been made straight after the Manchester event, Mr Hollows accepted that the Appellant could well have been selected.
45. Thirdly, Mr Hollows explained that the reason training sessions and resources are not provided to non HP Squad members is because CNZ does not have the resource or capacity to provide such services. Mr Hollows explained that this was the policy applied across all cycling disciplines managed by CNZ. There was nothing to suggest that not allowing the Appellant to train with the New Zealand Team while away was specific to him or met the test of actual bias.
46. In addition, the fact the Selection Panel considered the UCI rankings in their decision when they were not required to, demonstrates that they were willing to take into account a factor that was clearly in the Appellant's favour.
47. Finally, the Tribunal notes that in the email exchanges between Mr Hollows and Mr Nelson following the Appellant's injury, there was genuine concern expressed that he would not be able to race. This is seen in references such as *....boys are fit to race and well....unfortunately that's not the case for Michael....*[email from Mr Hollows to Mr Nelson] and *....I was looking forward to seeing him [Michael] race... ..*[email from Mr Nelson to Mr Hollows]. These references are inconsistent with close-minded decision-making.
48. The totality of the evidence does not support the contention that there was actual bias in the decision to not select the Appellant.

Injury to Appellant's Shoulder

49. The Tribunal considered whether bias had affected the Selection Panel's application of clause 7.3 in relation to the Supercross event in Papendal. Both Mr Hollows and Mr Nelson accepted that the injury to the Appellant's shoulder was taken into account in their decision not to select him.
50. Clause 9 provides that the Panel may take into account extenuating circumstances (the relevant circumstance in this case being that of an injury) in making selection decisions, providing the rider notifies BikeNZ (re-named CNZ) in writing.
51. It was submitted that the Appellant's mother's email to Mark Hollands and Mr Hollows dated 2 May 2015 amounted to notifying CNZ of the injury and that this should have been taken into account as an extenuating circumstance. It is not mandatory for the Selection Panel to take these circumstances into account.
52. It was noted by the Appellant's counsel that in Mr Nelson's evidence, Marc Willers was "still coming back from injury" and Matt Cameron injured his knee in a warm-up but neither rider had requested his injury to be taken into account as an extenuating circumstance.
53. It was submitted for CNZ that the difference between the Appellant and riders like Marc Willers and Matt Cameron is that the Selection Panel was able to see them compete in Papendal, whereas they could not see the Appellant race due to his injury. The Tribunal accepted this and notes that even if notified, an injury is only a discretionary matter for the Selection Panel to consider.
54. The Tribunal is concerned that as the Appellant's injury was taken into account by the Selection Panel, at no time, did they make further inquiries into the prognosis of the injury. Instead, they relied on their own and Mr Elliott's knowledge about such injuries to conclude that the Appellant would be unlikely to be ready to race at the 2015 World Championships in Belgium.
55. While the Selection Panel and Mr Elliott may have seen many shoulder injuries in the sport of BMX, it was not for them to supplement their own opinions over that of a medical examination that they could have sought under clause 9.2 of the Selection Regulations. Given the Appellant was not part of the HP Squad where medical resources and information may be more readily available, more care could have been taken to ensure the

Selection Panel had up to date relevant information about the Appellant's injury and prognosis. This is particularly relevant given the Tribunal heard from the Appellant himself that he is now injury-free and achieving personal bests in the gym.

56. Although it would have been better to have sought further information on the Appellant's medical position, the Tribunal does not consider this as prejudging. Nor could it be suggested that the elements of partisanship or hostility are met. As referred to earlier Mr Hollows and Mr Nelson expressed disappointment and concern about the Appellant's injury.

57. Accordingly, this ground of the appeal fails.

CONCLUSION

58. The Tribunal upholds the decision of CNZ to not select the Appellant to the New Zealand men's BMX team to compete at the 2015 World Championships in Zolder, Belgium.

59. We note that both parties indicated their willingness to work together and commend both parties for the way they have conducted themselves during this dispute. The Appellant has expressed his commitment to BMX and to representing New Zealand at BMX. He also indicated that he would embrace the opportunity to be part of the HP programme. Everything submitted at the Hearing gives the Tribunal confidence that both parties will work together in the pursuit of the Appellant's excelling at the sport of BMX.

Dated 3 July 2015



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Paula Tesoriero MNZM