

BETWEEN **KATE HENDERSON**

Appellant

AND **NEW ZEALAND WATER POLO**

Respondent

**DECISION OF SPORTS TRIBUNAL
29 JULY 2015**

Hearing: 24 July in Auckland

Tribunal: Dr James Farmer QC (Deputy Chair)
Chantal Brunner
Ron Cheatley

Present: Kate Henderson, Appellant
Robyn Muir and Brian Henderson, representing Kate Henderson
David Bullock, Counsel for New Zealand Water Polo
John Payne, General Manager, New Zealand Water Polo
Eelco Uri, Selector and National Teams Programme Director, New
Zealand Water Polo

Registrar: Brent Ellis

Introduction

1. Kate Henderson, who is a 20 year old (born 95) water polo player, was not selected for the Under 20 World Championship Team to compete in Greece next month and has appealed that decision to this Tribunal. Following the filing and service of briefs of evidence and written submissions from both sides, a hearing was held on Friday 24 July 2015. Kate was represented, very ably, by her mother and father and New Zealand Water Polo ("NZWP") was represented by counsel. At the hearing, evidence was given by Kate and, for NZWP, John Payne, acting General Manager and a director of NZWP, and by Eelco Uri, National Teams Programme Director for NZWP and a selector. They were each cross examined and questioned by the Tribunal in turn. In addition, written statements were received without objection from the other two selectors, Attila Biro and Barbara Ipacs, and from Sharon Geary, a member of the NZWP Board. Attila and Barbara are coach and assistant coach respectively of the U20 women's water polo squad.
2. Prior to the hearing, a conference was held by the chairman of the Tribunal, Sir Bruce Robertson, who issued a Minute that directed that the appeal must be confined to selection issues and that broader questions of the administration of NZWP which were part of the complaints raised in the appeal could not be the subject of this hearing. This was accepted by the appellant, although the point was made by Robyn Muir, Kate's mother, at the outset that at least part of the motivation for the appeal was to bring about change for the future through better governance and administration.
3. In this last respect, two complaints were the manner and terms in which Kate was advised of her non-selection and the lack of any feed-back in the months leading up to the selection decision from the coaches or National Programme Director as to improvements that might be needed by Kate to achieve selection. A further complaint, which was a ground of appeal, concerned the failure of NZWP to comply with its own constitutional requirement to appoint a 4 member selection panel after the last AGM held in March – the Panel only consisted of 3 members and there was no evidence that they had been appointed as contemplated by the Constitution after the last AGM. A further ground of appeal was that the selection decision was made and announced by or at the direction of the Panel before their recommendation had gone to the Board for ratification – as required by the Constitution. Finally, it was suggested that Attila Biro was (or at least may have been) biased against Kate because she had declined to transfer to and compete for the club with which he was associated. This allegation was based on Attila saying to Kate at the time that he advised her that she had not been selected that things might have been different had she played for his club.

Grounds of appeal

4. The questions of selection and appointment of a selection panel are contained in the New Zealand Water Polo Regulations, which are given effect by the Constitution. Relevantly, reg. 7.2 provides:

7.2 Selection of Representative Teams: Representative teams shall be selected as follows:

7.2.1 Selection Panel: The Association will annually appoint National Team Selection Panels for each team. These appointments will be made by the Association following the AGM. The Panel for each team will consist of four members: the relevant team Coach, the appointed Assistant team coach (as appropriate), and two other members appointed by the Association on an annual basis. The Team Coach will Chair the Selection Panel.

7.2.2 Submission of Names: The Panel will consult with any party it deems appropriate in making team selections. This process may include all other currently appointed national team coaches to ensure a continuity of selection and player development. The Panel will forward to the Association its recommendation for ratification at the next Board of Directors meeting. If this timing does not meet the required time frame, recommendations by e-mail or fax with the opportunity to accept / reject within a 72 hour time frame. The Board of Directors reserves the right to overturn a recommendation. Where time is of the essence, the Board of Directors has the right to appoint a representative to approve a team selection within necessary timeframes. All decisions ratified by the Board of Directors are final.

7.2.3 Conflict: If a member of the selection panel becomes a contender for selection to the relevant team or squad being selected, that member shall automatically cease to be a member of the selection group.

7.2.4 Selection Display: The names of all selection groups shall be provided to the Centres and the Clubs.

7.2.5 Appeal Process:

7.2.5.1 Any player who is aggrieved by the NZWP selectors' decision not to select them to a national squad or team, may appeal the decision of the selectors to the Sports Disputes Tribunal of New Zealand. The grounds of appeal are limited to:

- (a) the applicable selection criteria not being properly followed and/or implemented; or
- (b) the player not being afforded a reasonable opportunity by the selectors to satisfy the applicable selection criteria; or
- (c) the decision being affected by actual bias; or
- (d) there being no material on which the decision could reasonably be based.

5. In addition, of relevance is the published "Team Selection Policy" which repeats that the Board will annually appoint a 4 member Team Selection Panel for each team. That Panel is to consist of "the relevant team Coach, the appointed Assistant team coach (as appropriate), and two others appointed by the Board on an annual basis" (clauses. 2.3, 2.4). The Panel is

empowered to consult with any party it deems appropriate in making team selections (clause 2.6). It is not clear from the language of the relevant provisions whether the selection decision is that of the Panel. Clause 2.7 requires the Panel to forward its “recommendation” for “ratification” at the next Board meeting. While “ratification” typically refers to the confirmation of an act that has already occurred, clause 2.7 goes on to say “provided that, if timing does not allow for this, the recommendation can be sent to individual Board members with the “opportunity to **accept/reject** [emphasis added] within a 72 hour time frame”. This is more consistent with the selection decision residing with the Board. Clause 2.7 also expressly provides that the Board “reserves the right to overturn a recommendation”. “Overturn” is more consistent with the reversal of an action already taken. We think that, for the future, these ambiguities could usefully be addressed in a revision of the Regulations and Policy document.

Procedure followed by the Selection Panel

6. Eelco Uri gave detailed evidence of the considerations that led to the selection decision. In summary, the selection panel met as a group after a training camp in June and also consulted with coaches and officials who had been at an Australian event earlier and obtained their views. The team squad from which a final selection of 11 players would be made at that time consisted of 14 players so that, clearly, 3 would be eliminated. The Panel approached the matter by identifying specialist positions, which were filled by specialist players, and then looked at those players who could best be what was called an outside player who could also, as needed deputise for a specialist position. Kate was not regarded by the Panel as a specialist although her evidence was that she had played frequently in the centre back position for her club team. Eelco in his brief of evidence summarised the approach in this way:

In a broad sense, our first and most important consideration in selecting the team was ensuring that we had the best players at specialist positions. The next consideration was how versatile players were (whether they provide backup in other positions, given squad size restrictions). Finally we had a specific focus on players who were good defenders, in light of team strategy and the teams we would face at the World Championships.

7. Eelco also gave evidence as to statistics in relation to each player that had been compiled at the Australian tournament. Ultimately, the decision made by the Panel was that Kate was one of those who should be excluded from selection, notwithstanding ready acknowledgment that she was a talented and conscientious player whose performance in attending training sessions and the like was exemplary.
8. We do not think we are able to second guess this exercise of judgment by the selectors. In our view, the evidence established that they had approached the matter in a rational way and had brought their own experience to bear in a manner that was open to them. Accordingly, we do not think it was one of those very rare cases where the Tribunal can say that selectors had acted irrationally or in an unprincipled way.

9. That however is not the end of the matter necessarily and we therefore turn next to other matters that were raised to impugn the selection decision.

Assurances given to Kate that she would be selected

10. The evidence was that in December, at a time when Kate was determining whether to make the commitment to compete for a place in the World Championship team in 2015, given other commitments, in the way of University studies, that she had, she was assured (through her mother) by Eelco that she was in the team and that her name was “on a ticket”. It was claimed that Eelco had said further, in effect, that the players who were born in 1995 would be given priority (over younger swimmers). Later Eelco provided a letter, dated 17 February 2015, to Kate to give to the University. That letter said that Kate was a member of the NZWP National Teams Programme and that “Kate is currently a member of our Junior Water Polo Team which will participate in the 2015 FINA Women’s Junior World Water Polo Championship (and preparation)...”
11. In his evidence at the hearing Eelco said his statements had been misinterpreted. He said that the intention was that Born 95s would be given an opportunity to be selected for the world championships, not priority over younger swimmers. Eelco said in a supplementary brief that he was not in a position to unilaterally select Kate for the team and that realistically no selection decision could have been made so far out from the competition. Our view is that, while it was unfortunate that Kate and her mother had obtained the impression from what Eelco said, both to Kate’s mother and then later to the University, that Kate was already selected, that was not in fact the case, and could not have been.

Mode of communication to Kate as to her non-selection

12. The evidence from the appellant was that the manner in which Attila advised her that she had not been selected and the reasons he gave for her non-selection were humiliating and inappropriate. Attila prepared a written brief but did not deny having made these statements. We therefore accept that they were made.
13. While this was unfortunate we do not think that it provides a ground for setting aside the decision not to select Kate. As stated above, we think that the process and reasoning followed by the Panel, in terms of position selections, were rational and available to the Panel to make (subject to the question next considered of whether the Panel was properly constituted and whether the prescribed selection process was followed).

Appointment of Panel and prescribed selection process

14. As stated above, there were deficiencies both in relation to the appointment of the Selection Panel and in the decision-making process that was followed. Specifically:
 - (1) There was no evidence that the Panel was selected, as required, after the last AGM, which was held in March 2015 (Regulations, clause 7.2.1 and see also Policy, para. 2.3);

- (2) Only 3 and not 4, as required, selectors were appointed (Regulations, clause 7.2.1 and Policy 2.4);
- (3) The Panel made and announced the selection decision before it was ratified by the Board (Regulations, clause 7.2.2 and Policy 2.7).
15. It was argued for NZWP that the deficiencies in the appointment of the Panel were a mere “technicality” or that, alternatively, the deficiencies were not material. The basis of the latter submission was that because there had been consultation with others, including the manager who attended the Australian tournament and the men’s junior assistant coach who was at that tournament and that the views expressed coincided with those of the selectors, and because a fourth selector may well have been the manager, the outcome of a re-constituted 4 person panel would have been the same. The point could also be made that a fourth member who disagreed with the other 3 existing members could not have altered the outcome. What is not known however is whether the contribution that a fourth member made to discussion and debate among the members of the panel may have persuaded others to a different point of view from that which was finally reached.
16. The submission for NZWP on the further issue as to the failure to follow the prescribed process of the Panel forwarding its “recommendation” to the Board for ratification was that, on the contrary, NZWP had complied with the requirements as the recommendation for the team selection had been presented to the Board, considered and duly ratified. NZWP’s position on the issue of the announcement of the team prior to ratification by the Board was less clear but seemed to amount to a submission that the prior announcement was “unfortunate” but that, in any event, the Board agreed with the Panel and so there was no insuperable problem. That approach does rather relegate the Board’s role to that of a rubber stamp or at least compromises its ability to challenge or disagree with the Panel’s views once announced. NZWP conceded that reversing a publically announced selection decision would be embarrassing but asserted that it would have done so if the Board had taken issue with the proposed team selection.
17. As a Tribunal, we take a more serious view of these deficiencies. NZWP has laid down, in its Constitution, its Regulations and its Policy Statement the rules that govern the appointment of its selectors and the processes that lead to the final selection decision, which involve the Board of directors as well as the Selection Panel. Those rules are published and known or are available to players who are seeking selection. They are entitled to expect that NZWP will follow and abide by its own rules. We accept that difficulties may arise if the rules are ambiguous (as discussed above) or simply do not address an issue. For that reason, it is obviously desirable that rules are from time to time reviewed and, if necessary, amended to rectify difficulties that have been experienced.
18. We come back below to the consequence of these failures. However, first we need to refer to a submission that was made by NZWP that was severely criticised by Kate’s parents on her behalf and we think rightly so. This was stated by NZWP in the following terms:

NZWP observes that, if it is ordered to re-do the selection of the team, there is a possibility that it will not be able to send a team to the Junior World Championships. The coach of the team is currently overseas with the senior team and will not be returning to [New Zealand] before the Junior World Championships. Moreover, it is not clear that NZWP would be in a position to appoint a further selector under the Regulations (which require selectors to be appointed after the AGM). [para. 74 of NZWP Written Submissions and see also para. 5 to the same effect]

19. This statement was challenged by the Tribunal and counsel for NZWP agreed ultimately that it would be possible for a new Panel, including Attila overseas, to communicate and make a recommendation to the Board which could then make or ratify a selection decision, without jeopardising the team's participation in the World Championships. An issue was raised as to the ability of the Board to appoint the Selection Panel (as opposed the General Meeting) but we have no doubts on this question and refer in particular to 2.3 of the Policy Statement referred to above. If the outcome of this appeal were that the present selection decisions were set aside and the matter referred back to NZWP, we would expect NZWP to pull out all the stops to ensure that a Panel was properly appointed and the selection process, including reference to the Board, followed with the utmost expedition to ensure that the participation of an U20 team in the forthcoming World Championships did proceed.

Decision

20. As stated above, we do not feel able to challenge the reasoning of the Selection Panel as to its reasoning for its selection decisions and in particular for the exclusion of Kate for the team.
21. However, there is still the important legal question as to whether (a) the Selection Panel was validly appointed; and (b) whether the prescribed procedure for the Panel to make a recommendation to the Board for its ratification was followed.
22. There are two views on this. The strict decision is that these are matters of jurisdiction and not mere "technicality", as argued by counsel for NZWP. On that approach the selection decision was invalid, either because there was no properly constituted selection panel or because it abrogated the power to make the selection decision which was vested in the Board. The alternative approach is the materiality submission made by NZWP, namely that the outcome would have been the same, given that the Panel did consult with others including a member of NZWP who might well have been the fourth selector and because the Board ultimately ratified the views of the Panel in any event. Some support for the latter view is to be found in the fact that this Tribunal in *Sarah Her-Lee v. Table Tennis New Zealand* [ST 08/14, 2 July 2014] did say that in its view *on the facts of that case* the fact that the decision was made by a quorum of 2 selectors, rather than the 3 prescribed, did not affect the validity of the selection decision because the Tribunal was not persuaded "that the appointment of a third selector would have altered the decision which was ultimately made". In the present case, all the members of the Tribunal acknowledge that there is force in the submission made by NZWP that the 3 selectors had consulted with others who had knowledge of the U20 players and that the views expressed by those persons were

consistent with the views of the Panel so that the outcome of deliberations by any new expanded panel (if the matter were referred back) was likely to be the same.

23. In the present case, a majority of the Tribunal, while acknowledging that the two cases are different, are content to follow this pragmatic approach, principally because they are satisfied that if a new Panel were convened it would in all likelihood be comprised of the existing members and a fourth member and would arrive at the same decision. The dissenting member of the Tribunal in this issue is of the view that the issues raised are jurisdictional in nature and that the failure to appoint the selection panel correctly is a defect that cannot be overcome so that the selection decisions are invalid and, notwithstanding that the ultimate outcome is likely to be the same, it would be incumbent on NZWP, as a matter of urgency, to appoint a selection panel correctly and move to a selection decision with expedition taking account of the views of all 4 members.

24. The result is that the appeal is dismissed.

25. The Tribunal as a whole would however wish to make the following observations:

- (1) This appeal was properly brought and Kate was entitled to have the decision not to select her to be considered by this Tribunal;
- (2) It was not appropriate for NZWP to suggest that if the appeal had been allowed it would or might not have been possible to send a team to the World Championships – if that had been the outcome of this Decision that would be a result attributable to NZWP and not to Kate;
- (3) It is important that NZWP has clear, unambiguous selection rules and processes and properly and faithfully implements those selection rules and processes, both as to the establishment of selection panels and as to the decision-making processes and requirements;
- (4) Irrespective of the decision not to select Kate for the team that goes to the World Championships this year, the evidence is that she is a talented and dedicated water polo competitor with a future in the game and it is to be earnestly hoped that she will continue to pursue her ambitions in the sport.

26. The Tribunal expresses its gratitude to Ms Robyn Muir and Mr Brian Henderson, for Kate Henderson, for the quality of their submissions and also to Mr David Bullock, counsel for NZWP.

Dated 29 July 2015



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Dr James Farmer QC (Deputy Chairperson)