

**BEFORE THE SPORTS TRIBUNAL
OF NEW ZEALAND**

ST 13/10

BETWEEN

GARTH SHILLITO

Appellant

AND

FENCING NEW ZEALAND ("FeNZ")

Respondent

**REASONS FOR THE DECISION OF THE SPORTS TRIBUNAL
DISMISSING APPEAL (ADVISED 1 SEPTEMBER 2010)**

Dated 29 SEPTEMBER 2010

Tribunal:

Nicholas Davidson QC (Deputy Chairperson)
Ron Cheatley
Dr Lynne Coleman

Hearing:

By teleconference at 5.30pm 31 August 2010

Present:

Garth Shillito, Appellant
Laura Harvey, President Fencing North in
support of Garth Shillito
Ken Claridge, President FeNZ
Fiona McDonald, Secretary FeNZ
Mark Rance, Selector FeNZ
Luke Robertson as representative of selected
fencers

Registrar:

Brent Ellis

REASONS FOR THE DECISION OF THE SPORTS TRIBUNAL DISMISSING APPEAL (ADVISED 1 SEPTEMBER 2010)

A Introduction

1. The formal Decision of this Tribunal, dismissing the appeal, was delivered on 1 September 2010. The Reasons for the Decision are as follows.

B The nature of this appeal and Rules of this Tribunal

2. The Appellant, Garth Shillito, appealed to this Tribunal against his non-selection for the New Zealand team to attend the Commonwealth Fencing Championships 2010 in the Men's Open Sabre Team.
3. There was no challenge to the jurisdiction of this Tribunal, which proceeds under Part C of the Rules of this Tribunal (2009).
4. Rule 42 directs that the grounds for an appeal are those set out in the Constitution, Rules and Regulations of the NSO, but in the absence of such, the grounds are limited:

"42. The grounds for an appeal shall be those set out in the constitution, rules or regulations of the NSO or the NZOC (if the appeal is brought under section 38(c) of the Act) or as set out in the agreement between the parties (if the appeal is brought under the provisions of section 38(b) of the Act). In the absence of such grounds, the grounds shall only be one or more of the following grounds:

(a) natural justice was denied;

(b) the decision-maker or decision-making body acted outside of its powers and/or jurisdiction (i.e. acted ultra vires);

(c) substantial new evidence became available after the decision, which is being appealed, was made;

(d) in the case of a decision relating to misconduct, the penalty was either excessive or inappropriate;

(e) in respect of a decision relating to the Selection or Non-Selection of the appellant as a New Zealand representative in a sport or to a New Zealand representative team or squad, the following additional grounds apply:

(i) the applicable Selection Criteria have not been properly followed and/or implemented;

(ii) the person seeking selection was not afforded a reasonable opportunity by the NSO to satisfy the applicable Selection Criteria;
(iii) the selection decision was affected by actual bias;
(iv) there was no material on which the selection decision could reasonably be based."

5. The Appellant advanced a case that the applicable selection criteria in the Selection Policy had not been correctly applied and the directed process was not followed.
6. This was not an appeal where, despite urgency, the Tribunal would have substituted its Decision for that of the selectors. A successful appeal could only have seen the matter return to the selectors for consideration on a basis directed by the Tribunal.
7. Although it did not influence the Tribunal, following the filing of the notice of appeal, FeNZ advised the Tribunal that the selectors had *"conducted a review of the selection process, and the selectors confirm that they stand by their selection, and have no desire to include Mr Shillito within the team, by way of excluding another. The team is not just a collection of individuals, but must be able to fence as a team in team events – and the selectors are of the opinion that the team selected is the best available for those tasks."* We mention this as such post selection considerations are not a substitute for a prior process, if it is impaired.

C The other fencers selected

8. The Tribunal directed that fencers already selected should be advised of the appeal and that any further selection process directed by this Tribunal may affect them. They were given the opportunity to join the appeal proceedings as interested parties, and took the pragmatic course of having Luke Robertson, already selected for the team, and whose selection was accepted by the Appellant, represent their interests if that was considered necessary beyond the position advanced by FENZ opposing the appeal.

D Process adopted by this Tribunal

9. The process adopted by the parties was helpful in what was an urgent setting. The Appellant provided Grounds of Appeal as required, against which FeNZ made a tracked response, and in the same format the Appellant recorded his reply.
10. The matter was given urgency and the hearing was conducted at 5.30pm on Tuesday 31 August 2010.
11. The Appellant presented his case, and the response was made principally by Mark Rance as selector assisted by Ken Claridge as President of FENZ and Fiona McDonald as Secretary.
12. The Grounds of Appeal were developed broadly in line with the appeal brief. The Tribunal now sets out the discussion under heads which capture the matters raised.

E FENZ Selection Policy

13. The FENZ Selection Policy 2009, relevant to this appeal, begins by stating that a new selection process is under development. This is irrelevant to the appeal but is reflective of an existing policy which has its flaws.
14. The Policy refers to selection as based on:
 - *"A prediction of athlete performance by selection personnel*
 - *Being chosen in preference to another or other athletes on the basis of performance."*
15. *"Selection criteria"*:
 - *"Determines the basis for selection decisions – ie what is actually done to select athletes to your team."*

16. For "FeNZ Selection Processes and Methods", under "Nominations and Process" Clause 1.1 records:

"Fencers wishing to be considered for selection agree to comply with all requirements laid down by FeNZ, and their respective regions in the call for nominations. Fencers will have competed in the selection competitions for the relevant age grade."

17. Clause 2 "Method of selection" provides:

"2.1 Principal selection criteria will be individual results for the following tournaments together with the ranking system to determine relative performance in all events entered in New Zealand and overseas (emphasis added).

Open – North Island Championships, South Island Championships and Open National Championships."

The Selection Panel may consider additional selections where exceptional circumstances or results warrant inclusion or exclusion of a particular fencer. Other priority areas or instructions for selection may be advised by the FeNZ management committee (emphasis added)."

18. Clause 2.3 provides:

"The Selectors will create a priority list of all nominated fencers based on the minimum objective criteria below, giving weight to higher ranked fencers, in addition to subjective selection criteria as outlined by the FeNZ executive committee for any particular event. Where a selected fencer is unavailable the position will be offered to the next eligible fencer on the priority selection list."

19. Clause 2.8 reads:

"2.8 Fencers who are NZ Citizens and resident overseas or who are recovering from injury can apply to the Selector (sic) for exemption from the objective selection criteria upon submission of all competition results they wish to have considered (previous results outside the time period and/or results from overseas competitions)."

20. The Policy then sets out an outline of the Ranking System as "a guide to fencers". This commences with the statement that:

*"The ranking system is the **major component in objective selection criteria used** (emphasis added)."*

21. We make an observation at this point. The emphasis is on the ranking system as the "*major component*" in the objective selection criteria used. The "*principal*", but not exclusive selection criteria will address rankings to include overseas results, with the results of the three major Open Championships. The Guideline then refers to points towards ranking being calculated according to a formula which includes the number of entries in a tournament. Selectors have the right to increase or decrease points awarded for any event according to the strength of the field. Where that occurs the Management Committee should be advised. The Open Individual Ranking Tournaments are set out with the maximum points available shown.

22. The salient features of the Policy are that:

- (i) It is driven by **performance**, not some broadly predictive assessment such as a "*future prospect*";
- (ii) The policy, expressed as it is today, directs focus on the prediction of performance at a particular

tournament or event. The relevance of this lies in FeNZ's recognition that the selection for the Commonwealth Championships is pitched at a higher level than competitions in Australia or New Zealand, and that must be a factor in making a selection, a point with which the Tribunal agrees;

- (iii) The principal **but not exclusive selection criteria** will include individual results from the specified tournaments "**together with**" the ranking system **to determine "relative performance"** in all events entered in New Zealand and overseas;
- (iv) Selections may be made which go outside the stated criteria in specified circumstances;
- (v) An overseas based fencer may apply for exemption from the objective selection criteria provided they submit all competition results they want to have considered.

F The grounds of appeal

- 23. The Appellant correctly referred to the FeNZ selection policy for 2009 and its emphasis on performance in a particular tournament together with the **rankings**. FeNZ responded that the policy requires, not just the objective criteria but a "**prediction of athlete performance by the selection personnel**".
- 24. Such goes without saying. A selection based on a formulaic ranking would not be predictive nor much use in a relativity analysis, on the evidence before us.

Competition in "qualifying" tournaments

25. The Appellant's next ground of appeal was that fencers will have competed in selection competitions, and that he did so. The Policy was published **subsequent** to two of the three selection tournaments, and thus might be criticised as "*after the event*". However the selection competitions were contested at least in part by all those selected except for Rick Jiang, resident in Australia. The tournaments under focus were the North Island, South Island and National Championships.
26. Two fencers selected, Luke Crozier and Michael Mercer, had not attended the Open National Championships. FeNZ said it did not discount other competitions. The Appellant contended that selection should not have been based on one competition only where all fencers competed.

Exceptional circumstances/results

27. The Selection Panel may consider in its discretion **additional** selections "*where exceptional circumstances or results warrant inclusion or exclusion of a particular fencer*".
28. Although this appeal was not directed against any one fencer selected, and reconsideration of all selections would follow (bar Luke Robertson), focus fell on the fact that Mr Jiang's results in **Australia** were considered by the selectors to warrant his inclusion, and whether his results were required to be "*exceptional*" before he could be selected.
29. There was no absolute barrier to Mr Jiang or any other fencer not being selected simply because they did not compete in the selection competitions identified, although emphasis lay on them, together with the ranking system, but subject to the predictive of performance "*test*".

30. The Appellant's position is in essence that exceptional circumstances or results are just that, where there is something about an athlete which warrants inclusion or selection. Mr Jiang's results in Australia were said by the Appellant not to be exceptional nor did FeNZ directly contend for this, but FeNZ said that his performance and potential for the Commonwealth Championships warranted his inclusion for consideration in the team. As an overseas resident he can seek exemption from the stated criteria, and while not expressly stated, the Tribunal considers Mr Jiang could be properly considered for selection under that head.

North Island Championships – "cut off"

31. A further ground of appeal referred to competitions and results up to and including the North Island Championships, after which the team was to be announced. This was said to be a "**cut off**" point. FENZ responded that such was a misconception perpetuated by some parties wrongly believing the North Island Championships were the last tournament prior to selection. While in some cases positions were bracketed pending further possible results or information, this had no relevance in selecting the Men's Sabre team selection.

Rankings

32. Points for the ranking system are awarded for competitions listed in the Ranking System. Points are specific to each weapon.
33. The Appellant contended that his New Zealand ranking and performances of fencers Michael Mercer, Luke Crozier, the Appellant, and Rick Jiang were not properly considered. If the New Zealand ranking was to **determine** the position, then the Appellant's third ranking would have been decisive.
34. The Appellant placed 3rd in the New Zealand Champs and 8th in the North Island Champs. A number of Auckland tournaments also

gained him ranking points but the selectors considered that those fields lacked fencers of sufficient ability to place store in the results. The Appellant gained 351 points from five competitions but 193 of these stemmed from competitions which FeNZ said "*skewed*" the ranking. FeNZ referred to these as "*accepted flaws*" in the current system which "*resulted in a higher number of points than the standard of competitions really warrants*". Points gained in McLeavy Sabre, Fenton Epee and W Dawn competitions were used as examples.

35. FeNZ's position is that the rankings were "*skewed*" because the first, second and third place getters were placed in one pool while the Appellant if he was so ranked should have won easily but he suffered two defeats (described above).

Relativity

36. FeNZ said relativity was measured in part by the Appellant's performance in the North Island Championships, when he lost to unranked fencers and failed to progress through the Direct Elimination phase in such a way as to reflect his ranking.
37. The 2010 North Island Championships in June involved five selected fencers three of whom placed 1st, 2nd and 3rd. The Appellant placed 8th having lost two bouts in the seeding round. He won the first direct elimination bout and then lost to Luke Robertson.

Weighting

38. This is relevant to ranking and relativity. The FeNZ position is that assessing the weight to be given to Australian and New Zealand results is not difficult. FENZ asserted that a "*top State fencer*" in Australia would expect a place or a win in the New Zealand Open Championship. Australia has greater depth, and history shows that New Zealand fencers with a high ranking struggle to make the top 16, or top half of the field at Australian Open tournaments.

39. The Tribunal was told how the selectors assessed results, including the strength of the competition. In the Australian competitions AFF#1 (David McKenzie) on 24 April 2010 the Appellant's final placing was 18th. In a pool of 7 he beat the 29th, 31st and 19th place getters to gain his final position of 18th. FeNZ said that the groups from which the fencers proceed to the next stage of a tournament vary in number and strength, and by the direct elimination process a fencer may seem on the face of it to have a low ranking but in a 32 fencer field the 1st ranked competes against the 32nd ranked. Once fencers leave the competition in the first round, they are placed according to ranking in the elimination phase.
40. As an example of how the assessment works, FeNZ referred to Luke Robertson's results at the Novac Sabre in Sydney in July, where he placed third. That was set against the fact that he is the current National, North, and South Island Champion, and the first and second place getters were ranked 5th and 10th in Australia.

Regional competitions

41. The appeal addressed the way regional competitions were utilised. The Appellant submitted that the relative merits of such competitions including Australian State competitions, should be analysed in the same way.
42. He referred to Mr Jiang's placings of 2nd, 3rd and 5th in small entry tournaments including the Victorian Open Championships. He said that Mercer and Crozier competed only in two competitions which contributed to ranking points, one regional, and one selection tournament.

Regular competition

43. With the limited entry in competitions identified as relevant to selection, the Appellant's case was that there is an onus on those

seeking nomination to have competed "*regularly*". This submission is understandable but it is not a pre-requisite to selection.

Refereeing "*moderated*"

44. There was a suggestion that the refereeing was "*moderated*" and that the North Island Championships were attended by judges of higher capabilities than those available at the Auckland regional competitions, or the Auckland based Nationals in 2009. This is far too moot a point for the Tribunal to determine and it is in the Tribunal's view necessary to make such a point quite clear as should the process of ranking where anything turns on such assessment.

G Age

45. This issue troubled the Tribunal. FeNZ stated that the "*age and future potential*" of fencers needs to be taken into account. The Appellant, in his 50s, sought selection in a team with members in their 20s. Because there is no reference to age other than age grade in the selection criteria, the Appellant, in the Tribunal's view correctly, submitted that age **in itself** is irrelevant and should not have counted against him and in his words "*it is only my performance that should be considered here*".
46. FeNZ's response was difficult to pin down. It raised the question of age in its reply, and seemed to have brought the Appellant's age to account in an imprecise way. FeNZ then said it did not actually bring age to account, and it would only be in effect an **explanation** for performance. This proved elusive, and the Tribunal was not satisfied that it should simply accept the say so of the selectors that age was put aside.
47. In the same way FeNZ seemed to undo its stance about age when it said that for the Appellant "*to be considered seriously for selection results he really needed to be better than the younger fencers*".

This was said by FeNZ to be better expressed as "*other*" fencers, but the meaning is the same on its face. Age by this statement was a discriminating factor.

48. That left the Tribunal having to determine whether the process was in fact discriminatory on the grounds of age as opposed to an inference that actual performance may be influenced by age. In the end, and not without some reservation, the Tribunal has concluded that age of itself has not been a determinant in this case at least to count against a selection otherwise within the Policy. It can never be so, as such would be discriminatory. If there is something about age which unquestionably sounds in a measure of performance, that is a different matter, but there can be no assumption in this regard.
49. Age was said by FeNZ to result "*potentially*" in a disadvantage to the older fencer in sabre, as opposed to epee. Reaction time was said by FeNZ to be affected by age, but the Appellant's point was simply that there should be no such assumption. The Tribunal agrees.

H A "*team*"

50. Expressed vaguely, FeNZ then asserted that the team is not just a collection of individuals but must fence as "*a team*" and without further explanation considered the Appellant's cause was not advanced in that regard. Assessing the overall balance of a team must in the Tribunal's mind be secondary to primary selection criteria, unless there is a good cause otherwise. The notion that a fencer who possesses greater ability and performance and with more prospect, should be excluded because of the "*team*" argument is very difficult to grasp, and the Tribunal does not accept it on the material before it.

I Decision

51. The "*Principal selection criteria*" are made up of the individual results for the tournaments specified, **together with** the ranking system. These are not exclusive criteria, but the main thrust of the Policy. It is expressed that these are tools for determination of "*relative performance*" in all events in New Zealand and overseas. Relativity must be conveyed into the assessment of potential for performance in the competition to which selection relates, here the Commonwealth Championships.
52. Age as such cannot be a factor, although an observation of performance may indicate that age has something to do with the performance as assessed.
53. Relativity is to be measured from the specified tournaments, and involves the ranking system, which incorporates results outside the specified tournaments. The ranking system has its deficiencies, outlined above, but it does have to be brought to account. With the emphasis on relativity, this Tribunal cannot say that the assessment by the selectors has included irrelevant considerations, or failed to bring to account relevant considerations, nor failed to comply with the Policy, overall.
54. More problematical is when "*additional selections*" are brought to account such as Mr Jiang. These seem to fall outside the base criteria. On a relativity basis, which is a driver for selections, it seems that he is regarded by the selectors as having real talent and prospect for these Championships, based on his performances, but the Tribunal has reservations about whether they constitute "*exceptional circumstances or results*". Exceptional in these circumstances means "*standout*" and such an expression seems inapposite except in a relative sense.
55. However an overseas based fencer can expressly seek selection by another route, if all performances are considered, as here.

56. That took the Tribunal to the performances of Jiang and the Appellant in the AFF#1 David McKenzie competition in Melbourne where Jiang was placed 30th and the Appellant 18th. Both were defeated in the **same round**. Places were determined on seeding into the direct elimination round, where both were eliminated.
57. Mr Jiang's placings in regional Australia tournaments were said to indicate that *"he showed a great deal of promise – a prediction of future performance"*. FeNZ noted by comparison that *"as an indicator of ability, the New Zealand National Champion recently placed third in an Australian State Competition."* Debate took place about the weighting to be given to the Australian State competitions, with the Appellant challenging the strength of those. That is very much a matter for selectors and this Tribunal would have to identify clear errors before it intervened on such grounds.
58. This appeal was properly brought. In a number of respects FeNZ's position was properly challenged but the Tribunal will be slow to interfere with a selection decision unless the processes miscarried, or there was clear failure, in following the policy.
59. Here, aside from the vexing question of age, there was no obvious failure by the selectors but rather a judgment call which the Appellant challenges. Rankings are **relative** performance.
60. The Tribunal cannot conclude that there was a failure to follow the selection policy as alleged. Selection was necessarily laced with an overall judgment about prospects for the Commonwealth Championships. Such is the breadth of the Selection Policy in fencing.

J Comment

61. The Appellant has exposed a good deal wanting in the Selection Policy, and raised proper questions about its application. This

Tribunal will not rewrite policy and must in this case live with its infelicities.

62. The Tribunal is constrained as to the circumstances in which it can intervene in a selection decision unless it identifies an applicable provision of an NSO's own Rules or when an appellant establishes one of the grounds which otherwise found the jurisdiction of this Tribunal. In the case of selection policy, this is the degree of adherence to the policy laid down, or a breach of natural justice, or some supervening fact.
63. The Tribunal is however qualified by experience to make an observation that selection criteria should be clear, communicated in sufficient time for an aspirant to set a course to nomination and selection, and except in particular circumstances, again clearly marked, not to select from outside the base criteria without clear warrant.
64. Selectors do have an element of discretion and there will be an element of judgment brought to bear. If that judgment is not brought to bear on grounds which are easily understood, a substantial unfairness may be worked on those who aspire and prepare on the basis of what they understand are the relevant criteria.
65. Selection policy should be clear and not mislead an athlete as to what he or she should do, or must achieve to best advance their cause:
 - (i) If rankings are to be used, then the warrant for that must be explained and understood.
 - (ii) Where results of specific competitions are to be given weight, the **fact** of entering those competitions must be identified as of consequence, if the policy intends that, and the consequence of not attending, and the reasons for that.

- (iii) If refereeing standards are to be brought to account, that should be stated and explained.
- (iv) If the accumulation of points towards rankings includes elements which numerically count but which do not on analysis have their **apparent** weight, that should be stated.
- (v) If competitions outside New Zealand are to be brought to account, then the relative assessment of that should be understood.
- (vi) Age of itself should not speak against performance nor should the performance be excused by age.
- (vii) If there is to be a policy which goes outside performance, such as a "*looking to the future*" objective, then that must be understood and whether it applies only when all else is equal or as a consideration in its own right.
- (viii) If the consideration is the way in which a particular athlete may fit into a team, then the basis for that must be explained as well. This is particularly the case if such consideration may dictate a selection outside an individual performance analysis.

Dated this 29th day of September 2010



Nicholas Davidson QC
Deputy Chairperson (for the Tribunal)

For Ron Cheatley / Dr Lynne Coleman