

**BEFORE THE SPORTS TRIBUNAL
OF NEW ZEALAND**

ST 01/08

BETWEEN **TIM CURR**

 Appellant

AND **MOTORCYCLING NEW ZEALAND INC**

 Respondent

**DECISION ON COSTS APPLICATION
14 OCTOBER 2009**

For Appellant: Noel Curr

For Respondent: Bruce Corkill QC

For Tribunal: Nicholas Davidson QC (Deputy Chairperson)
 Dr Lynne Coleman
 Carol Quirk

Registrar: Brent Ellis

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A. INTRODUCTION

1. This decision concerns an application for costs in relation to a substantive appeal decided by the Tribunal (see ***Tim Curr v Motorcycling New Zealand***, ST 01/08, decision 21 November 2008).
2. Although the appeal was partly successful, the respondent Motorcycling New Zealand (MNZ) seeks an order for costs and disbursements against the appellant Tim Curr (Tim).
3. Tim appealed to the Sports Tribunal against a decision of the Board of MNZ which found that he breached MNZ Rules during a moto-cross meeting, and imposed suspensions and a fine on him. He appealed on a number of grounds mostly relating to how MNZ had dealt with his case, including allegations of breaches of natural justice, bias, predetermination and conflict of interest involving a decision maker. He also appealed against the penalties imposed.
4. A party appearing before the Tribunal may be represented, and there is no requirement that the representative be a lawyer.
5. Tim was represented throughout the appeal process by his father Mr Noel Curr (Noel). Noel is not a lawyer. However, Noel has a long history of involvement with the sport of motorcycling through the Marlborough motorcycling club. He has taken appeals to this Tribunal in his own right against decisions of MNZ. MNZ was represented by a very experienced lawyer, Mr Bruce Corkill QC.
6. The Tribunal heard the matter and issued a final decision of the Tribunal except as to costs. We refer to this as the "substantive decision" throughout this costs decision.
7. In relation to some of the appeal grounds, the Tribunal expressed reservations regarding MNZ's conduct of the disciplinary process. However, it concluded that none of these grounds were sufficiently made out to warrant quashing the decisions outright or referring the matter back to MNZ. The Tribunal therefore upheld the findings against Tim.

8. However, the Tribunal partly allowed the appeal against the penalties imposed and reduced the sanction imposed for one offence by a significant margin. The Tribunal took into account Tim's acknowledgments and recognition of his conduct while giving evidence at the Tribunal hearing, penalties imposed in other MNZ cases, Tim's youth, his otherwise good record and the severe impact of the sanctions upon him. The Tribunal reduced the sanction imposed by MNZ of two years' suspension followed by one year of partial suspension to a sanction of 15 months' suspension for the offence of riding dangerously near to a steward. Other lesser sanctions imposed by MNZ for other offences were not overturned.
9. The Tribunal made comments in its decision about how the matter had evolved before it and noted that it had been "*complicated in the extreme*" and that, in the process of getting to a hearing, many procedural issues had been raised by the parties that had required rulings.
10. The Tribunal addressed the issue of costs in its substantive decision as follows:

"Costs are reserved, although the Tribunal has a grave concern about the costs already incurred by MNZ and potentially by Tim and Noel Curr. The Tribunal reflects on the scale of the appeal as mounted, and considers that a more restrained approach may have avoided some of the extreme conflict at the heart of this appeal. The Tribunal will not address the question of costs without further submissions."

B COSTS APPLICATION AND SUBSEQUENT EVENTS

Costs application

11. The Tribunal received submissions from Mr Corkill on 11 December 2008 seeking costs in favour of MNZ. Mr Corkill made a number of submissions as to why costs should be awarded in favour of MNZ instead of Tim and these will be considered below.

12. Mr Corkill advised that the costs incurred by MNZ were \$19,000 plus \$200 disbursements. MNZ sought a costs order against Tim of \$9,500 plus an additional sum of \$200 for disbursements. These figures were based on Mr Corkill's estimate of what a costs order may have been if the matter had been heard in the High Court.
13. On 11 December 2008, the Tribunal invited Noel and/or Tim to make written submissions in relation to costs.

Events subsequent to the costs application

14. In an e-mail received by the Tribunal on 12 December 2008, Noel advised that he would make written submissions as to costs when he returned from holiday "*late next week*". However, by mid January submissions had still not been received.
15. The Tribunal set a formal timetable for the receipt of costs submissions. Noel was to file costs submissions by 5 February 2009 and MNZ were to file any submissions in response by 12 February 2009.
16. On 5 February, Noel requested a time extension to file the submissions. The Tribunal granted a time extension of 14 days and advised that no further time extension would be given.
17. On 25 February, Noel sent an e-mail to the Registrar seeking that the Tribunal revisit its substantive decision in light of allegedly new evidence. Noel stated that in light of the above information contained in his e-mail, "*we feel it is inappropriate to make any comment or claim, for costs in this matter at this time*".
18. The Tribunal issued a Minute on 7 April requesting that MNZ respond within seven days to the issues raised. The Tribunal stated it would then make a determination as to further process but in the meantime deferred any determination as to costs.
19. Mr Corkill responded for MNZ by a memorandum of 17 April. He essentially submitted that the Tribunal had no jurisdiction to revisit the matter.
20. By a Minute of 29 April, the Tribunal ruled that the issues raised by Noel were "*essentially considered by the Tribunal and the subject of its Final*

Decision, and that it is not appropriate to re-litigate this matter, irrespective of jurisdiction..." The Tribunal further stated that *"Nothing raised by Mr Curr suggests that the Tribunal process itself has been impugned by what he now says, and we decline to revisit our Decision. Whether we have jurisdiction to do so is thus not an essential part of our reasoning. The point essentially was dealt with, and we would not otherwise quash the Final Decision . . ."*

21. The Tribunal referred to an e-mail Noel sent to the Tribunal on 27 April. He referred to Rule 33 of the Tribunal's amended rules which came into force on 17 April 2009. This rule made express reference to the situations in which the Tribunal may order a rehearing of a matter. The Tribunal may order a rehearing if, in its opinion, there has been a miscarriage of justice that justifies a rehearing. The rule came into force on 17 April 2009, and did not apply to proceedings commenced before then. The Tribunal commented that *"even if the amended Rules were to apply to these proceedings, the Tribunal does not consider a miscarriage of justice has occurred here which would warrant a rehearing"*.
22. With the request to revisit the substantive decision disposed of, the Tribunal then could focus the parties' attention back to the question of costs. In the remainder of the Minute, the Tribunal summarized the present position in relation to the costs application and made some general observations.
23. The Tribunal gave Noel 14 days to reply to MNZ's application for costs. The Tribunal stated it *"takes this course because of the seemingly interminable process, and considers the guidance contained in its observations should assist Mr Curr in identifying the relevant issue."*
24. On 14 May, Noel made a submission by e-mail pointing to certain actions of MNZ and submitting that the parties should bear their own costs. This submission is considered below.
25. We have set out in detail above the events subsequent to the costs application to demonstrate the lengthy and convoluted process that the Tribunal has had to deal with.

26. The substantive decision is to be read in conjunction with this costs decision and in the substantive decision we also set out in detail (at paragraphs 108 - 138) the similarly lengthy and convoluted chain of events the Tribunal had to deal with to get the matter to a hearing. Even after the hearing, there were attempts to introduce further material. This has been no easy task for the Tribunal.

C. SUBMISSIONS AS TO COSTS

Submissions for MNZ

27. Mr Corkill referred to observations in the Tribunal's substantive decision regarding the "*prolonged, fractured and complex*" process, and the very serious allegations against MNZ. Mr Corkill submitted "*a plethora of allegations were made, many of them alleging bad faith. All of these were dismissed.*" The ground of appeal which succeeded related to penalty. He referred to paragraph 139 of the decision and the Tribunal's view that a more restrained approach may have avoided some of the extreme conflict at the heart of the appeal.
28. Mr Corkill then made submissions referring to the manner in which Noel had represented Tim. He stated:

"However, it was not just a case of a scatter gun approach being raised on numerous points of challenge, but also the fact that they were raised in a fashion which at times was difficult to comprehend, and that too incurred extra input on the part of Counsel, in trying to discern what it was that was being raised for the Appellant.

It is of course recognised that it is difficult for a lay person to become involved in legal processes such as the present, but nonetheless the process became considerably more protracted than it needed to be."

Mr Corkill referred to a passage from ***Birkenhead v Kendall & Anor*** [2008] NZCA 531 where it is stated: "*As important as protecting unrepresented litigants is ensuring that those who do have legal representation are not placed in a disadvantaged*

position because the Court appears to be pre-occupied with the unrepresented litigant”.

The Appellant, via his representative, was granted considerable indulgences as to time, as to issues of relevance, and as to the extent of materials which were permitted to be placed before the Tribunal. Indulgence is a relevant factor when considering issues of costs.”

29. Mr Corkill submitted:

*“In short, this is not a simple case where one can say that because (part only) of the appeal succeeded, costs should follow the event. This is obviously a case where the Tribunal has to consider the totality of the allegations that were raised, and the fact that most of them did not succeed. [reference was made to dicta in **Packing-In Limited (in liq) Formally Known as Bond Cargo Ltd v Chilcock** (2003) 16 PRNZ 869 in support of this].*

Here it is submitted that most of the allegations raised for the Appellant failed, that a significant amount of time was devoted to those issues, and consequently it is appropriate for an order of costs to be made against the Appellant. A further relevant fact is that the Tribunal only modified the penalty imposed by the Board, because of new evidence, which was not available to the Board at the time of its hearing. That evidence indicated remorse, and the profound effect that the suspension was having on Mr T Curr on an ongoing basis (loss of friendship, sponsorship and so on). It is fair to say the Board did not err, but that fresh information was available to the Sports Tribunal.”

30. Mr Corkill submitted that if the matter had been heard in the High Court and not the Sports Tribunal, and MNZ had “*succeeded outright*”, the High Court would have made a costs order of \$10,720 in favour of MNZ. He attached a schedule showing how he calculated this on what is called a “*2B basis*” under Schedule 3 of the High Court Rules.

31. However, given the “*outcome on penalty*”, Mr Corkill submitted some discount would be appropriate. MNZ sought a costs order against Tim of

\$9,500 which Mr Corkill submitted was a "reasonable and fair contribution to costs" plus an additional sum of \$200 for disbursements (photocopying, faxes and courier fees).

Submissions for Tim Curr

32. Noel made the following submissions on behalf of Tim:

"As the tribunal modified substancially (sic) the penalty imposed, and MNZ steadfastly rejected the offers to go to mediation, thus compelling (sic) the actions taken, and as correctly pointed out by the Tribunal that getting the required information from MNZ was made almost impossible, the action taken by Tim Curr was well founded and justified. It follows that all parties should absorb their own costs, and move forward."

D. COSTS AWARDS – PREVIOUS TRIBUNAL DECISIONS AND PRINCIPLES

Rules of Tribunal

33. MNZ's application for costs is to be considered under Rule 28 of the 2007 Rules of the Sports Tribunal. The Tribunal Rules have been amended since these proceedings commenced but the 2007 Rules apply to these proceedings. Rule 28(a) of the 2007 Rules states:

(a) The Tribunal may order any party to a Proceeding to pay to any other party and/or to the Tribunal such costs and expenses (including filing fees and witnesses' expenses) as the Tribunal thinks fit.

34. Rule 28 therefore gives the Tribunal a discretion whether to award costs or not. There is nothing in Rule 28 to suggest that a costs award will usually be made.

35. Other Tribunals and Courts operate under their own rules and some of these are quite different. The High Court operates under different costs rules to the Tribunal. Some rules applying to other bodies contain a presumption that costs will follow the event – i.e. the successful party will

normally expect to receive a costs award in its favour - and these rules specifically say so. This is the case in the High Court.

36. The Tribunal operates under its own rules and they contain no statement or presumption that costs will normally be awarded. This is appropriate given the Tribunal's intended accessibility.
37. We note that a submission that costs scales in the courts should apply to a tribunal has been rejected by the High Court in **Herron v Speirs Group Ltd** (High Court, Auckland, CIV 2006-404-002277, costs decision 30 October March 2008). The High Court approved of the broad approach to costs of the Human Rights Review Tribunal which included the statement that "*Caution needs to be exercised before applying an analysis of what might have been calculated under either the High Court or District Court scale of costs. Such an analysis can be no more than a guide*". The Court rejected a submission that that Tribunal's costs awards must be in proportion to what would be awarded in the District Court and noted that it would be inappropriate and inconsistent with that Tribunal's applicable costs rule under the Privacy Act 1993 (which gave a wide discretion to award costs as it saw fit) to constrain that Tribunal to costs that would be awarded in the District Court.
38. The recently amended Rules of the Tribunal contain a costs rule, Rule 29, which is identical to Rule 28. There has never been a presumption in any of the Tribunal's previous or current costs rule that costs will be awarded.
39. In fact, until the Tribunal's Rules were amended in 2007 there was an opposite presumption in the Tribunal's cost rule that parties would usually bear their own costs, or costs awards would be limited to a "*symbolic amount*", except in "*exceptional circumstances*". In the recent costs decision of **Noel Curr v Motorcycling New Zealand Inc** (ST 09/08, costs decision 26 February 2009) the Tribunal stated that it has not as a matter of practice departed from the intent of the original rule. This is considered further below.

Previous decisions of the Tribunal considering costs

40. We have reviewed previous decisions of the Sports Tribunal as to costs. The decisions considered below are limited to "appeal" cases - i.e. where

there has been an appeal against a decision of a national sporting organisation (NSO) - and do not include consideration of any anti-doping cases where costs have been awarded.

41. There do not appear to be any Sports Tribunal decisions where costs have been awarded against an appellant in **favour of an NSO**. In all the Tribunal cases where costs have been awarded, the awards have been in favour of the appellant. However, in the vast majority of cases, the Tribunal has not awarded costs. The highest costs award ordered by the Tribunal was \$2750. Other awards have been significantly lower.
42. The Tribunal has previously made the following costs awards:

Costs Award	Case
\$2750	<i>DP O'Connor v Motorsport NZ</i> (SDT 03/05, decision 7 September 2005)
\$750	<i>Noel Curr v Motorcycling NZ</i> (ST 19/07, decision 11 April 2008)
\$500 (in addition to ordering NSO to refund appeal fee of \$500)	<i>Tony Heuvel v Speedway NZ</i> (ST 12/08, decision 24 September 2008)
\$500	<i>Andrew Murdoch and others v Yachting NZ</i> (SDT 01-03/04, decision 17 March 2004)
\$300	<i>Daisy Thomas v Surfing NZ</i> (SDT 09/06, further decision 21 August 2006)

43. In ***Murdoch***, while noting it was its usual practice under its rules to let costs lie where they fall, the Tribunal awarded modest costs to the successful appellant Mr Murdoch but this was limited to the cost of the appeal filing fee (\$500). The Tribunal declined to award any further costs on the basis that it had commended Yachting NZ for adopting an effective and fair appeal procedure.
44. In ***Heuvel***, the appellant was successful in his appeal and his suspension was overturned. He received a modest costs award of \$500 (as well as the NSO being ordered to refund him the \$500 appeal fee). While he did

raise a number of appeal grounds that were not all successful, they were all directed toward the same result, and the Tribunal ultimately found numerous breaches of natural justice in the way the NSO had dealt with his case.

45. However, in the other cases where there have been costs awards it can be said that the appellant did not succeed in all grounds of appeal (such as **O'Connor** and **Curr**) or not at all (**Thomas**). This was a relevant factor taken into account by the Tribunal in determining the costs awards in these cases.
46. The costs award of \$2,750 in **O'Connor** is the highest made by the Tribunal to date. This award was not to reimburse for legal costs but rather was specifically directed towards reimbursing the additional fees paid to his consulting engineer, travel costs for that engineer and the appellant, and the filing fee paid on appeal. The appellant, who represented himself, also claimed costs for legal assistance he had received in preparing his case but the Tribunal declined to award such costs. While the appellant succeeded on his primary ground of appeal, and ultimately succeeded in his appeal, he failed on another ground and the Tribunal stated that this was taken into account in making the costs order.
47. In **Thomas** and **Curr**, deficiencies in the NSO's processes were taken into account, and balanced against the lack of total success of the appellants, in determining costs.
48. In **Curr** (ST 19/07), the appellant (Noel Curr) was awarded \$750 costs. He had sought over \$4000. He was only partly successful as, despite severe deficiencies in MNZ's processes, the Tribunal considered he had acted in a manner requiring a disciplinary penalty (although not as severe as the three years' suspension imposed by MNZ). The Tribunal allowed the appeal and reduced the penalty to nine months' suspension, which he had already served.
49. It could be argued that here there are similarities with **Curr** (ST 19/07) as the appeal was only successful as to penalty and in both cases the Tribunal found the appellants' conduct warranted a penalty. However, in

Curr (ST 19/07) costs were awarded in favour of the appellant, Noel, and not MNZ.

50. The **Curr** (ST 19/07) decision allows some reflection of whether MNZ is entitled to receive a costs award against Tim, who has also been partly successful in his appeal against MNZ. However, in Noel's case the Tribunal found that breaches of natural justice and severe deficiencies in MNZ's processes had been established. These were taken into account by the Tribunal in determining costs, as well as the fact that the appellant "*had to go some distance to get here*".
51. In **Thomas** the appellant was ultimately unsuccessful but her appeal had some merit and there were exceptional circumstances justifying a small costs award of \$300 in her favour. The appeal would have beneficial consequences within the NSO. Further it was the NSO's processes that had attracted the appeal. The costs award was not "symbolic" but a reflection of the NSO processes which had fallen short.
52. The only case before the Tribunal where an NSO has specifically sought costs against an appellant is **Noel Curr v Motorcycling New Zealand Inc** (ST 09/08, costs decision 26 February 2009) where the appeal was struck out for being out of time. In that case, MNZ also sought a costs order in accordance with the costs scale in the High Court Rules of \$1,760 (actual costs were said to be \$3,500). That decision rejected the proposition that the High Court costs scales were appropriate in the Tribunal. The Tribunal declined to award costs.
53. This decision reinforced the proposition that normally costs lie where they fall or if there is to be a costs award, then it should be "*symbolic*". It referred to principles in a previous Tribunal ruling, including that it would only be in "*exceptional circumstances*" where "*substantial*" costs awards would be made. It noted the Tribunal's original cost rule, Rule 25.2 of the 2003 Rules:

"The Tribunal shall usually make an order that requires each party to bear their own costs or an order imposing on a party the payment of costs limited to a symbolic amount. In exceptional circumstances, the Tribunal may make orders for payment of more substantial amounts, taking into account the outcome of the Proceeding; whether the Proceeding was without merit; the way in

which the parties conducted themselves in the Proceeding; and such other factors as the Tribunal considers just”.

54. In relation to this, The Tribunal stated at paragraph 4:

“The current Rules of the Tribunal are not so restrictive. Nevertheless, the Tribunal has not as a matter of practice departed from the intent of the original rule”.

55. The Tribunal noted that the appellant did have a right of appeal and the appeal was only struck out for procedural reasons as it was filed out of time. Therefore, there was no need for the Tribunal in that case to make any analysis of the merits of the appeal.

56. The costs rule applicable to this case is not as restrictive as its predecessor and gives the Tribunal a wide discretion to award costs as it thinks fit. However, the Tribunal has not in practice departed from the intent of the original rule when exercising its discretion of deciding whether to award costs as it thinks fit. **In practice, the Tribunal is only likely to award substantial awards of costs in exceptional cases.** The Tribunal is not limited to consideration of any particular factors in making an assessment of whether a substantial costs award is justified but it is likely to consider the factors listed in the original rule as relevant. These are: the outcome of the proceeding; whether the proceeding was without merit; the conduct of the parties in the proceeding; and any other factors that the Tribunal thought “just”.

Summary of principles and Tribunal’s practice in relation to costs awards

57. In summary, we draw the following relevant principles, and make the following observations about the Tribunal’s practice, in relation to the awarding of costs in the Tribunal:

- The Tribunal operates under its own Rules, not costs rules and scales applying to other courts or tribunals.
- The Tribunal will not apply the High Court’s costs rules and scales in making costs awards.

- Under its Rules, the Tribunal has a discretion to order costs as it thinks fit.
- There is no requirement or presumption in the Tribunal's Rules that costs will normally be awarded.
- The general practice of the Tribunal has been to award costs only in exceptional cases. Thus:
 - In the majority of cases heard by the Tribunal, costs have not been sought nor awarded.
 - There have been five "appeal" cases in which the Tribunal has awarded costs. Costs awards in those cases have been relatively modest. The highest costs award was \$2,750. The others ranged from \$300 - \$750.
 - The Tribunal has generally not made costs awards to reimburse for legal costs but will consider the warrant for such representation.
 - In determining costs awards, the Tribunal has taken into account whether an appellant has been completely successful in their claim.
 - In determining costs awards, the Tribunal has taken into account the conduct of parties and the merits of the appeal; including whether there have been deficiencies in NSO processes and/or breaches of natural justice.
- While the Tribunal now has a wide discretion to order costs as it thinks fit, it has not in practice departed from the intent of its original costs rule.
- The Tribunal is not limited to consideration of any particular factors in determining costs but is likely to consider the factors listed in the original rule as relevant, which are:
 - the outcome of the proceeding
 - whether the proceeding was without merit
 - the way parties conducted themselves in the proceedings and
 - any other factors that the Tribunal thinks just.

- Costs should not be an impediment to come to this Tribunal, but that principle must yield to circumstances where an award is warranted because of the merits, or lack of them, and the conduct of the case by a party. These factors are relevant considerations in this case. So too is the outcome of the proceedings.

E. DISCUSSION ON THE FACTS OF THIS APPEAL

Whether the High Court Costs scales are applicable

58. The Tribunal (once again) rejects that submission.

Outcome of the Proceedings

59. Mr Corkill submits that while the appeal succeeded as to penalty, the significant issues of process and bad faith raised by Mr Curr had not.
60. The Tribunal has previously awarded costs to an appellant where that person was only partly successful in their appeal. The Tribunal has never awarded costs against an appellant who has had some success, and would need compelling reasons to justify a costs award against an appellant who has been partly successful.
61. Tim ultimately failed in his attempt to unseat the MNZ process. He did succeed in his appeal as to penalty, although more through his own conduct than representations made on his behalf by Noel. Tim exhibited features of remorse and recognition, which allowed and warranted the Tribunal some room for manoeuvre as to penalty. Mr Corkill is correct that events after the MNZ process primarily warranted reconsideration of the penalty.
62. However, the Tribunal also took into account other factors, which do not necessarily neatly fall into the category of "*events after the MNZ process*", in deciding to reduce the penalty. The Tribunal had reference to the previous disciplinary decisions of MNZ. While the Tribunal commented in the substantive decision at para 105 that it was difficult without a line of disciplinary decisions addressing the issue to gain a sense of proportionality with other offending, it noted at para 102 that it had read

every decision referred to it and, while there were a range of offences referred to, the Tribunal considered from these that "*exposing others to danger is the salient reference point*" and "*concludes that a penalty in the range of 12 months to 2 years is warranted, and is proportional*". The penalty imposed by MNZ of two years' suspension followed by an additional one year partial suspension was outside this range.

63. The Tribunal also noted at para 101 that the MNZ constitution, applicable at the time of the offending, did not expressly allow for penalties such as the probationary partial suspension period and the Tribunal had reservations whether such a penalty was available to MNZ at the time.
64. Regardless of whether the penalty was available to MNZ, the Tribunal stated at para 101:

"...we can see no further benefit or requirement for a probationary period, given the length of suspension resulting from this appeal, the impact by way of punishment on Tim Curr and thus deterrence to others."

65. Although Tim was successful with his appeal to penalty, the majority of time spent in this case was on the allegations challenging MNZ's process and these grounds of appeal were all dismissed. This leads us to the next consideration. Were these appeal proceedings challenging MNZ's processes without merit?

Whether the proceeding was without merit

66. Mr Corkill is correct in his submission, at least in relation to MNZ's processes, that "*a plethora of allegations were made, many of them alleging bad faith. All of these were dismissed.*"
67. What is not said in Mr Corkill's Memorandum is a reflection of the very close scrutiny which was required about the MNZ process, and in particular the allegations of actual or apparent bias. The Tribunal had cause to say something in its substantive decision about the way in which the disciplinary processes were handled within MNZ, and Noel certainly raised legitimate issues in this regard for consideration which required close focus by the Tribunal. There were also difficulties in getting all relevant MNZ disciplinary material. There was enough in the claimed

defects as to process to warrant close scrutiny by the Tribunal. So we do not consider the case is one which wholly lacked merit.

Conduct of the parties in the disciplinary proceedings

68. Mr Corkill made submissions concerning the conduct of the parties in the proceedings and essentially argued that the manner in which Noel had represented Tim made the process more time consuming than it needed to be and ultimately more costly for MNZ. He submitted that not only was there a "scatter gun" approach by Noel in raising many points but the points of challenge were raised by Noel in a way that was difficult to comprehend. The Tribunal accepts there is some force in this. At times Noel raised points obscure as to relevance. Other points, even if initially difficult to understand in the manner in which they were raised, had some relevance.
69. The Tribunal recognises that with apparent assistance from persons with legal skills Mr Curr essentially ran the case as a layman. Mr Corkill's point is that that more effort was required by counsel for MNZ as the result of the way the appeal was mounted.
70. Mr Corkill referred to the judgment of Robertson J in ***Birkenhead v Kendall & Anor*** [2008] NZCA 531. This is a salutary reminder that in reaching to ensure fair process for the unrepresented litigant, and to assist presentation of the case in an orderly way, a party more familiar with the process, with skilled legal representation, is to some extent at a disadvantage, ameliorated only to the extent a Tribunal or Court can facilitate the lay litigant's presentation.
71. Mr Corkill refers to indulgence being granted to Noel, which may otherwise not have been readily granted. However, the principle that costs will follow that indulgence is one that the Tribunal would not normally apply unless there is an element in the conduct of the indulged party which results in specific additional cost to the other, and which should not have occurred.
72. To impose costs in this case as sought by MNZ would be a reflection of a discipline on litigants when coming before the Tribunal, to ensure the case is focused and properly made. This is a legitimate consideration but there

must be no penalty imposed by way of costs for the fact a litigant is represented in person (or as in this case by his father).

73. There is no requirement to have a legal representative in the Sports Tribunal and the Tribunal aims to be accessible and affordable to all. Although a party is entitled to be represented in the Tribunal, there is no general expectation, unlike in the courts and some other bodies, that parties will usually have legal representation and incur the costs that attach to this.
74. In the present case, representation of the appellant by a low cost *pro bono* counsel under the Tribunal's *pro bono* lawyer scheme may well have been preferable. However, parties have the right to not be represented or to be represented by the person of their choice.
75. While Noel did raise some legitimate issues during these proceedings, he also made some extravagant allegations, which are detailed in the substantive decision. The Tribunal considers that some of these allegations, and the manner in which they were made, went well beyond what an appellant and representative (whether legally qualified or not), acting responsibly in the process, would raise. Whether they went so far beyond that point that a costs award is justified needs to be weighed in all the circumstances of this case.
76. Noel made points about the conduct of MNZ in his submissions as to costs. Firstly, he pointed to MNZ "*steadfastly*" rejecting his offers to go to mediation to settle this matter and that MNZ's rejection of mediation compelled Tim and Noel to pursue the matter to a hearing before the Tribunal. There is no doubt that Noel requested MNZ to go to mediation over this matter and that MNZ refused to do so.
77. However, while the Tribunal generally encourages parties to see whether they can agree to settle their differences through mediation or some other process short of adjudication, there is no requirement for a party to agree to go to mediation. The Tribunal notes that it now has the power in its Rules to order parties to undertake mediation but this power did not exist at the time of these proceedings. In any event, this is not to say that the Tribunal would have ordered mediation. The Tribunal can appreciate that

in these circumstances MNZ may well have been reluctant to go to mediation over a challenge to a disciplinary decision it has made.

78. Whether mediation would have been successful and saved cost to the parties is now a moot point. While their refusal to agree to go to mediation perhaps represents an entrenched position, MNZ were entitled to refuse to take part in mediation.
79. Noel then submitted "*as correctly pointed out by the Tribunal that getting the required information from MNZ was made almost impossible, the action taken by Tim Curr was well founded and justified*".
80. The Tribunal considers that this submission has some force to the extent that Noel and Tim did experience difficulty and delays in getting some relevant information from MNZ. For example, there were difficulties in getting all relevant MNZ disciplinary material from MNZ.

Weighing the relevant circumstances

81. All the circumstances need to be weighed and any award of costs is ultimately a matter of discretion, doing justice to both sides.
82. Although the Tribunal found grounds to reduce the penalty, it has not found breaches of MNZ process or breaches of natural justice to warrant disturbing the findings of breach. This element of the appeal occupied most time and effort.
83. The appellant has not sought a costs award, which is clearly not warranted in the circumstances of this case.
84. The question devolves to whether the circumstances are exceptional or so out of the ordinary to justify a costs award in favour of the respondent?
85. An analysis that justified a costs award to the respondent on the grounds that the respondent "*succeeded*" on the more time consuming grounds would be simplistic and unwarranted, unless there was no merit whatsoever in these unsuccessful grounds.
86. Tim and Noel raised some issues of legitimate concern in relation to MNZ process. The Tribunal did not ultimately uphold those grounds, but it cannot be said that all these grounds were without merit to the extent they should never have been raised. Whether the appellant here was

represented or not, and no matter how the allegations were mounted, these allegations rightly required considerable input and response by MNZ. Reputations and process were at stake, and an important element of MNZ discipline was under examination.

87. The Tribunal considers that there can be no criticism of an appellant for pursuing grounds that raise legitimate concerns. Some of the grounds raised ultimately had little relevance, and we consider this below, but others raised had significant relevance. The Tribunal considers that a costs award against the appellant is not justified just because those grounds were pursued.
88. This then leads us to ask was there anything in the conduct of the parties, or their representatives, which when balanced against the above considerations, takes the case so out of the ordinary to justify a costs award?
89. We repeat that one of the aims of the Sports Tribunal is to be accessible and affordable. The Tribunal was established as an alternative to the courts for those who are involved in sports disputes. Part of the reason is to ensure access to justice for these people who may otherwise be put off pursuing a resolution by the potentially formidable costs, delays and legal complexities they might have to face if they had to go through the formal proceedings of the courts.
90. There is no requirement to have a legal representative and parties may represent themselves or be represented by a friend or family member as Tim chose to do here. Similarly MNZ could have represented itself, perhaps through a member of its executive, but chose, as it was entitled to do, to engage an experienced legal representative. Given the nature and scale of the challenge made to MNZ procedures and personnel this was justified. Mr Corkill has given the Tribunal considerable assistance.
91. The Tribunal supports a pro bono system of representation where it will provide parties with the contact details of lawyers who have agreed to represent parties on a low cost, or even possibly free, basis. Both parties were provided with the opportunity to receive these details if they so wished. Neither party wished to.

92. A lay representative will not usually advance their case with the same focus as an experienced lawyer. However, a lay representative still has obligations to present their case in a reasonable and responsible manner.
93. Despite the latitude that might commonly be allowed a lay representative, the Tribunal has significant concerns concerning the manner in which Tim's case was presented by Noel. Some allegations raised had little relevance and while that in itself may have not been of so much concern, the imprecise and at times inflammatory manner in which they were raised meant that more time than otherwise might have been needed had to be spent on these matters by the Tribunal, as well as Mr Corkill. The manner in which some of these allegations were made went beyond what we expect a party or their representative to reasonably or responsibly make. The Tribunal noted in the substantive decision that "*Noel Curr has demonstrated that he will leave no stone unturned, in his scrutiny of process and fact*" and we think it can be fairly said that in his determination to do so he has also demonstrated a tendency to advance his case in an abrasive manner and at times pushed the limits of what is acceptable conduct of the appeal. He displayed a marked reluctance to move on from matters that the Tribunal clearly stated were not relevant, and this added to the time spent. Noel has primarily had Tim's interests at heart and has thus advanced everything he could possibly think of to persuade the Tribunal to find in Tim's favour. Yet the manner in which Tim has been represented has made the case more protracted than it needed to be.
94. We thus consider that the manner in which the case has been advanced for the appellant by Noel may justify a modest costs award to the respondent. However, we need to weigh this against the other factors.
95. Noel has submitted that MNZ's conduct should weigh against it and there is something in this to the extent it could have been responsive to his requests for information.
96. Against a costs award is the fact that the appeal was not without merit. This appeal has demonstrated that there is room for improvement in MNZ's processes. The Tribunal has previously taken into account

shortcomings in an NSO's processes as a relevant and legitimate factor in determining whether costs should be awarded. MNZ will have learnt from this case.

97. The appeal was partially successful, even if that is primarily, although not totally, due to Tim's conduct at the Tribunal hearing. A costs award against an appellant who has been partially successful would be a novel result in this Tribunal.
98. This brings us to a further point. A costs award against the appellant would be an award against Tim, not a costs award against Noel. Our concerns are primarily directed at the manner in which Tim has been represented, not at Tim's conduct itself. However, it must be said that by allowing his father to represent him throughout these proceedings, it appears that Tim acquiesced to being represented in this manner.

F. DECISION

99. We have found this to be a difficult and finely balanced matter. We have concluded that, while there is an argument for making a modest costs award **against** the appellant, the other factors in combination weigh against making such an order. Those coming to the Tribunal will be guided by this Decision. Where a matter is argued without merit, and/or without any reasonable attempt to address the case responsibly and fairly costs may be awarded, even against a party partially successful.
100. The Tribunal therefore dismisses the application by the respondent for costs. Costs are to lie where they fall.

Dated 14 October 2009



Nicholas Davidson QC Deputy Chairperson (for the Tribunal)
Lynne Coleman
Carol Quirk