

Introduction

1. This is an appeal by Ms Lawton against her non-selection for the New Zealand Mountain Bike team to compete at the 2006 UCI World Mountain Bike and Trial Championships to be held at Rotorua later this month.
2. Ms Lawton was a candidate for selection in the elite women's cross country team. Eight members and two non-travelling reserves have been selected for that team. Ms Lawton, who had been a member of the World Champs training squad, was advised when the selections were announced that if she wished to receive feedback or to lodge a formal appeal against her non-selection, she was to follow a process which included lodging an appeal by 18 July 2006. Ms Lawton lodged such an appeal with Mountain Bike.
3. After advising of an appeal process, Mountain Bike determined that its constitution did not contain a process for appealing. Further, even if there had been an internal selection appeal review process, there would not have been time to allow a further appeal to this Tribunal, because the New Zealand team must be confirmed to the international organisation (UCI) by 11 August. Mountain Bike then asked this Tribunal to conduct the appeal. Rule 12.1.2 of the Tribunal's Rules give it jurisdiction to determine an appeal against the non-selection of a New Zealand representative if the parties to the appeal agree to do so in writing.
4. In accordance with the Tribunal's rules, those athletes who had been selected and "who may be affected by or who has a sufficiently close interest in the outcome of any proceeding, may be joined as an interested party". The Tribunal advised four of the selected team members and the two non-travelling reserves that they could become Interested Parties by giving notice to the Tribunal. None of these six athletes accepted the invitation to become an Interested Party.
5. Because of the exigencies of time the parties agreed to the hearing being conducted by telephone conference.

Jurisdiction

6. If a National Sports Organisation has an appeal procedure in its constitution or rules, all members of that National Sports Organisation are bound by those rules. Thus an appeal from a decision of a National Sports Organisation's Appeal Committee to this Tribunal is binding on both the appellant and other athletes selected in the team.

They, through the constitution or rules, have agreed to accept the jurisdiction of the Tribunal. In this case however, the matter comes before the Tribunal by agreement between the athlete and Mountain Bike. As such, the powers of the Tribunal are more limited.

7. In selection appeals, if the appeal is allowed, the Tribunal may refer the matter back to the National Sports Organisation for determination in accordance with the applicable selection criteria. It also has the right to conclusively determine the issue of selection of the appellant in certain circumstances. In this particular case, if the appeal were to be upheld, another athlete would be affected by the decision. It is the Tribunal's view that it could not "deselect" an athlete who has not submitted to the jurisdiction of the Tribunal. In such circumstances if the appeal were to be allowed, it would be necessary to refer the matter back to Mountain Bike for it to determine the final selection in accordance with the applicable selection criteria and its own constitutional arrangements.
8. The observations in the previous paragraph highlight the need for a National Sports Organisation, if it intends to give a right of appeal against national selections, to have appropriate provisions in its own constitution.

Background Facts

9. Ms Lawton, after winning the women's two day individual Coast to Coast race in February 2005, set herself the goal of achieving selection for the 2006 Mountain Bike World Championships. She and her coach prepared multi-sport training programmes.
10. In December 2005, Bike NZ, of which Mountain Bike is a member, issued a document entitled "Selection Policy 2006". This was the selection policy for both the Oceania Championships held in Rotorua in March this year and the World Championships to be held later this month.
11. The selection policy for the World Championships contained the following:

"Preferred Selection

1. The first three NZ riders on 06 UCI points at May 29th 2006.
2. First three finishing positions in each category at Oceania Championships (including Junior).

World Champs Training Squad

Another 12 riders coming from:

- Top 12 riders in the NZ National Championships
- Top 12 NZ Resident riders in NZ National Series

Preference will be given to NZ National Championship results if tied i.e. if two riders finish 10th in either event the result in champs wins selection.

Competing at the NZ National Championships is a compulsory part of World Championship Team selection, unless extenuating circumstances apply (entirely at selection panels discretion).

Final selection will be made from this squad to the NZ World Championship Team based on further results (domestic and international) with preference given to international results.

- World Champs Training Squad named after the conclusion of Oceania Championships/NZ National Series in early March, 2006
- Full World Championships team named on 10th July 2006 after the Brazil World Cup.

Note: all selections dependent on form and availability, at selection panels discretion"

12. On 26 January, Ms Lawton's coach sent an email to one of the selectors. This email sought advice on the steps to be taken to give Ms Lawton the best chance to be selected for the World Championships. The email noted that the top three riders in the UCI points from World Cup events would be selected and there would be four remaining places. The coach questioned whether it was necessary for Ms Lawton to travel overseas and asked whether consistent good performances through the national series plus some racing at home over the lead up to the World Cup would be enough for selectors to select Ms Lawton in one of the remaining spots.
13. The selector replied observing that UCI races would help sway the selectors' decision if the racers were very close in points or racers go overseas and have good performances overseas. It noted that one of the advantages for Ms Lawton racing overseas was to gain UCI points. The email noted that currently Ms Lawton was "doing enough to meet the basic selection criteria. For the World Champs we will be looking at putting the strongest team together and I have been told we will fill all positions available. My job is to recommend to Bike NZ the strongest team possible to represent NZ."
14. Ms Lawton elected not to go overseas. One of her reasons for this was that her UCI points ranking was such that she would not be one of the top three New Zealanders on that ranking list. Further, she was unlikely to be overtaken by any other squad member who was ranked below her.
15. In March 2006, Mountain Bike announced the World Championships squads. Twelve athletes were named in the Women's Elite squad including Ms Lawton. In the final

team of eight selected in July, seven of the squad were selected as was an athlete who was not in the squad. Two other members of the squad were appointed as non-travelling reserves. Ms Lawton was one of the three squad members not selected.

16. On 28 March, Mountain Bike posted a document on its website. That document was headed "2006 UCI World Mountain Bike and Trials Championship selection information". The following was included in the document:

"I'm in the squad; how do I give myself the best chance of making the final team"

- Familiarise yourself with the selection criteria and be mindful of your ranking within the team
- Create a training and racing plan that will ensure you reach peak condition in August
- Race in the upcoming international races (World Cups, NORBA's Swiss Cups, Maxxis Cups) if possible, otherwise choose your best domestic racing opportunities
- Keep in contact with your relevant selectors (see below)

Whether you're chasing experience and results at different events across Europe and North America or are focusing on local events with good competition, any results you achieve will be considered in the selection panel's final decision. Choose your events carefully to maximise the return you get for competing and the weight of your result. If in doubt about where you should be racing or the likely value of an event as it relates to your selection chances, please feel free to contact your selectors for advice."

Ms Lawton's evidence was that she did not see this document until after the World Championship team was selected in July.

Grounds of Appeal

17. The grounds of appeal are:
- (a) that the applicable selection criteria was not properly followed and/or implemented;
 - (b) that there was no material on which the selection decision could reasonably be based;
 - (c) Ms Lawton was not afforded a reasonable opportunity by Mountain Bike to satisfy the applicable selection criteria;
 - (d) that natural justice was denied;

- (e) that substantially new evidence has become available after the decision which is being appealed was made.

These grounds of appeal are all grounds of appeal available under the Rules of the Tribunal.

Ms Lawton's Submissions

18. Mr Hunt, in well considered submissions on behalf of Ms Lawton, submitted that this was a case where the Tribunal because of the manner in which members are appointed, should not be confined to a review process but should in effect itself make the selection if it allowed the appeal. As already noted, it is the Tribunal's view that in this case there are jurisdictional problems which would prevent it from deselecting a member of the team.
19. Ms Lawton, on the basis of domestic results, including a 7th placing in the New Zealand National Championships in Nelson on 29 January 2006, was selected for the women's team for the Oceania Championships. She was placed 10th at those championships. Based on her New Zealand results she was named in the World Champs training squad in March 2006.
20. Mr Hunt analysed Ms Lawton's results against three other local competitors all of whom have been selected in the World Championship team and another athlete, also selected, who did not compete in New Zealand at that time. Mr Hunt submitted, and the Tribunal accepts, that at the time the World Champs training squad was selected, the objective results would indicate that Ms Lawton had a greater claim to team selection than the three other members against whom she competed locally. In addition, her UCI points ranking at 3 July 2006, placed her 73rd in the rankings while the four other team members referred to above were placed between 83rd and 227th.
21. Against this background it was submitted on Ms Lawton's behalf that the selection policy referred to above was not properly followed and/or implemented. This was because there was no subjective criteria in the selection policy, and on the basis of the results already noted, Ms Lawton's claims were stronger than the three local members against whom she had competed and the fourth rider who had not competed domestically. The portion of the selection policy which referred to it being compulsory to compete in the New Zealand National Championships was also referred to as the overseas rider did not compete in those championships.

22. In support of the ground that there was no material on which the selection decision could be reasonably based, it was submitted that there were only two occasions when the athletes selected above her (among the identified four) beat her in any national or international race. Also the UCI rankings and the New Zealand National Championship results were of particular significance and Ms Lawton finished ahead of three of the four athletes in the National Championships, the other not being a competitor. She was ahead of the four of them in the UCI rankings. Because the criteria was objective and not subjective or a combination of objective and subjective, the results the selectors were required to take into account could not possibly have led them, reasonably, to have excluded her from the team selection, in favour of those athletes who had inferior competition records and results.
23. An alternative ground relied upon by Ms Lawton was that she had been advised she had not met the "Preferred Selection" criteria because she had not been in touch with the selectors. Ms Lawton's position was that this could not be so because the selectors were obliged to pick the strongest team and she had not received a copy of the document issued on 28 March which advised her to keep in contact with the relevant selectors. This was notwithstanding they had her email address.
24. The ground based on natural justice was in essence that the selectors had failed to keep her informed of the change in approach taken by them following the selection of the World Cup squad and that she was denied the opportunity to ensure that her results were in accordance with any variation of the original selection policy.
25. Finally, it was submitted that new evidence was now available to the selectors as they now knew that she had competed in three New Zealand races between being selected in the World Cup squad and the announcement of the team and that she had performed well in these races.

Mountain Bike New Zealand's Submissions

26. Ms Smith for Mountain Bike addressed the following issues:
 - (a) The selection decision and the subsequent appeal process.
 - (b) The selection panel's decision to not name Ms Lawton in the team;
 - (c) The selection panel's decision to name the Interested Parties in the team.

27. Ms Smith said that the selection criteria for the final World Championship team was posted on Bike NZ's website on 28 March 2006 and Ms Lawton was reminded of this in emails on 21 April and 3 July 2006. These emails referred to various matters including the selection criteria and clarification and gave directions as to how to access the website on which the information appeared.
28. It was submitted that:
- (a) Ms Lawton was not in the "Preferred Selection" category and that she was not within the first three NZ riders in the 2006 UCI points table at 29 May 2006 nor did she finish in the first three finishing positions in the Oceania Championships. Further, she had disadvantaged herself from selection by only competing in one domestic race after the national series and Oceanic Championships and no international races. There was no way of knowing what her current performance level was like and this made any potential selection very difficult.
 - (b) The lack of consistent communication with the selectors particularly as the importance of communication had been conveyed to Ms Lawton several times.
 - (c) Her lack of racing in large fields which could have been gained by racing in a couple of races overseas.
29. Ms Smith also gave detailed submissions on the performances of the four team members referred to above and the two reserves.

Discussion

30. On the information before the Tribunal it is likely that if the New Zealand World Championship team had been selected at the end of March, when the World Championship training squad was selected, Ms Lawton would have been in it. Her results and UCI rankings were superior to the other interested parties.
31. The Tribunal does not accept the submission that the selection criteria in this case were purely objective. It is common ground that the intention of the selectors was to select the strongest team. The original selection policy made it clear that the final team would be "based on further results (domestic and international) with preference given to international results". Further "all selections depended on form and availability, at selection panel's discretion". It is not in the Tribunal's view possible to make a selection among riders competing in different events against different

athletes in different parts of the world without bringing in subjective elements. A first placing in a local event on an easy course against weak opposition may be far inferior to a 15th place on a difficult course against top international competition. Selectors need to assess various factors including the nature of a course, the distance of a race, the calibre of the competition, the climatic conditions, circumstances which may have impinged on performance and the timing of the performance before they can make a reasoned comparison of the form of a rider at the time a selection is made. Thus even when the World Cup squad was named, the objective material may not have been the final determinative, although it appears likely to the Tribunal that at that time Ms Lawton would have been selected in the team.

32. When the team was announced in July 2006, the position had changed. The information before the Tribunal suggests that Ms Lawton did not compete to the same extent as the other relevant athletes. She competed in three local races and did well. The evidence suggests that these were races in which there were smaller fields and a lower standard than the races competed in by other athletes. Ms Lawton did not go overseas. While there can be no criticism of this decision, it may in effect have counted against her. One of the interested parties competed and performed reasonably well in four international events between the date the World Cup squad was announced and the team was selected. Another competed overseas twice and was said to have communicated well with the selectors and regularly updated them with the results and training plans. The one who had not competed in New Zealand had competed well internationally.
33. The further interested person was said to have achieved her best results in races where the selectors asked riders to perform. The Tribunal notes that this rider does not appear to have competed since the World squad was announced but in a summary the selectors stated she “gave herself an advantage by basing herself in Scotland”. She was said to be one of New Zealand’s most experienced riders and has raced in numerous international races. “Experience, consistency and improvement in her results made her a wise choice for selection”.
34. If the criteria had been purely objective and based at the date the World Cup squad was selected, Ms Lawton would have had a very strong claim. Indeed it is difficult to see that she would not have been selected in the World Cup team if it had been selected at that date. However, because of the subjective elements involved, it is the Tribunal’s view that the appeal cannot succeed. The Tribunal is not in a position to

make subjective judgments which experienced selectors are appointed to make. The Tribunal is not of the view that the selection criteria was not properly followed and/or implemented or that there was no material on which the selection decision could reasonably be based in July 2006.

35. It is necessary to comment on one or two other matters raised. First, there is the question of the athlete who competed overseas and not domestically. The selection policy issued in December 2005 required competing at the NZ National Championships as compulsory “unless extenuating circumstances apply (entirely at selection panel’s discretion)”. However, the selection information document of 28 March contained a provision which stated that if a person had not been selected in the World Championship squad, the selectors still have a mandate as their criteria was to have the strongest possible team on course in Rotorua. The selectors considered it an extenuating circumstance that she was overseas at the time and it is noted that the selectors have a discretion in this manner. This athlete was equally first amongst New Zealanders in last year’s World Cup Series (13th). The selection panel extrapolated her results to a New Zealand context and determined that she was up to the required standard. They were entitled to add to the squad and this was stated in the document issued on 28 March 2006.
36. It is also noted that UCI points, although being an important factor, are not in themselves determinative. This is particularly so in that not all athletes compete in as many UCI events which earn points as do others. There are other factors to be taken into account.
37. It is unfortunate that Ms Lawton did not see the document issued by Mountain Bike on 28 March containing selection information and in some ways clarifying the selection policy. While there was some clarification, the Tribunal is of the view that the basic provisions of the selection policy which required a subjective assessment remained unaltered. Further, the Tribunal is of the view that Mountain Bike took all reasonable steps to have the document available and if for some reason Ms Lawton could not access it, she could have requested that Mountain Bike provide her with a copy. She received at least two emails that told her that there was a document which included “selection criteria and clarification”. Ms Smith’s evidence was that she did not receive any request for copies of the document and there were at least 90 members of the squad who received the email which Ms Lawton received alerting her to the existence of the document. For these reasons the ground based on a failure to give natural justice cannot succeed.

38. In summary, it is the Tribunal's view that there were subjective elements in this selection and that it cannot be said that the selection criteria was not properly followed or that there was no material on which the decision could have been made.
39. The Tribunal acknowledges that it is unfortunate that a committed athlete has been unable to achieve her goals, but cannot hold that selectors erred.

Result

40. The appeal is dismissed but because of the way in which this appeal came to the Tribunal, Ms Lawton's filing fee will be remitted.



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Hon B J Paterson QC
Chairman of Sports Disputes Tribunal
7 August 2006