BEFORE THE SPORTS TRIBUNAL OF NEW ZEALAND

ST 19/07

BETWEEN	**MOTORCYCLING NEW ZEALAND ("MNZ")**
	Respondent
AND	**NOEL CURR**
	Appellant

FINAL DECISION OF TRIBUNAL (EXCEPT AS TO STEWARDSHIP)
(DECISION SUPERSEDES INTERIM DECISION OF 5 MARCH 2008)

Dated 11 April 2008

Tribunal:	Nicholas Davidson QC (Deputy Chairperson) Tim Castle Ron Cheatley
Registrar:	Brent Ellis

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A. THE DECISION UNDER APPEAL

1. Noel Curr, a member of Motorcycling New Zealand Inc. ("**MNZ**") has appealed to this Tribunal against a decision of the Board of MNZ dated 18 September 2007, following a disciplinary hearing on 17 August 2007. The Board of MNZ determined that Mr Curr's "*current suspension*" should continue for three years from the date his membership was initially suspended, being 13 May 2007. He was fined $500 and his position as an MNZ Steward was terminated as of 18 September 2007.

The earlier decision

2. A 28 day suspension was earlier imposed on Mr Curr at the time of the Annual General Meeting of MNZ held on 13 May 2007 in Wellington. That decision of the Board and the process surrounding it is considered below.

3. Following that meeting Mr Curr received a letter from Harkness Henry & Co, solicitors acting for the Board, dated 29 June 2007, which advised that the Board considered his conduct "*may have adversely affected the reputation of MNZ and may do so in the future*". The Board was considering terminating his membership in accordance with Clause 18 of the MNZ Constitution. The conduct complained of was particularised in the letter, and was the subject of the hearing before the Board on 17 August 2007, and the Decision of 18 September 2007.

B. PROCESS IN THIS TRIBUNAL

Right of Appeal

4. The right of appeal to this Tribunal arises under Clause 18.4 of the MNZ Constitution, and the Sports Tribunal Rules.

Legal Advice

5. Mr Curr had reference to legal advice. The Tribunal had urged him to engage Counsel. Nevertheless, he advised the Tribunal on 23 January that he would represent himself.

Should this Tribunal conduct a Rehearing?

6. By a Minute of 19 November 2007 the Tribunal noted that alleged breaches of natural justice can be cured by way of a re-hearing allowed by Sports Tribunal Rule 42(a). That is not the end of the matter, because Mr Curr submits that the MNZ Board process overall was so flawed that an appeal should not have to be mounted from such a Decision. He submits that he has been subject to two disciplinary processes for the same conduct and he cannot be disciplined twice. Sports Tribunal Rule 42(c) puts the onus of proof on the appellant, so the integrity of the disciplinary process is relevant to the discharge of that onus.

Reasons for the Board Decision

7. By a Minute of 19 November 2007 the Tribunal noted that it had limited material as to the reasons for the decision of the Board, although it had the decision of 13 September 2007. MNZ agreed to, and did, provide a full statement of the reasons for that decision.

MNZ would not seek to uphold the Decision of 13 May 2007

8. Ms McDonald advised that MNZ recognised the flaws in the decision of the Board during the AGM, which imposed a 28 days suspension, and instead would focus on the 3 year suspension imposed on 18 September 2007.

9. The hearing was compressed to one day on 23 January but late in the day new factual considerations arose. Submissions for MNZ and Mr Curr were then received.

C. NARRATIVE OF EVENTS

10. On 13 May 2007 Mr Curr attended the 89th MNZ AGM in the

Wellington West Plaza Hotel. He attended as the President and delegate of the Marlborough Motor Cycle Club Inc ("MMC"), for the 13th consecutive year. MMC had advanced remits for discussion and Mr Curr held proxy votes in support.

11. There was no indication given to him of what was to come, namely that suddenly and without warning he would face a Board disciplinary process and the scrutiny of members at the AGM.

12. On 11 May he arrived at the AGM venue and was given some responsibilities in preparing for the AGM. He attended workshops, and a session which explained the accounts. There was an official dinner for all attendees.

13. The President, Mrs Sandra Perry chaired the AGM on 13 May. Mr David Appleton had written a complaint about Mr Curr and another member and this was the first matter (not on the agenda) raised in open meeting at the AGM before all delegates.

14. After a *"disciplinary process"* described below the Board advised Mr Curr that he was suspended for 28 days during which time he would be given an opportunity to take advice and prepare a full response to the Board, and then a decision would be made as to his future affiliation with MNZ. He was asked to leave the AGM immediately. Mr Curr considered that this process was organised, and intended to prevent him from advancing the remits, and casting the proxy votes which he held. He had to leave the AGM in embarrassing and very public circumstances.

15. On 29 June 2007 Harkness Henry & Co, Solicitors acting for the Board of MNZ, advised Mr Curr that the Board considered that his conduct *"may have adversely affected the reputation of MNZ"* and may do so in the future and was considering termination of his membership under Rule 18 of the MNZ Constitution. The particulars of the conduct complained of were set out. These went beyond those raised at the AGM in May. The Board said that the correspondence indicated a "*consistent pattern of behaviour*" whereby Mr Curr levelled accusations of dishonesty, incompetence

or improper motive at those he perceived as having treated him unfairly.

16. Mr Curr was invited to respond in writing with supporting evidence not fewer than 10 working days before the Board meeting on 17 August and/or could attend the Board meeting on that date, and/or a Special Board meeting could be held prior to 17 August for him to be heard. He was asked to choose the process which suited him.

17. Mr Curr was told that there would be questions asked of him and of any person giving evidence, and that a person other than a member of the Board would undertake an inquisitorial role, either from the management team, or a solicitor. Mr Curr could engage Counsel.

18. He was advised that if a breach of Clause 18.1(c) was upheld, his membership would be terminated if the default could not be remedied within the time allowed by the Board, or he did not offer an explanation in the time allowed, or the Board did not accept such explanation. His right of appeal to the Sports Tribunal under Clause 18.4 was noted.

19. By this time Mr Curr's solicitors had asserted that the earlier (May) suspension was not in accordance with the MNZ Constitution. Any member bringing legal proceedings against MNZ faces automatic suspension but the Harkness Henry letter indicated that there was no bar to suspension for other reasons, thus in this "*unusual situation*", Clause 24.2 of the Constitution would apply, whereby if there is no applicable provision the matter can be decided by the Board in its discretion. This was the foundation argument to warrant the **process** at the AGM.

20. Following the hearing on 17 August 2007, the Board decided not to terminate the membership of Mr Curr but imposed a suspension of 3 years to commence on 13 May 2007. He was fined $500 and his position as Steward was terminated. This recorded outcome should be contrasted with the record of the Board Disciplinary Hearing and the subsequent Minutes of the Board Meeting which record the sanction. Ms McDonald advised that following the disciplinary

hearing on 17 August 2007 the Board decided that a 5 year suspension plus payment of all legal costs would be imposed on Mr Curr. This was moved and seconded at the Board Meeting which followed the Disciplinary Hearing. Subsequently the Board reviewed the penalty which it considered may have been too harsh. New Board member Mr Alan Cressey had not been involved in the August Disciplinary Hearing, but became involved in this reconsideration and the imposition of a lesser penalty. He should not have participated in the decision making process, but on the basis that the decision was being revisited to consider reducing the sanctions, the Tribunal accepts that his involvement is not usefully challenged.

21. The suspension of 3 years and a fine of $500 was thus substituted. No formal resolution records this, but it is the effective sanction as advised to Mr Curr, said to be by a unanimous decision of the Board Members entitled to vote.

22. The Board's reasons for imposing these penalties were expressed in this way:

> *"The Board has taken into account the matters raised by Mr Curr at the Hearing and has decided that in view of the fact that Mr Curr was unapologetic about his actions and appeared to indicate an intention to continue in the manner that he has been, that some sanction is necessary to ensure that members of MNZ are aware that behaviour of this sort will not be tolerated by the Board."*

23. Mr Curr said he was following a *"democratic process"* but the Decision said –

> *"…but does not consider the actions of Mr Curr, in making unjustified personal attacks on and veiled threats against Board members, employees of MNZ and others, he considers have not treated him fairly, can accurately be described as part of a democratic process."*

24. The Board then distinguished between what it described as "*acceptable conduct*", and "*inappropriate conduct*", the latter including:

> "*… personal attacks on office staff, employees and Board members, emails and other correspondence containing veiled threats, derogatory descriptions and baseless accusations of improper or illegal behaviour, or the spreading of malicious rumours about MNZ Board members and employees*."

25. The Board went on:

> "*Mr Curr has consistently refused to modify his behaviour over the years, despite numerous requests from various incarnations of the Board. The current Board feels that it cannot allow this conduct to continue with no repercussions for Mr Curr and has acted accordingly."*

D. A SUMMARY OF THE ALLEGATIONS AGAINST MR CURR

26. MNZ says that Mr Curr defamed the CEO Paul Pavletich, when he wrote to another MNZ member Mr Scott Wilkins on 30 April and 1 May 2007. The Board says that the emails indicated that Mr Pavletich was taking some financial advantage at North Island events, and if, as assumed, he had taken a pay cut with his previous employer he would have to make that up somehow or it would be "*a ploy to shaft his wife in a property settlement!*". By the email of 1 May 2007 there was an assertion that Mr Pavletich was "*deffinatly (sic) clipping the ticket on any sponsorship he raises…*". The Board's reasoning is that if his reputation was impugned in such a way, then his effectiveness as CEO would be adversely affected.

27. Under "*course of conduct*" and in addition to the defamatory statement alleged, the Board considered that Mr Curr had engaged in a course of conduct intended to bring MNZ into disrepute, so as to adversely affect the reputation of MNZ or with the potential to do so in breach of Clause 18.1(c) of the Constitution.

28. By an email of 19 April 2007 Mr Curr wrote to the former CEO and President David Appleton. He referred to a "*rumour*" that Mr Appleton was "*asked to leave over unauthorised use of an MNZ credit card*", and that the CEO gets a percentage of sponsorship solicited by him. Mr Appleton had taken legal advice. He also wrote to MNZ complaining about this communication. Mr Curr said he was warning Mr Appleton about the rumours. The Board said they had accepted this explanation and the comments did not form part of the reasons for imposing a term of suspension on Mr Curr.

29. However, the reference to Mr Pavletich's salary package was held to indicate that in receiving a commission on sponsorship Mr Pavletich and/or MNZ was acting inappropriately.

30. It said that the reference to information given to Mr Curr by "*the green man*" was a reference to Mike Wilkins, the owner of Kawasaki New Zealand, green being the colour of the Kawasaki motocross bikes, and this was a derogatory comment about Mr Wilkins which had the potential to damage the relationship between MNZ and the Motorcycle Distributors Association ("MDA").

31. By letter of December 2006 to Mr Pavletich, Mr Curr referred to Mr Pavletich's name being mentioned in relation to "*kickbacks*".

32. On 22 September 2006 Mr Curr wrote to Mr Lewis Speedy saying that some "*XC people would try and have him removed*", that he had "*pissed off some of the movers and shakers down here…*" and there was a threat that the South Island would "*pull the pin on MNZ completely…*".

33. In the period leading up to the Oceania Motocross at Barrabool, Australia on 12-13 November 2005, the Board referred to contact from Motorcycling Australia and the FIM about correspondence from Mr Curr to Dirk Deneve of FIM in late November 2005 suggesting that David White of Motorcycling Australia and David Appleton had accused Mr Deneve of not telling the truth about international permits and FIM licences, and that on 9 November 2005 Mr Curr wrote to Mr White accusing Motorcycling Australia of "*hijacking*" an

Oceanic event. Mr Curr was asked to respond, and by letter of 14 March 2006, and he replied in full. The Board decided not to take any action at the time, although having "*serious concerns*". Then, in 2007, the Board decided that it formed part of a course of conduct requiring imposition of a sanction.

34. Mrs Perry gave evidence. She described Mr Curr as a "*passionate advocate*" for his club and South Island Motocross riders in general. There was some history of conflict, but that does not influence this Tribunal. Mrs Perry considered that an email sent by Mr Curr to Mr Appleton linked a suggestion about his conduct with the possibility that the Board might be removed by a vote of no confidence. That issue too does not concern the Tribunal. Mrs Perry went on to explain the concern about Mr Curr's reference to Mr Wilkins as the "*green man*". Mrs Perry said the inference to be taken from the email was that Mr Pavletich and/or Mr Wilkins and/or MNZ had or were acting inappropriately. She said there had been rumours circulating among members regarding the role of Mr Wilkins in Mr Pavletich's appointment. The Tribunal sees nothing derogatory in the reference to "*the green man*", and does not make the connection referred to by Mrs Perry that in some way Mr Wilkins had acted inappropriately.

35. We accept that Mr Curr's reference to Mr Pavletich caused him real distress. Mrs Perry did not know how far the email had been circulated; she thought it was likely that it had been or would be circulated further. After taking legal advice she considered that the AGM was the most appropriate forum to air the issue, and she discussed the position with Mr Appleton and Mr Pavletich. Mr Appleton did not want the email about him circulated further, or copied.

36. The evidence before us was that Mrs Perry did not forewarn Mr Curr or Mr X of what she intended to do at the AGM, wanting to bring the rumours and allegations into the public domain. It is quite clear that raising the concerns in this way was inflammatory and a highly

charged situation developed before the Board imposed the 28 day suspension at the AGM in May.

37. The hearing on 17 August 2007 was in Christchurch and Mrs Perry and Messrs Boyd, Hepburn and Morris comprised the Board membership for the purposes of the hearing. The 2006 matters regarding Mr Speedy and the events leading up to the 2005 Oceania Motocross (both already referred to above) were referred to by or before the Board. The evidence records that "*despite having serious concerns about Mr Curr's actions (in those regards) the then Board decided not to take any further action against Mr Curr at that time. However as a result of Mr Curr's subsequent actions the current Board considered that it formed part of a course of conduct designed to bring MNZ into disrepute*".

38. Mr Pavletich gave evidence to this Tribunal regarding the emails of April and May 2007, saying the most offensive aspect was the suggestion he had been forced to leave Coca Cola. He was never employed by that company. He previously worked for Gilmours. He took a pay cut to work for MNZ. His love of the sport led him to do so and to put something back. He said his salary package gave him commission on new sponsorship, and the suggestion that this was somehow wrongful was deeply offensive to him. He regarded the personal comments about his domestic situation as particularly hurtful.

E. THE APPEAL TO THIS TRIBUNAL

39. Mr Curr filed an appeal dated 9 October 2007, which alleged four grounds for appeal, taken from the Tribunal's Rules. The grounds were: breach of natural justice, acting ultra vires, the availability of new evidence, and the severity of the sanction. He sought immediate reinstatement of membership and that the fine be set aside.

40. These grounds were developed at the hearing. The Tribunal's task was in part reduced by the MNZ concession that the Board's process at the May AGM was unsustainable. However other breaches of

natural justice were alleged, and the fact of the May process and suspension, reach into the later process.

41. The issues raised by Mr Curr on appeal are summarised as follows:

The AGM process was not that of the Board

(a) The decision to bring his correspondence before the AGM was that of the President acting alone. There was no Board meeting before the AGM, no vote taken and no Minutes kept. Other Board members were given limited information, and went along with what Mrs Perry proposed. He says this was not a "Board" process but that of the President alone and thus ultra vires (not a lawful action of the Board as such).

The AGM Board process was in breach of natural justice

(b) As a disciplinary process, it was conducted effectively at the AGM and while the Board retired to make a decision, the process of allowing delegates to be effectively involved, in what became a highly confrontational setting, was not only inappropriate but also in breach of the Constitution and Rules of MNZ and in breach of the principles of natural justice with no notice and no proper opportunity to be heard. Ms McDonald concedes these latter points for MNZ.

Suspension not available

(c) There was no provision in the Constitution nor the Rules to suspend him on an interim basis for 28 days, with the intention that the Board would consider further his membership.

The involvement of Mr Pavletich

(d) Mr Curr says that Mr Pavletich attended the Board meeting which was held in an ante room to the room in which the AGM was held, and that as a person aggrieved he should not have been involved in the Board discussion.

Predetermination / bias

(e) Mr Curr says that the entire process demonstrated an intent to treat him as having breached the MNZ Rules and the Constitution, and demonstrates bias on the part of the President and/or the Board against him, which carries into and contaminates the August hearing and September decision. He says the AGM process was designed to prevent his presenting remits.

(f) Mr Curr says the second process of August 2007 dealt only with penalty as his breach of the Rules was assumed on the issues raised in May. He submitted that the second process could not cure the former (in May 2007), because of the alleged *"bias and involvement of Mrs Perry as prosecutor and Judge"*. He says she had not approached the AGM process with an open mind having stated that she wanted to *"show support for the CEO"* and did not provide an impartial forum for a fair hearing, and this carried into the later process.

(g) Mr Curr also submitted that Mrs Perry held a prejudice against his family. The Tribunal does not find any credible support for this submission.

***"Charged"* and punished twice for the same offending**

(h) The process leading to the August hearing saw the same issues revisited as those raised at the AGM in May, supplemented by further allegations, said to constitute a *"course of conduct"*. One of those, relating to the Oceania 2005 competition, had already been investigated and put aside. Mr Curr says that the August process was a substantial repetition of the earlier process, and his being penalised twice for the same matter. On this argument it does not matter what penalty was imposed by the second process because there should never have been a second process at all. To give any form of life to that, for instance by treating this appeal as a rehearing, would equally be flawed, according to this submission.

The sanction was not that of the Board alone

(i) Mr Curr says that the Minutes of the Board meeting surrounding the August hearing did not conclude with a decision and that it appears that a decision was taken afterwards. He submits that those who ostensibly heard and considered the disciplinary issues reported to the Board, with a different membership, but which then made a decision.

Sanction excessive

(j) Mr Curr says the damage to Mr Pavletich, such as it was, was more a product of the recipients of the emails sharing these with others but more particularly then being distributed at the AGM, greatly expanding what was intended by him to be a limited publication.

(k) Mr Curr says that if he is to be suspended for circulating defamatory statements about the CEO by corresponding with a fellow MNZ Club President *"in private"*, then he asks about the consequence of the further circulation to all MNZ clubs and delegates, which was not his doing.

42. Ms McDonald did not try to justify the process at the AGM, but submitted that even if natural justice was denied or not observed at the AGM, there was no prejudicial effect because all that occurred was that Mr Curr was suspended pending a Board Disciplinary Hearing, and that the Board Meeting on 17 August 2007 cured any earlier breach of natural justice. MNZ says that the decision made at the AGM was the decision of the Board, and the further decision to suspend his membership and to impose a fine was valid under Rule 7.3.2.

F. CONSIDERATION OF ISSUES

(a) **The disciplinary process under Cl 18 of the Constitution**

43. By Clause 18.1 "*the Board **may decide to consider** ending the membership of any member…*", on three grounds, including 18.1(c)

"***If the Board considers that the conduct of the member has adversely effected the reputation of MNZ or may do so***". Thus the Board is to make a "*decision*" to "*consider ending the membership*". The steps are sequential. Clause 18.2 reads "*Notice to Member*" and that "*the Board must then:*" give written notice of its decision (to **consider** ending the membership) allowing time to remedy a default which can be remedied, or otherwise giving the member a reasonable time and opportunity to explain his or her actions in accordance with Rule 18.2. Then, sequentially, the Board "***may decide***" to terminate membership if the default cannot be remedied or is not remedied in the time allowed, the member does not offer an explanation within the time allowed, or the Board does not accept the member's explanation.

44. The Board first has to "*decide*" that it will **consider** ending the membership of the member, then give notice of that, then hear the member's response. It contemplates a fair preliminary consideration of the position, in itself consistent with a complaint of some sort coming to the attention of the Board, or generated by the Board from its own knowledge. In this case the "*decision*", "*to consider*" termination was couched in strong terms in the formal letter from Harkness Henry leading up to the August hearing.

(b) **The Board process up to and at the May AGM**

45. On the evidence, the Tribunal concludes that the decision to initially *"consider"* Mr Curr's actions was taken by Mrs Perry. In doing so she was acting out of a well placed concern for the reputation and role of Mr Pavletich as CEO. There was no discussion in detail about the correspondence which gave rise to concern.

46. There were no Minutes kept by the Board in respect of these preliminary discussions, and no note taken. Mr Boyd's evidence was that as Mrs Perry had evidently spoken with the Solicitors for the Board that day then she should proceed as she outlined. Mr Boyd had not seen the relevant correspondence before the AGM began. Mr Cressey said he was co-opted as a member of the Board for the

meeting. He was aware in general terms of the issue. But the detail had not been provided to him nor was it discussed.

47. The Minutes of the AGM record in stark detail the way in which the issue arose. After a Minute's silence was observed, Mrs Perry advised that there was "*an unfortunate but necessary issue*" which the Board felt that members and clubs should know. The emails sent by Mr Curr were then put up on a screen. No copies of emails were given out because Mr Appleton, who was the subject of comment, had contacted the Police regarding the content.

48. The meeting adjourned for 15 minutes so the Board could *"meet"* and when it returned to the full meeting Mr Pavletich spoke to the emails and explained the "*facts surrounding*", and that he had taken offence, especially as they intruded on his personal life.

49. Mr Curr and a second member were told they would be given time to prepare a response. The other member responded to the meeting before the adjournment. He told the meeting that he spoke to Mr Appleton to tell him of rumours circulating.

50. Then Mr Merewether, a Taranaki delegate, moved that Mr Curr should be banned for life and this was seconded by Mr Scott Wilkins, the Pukekohe delegate. Mrs Perry asked for the motion to be withdrawn as further discussion was required and the meeting adjourned. When the meeting reconvened the Board advised that the matter regarding Mr X was closed as his response had been accepted.

51. Mr Curr was given the right of reply and said he felt "*ambushed*", and that he considered Mr Appleton to be a friend. He was simply warning him of matters of concern. The Minutes record that *"he could not provide an explanation on the personal remarks made regarding the CEO*". Mr Curr had received information from another person but would not reveal the source.

52. The delegates were then involved in asking questions and clarifications from Mr Curr before Mr Paul Stewart intervened and

suggested no further discussion take place "*in case of legal implications*".

53. Mrs Perry thanked Mr Curr for his response and advised that the meeting would adjourn so that the Board could discuss the response. This Board discussion was held in a severely compromised setting. Outside the Board *"meeting"* there was member outrage. Messages were coming back to the Board. Mr Pavletich was there, on the evidence as a person urging a *"cool head"* but he was a person aggrieved. The presence of Mr Pavletich, the compromised setting for determination including delegate response, and the way this process was instituted are additional elements which grouped with other allegations extend to the subsequent process for evaluation.

54. The Board returned to the AGM. Mrs Perry advised Mr Curr he was suspended for 28 days during which time he would be given an opportunity to take advice and prepare a full response to the Board, and then a decision would be taken "*as to his future affiliation with Motorcycling New Zealand*". After a further adjournment the meeting reconvened. Mrs Perry advised that Mr Curr had been suspended from MNZ "*effective immediately*" and asked if any other club would present the Marlborough Club remits. Mr Curr then asked for clarification on his suspension. After the Board *"conferred"* he was advised that he should leave the meeting; and he did so.

55. In the lack of notice and proper opportunity to consider his position and be heard the Tribunal finds the MNZ process was flawed in the extreme. Nothing which occurred prior to or at the AGM and the Board meeting surrounding it, was consistent with the fair process required by the Constitution of the Board in formal meeting. There is no express provision for suspension within the Constitution but it was submitted that the provisions of Clause 24 allowed the Board to impose a temporary suspension, because the situation was not otherwise covered. Clause 24.2 reads "*No Rules*", and Clause 24.2(a) reads "*If anything for which there was no applicable rule or regulation arises the matter will be decided by the Board in its sole*

discretion." It decided it could impose a suspension of a temporary nature under this provision.

(c) **Mr Curr's contention that the process was established to prevent his presenting remits and proxy votes**

56. Mr Curr made much of this issue. He had remits to present from the Marlborough Club, and proxies in support. They would have been of moment at the meeting. As the meeting began by addressing the allegations against him which resulted in his being suspended and thus required to leave the AGM, the remits were not presented.

57. There was a discussion about an alternative process, whereby another Club would present the remits, and the proxy votes might be transferred. Mr Curr felt under considerable disadvantage, including his belief that proxies could not be transferred. Based on his recognition of a problem, he took the undertaking of the President to call a Special General Meeting within six months, and did not pursue that matter further. This undertaking was honoured.

58. In view of its conclusions on other matters it is unnecessary for the Tribunal to determine whether or not that the process was intended to deny Mr Curr the opportunity to present the remits and the proxies, although it clearly had that practical effect.

(d) **Does the later (August 2007) process cure the defects at the AGM?**

59. This question comprehends alleged breaches of natural justice as to the hearing process at the AGM, two disciplinary processes for much the same conduct, and bias or predetermination.

60. At the level of notice, the opportunity to be heard, and the hearing process, the Tribunal finds no fault. Ms McDonald submits this was in effect a fresh start and sustainable.

61. The members of the Board involved at the time of the AGM were Mrs Perry, Mr Cressey, and Messrs Boyd and Hepburn. Then Mr

Morris joined the Board. He sat at the August hearing. Mr Cressey did not.

62. The Tribunal adverted to the possibility that the flaws in the AGM Board process were such that the second hearing was prejudiced. Ms McDonald responded by citing authority, whereby a body which has its decision set aside may have to reconsider the case as best it can. In the words of Lord Reid in ***Ridge & Baldwin*** [1964] AC page 10, this depends on the matter being reconsidered *"afresh".* But the second process must stand scrutiny as well, and the judgment does not apply as an answer to allegations of bias or predetermination, or two disciplinary processes for the same conduct, in every case.

63. Mr Curr says that he could not get a fair hearing in August as bias (against him) was already shown, and an element of predetermination. Board members who participated in such a flawed process at the AGM were once again involved.

64. Ms McDonald cited ***Calvin v Carr*** [1979] UK PC 1, for the proposition that those who belong to organisations such as clubs must be taken to have agreed to accept *"what in the end is a fair decision, notwithstanding some initial defect".* The citation went on to record that the court *"must decide … whether, at the end of the day, there is or has been a fair result, reached by fair methods, such as the parties should fairly be taken to have accepted when they joined the association".*

65. The questions remain whether this Tribunal identifies bias or predetermination, or two disciplinary processes for the same conduct, so as to undermine the later process. A secondary question is whether the Tribunal should cure any such defects by a rehearing process, or whether overall the MNZ process is so flawed that Mr Curr should not be affected by the September decision.

66. Ms McDonald in her closing submissions identified two issues as to:

i. Whether MNZ had gone beyond a preliminary view in its letter of 23 May 2007 to Mr Curr?

ii. Whether Mr Pavletich's involvement in the Board meeting and during the AGM affected the subsequent process?

- to which we add the broader questions of bias or predetermination, and the two disciplinary processes.

67. Ms McDonald correctly points out that Clause 18 of the Constitution is in steps, the first being a Board decision *"to consider ending the membership…"*. If one examined the correspondence of 23 May 2007 from Harkness Henry, that is the indicated position. There is no issue regarding the particulars, nor the hearing as such. Ms McDonald is also right that when the Board comes to a preliminary view, the first step in the process, such is not of itself evidence of a closed mind. As an example of the Board being open minded, there is the decision taken after the 17 August hearing, when the Board accepted Mr Curr's explanations in relation to the emails, and to adjust its sights, not to terminate but to suspend membership. This submission is accepted so far as it goes. However, the Tribunal's concern is whether the AGM process, with the participation of three of the Board members (Mr Cressey excluded from the second process) was such that substantially the same body could not be reasonably seen to "start afresh" in the August process unaffected by what had gone before as the law requires.

68. Ms McDonald addressed the question of predetermination, and/or bias, first by saying that Mr Pavletich had only been present to calm down those at the meeting and to appeal for cool heads but did not take part in the decision making process. For a person, effectively the complainant, to be present with the decision making body is highly risky and, in our view, unacceptable. But Ms McDonald says that even if there is an appearance of bias then if actual bias can be excluded the point is answered – in ***Riverside Casino Limited v Casino Control Authority & Ors*** [2001] 2 NZLR 78 per Gault J. Then Ms McDonald says that the effect of Mr Curr's emails about Mr Pavletich was obvious, even to an objective observer.

69. We have no hesitation in saying that Mrs Perry proceeded with the best motives. She was clearly and understandably affected by the distress shown by Mr Appleton and Mr Pavletich. Her response was clearly flawed, prior to and at the AGM. Three of the same Board members sat again in August. The question is whether the approach and decision at the AGM taint the later process with Mr Curr concentrating on the President's role, saying he could not get a fair hearing with her attitude to him shown by the AGM process. Our conclusion is set out under *"Decision"* and it is a fundamental part of our reasoning.

G. THE SANCTIONS IMPOSED AND THE BOARD'S REASONS

70. The Tribunal now addresses the fundamental reasoning of the Board in more detail, before turning to the principal issues.

71. We remind ourselves that there is danger in reading allegedly offensive passages in isolation. There were two emails of 30th April 2007 and 1 May 2007, which the Board held to be defamatory of Mr Pavletich. It considered that the undermining effect on the CEO would have potentially damaging consequences for MNZ. If his reputation was impugned in this way, and members believed the allegations, then his effectiveness as CEO would be adversely affected.

72. The first email of 30 April 2007 unquestionably suggests a "*clipping the ticket*" by Mr Pavletich at North Island events, going further to suggest that that is the reason why *"…we get f…all events!"*. It goes on to say that Mr Pavletich had said he took a 50% pay cut to work for MNZ, and that Mr Curr had heard that Mr Pavletich had to "*find something else*" as "*Coke*" i.e. Coca Cola, were "*going to fire him anyway*". Then, if there was a 50% "*base fee cut*" then there had to be a "*mechanism that would make this up*", *"…or it was a ploy to shaft his wife in a property settlement*!"

73. The email of 1 May 2007 suggests that Mr Pavletich was "*definitely* (misspelled) *clipping the ticket on any sponsorship he raises…".*

74. The Tribunal has cautioned itself not to allow the intemperate and strongly expressed language to dictate any conclusion about these emails. For example the Tribunal sees comments in the email of 1 May 2007 which were critical of Mr Pavletich, as to his personality and manner. While Mr Curr told us that he did not intend to suggest wrongdoing by Mr Pavletich, who was fully entitled to a commission on sponsorship and other funding activities, the Tribunal has no hesitation in concluding that the words in context suggested impropriety. Mr Curr sought to dilute any such conclusion by suggesting that because Mr Pavletich had commercial contacts in the North Island that area gained most events and there were few in the South. He suggested that this was not intended to be derogatory of Mr Pavletich, but simply a fact. That is a refinement on an ordinary reading of the email. This Tribunal understands why Mr Pavletich and any reader would take it as suggesting something irregular or improper on his part.

75. The reasons then addressed the *"Course of Conduct".* By an email of 19 April 2007, Mr Curr referred to Mr Pavletich receiving a percentage of sponsorship "*solicited by him*". There is the reference to "*the green man confirmed to me….*". The Board concluded that this reference contained a clear inference that in receiving a commission on sponsorship Mr Pavletich and/or MNZ was acting inappropriately. The Tribunal does not take it that way. In itself it is put as a statement of a rumour, which happened to accord with the terms of remuneration. The Board thought the reference to "*the green man*" in the context was derogatory of Mr Wilkins as the owner of Kawasaki New Zealand, referable to the green Kawasaki motor-cross bikes. The Tribunal does not take this to be derogatory at all, and rejects that ground for the decision.

76. In correspondence to Mr Pavletich of December 2006, Mr Curr referred to his name having been mentioned in relation to "*kick backs*" and knowing that "*they have been investigated*". Before the Tribunal Mr Curr agreed that this reads like an accusation but says that he was effectively trying to give Mr Pavletich a "*heads up*". Having read the entirety of this email, which covered a number of

grounds, and in particular the following comment to Mr Pavletich "*give me a ring if you would like to discuss this further*", the Tribunal can accept this, although it was unfortunately expressed.

77. The further grounds included correspondence to Lewis Speedy of 22 September 2006 in which Mr Curr, according to the Board decision "*threatened*" to remove him from office. The email made it plain that Mr Curr had been speaking to some people "*in the South*" and there was some indication that Mr Speedy could be subject to some attempt to remove him "*from office*". The Tribunal concludes that this does not constitute an element of conduct "*intended to bring MNZ into disrepute*" and/or which "*adversely affected the reputation of MNZ or had the potential to do so…*".

78. The further ground related to a sequence of events heading up the Oceania Motocross at Barrabool Australia in November 2005, following which correspondence was sent by Mr Curr to the International Federation of Motorcycling, and Motorcycling Australia. The difficulty with reliance on this material is that it had been put to Mr Curr earlier, and he had responded in full on 25 March 2006, following which the Board wrote to him and treated this matter as at an end. To raise this again as a ground, the matter having been considered by the Board and resolved in his favour, is unsatisfactory both in law and in fact. There was the potential for disciplinary action, but nothing eventually was made of this, and it should not have been raised again. The correspondence warranted little or no attention in the context of the 2007 disciplinary process undertaken.

H. DECISION

79. We have reviewed the legal and factual issues and now come to our conclusion.

80. Mr Curr's conduct fell well outside anything acceptable, despite his passionate interest and contribution to the sport. The Tribunal was satisfied that the penny dropped at the Tribunal Hearing, when Mr Curr was faced with evidence and Tribunal questions. It seemed he then recognised that whatever was his intent, it had far greater

ramifications for Mr Pavletich and indirectly the sport. It is apparent to us that the recognition which came on him during the Tribunal hearing had not been present earlier. He did not seem to realise, until confronted at the Tribunal hearing, how his remarks would be taken on any ordinary reading of his correspondence, and that they were extremely offensive to Mr Pavletich in particular.

81. It follows that a disciplinary process which addressed the Board's concerns was entirely appropriate. A difficulty with the Constitution is that the process which led to potential termination of membership, has an element of self-fulfilment about it. The Board must consider that matters already drawn to its attention **may** result in termination, and the notice and a hearing procedure follow that premise. Where the premise is easily established what follows could not be held prejudicial of itself. But here the process surrounding the AGM was fatally flawed. The Board departed from the principles of natural justice in the lack of notice and proper opportunity to be heard, and the inappropriate mixed Board and AGM process. The involvement of members on the very issues the Board was to discuss, the pressure on the Board from within and outside the meeting, and the involvement of Mr Pavletich at least in person if not in the debate, all warrant the conclusion that that process could not stand. We do not find that Mr Pavletich actively participated in the Board decision at the AGM but his presence was inappropriate and gives the appearance of influence.

82. There is no difficulty in this Tribunal revisiting, by way of re-hearing, the issues so as to strip out of any decision as to breach and sanction the additional matters which influenced the Board, and to assess the conduct in its entirety. The question is whether it should go that far. That turns essentially on the questions of predetermination and/or bias and the two disciplinary processes, and then whether the right to conduct a re-hearing should be exercised against that conclusion. Mr Curr has the onus on an appeal and this is an important consideration in this and other appeals.

83. The Tribunal has serious concerns about much the same Board hearing substantially the same issues, having acted so incautiously and unfairly at the AGM. It was later brought to the correct process under the Constitution with legal assistance.

84. The Tribunal concludes that there is a strong case to simply set aside the decision on this ground. It is important that sports recognise that very serious breaches of process may see a decision set aside. However there is a difficulty with this in the event that the MNZ decides to come again; it would otherwise leave the matter undetermined on the facts. This Tribunal has been established to conclude issues in sport and where it can do so it should.

85. That still leaves the question of the two disciplinary processes. This has an additional element. While bias or predetermination may strike at the heart of an earlier decision and be cured at rehearing, if there should at law have been no further process then that is an end to it. It is tempting to describe this issue as double jeopardy but this does not bear analysis.

86. In ***Z v Complaints Assessment Committee*** NZAR [2006] at 146, Fogarty J reviewed the principle of double jeopardy. That case concerned a criminal process, followed by professional disciplinary charges. The notion of double jeopardy has its roots in the criminal law. The purpose of disciplinary proceedings is not to replicate the criminal process, but to ensure that no person unfit or because of misconduct should be allowed to continue to practise the particular profession or calling. The *"peril imposed by disciplinary hearing"* **after an acquittal** in a criminal trial, is not the peril of *"being punished twice for the same offence"* – Fogarty J, page 155, paragraph 30. Further, a professional disciplinary tribunal with expertise may differ from the judgment of a jury of lay persons on the same question. The New Zealand Bill of Rights Act 1990 thus does not have application in this case. The Tribunal's consideration of other criminal and civil processes, for example in the employment jurisdiction, provide no guidance to the point in question.

87. The Tribunal concludes that the principles of double jeopardy derived from the criminal law have no direct application in this case. This still leaves the Tribunal with a strong sense of unease about circumstances where the Board imposed a suspension pending a fuller process under the Constitution. Counsel acknowledges that there is no provision in the Rules allowing for this, but submits that the situation was such that the Board was entitled, by a fair process, to take the step. The principal allegations against Mr Curr in the later process relied on the same emails. Mr Curr's response which was abbreviated at the time of the AGM, without proper notice, was much fuller and carefully prepared in the August hearing.

88. The Tribunal concludes that the question, put simply, is whether the Rules of MNZ and the Constitution should be taken to allow two processes for the same offending, with an interim suspension pending a fuller process. Without the warrant of a specific rule allowing this process, and thus contractually accepted by members, this seems fundamentally unfair, and on one view of it the Board could not mount a second process as its jurisdiction was spent.

89. By a narrow margin this Tribunal stops short of holding that the second process was a nullity. The AGM process was intended as an interim measure pending a proper and fuller process. The second process cast a wider net addressing a *"course of conduct"*. For this reason, in this particular case, the Tribunal does not exclude the future application of the double jeopardy principle by analogy.

90. The Tribunal concludes that the better course is to record that it may in other cases decide to set aside a decision, and not to exercise a right of re-hearing but in this case, to bring an end to the issues, it will do so.

91. It concludes that the sanction imposed is already sufficient for what it finds is clearly conduct which falls within clause 18 of the Constitution, having regard to the extraordinary way in which matters were first raised against Mr Curr and the very public, and hostile setting in which he was disciplined and ordered to leave the

AGM. His card was well and truly marked within the sport, and in these circumstances the Tribunal concludes that the effective sanction should terminate at the date of the Interim Decision of this Tribunal given on 5 March 2008. His suspension should have been from the date of the September decision until the date of the Interim Decision, but with particular regard to his earlier suspension. Although a 28 day suspension was imposed at the AGM, Mr Curr in fact sat out a period of suspension from 13 May 2007 to 18 September 2007. So of a three-year suspension he had already served four months by 18 September when he was advised of the second decision; and to the date of the Interim Decision he had served more than nine months suspension. There is no comparable sanction for similar conduct. The Tribunal has to start afresh. In principle it accepts this overall period of suspension to reflect the seriousness of such conduct as appropriate, and a sufficient time for the transgressor to reflect.

92. Ms McDonald refers to the disciplinary procedure for hearings before the Board at Rule 7-2-7 of the 2007 MNZ Manual of Motorcycle Sport. She points out that Clause 18 of the Constitution allows for termination of membership, but the Board did not think Mr Curr's conduct warranted such sanction. Because the Constitution does not allow for suspension except in limited circumstances, Ms McDonald referred to Clause 24.2 of the Constitution which reads "*If anything for which there is no applicable rule or regulation arises the matter will be decided by the Board in its sole discretion*". Hence it is submitted that if there is the power to terminate a membership there must be the power to impose a lesser penalty. The Tribunal accepts this but records that the absence of specific power to temporarily suspend is an omission in the Constitution which should be rectified in the interests of certainty and fairness to all members.

93. The Tribunal should not conclude without emphasising that the sort of correspondence in which Mr Curr indulged is damaging in the extreme. He went far too far, and invited a vigorous response. Mr Pavletich has done nothing in substance wrong whatsoever. He is a

man who has given a great deal to the sport. He was deeply stung at a professional and personal level by what was said. Mr Pavletich did not dictate the Board process which followed, although he should not have been seen to have any involvement whatsoever with the Board as it made its decision.

I. INTERIM DECISION 5 MARCH 2008

94. The Tribunal issued an Interim Decision, which anticipated further submissions regarding costs and ancillary issues. The Interim Decision records, as does the Final Decision below, that the appeal is allowed, the suspension applying from 13 September 2007 to the date of the Interim Decision on 5 March 2008, and setting aside the fine. The question of stewardship with MNZ would be reviewed if required by the parties.

95. Mr Curr sought costs. His submissions centred on the breach of the principles of natural justice found by the Tribunal. He sought:

1) The legal fees incurred by him met by the Marlborough Motorcycle Club Inc, a total of $1,217.55. He estimated a further bill of $600.00.

2) The costs of travelling to the MNZ Conference in Wellington, when Mr Curr received "*no result*" (in his words) being the airfares and accommodation totalling $602.24.

3) The hearing in Christchurch on 17 August being:

   - Racecourse Hotel $75.00
   - Car travel $403.00
   - Technological assistance $125.00
   - Half day off work $182.50

4) Travel to Wellington for Sports Tribunal hearing

   - Sounds Air $74.00

- Ferry travel $72.50
- One day off work $290.00
- Reimbursement of Sports Tribunal filing fee $500

5) Thus the total, with the estimated legal fees for the month $4,141.79.

Mr Curr said any costs awarded above the legal fees incurred would go to the Marlborough Motor Cycle Club for junior rider development.

96. Ms McDonald correctly noted that the Tribunal has jurisdiction to award costs in the exercise of discretion. The Sports Tribunal Rule records:

> "*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.*"

97. Ms McDonald refers to the underlying principle that "*the loser pays the winner*", but such is not an absolute rule, and nor does it indicate the extent of a costs order.

98. She is correct, however, in her submission that there is fault on both sides. MNZ seriously erred in the process adopted, and Mr Curr has not been successful in setting aside the sanction in its entirety, but as to part. That is a matter of degree. To some extent, success in that regard results from his acceptance during the hearing process of the wounds inflicted by what he said about Mr Pavletich.

99. There is reference to his seeking mediation, and the evidence as the Tribunal has received it was that neither Mrs Perry nor Mr Pavletich were aware of such request. The Tribunal does not find this influential, because of the seeming reluctance of Mr Curr to accept

the seriousness of what he said, and its impact on Mr Pavletich and the sport.

100. MNZ indicates its costs, including legal and other, have reached approximately $30,000.00. This amply demonstrates to other sports just how detailed and costly a disciplinary process may become, and the Tribunal is not surprised by the size of those costs, given the legal and factual issues involved. It may be MNZ has insurance cover in whole or in part, but that will not influence the Tribunal.

101. This is not a case where an item by item examination of Mr Curr's claim to costs will lead to the correct answer. For example, he has claimed reimbursement for costs for attending the disciplinary hearing in Christchurch, but the MNZ rules preclude any liability for travelling or other expenses related to such a hearing. The fact of such attendance may, however, influence a final costs award.

102. The Tribunal's conclusion is that while MNZ has been found seriously wanting in its processes, a sanction of some consequence has been upheld. Nonetheless, Mr Curr has had to go some distance to get here. In the circumstances a modest award of costs in the sum of $750.00 is appropriate.

FORMAL DECISION

103. (1) The Appeal is allowed.

(2) Mr Curr is suspended from 13 September 2007 to 5 March 2008.

(3) The fine is set aside.

(4) Mr Curr's position as MNZ Steward will be reviewed by the Tribunal if that is required by either party. The Tribunal reserves this final jurisdiction.

(5) Costs of $750.00 in favour of Mr Curr.

Dated this 11th day of April 2008

Nicholas Davidson QC
Deputy Chairperson (for the Tribunal)

Timothy Castle
Ron Cheatley