

**BEFORE THE SPORTS DISPUTES TRIBUNAL  
OF NEW ZEALAND**

**SDT/09/06**

**APPEAL**

**BETWEEN**                      **Daisy Thomas**

Applicant

**AND**                              **Surfing New Zealand**

Respondent

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**FURTHER DECISION OF TRIBUNAL REGARDING  
ADDITIONAL GROUNDS OF RELIEF AND COSTS  
21 AUGUST 2006**

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Tribunal:                      Nicholas Davidson QC (Presiding Member)  
Dr Farah Palmer  
Ron Cheatley

Representation:              Ian Hunt - Counsel for Daisy Thomas  
Stephen Thomas (father of Daisy Thomas)  
Greg Townsend - Surfing New Zealand  
Anthony Lines - Counsel for Surfing New Zealand

Registrar:                      Brent Ellis

## **Introduction**

1. The Interim Decision of the Tribunal was delivered on 19 April 2006, dismissing the appeal against non selection of Daisy Thomas for the World Junior Surfing Championships 2006.

## **Further Relief**

2. The Notice of Appeal sought further relief as follows:
  - *“That Surfing New Zealand revise the team selection policy as distributed to athletes wishing to compete for the New Zealand team and the Selection Appeals Policy.*
  - *That Surfing New Zealand reviews their procedures for communicating formally with athletes in line for international selection both before, during and after the process”.*
3. This element of the Appeal was adjourned for further consideration.
4. Following release of the Interim Decision, Surfing New Zealand (SNZ), on 21<sup>st</sup> April 2006, indicated it would welcome guidance on the two issues identified for further relief. SNZ counsel Mr Lines advised that “... SNZ has taken the lessons on board and is determined to deliver better product in the future with transparency and good communication as critical tools”.
5. On 27 April 2006 the Tribunal sought submissions, noting that “*the Tribunal is not however an expert in these matters, while able to identify clear errors in process*”. It added that while it must address the further grounds “...*whether it makes recommendations will depend on the response to this communication.*”
6. SNZ by letter of 1<sup>st</sup> May 2006 indicated that it would deal with the process and policy of selection “*internally*” having regard to suggestions of the Tribunal at the hearing and its Interim Decision. It identified the need to follow the “*mandated process*” for appointment of selectors, when making selection

decisions and affirming the decisions of selectors. It would also disseminate information about the policy and criteria via the website, and to contenders for selection.

7. Mr Hunt as counsel for Daisy Thomas asked that the two remaining grounds of appeal and relief sought be dealt with by the Tribunal, in a substantive way, while noting that SNZ had recognised the need for change.
8. Mr Hunt submitted that, (in terms of recommendations), the Tribunal ought to:
  - *“Identify errors in process evident from the evidence it has heard...”*;
  - *Consider the specific detail of SNZ’s team selection policy and selection criteria, and identify areas in which both can be improved.*
  - *Make recommendations as to the process SNZ should employ to ensure that, for example, no surfer wishing to achieve New Zealand selection is in any doubt as to the criteria that will be applied, the dates by which selections will be made, the events which may be taken into account (and relative weighting of same), and so on.*
  - *And the Tribunal may also wish to comment and make recommendations in relation to the selection criteria.”*
9. Mr Hunt acknowledged that the Tribunal does not have the expertise to make specific recommendations relevant to surfing but said that there were significant issues in this appeal around the adequacy of the selection criteria, on which the Tribunal’s views and recommendations would be valuable. For example, he submitted that the Tribunal should consider whether it is satisfactory for any sports organisation to claim selection assessment within the sport is “*subjective*”, or to take refuge in the proposition that those who have the “*X*” factor need not be considered according to stated criteria. Mr Hunt acknowledged that many other sports, such as ice skating, diving, and gymnastics, require “*subjective*” assessments to some degree. He submitted that surfing, in the way by which

contestants are rated during events, has a detailed and formal means of ensuring that so called “*subjective*” assessments are “*quite refined*”.

10. He did not identify a “*contest*” between the appellant and SNZ, but rather that submissions should be made by each party, and the Tribunal then make recommendations as it thought appropriate.
11. Mr Lines responded on 17 May 2006, pointing out that SNZ was reliant on funding from sponsors, community trusts, SPARC and the like. It runs on a “*tight budget*”. He said “*It is not a business as such*”. The appeal had already resulted in cost. Revamped selection criteria would be posted on the website, under construction. He referred to process improvements including proper taking of Minutes, recording resolutions, and ratifying decisions.
12. Mr Hunt then made detailed submissions under cover of letter of 1<sup>st</sup> June 2006 dealing with the two further grounds of relief sought, and costs. This was a lengthy and thoughtful submission which the Tribunal has considered in full.
13. Mr Lines made a submission by email of 28 June 2006, going to costs and the additional grounds of relief.
14. In relation to “*Policies, Procedures and Criteria*” Mr Lines attached a copy of the Minutes of the SNZ committee from a meeting of 31<sup>st</sup> May 2006 and drew attention to “*Job 17*”. The committee resolved that it would adopt the recommendations of the Sports Disputes Tribunal and in particular “*the process for appointing selectors, communication to athletes regarding the selection policy, the timing of selection and events by way of a posting to the updated website, appointment of a convenor and two national selectors, and the process for appointing management positions*”. Any further material or course of action recommended by the Tribunal would be considered for incorporation.
15. Mr Lines recorded that the SNZ committee needed to move in accordance with its own timeframes, and while content to be “*...influenced by the appellant’s recommendations and more specifically consider any recommended by the*

*Tribunal*” he said (correctly) that the Committee is the decision maker for SNZ, and it did not envisage it would be practical to “*debate*” the matter by way of the submission process. In fact SNZ through Mr Lines submitted that the changes it needed to make to accord with the Tribunal’s (expressed) views were self evident and it would simply get on with it.

### **Jurisdiction of this Tribunal**

16. The jurisdiction sought to be invoked is under Rule 12.11 whereby the Tribunal may:

*“recommend that changes be made to any applicable rules, policies or procedures of (Surfing New Zealand)”.*

17. This is the first time the jurisdiction has been raised in this way before the Tribunal. That fact, and the comprehensive submissions, have directed the Tribunal’s attention to how far it can or should go with regard to recommendations. The Tribunal “*may*” make recommendations, in respect of changes to any applicable rules, policies or procedures **of SNZ** but this is not a licence for a general treatise on selection issues which must remain for the sport. It will be informed by experience, the observation of other sports, and challenges to selection where decisions of this and other tribunals will identify and demonstrate processes and policies which might be altered to achieve fair, informed, and transparent selection. The door will never close on challenge but the selection process may thus be strengthened.
18. Given Mr Lines’ response, the Tribunal first considered how far it should go, if at all. SNZ now has the benefit not just of the Interim Decision, but of Mr Hunt’s submissions, which have provided close analysis and observations within other codes and organisations. However SNZ has also said that it will bring to account anything the Tribunal may say.

19. The Tribunal has considered closely the material Mr Hunt put before it, but is not in a position to provide a blueprint for policies and procedures. It is primarily charged with considering selection appeals against applicable Rules and Policies and as matters of legal principle. However some points made by Mr Hunt are fundamental. Without trespassing into the area of advice, but relevant to SNZ it has decided to make some general, but short observations, which translate into recommendations.

### **Observations/Recommendations**

- (i) The Team Selection Policy should be compatible with the Rules.
- (ii) There should be clear identification of the appointment and membership of the selection committee in whatever configuration SNZ considers appropriate.
- (iii) The Convenor of selectors and the selectors should be **formally** appointed for a stipulated period of time, or for specific events to ensure jurisdiction is certain.
- (iv) Consultation outside the selection team may be expressly provided for in the Rules, **if that is intended**. This is not straightforward. A degree of consultation, formal and informal, is almost inevitable. Such cannot become the selection process to usurp the selectors' decision which must be the genuine decision **of the selectors**.
- (v) The selection criteria should be published to athletes. Mr Hunt made reference to the Guidelines for Selection issued by the Australian Sports Commission. They are straightforward and clearly merit consideration.
- (viii) Mr Hunt addressed the question of **how** SNZ should select surfers for New Zealand representation, and went into considerable detail. The Tribunal is not prepared to embark on this despite the thought and research that has gone into these submissions. That again is for the sport.

The principles regarding the process being known and advised, in clear terms, are elementary but it is for the sport to determine its own criteria. However the Tribunal makes the following comment, on two issues which stood out in the selection appeal.

### **Subjective criteria**

The greater the degree of “*subjectivity*” in the selection criteria the more it **may** seem a sport has room for flexibility, and ability to resist challenge. That latter consideration should not dictate the criteria adopted. A high degree of subjectivity may constitute an unfairness to athletes unless it is clear just **what** matters are to be assessed in a “*subjective*” way, and **how** they will be assessed in practice.

The Tribunal makes the observation that subjectivity expressed on “*instinct*” is not likely to be accepted nor understood by athletes and coaches. By contrast, bringing to account stated criteria, and making an overall assessment based on the selectors’ knowledge of a particular athlete compared with others, are elementary parts of any selection process.

Mr Hunt refers to International Surfing Association Rules which he submits are directed away from an “*X*” factor assessment. This expression came from SNZ evidence and submissions on the appeal. It is referred to in the Interim Decision. It translated to saying that there is something about the athlete which marks her/him out as having some inherent quality.

The “*X*” factor is a seductive term but a very difficult element to explain. It is hard to pin down any further. The “*X*” factor, for example, may be reflected in a particular skill level or some competitive quality, or a combination.

The Tribunal is not prepared to go further into this, except to express the view that the greater the degree of subjectivity the more uncertain the process. It is for the sport to inform athletes of selection criteria in a way which removes as far as possible the suspicion of too subjective an approach. Suspicion will inevitably arise through an inability to convey the relevant selection criteria.

Mr Hunt refers to the development of selection criteria and policies, “*without having to commit to a model that is wholly discretionary or subjective, on the one hand, or wholly objective on the other*”. He refers to some key points emerging from his consideration of other selection criteria. This section of his submissions bears scrutiny by SNZ. An example of providing more understandable assessment criteria was provided by SNZ itself at the hearing. After the selection in question it made specific assessments of the surfers to afford comparison of different skill sets and qualities.

### **Competitions**

If a “*league*” or particular competition is to be brought to account, athletes must know **how** such results will influence selection. The Interim Decision reflects this.

### **Selection Appeals**

20. The Tribunal considers it has said enough in the Interim Decision for SNZ to consider changes necessary.

### **Costs**

21. The appellant sought **travel** costs only for Counsel attending the hearing in Wellington of \$601.00. Counsel submitted that the appeal was meritorious and revealed significant defects in SNZ’s processes and policies. Mr Hunt submitted that a “*symbolic award of costs*” would be appropriate. Daisy Thomas was



supported by her father Steve Thomas, and otherwise could not have pursued the appeal.

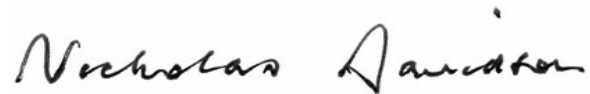
22. Mr Lines resisted an award of costs, and says that a fair and proper process was employed in making the selection decisions, while less than adequate in the recording of decisions, and communication to athletes. Mr Lines said that it was not appropriate to make a “*symbolic*” order for costs because SNZ was already reviewing its procedures and policies, and it “*stands ready to be influenced in a positive manner*”.
23. He submitted that this result (SNZ’s response) is a desired outcome of the appeal, and a costs award would not be appropriate. SNZ had already incurred significant costs of its own.
24. The decision of the Tribunal is first that the filing fee be waived. The appeal was properly and fairly mounted and it has driven SNZ to make changes in its selection processes, including Rules. The SNZ processes attracted the appeal so a small award of costs is appropriate in this case, in the sum of \$300.00. It does not regard that as “*symbolic*”, but a reflection of SNZ process which fell short. Costs on an unsuccessful appeal will seldom be awarded but this appeal had merit and has had beneficial consequence within SNZ.

### **Conclusion**

25. The brevity of this Decision, with “*recommendations*” should not detract from the further submissions made to this Tribunal by Mr Hunt, which may perhaps be accessible to others.
26. The wealth of material put before it by Mr Hunt included examples of Selection Policies in different sports. In the end it has decided not to address this material in further detail, and thus not to endorse any particular Selection Policy, Rules or Criteria. It is a Tribunal primarily charged with considering Selection Appeals where the wording of Rules, Policies, and Procedures, within individual sports

will inevitably come before it from time to time and it should not trespass into specifics.

27. The SNZ response to the Interim Decision, and to this further process, has been responsible.

A handwritten signature in black ink that reads "Nicholas Davidson". The signature is written in a cursive style with a prominent dot above the 'i' in "Davidson".

**NRW DAVIDSON QC**

**Deputy Chairperson**