

BETWEEN **DANIEL WALLIS**

 Applicant

AND **ATHLETICS NEW ZEALAND**

 Respondent

**DECISION OF SPORTS TRIBUNAL
DATED 2 OCTOBER 2020**

Present: Daniel Wallis, the Applicant
 Paul David QC, the Applicant's co-counsel
 Sarah Wroe, the Applicant's co-counsel
 Peter Pfitzinger, CEO of the Respondent
 Cameron Taylor, Chair of the Respondent
 Aaron Lloyd, the Respondent's counsel

Tribunal: Sir Bruce Robertson (Chairman)
 Nicholas Davidson QC
 Paula Tesoriero
 Ruth Aitken
 Pippa Hayward

Registrar: Mike Selwyn

1. The Applicant (Mr Wallis) was chosen by the Respondent (Athletics New Zealand, ANZ) to participate in a team at the World Half-Marathon Championships (the Championships) that are scheduled to take place in Poland on 17 October 2020.
2. On 3 August 2020, ANZ wrote to Mr Wallis and other selected athletes saying it was considering whether to send a team to the Championships and inviting a response. The letter noted the increasing number of Covid-19 cases and the risks of international travel and quarantine back in New Zealand. ANZ subsequently decided, because of the risk presented by Covid-19, not to send a New Zealand team. ANZ refused to give Mr Wallis permission to participate as an individual. Some competitions allow people to enter without a nomination from their local body, but in the case of the Championships, the entry must be made by ANZ.
3. On 26 August 2020, Mr Wallis asked ANZ to reconsider its decision and allow him to travel and compete as an individual. A conference call followed between the parties, and ANZ's CEO emailed further on 4 September 2020. Mr Wallis again asked for the decision to be reconsidered in a letter dated 18 September 2020, and on 25 September 2020 a letter was sent from ANZ's lawyers that outlined the health and safety risks and the moral obligation that ANZ owed to the athletes.
4. Mr Wallis challenged this, and both parties agreed to the Sports Tribunal considering the matter and issuing a decision. On 25 September 2020, an application was made to the Tribunal to determine the matter.
5. A telephone conference of all the parties was convened on 28 September 2020, and a timetable for the filing of further documents was discussed.
6. Documents were filed by the respective parties, and a telephone hearing was convened on 30 September 2020.
7. This case has been unique in a number of respects. There was less than a week from the time the Tribunal heard of the matter until the hearing. As well as being extremely urgent, this reflected the fact that there were no significant areas of disputed facts coupled with the professionalism of counsel in its preparation and focusing on the points which required adjudication. The core issue was novel and consequently we sat as a bench of five not three which is the routine.
8. Mr Wallis is a dedicated and experienced athlete who over a lengthy period has put his heart and soul into training to participate in this world event. As evidenced by his

initial selection, he has all the qualifications to enable him to be there. No acts or omissions of the athlete disqualified him from competing. Following the initial postponement and notwithstanding the challenges of Covid-19, he maintained his commitment to preparation. At a human level we completely understand his disappointment and distress when ANZ resolved that it would not send a team or endorse any individuals.

9. Although with the benefit of hindsight the interactions between the parties over the ensuing month could have been sharpened, taken as a whole ANZ kept the athlete informed, provided its reasoning and approach, heard and responded to the athlete's reactions. We are satisfied that the process was fair, reasonable and appropriate.
10. At its heart Mr Wallis contends that ANZ has overreacted to the pandemic and its effects, has overlooked the contractual relationship between the parties and has minimised the restraint of trade aspects of its decision. Mr David called for applied common sense as a touchstone of the inquiry and submitted this had not been kept at the forefront of the decision making.
11. We are not persuaded that a narrow lens interpretation of the contractual words is determinative of the case. The national sporting organisation (NSO) could not ignore the fact that it was a Person Conducting an Undertaking in terms of the Health and Safety at Work Act 2015. We do not accept that an option of Mr Wallis waiving responsibility of ANZ changes this responsibility. Covid-19 has submerged the world in new and different circumstances and the provisions of the contract do not preclude the pandemic environment being given consideration here as in all other aspects of life. The world has changed since the agreement was signed and the law does not prevent sensible, balanced and proportionate reactions. Restraint of trade does not arise as there is no blanket curtailing of the athlete's career but a specific and identified incident which is not endorsed.
12. Labels are not critical. The substance of the decision and its justification are the core of the assessment. Mr Wallis can only participate in the world event if he is entered by ANZ. This is to be contrasted with other events like the Diamond League where a NSO can recommend non-participation but as a formal endorsement is not essential individual athletes are independently able to make a decision.
13. A question arises as to the measure we should apply to our review of the decision of the NSO. Mr David submits that it is not analogous to our approach to selection

appeals where there is a significant degree of deference applied in recognising the skills and experience of selection panels. He argues in this instance a more robust and open “reasonableness enquiry” should occur. We accept that the exercises are different but the responsibility is with the NSO and we will not quickly substitute our appreciation of all the circumstances absent a clear and demonstrable error.

14. Mr Wallis contends that there is insufficient evidence that the NSO has properly engaged with its world body which has resolved to hold the Championship notwithstanding the pandemic, with protocols to protect the athletes. It is argued that without this step, failing to endorse participation from Mr Wallis was adopted and cannot be justified. We accept that the position of New Zealand and the pandemic is not on all fours with the position of countries in Europe. We accept the view of ANZ that the risk profile for athletes based in Europe where COVID-19 is more widespread is different to that of those based in Oceania where the COVID numbers are lower. This means ANZ could be seen to endorse an increased risk for athletes travelling from Oceania to the Championships. This is a reasonable assessment.
15. It is not without significance that Australia and Japan have taken the same position as New Zealand. The past half year is testament to the varying responses which there have been to all aspects of the pandemic with very different outcomes. The current position in Poland is problematic. It was argued by ANZ that the protective approaches outlined in the protocols will not deal with the risks in travel including stopovers and generally outside the event environment in Poland. ANZ was entitled to weigh those factors in reaching its decision.
16. There was a spirited interchange on what the NSO called moral hazard which Mr David suggested was incomprehensible. Stripped to its essentials it simply meant that ANZ took the view that it needed to apply the same measure to all athletes seeking endorsement to participate overseas irrespective of where they are currently residing. Otherwise athletes would have inequitable opportunities to participate potentially resulting in unfair outcomes. No objection can be taken to that approach to its task.
17. In a letter of 25 September 2020 from counsel for ANZ to Mr Wallis’ lawyers having considered the framework within which it was operating noted matters which ANZ had taken into account, included:

“(i) *The NZ government was advising, and continues to advise, New Zealanders not to travel overseas due to risks associated with Covid-19;*

- (ii) *The consensus among HP Sport medical personnel (confirmed by Athletics NZ's medical director) was (and remains) that travel was not safe due to the unknown extent of Covid-19 infection risks and the impact on athletes if they contract Covid-19;*
- (iii) *In respect of Poland specifically, the data relating to Covid-19 indicated a concerning picture, both in terms of real numbers, and of an upward trend, with 7-day moving average/daily cases at 730 (up from 521, 30 days prior) and 7-day moving average/daily deaths at 11 (up from 8, 30 days prior); and*
- (iv) *If an athlete goes to an overseas event and contracts Covid-19 or is otherwise negatively impacted because of Covid-19, then Athletics NZ will be responsible for those negative impacts, both potentially at law and from a moral and a sports integrity perspective”.*
18. We reiterate that we have heard how important running is to Mr Wallis and the incredible disappointment he has with not being permitted to enter the Championships.
19. A different conclusion might have been reached but the unwillingness to enter Mr Wallis cannot be said to be wrong. It was a reasonable response reached after an acceptable process. There is no basis for the Tribunal to issue any direction to ANZ enter the athlete, or to reconsider the decision.

Dated: 2 October 2020



Sir Bruce Robertson
Chairman