

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

STD 05/06

BETWEEN JARROD MUDFORD

Appellant

AND NEW ZEALAND SHOOTING FEDERATION INC.

Respondent

AND NEW ZEALAND OLYMPIC COMMITTEE INC.

Interested Party

**REASONS FOR JURISDICTIONAL DECISION GIVEN ON 24 FEBRUARY 2006
Dated 28th February 2006**

Tribunal Members Participating: Hon Barry Paterson, QC (Chairman),
Kit Toogood QC, (Deputy Chairman)
Ron Cheatley

Registrar: Brent Ellis

Appearances:

Appellant:	Michael Smyth
Respondent:	Paul David
Interested Party:	Maria Clarke

INTRODUCTION

1. In a decision dated 24 February 2006, this Tribunal declined to hear an appeal from Mr Mudford against the failure of The New Zealand Shooting Federation Inc. (“**NZSF**”) to nominate Mr Mudford to the New Zealand Olympic Committee Inc. (“**NZOC**”) for selection in the New Zealand team for the forthcoming Commonwealth Games in Melbourne. It now gives reasons for declining jurisdiction.
2. Mr Mudford’s notice of appeal was against a decision of the NZSF Appeal Committee made in January 2006. That appeal was, in effect, against Mr Sinclair being nominated for a position in the Men’s Trap Shooting Pairs and individual events. The notice of appeal stated that Mr Sinclair had been chosen to represent New Zealand, although he had not qualified. The grounds of appeal included that the selection criteria had not been followed or implemented and that the selection decision was affected by actual bias.
3. The Tribunal gave leave to both NZOC and Mr Sinclair to join the appeal as interested parties. Mr Sinclair elected not to do so but NZOC did apply to be joined and was joined.
4. It was originally proposed to hear the appeal on 1 March next. However, NZOC indicated that NZOC was required to attend a meeting in Melbourne to confirm and sign off the New Zealand team at 8.00 am EST on 27 February 2006. A hearing on 1 March would therefore have been pointless.
5. NZOC had, through its counsel, indicated that it may wish to appeal jurisdiction but a decision on this point could not be made until the Secretary General of the NZOC returned from overseas. When he returned, an application was made for leave to withdraw as an interested party, NZOC indicating that it did not wish to attend or participate in the proceeding and that it considered that matters pertaining to nomination were matters to be resolved between the athlete and his or her sport. It agreed to abide the decision of the Tribunal. NZSF had indicated that it wished to take the jurisdictional point. A hearing was therefore convened for 6.30 pm on 23 February 2006 with a substantive hearing being scheduled for Sunday, 26 February 2006 if the Tribunal determined it had jurisdiction.

6. The Tribunal did not give NZOC leave to withdraw and Ms Clarke attended the jurisdictional hearing, although she had limited instructions only. Because of the urgency of the matter, it was necessary to accept evidence from the Secretary General of the NZOC by way of a statement and from Mr Mudford by way of an email provided by his counsel. No evidence was submitted on behalf of NZSF. While the mode in which the evidence was tendered would have normally been unsatisfactory, it was the only way in which the Tribunal could have determined the jurisdictional matter. Under its Rules, the Tribunal may receive evidence whether or not it would be admissible in a court of law. In the circumstances, the Tribunal was satisfied that it had a sufficient appraisal of the facts to be able to make the jurisdictional decision.

THE NOMINATION AND SELECTION PROCESS

7. The NZOC approved, on 21 July 2004, a "Nomination Criteria and Selection Criteria for the New Zealand Team to the XVIII Commonwealth Games Melbourne 2006 ("the Selection Criteria"). The Selection Criteria set out the criteria which athletes needed to achieve in order to be nominated and then selected for the team. It contained a two-stage process, namely nomination by the National Federation ("NF") to the NZOC in accordance with the nomination criteria applicable to each sport participating in the Games. Once an athlete was nominated by an NF, the NZOC then had to consider, in accordance with the Selection Criteria, whether or not to select that athlete. There were certain preconditions for nomination which are not relevant for the purposes of this decision.
8. There are several provisions in the Selection Criteria which are relevant to the jurisdictional matter. The procedure to be followed in summary was:
 - (a) an eligible athlete was to complete and return to the NF by the date specified, an Athlete Application Form;
 - (b) in addition, every athlete who wished to be considered for nomination and selection was required to complete an Athlete's Agreement. The Athlete's Agreement only came into force if and when the athlete was selected to the team;

- (c) an NF could only nominate an athlete who had satisfied various preconditions. One was that he or she “met the Nomination Criteria set out in the NZOC’s Selection Criteria for the Games”.
- (d) The selection was made by NZOC. The Selection Criteria required that the NZOC must be satisfied that the nominated athlete had met the applicable Nomination Criteria for his or her sport.
- (e) The appeal procedure was set out in s 6 of the Selection Criteria. Under this provision, Mr Mudford had a right to appeal his nomination or non nomination by NZSF or his selection or non selection by the NZOC “in accordance with the procedures set out in this document”. The specific grounds upon which an athlete could appeal are set out in paragraph 6.3 but are not relevant to the Tribunal’s determination. Because of the contractual arrangement between Mr Mudford and NZOC, the Tribunal is of the view that the only right of appeal which Mr Mudford had was under the Selection Criteria. The Tribunal observes that Mr Mudford did not have a right to appeal against Mr Sinclair’s nomination and selection. However, if he had succeeded in his appeal, the NZOC did have a discretionary right to remove Mr Sinclair from the team and appoint Mr Mudford.
- (f) Paragraph 6.5 of the Selection Criteria sets out the procedure for an appeal. In summary, it is:
 - (i) the athlete must give written notice of the appeal (Appeal Notice) to the Secretary General of the NZOC and copy such notice to the Chief Executive of the NF within 48 hours of the official announcement of the selected athletes for that athlete’s sport being made;
 - (ii) within 48 hours of receiving the notice, the NF shall in consultation with the athlete and the Secretary General of the NZOC, arrange a meeting at which the parties shall endeavour to resolve the appeal by further discussion. This meeting is to be confidential.
 - (iii) If the meeting does not resolve the appeal, the athlete has a right to appeal to this Tribunal.

THE FACTUAL SITUATION

9. The relevant chronology in this case is:

<u>Date</u>	<u>Comment</u>
21/07/04	NZOC approves the Selection Criteria
20/12/04	<p>The Secretary General of NZOC by letter sent to NZSF, an agreement between the NZOC and NZSF regarding the nomination and Selection Agreement for the Games and the Selection Criteria. The Secretary General required NZSF, amongst other things, to:</p> <p>(a) sign the agreement and return it to the NZOC:</p> <p>(b) ensure that the prospective athletes are made aware of the Nomination Criteria (Note: This is not the Selection Criteria but the particular Nomination Criteria for Shooting). The Secretary General in his statement, suggested that the letter asked NZSF to circulate the Selection Criteria to its athletes. However, the letter asked NZSF to circulate the Nomination Criteria and not the Selection Criteria.</p>
20/01/05	<p>The Nomination Criteria was finalised and posted on the Commonwealth Games website a few days later. When Mr Mudford checked the website he actually saw this document.</p>
25/01/05	<p>NZSF through its Chief Executive, signed its agreement with NZOC.</p>
21/07/05	<p>Mr Mudford signed his Athlete's Application Form and it was submitted to NZOC shortly thereafter. That form contained the following:</p> <p><i>"(a) I have been provided with access to a copy of the NZOC Nomination and Selection Criteria for the 2006 Commonwealth Games (including the Nomination Criteria for my sport) via the NZOC website www.olympic.org.nz. I agree to comply with and be bound by the terms of NZOC Nomination and Selection Criteria.</i></p> <p><i>(b) will abide by the terms and conditions of the NZOC Nomination and Selection Criteria and in particular acknowledge my right of appeal and the process for such appeal in relation to my nomination/non-nomination or selection/non-selection to the Team. I acknowledge that the process for such appeal overrides any right of appeal I might otherwise have had under the rules, policies, regulations or by-laws of the New Zealand Shooting Federation Incorporated [name of NF]("the NF");"</i></p> <p>The Secretary General acknowledged that due to a misunderstanding in the NZOC office, the Selection Criteria was not published on the NZOC website.</p>
10/01/06	<p>NZOC received the Nominated Athletes list from NZSF. This list was subsequently changed due to appeals and other eligibility requirements and the final Nominated List was sent by NZSF to the NZOC on 26 January 2006. The Secretary General of NZOC stated he <i>"became aware of the fact that NZSF had some appeals regarding nominations between 5 and 10 January 2006."</i></p>

03/02/06 The NZOC selectors made their decision on the composition of the Shooting Team and this was officially announced by way of media release on this date.

Mr Mudford, in his appeal brief, gives the following chronology of what happened to him:

23/12/05 He received a call from Mr Ogilvie advising of the Team selection and that he had been selected as a non-travelling reserve. He was not given a reason for Mr Sinclair's selection and he says that Mr Ogilvie told him that "*he expected me to lodge an appeal*". Following that conversation, Mr Mudford sent an email to NZSF, lodging an appeal against his non-nomination.

07/01/06 Mr Mudford received an email from NZSF saying he would need to put forward the basis of his appeal. He says he found this difficult because he did not know the basis of selection and had not been advised.

24/01/06 Mr Mudford's appeal heard at Auckland International Airport (he had originally been advised it would be heard on 10 January 2006 but that was subsequently changed). Mr Mudford was advised at the hearing that NZSF stood by Mr Ogilvie's decision.

26/01/06 NZSF advised Mr Mudford of the Appeal Board's decision.

07/02/06 Mr Mudford lodges an appeal with this Tribunal.

NZSF'S SUBMISSIONS

10. Mr David for NZSF submitted that the Tribunal did not have jurisdiction because the appeal to it was in effect statute barred. Mr Mudford was in effect seeking to avoid a procedure he had agreed to be bound by. This was the appeal procedure set out in the Selection Criteria. In his Athlete's Application, Mr Mudford had agreed "*to comply with and be bound by the terms of NZOC Nomination and Selection Criteria*". In sub-paragraph (b) of that Application, Mr Mudford acknowledged, in particular, that he would abide by the appeal process in the Selection Criteria and that "*the process for such appeal overrides any right of appeal I might otherwise have had under the rules, policies, regulations or bylaws of the New Zealand Shooting Federation Incorporated.*" It was submitted that Mr Mudford was bound by the appeal provisions in the Selection Criteria notwithstanding that the NZOC had omitted to post the Selection Criteria on the website, as it had agreed to do under sub-paragraph (a) of the Athlete's Application.
11. In particular, Mr Mudford had not complied with the mandatory provision of giving written notice to the Secretary General of the NZOC within 48 hours of the official announcement of the selected athletes for the athlete's spot being made. It was

common ground that Mr Mudford had not followed the procedure set out in the Selection Criteria. It was submitted on behalf of NZOC that the mandatory provision requiring notice within 48 hours was there for a good purpose, namely to give certainty and to ensure that such matters were resolved expeditiously.

MR MUDFORD'S SUBMISSIONS

12. On behalf of Mr Mudford, Mr Smyth's primary submission was that the Selection Criteria did not form part of the contract between the parties. This was because it had not been posted on the website. He submitted that for terms of a contract to be contained in a separate document they must be sufficiently brought to the attention of the contracting party beforehand. In this case they were not because the Selection Criteria were not placed on the website. Mr Smyth also relied upon the *contra proferentem* rule and waiver. It was his submission that in the circumstances the appeal process under the rules of NZSF applied. Subsidiary submissions were that Mr Mudford had substantively complied with the Selection Criteria and had prosecuted his appeal speedily.

DISCUSSION

13. The Tribunal has considerable sympathy for Mr Mudford. The decision to decline jurisdiction was made reluctantly but, in the Tribunal's view, was inescapable on the facts of this case. Mr Mudford has been denied a right of appeal which the NZOC gave him because of administrative errors, both by the NZOC and NZSF. On the facts as we understand them, Mr Mudford wished to pursue his right of appeal from an early stage and if the Selection Criteria had been placed on the website, as NZOC contracted to do, Mr Mudford would have followed the correct procedure. Technically, there was a breach of contract by NZOC. This was partly compounded by NZOC posting on the web the Nomination Criteria for Shooting which had a reference to the NZOC Nomination and Selection Criteria. We can understand that Mr Mudford could have been misled by the posting of this document and the failure to place the Selection Criteria on the web.
14. NZSF failed Mr Mudford by convening an appeal committee and hearing his appeal. The agreement between NZOC and NZSF was completed in early 2005. That agreement made it clear that the Selection Criteria applied and that the Selection Criteria was incorporated into the Agreement and that NZSF acknowledged and

agreed that it was bound by it. NZSF thus bound itself to the appeal procedure in the Selection Criteria, yet it encouraged Mr Mudford to appeal to its appeal board, assembled an appeal panel and charged him a fee of \$500.

15. The appeal process was invalid and, presumably, NZSF will refund this fee. The position is further complicated by the fact that the Secretary General of NZOC, in his statement, said he was aware that NZSF "*had some appeals regarding nominations between 5 and 10 January 2006*". There could be no objection to this knowledge because nominations were not made to NZOC until 10 January 2006. However, the Secretary General also noted that there were changes in the original nominations "*due to appeals and other eligibility requirements and the final nominated list was sent by the NZSF to the NZOC on 26 January 2006*". Although the Tribunal can see no reason why there should not have been some internal appeals to NZSF before nominations were made, it is difficult to see how there could have been any such appeal in the period between 10 January and 26 January 2006, as the Selection Criteria appeal procedure applied during that time.
16. Notwithstanding the Tribunal's sympathy for Mr Mudford, it felt obliged to accept the submissions made on behalf of NZSF. It is clear law that a contracting party is bound by the terms of a written contract whether or not that party has read the terms and whether or not it is ignorant of their prime legal effect. A party who signs a contract is bound by the terms. Those terms can be incorporated by reference to another agreement.
17. In this case, a contract was entered into between Mr Mudford and NZOC. Mr Mudford bound himself to an appeal procedure. It was, in fact, the only appeal procedure available to an athlete who wished to appeal a non-nomination. The fact that he was misled by both NZOC and NZSF is at the end of the day, irrelevant from a legal point of view. The Tribunal can understand why Mr Mudford did not seek a copy of the Selection Criteria, as we understand other athletes did, and how he may have been misled by the Nomination Criteria which was on the web. It is noted, however, that Clause 9 of the Nomination Criteria stated that the Selection Criteria applied after nomination. This was a reference to the Selection Criteria and Mr Mudford could have sought that Selection Criteria at that stage, as he could have sought it at the time of the nomination.

18. The Tribunal therefore concluded that, under the terms of the contract between Mr Mudford and NZOC, there was only one appeal right which Mr Mudford did not exercise and which at the time of his appeal it was too late to exercise. It therefore declined jurisdiction.

COMMENT

19. Many sports nominate to the NZOC athletes for selection for Commonwealth or Olympic Games. Some of those sports do not have full time administrative structures, as do others. In this case, an athlete was denied his right of appeal because of administrative failures. It would seem to the Tribunal that a way of avoiding this problem in the future would be for the NZOC to send to all the NFs an instruction sheet clearly setting out the appeal rights and the steps to be taken and requesting that a copy of this sheet be sent to all athletes likely to be affected. The Tribunal can understand how an amateur administration can overlook appeal provisions buried in contracts, particularly where there may be a change of personnel between the date of the contract and the date of the nomination. However, such matters are very important to the athletes and it is disappointing to see an athlete denied a right of appeal because of administrative failures. In saying this, the Tribunal has not looked at the substantive issue, has not had submissions or evidence on it and is in no way able to comment on whether or not Mr Mudford would have succeeded in his appeal.

FILING FEE

20. In the circumstances, the Tribunal directs that the filing fee paid by Mr Mudford on this appeal be refunded to him.



.....
Hon Barry Paterson QC
Chairman

28 February 2006