

BEFORE THE SPORTS DISPUTES TRIBUNAL OF NEW ZEALAND

SDT 12/05

BETWEEN

NICOLO RIOSA

Appellant

AND

CANOE RACING NEW ZEALAND

Respondent

Representation:

N Riosa in person
D Mackinnon and K Marshall for Respondent
S Ferguson – Interested Party

Date of Hearing:

9 October 2005

REASONS FOR DECISION OF TRIBUNAL GIVEN ON 10 October 2005

21 October 2005

Tribunal Members Participating:

Hon Barry Paterson, QC (Chairman)
Kit Toogood QC
Adrienne Greenwood

Registrar:

Brent Ellis

INTRODUCTION

1. Mr Riosa appealed his non-selection in the Men's Open K1 Marathon at the 2005 International Canoe Federation Marathon Championships scheduled for 15 October 2005 in Perth, Australia. A hearing was held on 9 October 2005 and the Tribunal gave its decision, without reasons, on 10 October 2005. It now gives its reasons.

BACKGROUND

2. Mr Riosa has for the past few years lived overseas and competed in canoeing events in Europe and other parts of the world. In the past he has been a New Zealand representative in the Men's Open K1 Marathon. The Tribunal understands that in the past there has not been competition for selection in the International Men's Open K1 Marathon.
3. Mr Riosa hoped to be selected for the Perth Championship this year. He was not successful and Messrs Fouhy and Ferguson were so selected. He appealed to this Tribunal against his non-selection. Canoe Racing New Zealand ("**CRNZ**") challenged this Tribunal's jurisdiction to hear the appeal.
4. Because Mr Riosa was overseas and because of the urgency of the matter, it was necessary to conduct a hearing by telephone conference on Sunday, 9 October 2005. Mr Riosa attended the conference from Perth. CRNZ was represented by counsel. Also attending the telephone conference were Mr Ferguson, to whom the Tribunal had given interested party status, Mr Exeter, a selector of the canoeing team and a person who had provided a statement and two members of CRNZ, its chairman, Mr Jago and its executive director, Ms Beer. The latter two were able to assist in clarifying uncontested matters but did not give evidence.
5. The Tribunal determined that it did have jurisdiction to hear Mr Riosa's appeal but on consideration of that appeal determined that he had not established grounds for appeal and therefore dismissed his appeal.

JURISDICTION

6. Although CRNZ in its statement of defence, had raised other grounds, in the end Mr Mackinnon for CRNZ, concentrated on paragraph 6 of the "New Zealand Representation Policy" of the New Zealand Canoeing Federation Inc. ("**NZCF**"). NZCF had appointed CRNZ as the governing body of canoe racing in New Zealand.

It was common ground that its representation policy applied. The relevant provision of it states:

“6 Any person not selected for national representation within a team or squad has the right to appeal such a decision to the Sports Disputes Tribunal of New Zealand where all other avenues of appeal have been exhausted.”

7. Also relevant is the jurisdiction which this Tribunal has under its own rules. Rule 6.1(b) contains the jurisdiction to hear selection appeals. It states:

“National Selection:

Where a person wishes to appeal a decision made by a National Sporting Organisation (including any person/s or committee on its behalf)... relating to their... Non-Selection as a New Zealand representative in a sport or to a New Zealand representative sports team or Squad.”

8. Mr Mackinnon’s submission, on behalf of CRNZ, was that this Tribunal did not have jurisdiction because CRNZ has picked a team or squad to represent New Zealand at the World Championships. Mr Riosa was in that team and is part of it, albeit that he was not selected in the Open Canoe Marathon race but rather in the Masters race. As CRNZ had named a travelling team to compete in two conjoint events and Mr Riosa was part of that team, he had no right of appeal.
9. Mr Riosa’s response was that he was not a member of the New Zealand team at the World Championships. The Championships were to be held over the weekend of the 15 and 16 October, with the opening ceremony being held on 14 October. There were various events on the Championship feature list but these did not include the event in which Mr Riosa was competing. CRNZ selected him for the Masters 30-34 age group which was an open, all-comers race (for those within the age group) and no selection was necessary. The Masters races were to be held on 12 and 13 October which was prior to the World Championship. While CRNZ has limited the number of Masters in each category, the organisers of the Masters events do not impose such a restriction. While CRNZ treated both the World Championship and the Masters World Cup teams together, they are in effect distinct.
10. The Tribunal’s jurisdiction is in effect contractual. The right conferred through CRNZ by the NZCF’s Representation Policy is given to a person “not selected for national representation within a team or squad”. While there is an overall team going to Perth, the Tribunal is of the view that the correct interpretation of paragraph 6 of the

NZCF's representation policy is that a person has a right of appeal against non-selection in the particular event for which that person makes himself available (ignoring for the moment necessary pre-nomination or pre-selection requirements). In this case, Mr Riosa was a candidate for the Open Canoe Marathon. He did not make the team or squad for that event. In the Tribunal's view, he had the right to appeal his non-selection. This is the intent of the rule, as the Tribunal interprets it.

11. Similar considerations apply to the Tribunal's own rules. Mr Riosa was a candidate as a New Zealand representative for the Open event. He was not so selected. He therefore had a right of appeal.

THE SUBSTANTIVE ISSUE

12. This Tribunal's jurisdiction in selection appeals is not unlimited. Many issues come into a selection of an athlete and judgment on them is required. The selectors of a particular sport are in a position to make those judgments. This Tribunal is not. The particular grounds upon which the Tribunal can allow an appeal are:

- (a) there were no applicable Selection Criteria followed, or where there are applicable Selection Criteria, that:
 - (i) the criteria have not been properly followed and/or implemented;
 - (ii) the person seeking selection was not afforded a reasonable opportunity by the National Sports Organisation to satisfy the applicable Selection Criteria;
 - (iii) the Selection decision was affected by actual bias; or
 - (iv) there was no material on which the Selection decision could reasonably be based.

In addition, under its general appeal grounds, this Tribunal can uphold a selection appeal if natural justice has been denied. This ground did not arise in this case.

13. In his original appeal application, Mr Riosa's grounds were:
 - (a) CRNZ's Marathon Selection Criteria is "non specific" in regard to what needs to be achieved for selection;
 - (b) the criteria has not been properly followed for a sound selection to be made;

- (c) CRNZ was unable to specify races for me to participate in for the purposes of selection whether it was in New Zealand or Europe.
14. A further particular ground of appeal which arose out of the statement of defence filed by CRNZ is that CRNZ did not hold a final section race as it was the selectors' view that such a race would not have altered their final selection. Mr Riosa alleges that this is a biased position and that even if he had won this race, he would not have been selected.
15. The relief which Mr Riosa sought was that the selection of Mr Ferguson be overturned in his favour or that a selection race be organised between himself and Mr Ferguson.
16. It is necessary to give a brief summary, in chronological sequence, of the dealings between Mr Riosa and CRNZ.

4 Nov 2004: Mr Jago, chairman of CRNZ, in an email to Mr Riosa, said:

"It is useful – and acknowledged – that you intend competing internationally next year. I will be asking the Marathon administrators to work directly with you to ensure that fair and equitable selection opportunities are in place for you, that you understand."

30 Dec 2004: Mr Jago advised Mr Riosa, by email, that:

"The Marathon selection policy as previously advised to you still stands. Implementation of this policy now rests with the selectors."

The selection policy to which Mr Jago was referring was an email sent by Mr Riosa to Ms Beer at CRNZ and copied to Mr Exeter. It stated:

"In selecting, selectors will use the results from a nominated event in New Zealand as chosen by the candidate and from any international events in which the candidate has competed. Events available for choice will include the three Regional Championships and the National Championships. Where possible, performance will be gauged against those with proven ability competing in the same event. Selection will be confirmed after a selection race specifically organised for that purpose and held not more than three months before the event for which selection is required. Failure to compete in any particular event will not necessarily exclude the candidate from selection."

7 Feb 2005: Mr Riosa sent an email to Ms Beer copied to Mr Exeter (a selector) asking for any news/information on the specifics of the selection for the World Marathon Champs. He received no reply.

14 April 2005: Mr Riosa emailed to CRNZ his plan for the racing season, including a financial plan, together with a suggested guide as how he could be selected for the World Champs in Perth as he now lived in Europe and it was impracticable to come back to New Zealand for selection.

24 May 2005: Mr Riosa responded to an email from Ms Beer of 20 May 2005. Ms Beer advised in her email of the difficulties of comparing world rankings against NZ rankings and noted it was like comparing apples and oranges. She noted a preference to see Mr Riosa race against other NZ Paddlers "so at least we have a handle on your current performance levels compared to existing NZ talent" Ms Beer noted that the selectors had no objection to Mr Riosa racing in the World Cup in Portugal to which Mr Riosa replied noting his interest and asking "the actual financial amount CRNZ would contribute". It was in his email that Mr Riosa noted he was asking for consideration for the Open Men's K1 at Perth. Ms Beer's email contained the following:

"Selection for Perth will be based on NZ Nationals and the Regionals – whilst your non-attendance of these events does not exclude your selection, you will appreciate it makes it difficult for the selectors when determining whether to give the Open Men's spot to Ben, Steven, Mike or Nic. If Ben, Steve and Mike have competed at NZ Nationals and the Northern Regionals but Nic is racing in Europe, how do we determine who can paddle the best race in Australia? (Especially given Ben's second place in Australia, this gives the selectors a very good benchmark to use)."

In his reply Mr Riosa noted that currently Ben and Steven were in Europe and suggested they extend their stay for another week to allow them to compete in the Czech Nationals on June 4 and 5. Ms Beer in her email had referred to the Northern Regionals likely to be held on July 16 – 17 and advised that CRNZ would not contribute to Mr Riosa's costs if he were to return and compete. In his reply he said:

"It is unlikely for me to make the Northern Regionals without my costs being covered. I am able to take 1 week off work, which means I would leave Europe on the 13 of July, arriving in NZ on the 15, race the 16 or 17 and then depart NZ on the 18th. My work commitments do not allow me to take more time. To travel like this, my coaches have issues with the amount of training down time I would have as it will take about 3 weeks to get over the jet lag. With all this in mind, if the travel costs are covered I would be prepared to take the risk in order to compete at the Northern Regionals and get selected for the world champs in Perth."

13 June 2005: Mr Riosa advised that he was unable to compete at the World Cup in Portugal and his reasons included a lack of information from CRNZ in regard to actual amount of funds that will be contributed for the event. His budget if he were to

attend was approximately 1500 Euros. He also advised he was making himself unavailable to compete at the Regional Champs next month. He said:

"Even if CRNZ was to pay for the air fare as requested, the journey to NZ for 2 days and back to Europe would effect my training that I will do for about a month, under advisement from all my coaches and advisers they strongly suggest that I do not travel like this. I have now agreed with them."

Mr Riosa advised his recent race results and asked that these be forwarded to the selectors. His next race was to be the Italian Marathon Champs on 3 July and he noted that after those champs he would not have the funds to continue as planned and asked CRNZ to assist with financial help if he were selected to compete at the World Games in Perth.

15 June 2005: Ms Beer replied advising that she had forwarded the results to the selectors.

21 June 2005: Mr Riosa sent a further email addressed to the CRNZ Board and CRNZ selectors asking for clear exact guidelines for selection for the 2005 World Marathon Championships. He provided an updated and revised schedule for preparations leading up to those championships and included marathon race results for the year to date with relative details. He noted the most important date to be adhered to was 15 July 2005 "as holistic planning needs to occur to prepare as per stated plans". Mr Riosa noted that it was unlikely he would be able to race against the other three athletes competing for the two marathon spots at Perth as the opportunity earlier that month to race at the Czech championships had not been taken up. He confirmed he would not be coming to New Zealand for the regional championships. He requested funding to assist in his preparations leading to the world marathon championships and enclosed a full season's budget. He asked CRNZ to select a race(s) that he needed to do to qualify for the marathon spot at Perth and suggested the British Marathon Champs on 27 August.

21 July 2005: In an email to CRNZ Mr Riosa noted:

"I am still waiting to hear what I need to do to get one of the Open Men's K1 spot. I DO NOT like this 'wait to the last minute' game that is being played by CRNZ. I have given all details of the racing season (sent January 05), plans, budgets and results."

He also asked to be advised "the total amount of funding that I will receive to prepare and compete at the World Champs in Perth". A few hours after sending his email Mr Riosa received an email from the CRNZ office informing him of his non-selection

to the Open Men's K1 and his selection for the Master's Race. There were subsequent telephone conversations between Mr Riosa and Mr Bill Exeter, the marathon director of CRNZ and Mr Couchman, a selector, in respect of his selection. Mr Riosa made various allegations as to what was said to him during these meetings. The Tribunal does not find it necessary to go into those matters.

17. Mr Riosa's specific submissions in respect of his appeal were:

- (a) He was not offered a reasonable opportunity to satisfy the selection criteria. A particular matter relied upon was that the email which advised him that it was in his interests to come back to this country to compete in the NZ Nationals and the Regional Champs was dated 9 May 2005 when in actual fact the National Champs had already been held in April.
- (b) He considered coming to the Northern Regional Champs and informed CRNZ that this was possible if he had financial assistance. This request was declined and as it was not clear to him that he would get selected, it was not in his best interests to come back to New Zealand taking into account the interruptions that there would be to his training if he did come back.
- (c) CRNZ did not hold a final selection race because in the words of Mr Exeter, a selector, it would not have altered the final selection. This was a clearly biased statement and showed that even if he had won the selection race he would not have been selected.
- (d) CRNZ's selection policy was unclear and confusing. As it was not clear or precise, it was difficult for an athlete to determine what that athlete needed to do or which race to compete in. It did not nominate specific events for athletes who wished to be selected for the national team. If events had been nominated, there would have been a level playing field which would have allowed athletes to plan. In his case, this allowed CRNZ to have a bias towards the New Zealand Nationals and his European results were taken out of context.

18. Mr Mackinnon for CRNZ submitted:

- (a) CRNZ complied in all key respects with its selection criteria. Mr Riosa did not return for any of the regional races nor the National Championships thus

"putting all his eggs in one basket" namely the quality of his international results.

- (b) The selectors did analyse Mr Riosa's international results although they were hampered to a degree by the paucity of supporting data Mr Riosa provided. Using their expertise they concluded that those results were not compelling and that Mr Riosa's claim for selection was a long way behind Mr Ferguson's claim.
- (c) The only part of the criteria not strictly followed was the holding of a specific selection race. This was unnecessary. There were two stand-out candidates for the men's open event, the cost of holding a selection race would have been prohibitive and Mr Riosa had already indicated he would not be returning to New Zealand before Perth. Further, the criteria made it plain that no one race (even the final selection race if it had been held) was determinative.

19. Mr Maurice Exeter, a selector, gave evidence and was questioned both by Mr Riosa and the Tribunal. Relevant portions of his evidence in chief were:

- (a) The selectors analysed the eligible candidates and made a selection based on their knowledge of the sport, the competitors and following the written criteria. When analysing each candidate's race results, they took several factors into account including race distance, number of portages, race time, race conditions (wind, etc).
- (b) This was the first time that selection had been an issue with marathon racing. Mr Riosa had been selected previously because he raced internationally, was prepared to meet his own expenses and there was no-one else competing for the position. This year there were several candidates competing for two positions.
- (c) In comparing performances, the selectors looked at various events particularly the New Zealand National Championships and the three regional championships. Further, any event where competitors raced against each other was included. Candidates were aware that failure to compete in any particular event would not necessarily exclude a candidate from selection.

- (d) The selectors considered international events but the information from those events had to be sufficient to allow them to do an accurate comparison of the talent available. Mr Riosa sent through limited information and the results he did send through were not in the selectors' view overly impressive.
- (e) Mr Riosa was told on numerous occasions that given his wish to be selected in the Open Men's K1 race, it was in his best interests to return to New Zealand if he possibly could and compete against other New Zealand athletes at one of the regional champs or the New Zealand Nationals. He did not do this and his international results did not support the proposition that he should be selected before Mr Ferguson. Mr Riosa's international results did not place him above Mr Ferguson. It was completely unnecessary and too onerous (financially) for the competitors and CRNZ to stage a selection race. Finance was a factor for competitors. The selectors felt they had a strong measure of candidates and their ability. They also considered as a yard stick the results of a long time competitor and a one time 9th place getter in World Championships. Mr Riosa had raced this competitor in the past and could not beat him. Both Mr Fouhy and Mr Ferguson had beaten the competitor. Further, Mr Riosa had made it clear he would not return to New Zealand.
- (f) The statement on which Mr Riosa relied was:
- "However, even if we had had a selection race, which Mr Riosa had somehow attended, and done well in, I don't see how he would have been selected ahead of Mr Ferguson and Mr Fouhy. Their results in recent times have been consistently excellent."
- (g) The selectors did take into account Mr Riosa's international results and endeavoured to assess the quality of his performance.

20. In the Tribunal's view CRNZ did have a selection policy. It was however not as precise as it should have been and Mr Riosa could have been kept more informed of developments. The selection policy was to endeavour to assess the respective abilities of the candidates preferably from events in which the candidates competed against each other. The policy suggested there would be several events for choice but only referred explicitly to three Regional Championships and the National Championships. It did not preclude the selection of a person who did not compete in those championships and who did not race in New Zealand.

21. Mr Riosa was aware of the selection policy from late 2004. He was proactive in endeavouring to obtain financial assistance from CRNZ and to organise a race against the other main competitors preferably in Europe. It is unfortunate that CRNZ did not prior to May 2005 stress the importance of Mr Riosa competing in either the National or the Regional Championships. By the time of the email exchange in mid-May 2005, the National Championships, which presumably would have been an important event, had already been held. While it is correct that CRNZ on more than one occasion indicated to Mr Riosa that it would be in his interests to return to New Zealand, this was not part of the official selection policy which left open the possibility that an overseas candidate could be selected.
22. The Tribunal does not think it unreasonable that CRNZ would have preferred a candidate to return to New Zealand to compete in the championships but it would have been preferable if this had been stressed at a far earlier stage. There was a submission that Mr Riosa knew at an earlier stage of this requirement but as there was no direct evidence of this from CRNZ, we accept Mr Riosa's evidence. Another complaint which Mr Riosa had may also have validity. It does appear as though all the selectors did not have the details of Mr Riosa's overseas performances which he provided to CRNZ. His evidence was that one of the selectors, Mr Couchman, advised him that he had not seen it. Mr Couchman did not give evidence but it does appear as though he was not on email and there must be a reasonable prospect that his comment to Mr Riosa indicates he did not see all of Mr Riosa's results.
23. The Tribunal accepts that the selection policy was substantially complied with and that there was material on which the selectors' decisions could reasonably be based. Mr Fouhy had competed with some distinction in the Australian Marathon Championship. In the National Championship Mr Ferguson had competed reasonably competitively with Mr Fouhy. The selectors were entitled on this information to consider Mr Ferguson a strong candidate. They had no direct comparison between Mr Riosa on the one hand and either Mr Fouhy or Mr Ferguson on the other. There are obvious difficulties in comparing athletes competing under different conditions against different competitors in different parts of the world. A canoe marathon like road marathon racing is not an event in which times themselves are adequate comparative tools. In the circumstances the Tribunal's view is that the appropriate method of selection was on a comparative basis and accepts that in the circumstances a judgement call was required from the selectors. An athlete who had not competed against the local athletes would in the circumstances have had to have

a compelling case to be selected. This point could have been made in stronger fashion to Mr Riosa at an earlier date.

24. The Tribunal does not accept that the evidence suggests that there was bias on the part of CRNZ. The wording of Mr Exeter's evidence was unfortunate. Under questioning he agreed that if there had been a selection race and Mr Riosa had performed very well, he may have been selected. While the Tribunal accepts that on the strict wording of the selection criteria there was not a need to hold a selection race, an athlete such as Mr Riosa could have expected there to be such a selection race. However, this is not a point that in the Tribunal's view Mr Riosa can rely upon. Although he says that he may have returned to New Zealand if he had known that winning a selection race would have been to his benefit, CRNZ was entitled to assume, in the Tribunal's view, that Mr Riosa was not prepared to return to New Zealand unless he received financial assistance. CRNZ was not prepared to do this and had no obligation to do so. It would have been preferable if the decision not to hold a selection race was communicated to the contenders, particularly Mr Riosa, before final selection was made. However, in the circumstances the Tribunal's view is that the decision not to hold a selection race cannot assist Mr Riosa.
25. As already indicated, an appellant must come within the grounds of the Tribunal's rules before an appeal can be upheld. In a selection based on comparative performances, as this selection was, the judgment of persons experienced in the sport will be required. This is particularly so in a sport such as marathon canoeing where a competitor for a selection spot has not competed against the other competitors. Some of the factors which the selectors have to exercise judgment on have already been referred to. It would only be in exceptional circumstances (if at all) that this Tribunal will exercise a selectorial judgment. The normal course, if an applicant establishes grounds of appeal, would be to refer the matter back to the selectors with an indication of the matters which the selectors are required to take into account before making a final selection. This was not one of those cases and accordingly the appeal was dismissed.

A handwritten signature in blue ink, appearing to read 'B J Paterson', is positioned above a dotted line.

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Hon B J Paterson QC (Chairman)

Date: 21 October 2005