

**DISPUTE BETWEEN**

████████████████████

**Appellant**

**AND**

**NEW ZEALAND CANOE POLO ASSOCIATION**

**Respondent**

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**DECISION OF SPORTS TRIBUNAL  
24 November 2023**

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**Tribunal**

John Macdonald (Chair)  
Ruth Aitken DNZM  
Paula Tesoriero MNZM

**Representation**

Kathryn Lydiard, counsel for the Appellant  
Michael Smyth, counsel for the Respondent

**Registrar**

Helen Gould



9. The SDT interviewed ██████ and 10 boys who had been in the dorm area where ██████ had stayed. Five of the boys were interviewed twice. During the course of the interview process, it became apparent that ██████ and three other boys had been using the voice translator technology, that ██████ was alleged to have made an undetermined comment about ██████ and that one of the other boys had said that ██████ was a 'fat homo' and made a vulgar comment about ██████'s mother.
10. On 11 July 2023 the SDT wrote official warning letters to the boys involved telling them that they had breached the Association's Code of Conduct and outlining the penalties imposed. ██████'s penalty was to complete a reflective process and write apology letters to ██████ and the NZCPA, and that he would be monitored for six months; the letter also said that ██████ could continue in the Oceania campaign.
11. The warning letter came as a surprise to ██████ and so, through his mother (██████), he indicated he wished to appeal against the decision.
12. The main grounds for appeal it would seem, although not exactly set out, were that the process was flawed. From the outset ██████ had queried the process followed by the SDT. ██████ responded to the initial invitation to attend a Zoom meeting wondering what the meeting was about.
13. As the process progressed ██████ queried again what ██████ was alleged to have done. She anticipated that, because the SDT had explicitly told the boys that they were just investigating to get both sides of the story, they had not predetermined anything, and the interviews did not constitute a hearing, ██████ would have the opportunity to be heard and to defend himself. This, of course, did not happen and ██████ and ██████ were left wondering exactly what he had been found to have done to breach the Code, and the identity of the victim to whom he was to apologise (although they had been able to work that out for themselves).
14. ██████ stated that they wished to appeal against the SDT decision because they believed it was without basis (p020 paginated bundle).
15. The appeal went to the new Board of the NZCPA which followed the Disputes Policy and established the Association Disputes Tribunal (ADT).

16. The ADT reviewed all the evidence, presented excerpts of the evidence for █████ to respond to and received some additional material from █████ through his mother. The ADT then decided that █████ had made the 'fat homo' comment and had been part of a broader pattern of bullying behaviour during the course of the camp.
17. The ADT decided to increase █████'s supervision period from six to 12 months and stood him down from the Oceania Champs, effectively imposing a more punitive sanction on █████ than the original sanction imposed by the SDT.

### **This appeal**

18. █████ is appealing against the decision of the ADT on the grounds that natural justice was denied (Rule 42(a) of the Sports Tribunal Rules 2012) and that the penalty imposed was excessive, inappropriate and disproportionate to the penalties imposed on the other boys (Rule 42(d)).
19. NZCPA says that █████ was not denied natural justice and that the penalty was appropriate as it recognised the gravity of the conduct and the harm caused to the victim.

### *Natural justice*

20. Both the appellant and respondent have made submissions on the standard of natural justice. The respondent has identified (at [3.5]) the elements of natural justice contained within its Disputes Policy and submits that it restricts the ADT to those elements. The Tribunal is of the view that there should be some flexibility of thought when approaching appeal processes to ensure natural justice is served.
21. The appellant (at [39]) submits that natural justice means, among other things, there should be the right to a fair hearing so that evidence can be tested. The Tribunal agrees with this proposition and also wonders if it is possible for a fair hearing to be conducted in an environment when the decision-maker and defendant do not understand how the process will be conducted.
22. The ADT 'appeal' process was never made clear to █████ and it would appear that this is because ADT did not really understand the process and what was required of them. By way of illustration, on the 13 August 2023 the NZCPA Board Chair emailed █████ informing her that they had 'reviewed' the appeal. The letter attached to this email said

that the ADT had been formed to 'hear' the appeal, goes on to say that an 'appeal process is underway' and then states that the ADT [will] 'uphold your appeal'.

23. The Tribunal's interpretation of this confusion about a review of the appeal, upholding the appeal, hearing the appeal and the process being underway is that ADT have followed a two-step process whereby they have looked at ██████'s 'appeal' and have decided that her concerns about the SDT decision and process were valid and have then proceeded to essentially take on an investigation of the matter *de novo* (afresh). Notwithstanding Rule 16.1(b), this in the Tribunal's view was never made clear to ██████ and ██████
24. The confusion seems to continue when the Executive Officer, on behalf of the ADT asks ██████ on 28 August 2023 if they would like an online hearing or if they would prefer to state their position in writing. Then on 8 September 2023 the Executive Officer says that the ADT is convening to 'consider your appeal' and on 10 and 11 September 2023, the new NZCPA Board member and ADT Chair, Robert Coulson, writes about reviewing the evidence and considering the appeal.
25. Nowhere in the correspondence with the ██████ did the ADT make it explicit that it would, as it was entitled to do, be rehearing the matter.
26. From the evidence before the Tribunal, it can be inferred that ██████ and ██████ were expecting the ADT to review what had taken place, to decide whether there had been a proper process and also whether the outcome of the SDT investigation should stand. It would seem that they did not have any idea that there was a risk (due to the matter being heard afresh) of the sanctions being increased. More likely they were expecting to be told that either the SDT was wrong, or it was right, and the first sanctions (apology letter and six months supervision) should remain.
27. The respondent, in its written submissions (at [4.9]) suggests that ██████ would have been aware of the detail of the Disputes Policy because he had raised the appeal. The evidence suggests, however, that ██████ and ██████ have responded to the paragraph in the letter dated 11 July 2023 detailing who to contact should they wish to appeal the SDT's decision (the email address was printed incorrectly and ██████ had to re-send it).
28. The respondent (at [4.10]) assumes that ██████ was a properly informed appellant and so should have expected that the sanction could have been increased. The context of this particular case though needs to be borne in mind and the ADT should have turned

its mind to the possibility that an unrepresented (aside from his mother) 15-year-old might not be familiar with the powers of the ADT, and the Tribunal believes these should have been explained to him.

29. The Tribunal notes that while [REDACTED] was invited to respond to allegations and to comment on the evidence that was provided to him, the confusing process was not conducive to ensuring natural justice. The respondent's submission states that [REDACTED] requested to be heard in writing, a statement the Tribunal considers to be an over-statement as [REDACTED] merely responded to a question about whether they wanted to appear or to respond in writing. The Tribunal is sympathetic to the position that [REDACTED] wanted to respond in writing given that he was a 15-year-old boy who may have found having to attend a hearing quite daunting.
30. The appellant's written submission addresses the issue of whether [REDACTED] was provided with a proper opportunity to respond to the allegations made against him or to the evidence that was being considered by the ADT ([43]-[52]). While the Tribunal acknowledges the legitimate concerns of the ADT to protect the privacy of the boys who participated in the video interviews it still remained fundamental to a fair process that the specific allegations against [REDACTED] were put to him, as that would have provided him with the opportunity to test the evidence and properly defend himself. As it was the Tribunal does not accept that the summary of evidence supposedly adverse to [REDACTED] which was prepared by the ADT met that requirement.
31. In addition, the Tribunal notes that the ADT decision, in the form of the letter of 15 September 2023, merely stated that it found against the appeal and identified breaches of five parts of the Code of Conduct. However, no details as to how they had been breached were provided and there were also no reasons provided as to how or why the ADT reached the decision it did.
32. Where there is a process by which a decision can be appealed (as in this case), it is common practice for decision-makers to provide reasons for their decisions. Although there is no common law that requires reasons to accompany decisions, principles of fairness would also generally require a decision to be accompanied by reasons. That aside, the NZCPA's Disputes Policy, at Rule 17 sets out the requirement for a written judgment (which is silent on having to provide reasons). The letter sent on 15 September 2023 informing [REDACTED] of the decision of the Tribunal cannot be described as a written judgment and does not comply with NZCPA's own rules in that regard.

### *Error in fact*

33. In Mr Coulson's witness statement, the Tribunal has noted a significant error in fact in wrongly concluding that it was █████ who made the 'fat homo' comment to █████. This seems to have been the basis for its decision and the penalty imposed.
34. Nowhere within the Closed Bundle do any of the boys attribute the 'fat homo' comment to █████, but it is attributed to another boy a number of times. One of the boys has said that █████ has made an initial comment about █████ but has not said what that comment was. For the ADT, as described by Mr Coulson, to rely on non-existent evidence that █████ said █████ was a 'fat homo' renders the decision unsound.
35. The respondent addresses this issue in its written submissions at [6.5] stating that even if █████ had not made the comment, it would have made no difference to the outcome. The Tribunal is not convinced about that submission as Mr Coulson's statement at [20] clearly places significance on the comment by listing it as the first piece of evidence the ADT relied on to make its decision.
36. The submissions also say that (at [6.2]) the primary finding of the ADT was that █████ had participated in the bullying behaviour directed at █████ and at [6.4] that it was largely immaterial to attribute specific comments to specific people. Again, however, the Tribunal notices the discrepancy between that submission and Mr Coulson's statement; he certainly did not think attributing the comment to █████ was immaterial at all.

### *Sanction*

37. The ADT chose to increase the penalty imposed on █████ despite not informing █████ that this was a possible outcome of the 'appeal' process and justifies it on the basis that it was because the matter was being heard afresh and because they assumed that he would be familiar with the Disputes Policy.
38. The Tribunal is of the view that once the ADT had determined that █████ had breached the Code of Conduct and was about to embark on a review of the sanction imposed by the SDT it should at that point have given █████ the opportunity to be heard on that issue.

39. The aggravating features described by Mr Coulson were that the behaviour came just after the camp participants had attended a talk about the difference between banter and bullying and that █████ had not, at the time of the decision being made, written his apology letters.
40. Mr Coulson further states that the ADT considered sanctions given to other players and noted that there was a disparity between █████'s sanction and the sanction of another boy who was as culpable as █████; however, because that boy did not appeal against the SDT decision they could not increase his penalty to make it the same as █████'s. Nonetheless by increasing █████ sanction they had created a disparity.
41. The Tribunal is disappointed that the ADT recognised that increasing █████'s penalty would create a disparity but went ahead and created the disparity anyway. The Tribunal is of the view that the ADT should have turned its mind to the emotional impact that the increase in sanction would have on █████, being singled out as the only boy that was stood down from the Oceania Champs, and the potential impact it could have on future performance. The Tribunal disagrees with the assertion that missing out on the Oceania Champs would have no bearing on █████'s ability to participate in future events. We assume that the Oceania Champs is an important competition and no doubt those who attend and perform well would surely have an advantage when it comes to selection for future events.

## **Discussion**

42. The Tribunal has considered all the evidence presented to it, some of which is referred to above, as well as the written submissions of both parties.
43. The Tribunal agrees with the ADT that there were problems with the process followed by the SDT, not least of which was that on completion of the investigation and the evidence gathering stage they proceeded straight to a determination without putting the allegations to █████ and the other boys to provide them with an opportunity to defend themselves.
44. The Tribunal also agrees that the decision of the SDT should have been set aside due to the absence of an appropriate process.



45. The Tribunal, however, has concerns about the process that was then followed by the ADT. A review of the Disputes Policy shows it is silent on the actual process that should be followed once an appeal is before the ADT. While the Policy provides the ADT with broad powers there is not enough guidance on how to conduct the process, which is surprising given the point made in the respondent's submission that the NZCPA is largely made up of volunteers and the ADT did not have the luxury of legal advice. The lack of direction has caused confusion for all involved.
46. The Tribunal acknowledges that the ADT went to some length to try to make the process fair for all parties, and further acknowledges that NZCPA wants to send a strong message about bullying. However, in the absence of clear direction from the Disputes Policy, the ADT appears to have conducted a rather muddled process whereby it was not entirely clear as to what it was supposed to do. It also did not inform █████ what the process was and what the possible outcomes could be.
47. On this basis the Tribunal is satisfied that for █████ there has been a denial of natural justice for the following reasons:
- (i) the appeal process was unclear, and it was never properly explained to █████ that the ADT was conducting a rehearing;
  - (ii) it was not explained to █████ that the ADT had the power to increase the sanction that had been imposed by the SDT;
  - (iii) █████ was not properly provided with an opportunity to answer or challenge the specific allegations made against him or the evidence relied on by ADT;
  - (iv) █████ was not provided with an opportunity to be heard on the issue of sanction; and
  - (v) in reaching its decision that █████ had breached the Code of Conduct, and also in its assessment of the appropriate sanction, the ADT had in part relied upon a factual finding that █████ was the one who called █████ 'a fat homo' when there was no evidence to support such a conclusion.
48. As to the sanction imposed by the ADT, the fact that █████ was never warned that his appeal could result in an increased penalty, that the penalty imposed was based in part on an error of fact, and that the end result is that █████ has received a much harsher sanction than the other boy who had a high (if not higher) level of involvement causes

the Tribunal to conclude that the penalty was excessive, inappropriate and disproportionate to the penalty imposed on the other boys.

## Decision

49. The Tribunal has turned its mind to how it should deal with the dispute and appeal before it. Rule 45 of the Tribunal Rules 2012 provides the Tribunal with the power to determine how it hears the matter, including that it can determine the appeal by reference only to the documents filed. Further, the Rules provide (at 46(a)) that the Tribunal has discretion to rehear the matter. At Rule 47(a), the Tribunal is provided with powers to '*make any decision that the body appealed from was capable of making on the original application*', Rule 47(b) provides that if the appeal is allowed the Tribunal may also '*make such orders as it considers appropriate to give effect to its decision*'.
50. Bearing these provisions in mind, and having reviewed the Disputes Policy, the Tribunal has decided that it will consider the matter before it as an appeal rather than a rehearing.
51. The Tribunal upholds ██████'s appeal and quashes the ADT decision.
52. The Tribunal is not minded to order a rehearing of this matter, either by itself or by reverting it back to the ADT. The Tribunal considers that two appeals and a process that has lasted for six months is more than enough for both ██████ and the volunteers of the NZCPA.
53. The result of this is that ██████ would be eligible to participate in the Oceania Champs and the period of supervision would no longer apply.
54. This decision does not mean that the Tribunal has found that ██████ was innocent in the sense that he was not involved in acts of bullying or did not breach the Code of Conduct. Instead, our decision simply reflects that there were procedural flaws in the manner his appeal was dealt with, which in turn amounted to a denial of natural justice.
55. The Tribunal acknowledges that ██████ suffered harm and accepts that it was appropriate that ██████ was required to write a letter of apology to him.
56. Finally, the Tribunal points out that it does not consider that ██████ has necessarily 'got away with' poor behaviour. In having been under supervision for the last five months,

having missed out on the build up to the Oceania Champs in which the other boys have participated, and having not been able to train at his club, [REDACTED] has already served some form of punishment. There were also the other unintended consequences for [REDACTED] (as set out in the appellant's submissions).

Dated: 24 November 2023



**John Macdonald**  
Chair



**Ruth Aitken DNZM**  
Member



**Paula Tesoriero MNZM**  
Member