BEFORE THE SPORTS TRIBUNAL
OF NEW ZEALAND **ST 03/2024**

BETWEEN	**QUAID THOMPSON**
	Appellant
AND	**CANOE RACING NEW ZEALAND**
	Respondent
AND	**NEW ZEALAND OLYMPIC COMMITTEE**
	Interested Party

DECISION ON NON-NOMINATION APPEAL
29 April 2024

Tribunal	John Macdonald (Chair) Helen Tobin (Member)
Representation	David Fraundorfer, counsel for Appellant Paul David KC, counsel for the Respondent
Registrar	Helen Gould

1. Quaid Thompson (the appellant) filed an appeal with the Sports Tribunal against Canoe Racing New Zealand (CRNZ (the respondent)) after being informed that CRNZ had returned its K1 quota to the International Canoe Federation (ICF) in favour of the K2 quota. With no K1 event entered by the New Zealand Olympic Committee (NZOC), the respondent took the view that the appellant could not be nominated for selection to compete at the Olympics.

2. Further, the appellant was informed that there would be athletes nominated for the K2, C2 and K4 crew boats but as he had not made himself available for the crew boat process, he was not eligible for nomination.

3. The grounds for the appellant's appeal were that the criteria had been improperly applied and were changed, there was a lack of communication and there was an over-emphasis on selecting a K4 boat rather than the best paddler and that he did not have a reasonable opportunity to fulfil the criteria and there was actual bias in the nomination process.

4. A hearing was held via Teams on 23 April 2024.

Issue of jurisdiction

5. At the hearing, counsel for the respondent, Mr David, raised the issue as to whether the Tribunal had the jurisdiction to hear the appeal, notwithstanding that the respondent had, on its Form 5, accepted the jurisdiction of the Tribunal.

6. Mr David explained that jurisdiction had been accepted in a generalised way based on the material before the respondent at the time, but that there had been a large volume of additional material provided by counsel for the appellant, Mr Fraundorfer, which had caused it to change its position and this was entrenched further on receipt of Mr Fraundorfer's written opening submissions on the morning of the hearing.

7. Mr David pointed to the relief the appellant was seeking, outlined in Mr Fraundorfer's submissions, as being the catalyst for his challenge to jurisdiction; this was because it now became apparent that the appellant was no longer appealing against *his* non-nomination but rather the nomination of other athletes.

8. Paragraph 8 of the opening submissions for the appellant sought directions from the Tribunal for the K1 to be reconsidered as the priority boat, that the appellant be considered for the K2 and K4 boats and for there to be a re-trial to the K4. Paragraph 24 also sought the direction that the appellant would join the group of five paddlers trialing for the K4.

9. Mr David argued that (i) this demonstrated this was no longer a non-nomination appeal by the appellant and that (ii) the Tribunal did not have the power to make the directions sought.

Is this a non-nomination appeal?

10. Mr David relied on an appeal case taken to the Court of Arbitration for Sport (CAS) by Yachting New Zealand (YNZ) (*YNZ v Murdoch* CAS 2004) against a decision of the Tribunal to direct YNZ to cancel its nomination of athletes, to reconsider the nomination following the trialing of three athletes through a further event and to consider their nominations in terms of a clause in the nomination criteria.

11. That case explored the policy reasons, principles and meaning of 'their nomination or non-nomination appeal' and concluded at [5.19 – 5.20] that the wording of the NZOC Selection Regulations, which govern the appeal process, precludes an athlete from appealing against the nomination of another athlete; an athlete can only appeal against his or her own non-nomination. In the strongest terms the CAS concluded that the Tribunal's finding that it had jurisdiction to hear the original appeal by Mr Murdoch was 'wrong in law'.

12. Mr David argued that the appellant's appeal had emerged as an appeal against the nomination of other athletes, given that he was seeking a re-trial, a direction he be inserted into the trialing group and that he be considered for the K2 and K4 boats. Such remedies would have an impact on other athletes.

13. The reasons why this appeal is not against the appellant's own non-nomination were set out by Mr David as being:

    a. there was no K1 boat going to the Olympics and so he had not been eligible for nomination in the K1 event; and

b. he had not made himself available to the crew boat process and nor had he been part of the sprint squad which was a nomination criteria.

Put simply, Mr David argued, the appellant was ineligible for nomination to the Olympics and so there was no non-nomination relating to him.

14. The submissions on jurisdiction requested by the Chair were to address that very issue with a focus on the *Murdoch* case. However, Mr Fraundorfer did not address the issue of whether an ineligible athlete could challenge the nomination of an athlete other than himself. Instead, he argued that the appellant *was* eligible to be nominated and on that basis the Tribunal could hear the appeal.

15. Seemingly then, the appellant has accepted that being an athlete eligible for nomination was the factor that provided the Tribunal with the jurisdiction to hear the appeal.

16. So, the Tribunal must first consider whether the appellant was indeed eligible for nomination.

17. In their submissions both counsel draw the Tribunal's attention to clauses 1.4, 4.4 and 5.1 of the CRNZ Olympic Nomination Criteria.

18. Mr David submitted that these clauses render the appellant ineligible. Mr Fraundorfer submits precisely the opposite.

19. Clause 1.4 addresses the ICF Qualification System and states that it may be necessary for CRNZ to choose between quotas and, in those circumstances, it will choose the boat which will give the largest number of athlete quota places.

20. The appellant would have been aware that there was a risk that the K1 quota would be returned in favour of a boat with more athletes, such as the K2. In his email dated 28 November 2023, the appellant declined the opportunity to race in the K2 boat because he could not meet the training requirement to reside in Cambridge. Therefore, the only boat he could have been eligible to race in at the Olympics was the K1 1000, but this quota had been returned under ICF rules. There was therefore no boat to which the appellant could be nominated.

21. Clause 4.4 provides that invitations to trial for K1 events will be extended to athletes who make themselves available to compete in global and continental qualifying competitions, *including in crew boats*. Under cross examination, the appellant stated that he had not competed in international crew boat events since 2018, pre-the 2020 Olympics.

22. Clause 5.1 states that to be nominated for crew boat events, athletes must be a member of a CRNZ sprint squad. The appellant argues in his submissions that he thought he was a member of a sprint squad because he received emails to the 'team' and that this apprehension had caused him to behave in a certain way and make certain choices. He further argues that in such circumstances the principles of affirmation and estoppel should be applied. He also submitted that he was never told he would not be eligible for nomination because he was training independently.

23. The Tribunal does not accept that submission because there is ample evidence to show that the appellant would have been aware that to be eligible for nomination to a crew boat he had to be part of a sprint squad and that meant competing internationally in a crew boat, having a CRNZ coach's training plan, residing and training in a centralised location and signing an athlete's agreement (see the 2024 Olympic Team Men's Crew Nomination Process document which was filed by the appellant as evidence; that document not only provides a definition of being in a sprint squad but it has a link to the sprint squad policy). Based on these factors, to say that he thought he was a member of the sprint squad is just not credible.

24. In any event, the appellant conceded under cross-examination that he had not been part of a sprint squad, had not competed internationally, did not have a CRNZ coach and had not resided in a central location to train.

Discussion

25. The Tribunal accepts that the principles contained in the *Murdoch* case mean that if the appellant was ineligible for nomination to the NZ Olympic Team his appeal would not be against his own non-nomination but would be an appeal against the nomination of other athletes. As such the Tribunal would not have jurisdiction to hear this appeal.

26. Mr Fraundorfer has not submitted against that but rather has attempted to demonstrate that the appellant was eligible, and that, if he in fact was not, the principle of estoppel

should be applied because he did not know he was ineligible and had acted as if he was.

27. The jurisdiction to hear this appeal comes down to whether the appellant was eligible to be nominated.

28. Unfortunately for the appellant, that appears to the Tribunal to be very straightforward; he was not eligible for nomination because there was no K1 boat quota for him to be nominated to and he did not meet the criteria to be nominated to a crew boat.

29. The Tribunal does not accept the submission that the appellant was never told he was not eligible for nomination because he clearly received the nomination criteria. He even acknowledged in an email that he had had a 'good read' of it. Further, the appellant admitted under cross-examination that he had not been a member of a sprint squad.

30. The Tribunal notes that the issue of whether the Tribunal had the power to make the directions sought by the appellant was also raised by counsel for the respondent, both at the beginning of the hearing and in written submissions.

31. In that regard, the Tribunal accepts the submission that Rule 49 of the Sports Tribunal Rules does not give it the power to make directions, meaning the relief sought by the appellant cannot be granted. The Chair had also pointed this out to counsel before the hearing began and it was conceded by counsel for the appellant at the time.

32. In his written submissions Mr Fraundorfer points to the principles of natural justice to argue that the Tribunal could make the kind of directions sought, but the Tribunal does not accept that there is an argument of that sort to be made here.

Decision

33. The Tribunal is satisfied that it does not have the jurisdiction to hear this appeal.

Conclusion

34. The appeal is dismissed with costs being reserved.

Addendum

35. Although that determines the appeal, the Tribunal makes some final comments on the evidence and the grounds the appellant relied upon in bringing his appeal.

36. The Tribunal acknowledges that CRNZ had an acrimonious relationship with the appellant's father and that this had extended over many years but, the same was not the case with the appellant. While he might have decided to train independently and be trained by his father, the relationship he had with CRNZ appeared to be perfectly amicable. CRNZ regularly communicated with him and he was informed about the choices being made with respect to quota. He received ongoing funding from CRNZ and every year the offer to join the boat crew which lived and trained in Cambridge was made to him. Against that background the Tribunal could find no substance in the allegations of bias levelled against CRNZ.

37. The Tribunal further concludes that there was nothing improper in the way CRNZ applied the relevant criteria, which is particularly the case with the choices made between quota.

38. As to whether CRNZ failed to provide the appellant with a reasonable opportunity to meet the nomination criteria the Tribunal does not accept that, and it is perhaps best answered by the repeated offers to the appellant to join the boat crew process and live in Cambridge. To turn down such offers was solely a matter of choice on the part of the appellant.

39. In respect of the appellant's complaint that CRNZ had placed an over emphasis on selecting a K4 boat the Tribunal reflects that the K4 boat is the most likely crew boat to gain a placing at the Olympics and that it missed out on a quota spot by a very fine margin. The CRNZ nomination policy always made it clear that it would be selecting the boats that could ensure the largest number of athletes to attend the Olympics. The appellant could have taken action to ensure he could be considered for selection in a crew boat.

Dated: 29 April 2024

John Macdonald
Chair

Helen Tobin
Member