



Arbitration CAS 2008/A/1539 Nicholas D'Arcy v. Australian Olympic Committee (AOC), award of 27 May 2008

Panel: The Hon Justice Henric Nicholas (Australia), President; The Hon John Winneke QC (Australia); The Hon Justice Roger Gyles AO (Australia)

Swimming

Membership for the 2008 Australian Olympic Team

Breach of a membership condition: conduct bringing an athlete into disrepute

NOC's power of control and discretion in connection with Olympic team membership

- 1. Bringing a person into disrepute is to lower the reputation of the person in the eyes of ordinary members of the public to a significant extent. The conduct of an athlete who has been intoxicated and has seriously injured another athlete is such that, when reported by the public media, could not help but be likely to bring him into disrepute.**
- 2. It is to be reasonably expected that the Australian body representative of Olympic sport should have adequate powers of control of membership of the Olympic Team, including power to deal with any behaviour of a member who is guilty of conduct likely to bring himself, his sport, or the AOC into disrepute or censure. It is reasonable that the NOC has power to terminate selection in the Team in the event that such conduct is established.**
- 3. The Membership Agreement does not provide for automatic termination of membership upon a finding of breach of condition. Discretion to terminate arises and should be exercised with regard to what, as between the parties, is fair and reasonable in the circumstances, with due weight given to the consequences of termination for the member. That discretion resides in the AOC or the Chef de Mission in their respective role. When the decision to terminate has been taken personally by the President and was communicated to the Appellant as such, the proper procedure laid down by the Membership Agreement has not been followed. The matter has therefore to be remitted to the AOC to exercise its discretion.**

By an Application dated 18 April 2008, Mr Nicholas D'Arcy (the "Appellant") lodged an appeal against a decision handed down on 18 April 2008 to terminate the Appellant's membership of the 2008 Australian Olympic Team.

The relief which the Appellant seeks includes an order setting aside the decision to terminate the Appellant's membership of the 2008 Australian Olympic Team and a declaration that the Appellant

be reinstated as a member of the 2008 Australian Olympic Team in accordance with the terms and conditions of the 2008 Australian Olympic Team Membership Agreement – Athletes entered into between the Appellant and the Respondent on 28 February 2008 (the “Membership Agreement”).

The Appellant is an Australian international level swimmer who has been selected to represent Australia at the 2008 Beijing Olympic Games as a member of the Australian Olympic Team.

The Australian Olympic Committee Inc (AOC) (the “Respondent”) is an incorporated body charged with the task of controlling or administering Australian Olympic athletes and each Australian sport included on the Olympic program for the Summer Olympic Games and the Winter Olympic Games.

The Application dated 18 April 2008, which was originally filed with the CAS Oceania Registry in the Ordinary Division, was assigned to the Appeals Division of CAS by the CAS Court Office.

In accordance with the directions given at the preliminary conference call on 1 May 2008, the Appellant filed an appeal brief with his statement of appeal on 9 May 2008. The Respondent, in accordance with directions given, filed a response on 14 May 2008.

The hearing took place on Thursday, 15 May 2008 in Sydney Australia.

On 29 March 2008 the Appellant was selected as a member of the 2008 Australian Olympic Team following selection trials held in Sydney.

In the early hours of 30 March 2008 in a public establishment known as The Loft bar in Sydney, the Appellant struck one Simon Cowley in the face with his elbow and inflicted serious injuries upon him. The Appellant had drunk a considerable quantity of alcohol and was intoxicated. Mr Cowley was taken to hospital.

On 31 March 2008 the Appellant was charged with an offence or offences arising out of the incident by a member of the New South Wales Police Force and was bailed to appear in court on 21 April 2008. On that day the New South Wales Police issued a media release including the following:

About 11am today police arrested a 20-year-old Queensland man at City Central Police Station. He was interviewed and charged with assault occasioning grievous bodily harm and assault.

The Court Attendance Notice only included one charge of recklessly causing grievous bodily harm, contrary to an inappropriate section of the *Crimes Act 1900*. That was corrected when the matter came before the Court. The Police Facts Sheet includes the complainant’s version of the incident, namely, that when he raised his hand in an effort to shake hands and introduce himself to the Appellant, the Appellant reacted by elbowing the complainant in the face at full force. The names of four witnesses in addition to the complainant are disclosed. The Facts Sheet refers to an electronic record of interview between the Appellant and the Police. During the interview the Appellant stated that he reacted after being slapped in the face by the complainant.

On 2 April 2008 the Appellant issued a statement to the media which included the following:

I deeply regret my involvement in this incident and the injury occasioned to Simon Cowley. This was a night marked for celebration of the selection of the Australian Olympic Swimming Team.

I sincerely regret the embarrassment caused to Australian Swimming, the Australian Olympic Swimming Team and to my family. I wish to express my sincere thanks for the support from my family, friends, team mates and Australian Swimming throughout this difficult time.

There was widespread coverage concerning the incident and the charges in the public media in Australia.

On 7 April 2008 Mr John D Coates AC, in his capacity as President of the AOC, wrote to the Appellant raising the incident in question, referred to some other matters and sought a written response within seven days. The Appellant responded by letter of 11 April 2008 which also enclosed a number of favourable references. This letter included his account of the incident in the early hours of 30 March, his comments in relation to certain other matters raised by Mr Coates and a general statement of matters which should be taken into account in his favour. The Appellant's version of the incident was that he had been unexpectedly and without provocation slapped in the face by Mr Cowley and had reacted in self defence. His response included the following:

My matter is presently before the Courts, and it will be up to the Judicial system to decide my guilt or innocence in respect of this matter. Until that determination is made by the Judicial system, I am entitled to a presumption of innocence.

...

In conclusion, I submit that I am a fit and proper person to remain on the Australian Olympic Swimming Team. In the absence of a finding of fact made by the Judicial system, I should be entitled to a presumption of innocence not only to the charge I face before the Court but also in respect of any investigation as to whether or not my conduct has brought the sport of swimming into disrepute.

By letter of 18 April 2008, Mr Coates, in his role as President of the Australian Olympic Committee, informed the Appellant that he had decided to terminate his membership of the Team. The terms of that letter are as follows:

Membership of the 2008 Australian Olympic Team

I refer to my letter dated 7 April 2008 and to the material which you provided under cover of your fax dated 14 April 2008, which you asked that I take into account in making a decision about your membership of the 2008 Australian Olympic Team ("the Team").

Having considered that material, in my role as President of the Australian Olympic Committee, I have decided to terminate your membership of the Team.

I have attached a copy of clauses 2 and 7 of the 2008 Team Membership Agreement. You will see that your continued membership of the Team is conditional upon you not engaging in conduct which is publicly known and brings or is likely to bring you, your sport, the AOC or the Team into disrepute or censure.

I have formed the view that your publicly known conduct has brought you and your sport (swimming) into disrepute or censure and is likely to bring the AOC and the Team into disrepute or censure if you remain a member of it.

Specifically, the fact that you now face serious criminal charges (one of which I understand to be punishable by a term of imprisonment of up to 10 years) I believe has had the effect of bringing you and your sport into disrepute and would be likely to bring the AOC and the Team into disrepute if you remain a member.

I wish to make clear that I have not come to any view about your guilt of the charges which have been laid. However, my advice is that, before the New South Wales Police lay charges, the charging officer must form the belief on reasonable grounds that you have committed the offence charged. That is sufficient, in my view, to entitle me to terminate your membership.

In addition, and independently of the fact that you have been charged with criminal offences, you indicate, first, that you were intoxicated in a public place in the early hours of Sunday 30 March 2008 and second, that while intoxicated you struck Simon Cowley. Whether or not you are guilty of any crime, and whether or not Mr Cowley provoked you as you claim, those actions (intoxication and striking Mr Cowley) which are publicly known have brought you into disrepute and censure and will bring your sport, the AOC and the Team into disrepute if you remain a member of it.

For these reasons, I have decided to terminate your membership of the Team.

You have a right to appeal this decision to the Court of Arbitration for Sport under the attached clause 20 of the 2008 Olympic Team Membership Agreement.

Mr Coates' statement that was tendered in evidence confirmed the approach taken in the letter, making it clear that he had personally formed the stated view as to the effect of the Appellant's conduct and that he had also and separately made the decision in his absolute discretion to terminate the Appellant's membership of the Team. Mr Coates stressed the importance of the Olympic Charter, the ideals of the Olympic movement and the privileges and obligations of athletes. In cross-examination by counsel on behalf of the Appellant, Mr Coates was pressed with the fact that the only first hand account of the incident that he had was that by the Appellant and that he had no reason not to accept that version. Mr Coates made it clear that his decisions had not been based upon his resolving the truth of what occurred on 30 March 2008 where there was a factual issue. Mr Coates was cross-examined as to discrepancies in the evidence as to the nature of the charges that were initially laid. On any view of the matter, the charge was, or the charges were, serious.

Mr Coates was challenged in cross-examination as to the fact that, in relation to the 2004 Olympic Games, an Australian Olympic boxer on bail facing serious assault charges, was permitted to remain a member of the Team and competed. The AOC Media Director had issued a release including the following statements:

Wakefield has pleaded not guilty, and the Court has various bail conditions to allow him to train in France and then go on to Athens for the Games. There is a presumption of innocence until proven guilty and on that basis he has been allowed to join the Team in France and he will move into the [athletes'] village in a few weeks.

Mr Coates gave an account of the circumstances surrounding that matter. Mr Coates was not aware of the substance of it until it was raised at the time. The issue of the media release by the Media Director without his knowledge effectively pre-empted the situation from a practical point of view. However, Mr Coates readily conceded that he and the AOC had the opportunity of intervening and did not do so. His evidence was that he very much regrets that that was the case.

The Appellant, in his written statement and in his oral evidence, stressed the fact that he would pursue a bona fide defence to the criminal proceedings. He also emphasised all of the personal factors which would point towards leniency in his case.

LAW

CAS Jurisdiction

1. The parties to this Appeal have agreed and consented to the jurisdiction of the Court of Arbitration for Sport (CAS), in accordance with the Code of Sports-Related Arbitration (2004 Edition) (the "CAS Code"), to hear and determine this Appeal. In any event, the jurisdiction of the CAS to hear this Appeal is clear from Clause 20 of the Membership Agreement.

Nature of the Appeal

2. The seat of the Arbitration is Lausanne, Switzerland. The law of New South Wales is to be applied to the merits of the matter.
3. Rule 57 of the CAS Code, which is applicable to this Arbitration, includes the following:
The Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance.
No other provision modifying that power has been drawn to our attention.
4. Rule 59 of the Procedural Rules provides that the Award shall state brief reasons. However, we need to deal with various points, albeit as briefly as reasonably possible.

Contractual Background

5. It is agreed that the Membership Agreement incorporates the following:
 - (a) The Olympic Charter;
 - (b) The AOC Constitution;
 - (c) AOC Ethical Behaviour By-Law;

- (d) AOC 2008 Australian Olympic Team Selection By-Law;
- (e) AOC 2008 Australian Olympic Team Selection Criteria – Swimming; and
- (f) AOC 2008 Australian Olympic Team Swimming Australia Ltd Nomination Criteria.

6. The relevant parts of the Membership Agreement include the following:

1. Introduction.

This agreement governs the conditions by which I have been selected as a member of the Team and my continued membership of the Team.

I agree that my selection to and continued membership of the Team is conditional upon me entering into this agreement and observing its terms and conditions.

2. Conditions of Membership.

I acknowledge that my selection and continued membership of the Team is at the discretion of the AOC and is conditional upon me having met the AOC selection criteria (which I acknowledge are subject to the Participation and Qualification Criteria for the Games determined from time to time by my IF and the IOC) and my NF nomination criteria as approved by the AOC (if applicable) and, in particular:

- (1) *signing this agreement;*
- (2) *have not engaged at any time in conduct which is publicly known and in the absolute discretion of the President of the AOC (or, during the period of the 2008 Olympic Games, in the absolute discretion of the Chef de Mission of the 2008 Australian Olympic Team) has brought or would be likely to bring me, my sport, the AOC or the Team into disrepute or censure, or*
- (3) *have not engaged at any time in conduct which is not publicly known and in the absolute discretion of the President of the AOC (or, during the period of the 2008 Olympic Games, in the absolute discretion of the Chef de Mission of the 2008 Australian Olympic Team) would be likely to bring me, my sport, the AOC or the Team into disrepute or censure were the conduct to be publicly known;*

...; and

- (8) *continuing to observe the provisions of the AOC National Federation Commercial Activities By-Law and the AOC Ethical Behaviour By-Law as adopted from time to time (a copy of the current By-Laws are Schedules 7 and 8 respectively).*

If I have not met the above conditions, I agree that the AOC or the Chef de Mission in their respective sole and absolute discretion may terminate my selection to, and continued membership of, the Team and that I may be subject to the disciplinary procedures provided in clause 14 of this Agreement.

...

7. My Obligations.

7.1 *As a member of the Team, I agree to:*

- (1) *be bound by the Olympic Charter as in force from time to time (relevant rules and bylaws of the Olympic Charter as at the date of this agreement are set out Schedule 2);*
- (2) *comply with, the AOC Constitution and By-Laws and this agreement;*

- (3) *respect the spirit of fair play and non-violence and behave accordingly;*
- (4) *conduct myself so as to obtain and maintain my best possible mental and physical fitness and health to perform to the highest possible standard at the Games and carry out my duties to the Team to the best of my ability;*
- ...
- (6) *not engage in conduct which is publicly known and in the absolute discretion of the President of the AOC (or, during the period of the 2008 Olympic Games, in the absolute discretion of the Chef de Mission of the 2008 Australian Olympic Team) will or would be likely to bring me, my sport, the AOC or the Team into disrepute or censure;*
- (7) *not engage in conduct which is not publicly known and in the absolute discretion of the President of the AOC (or, during the period of the 2008 Olympic Games, in the absolute discretion of the Chef de Mission of the 2008 Australian Olympic Team) will be likely to bring me, my sport, the AOC or the Team into disrepute or censure were the conduct to be publicly known;*
- ...

7. The Ethical Behaviour By-Law includes the following:

2. Compliance with this By-Law

2.1 *This By-Law applies to:*

- (1) *Athletes;*
- ...

2.2 *All Relevant Persons must not, by their acts or omissions, engage or participate in:*

- ...
- (6) *conduct which, if publicly known, would be likely to bring person, the person's sport or the AOC into disrepute or censure, and*
- (7) *conduct which, if not publicly known and, in the absolute discretion of the person responsible pursuant to clause 3.1 of this By-Law, would be likely to bring the person, the person's sport or the AOC into disrepute or censure were the conduct to be publicly known.*
- ...

3. Breaches of this By-Law

...

3.4 *If a breach of this By-Law is established:*

- (1) *if the Relevant Person concerned is a member of that Team, then that Relevant Person will be subject to the sanctions described in the agreement governing that Relevant Person's membership of that Team;*
- ...

Decision

8. We are satisfied that the conduct of the Appellant in the early hours of 30 March 2008 was likely to and did bring himself into disrepute. It follows that Mr Coates was entitled to so find. Bringing a person into disrepute is to lower the reputation of the person in the eyes of ordinary members of the public to a significant extent. In our opinion, the conduct of the Appellant was such that, when reported by the public media, it could not help but be likely to bring him into disrepute. Members of the public would learn that a member of the Olympic Team had been out at a public bar in the early hours of the morning, intoxicated and had become involved in a fracas with another former athlete, which led to that person being very seriously injured and taken to hospital. Members of the public were also told that the conduct of the Appellant was such as to cause members of the New South Wales Police to reasonably believe that he was guilty of a serious criminal charge arising out of the incident. Although the question here is not quite the same as that arising in defamation cases, consideration of similar issues that arise in that field are of assistance. The reasoning of the members of the High Court in *Mirror Newspapers Ltd v Harrison* (1982) 149 CLR 293 and *Favell v Queensland Newspapers Pty Ltd* (2005) 221 ALR 186; (2005) 79 ALJR 1716 points clearly to the conclusion that a reasonable member of the public would think considerably less of the Appellant on account of his conduct, albeit realising that he may have a defence to the criminal proceedings and might be acquitted at trial.
9. The question as to whether the conduct of the Appellant would be likely to bring the sport of swimming or the AOC into disrepute or censure is a more difficult issue that we do not need to resolve for present purposes.
10. It follows from this finding that the Appellant was in breach of Clause 2.2(6) of the Ethical Behaviour By-Law. He, thus, did not continue to meet the condition imposed by Clause 2(8) of the Membership Agreement. He was also in breach of Clause 7.1(6) but there is no express sanction for that as Clause 14 of the Membership Agreement only operates during the period of the Games. It is also arguable that the Appellant had not met the condition laid down by Clause 2(2) of the Membership Agreement if it is given an ambulatory operation. It is not necessary to resolve that question in view of our opinion concerning Clause 2(8) of the Membership Agreement, particularly as that clause is favourable to the athlete, there being no reference in it to the absolute discretion of the President of the AOC. We should say that we do not accept that a combination of Clause 1 and the introduction to Clause 2 of the Membership Agreement has the effect that there is an uncontrolled discretion in the AOC to terminate membership of the Team that is not referable to any breach of condition or provision of the Agreement.
11. We do not see any basis for application of the *Contracts Review Act 1980* (NSW) to Clause 2 of the Membership Agreement as it would operate in this case, assuming that there is power to apply that statute in this Arbitration. We have considered the matters set out in section 9 of the *Contracts Review Act* in the light of the submissions made on behalf of the Appellant. In our opinion, there is no provision of the contract, which has operative effect in this case, which is unjust in the circumstances relating to the contract at the time it was made. In our opinion, it

is to be reasonably expected that the Australian body representative of Olympic sport should have adequate powers of control of membership of the Olympic Team, including power to deal with any behaviour of a member who is guilty of conduct likely to bring himself, his sport, or the AOC into disrepute or censure. We think that it is reasonable that there should be power to terminate selection in the Team in the event that such conduct is established. Furthermore, it is appropriate that there be a standard form contract applying to all athletes to ensure that there is no discrimination between athletes or between sports. Representing at an Olympic Games is a considerable privilege which carries consequent responsibilities. Moreover, the width of the appeal provisions by virtue of Clause 20 of the Membership Agreement, when coupled with the CAS Code, is a safeguard for athletes and substantially ameliorates the possibility of flawed or arbitrary decision making.

12. We are satisfied that Clause 2 of the Membership Agreement does not provide for automatic termination of membership upon a finding of breach of condition. A discretion to terminate arises. The discretion is to be exercised with regard to what, as between the parties, is fair and reasonable in the circumstances, with due weight given to the consequences of termination for the member. However, that discretion resides in the AOC or the Chef de Mission in their respective role – the latter only being operative after the Team assembles. Thus, at the relevant time (and still) it is the AOC which has the discretion, not the President of the AOC. It is quite clear that the decision to terminate was taken by Mr Coates personally in his role as President and was communicated to the Appellant as such. This means that the proper procedure laid down by Clause 2 of the Membership Agreement was not followed. The normal consequence of that finding would be that the decision to terminate be set aside and the matter remitted to the AOC for it to consider the exercise of its discretion to terminate membership of the Team.
13. However, that course was not proposed by either party and there was no discussion of the issue during the hearing. An unfavourable result to the Appellant of the remittal could, of course, lead to another appeal with consequent delay and extra cost, but we cannot prejudge that outcome. The other alternative is for this Court to now consider the exercise of the discretion. R57 of the CAS Code is wide enough to enable that to be done and the parties have put their arguments on that issue. In pointing out this course, we do not wish to suggest that we favour it. Indeed, we are not inclined to consider exercise of the discretion to terminate without the consent of both parties.
14. The Court proposes to make a partial operative Award resolving the question of failure to comply with Clause 2(8) of the Membership Agreement and stand the Arbitration over for a short period to enable the parties to consider this Award, including the reasons, and put submissions as to the procedure from here on. Costs are reserved.

The Court of Arbitration for Sport:

1. Declares that on 30 March 2008 Mr Nicholas D'Arcy did not continue to observe the provisions of the AOC Ethical Behaviour By-Law, to wit Clause 2.2(6) thereof, and so did not meet the conditions of Clause 2(8) of the Membership Agreement between himself and the Australian Olympic Committee Inc.
2. Orders that this award be made public.
3. Stands the Arbitration over to a date to be fixed.